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CANADA

**REPORT ON THE OFFICERS AND AGENTS OF PARLIAMENT
CREATED OR MODIFIED BY THE *FEDERAL ACCOUNTABILITY ACT***

**Standing Senate Committee on
National Finance**

THIRTEENTH REPORT

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TABLE OF CONTENTS

INTRODUCTION.....	2
THE <i>FEDERAL ACCOUNTABILITY ACT</i>	2
OFFICERS OR AGENTS OF PARLIAMENT	3
FINANCIAL INDEPENDENCE.....	6
THE IMPLEMENTATION PROCESS	8
THE PUBLIC APPOINTMENTS COMMISSIONER.....	12
THE PARLIAMENTARY BUDGET OFFICER	13
THE PROCUREMENT OMBUDSMAN	16
OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....	20
THE PUBLIC SECTOR INTEGRITY COMMISSIONER.....	24
OFFICE OF THE COMMISSIONER OF LOBBYING.....	26
OBSERVATIONS AND RECOMMENDATION	27
RECOMMENDATION.....	28
APPENDIX I- SUMMARY TABLE ON THE OFFICERS AND AGENTS OF PARLIAMENT	29
APPENDIX II – WITNESSES LIST	30

**REPORT ON THE OFFICERS AND AGENTS OF PARLIAMENT
CREATED OR MODIFIED BY THE *FEDERAL ACCOUNTABILITY ACT***

INTRODUCTION

The committee undertook an examination of the estimates of the new positions and/or offices created or modified under the *Federal Accountability Act*. The study began under the 2007-2008 Estimates and continued under the 2008-2009 Estimates. Work completed in the previous fiscal period was reported in the committee's Final Report on the 2007-2008 Estimates in March 2008. The committee was concerned about the progress of the implementation of provisions of the *Federal Accountability Act*. In addition, it was specifically interested in identifying the measures adopted to ensure the independence or autonomy of the positions relative to the government.

During its examination of the Estimates the Standing Senate Committee on National Finance reviewed the planned expenditures of these positions. Over several meetings held between December 2007 and April 2008, the committee discussed the expenditure plans and the process by which the offices were set up and the procedures used to appoint key personnel. Each newly appointed officer or agent reviewed his or her mandate, spending plans and challenges that they face at this time. Where a position remains unfilled, the committee discussed the matter with officials of the Treasury Board Secretariat (TBS) and the Privy Council Office (PCO).

THE FEDERAL ACCOUNTABILITY ACT

On April 11, 2006, the Government of Canada introduced the *Federal Accountability Act* (FAA) and its accompanying Action Plan which contained supporting policy and other non-legislative measures. The FAA was granted Royal Assent on December 12, 2006.

The FAA creates or modifies a number of federal positions. While some are not considered Officers or Agents of Parliament in the more strict application of the concept⁽¹⁾, they all are intended to strengthen accountability and increase transparency and oversight in government operations. These positions include:

- The Parliamentary Budget Officer (PBO)
- The Commissioner of Lobbying (CL)
- The Office of the Procurement Ombudsman
- The Public Appointments Commissioner
- The Public Sector Integrity Commissioner (PSIC)
- The Director of Public Prosecutions (DPP)
- The Conflict of Interest and Ethics Commissioner

This study, did not examine the position of the Conflict of Interest and Ethics Commissioner because it is strictly a matter for the House of Commons.

OFFICERS OR AGENTS OF PARLIAMENT

It is important to understand which of these new positions are Officers of Parliament and which are Agents of Parliament. As the committee observed in an earlier report⁽²⁾:

“The title of Officer of Parliament is not defined in any statute or parliamentary publication. Different parliamentary committees and academic commentators have at one time or another associated the position with that of the Speakers of the two Houses of Parliament, the Clerks, the Parliamentary Librarian, and other positions that serve Parliament. There is another group of positions or organizations that report to Parliament but do not function specifically within the halls of Parliament. This group comprises a set of six to eight organizations

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- (1) The term “Officers of Parliament” has been used loosely and inconsistently, and in different contexts to refer to different things. Traditionally, at the federal level in Canada, the term “Officers of Parliament” refers to those independent, accountability agencies created to assist Parliament in holding ministers and the bureaucracy accountable and to protect various kinds of rights of individual Canadians, or to carry out certain functions independent of the executive. The holders of these offices are responsible to Parliament rather than to the federal government or an individual minister, and their appointments (and removal from office) usually involve Parliament in some capacity.
- (2) Twelfth Report of the Standing Senate Committee on National Finance, May 2005, Third Interim Report on the Main Estimates 2005-2006 – Officers of Parliament.

that while enjoying some freedom from the government they both serve Parliament and protect the public.”

In a paper on Officers of Parliament, Paul Thomas reviewed the past work of several House of Commons committees and developed a “List of Leading Examples of Officers of Parliament.”⁽³⁾ According to Mr. Thomas, at that time, these would include:

- Office of the Auditor General,
- The Public Service Commission,
- The Office of the Chief Electoral Officer,
- The Office of the Commissioner of Official Languages,
- The Canadian Human Rights Commission,
- The Office of the Information Commissioner,
- The Office of the Privacy Commissioner, and
- The Office of the Ethics Counsellor.

According to Mr. Thomas, most of the offices were created by Parliament in the last thirty years for a number of reasons. These include:

1. The concern about holding the government to account in a wide range of activities;
2. The fear that ministers and senior public servants might abuse the powers granted to them; and
3. The desire to reduce the partisanship and publicity associated with certain types of citizen complaints.

He also identifies several concerns that were evident when parliament created these offices. For instance, there was an interest in preserving the independence of officers from the government of the day and to grant them a degree of operational freedom from Parliament and its members. Mr. Thomas identifies five structural features which determine the independence/accountability relationships of the parliamentary agencies⁽⁴⁾:

(3) P.G. Thomas, Fall 2003, The Past, Present and Future of Officers of Parliament, Canadian Public Administration, Vol. 46, No. 3, p. 294.

(4) For an alternate discussion on the role and mandate of the traditional Officers of Parliament see: Jeffrey Graham Bell, “Agents of Parliament: A New Branch of Government?” Canadian Parliamentary Review, Vol. 29, No. 1, 2006.

