Policy Forum: Building a Tax Review Body That Is Fit for Purpose—Reconciling the Tradeoffs Between Independence and Impact

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PRÉCIS
Dans ce court article d’opinion, j’aborde diverses options pour structurer et soutenir un examen du régime fiscal fédéral au Canada, y compris les interactions avec les mesures fiscales infranationales. Je me concentre en particulier sur les choix qui doivent être faits entre l’indépendance du gouvernement et l’influence sur l’élaboration de la politique gouvernementale. Les modèles traditionnels auxquels nous pensons généralement — les examens internes par les représentants du gouvernement, les groupes de travail et les commissions royales — comportent tous des forces et des faiblesses comme mécanismes d’examen complet, transparent, indépendant et influençant du régime fiscal. En plus de ces options, je considère des exemples internationaux, tel le rapport Mirrlees au Royaume-Uni. Enfin, je suggère de créer un organisme subventionné par l’État ayant pour mandat permanent de réaliser des analyses, de faire participer les parties prenantes, et de formuler des recommandations stratégiques. Il est peu probable que la réforme fiscale canadienne soit un exercice unique dans le temps, et il serait donc opportun de former un organisme d’examen fiscal qui se consacrera à cette tâche.

ABSTRACT
In this brief opinion piece, I discuss various options for structuring and supporting a review of the federal tax system in Canada, including interactions with subnational tax measures. I focus in particular on the tradeoffs that must be made between independence from government and influence on government policy making. The traditional models that we are accustomed to thinking of—internal reviews by government officials, task forces, and royal commissions—all have strengths and weaknesses as mechanisms for conducting a comprehensive, transparent, independent, and influential review of the tax system. In addition to these options, I consider international examples, such as the United Kingdom’s Mirrlees review. In the end, I suggest the creation of a publicly funded body with a standing mandate to conduct analysis, engage stakeholders, and make

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policy recommendations. Tax reform is unlikely to be a one-time policy need in Canada, and so we should build a tax review body fit for purpose.

**KEYWORDS:** TAX REFORM. COMMISSIONS. ACCOUNTABILITY. GOVERNANCE. POLICY MAKING. POLITICS

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**INTRODUCTION**

In thinking about the prospects for a comprehensive review of Canada’s tax system, we should not overlook the important questions of how such a review should be structured, resourced, and run. However meritorious the exercise of undertaking a fresh critique of our tax system, however expert those who carry out the task, a review is unlikely to be successful if it is not built for purpose. Regardless of how we define “success” in an ambitious tax review exercise—and there may not be consensus on the policy goals or priorities for a tax review—we have to give at least some thought to administrative questions such as accountability and mandate.

Previous reviews of Canada’s tax system have often taken the form of royal commissions. Notable examples include the 1945 Ives commission on the taxation of annuities1 or, more prominently, the Carter commission from 1962 to 1966 (discussed in the preceding article by Shirley Tillotson).2 But important exercises in tax reform have taken administrative forms other than a royal commission. In recent years, federal governments have appointed a number of advisory panels and task forces to make recommendations on tax policy, though generally within a much more limited mandate. This was the case with the 1997-98 Technical Committee on Business Taxation3 and the 2006 advisory body to the minister of finance that recommended amendments to the Income Tax Act4 to create a new tax-preferred savings instrument, the registered disability savings plan (RDSP).5 Sometimes recommendations for specific tax reforms emerge from bodies appointed with a mandate to examine a policy issue where the tax system makes up a critical part of the federal policy toolbox. For example, in 2011, the government received recommendations for reform

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4 RSC 1985, c. 1 (5th Supp.), as amended.
of the scientific research and experimental development (SR & ED) tax credit from a task force on innovation in Canada, appointed by the minister of state (science and technology).\(^6\) Such royal commissions and task forces (or advisory panels) are external to government, though they operate with different degrees of independence and different timelines for conducting research and issuing recommendations.

