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Demystifying the Mandate of the Parliamentary Budget Officer

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This paper was prepared by Tolga Yalkin and Benjamin Segel-Brown for a parliamentary seminar which took place on 29 May 2014.

1 What is the PBO?

The Parliamentary Budget Officer provides independent financial analysis to parliamentarians. The position was created in December 2006 as part of the *Federal Accountability Act*.ⁱ It was created in order to provide transparency and credibility to the government's fiscal forecasting and budgeting. It was hoped that the PBO's oversight would promote truth in budgeting and foster trust in government.ⁱⁱ

Three features of the PBO are worth noting: it is independent, it is authoritative, and it is non-partisan. The PBO is independent in that it is insulated from political influence. As noted by the federal court: "By establishing the position of a Parliamentary Budget Officer and enshrining his or her mandate in legislation, Parliament intended that independent, *i.e.* independent from Government, financial analysis should be available to any member of Parliament, given the possibility that the government of the day may be a majority government with strong party discipline."ⁱⁱⁱ The PBO's independence arises from this intended role more than from the formal protections offered by statute, which are in fact quite modest: The PBO is selected by the Governor in Council from a list of three names selected by a committee chaired by the Parliamentary Librarian, holds office for a five-year renewable term during pleasure, and is subject to regulations agreed upon by the Speakers of both houses and the Joint Committee devoted to the administration of the Library of Parliament.^{iv} The PBO looks at the data and comes to its own conclusions without deference to the methods relied on by government.

A second key feature of the PBO is that it is authoritative. As noted by an academic commentator, "the work produced by the PBO and

his staff is widely acknowledged to be as authoritative as any private sector equivalent."^v Most PBO employees are economics or public policy analysts with advanced degrees and experience in the public service. On larger files, such as military acquisitions, the PBO often incorporates an independent peer review to provide guidance and assure the results meet the highest standards of quality.^{vi}

Finally, the PBO is non-partisan. The PBO is an officer of the non-partisan Library of Parliament.^{vii} They conduct analysis for committees and parliamentarians, independent of their political affiliation. Unlike private watchdogs and think-tanks receiving private funding, the PBO is not influenced by private donors or beholden to a particular political ideology. It applies accepted economic methodologies in order to provide a second opinion to Parliament on fiscal matters.

Because the PBO provides a second data point that often contrasts with information provided by the government, his analysis is sometimes used for political purposes. Opposition members will frequently request analysis of contentious matters, and the resulting public reports are used to hold the government to account.^{viii} Even where requests are submitted by individual parliamentarians, all parliamentarians have an equal interest in the fruits of the request. For example, the PBO's estimates of the total economic and financial cost associated with remediating contaminated sites are useful for all Senators and MPs in determining the funding that should be allocated to cleaning up the sites when reviewing the Budget.

The current PBO, Jean-Denis Fréchette, was appointed 3 September 2013. The office has a budget of \$2.8 million for the 2014-15 FY and a staff of 14 employees.^{ix} PBO's analysts have produced over 200 publications since 2008.^x

2 What sort of work and when does the PBO undertake it?

The mandate of the Parliamentary Budget Officer is to provide independent analysis to Parliament on the state of the nation's finances, the government's estimates, and trends in the Canadian economy; and upon request from a committee or parliamentarian, to estimate the financial cost of any proposal for matters over which Parliament has jurisdiction.^{xi}

Pursuant to its mandate to report on the state of the nation's finances, the government's estimates and trends in the Canadian economy, the PBO produces:

- an annual Economic and Fiscal Outlook, and occasional updates;
- an annual Labour Market Assessment;
- a quarterly review of federal program spending;
- analysis of the main and supplementary estimates.

The PBO's mandate also includes estimating the financial cost of any proposal for matters over which Parliament has jurisdiction. For example, the PBO has recently produced reports requested by parliamentarians to:

- estimate the financial cost to remediate Canada's contaminated sites;
- undertake an independent fiscal analysis of absenteeism in the public service;
- estimate the cost premium associated with building the Royal Canadian Navy's Joint Support Ships in Vancouver's Seaspan Shipyards rather than the United States;
- analyze the fiscal impact of the Last Post Fund announced as part of the 2013 Budget.

