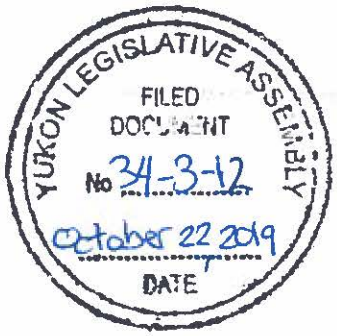

August 2, 2019

Hon. Nils Clarke, MLA
Speaker of the Yukon Legislative Assembly
Chair of the Members' Services Board

Via email

Dear Mr. Speaker,

I write to you and all members of the Members' Services Board of the Yukon Legislative Assembly regarding the recently announced initiative of the Government of Yukon regarding the Independent Commission on Electoral Reform (ICER). I have a number of concerns about this process which I believe to be fundamentally unfair.

More fundamentally, the ICER process is part of a longer-term problem: It is another initiative of the executive branch of the Government of Yukon that undermines the ability of the Legislative Assembly to perform its core constitutional function – holding the executive accountable for the way in which it governs Yukon.

Fairness

In 2019 Yukoners should be able to expect that processes used to determine the infrastructure of their electoral system (methods of voting, electoral district boundaries, campaign financing) are fair to all the political parties, candidates and voters would take part in elections. In fact, one would hope that those establishing ways of reviewing the existing system or implementing changes to it would be scrupulous in avoiding processes that would invite doubts about its neutrality and non-partisanship.

Fairness is key. Yukon periodically reviews the number and boundaries of electoral districts to ensure that Yukoners are fairly represented in the Legislative Assembly. Obviously there are different ideas of what constitutes fairness, but fairness is the goal.

The desire for electoral reform is similar. It is founded on a concern that some people have that aspects of the current electoral process are unfair. Primarily, some believe that the first past the post method of election is unfair and that a different system (such as mixed member proportional) would provide a fairer way of translating votes into seats. As with electoral district boundaries, there are different views of what constitutes a fair voting system but everyone involved in the debate is looking to achieve fairness.

The government's electoral reform process fails the fairness test because only one political party – the Yukon Liberal Party – has had a hand in creating the ICER process. The Liberals has established the timeline for the commission, its terms of reference, its

membership, arranged for its administrative assistance and determined its budget. It has allocated opportunities to participate to the Yukon Party and the Yukon New Democratic Party as it sees fit.

The reason why fairness requires all-party participation is obvious, but I will state it anyway: Each political party has a vested interest in the outcome of elections. No one party should, therefore, be allowed to control the reform process or the outcome.

This idea is embedded in the process by which electoral district boundaries are reviewed. The criteria for the establishment and conduct of such a review are written into the *Elections Act*. The process stipulates that each political party represented in the Legislative Assembly at the time that an electoral district boundary review is to be initiated gets to appoint one person to the commission. That is one way of being fair. There are others. The approach taken by the government to electoral reform is not one of them.

Authority

In a recent newspaper article, Premier Silver, in response to criticisms from the Yukon Party, offered this defence of the government's approach: "They [the Yukon Party] want to dictate and control the complete process and they're not in government, so they're not going to do that."[1] The Premier's position, then, is that the Liberal Party's control of the process is legitimate because they are the government. This is mistaken.

During the 2016 general election campaign the Yukon Liberal Party committed, in its electoral platform, that should it form a government it would "strike a non-partisan Commission on Electoral Reform to consult Yukoners on possible options for territorial electoral reform."[2] The Liberals did form the government following the election and have now struck the commission. This appears to be a straightforward matter of fulfilling an election commitment.

However, the conduct of elections is not a matter that falls within the authority of cabinet. In a constitutional democracy there are limits to the power of cabinet. The conduct of elections falls outside those limits. As stated above: No one party, even if it is the party of cabinet, should control the electoral reform process because it has a vested interest in the outcome of elections. This is true regardless of the party in power. If the conduct of elections did fall under the authority of cabinet there would be a Department of Elections headed by a Deputy Minister of Elections who reported to a Minister responsible for Elections and who serves at the pleasure of the Premier. That is not how the electoral process works in Yukon.

As you know, Elections Yukon, which is not a government department but an independent entity, administers territorial elections. Elections Yukon is headed by the Chief

[1] Julien Gignac "YG names electoral reform commission members, opposition cries foul", Yukon News July 17, 2019 11:15 a.m. https://www.yukon-news.com/news/yg-names-electoral-reform-commission-members-opposition-cries-foul/

[2] https://www.ylp.ca/electoral_process_1

Electoral Officer (CEO), who is an Officer of the Legislative Assembly, not a deputy minister. The CEO is appointed pursuant to a motion of the Legislative Assembly and does not serve at the pleasure of the Premier.

