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## **Is Canada's Competition Watchdog on a Leash? Ottawa Must Champion Competition Enforcement**

### **Sixteenth Report of the C.D. Howe Institute Competition Policy Council**

At their October meeting, Council members supported measures to re-invigorate competition enforcement in Canada and to ensure that the Commissioner of Competition is an effective advocate for competition. While some have suggested that the Competition Bureau should be restructured as an independent agency, the majority of Council members supported keeping the Competition Bureau as part of Innovation, Science and Economic Development (ISED) where the Bureau can help influence the direction of Canada's industrial policy and encourage reliance on competitive market forces over direct economic regulation.

However, this federal government must make the rigorous enforcement of competition law a higher priority. Council members endorsed a greater prominence for the role of the Competition Bureau in the federal government's economic agenda. In particular, Canada's Competition Bureau must be adequately resourced to do its job: many Council members agreed that the Bureau should have a separate budget allocation so that ISED's other responsibilities do not crowd out the resources for the Bureau to investigate cartels, challenge anti-competitive conduct, efficiently review mergers, prevent deceptive marketing, and engage in competition advocacy. As well, Parliament could devote greater attention to scrutinizing the Bureau's performance by requiring a parliamentary committee to review a detailed annual report by the Bureau and by providing regular opportunity for the Commissioner of Competition to appear to answer questions. As previously recommended by this Council, the government might also consider creating an independent assessment body to periodically evaluate the Bureau's performance.

This is the majority view of the C.D. Howe Institute's Competition Policy Council, which held its sixteenth meeting on October 16, 2018.



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The Competition Policy Council comprises top-ranked academics and practitioners active in the field of competition policy. The Council, co-chaired by Adam Fanaki, Partner, Competition and Foreign Investment Review and Litigation at Davies Ward Phillips & Vineberg LLP, and Grant Bishop, Associate Director, Research, at the C.D. Howe Institute, provides analysis of emerging competition policy issues. Professor Edward Iacobucci, Dean at the University of Toronto Faculty of Law and Competition Policy Scholar at the Institute, advises the program. The Council, whose members participate in their personal capacities, convenes a neutral forum to test competing visions and to share views on competition policy with practitioners, policymakers and the public.

**At Issue:** Should the Competition Bureau be given greater autonomy, such as by establishing the Bureau as a separate agency that is independent from the Innovation, Science and Economic Development (ISED) department with full authority to manage financial affairs and other operational aspects?

## Background:

Canada's competition authority, the Competition Bureau, plays a critical role in countering anti-competitive conduct and promoting efficient markets. Although the Bureau independently enforces competition law, the Commissioner of Competition reports on non-enforcement and administrative aspects of Bureau operations through Innovation, Science and Economic Development (ISED), a federal government department. In contrast, many of the Bureau's foreign counterparts are constituted as fully independent agencies and have greater autonomy to advocate for policy changes to enhance market competition in key sectors.

To enhance the Bureau's governance, certain commentators have called for greater structural separation of the Bureau, and the Commissioner, from ISED.<sup>1</sup> This Council sees great benefit in publicly positioning the Commissioner as a champion of competition in the Canadian economy. In this regard, the consensus was that Bureau resources and performance should be more visible – for example, through the separation of the Bureau's budgeting from that of ISED and consideration of the Bureau's annual performance by parliamentary committee rather than by ISED. In particular, Council members emphasize the importance of rigorous performance reporting (as recommended in the Council's

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1 John Pecman, "Unleash Canada's Competition Watchdog: Improving the Effectiveness and Ensuring the Independence of Canada's Competition Bureau." *Canadian Competition Law Review*, [2018] 5-49. Available online at: [https://cbaapps.org/CBA\\_CCLR/PDF\\_Documents.aspx](https://cbaapps.org/CBA_CCLR/PDF_Documents.aspx).

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November 2015 communiqué)<sup>2</sup> and recommend a separate financial allocation to the Bureau in the federal budget.

A majority of the Council do not support removing the Bureau from ISED. Council members underscored the critical importance of Bureau independence on enforcement decisions and supported the Commissioner's role in policy advocacy that improves competition – particularly in regulated sectors. However, most members emphasize the value of the Bureau remaining “inside the tent” on federal government industrial policy, as many such decisions involve public interest considerations beyond competition policy. Most Council members believe that the Commissioner can more effectively interact with federal decisionmakers as a member of the ISED team rather than as an independent agency.

