

# A Modern Treaties Implementation Review Commission

■ a proposal to the

Government  
of Canada

by the

Land Claims  
Agreements Coalition

November, 2017

## LAND CLAIMS AGREEMENTS COALITION



Council of Yukon First Nations  
Grand Council of the Crees  
Gwich'in Tribal Council  
Inuvialuit Regional Corp

Kwanlin Dun First Nation  
Maa-nulth First Nations  
Makivik Corporation  
Naskapi Nation

Nisga'a Nation  
Nunavut Tunngavik Inc  
Tla'amin Nation  
The Sahtu Secretariat Incorporated

Tlcho Government  
Tsawwassen First Nation  
Vuntut Gwitchin

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November 10, 2017

BY FAX AND EMAIL

The Right Honourable Justin Trudeau, P.C., M.P.  
Prime Minister of Canada  
Langevin Block, 80 Wellington St., Ottawa ON K1A 0A2

### **Re: Modern Treaties Implementation Review Commission**

Dear Prime Minister Trudeau,

The First Nations members of the Land Claims Agreements Coalition (LCAC) appreciated the opportunity to meet with you last Friday as the Inuit members similarly valued your meeting with them earlier this year. Your willingness to engage with our members is truly appreciated, and we shall write further on this under separate cover.

As you know, LCAC was formed in 2003, and includes both First Nations and Inuit modern treaty signatories. Our treaties vary from one to another, but we found that we share common problems of implementation. In this context, over the years we have put forward a number of statements on position and policy, the most important of which were forwarded to you prior to our November 1, 2017 meeting.

During that meeting, Deputy Grand Chief Jordan Peterson of the Gwich'in Tribal Council called upon you to establish a Modern Treaties Implementation Commission (MTIRC) as an important part of the reconciliation agenda as it applies to Indigenous modern treaties. A detailed proposal, developed by the LCAC, is attached.

We see this proposal as a crucial step for assuring Parliament that the Crown's obligations and responsibilities under modern treaties are properly discharged and that the objectives of these constitutional instruments are achieved. Reviews by the Auditor General, over the past 15



**Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.**

***- UN Declaration on the Rights of Indigenous Peoples, Article 37***

# Table of Contents

- Proposal ..... 4**
- 1. Background ..... 7**
- 2. Analysis ..... 9**
- Appendix A - Examination of Models ..... 17**
  - Variables ..... 17
    - 1. Reporting Relationship ..... 17
    - 2. Extent of Authority ..... 18
    - 3. Capacity to Initiate ..... 18
    - 4. Capacity to Direct ..... 18
    - 5. Ability to Acquire Requisite Information ..... 19
    - 6. Source of Creation, Mandate and Authority ..... 19
  - Models ..... 19
    - 1. National Defence & Canadian Forces Ombudsman ..... 20
    - 2. Yukon Ombudsman ..... 21
    - 3. Office of the Correctional Investigator ..... 23
    - 4. Office of the Parliamentary Budget Officer ..... 24
    - 5. Cree-Naskapi Commission ..... 26
    - 6. Commissioner of Official Languages ..... 28
    - 7. Office of the Auditor General ..... 30
    - 8. Commissioner of the Environment and Sustainable Development ..... 32
- Appendix B – Officers of Parliament ..... 35**

## Proposal

The Land Claims Agreements Coalition (LCAC) calls upon the Government of Canada to establish an independent **Modern Treaties Implementation Review Commission** (MTIRC), guided by fundamental objectives of *credibility, effectiveness and independence*, as described in this proposal.

### On Purpose

1. The MTIRC's responsibility shall be to monitor and report to Parliament on the progress of Modern Treaty implementation matters in all parts of Canada where Modern Treaties are in place.
2. The MITRC's fundamental objective shall be the examination of Government actions, required by, relating to, or in any way affecting the implementation of Modern Treaties.

### On Structure & Reporting

3. The Commission shall be established as an adjunct Office within the Office of the Auditor General of Canada (OAG), and undertake reviews in a manner similar to that of the OAG and the Commissioner of the Environment and Sustainable Development (CESD) so as to continue the high standards and respectability of that Office.
4. As such, the Commission shall report to Parliament.
5. The Commission shall be made up of a Commissioner appointed by the Auditor General.
6. Budgetary and administrative support, as well as such expert advice as may be required, shall be provided to the Commission through the OAG.

### On Appointments

7. The process for appointment of the Commissioner of the MTIRC shall be consistent with procedures established for the appointment of the CESD and shall be undertaken in such a way as to ensure consultation with LCAC members.
8. The process shall ensure that the MTIRC is seen as fair, credible and independent by Modern Treaty governments, organizations and citizens, Parliament and the Government of Canada.
9. Deadlines for appointments, following the occurrence of a vacancy, shall be provided for in the MTIRC's mandating legislation.

### On Mandate & Extent of Authority

10. The MTIRC shall initiate and conduct reviews for reports to Parliament on all matters relating to the implementation of Modern Treaties and self-government agreements which are negotiated pursuant to Modern Treaties or as separate but associated agreements between Canada and a Modern Treaty Aboriginal signatory.

11. The foundation documents for all MTIRC's reviews and examinations shall be Modern Treaties and the MTIRC shall not address matters outside the scope of Modern Treaties and their implementation.
12. The MTIRC shall submit all reports to Parliament without interference from the Government.
13. The MTIRC shall have the capacity to initiate a review of any governmental implementation matter.
14. Federal legislation shall require departments and agencies of the federal government to provide information requested by the Commission in a manner consistent with that provided to the OAG and the CESD, so that the MTIRC may appropriately examine Government actions relating to the implementation of the Modern Treaties.
15. MTIRC's mandating legislation shall provide for the power to enter into agreements respecting information protocols between the MTIRC and provinces and territories. Such agreements shall respect the jurisdictional authority of the provincial and territorial governments, while encouraging the exchange of information needed to enable the Commission to be effective in reporting to Parliament. This shall not in any way impinge upon the authority of the OAG to act as Auditor General for a territory (as authorized through the *Yukon Act*, *Northwest Territories Act* and *Nunavut Act*).
16. Where provided for through a protocol with a provincial or territorial government, as described above, the MTIRC may submit a report to the Legislative Assembly of a province or territory on implementation matters that require involvement by the government of that province or territory.
17. In a manner similar to the Environmental Petitions Process provided for in the *Auditor General Act*, and the Filings of Representation process under the *Cree-Naskapi (of Quebec) Act*, the MTIRC's mandating legislation shall provide for a process whereby the Aboriginal persons holding rights under Modern Treaties, may call upon the MTIRC to look into specific implementation issues affecting such persons.

#### On Source of Authority

18. The mandate of the MTIRC shall be clearly established through separate federal legislation, in a manner similar to that of the CESD. This legislation shall be developed in close collaboration with the LCAC members in a comparable manner to that undertaken by the Government of Canada in developing ratification and implementing legislation regarding Modern Treaties.
19. Consultation requirements shall be included in the MTIRC's mandating legislation which shall require engagement with LCAC members prior to undertaking any changes to the mandating legislation.

The MTIRC shall have no mandate to:

- review and comment on policies regarding the negotiation of Modern Treaties;

## Modern Treaties Implementation Review Commission

- substitute for, or in any way conflict with, the instruments set out in Modern Treaties relating to consultation, mediation or arbitration; however, where there are concerns on the part of Modern Treaty signatories with the application of such instruments, the MTIRC may review and report on ways to address such concerns or related issues;
- replace or in any manner affect the mandates of other bodies such as the OAG, the Canadian Human Rights Commission, or the Cree-Naskapi Commission; or
- review issues relating to Aboriginal peoples which do not involve a Modern Treaty that is in effect or which deal with a matter that is not the subject of a Modern Treaty.