The upshot is that forming a government does not, in and of itself, give the Yukon Liberal Party, the authority to unilaterally implement an electoral reform process.

In fact, there is not, at present, any authority, of which I am aware, that allows any person or entity to establish an electoral reform commission for Yukon. That authority needs to be established. The commission's web page indicates that three individuals were appointed to the commission and that such appointments were made by way of a ministerial order issued by the Minister responsible for the Executive Council Office.[3]

The glossary on the Department of Justice webpage defines a Ministerial Order as "An Order of a Minister made under an Act e.g. an Order enacting regulations."[4] The commission's web page does not identify an act under which the ministerial order appointing the commissioners was issued. As of the date of this letter, the Government of Yukon web page listing new regulations (regulations issued since 25 April 2019) does not list any such ministerial order being issued. [5]

The government has not claimed that its authority rests on the motion adopted by the House on November 22, 2017:

> THAT this House urges the Government of Yukon to fulfill its election commitment by appointing, in cooperation with all political parties in the Yukon Legislative Assembly, a non-partisan commission on electoral reform to engage and collaborate with Yukoners, consider fixed elections dates and consider other changes to Yukon's electoral system. (Motion No. 19, moved by Ms. Hanson, as amended)[6]

However, even if it did this motion would not support the government's actions, either. A motion worded in this way is a resolution of the House, not an order of the House. A resolution is not binding on the government. While it expresses the House's wish that an electoral reform commission be established, it does not provide authority to establish such a commission. Frankly, I don't believe the Legislative Assembly could establish a commission by resolution; it would require the passing of a bill.

It is therefore not clear what authority, if any, the government is using in establishing the ICER. The government should make clear and make public the authority on which it is relying. Of course, even if the government has the authority to unilaterally establish an electoral reform process it has a duty to create one that is fair.

---

[3] http://www.eco.gov.yk.ca/independent-commission-on-electoral-reform.html
[4] http://www.gov.yk.ca/legislation/glossary.html
[5] http://www.gov.yk.ca/legislation/regs_new.html
[6] Yukon Legislative Assembly, Journals, 2nd Session, 34th Legislative Assembly, 2017 Fall Sitting, Appendix IV: Consolidation of Motions http://www.legassembly.gov.yk.ca/pdf/VPs_Fall_2017.pdf

In contrast, the authority for an electoral district boundary commission is clear and is stipulated in Part 7 of the *Elections Act*.[7] The government needs to explain why it did not follow a similar approach with regard to an electoral reform commission, i.e. introduce amendments to the *Elections Act* to provide for the creation of such a commission. This would have not only established a commission process clearly founded in law but would have also allowed the Legislative Assembly to publicly debate the electoral reform commission proposal prior to the commission's establishment.

The Legislative Assembly

The ICER process undermines the Legislative Assembly in three ways that I will mention. First, because the government by-passed the Assembly in creating the ICER, relying on a cabinet process whose authority has not been stated.

Second is the fact that the CEO, an officer of the Legislative Assembly, is not providing administrative support to the electoral reform commission.[8] Paragraph 408(1)(a) of the *Elections Act* identifies the CEO as a member of any electoral district boundaries commission. Also, pursuant to subsection 413(1) of the *Elections Act* the CEO is tasked with providing the required administrative support to an electoral district boundaries commission (employees, contractors, advisors, etc.)

In the news release announcing the appointment of the ICER commissioners the government said, "The Commission will receive administrative and research support to carry out their mandate from the Electoral Reform Secretariat. The Secretariat comprises public servants who will receive their guidance and direction from the Commission."[9]

This is another decision that bears explanation. The CEO has extensive knowledge of electoral matters and extensive contacts across Canada. This knowledge extends not only to methods of voting (and other matters listed in the commission's draft terms of reference) but also to understanding the logistical challenges (including the cost) of implementing certain reforms. This knowledge would be invaluable to the ICER since it is not apparent that any of the commissioners possess comparable knowledge of electoral processes.

Third, the electoral reform process infringes on the Legislative Assembly's fundamental right to govern its own proceedings.