Finally, exercises in tax reform can also be conducted internally by officials working within the federal public service, to provide confidential advice to the government, generally through the minister of finance. Sometimes this internal work is made visible through a public report such as a white paper. This was the case in 1987, when then Finance Minister Michael Wilson released a white paper on tax reform that preceded major changes to personal, corporate, and consumption taxes in the 1988 federal budget.\(^7\) Similarly, in 1969, in response to the recommendations of the Carter commission, then Finance Minister Edgar Benson tabled a white paper on tax reform.\(^8\) However, in the latter case, many of the proposals failed to materialize as government policy. As one member of Parliament noted during the debates on the sweeping changes proposed in Benson’s white paper, Canadians “like better the devil they know than the devil unknown.”\(^9\) There are also myriad examples of tax reforms that have been conducted as internal exercises but without a public report before policy changes are made. These internal policy debates can include input from external advisers, as was the case in the 2016 federal review of tax expenditures,\(^10\) but that has been the exception rather than the rule.

The historical record suggests at least two overarching and related questions. First, how far at arm’s length should a tax review body be from the government of the day? And second, if the review is to generate advice that will be adopted and acted upon by the government of the day, how close should the body conducting the review be to the institutions of government? In the remainder of this brief article, I discuss the tradeoffs between independence and impact, and offer some thoughts on the administrative questions of accountability, resourcing, and mandate for an imagined comprehensive national tax review exercise.

For the purposes of this discussion, I am going to set aside the question of what a tax review should accomplish and instead focus on how a tax review might be accomplished. While there may be many readers of this journal who would agree on the need for a comprehensive and public tax review, the motivations for a review

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10. I was appointed by the minister of finance to a panel of advisers tasked with providing peer review of analysis conducted by officials in the Department of Finance during the 2016 tax expenditure review.
are likely to be varied. For example, some may prefer a tax review aimed at creating incentives for business development and aggregate economic growth. Others may prefer a review aimed at reducing economic inequalities and enhancing redistribution or predistribution of resources. Yet others will see value in reforms to simplify tax measures and make compliance easier. There are many other possible policy objectives for tax reform, each with its own merits. But if there is disagreement on why a review is warranted, there is, I think, broader agreement on how a tax review ought to be conducted. So it is in that area of agreement—the “how”—that I will advance the rest of my brief argument.

**FIRST PRINCIPLE: FORM SHOULD FOLLOW FUNCTION**

The administrative structure of the body charged with reviewing Canada’s tax system should be determined by what that body is expected to do. When observers talk about a body charged with recommending comprehensive tax reform, there seem to be at least three features that they want this body to have. I believe that these design criteria can help us to determine how independent a body charged with tax reform needs to be.

First, the body should deliver a package of proposals for comprehensive tax reform including personal and corporate income taxes and consumption taxes. Recent reviews have focused on a particular tax measure, such as the task force that reviewed the SR & ED credit and the expert panel that led to the creation of the RDSP. Instead, the mandate of the body would be to conduct a system-wide review of federal taxation in Canada, including interactions with subnational taxation.

Second, the work and recommendations of a review should be transparent. In other words, the body conducting the review and making recommendations should make its analysis public, so that it can be scrutinized by other experts and debated by stakeholders. There should be opportunities for other experts to review the work of the tax reform body and opportunities for stakeholders to understand what is being proposed before any changes are implemented.

Third, the package of proposals for comprehensive reform should be grounded in a clear statement of principles for optimal tax design that is independent of current policy. As Boadway has argued, principles articulated by the Carter commission, such as ability to pay and the basis of taxation (income versus consumption), continued to inform tax policy long after they were presented in the commission’s report. Proposals for tax reform, whether sweeping or specific, are subject to a set of assumptions about what economic activity should be taxed and who should pay.

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11 While the Mintz committee issued an ambitious set of recommendations (including changes to corporate income and capital taxes, as well as payroll and excise taxes), it did not have a mandate to look at consumption or personal income taxes. See supra note 3.