## 1. Background

The Land Claims Agreements Coalition (LCAC) was formed in 2003 and represents Aboriginal parties to Modern Treaties (comprehensive land claims agreements). Currently there are twenty-six Modern Treaties that have been signed by the Government of Canada, and which are in effect.

LCAC members are pursuing the achievement of the broad objectives of Modern Treaties within the context of new relationships. It is their view that the measurement of implementation progress should be against these Modern Treaty objectives rather than against a restrictive list of legal obligations, interpreted narrowly. Regrettably, the latter has been the approach frequently taken by the federal government, as well as by provincial and territorial governments, since these agreements have been put in place.<sup>1</sup>

In December 2006, as part of the “Four-Ten’ Declaration of Dedication and Commitment”, the LCAC stated:

There must be an independent implementation and review body, separate from the Department of Indian Affairs and Northern Development. This could be the Auditor General's department, or a similar office reporting directly to Parliament. Annual reports will be prepared by this office, in consultation with Groups with land claims agreements. (Point #4).

In 2008, following hearings on Modern Treaty implementation that included testimony from numerous LCAC members, the Senate Committee on Aboriginal Peoples recommended:

That the Government of Canada, in collaboration with the Lands Claims Agreements Coalition and its present and future members, take immediate steps to establish an independent body, through legislation, such as a Modern Treaty Commission, to oversee the implementation of comprehensive land claims agreements, including financial matters. That the mandate of the Commission be developed jointly with the Land Claims Agreements Coalition and its members.<sup>2</sup>

Early in 2016, in hearings of the Standing Committee on Aboriginal Affairs and Northern Development, LCAC representatives reiterated the need for an independent oversight body, reporting to Parliament.

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<sup>1</sup> See *Honour, Spirit and Intent: A Model Canadian Policy on the Full Implementation of Modern Treaties Between Aboriginal Peoples and the Crown*, LCAC, November, 2008. See also *Report of the Auditor General to the House of Commons, November 2003*, Chapter 8.

<sup>2</sup> *Honouring the Spirit of Modern Treaties: Closing the Loopholes*. Interim Report, Special Study on the Implementation of Comprehensive Land Claims Agreements in Canada, Standing Senate Committee on Aboriginal Peoples, Parliament of Canada, May 2008.

More information was requested on what such an oversight body would look like and what it would have the power to do.<sup>3</sup>

In accordance with the LCAC's long-standing advocacy for such an oversight body the LCAC has examined various models to determine more precisely the components of an oversight body that would work to build a stronger, informed relationship between Canada and the LCAC members.

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<sup>3</sup> Standing Committee on Aboriginal Affairs and Northern Development, House of Commons, Parliament of Canada, Evidence, February 25, 2016.

## 2. Analysis

Land Claims Agreement implementation issues remain at “the top of the list” of challenges faced by Modern Treaty Aboriginal signatories throughout Canada, and have been so throughout the history of Modern Treaties. Witness the 1999 presentation to the Senate Standing Committee on Aboriginal Peoples by the Cree-Naskapi Commission, which described persistent frustrations with the implementation process throughout the life of the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement.

Conflicts have become ubiquitous in the implementation world. The 1998 Auditor General’s report was highly critical of the federal role in land claims implementation. This was followed by a second report in 2003 on implementation shortcomings relating to the Gwich’in and Nunavut agreements, in 2007 in relation to the Inuvialuit Final Agreement, and in 2015 on the Labrador Inuit Land Claims Agreement.

Two of these long-standing conflicts are worth highlighting:

- In February of 2008, Canada and the Grand Council of the Crees (Eeyou Istchee) of northern Quebec signed an agreement to end controversy (including litigation) surrounding implementation of the 1975 James Bay and Northern Quebec Agreement. Federal legislation to amend the 1984 *Cree-Naskapi (of Quebec) Act*, in keeping with terms of the “New Relationship Agreement”, passed through the House of Commons and Senate in the spring of 2009.
- In December of 2006, Nunavut Tunngavik Incorporated (NTI) initiated legal action against the federal government for the non-fulfillment of numerous obligations under the Nunavut Agreement. This legal action was finally settled out of court in May of 2015.

These examples demonstrate the severity and persistence of the implementation challenges faced by Modern Treaty parties. Even if sometimes needed to ensure compliance, litigation is a “last resort”. It is an attempt to effect change in the face of a failure to implement, and reflects the failure of regular decision-making and dispute resolution processes. Regrettably litigation focuses energies towards proving what parties could have done and have failed to do, rather than building on opportunities for change and growth. In the context of Modern Treaty implementation, this litigation experience highlights the pressing need for alternative accountability mechanisms.

It is believed that this problem could well increase as other Aboriginal groups in various parts of Canada sign Modern Treaties. Comprehensive Land Claims agreements are currently being negotiated in the Atlantic Provinces, Quebec, Ontario, Manitoba, Nunavut, the Northwest Territories, and British Columbia.

In June, 2015 as a measure to address the problems of government in ensuring effective Modern Treaty implementation, a federal Cabinet Directive was issued providing for the establishment of a Deputy Ministers' Oversight Committee and the establishment of a Modern Treaty Implementation Office within Aboriginal Affairs and Northern Development Canada, now Indigenous and Northern Affairs Canada (INAC).

The LCAC leadership has recognized these as important measures to improve implementation. In isolation, however, they are insufficient. These are mechanisms within government, important but subject to the political direction and competing priorities of the day, and certainly not transparent in their operation. It is not our intent to discredit these bodies. On the contrary, we believe that their effectiveness will be enhanced by the establishment of an independent review agency.

The review of a number of other models briefly described in Appendix A provides useful information, including "lessons learned", that can be brought to the question of how to establish a Claims Implementation oversight body for the Modern Treaty groups. The following analysis, organized in accordance with the LCAC objectives for an oversight role -- *credibility, effectiveness and independence* - provides context for understanding the Proposal set out in the first section of this paper.

### ***On Credibility***

- Direct accountability and reporting to Parliament, as a Commission within the OAG, is the best way to get information not only to government but to Canadians.
- It is of note that there are other "bodies" created by the Treaties themselves that have specific responsibilities for addressing conflict, such as (in some Modern Treaties) the capacity of Parties to go to arbitration over outstanding implementation issues. An oversight body at the national level, as proposed in this paper, needs to be mandated in a way that does not duplicate or conflict with processes provided for in the terms of the Modern Treaties.
- The appointment process is important for the success of this oversight body. The process must be structured to involve the LCAC members in the identification of suitable candidates; otherwise it will not be viewed as credible in the eyes of the Aboriginal Modern Treaty signatories. However, it is also important that the oversight body be credible in the eyes of Parliament and the federal government. This balance, to accomplish universal recognition, will be critical to the success of the new body. Given its reputation for neutrality and professionalism, appointment

ultimately by the OAG, in consultation with the LCAC members, is a highly credible approach recommended here.

