

Intelligence MEMOS



From: The Hon. Konrad von Finckenstein, Q.C.
To: Navdeep Bains, Minister of Innovation, Science and Economic Development
Date: July 25, 2016
Re: MORE OVERSIGHT OF CANADA'S COMPETITION BUREAU? NOT SO FAST

On Nov 5, 2015 the C.D. Howe Institute's [Competition Policy Council](#) issued a Communiqué: [Watching the Watchmen: The Need for Greater Oversight of the Competition Bureau](#).

It noted that the Bureau was deficient in terms of transparency, performance measurement, strategic planning and reporting. It suggested that:

“the Bureau would benefit from a periodic review of its strategic planning and performance by an independent assessment body consisting of a group of knowledgeable individuals, who would define key indicators and assess the Bureau’s overall performance”

Whether one agrees with the assessment in terms of transparency and performance measurement or not, the periodic review of the Bureau’s strategic planning and performance by an established independent assessment body creates some very practical problems.

First, who does one appoint to such body? Presumably the Governor in Council. However, the experts both legal and economic in this field are few and most of them will have been involved in the cases being reviewed. Issues of conflict and confidentiality will abound.

Second, who pays for this expert panel? Presumably it will be taken out of the Bureau’s budget. This will only increase resource constraints.

Third, a large amount of Bureau resources will be consumed for gathering, sorting and arranging materials for the review body. This deviation of the Bureau’s resources will manifest itself in slower dealings with existing workload.

Fourth, the review body will no doubt issue a report suggesting improvements to the Bureau’s performance, measuring and reporting. What is the status of this report? Who receives it, who acts on it? The Bureau annually reports to Parliament via the Minister of Innovation, Science and Economic Development. Clearly, its observance or deviation from panel recommendations will need to be noted in its report thus forcing the Commissioner to report to Parliament regarding recommendations issued by an expert panel. Does he defend his decisions or panel recommendations?

Fifth, the Commissioner exercises his powers according to the *Competition Act* and the jurisprudence. He listens to submissions from concerned parties but then comes to a decision based on the particular facts before him. All decisions are fact-specific driven by the peculiar circumstances of each situation. Decision constrained by a need to comply with the review panel recommendations would rather severely limit the discretion of the Commissioner. Already, all his decision can be contested before a court. In conspiracy cases or mergers, he only challenges, the ultimate decision is up to a court. Thus the suggested analogue to the British Competition and Markets Authority, which the panel makes, is clearly not applicable.

Finally, the Bureau is already subject to too many reporting requirements. Business constantly complains about the time it takes for the Bureau to make decisions. Another layer of review will only further slow down the Bureau. Compliance with the review panel will trump any need for urgency.

No doubt the present reporting and strategic planning by the Bureau can be improved. However adding another layer of oversight will not produce the objectives sought by the panel.

[In the spirit of full disclosure, it should be noted that I am a member of the Council but did not participate in this discussion.]

The Hon. Konrad W. von Finckenstein, Q.C., was formerly the Chair of the Canadian Radio and Telecommunications Commission, a Federal Justice and Commissioner of Competition.