A typical report will contain an explanation of the methodology used by the public service and by the Parliamentary Budget Office to estimate the

cost in question, and an analysis of trends in the results and the factors driving them.^{xii}

The PBO prioritizes requests based on materiality and contribution potential. A project or request is material if it can reasonably be expected to have a substantive impact on the government's finances, estimates or the Canadian economy. A project or request has the potential to increase budget transparency and/or promote informed parliamentary and public dialogue towards implementing sound budget policy and financial management if it can: (A) strengthen fiscal discipline; (B) better allocate the government's resources to priorities; and/or (C) increase operational efficiency. Of these two concepts, materiality is the PBO's primary overriding principle for setting priorities.

3 Where does the PBO get information to undertake his work?

Where possible, the PBO relies on publicly available data and models, or those it can purchase from private sources. For example, the PBO's cost estimates for the two joint support ships were based on PRICE Systems' TruePlanning® software package, which experts identified as "widely recognized and highly respected around the world as a robust military cost estimating tool."^{xiii} That model was run using a combination of publicly available and confidential data.

Because the PBO is frequently being asked to provide analysis of the costs of particular programs or proposals over which the government has exclusive control of information, the PBO has been provided with a statutory power to require certain information. Under the *Parliament of Canada Act*, "the Parliamentary Budget Officer is entitled, by request made to the deputy head of a department [...] to free and timely access to any financial or economic data in the possession of the department that are

required for the performance of his or her mandate.”^{xiv}

Exceptions are carved out for private data to which access is restricted under the *Access to Information Act* and information contained within Cabinet confidences.^{xv}

To break this down into its elements, the PBO is entitled, upon request, to information which is:

1. *Data*: Data includes the microdata and associated documentation on the source and organization of the dataset, as well as other related facts and information.
2. *Financial or economic*: Financial refers to facts or information in dollar terms. Economic may be broader, including all factors of production, for instance the number of full-time employees who will be hired for a project.
3. *In the possession of the department*: Possession narrows the ability of the PBO to access information to information that the department currently has, it cannot compel the collection of data. ‘Department’ is defined in the *Financial Administration Act* and includes most core departments and agencies.
4. *Required for the performance of the PBO’s mandate*: The PBO may only request information related to its mandate, i.e. information related to the state of the nation’s finances, the estimates, trends in the economy, or the cost of a proposal within Parliament’s jurisdiction in relation to which a request has been made.

The exceptions to this power are limited:

1. As provided by any other act of Parliament that expressly refers to this subsection.
2. Personal information under s 19 of the *Access to Information Act*.
3. Information which exists only in documents subject to the Queen’s Privy Council for Canada under s 69 of the *Access to Information Act*.

For example, in order to produce its report on the costs associated with sick leave, “The PBO obtained sick leave data from the Treasury Board Secretariat (TBS) and salary data from the Receiver General” as well as relying on data publicly available from Statistics Canada.^{xvi}

4 What challenges has the PBO faced in getting information to undertake his work?

In 2012, two Ministers of the Crown asserted that the PBO’s mandate did not extend to evaluating the asserted costs savings from cuts outlined in the Budget. Such analysis appears to fall clearly within the PBO’s mandate to provide analysis of the state of the nation’s finances and the estimates of government. The PBO understands “analysis” to mean a report resulting from examination of data, “the state of the nation’s finances” to include all matters affecting the government’s financial position and “the estimates of the government” to include how the government plans to spend, including the formal estimates process. Thus, analysis of the state of the nation’s finances includes analyzing the budget’s impact on the government’s financial position and analysis of the government’s estimates includes analyzing the planned expenditures. Although it could be debated, it is difficult to understand how this could possibly be interpreted to prevent the PBO from analyzing the achievability and consequences of cuts outlined in the federal budget.

While, broadly speaking, compliance with PBO information requests has been satisfactory, there have been some notable circumstances in which the government has refused to provide information. In 2011 and 2012, the majority of these problems revolved around information requests to analyze the budget. The vast majority of federal departments did not provide the requested information, which meant that the

PBO could not produce the analysis. The overall effectiveness of the PBO's oversight is substantially diminished when departments refuse to provide requested information, as such refusals inherently raise doubt that claimed costs are either not sufficiently supported by any data or are contradicted by that data. The refusals consequently undermine the value of the PBO as a general deterrent to making unsupported claims and as a means of promoting trust in government. The failure to produce led to a reference application to the Federal Court of Canada and the Court's subsequent reference decision in *Page v Mulcair*.