- a) The nature of the mandate of the agency, including how it is defined initially and how it is updated periodically;
- b) The provisions respecting the appointment, tenure and removal of the leadership of the agency;
- c) The process for deciding budgets and staffing for the agency;
- d) Whether the agency is free to identify issues for study and whether it can compel the production of information;
- e) The reporting requirements for the agency and whether its performance is monitored.

These officers should not be confused with those of other positions such as the Clerk of either house, the Sergeant-at-Arms, the Law Clerk and Parliamentary Counsel or the Parliamentary Librarian. The latter officials assist Parliament in procedural and administrative matters, whereas officers of Parliament support Parliament in its accountability and scrutiny functions and in carrying out other tasks⁽⁵⁾. While there is no official definition for these types of positions that assist Parliament, the Privy Council Office has, in practice, begun to make a distinction between “Agents of Parliament” and “Officers of Parliament.” The distinction rests on whether the position reports directly to Parliament or whether it reports indirectly through another position, government agency or a federal minister. This definition focuses on their independence from the government of the day. If we use this distinction, the Federal Accountability Act has created three new Officers of Parliament (the Conflict of Interest and Ethics Commissioner, the Commissioner of Lobbying, and the Public Sector Integrity Commissioner) and the other four would be considered Agents of Parliament. The Agents of Parliament retain some degree of autonomy in their operations but must report through another office (the PBO through the Parliamentary Librarian) or another position (the Procurement Ombudsman through the Minister of PWGSC).

The convention at the Treasury Board Secretariat would seem to designate as Officer of Parliament any position that derives from the Parliament of Canada Act. They are positions whose budget is included in the appropriations of the House of Commons, the Senate or the Library of Parliament. This would seem to include:

(5) Hurtubise-Loranger, Élise and James R. Robertson, 2007, Appointment of Officers of Parliament, TIPS-24E, Parliamentary Information and Research Service, Library of Parliament.

- The Clerk of the Senate;
- The Clerk of the House of Commons;
- The Senate Ethics Officer;
- The Conflict of Interest and Ethics Commissioner of the House of Commons;
- The Parliamentary Librarian; and
- The Associate Parliamentary Librarian.

The Parliamentary Budget Officer and the Parliamentary Poet Lauriat, are both mentioned in the Act, and are defined in the Act as Officers of the Library of Parliament.

All other agents, commissioners etc. are by, this definition, Agents of Parliament.

FINANCIAL INDEPENDENCE

In the spring of 2005 several sources including the committee's own Report on the Officers of Parliament expressed serious concern about the process whereby budgets were determined for these organizations. The critics noted that there existed a real or perceived conflict of interest in the existing process and argued that Parliament should play a greater role in the resource allocation decisions for the Officers and Agents of Parliament. The concern is that the independence from government needed by these organizations, in order to serve Parliament effectively, may be compromised by the fact that the Treasury Board (i.e., the Government) makes the decisions on funding requests by the Officers and Agents of Parliament, and sets administrative policies.

Therefore, at the request of the President of the Treasury Board, a framework agreement was negotiated and agreed to in the fall of 2005 with a view to establishing a pilot project to test a proposed new funding and oversight model for Officers of Parliament. The House of Commons Advisory Panel on the Funding of Officers of Parliament was established at that time as a two-year pilot project. It is composed of 13 Members of the House of Commons, including the Speaker and representatives of all political parties.

The existing House of Commons committee process on the Estimates could not be of use in situations where Officers of Parliament required additional resources for the execution of their mandates. The principle of the Royal Recommendation limits Parliament's role to approving, reducing or rejecting outright the estimates. This means that it is the Treasury Board rather than Parliament that establishes the upper limit on spending by Officers of Parliament, by determining the amounts that are included in the estimates.

Therefore, the Panel is an informal mechanism, which functions as an advisory body only. Its role is to consider requests for new funding developed by Officers of Parliament before they are considered by the Treasury Board, as well as issues relating to Treasury Board administrative oversight. This enables the Panel to provide the Treasury Board with recommendations concerning funding requests and other matters such as the application of Treasury Board policies. Although the Treasury Board is not bound to adopt recommendations of the Panel, the role of the Government in creating the Panel made it foreseeable that this would occur, and it has occurred consistently since the Panel was created.

Until the creation of the Panel, the Officers and Agents of Parliament, like departments, agencies, and other government organizations, would, depending on the nature and timing of their need for additional funding include their request for appropriations in either the Main Estimates or the Supplementary Estimates.

Any requests for new funding would be set out by the organizations in Treasury Board submissions for consideration by the Treasury Board, which determines the amounts that go into the estimates. Funding needs are typically discussed and negotiated with officials of the Treasury Board Secretariat (TBS) as a formal submission for funding is developed, so that the eventual submission is reflective of TBS standards and expectations. A source of funds must be identified for new spending and this funding can come from the Budget, the fiscal framework, internal reallocation, or through other means.

TBS officials prepare, for consideration by the Treasury Board, an assessment of the submission, which summarizes the submission and includes an analysis. This analysis

provides the basis for a decision by the Treasury Board. The creation of the Panel means that the Treasury Board will now reach a decision concerning funding or other submissions from the designated Officers or Agents of Parliament on the basis of recommendations from parliamentarians (the Panel), that are informed by TBS, as well as making use of advice from TBS in the usual manner. Thus, the formal roles of Parliament and the Treasury Board in the supply process remain unchanged.

The mandate of the Panel extends to five Officers of Parliament existing at the time of its creation:

- The Information Commissioner
- The Auditor General
- The Chief Electoral Officer
- The Official Languages Commissioner
- The Privacy Commissioner

In practice, the Panel has generally accepted the advice and recommendations of the Treasury Board Secretariat, and reflected these in the Memoranda it forwards to the Treasury Board. The pilot project is currently being assessed and a decision will be made on whether to continue, or even expand the process.

While the National Finance Committee is often interested in many aspects of the organizations whose estimates are under review, the committee's focus remains the planned spending of organizations. However, in the case of the new positions created with the introduction of the FAA, the committee broadened its examination to include several aspects discussed above.

THE IMPLEMENTATION PROCESS

As previously mentioned in the committee's Final Report on the 2007-2008 Main Estimates⁽⁶⁾ the committee began to examine the appropriations sought to support the operations of a number of positions created by the implementation of the *Federal Accountability Act*, and related

(6) Standing Senate Committee on National Finance, 2008, Final Report on the 2007-2008 Main Estimates, Tenth Report, March 2008.

legislation. The committee held two meetings on this matter during its examination of the 2007-2008 Estimates.