## The Need for a Competition Champion

Competition is critical for an efficient and innovative economy. The *Competition Act* prescribes the law of general application for countering anti-competitive conduct and ensuring mergers do not substantially lessen or prevent competition. The Competition Bureau enforces the Act to promote the dynamism of our economy.

Recently, various commentators have underscored the importance of competition as a powerful incentive for innovation, noting the harm resulting from the insulation of key industries from competition, such as through restrictions on foreign ownership or other barriers to entry.<sup>3</sup>

Pursuant to its current power to make representations under section 125 of the *Competition Act*, the Bureau has made a number of interventions in proceedings of government agencies, commissions and other regulatory bodies. It used these interventions to analyze specific markets and make submissions in support of enhancing competition in specific regulated industries. As well, for other market studies, the Bureau has relied on the Commissioner's general authority for enforcement and administration of

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2 C.D. Howe Institute Competition Policy Council, *Watching the Watchmen: The Need for Greater Oversight of the Competition Bureau* (5 November 2015). Available online at: <https://www.cdhowe.org/cpc-communique/watching-watchmen-need-greater-oversight-competition-bureau>.

3 See Peter Nicholson, *Facing the Facts: Reconsidering Business Innovation Policy in Canada* (4 October 2018), Institute for Research on Public Policy. Available online: <http://irpp.org/research-studies/facing-facts-reconsidering-business-innovation-policy-canada/>. Also see Paul Boothe, *Compete to Win: The Wilson Report Six Years Later* (2 March 2015), Business Council of Canada. Available online: <https://thebusinesscouncil.ca/publications/compete-to-win-the-wilson-panel-report-six-years-later/>.

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the *Competition Act* under section 7 of the Act. The Bureau's advocacy initiatives have recently included a study of competitive considerations for "FinTech," net neutrality recommendations to CRTC, a submission to the Canadian International Trade Tribunal on anti-dumping duties for drywall, and reports on the impact from restrictions on healthcare advertising and nurse practitioners.

Council members support measures to re-invigorate competition enforcement. This is critical to ensure a level playing field and promote the competitive marketplace that drives innovation. In particular, Council members support a greater prominence for promotion of competition by the Bureau in the federal government's agenda for general "micro-economic policy" (contrasted with fiscal and monetary aspects of the government's economic objectives).

Some Council members also believe that the Bureau should have express authority and resource allocation to provide advice to the federal government on new industrial or economic policy initiatives. However, other Council members question whether increasing advocacy would detract from the Bureau's enforcement mandate. These members are sceptical of expanding the Commissioner's current statutory authority to make representations to agencies, commissions and regulatory bodies.

It is important to note this Council's past opinion on whether the Bureau should undertake market studies.<sup>4</sup> In that prior communiqué, a majority of this Council cautioned against providing the Bureau with powers to compel information in market studies and recommended that any market studies should be limited in scope and length.

## **Does Canada's Competition Authority Have Sufficient Independence?**

The OECD's recent roundtables on institutional design emphasized the importance of independence for competition agencies.<sup>5</sup> Best practices included:

- Robust governance processes, with non-political, merit-based appointments of top management and which protects functional day-to-day independence, if not full separation, from ministers and political decision-makers;
- Insulation of decisionmaking, with an essential "inner core" (i.e., case initiation, investigations, litigation/prosecution) that is rigorously protected from any political influence;

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4 C.D. Howe Institute Competition Policy Council, *Competition Bureau Should Not Have Power to Compel Information for Market Studies* (4 May 2017). Available online at: <https://www.cdhowe.org/cpc-communique/competition-bureau-should-not-have-power-compel-information-market-studies>.

5 OECD Directorate for Financial and Enterprise Affairs, *Changes in Institutional Design of Competition Authorities* (31 March 2016). Available online: <http://www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm>.

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- Adequate financial resources, with budgetary allocations that are protected from political interference; and
- Accountability to the public through government bodies, with annual planning and regular performance reporting through oversight committees.

Presently, Canada's Competition Commissioner reports to the Minister of Innovation, Science and Economic Development and the Bureau's budget is determined as an allocation within the overall ISED budgetary envelope. The Commissioner is appointed by the Governor in Council.