Proposals are also guided by theory or shared beliefs about what constitutes a good tax system. These assumptions, theories, or beliefs should be made explicit. In addition, where longstanding assumptions are being replaced, the work of the tax review body should make it clear why new assumptions are necessary or at least preferable. For example, the final report of the United Kingdom’s Mirrlees review described criteria for evaluating tax systems, reviewed principles of optimal tax theory that would be familiar to most tax scholars, and offered certain rules of thumb for tax design.13

The three features described above argue for a body that can conduct and publish analysis, and issue detailed reports to the Canadian public. They argue for a structure that is designed to receive and make use of input from stakeholders and experts outside the government. They also argue for an advisory body that will be able to discuss the goals of the Canadian tax system independently from the policy goals of the government in power. In general, this suggests a structure located outside the federal public service and independent from the government in power.

Public servants in the Department of Finance have significant expertise in tax policy and will have working relationships with some external stakeholders. However, officials in the department will be limited in their ability to share their analysis and advice publicly. Public servants have access to unique forms of information, such as administrative files and tax records that cannot be freely shared for reasons of privacy and security of information, or because publication is subject to approval by the minister. To be successful, a review of the tax code must not put public servants in open conflict with the core executive they serve. To do so would put at risk the ongoing ability of public servants to work in a privileged relationship with the core executive, in which they are able to provide fearless advice and be trusted to provide loyal implementation of a government’s decisions. Asking public servants to share sensitive analysis publicly and without ministerial approval would also erode the principal mechanism of government accountability in our system—ministerial accountability to Parliament.14 In turn, if information sources cannot be readily shared, this limits opportunities for stakeholders to scrutinize analysis and methods. Departmental officials simply do not enjoy the independence needed to conduct a comprehensive, unfettered, and transparent review of the tax system. They are subject-matter experts and keepers of unparalleled Crown information, but their contribution must be made within the confines of the bargain between the government and the officials who serve it. This bargain also applies in circumstances where public servants are temporarily assigned to support a task force or commission.


14 In some circumstances, research papers prepared by federal employees can be published in academic journals. They cannot, however, include information not otherwise sanctioned for public release; they must be shared in advance with supervisors; and generally they cannot make or even imply recommendations for policy change.
Instead, the best options for a comprehensive, transparent, and independent review of Canada’s tax system seem to be housed outside the day-to-day operations of the government. In practice, external exercises in tax reform have taken several forms, ranging from a ministerial task force, to a royal commission, to an entirely independent project undertaken by a private think tank. Each of these enjoys a different degree of independence from and access to the government. In the section below, I turn to the question of impact, and consider how close to the institutions of government a body charged with tax reform might need to be in order to effect change.

SECOND PRINCIPLE: FORM SHOULD SUPPORT POLICY CHANGE

It seems reasonable to suggest that discussions promoting a comprehensive review of Canada’s tax system are starting from the premise that some important changes to the current system are necessary. We hardly need a national review of taxation if we agree that the current system is working well. But if the goal is to support policy change, to have impact, what does this imply for the structure of the body in charge of the review?

The Mirrlees review in the United Kingdom presents an interesting model in that it was conducted entirely outside government. It was initiated by the Institute for Fiscal Studies (IFS), an independent and non-partisan think tank, and funded by a mix of research grants from the national academic granting council (the Economic and Social Research Council) and philanthropic funding from a charitable trust (the Nuffield Foundation). The IFS provided administrative support for the 2010 conference to launch the project, including the collection of conference papers, and for the publication and dissemination of the final collection of papers in 2011. In all, 63 authors contributed to the review, including many of the leading researchers in tax policy. Following the review, a parliamentary committee was prompted to launch its own inquiry on the principles of taxation. The work of the review was cited by several government officials and helped to inform the 2012 debate on the harmonization of various income-tested benefits delivered as refundable credits.

The Mirrlees review took on the task of imagining an optimal tax system for an open economy in the 21st century. The two collections of papers, Dimensions of Tax

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17 Tax by Design, supra note 13.