On December 11, 2007, the committee heard evidence from Joe Wild, Executive Director, Strategic Policy, Corporate Priorities and Planning, Treasury Board of Canada Secretariat TBS, and from Marc O'Sullivan, Acting Assistant Secretary to the Cabinet, Senior Personnel and Special Projects, Privy Council Office (PCO), on aspects of the implementation of the *Federal Accountability Act* (FAA) and specifically on matters concerning positions and offices created or modified under the Act.

Mr. Wild provided a brief overview on the progress of the implementation of legislation to that date. This included at the time 10 orders-in-council which brought into force all but two elements of the *FAA*. In both cases, the necessary regulations were being developed. In the first 12 months since enactment, the government had also:

- adopted three sets of regulations, with six more sets of regulations at various stages of development;
- received the results of four major reviews of government policies and operations;
- created or revised five policy instruments or guides with several more underway; and
- made seven Governor-in-Council appointments and established two new oversight bodies; and ratified a major international treaty.

Mr. Wild said that the *Federal Accountability Act* and Action Plan had thirteen themes, and outlined the progress on each.

First, he said that measures to reform political party financing have been fully implemented. The relevant statutory amendments came into force on January 1, 2007, and these measures are currently administered by the Chief Electoral Officer.

Second, he said that the ban on secret donations to political candidates has been fully implemented. The final statutory amendments came into force on July 9, 2007, and these measures are currently administered by the Chief Electoral Officer and the Conflict of Interest and Ethics Commissioner.

Third, Mr. Wild stated that measures to strengthen the role of the ethics commissioner have been fully implemented. The new Conflict of Interest Act came into force on July 9, 2007.

He also stated that as committed to in the action plan, on March 29, 2007, the government announced the release of a revised guide for ministers that includes ethical principles and political activity guidelines for ministers and Governor-in-Council appointees. These principles and guidelines form part of the terms and conditions of appointment for these positions.

Fourth, he said that the provision to ensure truth in budgeting with a parliamentary budget authority came into force upon Royal Assent. (Subsequent to Mr. Wild's appearance, the government announced the appointment of Mr. Kevin Page to the position of Parliamentary Budget Officer.)

Fifth, he said that statutory amendments to provide parliamentarians with more say in the appointment of Agents of Parliament, to revise the process for appointing returning officers under the Canada Elections Act, to provide for the creation of a public appointments commission, and to remove entitlements to priority appointments within the public service for ministerial staffers have all come into force.

Sixth, he said that most measures under the theme of cleaning up government polling and advertising have been implemented.

He told the committee that statutory and policy changes have been made to require written reports as part of public-opinion contracts; public-opinion research contract regulations came into effect on June 7, 2007 to prescribe the form and content of contracts and reports, and to provide that reports be provided to Library and Archives Canada; and departments and agencies have been directed to conduct risk-based audits of their advertising and public-opinion research activities and processes.

He also advised the committee that an independent adviser was appointed by the Minister of Public Works and Government Services to conduct a review of public-opinion research. He said that a report had been issued to the Minister of Public Works, and the government was preparing its response.

Seventh, with respect to protecting whistle-blowers, Mr. Wild advised the committee that provisions of the *Public Servants Disclosure Protection Act* were operational as of April 15, 2007.

Eighth, Mr. Wild advised the committee that all the amendments to the *Access to Information Act* have been brought into force. The *Access to Information Act* now includes Agents of Parliament, five foundations created under federal statute, seven additional parent Crown corporations, and all wholly-owned subsidiary Crown corporations.

Ninth, Mr. Wild advised the committee that amendments to strengthen the power of the Auditor General have been brought into force, and that regulations are being developed to support the Auditor General's authority to inquire into the use of funds under federal funding agreements.

Tenth, Mr. Wild advised the committee that measures to strengthen auditing and accountability within departments are in force. Deputy heads have been designated as accounting officers under the *Financial Administration Act*. Statutory amendments have been brought into force regarding the governing structures of Crown corporations, and a new offence has been created for fraud involving public monies.

Eleventh, Mr. Wild advised the committee that the provisions creating a director of public prosecutions took effect upon Royal Assent.

The twelfth theme concerned ratification of the United Nations Convention against Corruption. Mr. Wild advised the committee that Canada ratified the convention on October 2, 2007.

Theme 13 concerned cleaning up procurement of government contracts. Mr. Wild advised the committee that several items under this element have been completed, including the incorporation of an overarching statement of principle with respect to procurement in the *Financial Administration Act* and the adoption of a new Code of Conduct for Procurement on September 19, 2007.

Mr. Wild said that of the two major measures that had yet to be implemented; one concerned the statutory provisions for the creation of the Procurement Ombudsman, where work was continuing on the development of the necessary regulations.

The other concerned the *Lobbyist Registration Act*, where work was also continuing on the development of the necessary regulations.

Mr. O'Sullivan provided the committee with a quick update on a number of Governor-in-Council appointments for positions that were established by the FAA including that of:

- the Conflict of Interest and Ethics Commissioner, Mary Dawson, appointed on July 9, 2007;
- the Public Sector Integrity Commissioner, Christiane Ouimet, was appointed on June 12, 2007; and
- On September 10, 2007 the government appointed the Procurement Ombudsman Designate, Shahid Minto.

Mr. O'Sullivan added that the selection processes were then underway with respect to the Director of Public Prosecutions and the Parliamentary Budget Officer. As to the appointment of a Commissioner of Lobbying, Mr. O'Sullivan noted that it would be made once the regulatory process has been completed and the legislation has been brought into force.

To examine further the process of establishing these new positions the committee held additional hearing in the early spring of 2008. These are reviewed below.

THE PUBLIC APPOINTMENTS COMMISSIONER

The FAA provides that the government may establish a public appointments commission to oversee and report on the selection processes for appointments by the Governor-in-Council to agencies, boards, commissions and Crown corporations. A Secretariat for the Public Appointments Commission was established by order-in-council on April 21, 2006, prior to the passage and coming into force of the FAA. However, the nomination of Mr. Gwyn Morgan as chairperson was rejected on May 16, 2006 by the Standing Committee on Government Operations and Estimates of the House of Commons. The government has not filled the position since the Act came into force. While the Secretariat projects spending requirements of about \$1.07 million for the fiscal year 2008-2009 and beyond, it cannot carry out the mandate of the Public Appointments Commission without a Commissioner. At the present time the Secretariat has two full-time employees, while the Main Estimates provide for up to 4 FTEs.