Notably, while the Bureau has intensified its advocacy on certain policy matters during recent years, it has not played a policy advocacy role in certain sectors regulated by the federal government (e.g., supply-managed agriculture). As well, in 2011, the competition legislative policy function (i.e., recommending potential changes to the *Competition Act*) was moved to Industry Canada (now ISED) from the Bureau.

In his recent article in the *Canadian Competition Law Review*, former Commissioner John Pecman contended that the Bureau should have full independence from the executive branch of government.<sup>6</sup> Pecman stressed that ISED is heavily lobbied by Canadian industries and is the focal point for concerted efforts to influence government economic policy. While Pecman stresses that Bureau enforcement decisions are not directly influenced by political decisionmakers, he believes that the Bureau's reporting relationship with ISED represents a conflict of interest. As well, while emphasizing Canadian and foreign firms stand on equal footing in the enforcement of Canadian competition law, Pecman highlighted that policies to advance "national champions" and protect particular sectors will frequently run contrary to the objectives of competition policy. Pecman believes that the current governance model results in the deprioritization of competition policy in Canada relative to its major trading partners.

Therefore, Pecman argued that greater institutional separation from ISED is necessary to insulate the Bureau from political interference with its mandate. Pecman observed that such separation is the norm across the Bureau's foreign counterparts, pointing to Australia's Competition and Consumer Commission (ACCC) and the UK Competition and Markets Authority (UK CMA) as agencies with independent statutory authority.<sup>7</sup>

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<sup>6</sup> See Pecman (2018), *supra* note 1.

<sup>7</sup> Certain Council members observed that certain foreign agencies with apparent structural independence remain subject to some direction by political decisionmakers. For example, although restricted from intervening in enforcement matters, the Australian Treasury minister may issue directions to the ACCC under section 29 of Australia's *Competition and Consumer Act 2010*.

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However, most Council members are not convinced that the Bureau would be more effective at shaping policy by being outside ISED and do not believe that the Bureau's enforcement actions are influenced by political decisionmakers. Specifically, many Council members agreed that any promotion by ISED of "national champions" does not represent a risk for independent competition enforcement. As evidence, these Council members point to the focus of recent enforcement activities against Canadian businesses (e.g., Hudson's Bay Company, Toronto Real Estate Board, Tervita, Vancouver Airport Authority). These Council members do not see evidence that enforcement by the Commissioner preferred Canadian businesses or that enforcement was being directed disproportionately at foreign competitors.

With respect to advocacy for greater competition in federal regulatory regimes, Council members recognize the trade-off between acting as an independent advocate for competition and influencing industrial policy within government. Most Council members weighed in favour of the Commissioner as a champion within government, with the Bureau remaining within ISED in order to practically influence policy decisions.

Certain Council members proposed that locating the Bureau within another department (e.g., Treasury Board, Department of Justice or Department of Finance) could insulate the Bureau from potential conflicts of interest that are specific to ISED. However, other Council members believe that locating the Bureau within another department may do more to sideline the Bureau in policy decisions than increase its independence.

Moreover, many Council members stressed that regulation of certain industries (e.g., agricultural supply management) reflects a political balance, accounting for a diversity of factors to judge the public interest. Many Council members believe that a Commissioner can and should work within government to cultivate a broader appreciation of the role competition plays in economic policy. Nonetheless, while competition is a critical channel for productivity and innovation, it is not the singular focus of all economic policy and Council members recognized that governments must balance other legitimate objectives in formulating policy.

Finally, most Council members view the legislative function as appropriately vested within ISED: this serves to partition enforcement under the *Competition Act* from recommendations for legislative amendments. This safeguards against the Bureau advocating amendments that respond to outcomes in individual cases as opposed to broader competition policy issues. Practically speaking, the Commissioner will give advice on potential changes through ISED, but remains separate from the ultimate recommendations for amendments.



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## Financial Resourcing for the Competition Bureau

Council members are concerned about the Bureau's resources and the impact from financial constraints on the Bureau's effectiveness. Council members emphasized that the Bureau must have sufficient resources dedicated to investigating anti-competitive activities, actively prosecuting cases and conducting efficient merger reviews.

Council members noted that Canada's economy continues to grow and change in composition. In particular, digital technology and innovation is disrupting many sectors. As well, deference to market forces has rightly motivated liberalization of several key sectors (e.g., telecommunications, transport, electricity retail). However, this requires that competition authorities step up to guard against anti-competitive conduct in these sectors. Reducing direct economic regulation also increases the number of sectors in respect of which the Bureau must develop expertise and potentially devote specific enforcement efforts.