- The Canadian federation has a complex set of jurisdictional relationships between the national government and the provinces and territories. Illustrative of this is the need for the Parliamentary Budget Officer (PBO) to look into provincial economies when looking at the overall national economy. The PBO cannot do his job well without including this important information. In the context of Modern Treaties, the mandate for implementation review should build in the capacity of the oversight body to comment on and bring information relating to claims implementation issues not only to Parliament and the federal government, but to the provincial and territorial governments as well, given how important these governments are to effective implementation. This capacity can be built into legislation creating the oversight body. Examples of such an approach exist in the OAG which also serves as the Auditor General for the territories, as provided for in the federal statutes establishing the public government framework of the territories,<sup>4</sup> and the Yukon Ombudsman, who is legislatively mandated to take on the role of Ombudsman for Yukon First Nations when a request is made.
- By adding the MTIRC to the OAG, immediate respect at the highest levels of objective reporting to Parliament will be assured. (Indeed the appointments process for the AG is designed to garner this credibility; the AG is an Officer of Parliament appointed for a non-renewable 10 year term upon resolution of the House of Commons and Senate.) There will be no confusion regarding reporting, or concerning whether or not the Commission is well supported and managed.
- Because of the OAG's long-standing strong relationship with the departments and agencies of Canada, the MTIRC can "piggy-back" on this reputation and use the OAG's procedures and practices to achieve immediate working relationships with the bodies that hold information important to the anticipated effectiveness of the MTIRC, and which have the capacity to consider and implement changes and approaches recommended by the MTIRC to Parliament.
- The appointment process is critical to the credibility of the MTIRC and how it is viewed by LCAC members and their citizens. Likewise it is crucial that Parliament, the Government of Canada and its various departments view this as a credible body just as they view the OAG and the CESD in this light. It is therefore important at the outset for all parties (Parliament, Canada and LCAC members) to work out the details for selection and determine how this will be treated in the mandating legislation.
- Deadlines should be included in the mandating legislation to ensure that the appointment of the Commissioner, when there is a vacancy, is made expeditiously.
- The size of the MTIRC was considered carefully. A single Commissioner with the appropriate skills and experience seems to be appropriate. Just as the CESD is appointed based on merit

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<sup>4</sup> Viz. *The Yukon Act*, S.C. 2002, c. 7, ss. 33-37; *The Northwest Territories Act*, S.C. 2014, c. 2, ss. 39-43; *The Nunavut Act*, S.C. 1993, c. 28, ss. 43, 46-48.

and ability to oversee the direction and work of environmental audits and reviews, the Commissioner to review of Modern Treaty implementation should be appointed based on similar characteristics. The LCAC is open to discussing how to get the best person for the position.

- As described below in respect of the role of the Correctional Investigator, “although the Investigator’s recommendations are not binding, the ‘authority’ (more accurately its ‘influence’) lies in the ability to thoroughly and objectively investigate a wide spectrum of administrative actions and present findings and recommendations to an equally broad spectrum of decision-makers, inclusive of Parliament.” Many of the models described here have the similar ability to identify issues requiring redress and the ability to do so without interference from Government or from senior offices within the public service. This should not be underestimated when considering whether this is a powerful role. The OAG, the Commissioner of Official Languages and the Commissioner of the Environment and Sustainable Development all reveal how powerful this role can be. Even where the body is not an Officer of Parliament, such as the Correctional Investigator, the PBO and the CESD, the very fact that such findings can achieve prominence in Parliamentary debate gives significant and persuasive effect to the findings of these Offices.
- Given the importance of provincial and territorial governments to the effective implementation of Modern Treaties, it is recommended that the mandating legislation provide for supplemental agreements among the MTIRC, the Aboriginal party, and the respective province or territory, to ensure that the parties to the effective treatment of the Modern Treaties engage formally on a regular basis in the discussions around changes to implementation approaches or to addressing implementation issues.

### ***On Effectiveness***

- Legislation should clearly set out the reporting relationship. The controversy stemming from the way in which the PBO was created underscores this point.
- There are examples where the reporting does not necessarily have to be directly to Parliament to be effective, but the relationship must be to another highly credible body such as the Auditor General of Canada. The CESD is an example of how this can be done. The LCAC is open to discussing with Canada how best to achieve this.
- A critical issue that should be addressed at the outset, and possibly solved through legislation or organization, is sufficiency of resources. Funding has been a chronic problem faced by a number of bodies set up in a “watch dog” or ombudsman-style role. Under-resourcing has been noted as an issue for Yukon’s Ombudsman, as that role continues to be provided for as a part-time position. Even a body as credible and highly respected as the Office of the Auditor General must focus considerable attention on setting an audit plan that is within budget.

- The effectiveness of all of the bodies examined in Appendix A is due to the credibility and visibility of the office in question. In no example is there the capacity to enforce recommendations put forward following examination of a matter. “Success” is measured by consistent and effective communication with government departments and agencies (no matter how contentious) illustrated clearly by the roles of the Ombudsman and the Auditor General. In addition, visibility is a key to success, in that the bodies have the capacity to report findings to Parliament without interference from the government of the day.
- The Cree-Naskapi Commission holds a number of useful “lessons learned”. Of particular interest here is the lack of progress in addressing implementation concerns and issues identified over many years by the Commission:

Some Cree communities have commented on the increasing backlog of recommendations of the Commission from its past biennial reports that remain unresolved and outstanding for several years. They question the effectiveness of the Commission in raising these issues and concerns of the Crees with recommendations to address them...

18. The Government of Canada, Cree Nation Government and the Naskapi Nation of Kawawachikamach should determine an effective process or mechanism to ensure proper and efficient follow-up and implementation of the recommendations of the Cree-Naskapi Commission.<sup>5</sup>

- There is considerable value in associating the MTIRC with the OAG. The OAG has evolved substantively over time. Whereas it had in the past a fairly narrow financial auditing mandate, it now has a robust ability to look at broad matters affecting Canada. For instance, it now has the ability to undertake more than just financial audits (with their strictly focused mandates) through what are called performance audits and special examinations. Thus the Office has far more capacity to look at a broad range of factors that ultimately determine whether the efforts of the federal government are meeting the needs of Canadians.
- In addition, the OAG’s highly disciplined approach to the audit and review processes, an approach recognized world-wide, will be followed by the MTIRC. Adopting these highly respected methods will ensure that the MTIRC’s work will be of value to Aboriginal Modern Treaty signatories, the federal government and Parliament.
- Also, the OAG has taken on topic-specific responsibilities. This “Officer of Parliament” now holds responsibility for the environment and sustainability, through the Commissioner of the Environment and Sustainable Development. Therefore, the addition of the MTIRC will not be entering unfamiliar territory; this will be consistent with what has already been considered a success in the institutional domain of Parliament.
- The OAG has in place a strong administration and management structure including established procedures for program planning, financial and personnel management and accountability. Thus

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<sup>5</sup> Cree-Naskapi Commission Report, 2014, Recommendation #18.

the MTIRC will not need to build new systems and structures, leaving it to focus on its main role of reviewing matters associated with implementation of Modern Treaties in Canada. Neither the federal government nor Parliament will have to be concerned over the administrative capacity of the Commission; as a well-respected body, the OAG will be providing this role.

- The Act might also include provisions similar to those included in the Yukon Ombudsman's mandate, under which the Ombudsman's authority can be extended to working with a Yukon First Nation or a municipal government. The territorial legislation creating this Office provides for this extension of mandate where funding is made available for this additional role. The MTIRC could be mandated to review and report to a provincial or territorial government on a Modern Treaty implementation matter that affects the particular province or territory.