Any possible positions that might have been of interest to a Public Appointments Commissioner are continuing to be processed by the Privy Council Office according to past practices.

The committee is naturally disappointed that this position remains vacant at this time. It sincerely hopes that the government will move to finalizing the implementation of this important element of the FAA by appointing a Public Appointments Commissioner. It views this position as an important step in achieving greater transparency in government operations. Furthermore the committee is concerned that the operation of a Secretariat without a Commissioner is not providing Canadians with value for their money.

THE PARLIAMENTARY BUDGET OFFICER⁽⁷⁾

The FAA establishes the position of Parliamentary Budget Officer (PBO) within the Library of Parliament. The government created this position to increase transparency in the Government's fiscal planning framework and enable Parliament to better hold government to account. The PBO's mandate includes the provision of objective analysis of government estimates to both Houses and to certain parliamentary committees and to evaluate the costs of private bills emanating from parliamentarians and parliamentary initiatives. On February 12, 2008, Mr. William Young, Parliamentary Librarian, reviewed the role and mandate of the Parliamentary Budget Officer as laid out in the Act. He then outlined to the committee the steps taken in creating the position of the Parliamentary Budget Officer (PBO) including the wide ranging consultation with the public service community that will have to work closely with the PBO. Once the job description was completed, the classification was determined by the Privy Council Office and the commensurate salary level was set by that decision. On that basis a cross country search for suitable candidates was begun with the intent of providing the names of three candidates that could be recommended to the Leader of the Government in the House of Commons, as required by the Act. The PBO is then appointed by the Governor-in-Council by commission under the Great Seal. He or she holds office for a renewable term of not more than five years.

Although the selection committee was able to identify suitable candidates for recommendation to the Leader of the Government, no candidate was willing to accept the position at the then current level of classification and salary. Mr. Young explained that after canvassing both past and present senior level public servants, there was a sense that the position was under classified and

(7) For additional information see the publication: *Library of Parliament Overview*, February 2008.

that any individual holding such a position would not be able to interact effectively with the administrators of the various departments whose cooperation would be required to carry out the function of the PBO. Consequently, candidates were reluctant to put their names forward for the position.

Mr. Young explained that the matter was then under consideration by the government and he awaited a decision. The committee was concerned by this delay in filling a position which it felt was of great importance in facilitating the work done by parliamentarians. The committee therefore recommended in its Final Report on the 2007-2008 Main Estimates that the classification of the Parliamentary Budget Officer position should be raised.

On April 16, 2008, the Parliamentary Budget Officer, Mr. Kevin Page, and the Parliamentary Librarian, Mr. William Young, appeared together to provide further details to the committee. At that meeting, Mr. Marc O'Sullivan of the PCO responded to the committee's recommendation by explained that the position could not be classified any higher because the next level would equal that of the Parliamentary Librarian and the rules do not allow a position to be classified at a level equal to or greater than a level to which it reports. The PCO decided to leave the classification unchanged but provide a higher salary to Mr. Page. The PCO will re-evaluate this situation in the coming year. The committee may wish to revisit this issue in the future.

Mr. Page was appointed Parliamentary Budget Officer on March 25, 2008 for a five year term. He is a career public servant with experience working on relevant fiscal forecasting, policy and expenditure portfolios within the Department of Finance, the Treasury Board Secretariat and the Privy Council Office.

The senators were interested in several aspects of his new position and in the many challenges he will face in the coming year. In particular, senators were concerned whether the organization of the PBO would be able to deal effectively with issues involving the environment, gender bias in economic policy, the regional impact of government programs and policies, and the anticipated surge of demand for his services from parliamentarians and any other bias that might arise in the discharge of his duties. On the matter of bias, Mr. Page explained that it is important to him that members of the National Finance Committee and other parliamentarians be comfortable with him as their Parliamentary Budget Officer. In his words "Trust must be accompanied by

professional, unbiased and competent advice for me to be an effective servant of Parliament.” In this regard, he noted that as the Parliamentary Budget Officer he will maintain the tradition of the Library of Parliament in the provision of independent, non-partisan advice.

In the matter of concerns over the environment; gender equality; and regional economic impact studies, he plans to ensure that the PBO is well prepared to deal with any emerging economic issues, although he did not say how he will go about doing so. Although he plans to utilize all the resources provided to the PBO in the most effective manner possible, he recognizes that it will take some time for the Office to be fully operational. Until such time he wants to leverage the available resources in the Library, in federal departments and agencies through the provision of information, and through external stakeholders interested in serving Canadians. He intends to work with the Department of Finance and private sector forecasters to ensure that there is satisfactory comprehension and oversight by parliamentarians on the economic and fiscal outlook, the related risks and the implications for fiscal planning and budgetary choices.

Finally, on the question of rising demands for his services, Mr. Page acknowledged that this might indeed challenge the capacity of the PBO to deliver his services in a timely fashion. He expressed a hope that parliamentarians and particularly the committees that he is charged with assisting will be able in time to provide guidance on this matter.

The PBO's original spending estimates were set out in the 2006-2007 Supplementary Estimates (B) at \$250,000. In the submission for 2008-2009 Main Estimates, the Library sought funding of \$1.9 million for the fiscal year 2008-2009 and estimates that \$2.8 million will be required in the fiscal year 2009-2010 for the on-going implementation of the Parliamentary Budget Officer functions.

The PBO has no statutory duty to make a report to either House of Parliament. However, the Library of Parliament, which reports to the Speakers of the Senate and House of Commons, does table an annual report to Parliament, and this could include reports from the PBO. During his appearance before the committee, the PBO mentioned that he anticipates his Office producing a number of regular publications which may form the basis of on-going dialogue between himself and those parliamentary committees that he is specifically charged with assisting.

THE PROCUREMENT OMBUDSMAN⁽⁸⁾

The Procurement Ombudsman is appointed by the Governor in Council for a term of not more than five years. He will deliver an annual report on his or her activities and findings to the Minister of Public Works and Government Services (PWGSC), who will table it in both Houses of Parliament. Mr. Shahid Minto was appointed the Procurement Ombudsman Designate in September 2007, following a nationally advertised selection process. The appointment was on a designate basis because the regulations that fully prescribe the duties and functions of the ombudsman had not yet been issued. While they are expected in the late spring of 2008, Mr. Minto in the interim has no power or authority, statutory or otherwise, to carry out the mandate of the office. His mandate at this time is to assist with developing the mandate of the Procurement Ombudsman and to set up the Office. In creating the position of the Procurement Ombudsman, the government also intended to create a code of conduct for public servants and suppliers, and the embedding of integrity provisions in all contracts. The annual budget for the Procurement Ombudsman is expected to be approximately \$5 million.