Council members question whether the federal government has adequately resourced competition law enforcement. Indeed, Council members perceived that the Bureau resources may have been compromised by ISED's other spending priorities.

Since the 2015/16 federal budget, the Bureau's financial allocation has flat-lined (see Figure 1). While the Bureau will see a budgetary boost from user fees in the coming year, this revenue is segregated for conducting merger reviews.<sup>8</sup> During a period when competition enforcement should be an increased priority for the government, the Bureau budget has shrunk by 6 percent from 2011/12 to 2017/18. Even with the budget increase from user fee revenue, the Bureau will have almost 10 percent fewer full-time equivalent staff in 2018/19 relative to 2011/12 levels (see Figure 2).

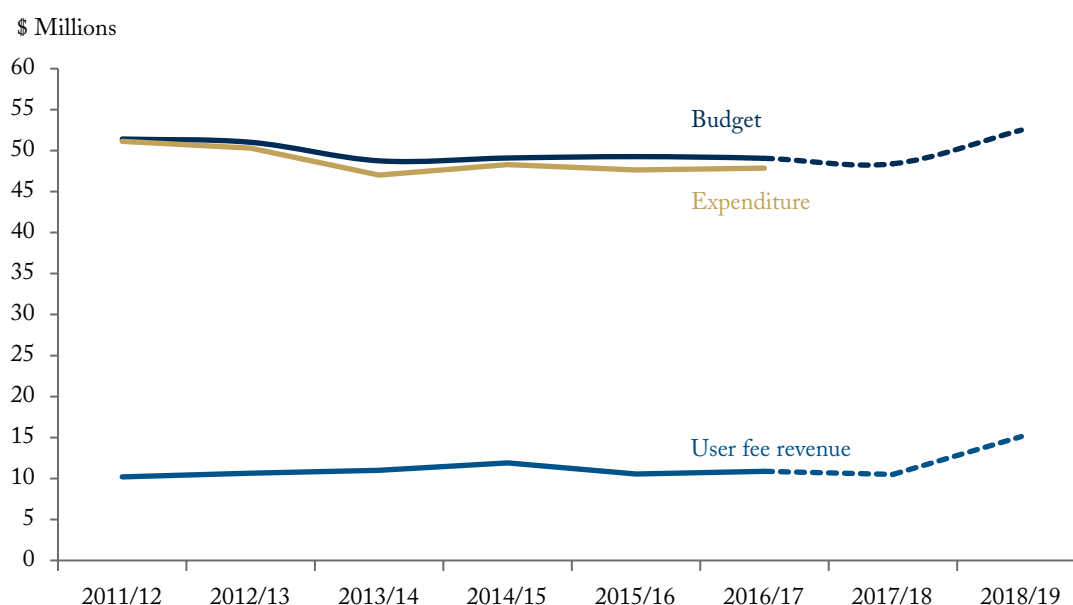
In contrast, this federal government's last budgets have boosted ISED's spending considerably (see Figure 3). In addition, the ISED estimates for Treasury Board anticipate a reduction in the resources for Bureau's competition enforcement activities: planned spending for "Competition Law Enforcement

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8 As of May 1, 2018, the ISED Minister increased the filing fee for pre-merger notifications and requests for advance ruling certificates (ARCs) to \$72,000 from \$50,000 (at which this fee has been fixed since 2003). This equates to approximately \$4.6 million in additional annual revenue for the Bureau, and this user fee revenue is ring-fenced for conducting merger reviews. See: *Revised Competition Bureau filing fee for merger reviews* (28 April 2018), Canada Gazette, Part I, Volume 152, Number 17 (Government Notices). Available online: <http://www.gazette.gc.ca/rp-pr/p1/2018/2018-04-28/html/notice-avis-eng.html>.