### ***On Independence***

- During examination of the various models outlined in Appendix A to this proposal, recommendations of the Truth and Reconciliation Commission were reviewed. Recommendation #53 calls "upon the Parliament of Canada, in consultation and collaboration with Aboriginal peoples, to enact legislation to establish a National Council for Reconciliation. The legislation would establish the council as an independent, national, oversight body with membership jointly appointed by the Government of Canada and national Aboriginal organizations..." The Prime Minister announced in a December 15, 2016 Statement, that "we will establish an Interim Board of Directors to make recommendations on the creation of a National Council for Reconciliation. The Interim Board will begin an engagement process to develop recommendations on the scope and mandate of the National Council."
- At first glance it may appear that this Council might serve as the oversight body to look into matters regarding Modern Treaty implementation. However, this proposal does not support taking this direction. The Council's purpose is to facilitate the pursuit of reconciliation in broad ranging fields of contention. The current Modern Treaty groups have already set out, through Land Claims and Self-Government Agreements, terms of reconciliation. Their issues are about the interpretations of these Agreements and what would be fair and appropriate regarding their implementation and funding requirements. It would be a disservice to the Council to "add on" the range of particular issues of the LCAC members, in effect "watering down" the Council's capacity to address the already comprehensive set of topics set out in its mandate.
- With the comprehensive nature of the proposed mandate for this Commission, it would also be of concern that the specific select issues faced by the LCAC members would not receive the necessary attention that they deserve.
- Indeed, in its March 31, 2016 letter to Prime Minister Trudeau, the LCAC was clear about the unique nature of the Modern Treaties. The letter states:

“It is important to clarify that the LCAC is entirely separate from other national Indigenous organizations, namely the Assembly of First Nations, Inuit Tapiriit Kanatami, the Congress of Aboriginal Peoples and the Metis National Council. While some of our members may be affiliated with the above national organizations, LCAC is unique in that all of our members hold modern treaty agreements with the Crown and alone have the authority to speak with regard to them.”

- Separate federal legislation would help to ensure that there is clarity in the mandate and roles and responsibilities of the Commission, and avoid potential confusion when attempting to use other legislation to set the legislative mandate. This was a problem that arose from using the *Parliament of Canada Act* and its sections for the Parliamentary Library (ss. 73-79) to create the PBO.
- Consultation on the new Act can ensure that the interests of LCAC members are met through the drafting process and that there are no overlaps or conflicts with Modern Treaties or associated settlement legislation.

Without affecting the authority of Parliament, it is possible to ensure that in the future there will be no surprises to LCAC members if a future federal government were to decide to unilaterally change the Act. As an important element in the road to reconciliation, it is important that the Modern Treaty members have an effective voice in any changes to this relationship where contemplated in the future. The *Yukon Act* is a good example where there are requirements for the federal government to consult with the Yukon's Executive Council in advance of introduction of amendments to that Act in the House of Commons. In addition, s. 56 (2) also mandates the Yukon's Legislative Assembly to recommend to a responsible federal Minister, changes to or repeal of the *Yukon Act*. Similar capacity to engage relating to the mandating legislation for the MTIRC could be included in that Act.<sup>6</sup>

### **Other Considerations**

- A number of the models reviewed as part of this proposal are offices in which there is an associated ombudsman role. Although it is tempting to add such a role to the MTIRC, this is not recommended. There are a number of ways in which the parties to a Modern Treaty (the federal government, a provincial or territorial government, and an Aboriginal signatory) can engage to address particular disagreements, from mediation through to arbitration or the Courts. To create another body with a related role would be confusing, possibly duplicative and could ultimately be counterproductive. Therefore the recommended mandate is to focus the Commission on the collection of information that can be used to examine and report in an objective and credible manner on the progress, successes, failures and challenges of implementation at its various stages across Canada, as well as recommendations to address the failures and challenges.
- The MTIRC can work cooperatively and reinforce work by other bodies with oversight mandates such as the Cree-Naskapi Commission and the National Council on Reconciliation. Support from

the Office of Correctional Investigator for the Québec Ombudsman's "Special Report Detention Conditions, Administration of Justice and Crime Prevention in Nunavik" illustrates this reinforcing and supportive role.

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<sup>6</sup> *Yukon Act*, S.C. 2002, c. 7, s. 56.

## Appendix A - Examination of Models

There are eight models that have been reviewed. Each model is examined from the perspective of the variables described below.

### Variables

The following subsections describe the five variables that this paper uses to assess the efficacy of various models relative to the interests of the LCAC membership in pursuing a new partnership with Canada over Modern Treaty implementation.

There are other considerations that are also of importance to the potential success of the model to be implemented. Most notable is the matter of resourcing for whatever body is established to undertake this oversight role. This vulnerability is ubiquitous and therefore not separated out. The model proposed speaks to the importance of this security of resourcing.

#### 1. Reporting Relationship

The ability to submit reports directly to Parliament represents the ultimate distancing between the body's ability to act objectively and independently and the possibility of political interference over what information is submitted to Canadians.<sup>7</sup>

However, another option is to have an Officer reporting to a Minister of the Crown, with legislated independence whereby Government can only dismiss "with cause". This is done in circumstances such as the appointment of a Public Service Commissioner or a Clerk of a Legislature. They hold Deputy Minister status but do not serve at pleasure and have strong protections built in through legislation. The advantage of such an option is that the Officer can have greater direct links inside bureaucracy where many of the challenges exist in implementation of Land Claims Agreements.

Although reporting to a Minister, independence of reporting can be legislated; the Minister must submit the Officer's report to the legislature within a prescribed timeframe.

No matter the reporting relationship, it is this ability to issue reports publicly without vetting through some means (bureaucratic or political) that provides the ultimate leverage to influence change.

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<sup>7</sup> See Appendix B: Officers of Parliament.

## **2. Extent of Authority**

In some cases, bodies set up by Parliament have capacity to undertake independent work in their area of responsibility, not just in association with federal offices or jurisdiction. In some cases they can undertake work under provincial jurisdiction as will be discussed in Appendix A, where the Office of the Correctional Investigator is concerned. In addition, if called upon to do so, the Yukon Ombudsman can act for a Yukon First Nation.

Finding ways to involve other levels of government in achieving implementation goals, although ultimately the responsibility of Canada, could be advantageous given that many implementation matters relate to the jurisdictions of provincial and territorial governments.

## **3. Capacity to Initiate**

In most instances, bodies of this kind are set up with the capacity to take action at their own discretion without direction from an external body like a government or agency, or through application by an aggrieved party. However, that is not always the case.

Without question, the ability to initiate increases the ability of the Office to bring information to Government, Parliament and Canadians on where issues are being faced by Modern Treaty groups in achieving effective implementation of their land claims agreements.

## **4. Capacity to Direct**

This is another critical area of decision in shaping an effective model. Ultimately this poses the question of whether the body will be, strictly speaking, advisory to Parliament, government, and Modern Treaty Aboriginal groups, or if it will have some authority to compel parties to accept its decisions? Is its role to be advisory or will it be decision-making to some extent?

Modern Treaty Aboriginal groups have dispute resolution mechanisms set out in a number of their Agreements. In a few cases, such as the Inuvialuit Final Agreement, the Aboriginal representative body can initiate arbitration without agreement from the federal government. In other Modern Treaties, this is not the case and, although recently addressed, this was a long-standing issue for Nunavut Inuit and was

a significant factor for them in going to Court to seek resolution of wide-ranging implementation grievances.<sup>8</sup>

Given that the agency's role is not to duplicate decision-making and dispute-resolution mechanisms provided for in particular Modern Treaties, it is assumed here that the agency will not play a direct dispute-resolution role. The body will provide independent advice; it will not involve itself directly in attempting to resolve particular disputes.