This position, along with other changes in the Action Plan, are intended to ensure that the procurement process is free of political interference, and that a clear process is in place to address complaints from potential suppliers.

At a committee hearing of February 12, Mr. Minto explained that the *Federal Accountability Act* provides for the appointment of a Procurement Ombudsman who will operate at arm's length from government departments to promote fairness, openness and transparency in federal procurement processes. The office's mandate, which ultimately depends on the final form of the regulations, is four-fold:

1. To conduct reviews of the procurement practices of departments and agencies and to develop detailed recommendations designed to strengthen fairness, openness and transparency of government procurement.
2. To respond to complaints from suppliers related to contract award and contract administration. For complaints regarding the awarding of contracts, the mandate is limited to contracts worth up to \$25,000 for goods and up to

(8) Additional information is available at: <http://news.gc.ca/web/view/en/index.jsp?articleid=350369>.

\$100,000 for services. There are no dollar value restrictions on the office's ability to address complaints about contract administration.

3. To establish an alternative dispute resolution process that can enable the government and suppliers to avoid costly litigation when disputes arise.
4. To perform, as directed by the Minister of Public Works and Government Services Canada, any other duties or functions relating to the procurement practices of government departments.

Mr. Minto noted that the *Federal Accountability Act* does not give the office the authority to review procurement of accommodations through leasing, lease purchase or outright purchase. The mandate is focused on reviewing procurement of goods and services, including construction contracts. He reminded the committee that the Procurement Ombudsman will not make policy, and that it will be the responsibility of deputy heads to implement the Ombudsman's recommendations.

Since his appointment he has worked to ensure that the office is up and running as soon as the regulations come into effect. He has also sought to develop draft standards, criteria and procedures for various aspects of the mandate. His staff has developed website content as well as communication tools and outreach programs to make their services known and easily accessible. They are working closely with Department of Justice officials to design the alternative dispute resolution process. Finally, they have reviewed the proposed Procurement Ombudsman regulations and have provided detailed analyses and comments to the government.

He felt it important to highlight what he believed to be a key issue: "How do we ensure that the Office of the Procurement Ombudsman operates, and is seen to operate, in an independent and neutral manner?" In answer to this question, he says the government has taken a number of steps to ensure the independence and viability of the office – such as selecting the Ombudsman through a nationally advertised competitive process, making the appointment through an order-in-council, and providing a reasonable start-up and ongoing operational budget. Nonetheless, the *Federal Accountability Act* clearly stipulates that the ombudsman will submit an annual report to the Minister of PWGSC.

Furthermore, the Ombudsman is not set up as a separate entity under the *Financial Administration Act*. The Office of the Procurement Ombudsman receives its funding through a PWGSC appropriation. As a result, the deputy minister's accountability for the management of public funds, property and human resources, as well as his role as chief accounting officer, extend to this office.

At the time of the committee hearing, Mr. Minto explained that discussions were under way to ensure that the specific roles and accountability of both the deputy minister and the Procurement Ombudsman are respected. A Memorandum of Understanding is to be signed shortly between the two organizations. To further ensure the Ombudsman's independence, the office will use its own resources to develop its communications products and reports. They are consulting with the Department of Justice to develop the best way for the office to obtain independent legal support.

Senators were interested in several aspects of the mandate and role of the Procurement Ombudsman. Mr. Minto provided further elaboration and clarifications in response to Senators' questions. In particular senators were concerned that the ceilings of \$25,000 for goods and up to \$100,000 for services for complaints regarding the awarding of contracts were not adequate. Mr. Minto explained that this ceiling was set because the Act appeared to try and avoid overlap with the mandate of the Canadian International Trade Tribunal (CITT), which has the mandate to look at complaints pertaining to awards of contracts over these limits. His understanding is that it was felt that there was a gap because no one was reviewing complaints regarding the awarding of contracts below the CITT limits. Senators observed that the CITT has an international role, not a domestic role. Since there does not seem to be any opportunity for domestic firms to complain about contracts awarded above the existing ceiling the committee recommended in its Final Report on the 2007-2008 Main Estimates that the government should increase the ceilings on the value of contracts subject to review by the Procurement Ombudsman.

Senators were also concerned that the *Federal Accountability Act* does not give the office of the Procurement Ombudsman the authority to review procurement of accommodations through leasing, lease purchase or outright purchase. These are significant transactions of the federal government that are often contentious. Therefore, the committee, again in its Final Report on the 2007-2008 Main Estimates recommended that the Procurement Ombudsman be given the power

to review procurement of federal accommodations obtained through leasing, lease purchase or outright purchase.

On April 15, the Honourable Michael Fortier, the Minister of PWGSC, responded to these recommendations by saying that the government wanted to provide some recourse for suppliers of contracts below the minimum levels covered by the CITT. He reminded the committee that there are close to 200,000 contracts under \$25,000. He felt that this is a significant number of contracts that will now be covered by the Ombudsman. There is no intention at this time of the government increasing the scope of the Ombudsman to allow his office to review contracts of greater value.

As to reviewing the procurement of federal accommodations obtained through leasing, lease purchase or outright purchase the Minister explained that the government wanted to basically mirror the CITT in the sense that those contracts that could go before the CITT would continue to do so. Those contracts that could not be reviewed by the CITT would go before the Procurement Ombudsman. Neither would have the powers to review federal accommodations obtained through leasing, lease purchase or outright purchase.

While the Minister attempted to explain the rationale for limiting the Ombudsman's powers of review, some senators remain unsatisfied and would like to see the Office granted responsibility to review the procurement of lease contracts and to review procurement of greater value than those stipulated in the legislation.

Some senators noted that independence is an important theme that is running through all the various positions that are being created. They felt that in order for someone like the Procurement Ombudsman to have credibility with government suppliers, there has to be a perception and the existence of independence. They must know that their complaint will be dealt with fairly and objectively. The Minister assured the committee that the independence of the Procurement Ombudsman will be evident. First because the person selected to fill the position has superb credentials and experience in accounting and in reviewing contracts. Second, the Act itself gives the Procurement Ombudsman powers to look at the contracts and to review the contracts and complaints. Finally, it also gives him the ability to assist in alternative dispute resolutions and to

assist suppliers who have succeeded in getting a contract from the federal government, regardless of the threshold, and who cannot get paid or have an issue with a current contract.