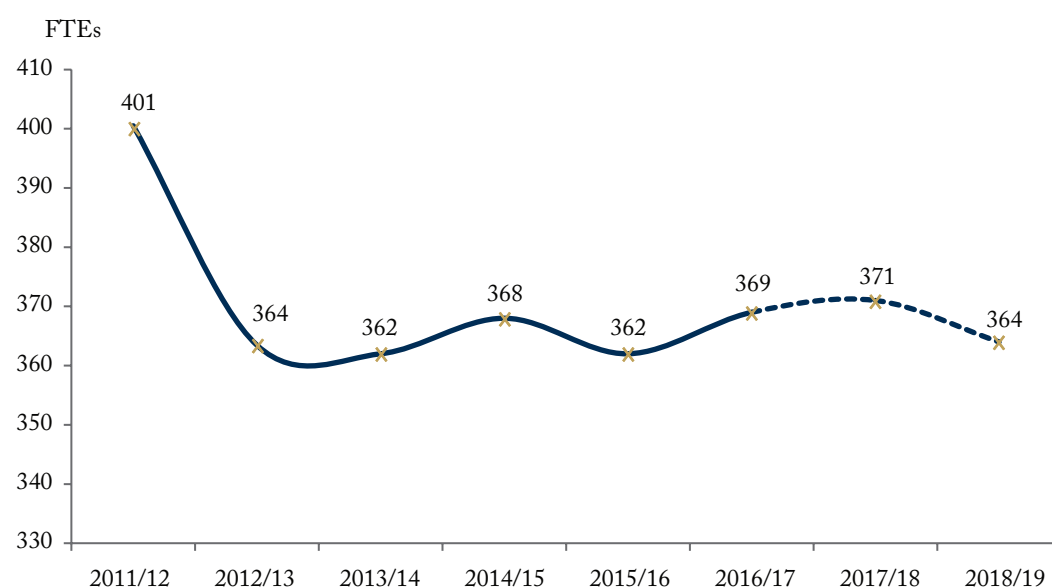
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**Figure 1: Budget, Expenditures and User Fees for Competition Bureau**



Sources: Competition Bureau Annual Reports for 2011/2017, Annual Plans for 2017/18 and 2018/19.

**Figure 2: Budgeted Full-time Equivalent Staff for Competition Bureau**

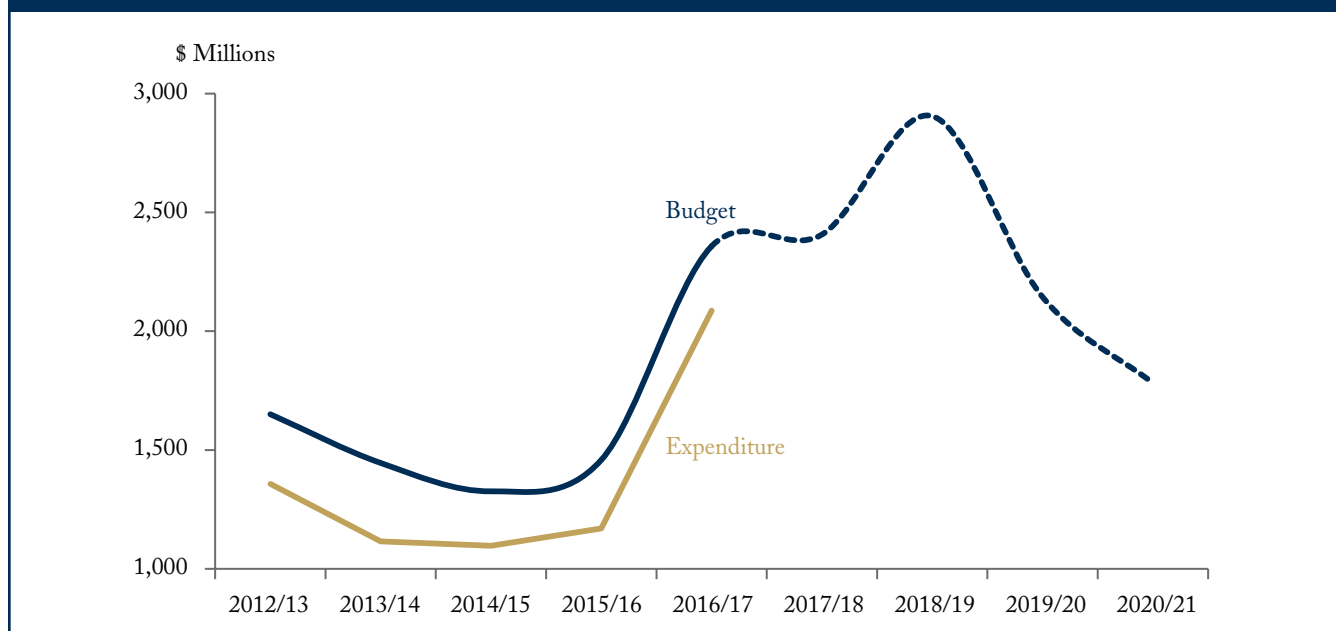


Sources: Competition Bureau Annual Reports for 2011/2017, Annual Plans for 2017/18 and 2018/19.