## **5. Ability to Acquire Requisite Information**

Although care has been taken in the recommendations herein to avoid duplication or conflict with dispute-resolution procedures provided for in Modern Treaties, there are still areas where real power to compel would be useful to achieve the main objective of providing useful and accurate information. For instance, through legislation, the body could be empowered to request and compel the turn-over of information by government departments and agencies that could be used in the body's examination of a Modern Treaty implementation matter, the ultimate objective being to give the Commission what it needs to appropriately examine government actions relating to the implementation of the Modern Treaties.

Similarly the legislation could be used to compel individuals to appear before the body and provide information to it relating to implementation.

## **6. Source of Creation, Mandate and Authority**

To achieve the establishment of a Modern Treaty implementation oversight body, the Government of Canada (Cabinet) will need to initiate legislation as a Government Bill before Parliament, and ultimately Parliament will need to pass this initiative into law.

## **Models**

The eight models that have been reviewed are:

- National Defence & Canadian Forces Ombudsman,
- Yukon Ombudsman;
- Office of the Correctional Investigator;
- Parliamentary Budget Officer;
- Cree-Naskapi Commission;

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<sup>8</sup> Arbitration is dealt with in Article 38 of the Nunavut Agreement. The May 4, 2015 settlement agreement between NTI and the federal and Nunavut governments, provided for Article 38 of the Nunavut Agreement to be amended to allow a single party to refer a dispute to an arbitrator. These amendments to Article 38 are now in effect.

- Commissioner of Official Languages;
- Office of the Auditor General; and
- Commissioner of the Environment and Sustainable Development.

## **1. National Defence & Canadian Forces Ombudsman**

The Ombudsman investigates complaints and serves as a neutral third party on matters related to the Department of National Defence and the Canadian Forces.

The office is a direct source of information, referral, and education to those employed by the Department of National Defence and the Canadian Forces. The role is to help individuals in their efforts to access existing channels of assistance or redress when they have a complaint or concern.

In addition, the Ombudsman may investigate and report publicly on matters affecting the welfare of members and employees of the Department or the Canadian Forces and others falling within the office's jurisdiction. Ultimately, the goal is to contribute to substantial and long-lasting improvements to the Defence community.<sup>9</sup>

### *Reporting Relationship*

The Ombudsman reports directly to the Minister of National Defence. This allows him or her to act independently of the military chain of command as well as of departmental management.

In addition, the Ombudsman is responsible to issue an annual report and other reports. These go directly to the Minister, and the Ombudsman has the responsibility to publish these documents. No one other than the Ombudsman has the ability to alter reports issued to the Minister.

The Minister can issue general policy directives and the Ombudsman is bound by these.

### *Extent of Authority*

The Ombudsman's authority extends to all employees of the department and the Canadian Forces.

### *Capacity to Initiate*

The Ombudsman acts where there is a complaint submitted to him/her, or when a matter is referred in writing by the Minister. If there is a formal mechanism in place to address a grievance, it is to be used and exhausted before the Ombudsman can engage on the matter.

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<sup>9</sup> <http://www.ombudsman.forces.gc.ca/en/ombudsman-about-us/mission-mandate.page>

However, the Ombudsman can initiate investigations leading to special reports to the Minister on matters such as impacts on families of servicemen and servicewomen, hiring processes, etc.

#### *Capacity to Direct*

The office is set up to influence the resolution of matters through persuasion and engagement, but ultimately has no authority to direct a resolution to a matter. Access to the entire chain of command does provide considerable capacity to the Ombudsman to achieve resolution to issues.

#### *Ability to Acquire Information*

The Ombudsman is eligible to receive information needed to act on a matter. However there are certain restrictions that may be applied for reasons of security. Where information is denied, there are appeal mechanisms in directives.

#### *Source of Creation, Mandate & Authority*

The authority of the Ombudsman and restrictions are set out in detail through Ministerial Directives and Defence Administrative Orders and Directives (DAOD). These provide legal authority to the Office of the Ombudsman. Ultimately he or she is acting on behalf of the Minister.

## **2. Yukon Ombudsman**

Across Canada all provinces and territories with the exception of Prince Edward Island, the Northwest Territories and Nunavut, have an Office of Ombudsman. The first of these was established by the Province of Alberta in 1967: that is, 50 years ago.

Generally, the mandate of the Ombudsman is to investigate complaints brought by a person or group that relate to decisions or recommendations made by officials in the conduct of a power or function conferred on them by an enactment.

There are unique features of the Office and its role in Canada that illustrate aspects of value to this investigation. In particular, the Yukon model has specific elements that relate both to First Nations and to public government.<sup>10</sup>

#### *Reporting Relationship*

The Ombudsman reports to the Members' Services Board of the Legislative Assembly.

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<sup>10</sup> <http://www.ombudsman.yk.ca/yukon-ombudsman/for-authorities/ombudsman-act>

*Extent of Authority*

The authority of the Ombudsman covers all departments of the Yukon Government, and all other agencies that are responsible to the Government (for instance public schools are covered, as is Yukon College, and the hospitals and their management bodies).

It is of note that, unlike any other office of a province in Canada, a municipality or a Yukon First Nation government may at any time refer a matter to the Ombudsman for investigation and report, so long as the Office can recover costs. The method of reporting back to the municipality or First Nation can be determined by the Ombudsman.

*Capacity to Initiate*

The Ombudsman acts on complaints, but does not initiate. This can include the referral of a matter to the Office by the Legislative Assembly of the Yukon.

*Capacity to Direct*

The Ombudsman does not have any legal power to direct actions. The office has powerful persuasive and influencing capacity as ultimately its work can be reported to the legislature. The legislative intent is to find options for the settlement of matters, and to pursue avenues of settlement with authorities in government, including at the Ministerial level.

*Ability to Acquire Information*

The Ombudsman has the authority to require a person to furnish information or produce documents relating to the matter under investigation.

His or her authority extends to the summoning and examination, under oath, of any person whom the Ombudsman believes is able to give information relevant to an investigation, whether or not that person is a complainant or a board member or the employee of an authority.

*Source of Creation, Mandate & Authority*

The Ombudsman office is set up under legislation of the Yukon Legislature.

To ensure independence and to reduce any sense that the office is “tainted” politically, the appointment of the Ombudsman is made by the Commissioner in Executive Council (territorial Cabinet), but on the recommendation of the Legislative Assembly and with two-thirds of the members supporting the recommendation. Appointments are made for five years so that (ordinarily) no one Legislature can appoint an Ombudsman twice within its term. Likewise the Ombudsman’s salary cannot be reduced by the government, which again removes the possibility of political interference in the work of the Officer.

### 3. Office of the Correctional Investigator

The Correctional Investigator acts as an Ombudsman for federal offenders with the primary function to investigate and resolve offender complaints. More generally, the Office is responsible to review and make recommendations on the Correctional Service's policies and procedures relating to areas of individual complaints, with the focus on ensuring that systemic areas of concern are identified and addressed.

Fundamentally the mandate is to right a wrong, this being central to the Ombudsman concept. It is therefore more than a body responding to specific legal, policy or technical elements associated with the area of concern being investigated. Determining the fairness of actions taken is central to providing a counter-balance to the relative strength of public institutions when compared to that of individuals.