5 What happened in *Page v Mulcair*?

In *Page v Mulcair*, the PBO sought a reference from the federal court to clarify that the PBO has jurisdiction to analyze, pursuant to a request by the Leader of the Official Opposition Thomas Mulcair, the achievability of the fiscal savings outlined in the government's 2012 Budget and the authority to request related information from departments on the savings related to staffing reductions.^{xvii} The Court found that the issue was non-justiciable—that is to say, it could not be answered by a court—because the departments had not yet declined to provide the necessary information so there was no issue to be decided.^{xviii}

The decision is significant for its clarification of the relationship of the PBO to Parliament, the Minister, and the Courts. The Court held that if Parliament wished to restrain the PBO, Parliament would have to abolish or redefine the mandate of the PBO by statute.^{xix} On the contrary, the Court “suggested that Mr. Page should have acted on his own interpretation of his statutory mandate and called upon deputy ministers to provide the information requested.” When information is requested, the Court held that the refusal would be subject to judicial review on the non-deferential

standard of correctness.^{xx} *Page v Mulcair* thus reflects an affirmation of the independence of PBO and its right to resort to judicial review where departments unlawfully refuse to disclose information.

6 Comparison of legislative framework

The Parliamentary Budget Officer is not actually an officer of Parliament; rather, it is an officer of the Library of Parliament, a title shared with the Parliamentary Librarian, the Associate Parliamentary Librarian and the Parliamentary Poet Laureate (with whom they bear no resemblance). Locating the PBO within the Library of Parliament was not entirely illogical, as they both produce analysis at the request of parliamentarians. However, the PBO is more comparable to the officers of Parliament in that it assists in the accountability function, has a right to access information, and is appointed by the Governor in Council.^{xxi} A vote introduced by the official opposition to make the Parliamentary Budget Officer an officer of Parliament was defeated on June 12, 2013.

The PBO has less statutory independence than other officers of Parliament in terms of his appointment, reporting, and dismissal. The PBO is selected by the Governor in Council from a list of three names submitted to the Leader of the Government in the House by a Committee formed and chaired by the Parliamentary Librarian whereas officers of Parliament usually have multi-partisan consultations or a joint-resolution of both Houses before being appointed by the Governor in Council. The PBO holds office “during pleasure,” meaning the PBO may be dismissed without cause while all other officers of Parliament hold office “during good behaviour,” meaning they may only be dismissed with cause.^{xxii}

Internationally, 26 countries, including the vast majority of the OECD member states, have

independent budget officers or fiscal councils to advise the legislature.^{xxiii} In the United States, the Congressional Budget Office (CBO) produces independent analyses of budgetary and economic issues to support the Congressional budget process. It is substantially larger, with 235 staff, and has more statutory independence, as the director is appointed by the Speakers of both Houses and is removable only by a resolution of one of the Houses.^{xxiv} The CBO has slightly broader powers to compel the production of information and documents: “The Director is authorized to secure information, data, estimates, and statistics directly from the various departments, agencies, and establishments of the executive branch of Government and the regulatory agencies and commissions of the Government.” Australia has a similar Parliamentary Budget Office as a “Department of the Parliament”, although its role does not include economic forecasting. In contrast, the UK Office for Budget Responsibility focuses primarily on economic forecasting and assessing performance against fiscal targets.

7 Conclusion: What the PBO means for you

The Parliamentary Budget Officer provides independent financial analysis to Parliament. It is independent, authoritative, and non-partisan. It provides economic forecasting and, upon request, will estimate the financial cost of any proposal for matters over which Parliament has jurisdiction. Where necessary, it can legally compel the production of data in support of this mandate. PBO is a very useful institution enabling parliamentarians to hold government to account in relation to fiscal forecasting and budgeting, and by often generating an informative public debate.

ⁱ *Federal Accountability Act*, SC 2006 c 9 s 116.

ⁱⁱ See Treasury Board of Canada Secretariat, *Federal Accountability Action Plan*, (Ottawa: Her Majesty the Queen in Right of Canada represented by the President of the Treasury Board) at 13, online: TBS <<http://www.tbs-sct.gc.ca/faa-lfi/docs/ap-pa/ap-pa-eng.pdf>>. See also, Prime Minister’s Office, News Release, “Federal Accountability Act introduced” (11 April 2006) online: PMO <<http://www.pm.gc.ca/eng/news/2006/04/11/federal-accountability-act-introduced>>.

ⁱⁱⁱ *Page v Mulcair*, 2013 FC 402 at para 46 (available on Canlii).

^{iv} Karine Azoulay, “Making the Case: Canada’s PBO, the Courts and the Fourth Branch of Government” (2014) 8 *Journal of parliamentary and political law* at 114 (Radar a607638).