Another aspect defining the degree of independence of the Procurement Ombudsman from the government involves the issuance of public reports. Senators asked the Minister about the provisions in the Act that require the government to make public the annual reports and special reports of the Procurement Ombudsman. The Minister indicated that the law requires only that the Ombudsman submit an annual report to Parliament through the Minister. There is however no requirement that any other reports of the Ombudsman be published. Some senators questioned whether this arrangement will provide sufficient transparency in the operations of the Office of the Procurement Ombudsman.

The committee is of the view that other reports of the Ombudsman to the Minister should be made public. This is not unlike the situation of the Office of the Ombudsperson for the Department of National Defence and the Canadian Forces. That Office prepares an annual report as well as special reports to the Minister of National Defence, all of which are publicly available.

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS⁽⁹⁾

The Director of Public Prosecutions (DPP) is to be appointed by the Governor in Council on the recommendation of the Attorney General. The Attorney General must establish a selection committee consisting of a representative from the Federation of Law Societies of Canada, a representative from each recognized political party in the House of Commons, the Deputy Minister of Justice, the Deputy Minister of the Department of Public Safety and Emergency Preparedness, and a person selected by the Attorney General. It may be noted that the Attorney General would still have been indirectly involved in the initial selection of candidates, as there are two deputy ministers on the selection committee, as well as a person appointed by the Attorney General. The final candidate must be approved by a parliamentary committee designated or established for that purpose. After approval by the parliamentary committee, the Attorney General must recommend the appointment of the final candidate or, if the committee

(9) Additional information on the DPP and the PPSC is available at: <http://www.ppsc-sppc.gc.ca/eng/>.

does not give its approval, refer one of the other two short-listed candidates to the parliamentary committee.

Brian J. Saunders is the Acting Director of Public Prosecutions, a position he has held since December 12, 2006 when Part III of the FAA came into force establishing the Office of the Director of Public Prosecutions. Before assuming these duties, Mr. Saunders held various positions within the Department of Justice including Assistant Deputy Attorney General (Criminal Law), Assistant Deputy Attorney General (Citizenship, Immigration and Public Safety) and Senior General Counsel and Director General of the Ottawa Civil Litigation Section. Mr. Saunders has had considerable experience in litigation involving the federal government, particularly in the areas of human rights, the Charter of Rights, and administrative law.

The DPP is the head of the Public Prosecution Service of Canada (PPSC) which is a federal government organization, created on December 12, 2006, when the Director of Public Prosecutions Act, Part 3 of the FAA, came into force. It fulfils the responsibilities of the Attorney General of Canada in the discharge of his criminal law mandate by prosecuting criminal offences under federal jurisdiction and by contributing to strengthening the criminal justice system.

In this regard, the PPSC assumes the role played within the Department of Justice Canada by the former Federal Prosecution Service (FPS), and takes on additional responsibilities for prosecuting new fraud offences under the FAA as well as offences under the Canada Elections Act. Unlike the FPS, which was part of the Department of Justice, the PPSC is an independent organization, reporting to Parliament through the Attorney General of Canada. By June 30 of each year, the DPP must report on the activities of the Office of the DPP during the preceding fiscal year, except those relating to proceedings under the Canada Elections Act (section 16). The report must be submitted to the Attorney General, who must then table it in each House of Parliament within 15 sitting days.

The PPSC is responsible for prosecuting offences under more than 50 federal statutes and for providing prosecution-related legal advice to law enforcement agencies. Cases prosecuted by the PPSC include those involving drugs, organized crime, terrorism, tax law, money laundering and proceeds of crime, crimes against humanity and war crimes, Criminal Code offences in the

territories, and a large number of federal regulatory offences. It employs approximately 900 full time employees, including 500 prosecutors, and retains more than 810 private-sector lawyers as agents across Canada.

According to its website, the creation of the PPSC reflects the decision to make transparent the principle of prosecutorial independence, free from any improper influence. Its mandate is to provide prosecutorial advice to law enforcement agencies, and to act as prosecutor in matters prosecuted by the Attorney General of Canada on behalf of the Crown. Its mandate also includes initiating and conducting prosecutions on behalf of the Crown with respect to offences under the Canada Elections Act.

The PPSC reports to Parliament through the Attorney General of Canada. The *Director of Public Prosecutions Act* states that the Director of Public Prosecutions acts “under and on behalf of the Attorney General of Canada.” The relationship between the Attorney General and the Director is premised on the principles of respect for the independence of the prosecution function and the need to consult on important matters of general interest.

The core powers, duties, and functions of the Director of Public Prosecutions are set out in subsection 3(3) of the *Director of Public Prosecutions Act*. These responsibilities include:

1. Initiating and conducting federal prosecutions;
2. Intervening in proceedings that raise a question of public interest that may affect the conduct of prosecutions or related investigations;
3. Issuing guidelines to federal prosecutors;
4. Advising law enforcement agencies or investigative bodies on general matters relating to prosecutions and on particular investigations that may lead to prosecution;
5. Communicating with the media and the public on all matters respecting the initiation and conduct of prosecutions;
6. Exercising the authority of the Attorney General of Canada in respect of private prosecutions; and
7. Exercising any other power or carrying out any other duty or function assigned by the Attorney General that is compatible with the office of the Director.

When carrying out these statutory responsibilities, the Director is the Deputy Attorney General of Canada. Unless otherwise directed in writing by the Attorney General, the Director has the power to make binding and final decisions to prosecute offences under federal statutes. The requirement that all directions from the Attorney General be in writing and published in the Canada Gazette is intended to safeguard the Director's independence.

The PPSC is not an investigative agency. It prosecutes when a charge has been laid pursuant to an investigation by the Royal Canadian Mounted Police (RCMP) or some other police force or investigative agency of a violation of federal law. The PPSC provides advice and assistance to investigators at the investigative stage and works closely with them, particularly in terrorism, criminal organization, proceeds of crime, money laundering, market fraud, and mega cases.