#### *Reporting Relationship*

The appointment of the Correctional Investigator is by the Governor in Council. The Correctional Investigator acts independently.

#### *Extent of Authority*

Although the Investigator's main role is to attend to federal institutions, the Correctional Investigator has some narrow responsibilities in the provinces. If a province has not appointed a provincial parole board, the Correctional Investigator can investigate the problems of offenders confined in provincial correctional facilities (related to the preparation of cases of parole by any person under the control and management of, or performing services for or on behalf of, the Commissioner).

Despite the focus on federal institutions, the Correctional Investigator maintains a cooperative and mutually supportive relationship with similar provincial offices, and as a consequence undertakes to speak publicly in support of provincial findings, including in some highly contentious areas. For instance, on February 18, 2016 the Correctional Investigator of Canada issued a Statement commending the Québec Ombudsman's Special Report *Detention Conditions, Administration of Justice and Crime Prevention in Nunavik*.

#### *Capacity to Initiate*

Investigations can be conducted as a consequence of a complaint from an inmate (or his or her representative), or when requested by the Minister. However, in addition, the Investigator can initiate an investigation on behalf of an offender. Special Reports on systemic matters can also be initiated by the Correctional Investigator.

### *Capacity to Direct*

The Act does not give independent directive authority to address an issue under examination. However, the reporting structure does enable the Correctional Investigator to take a matter “upstairs” if actions are not taken by the Commissioner of Corrections. Indeed the Act requires the Correctional Investigator to give notice and report to the Minister if, within a reasonable time, no action is taken on a matter by the Commissioner. The Act further requires the Minister to table in both Houses of Parliament, within a prescribed time period, the Annual Report and any Special Report issued by the Correctional Investigator.

Although the Investigator’s recommendations are not binding, the “authority” (more accurately its “influence”) lies in the ability to thoroughly and objectively investigate a wide spectrum of administrative actions and present findings and recommendations to an equally broad spectrum of decision makers, *inclusive of Parliament*, which can cause reasonable corrective action to be taken if earlier attempts at resolutions have failed.

### *Ability to Acquire Information*

The Investigator can order the release to him/her of documents and information necessary to achieve thoroughness and objectivity. Also, individuals can be summoned and examined under oath.

### *Source of Creation, Mandate & Authority*

The Correctional Investigator’s authority derives from Part III of the *Corrections and Conditional Release Act*, a statute of the Canadian Parliament.

The legislation as well provides that the Correctional Investigator, when informing the Commissioner of the existence of a problem, may make any recommendation relevant to the resolution of the problem that the Correctional Investigator considers appropriate.

## **4. Office of the Parliamentary Budget Officer**

The Parliamentary Budget Officer (PBO) is Parliament’s financial and economic analyst. The mandate of the Office falls into four main categories:

1. Analysis of the State of the Nation’s Finances: analysis to Parliament on the state of the nation’s finances, which depends on the expenditures, revenues, assets and liabilities of the federal government. This role includes testifying to the House of Commons Finance Committee. This analysis and reporting includes assessment of the fiscal sustainability of the federal, provincial and territorial governments. Finally the Office can provide analysis of certain issues that are likely to impact the nation’s finances. For example, upon request from a parliamentarian, in 2015 the Office provided an assessment of the Fiscal Impacts of Lower Oil Prices.

2. Analysis of the Government's Spending Plans: The Office provides Parliament with analyses of the Budget, and Main and Supplementary Estimates, to help parliamentarians understand what they are approving. Regarding cuts to funding, the Office provides analyses to help Parliament understand what cuts have been implemented, and what impact those cuts are having.
3. Analysis of Trends in the Canadian Economy: The government's finances are linked to the performance of the Canadian economy. To help Parliament make informed financial decisions, the Office provides independent analysis of trends and developments in the Canadian economy. Given the substantial role of the provinces in the nation's economy, this area of activity includes examination of provincial economies.
4. Estimation of Financial Cost of Proposals within Parliament's Jurisdiction: This analysis is initiated by parliamentarians (e.g. upon request, the Office provided estimates on the financial cost of extending Canada's mission in Iraq).<sup>11</sup>

#### *Reporting Relationship*

This position is not considered an "Officer of Parliament". Perhaps for ease of legislative effort, sections were added to the *Parliament of Canada Act*, and the incumbent is deemed to be an officer of the Library of Parliament. The Governor in Council appoints the PBO from a list of three names submitted through the Leader of the Government in the House of Commons; the names are forwarded from a committee formed and chaired by the Parliamentary Librarian. As such the position does not hold the same distinction as an "Officer of Parliament" (see Appendix B). However, it is not clear whether or not, in the performance of duties, there is any real difference, as this office has shown no signs of being interfered with in performing its duties. Although not clear in legislation, the federal government sees this position as an independent officer of the Library of Parliament, reporting to the Speakers of the House of Commons and the Senate.

#### *Extent of Authority*

As noted in the description of the mandate, the PBO has the capacity to review all matters in the national and international domain that affect the economy of Canada. The focus however is to advise Parliament, not provincial/territorial legislatures, and thus it would be unlikely that the Office would ever do so specifically, although nothing explicit in the few provisions of the *Parliament of Canada Act* prevent this from happening. An example of where the Office has commented on the linkages between the federal and provincial domains is provided in the report on "2014-2015 Federal Transfers to Provinces and Territories".

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<sup>11</sup> <http://www.pbo-dpb.gc.ca/en/>

### *Capacity to Initiate*

Despite confusion on the degree of independence when the PBO was first established, the first Officer to hold the position set the tone by articulating that he was independent not only in his ability to accept requests from parliamentarians but also in his ability to initiate his own studies. Mr. Page stated that he had the authority to hire staff and operate at arms' length from the day-to-day operation of the Library of Parliament. In addition, it was his view that the Parliamentary Librarian had to provide him with the appropriate resources to fulfil his mandate.

### *Capacity to Direct*

There is no capacity to enforce any recommendations put to Parliament.

### *Ability to Acquire Information*

This has been controversial during the decade since the Office's inception. The 2008 *Information Protocol* of the Office notes that "...to fulfill this mandate, the PBO is entitled to free and timely access to any financial or economic information in the possession of departments required for the performance of his or her mandate." In 2011 and 2012 a number of federal departments refused to provide information relating to budget and personnel cuts. The Office responded by filing requests through the *Access to Information Act*. At one point it threatened to take the government to Court to access what it believed to be necessary information for the performance of its investigations on behalf of Parliament.

### *Source of Creation, Mandate & Authority*

There is no specific enabling legislation for this Office (which thus differs from offices like Access to Information and Official Languages, which have their own statutes). The post was created through amendments to the *Parliament of Canada Act*, and this procedure has led to confusion and conflict, from inception.

## **5. Cree-Naskapi Commission**

The Commission is an independent, non-governmental body for the monitoring of implementation of the *Cree-Naskapi (of Quebec) Act*. Its main purpose is to prepare biennial reports on the implementation of the Act. In addition, it investigates representations submitted to it relating to implementation matters. There are differing perspectives on whether the mandate extends to all Treaty matters (see below: *Source of Creation, Mandate & Authority*).