Design and Tax by Design, continue to be an important reference for students, researchers, and policy makers. The review was not limited to recommending only those tax changes that would have the greatest chance of enjoying political support, but the researchers clearly recognized that their recommendations alone would not be sufficient to motivate policy action:

Government in a media-driven democracy is difficult and there is a need to work within the bounds of the politically feasible. But there is a better way to make tax policy. There are taxes that are fairer, less damaging, and simpler than those we have now. To implement them will take a government willing to be honest with the electorate, willing to understand and explain the arguments, willing to listen to and to consult experts and public alike, and willing to put long-term strategy ahead of short-term tactics.

Some of the same features that gave the review academic credibility—access to granting council support, affiliation with a well-regarded think tank, and, most importantly, the involvement of leading scholars—also raise considerations about accountability and mandate. Think tanks and scholars are free to pursue research on tax policy, to make recommendations, and even to pursue a project as ambitious as the Mirrlees review. But without a public mandate, their work risks becoming only a reference document—albeit, perhaps, an important one—rather than a set of recommendations that exert influence over tax policy. A primarily academic exercise is also likely to suffer from difficulties in gaining the engagement and support of other stakeholders and, in particular, the general public. Academics, think tanks, and other researchers have much to contribute to policy processes, and not simply as observers and faithful critics; but they do not have the same formal accountabilities as elected officials or even public servants. The Mirrlees review did not seem to attract the interest of external stakeholders whose views would later play a role in parliamentary debate and legislative amendments. It appears that the Mirrlees review was able to complete its analysis removed from the political pressures familiar to ministers of finance, tax policy officials, and parliamentarians considering tax changes. For those conducting research in a more academic context, the freedom to work outside political influence is essential to the independence and academic credibility of their results. But there are downsides to working in isolation from outside interests and stakeholder lobbies, including the absence of political capital to support the recommendations.

In 2017, when the UK government again tried to advance a major reform of the tax system, informed in part by the work of Mirrlees on questions of inheritance, exclusion of dividend income, taxation of non-residents, and corporate taxation, it was forced to abandon substantial parts of its agenda. Neither Mirrlees nor the government had been successful in building a public consensus on tax reforms.

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20 Ibid., at 503.
Given the present all-consuming focus on Brexit, it seems unlikely that a UK government of any political stripe will spend much political capital on tax reform in the near future.

The mandate to build public consensus and, in turn be held to public account, requires a public organization to lead the tax review effort. The mandate may come from government or from Parliament itself, but it cannot be self-appointed. This brings us to consider at least two forms of ad hoc public bodies have previously been used for tax reform exercises: task forces (or advisory panels) and royal commissions.

The task force or advisory panel model is a poor fit for the project of comprehensive tax reform. As discussed above, recent examples show a tendency to use task forces and advisory panels for very narrowly defined policy questions that are concerned with either a particular problem in tax policy (such as the proliferation of spending measures through the tax code) or a particular problem with respect to which tax policy is a key instrument to the government (such as financial support for persons with disabilities or for research and development). Furthermore, such ad hoc bodies are appointed by a minister to report to or advise that same minister. Their mandates are generally limited in scope, as well as in duration, encouraging the appointed members to wrap up their work quickly, generally with the support of a small cadre of officials seconded from the minister’s department. The work of the panel or task force is completed when the members issue their final report; there is no mechanism to hold them to account for their analysis or advice. The government, for its part, is free to take or leave the advice given—or, more likely, to cherry-pick the parts that it finds useful as support for its preferred policy approach.

In some cases, a public review of taxation can be initiated and completed within the mandate of a single government. For example, the George W. Bush administration established a task force to review the US tax code that commenced its work in January 2005 and reported in November of the same year. In contrast, Canada’s Carter commission was announced in 1962 by the Diefenbaker government and issued its report four years later to the Pearson government. A full formal response to the Carter recommendations did not come until 1969, when Pierre Trudeau’s government issued its policy papers on tax reform. Between the publication of the Carter report and the enactment of the Tax Reform Act in 1972, Canada experienced a turnover in federal finance ministers as well.