Senators were very interested in determining the degree of independence of the DPP from the Attorney General. There were many questions to ascertain the nature of the relationship between the PPSC and the minister; on the frequency of meetings with the minister's staff; and on the relationship between PPSC and the police. Mr. Saunders assured the committee that every effort is made to minimize any influence of the Minister or his staff on the everyday operations of the PPSC. However, he recognizes that there are instances where the national interest dictates that the Minister needs to be involved. The Act provides for such instances and he and the Minister's office are developing the protocols that will guide such communications.

With respect to issue of physical location, the PPSC currently shares a building with the Department of Justice. However, there is talk about moving into a separate location, and for the time being the two entities use separate entrances to emphasize their autonomy. Also, other facilities and equipment, such as the computer system, will have to be separated from that of the Department.

THE PUBLIC SECTOR INTEGRITY COMMISSIONER⁽¹⁰⁾

The Public Sector Integrity Commissioner is appointed by the Governor in Council by commission under the Great Seal, after consultation with the leader of every recognized party in the Senate and the House of Commons and after approval of the appointment by resolution of the Senate and the House of Commons. He or she holds office for a seven-year term. The government created this position to help foster an environment in which employees and all Canadians can honestly and openly report wrongdoing in the federal government without fear of reprisal.

On June 12, 2007, the Prime Minister of Canada announced the nomination of Ms. Christiane Ouimet as the new Public Sector Integrity Commissioner. At the time of her appointment, Ms. Ouimet served as Associate Deputy Minister of Agriculture and Agri-Food. Throughout her 25 year career, Ms. Ouimet has gained considerable experience and expertise in the areas of audit, regulatory affairs and policing and enforcement.

An Officer of Parliament, the Public Sector Integrity Commissioner is responsible for the administration of the new *Public Servants Disclosure Protection Act*, which protects public servants and Canadians who report wrongdoings in the federal government. The Commissioner will conduct independent reviews of disclosures of wrongdoing in an equitable and timely manner, issue reports of findings to enable organizations to take appropriate remedial action and submit annual and special reports to Parliament, through the Speaker of the House of Commons.

The Commissioner may conduct investigations and attempt to conciliate a settlement between the parties, but does not have the power to enforce a settlement. If there is no settlement, the Commissioner may decide to refer the matter to the new, independent Public Servants Disclosure Protection Tribunal. The Commissioner must report to Parliament on his or her findings and conclusions when he or she deems that an allegation of wrongdoing or reprisal is well-founded.

In addition to reports presented after the completion of an investigation, the Public Sector

(10) Additional information is available at the Public Sector Integrity Canada website:
<http://www.psic-isp.gc.ca/index.php?lang=en>.

Integrity Commissioner must table an annual report to Parliament. He or she may also submit special reports on any matter within his or her mandate.

During her appearance before the committee Ms. Ouimet explained that the Act is a pioneering piece of legislation. Nowhere in the world is there a body of legislation that combines in the same package a disclosure process together with protection for “whistle-blowers” against reprisals. She believes that this presents a unique challenge because the PSIC will operate in a brand new field of law and policy with many unknowns. Accordingly, every decision has the potential of setting precedent. At the same time, the Act proscribes very short deadlines.

Perhaps because of these implications, the PSIC favours prevention over investigation. Already, one week after assuming her duties, the Commissioner invited all parliamentarians for consultations about the implications of the new legislation. She also held over 70 bilateral meetings and 80 group meetings with former chief executives, academics, union leaders and middle managers across the country. The goal of these meetings was to explain the role and mandate of the PSIC. In the Commissioner’s experience, there was considerable amount of confusion about the PSIC’s mandate and therefore efforts were required to avoid duplication with other organizations that have similar mandates.

Ms. Ouimet explained that the Office is also developing an alternative dispute resolution process that could be applied to resolve some investigations. She reminded the committee that there exists a specific provision for conciliation under the reprisal sections of the Act. Therefore, the PSIC will seek to find the best solution, at the least cost and hopefully, try to enhance the reputation of public institutions.

In response to concerns about the overall operations, the Commissioner informed the committee that as they were setting up the organization, she instituted a procedure whereby, as soon as there is an allegation of reprisal, the Commissioner is personally informed regardless of the action ultimately taken.

The PSIC budget now stands at \$6.5 million. Presently, financial and other resources are sufficient to meet the current needs of the Office. However, the Commissioner informed the committee that she remains committed to three-year reviews in order to assess how well the organization meets expectations, to report on the promptness of the investigations and

interventions, to examine capacity of the office and to establish a clearer picture of resource requirements. In its first year of operation, the Office has received over 200 inquiries from various levels of the public service. The vast majority of these fall outside the mandate and jurisdiction of PSIC. Most inquiries or complaints deal with private matters such as staffing, classification issues and human rights issues that do not fall within PSIC's mandate. The Commission has redirected complaints to the appropriate organization. There is still considerable amount of confusion by the general public as to the role PSIC plays.

OFFICE OF THE COMMISSIONER OF LOBBYING⁽¹¹⁾

The Commissioner of Lobbying is appointed by the Governor in Council by commission under the Great Seal, after consultation with the leader of every recognized party in the Senate and the House of Commons and after approval of the appointment by resolution of the Senate and the House of Commons. He or she holds office for a seven-year term. This office replaced the Office of the Registrar of Lobbyists within the Department of Industry. At the time of the committee's hearings no person had yet been appointed because the provisions of the FAA that establish this Office have yet to come into force. In the interim the Office of the Registrar of Lobbyist continues to operate.

The mandate of the Office of the Registrar of Lobbyists (ORL) is to ensure transparency and accountability in the lobbying of public office holders with a view to contributing to confidence in the integrity of government decision-making. The ORL was initially placed within the Department of Industry. A further move towards greater independence of the ORL was made in February 2006, when the Office was moved to the portfolio of the President of the Treasury Board as an independent entity, while the government works to further revise and strengthen the *Lobbyists Registration Act*.

Weaknesses with the *Lobbyists Registration Act (LRA)* prompted the government to establish an independent Office of the Commissioner of Lobbying. These weaknesses included low compliance with registration requirements, insufficient disclosure of information on the part of

(11) The Office of the Commissioner of Lobbying is not yet functioning. However, information is available at the website of the Office of the Registrar of Lobbyists at:
<http://www.orl-bdl.gc.ca/epic/site/lobbyist-lobbyiste.nsf/en/home>.

lobbyists, and, on the part of the Registrar of Lobbyists, a lack of necessary independence, powers, and resources to conduct effective investigations of possible infractions under the LRA. The FAA replaces the existing Registrar of Lobbyist by establishing a new Commissioner of Lobbying as an independent Agent of Parliament. The Act also gives the Commissioner expanded investigative powers to ensure compliance with the *Lobbying Act* (formerly the Lobbying Registration Act) as well as an education mandate.