The Cree-Naskapi Commission consists of a maximum of three individuals appointed by the Governor in Council (federal Cabinet) on the recommendation of the Cree Nation Government and the Naskapi Nation.<sup>12</sup>

#### *Reporting Relationship*

The Act requires the Commission to provide a report to the Parliament of Canada every two years regarding the overall progress and status of implementation of the Act. There is a requirement for substantive consultation with communities and the federal government on successes, problems, concerns and general progress.

Of note, the Commission provided a Discussion Paper to the Senate Standing Committee on Aboriginal Peoples entitled “Proposal for an Aboriginal Treaty Implementation Act”, which foreshadows this proposal in suggesting how there can be more effective relationships between Canada (Parliament and the federal government) and Modern Treaty Aboriginal groups on implementation matters.<sup>13</sup>

#### *Extent of Authority*

The focus of attention is specific to matters covered by the *Cree-Naskapi (of Quebec) Act*. The geographical extent is also confined to the territory set out in the Act.

Cree Communities and residents include: Whapmagoostui, Chisasibi, Wemindji, Eastmain, Waskaganish, Nemaska, Waswanipi, Ouje-Bougoumou, Mistissini.

Naskapi community and residents include: Kawawachikamach.

All Cree and Naskapi beneficiaries are covered by their Modern Treaties and therefore fall under the jurisdiction of the Commission.

#### *Capacity to Initiate*

The Commission has the jurisdiction to initiate all reviews necessary to fulfill its mandate to report to Parliament. As noted above, this is heavily guided by what is heard from consultations; it is substantively accomplished by way of “filings of Representation” as set out in the Act and in procedure.

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<sup>12</sup> <http://www.creenaskapicommission.net/>

<sup>13</sup> See “Proposal for an Aboriginal Treaty Implementation Act: Submission to the Senate Standing Committee on Aboriginal Peoples”, March 1, 1999. To access this paper go to <http://www.creenaskapicommission.net/> Use the “Info” link, scroll to the bottom of that page, and use the “Proposal for an Aboriginal Treaty Implementation Act” link.

### *Capacity to Direct*

The Commission has no authority to direct either Canada or the Aboriginal government in addressing implementation challenges.

### *Ability to Acquire Information*

The Commission may request any person to appear before it, and ask that that person give evidence. It may also ask that a person or persons produce documents and things necessary for an investigation, but there is no obligation for the person to comply with the request, and the Commission has no power of subpoena.

### *Source of Creation, Mandate & Authority*

Part XII of the *Cree-Naskapi (of Quebec) Act* is the legal source for the creation of the Commission.

#### *“Cree-Naskapi Commission established*

158 (1) There shall be a commission, to be known as the Cree-Naskapi Commission, consisting of a maximum of three individuals appointed by the Governor in Council on the recommendation of the Cree Regional Authority and the Naskapi band.<sup>14</sup>

Chairman

(2) The Governor in Council shall designate one member of the Commission as Chairman.”<sup>15</sup>

There is a long-standing difference of opinion between the Commission and Government on whether the Commission is to deal only with matters relating directly to the Act, or whether it has the mandate to speak to all implementation matters relating to the Treaties. In the Commission’s opinion,

“The Commission reports also on the implementation of the JBNQA<sup>16</sup> and the NEQA<sup>17</sup> as particular sections of these Agreements contemplate the powers and duties of the local governments of the Cree and Naskapi First Nations. The Commission reports on the implementation of these Agreements in virtue of paragraph 21(j) of the Act which stipulates that the objects of a Band are ‘to exercise the powers and carry out the duties conferred or imposed on the Band or its predecessor Indian Act Band by any Act of Parliament or regulations made thereunder, and by the Agreements.’ ”<sup>18</sup>

## **6. Commissioner of Official Languages**

The Commissioner of Official Languages of Canada carries out the following roles:

1. Ombudsman role: The Commissioner of Official Languages of Canada protects the language rights of Canadians and promotes the equality of both official languages in Canadian society. As

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<sup>14</sup> Now the Cree Nation and the Naskapi Nation, respectively.

<sup>15</sup> *Cree-Naskapi (of Quebec) Act*, S.C. 1984, c. 18, s. 158.

<sup>16</sup> James Bay and Northern Quebec Agreement

<sup>17</sup> Northeastern Quebec Agreement

<sup>18</sup> See Report of the Cree-Naskapi Commission, 2014, Chapter 1.

an ombudsman, the Commissioner receives and reviews complaints and, if required, investigates them.

2. Auditing role: The Commissioner of Official Languages of Canada plays a proactive role by conducting audits to measure federal institutions' and other organizations' compliance with the *Official Languages Act*.
3. Liaison role: The Commissioner of Official Languages of Canada holds a collaborative role, and through a collaborative official languages network helps gain a better understanding of the needs and concerns of communities, make relevant recommendations and intervene judiciously in major official languages issues.
4. Monitoring role: The Commissioner of Official Languages of Canada monitoring role involves acting pre-emptively by intervening at the stage where laws, regulations and policies are developed to ensure that language rights remain a primary concern of leaders.
5. Promotion and education role: A key role is to support linguistic duality in both the public service and Canadian society. To this end the Commissioner works with community organizations and tries to convince various organizations subject to the Official Languages Act to give official languages and minority communities the attention they deserve.
6. Court intervention role: The Commissioner intervenes, when appropriate, before the courts in any proceeding related to the status or use of English or French.
7. Reporting role: Each year the Commissioner submits an annual report to Parliament that addresses current issues, findings and recommendations.<sup>19</sup>

### *Reporting Relationship*

As identified in Appendix B, this is an Office of Parliament. The Commissioner's relationship is clear through specific federal legislation.

Regarding appointment, the Governor in Council (Cabinet) is the decision-making body in fact, although there is requirement for consultation with the leader of every recognized party in the Senate and House of Commons and approval of the appointment by resolution of the Senate and House of Commons.

The Commissioner has authority to take matters as far as Parliament where he/she believes that actions have not been taken to address recommendations put to a departmental head or Minister.

### *Extent of Authority*

The Commissioner's role does not extend beyond the jurisdiction of the federal government, its departments and agencies.

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<sup>19</sup> <http://www.ocol-clo.gc.ca/en>

*Capacity to Initiate*

The Commissioner can conduct and carry out investigations either on his or her own initiative or pursuant to any complaint made to the Commissioner.

*Capacity to Direct*

This body is charged with the responsibility to advise, but cannot direct.

*Ability to Acquire Information*

There are substantive powers for the Commissioner to compel the turnover of information as required for matters before that body. The Commissioner may summon and enforce the attendance of witnesses, and the provision of information required for an enquiry.

*Source of Creation, Mandate & Authority*

Part IX of the *Official Languages Act* is the source of this body.

The “whereas” clauses of the Act that creates the Commission, the *Official Languages Act*, note that “the Constitution of Canada provides that English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada”. This is a useful linkage between this overarching Office of Parliament and the Constitution of Canada. With s. 35 protecting rights of Aboriginal people in a similar way, this is a useful and instructive model to help in the shaping of a Modern Treaty Implementation body.

## **7. Office of the Auditor General**

The Office of the Auditor General of Canada (OAG) serves Parliament by providing it with objective, fact-based information and expert advice on programs and activities; this information is obtained through formal auditing procedures. This information enables Parliamentarians to hold the federal government to account for its handling of public funds.

The OAG audits:

- the federal government’s 100 departments and agencies, both in Canada and overseas;
- forty Crown corporations; and
- the governments of Nunavut, the Yukon, the Northwest Territories, and their twenty territorial corporations and agencies.