The draft terms of reference for the commission include the following in the commission's mandate: "Investigate and assess options to improve how political parties and elected officials work...This work should include options for fair and transparent elections,

[7] http://www.gov.yk.ca/legislation/acts/elections_c.pdf
[8] Subsection 12(1) of the *Elections Act*. Identifies the CEO as an officer of the Legislative Assembly.
[9] https://yukon.ca/en/news/independent-commission-electoral-reform-members-appointed

political fundraising and spending rules, and **a more open and accountable legislature** (emphasis added)." [10]

The commission's mandate should **not** include any reference to the extent to which, and the manner in which, the Legislative Assembly is "open and accountable." The first reason is that the conduct of legislative proceedings is a separate topic from electoral reform. It would be possible to reform all the other matters mentioned in the draft terms of reference without changing the manner in which the House operates. Similarly, the House can change its procedures without affecting the conduct of elections. They are separate issues and should be dealt with separately.

The second, and more fundamental, reason is that the Legislative Assembly enjoys exclusive cognizance (to borrow a Britishism) over the conduct of its proceedings. Neither the executive branch nor the judicial branch (or anyone else) has authority in this area.

The source of this exclusive cognizance is parliamentary privilege. The Yukon Legislative Assembly has inherited parliamentary privileges that originated with the English *Bill of Rights* of 1689 and were imported to Canada via the *Constitution Act, 1867*. These privileges exist so that the legislative branch of government can exercise independence from the executive branch, the judicial branch and others. This independence is necessary in order that the Legislative Assembly can fulfill its core constitutional role of holding the executive branch to account for the manner in which it governs the territory.

One of the fundamental privileges of a legislative body operating according to the Westminster parliamentary model is the exclusive right and authority to make rules for its own internal operations "including day-to-day procedure in the House."[11]

The Yukon Legislative Assembly's authority to make its own rules of procedure is also recognized in section 16 of the *Yukon Act* which says, "The Legislative Assembly may make rules for its operations and procedures, except in relation to the classes of subjects with respect to which the Legislature may make laws under paragraph 18(1)(b)." Paragraph 18(1)(b) refers to "the disqualification of persons from sitting or voting as members of the Legislative Assembly and the privileges, indemnity and expenses of those members".[12]

The Legislative Assembly creates rules of procedure (the Standing Orders) which it may amend from time to time. The Legislative Assembly appoints a Standing Committee on Rules, Elections and Privileges (SCREP) to study matters of procedure. SCREP may propose amendments to the Standing Orders. During the current Legislative Assembly the House has adopted two motions for concurrence in reports from SCREP. The adoption of these motions effected changes to the Standing Orders.

---

[10] https://yukon.ca/en/draft-terms-reference-commission-electoral-reform

[11] (This quote is from the reasons for judgement in the Supreme Court of Canada decision in *Canada (House of Commons) v. Vaid, [2005] 1 S.C.R. 667, 2005 SCC 30,* point 10 in paragraph 29). https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2231/index.do

[12] https://laws-lois.justice.gc.ca/eng/acts/Y-2.01/page-1.html#h-472442

In exercising the authority delegated to it by the Legislative Assembly, SCREP can solicit public input through a survey, written submissions or by calling witnesses to appear before it. SCREP may seek views regarding the proceedings of the Legislative Assembly, including the degree to which, and the manner in which, these proceedings are open and accountable.

Neither the Legislative Assembly nor SCREP asked the government to survey the public with regard to how the assembly functions. Neither the Legislative Assembly nor SCREP asked the cabinet to include matters of legislative procedure in the ICER's mandate. By doing so, cabinet has created the impression that this is a matter that falls within its authority. It does not. This should be excluded from the ICER's terms of reference or mandate.

It is worth noting that the Liberal Party made other commitments in its election platform regarding the operations of the Legislative Assembly. For example, the Liberals committed to "creat[ing] a publically disclosed Lobbyist Registry." Subsequently, the *Lobbyists Registration Act* was introduced, passed and assented to during the 2018 Fall Sitting. The Liberals also committed to "legislate fixed calendar dates for legislative sittings." This matter was referred to SCREP. SCREP considered the issue and submitted a report to the House recommending that fixed start dates for the Spring and Fall sittings be incorporated into the Standing Orders. A motion to concur in SCREP's report was adopted by the House and the change was made to the Standing Orders.

I mention these examples because they indicate instances where the government followed proper legal or parliamentary procedure to implement commitments made in the Liberal Party election platform. Cabinet did not simply act on its own to implement campaign commitments.

The ICER process therefore undermines the Legislative Assembly because it: (1) by-passes the House because it was established by cabinet policy rather than by law, and (2) includes as part of the ICER mandate a matter that falls under the exclusive cognizance of the Assembly without the consent of the Assembly.