In 2007-2008, the Office received \$3.4 million through the 2007-2008 Main Estimates and has requested \$1.2 million through the 2007-2008 Supplementary Estimates (A). In 2006-2007 the office received appropriations of \$3.5 million; actual spending totalled \$3.1 million. In that year the Office employed 20 full-time equivalents. It is anticipated that the Office of the Commissioner of Lobbying will require a similar magnitude of resources.

OBSERVATIONS AND RECOMMENDATION

The committee has several concerns about the process of implementing the offices created or modified by the FAA. While the individuals appointed or designated in the interim to set up the offices displayed a welcomed enthusiasm for the daunting tasks that they face, the committee is disappointed that nearly 18 months after Royal Assent, only two of the six positions have been filled with permanent appointments (see the table in Appendix I). These positions will play an important role in the provision of greater transparency and accountability in government and should move more quickly towards complete implementation.

A case in point concerns the vacancy in the office of the Public Appointments Commissioner. The committee is particularly concerned that the government has never nominated a candidate for Commissioner under the Act, and it is also concerned about the total lack of a statement of intent to do so. In addition, the committee is very concerned about value for money in connection with ongoing requests for millions of dollars of funding for a commission that has never been established.

As to the matter of financial independence, the committee believes that the operations of the Officers and Agents of Parliament should not only be free of government influence exerted through the control of the purse, but must also appear to be free of such influence. Accountability and transparency in government will be well served if these offices continue to

maintain an acceptable level of independence or autonomy. While the risk that a government will deliberately underfund these offices so as to stifle their criticism can be exaggerated, the appearance of such a situation should be avoided. The committee therefore welcomes the attempt to establish, through the House of Commons Advisory Panel on the Funding of Officers of Parliament, some degree of oversight in the budget determination process of these offices. The committee acknowledges the constitutional principles that all spending must originate with the Crown (i.e., the Cabinet) and be approved by Parliament. It also believes that Parliament and Canadians have a right to know that their government is behaving correctly. The creation of the Panel seems to strike a proper balance between the obligation of the government to exercise control over the budget process and the provision of adequate resource to the Officers and Agents of Parliament so that they can discharge their duties. The committee encourages the government to continue the process begun with the Panel on the Funding of Officers of Parliament and extend it, where warranted, to the new offices created by the FAA.

Finally, the committee was concerned that the current provisions of the FAA regarding the reporting procedures of the Procurement Ombudsman as they do not provide for the publication of special reports. The committee views this situation as unsatisfactory. In fact the committee believes that all reports of the Ombudsman, as well as those of the other offices created or modified by the FAA, should be tabled in Parliament and made available to the public, subject to any secrecy requirements. The committee therefore recommends that:

RECOMMENDATION

All reports of all Officers and Agents of Parliament shall be tabled in both Houses of Parliament.

**APPENDIX I- SUMMARY TABLE ON THE OFFICERS AND AGENTS OF
PARLIAMENT**

Organization	Officer/Agent of Parliament	Coming into force of relevant provisions	Date of appointment	Regulations in place
Parliamentary Budget Office	Kevin Page	12 December 2006	25 March 2008	Does not apply
Commissioner of Lobbying	Vacant	Not in force	Does not apply	No
Office of the Procurement Ombudsman	Vacant	Not in force	Does not apply	No
Public Appointments Commissioner	Vacant	12 December 2006	Does not apply	Does not apply
Director of Public Prosecutions	Brian J. Saunders (Acting)	<i>Director of Prosecutions Act</i> , 12 December 2006	12 December 2006	Does not apply
Public Sector Integrity Commissioner	Christiane Ouimet	<i>Public Servants Disclosure Protection Act</i> , 15 April 2007 and <i>Conflict of Interest Act</i> 9 July 2007.	12 June 2007.	Does not apply

APPENDIX II – Witnesses list

Witnesses appearing before the committee on the subject of the Implementation of the Federal Accountability Act (C-2), 39th Parliament, 2nd Session

Tuesday, December 11, 2007

Issue 3

Privy Council Office:

Cathy Hawara, Director, Appointments and Selection Process

Marc O’Sullivan, Acting Assistant Secretary to the Cabinet, Senior Personnel and Special Projects

Treasury Board of Canada Secretariat:

Joe Wild, Executive Director, Strategic Policy, Corporate Priorities and Planning

Tuesday, February 12, 2008

Issue 5

Library of Parliament:

William R. Young, Parliamentary Librarian

Allan Darling, Senior Special Advisor, Parliamentary Budget Officer

Jacques Sabourin, Acting Director General, Parliamentary Information and Research Services

Office of the Procurement Ombudsman of Canada

Shahid Minto, Procurement Ombudsman Designate

Isabelle Deslandes, Senior Advisor

Tuesday, April 8, 2008

Issue 9

Office of the Public Sector Integrity Commissioner:

Christiane Ouimet, Commissioner

Wayne Watson, Deputy Commissioner

Joe Friday, General Counsel

Wednesday, April 9, 2008

Issue 9

Public Prosecution Service of Canada:

Brian Saunders, Acting Director of Public Prosecutions

Chantal Proulx, Acting Deputy Director of Public Prosecutions, Regulatory Litigations and Criminal Justice Branch

George Dolhai, Acting Deputy Director of Public Prosecutions, Criminal Litigations and Organized Crime Branch

Marc Fortin, Executive Director and Corporate Counsel

Tuesday, April 15, 2008

Issue 10

Appearing:

The Honourable Michael Fortier, P.C., Minister of Public Works and Government Services Canada

Public Works and Government Services Canada:

François Guimont, Deputy Minister

Ian McLeod, Counsel, Justice Canada

Wednesday, April 16, 2008

Issue 10

Library of Parliament:

Kevin Page, Parliamentary Budget Officer

William R. Young, Parliamentary Librarian

Privy Council of Canada:

Marc O'Sullivan, Acting Assistant Secretary to the Cabinet, Senior Personnel and Special Projects

Office of the Registrar of Lobbyists:

Michael Nelson, Registrar of Lobbyists