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**Figure 3: Budget and Spending by ISED**



Sources: Government of Canada InfoBase, 2017/18 Estimates for Government of Canada Expenditure Plan.

and Promotion” will be further cut from \$39.2 million in 2019/20 for 2018/19 to \$38.6 million estimated in both 2019/20 and 2020/21.<sup>9</sup>

Council members support greater prominence for the allocations to the Bureau in the government’s budgeting. Specifically, many Council members suggest that if the Bureau had a specific budgetary allocation (as do certain entities under other departments, such as the Canadian Environmental Assessment Agency, or the Public Health Agency), Parliament would have greater visibility as to the resource constraints facing the Bureau. Certain Council members caution that a separate budget may be difficult given the current integration with ISED (e.g., shared internal services).

## Bureau Accountability and Reporting to Parliament

This Council has previously recommended enhanced reporting on Bureau performance and the economic impacts of its enforcement activities.<sup>10</sup> This Council meeting also considered whether an independent oversight body could enhance the accountability and profile of the Bureau.

<sup>9</sup> See spending history and budgetary allocations for ISED, available online through Treasury Board GC InfoBase (see: <https://www.tbs-sct.gc.ca/ems-sgd/edb-bdd/index-eng.html>).

<sup>10</sup> C.D. Howe Institute Competition Policy Council (5 November 2015), *supra* note 2.

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If the Bureau remains within ISED, the Commissioner of Competition will remain accountable to the ISED Minister, who will exercise oversight with respect to the Bureau's budget and performance. Therefore, since the view of most Council members is that the Bureau should remain within ISED, Council members generally agreed that a separate board of directors or commissioners would not be appropriate as a governance model for the Bureau. Additionally, the *Competition Act* separates the adjudicative and enforcement functions between the Competition Tribunal and the Commissioner. Council members do not presently propose a fundamental change to the Bureau to adopt a commission-style model that integrated both adjudication and enforcement within a single entity (e.g., securities commissions).

However, certain Council members emphasize that greater independent oversight could improve the Bureau's allocation of resources and accountability for performance. Other members question whether an oversight body would add to the Commissioner's administrative burden and distract from the Bureau's core activities. Nonetheless, in its earlier communiqué, a majority of this Council recommended that Bureau accountability could be enhanced by an independent assessment body, with a membership appointed based on skillset or suitability to represent key stakeholders.<sup>11</sup> Such a body could review, report and recommend on the Bureau's performance.

As well, certain Council members are concerned that the Bureau's role and performance remain largely opaque to Parliament. The Bureau publishes an annual report on its activities and spending,<sup>12</sup> and section 127 of the *Competition Act* requires that the ISED Minister table this report before Parliament. However, the Commissioner does not face direct scrutiny from Parliament with respect to the Bureau's activities, its allocation of resources and economic impact. Certain Council members endorsed educating parliamentarians through appearances of the Commissioner before parliamentary committee to answer questions on the Bureau's annual report and overall performance.

Notably, Bureau executives and subject matter experts regularly appear before parliamentary committee on competition issues.<sup>13</sup> However, based on Parliament's online records, the last appearances of a Commissioner of Competition before a House of Commons committee was by Sheridan Scott in

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11 *Ibid.*

12 Competition Bureau, Annual Report of the Commissioner of Competition for the Year Ending March 31, 2017 (2 March 2018). Available online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04328.html>.

13 Bureau staff identify nine appearances before parliamentary committee in the last two years on matters including media concentration, airline joint ventures, Canada's anti-spam legislation (CASL), digital economy and data-driven platforms.

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2007,<sup>14</sup> and then-Interim Commissioner Melanie Aitken also appeared before a Senate committee in 2009.<sup>15</sup> These appearances concerned specific competition issues or proposed legislative amendments. Council members could not recall a Commissioner appearing before a parliamentary committee to discuss the Bureau's performance.