The larger issue

The larger issue is that the ICER process is only the latest example of a long-term trend of cabinet initiatives that improperly marginalize the Legislative Assembly from a decision-making processes in which it should be involved.

For the sake of brevity and the purposes of this letter I will focus on one practice because it is arguably the most important: the development of bills that affect the authority of the Legislative Assembly and/or its House Officers without the knowledge, or involvement, of the Legislative Assembly or the Members' Services Board.

This problem cuts to the core of the Westminster parliamentary system of democracy, one in which cabinet governs the territory and the Legislative Assembly holds cabinet accountable for how it governs. Put simply, the Legislative Assembly cannot fully perform its

constitutional function if its authority and that of its House Officers can be unilaterally determined and altered by the entity it is supposed to hold accountable.

At the risk of being categorical, I would say that this problem affects, to a greater or lesser extent and in ways large and small, all Acts that determine the authority of a House Officer in Yukon. There was a fair amount of action on the House Officer front in the years that I was Clerk of the Legislative Assembly (2007 to 2019). One new House Officer position, the Child and Youth Advocate, was created in 2009. The Chief Electoral Officer was officially made a House Officer in 2015. The Ombudsman/Information and Privacy Commissioner acquired responsibility for the *Health Information Privacy and Management Act* in 2013 and the *Public Interest Disclosure of Wrongdoing Act* in 2014. The Conflict of Interest Commissioner assumed responsibility for the *Lobbyist Registration Act* when that bill was passed and assented to in 2018. A new *Access to Information and Protection of Privacy Act* was also passed and assented to in 2018.

I no longer have access to the minutes of MSB meetings. However, MSB can search its own files to see how often (if ever) the decision to create a new House Officer position or assign new responsibilities to existing an House Officer originates with, or is even substantially considered, by MSB.

The only area where the executive branch has consistently taken a 'hands-off' approach to legislation affecting the Legislative Assembly is with the bills that affect the remuneration and pensions of Members of the Legislative Assembly.

Among the problems with having the executive branch drafting 'House Officer' bills is that invariably the bills create a situation where the Officers of the Legislative Assembly are put in a position of having to serve two masters – cabinet and the Legislative Assembly – when their accountability, as House Officers, should be to the Legislative Assembly only.

Let's look at the *Child and Youth Advocate Act* as an example. In 2008 the Assembly passed, and the Commissioner assented to, the *Child and Family Services Act*.[13] Section 211 of the Act says

> 211(1) The Minister shall develop an Act to establish a child advocate, to be independent of the director of family and children's services and of any director appointed under paragraph 173(c).
> (2) The Bill to establish the Act is to be presented to the Legislative Assembly no later than the anniversary date of the proclamation of this Act.

Note that the Act says does not designate the advocate as an Officer of the Legislative Assembly. That decision was made while the *Child and Youth Advocate Act* was being drafted.

[13] http://www.gov.yk.ca/legislation/acts/chfase_c.pdf

According to a Library of Parliament background paper "Officers of Parliament are responsible directly to Parliament rather than to the government or a federal minister. This emphasizes their independence from the government of the day. They carry out duties assigned by statute and report to one or both chambers of Parliament."[14]

However, the *Child and Youth Advocate Act* creates a situation where the Advocate is alternately under the authority of the legislative branch (the House or MSB) or the executive branch (Commissioner in Executive Council or a minister). On the legislative side MSB

1. recruits the Advocate (though this is not stipulated in the Act).
2. approves the Advocate's estimates for inclusion in an appropriation bill (section 22).
3. initiated the five-year review of the Act (section 30).

At the same time the Act gives the Commissioner in Executive Council exclusive control over:

1. the general power to make regulations under the Act (section 29)
2. authorizing that the Advocate may "hold any other public office or carry on a trade, business or profession." (subsection 4(3))
3. determining the remuneration of the Advocate. (section 5)
4. providing premises, equipment and supplies to the Advocate. (section 10)

While the Commissioner in Executive Council may, in fact, exercise these powers on the advice of MSB, the fact that the Act allocates these powers to the Commissioner in Executive Council means that MSB cannot be guaranteed that its advice will always be taken.

Areas where the Commissioner in Executive Council acts upon the recommendation of the House include:

1. Appointing the Advocate (subsection 4(1)).
2. Reducing the remuneration and benefits of the Advocate (subsection 5(2)).
3. Suspending or removing the Advocate from office (section 6).
4. Appointing an acting Advocate (section 7).