^v Azoulay, *supra* note 4 at 115.

^{vi} For example, see Erin K. Barkel and Tolga R. Yalkin, *Feasibility of Budget for Acquisition of Two Joint Support Ships*, (Ottawa: Office of the Parliamentary Budget Officer 2013) at 2.

^{vii} *TBS*, *supra* note 2.

^{viii} Azoulay, *supra* note 4 at 115.

^{ix} Office of the Parliamentary Budget Officer, *PBO at a Glance*, online: <<http://www.pbo-dpb.gc.ca/en/PBO+at+a+Glance>>.

^x For a complete list see Office of the Parliamentary Budget Officer, *Our Publications*, online: <<http://www.pbo-dpb.gc.ca/en/OUR+PUBLICATIONS?news-date-from=2014%2F02%2F09&news-date-to=2014%2F05%2F09&keyword=&catOne=ALL&filter-news-all=View+All>>.

^{xi} *PBO at a Glance*, *supra* note 10. See also, *Parliament of Canada Act*, RSC 1985 c P-1 s 79.2.

^{xii} For example, see Erin K. Barkel, *Fiscal Analysis of Sick Leave in the Federal Public Service*, (Ottawa: Office of the Parliamentary Budget Officer 2014).

^{xiii} Barkel and Yalkin, *supra* note 7 at 4.

^{xiv} *Parliament of Canada Act*, *supra* note 12 at 79.3(1) (“Except as provided by any other Act of Parliament that expressly refers to this subsection, the Parliamentary Budget Officer is entitled, by request made to the deputy head of a department within the meaning of any of paragraphs (a), (a.1) and (d) of the definition “department” in section 2 of the *Financial Administration Act*, or to any other person designated by that deputy

head for the purpose of this section, to free and timely access to any financial or economic data in the possession of the department that are required for the performance of his or her mandate”).

^{xv} *Ibid*, at 79.3(2) (“(2) Subsection (1) does not apply in respect of any financial or economic data (a) that are information the disclosure of which is restricted under section 19 of the *Access to Information Act* or any provision set out in Schedule II to that Act; or (b) that are contained in a confidence of the Queen’s Privy Council for Canada described in subsection 69(1) of that Act, unless the data are also contained in any other record, within the meaning of section 3 of that Act, and are not information referred to in paragraph (a).”).

^{xvi} Barkel, *supra* note 13 at 1-2.

^{xvii} *Page v Mulcair*, *supra* note 3 at para 3.

^{xviii} *Ibid*, at para 5 (“Mr. Page has never actually requested data from any department at the instance of Mr. Mulcair. It follows that no refusal to provide data is contained in the record before me. Therefore, the questions are hypothetical and I decline to answer them on the grounds of non-justiciability”).

^{xix} *Ibid*, at para 28 (“[...] Parliament not only intended that the Parliamentary Budget Officer be answerable to it and to its committees, but also to every backbencher irrespective of political stripe. In my view, the purpose of the statute is to shield any given member of either House of Parliament from the will of the majority. [...] If the majority wants to abolish the position of the Parliamentary Budget Officer, or define his or her mandate somewhat differently, so be it! However, it must do so by legislation. Having made that law by statute, it must unmake it by statute. In the meantime, Parliament has no right to ignore its own legislation”).

^{xx} *Ibid*, at para 37, 60, 29 (“the rights Mr. Page asserts he is entitled to exercise are to be exercised outside Parliament and, therefore, are under the protection of this Court.” “The interpretation of a statute by a Minister responsible for its implementation is to be reviewed on a standard of correctness unless Parliament has provided otherwise”).

^{xxi} Azoulay, *supra* note 4 at 108.

^{xxii} *Ibid* at 114.

^{xxiii} Office for Budget Responsibility, *Fiscal councils overseas* (London: Office for Budget Responsibility), online: TBS <<http://budgetresponsibility.org.uk/links/#overseas> >.

^{xxiv} Congressional Budget Office, *An Introduction to the Congressional Budget Office* (Washington: Congressional Budget Office) at 4, online: CBO

<<http://www.cbo.gov/sites/default/files/cbofiles/attachments/2012-IntroToCBO.pdf>>. See also, Congressional Budget and Impoundment Control Act of 1974, Pub L No 93–344, § 201 88 Stat 297, online: US House of Representatives<<http://www.house.gov/legcoun/Comps/BUDGET.pdf>>.