

# Intelligence MEMOS



From: George N. Addy

To: Competition Law Observers

Date: April 12, 2022

Re: **COMPETITION ACT AMENDMENTS: FIRST ADD OVERSIGHT AND ACCOUNTABILITY**

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Competition law – traditionally the domain of lawyers, economists and bureaucrats – has in recent years caught the attention of elected officials, media and the general public in many countries.

In Canada, calls for amendments to the *Competition Act* grew in early 2021 and increased last fall when Senator Howard Wetston invited submissions on the need, or not, to amend the act in the digital era.

Meanwhile, Innovation, Science and Industry Minister François-Philippe Champagne's [mandate](#) letter late last year directed that the minister undertake a broad review of the current legislative and structural elements that may restrict or hinder competition and review the mandate of the Commissioner of Competition.

Over the past year and more, a wide range of commentators, including academics, lawyers, think-tanks, politicians, and the Competition Bureau itself have shared their views on potential changes to the act. And that process continues.

Recommendations have ranged from a complete overhaul of the legislation to endorsements of the status quo. A few have gone so far as to suggest that broader social policy objectives could be rolled into the basket of issues that the Bureau should address in its day-to-day work.

Most people with knowledge of the Act, its objectives and its history, who understand the issues and risks of missteps, have largely coalesced around two points: First, ensuring the legislation's focus remains squarely on achieving economic efficiency; and, second, this area is complex with a high risk of unintended consequences. This means any amendments, even those proffered as "minor" or merely "clarifications," need thorough and non-precipitous in-depth analysis.

Notably absent from reform discussions, despite the ministerial mandate to review the role of the Commissioner of Competition, is a serious unaddressed legislative gap: The absence of oversight, accountability, and transparency of the use of resources provided to the Commissioner.

Police forces across Canada are subject to some form of civilian oversight, including police commissions whose members are not serving officers and who review budgetary decisions and priorities. There is no equivalent body for the Bureau.

While the Bureau falls under the department of Innovation, Science and Industry, this is purely for federal budgetary tracking purposes. With limited exceptions – such as certain matters involving financial institutions or transportation undertakings – the enforcement of the Act is at the sole discretion of the Commissioner. In effect, the Bureau receives its budget from the federal government but has sole discretion on how those resources are used.

The Commissioner unilaterally sets enforcement priorities and determines how to use enforcement resources within the Bureau. There is no oversight, review, or assessment of these decisions, resource allocation, budgeting priorities, or value for money for taxpayers. While the Bureau does occasionally release some [metrics](#), they are largely limited to reporting on activity, not the value of the work undertaken or outcomes and provide little insight into how well the Bureau is doing its job.

Returning to the police comparison, one can only imagine the reaction from citizens and elected officials if a force announced its officers would focus exclusively on speeding tickets instead of robberies and other crimes or that all traffic stops would require a minimum of four officers.

Accountability, transparency, and oversight are baseline expectations for law enforcement agencies in this day and age – and the Bureau's ongoing exclusion does not make sense.

And, as with police forces, oversight of budget management and strategic direction do not dictate how a police chief, or in this case the Commissioner, exercises enforcement discretion in particular cases. Oversight does not imply second-guessing or limiting the Commissioner's independence in any particular case.

Nonetheless, someone needs to be assessing the value of what the Bureau is doing – not simply activity level. Other nations have done this. Examples include the UK's Competition and Markets Authority's [Board of Directors](#) with non-agency representatives providing some degree of oversight and accountability.

The Bureau has long [sought](#) – and recently received – a significant budget increase. While there is no doubt that the Bureau requires adequate funding to enforce the Act, it is unfortunate that no consideration appears to have been given to introducing a means of oversight or assessing how new or existing resources have been used in the past or the strategic plan for how resources will be used going forward. The C.D. Howe Institute Competition Policy Council has called for many years for [greater oversight](#) of the Bureau, and pairing increased resources with stronger oversight to [reinvigorate competition](#) enforcement in Canada.

While the Act is not perfect, and there may be opportunities for amendments, incorporating transparency and oversight befitting a law enforcement agency is the right place to start.

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