On the one hand, the American example suggests that a rush to complete a review within a constrained political time frame may significantly limit the scope and ambition of the project. On the other hand, the Carter example suggests that one-time exercises in reform that experience multiple turnovers in government may ultimately see their policy impact diluted.

22 SC 1970-71-72, c. 63.
Mechanically, royal commissions are created by an order in council, drafted by Cabinet and signed by the governor general. Under the Inquiries Act, their authority comes directly from the Crown; they are able, within the terms of their mandate, to compel evidence (similarly to a court) but may not adjudicate disputes or impose sanctions on parties appearing before them. By law, commissioners are granted access to any public office and any government record. This access could not, for example, violate the privacy of individual Canadians, but the investigative powers of a commission would presumably facilitate access to federal tax data. A tax review body that does not have access to complete and accurate microdata, as well as administrative information, is at a significant analytical disadvantage compared to the Department of Finance. For example, the Mirrlees review had no privileged access to British tax data and was therefore limited to making broad or directional recommendations, rather than specific ones that could be tested against the current system.

In addition to the power to gather information, commissioners can hire technical experts and assistants, as they feel is necessary, and may draw resources for their work from the government’s consolidated revenue fund. Parliament cannot hold a government to account for the activities or findings of a commission once it is launched, but it can ask the government to account for the purpose, mandate, resourcing, and response to a commission of inquiry. This last feature has, at times, made royal commissions an attractive mechanism for governments looking to delay decisions or avoid difficult policy choices.

At first glance, these features of independence, transparency, and access to important information might seem to make a royal commission the ideal mechanism through which to complete a review of the tax system. Given the existing model of the Carter commission, it would be tempting to return to the same structure today. However, several concerns have been raised about the use of “temporary adhocracies.” For example, Doern has listed a number of common criticisms of royal commissions, including their cost and the tendency for them to be used by governments seeking to delay action. Osberg has argued that temporary advisory bodies have very little time to conduct any real analysis in the brief window of time between starting up, receiving public input, and issuing a report. Aucoin has argued that, by the early 1970s, royal commissions came to be seen as a “relatively clumsy” mechanism and, since then, governments have tended instead to keep deeper dives

24 RSC 1985, c. I-11, as amended.
on policy issues in-house to the public service and core executive. Aucoin has also asserted that royal commissions are no more able than public servants to overcome the dominant paradigms in a field of study at a given time. While commissions of inquiry may be particularly “useful instruments for governments . . . confronted by intractable or ‘wicked’ (as opposed to ‘tame’) problems,” they cannot be a substitute for processes within government itself. Doern goes further and suggests that royal commissions are “not adequate to face a modern federal state’s policy problems, most of which are of a recurring nature.” A royal commission may be an effective and appropriate mechanism to investigate branches of government, to allow grievances and opinions be heard on a particular topic, or to gather information on which to base a one-time policy choice. They are, as Doern argues, public, ad hoc, and investigatory in their operation, and they are dismantled once the work is done. However, as in the case of a task force, there is no real way to hold a royal commission accountable for its analysis and advice once its work is completed. Despite their long (indeed medieval) history, royal commissions seem ill-suited for complex, persistent policy problems that may not be resolved by a one-time set of recommendations.

Tax policy is a wicked policy problem, and it is also, most certainly, an ongoing one. Tax reform cannot, in my view, be done as a single exercise, shaped by a single report and a set of recommendations that will be expected to stand for as long as successive governments are content to avoid another review. As Doern wrote, “there is need for a permanent body of expertise related to recurring social and economic problems.” While some may hope that a royal commission might, for a time, rally public attention to the issue of tax reform or motivate stakeholders to participate in an inquiry, I am not so optimistic. Observers of and participants in public policy debates have no shortage of demands for their time and attention. In fact, a royal commission could easily be drowned out by any number of news cycles and competing high-profile events. And, as noted earlier, the short lifespan of a royal commission makes it difficult to get much work done in the time between setting up and shutting down.