Even while the Commissioner would continue to report through ISED, some Council members believe that annual appearances and questioning of the Commissioner before Parliament's Industry, Science and Technology standing committee would enhance the transparency and public accountability of the Bureau. Such appearances would also help to build wider support for an adequately resourced Competition Bureau and to cultivate a broader awareness of the contribution of marketplace competition to a dynamic and innovative Canadian economy.

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14 Based on a search for names of past Commissioners in evidence from meetings of House of Commons committees (see: <http://ourcommons.ca/>).

15 Based on a search for names of past Commissioners in evidence from meetings of Senate committees (see: <https://sencanada.ca>).

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## Members of the C.D. Howe Institute Competition Policy Council

*Members of the Council participate in their personal capacities, and the views collectively expressed do not represent those of any individual, institution or client.*

**George N. Addy**, Partner, Head of Competition and Foreign Investment Review, Davies Ward Phillips & Vineberg LLP. Director of Investigation and Research, Competition Bureau, 1993-1996.

**Grant Bishop**, Associate Director, Research, C.D. Howe Institute, Co-Chair, Competition Policy Council of the C.D. Howe Institute.

**Marcel Boyer**, Research Fellow, C.D. Howe Institute. Professor Emeritus of Industrial Economics, Université de Montréal, and Fellow of CIRANO.\*

**Tim Brennan**, International Fellow, C.D. Howe Institute. Professor of Public Policy and Economics, University of Maryland Baltimore County. T.D. MacDonald Chair of Industrial Economics, Competition Bureau, 2006.

**Neil Campbell**, Co-Chair, Competition and International Trade Law, McMillan LLP.

**Jeffrey R. Church**, Professor of Economics, University of Calgary. T. D. MacDonald Chair of Industrial Economics, Competition Bureau, 1995-1996.\*

**Renée Duplantis**, Principal, The Brattle Group. T.D. MacDonald Chair of Industrial Economics, Competition Bureau, 2014.\*

**Brian Facey**, Chair of Competition, Antitrust & Foreign Investment Group, Blake, Cassels & Graydon LLP.\*

**Adam F. Fanaki**, Partner, Competition and Foreign Investment Review and Litigation, Davies Ward Phillips & Vineberg LLP, Co-Chair, Competition Policy Council of the C.D. Howe Institute.

**Peter Glossop**, Partner, Competition/Antitrust, Osler, Hoskin & Harcourt LLP.\*

**Calvin S. Goldman**, Head of Competition, Antitrust and Foreign Investment Group, Goodmans LLP. Director of Investigation and Research, Competition Bureau, 1986-1989.\*

**Lawson A. W. Hunter, Q.C.**, Senior Fellow, C.D. Howe Institute. Counsel, Stikeman Elliott LLP. Director of Investigation and Research, Competition Bureau, 1981-1985.

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**Susan M. Hutton**, Partner, Stikeman Elliott.

**Edward Iacobucci**, Dean, and James M. Tory Professor of Law, Faculty of Law, University of Toronto. Competition Policy Scholar, C.D. Howe Institute.

**John Pecman**, Senior Business Advisor in the Antitrust/Competition & Marketing group at Fasken. Commissioner of Competition at the Competition Bureau Canada from June 2013 until May 2018.

**Madeleine Renaud**, Partner, Competition Group, McCarthy Tétrault.\*

**The Hon. Marshall Rothstein**, Former Puisne Justice of the Supreme Court of Canada.

**Margaret Sanderson**, Vice President, Practice Leader of Antitrust & Competition Economics, Charles River Associates.\*

**The Hon. Konrad von Finckenstein**, Senior Fellow, C.D. Howe Institute. Commissioner of Competition, Competition Bureau, 1997-2003.

**Omar Wakil**, Partner, Competition and Antitrust, Torys LLP.\*

**Roger Ware**, Professor of Economics, Queen's University. T.D. MacDonald Chair of Industrial Economics, Competition Bureau, 1993-1994.\*

**The Hon. Howard I. Wetston**, Senior Fellow, C.D. Howe Institute. Director of Investigation and Research, Competition Bureau, 1989-1993.\*

**Lawrence J. White**, International Fellow, C.D. Howe Institute. Robert Kavesh Professor of Economics, Stern School of Business, New York University.\*

**Ralph A. Winter**, Canada Research Chair in Business Economics and Public Policy, Sauder School of Business, University of British Columbia.

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\* Not in attendance, October 16, 2018.