Topics for audits are wide-ranging. They include health, culture, the environment, finance, agriculture, transportation, and scientific research, etc. The Office now conducts audits and monitors the federal government's activities around the environment and sustainable development through the office of Commissioner of the Environment and Sustainable Development (see section 8 below).<sup>20</sup>

#### *Reporting Relationship*

As with the Commissioner of Official Languages, this is an Officer of Parliament, thus accountable directly to Parliament.

On matters relating to the business of the territorial governments, the OAG reports to the respective legislature of that territory.

The *Auditor General Act* provides that:

#### *“Appointment*

3(1) The Governor in Council shall, by commission under the Great Seal, appoint an Auditor General of Canada after consultation with the leader of every recognized party in the Senate and House of Commons and approval of the appointment by resolution of the Senate and House of Commons.

#### *“Tenure*

(1.1) The Auditor General holds office during good behaviour for a term of 10 years but may be removed for cause by the Governor in Council on address of the Senate and House of Commons.”<sup>21</sup>

#### *Extent of Authority*

The Auditor has full authority over all matters of the Government of Canada (with the exception of certain Crown Corporations), and of the three territorial governments.

#### *Capacity to Initiate*

The OAG has full discretion to determine areas to audit, and to initiate those audits.

The OAG has a rigorous planning process to determine where to conduct its program of audits; this is done years in advance. High risk areas such as expensive programming and the protection of health and safety of Canadians are given high priority.

#### *Capacity to Direct*

The OAG advises Parliament on matters but does not direct. However, there is a long-established relationship between this Office and federal and territorial departments and agencies (first established in

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<sup>20</sup> [http://www.oag-bvg.gc.ca/internet/English/admin\\_e\\_41.html](http://www.oag-bvg.gc.ca/internet/English/admin_e_41.html)

Canada in 1878), whereby those departments and agencies prepare the responses to the audits as they are being developed. This is a necessary relationship, compared by others to that of the dentist and patient; it is not pleasant but it is essential! Ultimately this relationship is fundamental to Parliament being well informed from both the neutral objectivity of its “watch dog” and the respective challenges faced by departments that work to serve government (no small task!).

#### *Ability to Acquire Information*

The OAG has full authority to obtain whatever information it needs from federal and territorial departments and agencies to provide thorough objective advice to Parliament or the respective territorial legislative assembly.

The relationship between departments/agencies and the OAG can be somewhat intense, but, unlike the Office of the Parliamentary Budget Officer, there is no ambiguity about accountability of the Office, its roles and responsibilities, and the procedures that have been developed over many decades. Thus it is through dialogue between the auditor and the department that the audit parameters are shaped and implemented. Communication therefore plays an important part in the success of the work.

Another ingredient in the success of the audit function is the practice of the OAG in commissioning outside advisory committees of external experts who can help determine what should be addressed in an audit. This is also useful to ensure objectivity, and most importantly, the credibility of the work of the Office. This triumvirate of objective auditors, departmental senior officials and external experts lends to significant credibility of the function of this Office.

#### *Source of Creation, Mandate & Authority*

The OAG has its legislative basis principally in the *Auditor General Act*, and the *Financial Administration Act*; it is also referenced in other statutes.

## **8. Commissioner of the Environment and Sustainable Development**

In 1995 the Commissioner of the Environment and Sustainable Development (CESD) was set up through amendments to the *Auditor General Act*. As a consequence, the OAG subsequently has a specific mandate related to the environment and sustainable development carried out by the Commissioner.

Under the *Federal Sustainable Development Act*, the CESD must review a draft of the federal government’s sustainable development strategy and comment on whether the targets and implementation strategies can be assessed. The CESD must also monitor and report on the extent to which federal

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<sup>21</sup> *Auditor General Act*, R.S.C., 1985, s. 3.

departments have contributed to meeting the targets and goals set out in the Federal Sustainable Development Strategy. The Act sets out its purpose to provide the legal framework for developing and implementing a Federal Sustainable Development Strategy that will make environmental decision-making more transparent and accountable to Parliament.

Specifically the CESD conducts performance audits, and is responsible for:

- monitoring sustainable development strategies of federal departments;
- overseeing the environmental petitions process; and
- auditing the federal government's management of environmental and sustainable development issues.<sup>22</sup>

#### *Reporting Relationship*

The Commissioner is appointed by the Auditor General of Canada, and on behalf of the Auditor General, the Commissioner provides Parliamentarians with objective, independent analysis and recommendations on the federal government's efforts to protect the environment and foster sustainable development.

#### *Extent of Authority*

Pursuant to the *Auditor General Act* and the *Federal Sustainable Development Act* the Commissioner has wide-ranging authority to monitor and audit matters relating to the environment in Canada and federal efforts to strengthen sustainability.

#### *Capacity to Initiate*

As with the Auditor General, the CESD has the authority to direct when and where the Office will conduct audits.

There is also an "environmental petitions process" that increases the interaction between the Office and Canadians. Through the petitions process, citizens can seek answers from federal ministers on specific environmental and sustainable development issues in areas of federal jurisdiction. Results of petitions have included such action by federal departments as new environmental projects, follow-up on violations, and changes or clarifications in policies and practices. The Commissioner of the Environment and Sustainable Development reports annually to Parliament on the petitions process.

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<sup>22</sup> [http://www.oag-bvg.gc.ca/internet/English/au\\_fs\\_e\\_370.html#Commissioner](http://www.oag-bvg.gc.ca/internet/English/au_fs_e_370.html#Commissioner)

*Capacity to Direct*

As with the Auditor General, there is no ability for the Office to direct change by federal departments or agencies. However, because of the credibility of the OAG generally, and the public nature of reporting by the CESD, departments and agencies are usually very responsive to the work of the CESD.

*Ability to Acquire Information*

Again, as with the Auditor General, information is usually forthcoming when requested by the Commissioner.

*Source of Creation, Mandate & Authority*

The CESD is established under the *Auditor General Act*. In addition, the *Federal Sustainable Development Act* provides authority to the CESD in conducting reviews and monitoring of the federal government's sustainable development strategy. Under the Act the Government and specific identified departments are charged with the responsibility to contribute directly to the sustainability mandate.

## Appendix B – Officers of Parliament

The offices that are traditionally referred to as the “Officers of Parliament” are

- the Auditor General (established 1868);
- the Chief Electoral Officer (established 1920);
- the Official Languages Commissioner (created in 1970);
- the Privacy Commissioner (1983);
- the Access to Information Commissioner (1983);
- the Conflict of Interest and Ethics Commissioner (2007);
- the Public Sector Integrity Commissioner (2007);
- the Commissioner of Lobbying (2008).

The Privy Council Office, and some governmental documents, refers to these officers as “Agents of Parliament,” thereby emphasizing that:

- they carry out work for Parliament and are responsible to Parliament,
- they are independent of the government of the day
- as “Officers of Parliament”, they carry out duties assigned by statute
- they report to one or both of the Senate and House of Commons
- individuals appointed to these offices perform work on behalf of Parliament
- they report to the chambers, usually through the Speakers.

The appointment of such Officers usually – although not necessarily – involves the House of Commons and/or the Senate although the appointment procedures for such Officers of Parliament are not consistent.

In recent years, other offices have been established with some of the attributes of the Officers of Parliament (principally an element of independence from government and a right to report to Parliament, as well as some parliamentary involvement in the appointment process). These include: the Canadian Human Rights Commissioner, the Public Service Commissioner, and the Parliamentary Budget Officer.