An ongoing body has at least two further advantages in advancing the goal of policy change. First, a standing external body is not very useful to a government

30 Ibid., at 5.
31 Supra note 27, at 431.
32 Ibid., at 417.
33 Lockwood, supra note 25, at 172 and 180, notes that the first royal commission in Canada was appointed in 1848 (before Confederation), but that the English tradition of an inquiry mandated by and reporting to the Crown dates back to 1080, when royal commissioners were sent by the king to assess the ownership and value of all taxable property in the kingdom, with the results being compiled in the Domesday Book.
34 Supra note 27, at 432.
looking to delay a decision or action. There is no end point to which the government can ask the Opposition, the media, or other critics to look before expecting the government to act in response. In short, a standing body can inform future policy choices, but it also gives no quarter to a government that is already aware of some important tax changes that it could make. Second, a standing external body becomes formally part of the policy-making system, albeit at arm’s length from the government. Over time, this allows public servants, whose confidential analysis and advice continue to provide critical input to political decision makers, to develop working relationships with—or even spend time working inside—another public body that, like the public service, is here for the long term.35

Canada has had at least one example of an advisory body that has managed the delicate balance of having proximity and influence while also enjoying political independence, the ability to engage more easily with external stakeholders, and the freedom to make public recommendations on matters of policy. From 1963 to 1993, the Economic Council of Canada (ECC) was one of a small number of arm’s-length national bodies with the public authority to collect information, conduct analysis, and make recommendations to the federal government on ongoing policy questions. Established by statute,36 the ECC was structured as a Crown corporation, accountable to Parliament through a report to a responsible minister, but independent from the direction of that minister. It was required, by statute, to produce at least one annual report and was otherwise able to conduct and publish analysis and recommendations as it saw fit. Employees in the federal public service were able to work for the ECC for a limited period before moving on (or returning) to various federal departments and agencies.37 The ECC attracted high-calibre chairs whose considerable intellectual heft contributed to the quality of the published work. Council members were generally diverse in their professional experience and expertise (but not adequately in terms of gender, ethnicity, and other forms of diversity). The ECC actively engaged with stakeholders and experts outside government, many of whom likewise spent time working at the council before returning to the private or academic sectors. It was also a prolific publisher of research and analysis. For much of its life, the ECC worked to “form a consensus on the political economy.”38

35 A permanent body would also need clear and legislated access to federal tax data. In the same way that Canada Revenue Agency makes microdata available to the Department of Finance and to Statistics Canada, rights to microdata could be made available to a new federal body that would also be subject to federal authority and oversight on the handling, use, and release of private data. The experience of the parliamentary budget officer (PBO) in obtaining access to microdata is instructive here but is at least partially explained by the PBO’s different lines of accountability compared to Crown departments and agencies.

36 Economic Council of Canada Act, SC 1963, c. 11 (since repealed).


38 Ibid., at 456.
On the issue of comprehensive tax reform, we ought to look for similar opportunities to form consensus if we want recommendations for tax reform to be enacted into policy. Such consensus will take more public engagement than the public service is permitted. It will take more time and independence than a ministerial task force or advisory panel has available. And it will take a collaborative, cross-sectoral way of working, rather than a quasi-judicial one. Finally, decision makers and the public should be able to ask those who do the analysis and issue recommendations to defend and account for their work, and to remain formally engaged in the debates that follow.

We are sorely in need of an updated look at our system of taxation—one that is as ambitious as the review conducted by the Carter commission more than 50 years ago. But even if a new exercise succeeds, we are likely to need a further update sooner than we expect. Better that we should plan ahead and design a structure that can meet ongoing needs for comprehensive, transparent, and independent analysis and advice than spend another five decades hoping and waiting.