Perhaps the best example of a House Officer being put in the position of serving two masters is found in section 15 of the Act. This section says

> 15(1) The Legislative Assembly or a Minister may refer to the Advocate for review and report any matter relating to the provision of designated services that involves the interests and well-being of children and youth, which may include a review of critical

[14] "Appointment of Officers of Parliament" Background Paper by Andre Barnes, Legal and Social Affairs Division, Laurence Brosseau, Legal and Social Affairs Division and Élise Hurtubise-Loranger, Legal and Social Affairs Division. 2009-12-07 *Revised on: 2018-03-21*
https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200921E#a1

injuries, a death or other specific incident concerning a child or youth in the care or custody of the government or a First Nation service authority.
(2) The Advocate must conduct a review and make a report under subsection (1) in accordance with the terms of reference established for the review by the Legislative Assembly or the Minister.

Note that even though the Advocate is an Officer of the Legislative Assembly the Act allocates equal authority to the Legislative Assembly and the Minister in referring a matter for review to the Advocate. Note also that the Advocate must follow the terms of reference that are established. This despite the fact that the Advocate's role as a House Officer is to assist the Legislative Assembly in holding the Minister accountable for the department's performance under the Act.

Giving the Advocate two masters to serve would be especially problematic in the event of a minority government. In that context we could find the Minister issuing terms of reference to the Advocate only to have the House issue different, perhaps conflicting, terms of reference on the same issue.

Clearly, such terms of reference should only be issued to the Advocate by the Legislative Assembly. If cabinet has an issue that it feels requires a review by the Advocate it can bring that issue to the House for debate and a decision.

Cabinet control over House Officer legislation has also produced a number of inconsistencies between the various Acts. Here are three examples:

Method of appointment: The Ombudsman, CEO and Child and Youth Advocate are appointed by the Commissioner in Executive Council subsequent to a motion of the Legislative Assembly. No OIC is required to appoint the Conflict of Interest Commissioner following the motion in the House.

A motion to appoint the Ombudsman or the CEO must receive the support of two-thirds of all members of the House in order to pass. This means 13 members must vote in favour of the motion regardless of the number of members present for the vote. A motion to appoint the Conflict of Interest Commissioner requires the support of two-thirds of members present for the vote in order to pass. In order to pass the House, a motion to appoint the Child and Youth Advocate requires a simple majority.

Length of term: The term of the Chief Electoral Officer is tied to the electoral cycle, which makes sense. The Ombudsman and the Child and Youth Advocate are appointed for five-year terms. The term of a member of the Conflict of Interest Commission is three years.

Tabling of annual reports: The annual report of the Child and Youth Advocate must be tabled in the House before the Advocate can make the report public. No such restriction

applies to the Ombudsman, the Chief Electoral Officer or the Conflict of Interest Commissioner.

It is not clear why these differences exist. I would argue that eliminating unwarranted inconsistencies would be easier if the authority for determining the content of these Acts was in the hands of the Legislative Assembly. The Legislative Assembly Office could monitor the small number of Acts that would be under the authority of the Legislative Assembly to ensure consistency.

Executive control over this legislation means the Assembly doesn't know from one year to the next whether it will receive a new House Officer or whether existing House Officers will be given new responsibilities. This uncertainty is administratively problematic for the Legislative Assembly Office because the LAO provides financial, administrative, human resources and other services to all the House Officers. The LAO's workload increases whenever new responsibilities are given to House Officers.

The result of the executive branch 'overreaching' into matters properly within the authority of the legislative branch means that the Legislative Assembly is less capable than it should be of holding the government to account. The solution is to change existing procedures regarding the drafting of bills so that the policy behind any bill that affects the Legislative Assembly or its House Officers is developed at the Members' Services Board, not cabinet.

More generally, MLAs and others have to understand and respect the constitutional role of the Legislative Assembly and ensure that it is able to hold the government to account.

I am willing to meet with the Members' Services Board to discuss these matters further, at a time of mutual convenience, if the Board wishes to do so.

Sincerely,

Floyd W. McCormick, Ph.D.

Copied to:
Hon. Sandy Silver, MLA, Premier of Yukon
Hon. Tracy-Anne McPhee, MLA, Government House Leader
Brad Cathers, MLA
Elizabeth Hanson, MLA
Dan Cable, Clerk of the Legislative Assembly
Maxwell Harvey, Chief Electoral Officer
Helen Fitzsimmons, Director, Adminstration Finance and Systems, Legislative Assembly Office