An Empirical Analysis of Cases at the Competition Tribunal

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Introduction

Empirical analysis of adjudicators' decisions will become an increasingly important part of lawyers' toolkits for advising and advocating for their clients. This report provides examples of how that type of analysis can be used. This report focuses on an empirical analysis of cases before the Competition Tribunal, the federal administrative body with jurisdiction over broad swathes of the *Competition Act*.

The analysis set out in this report is based on a data set we compiled containing information about almost every case filed with the Competition Tribunal dating back to the late 1980s. For each of those cases, we coded almost 70 variables that we could then analyze and correlate with one another. This provides us with a rich data set that allows us to systematically analyze various characteristics and outcomes of cases filed with the Competition Tribunal.

There are many types of analysis that we can do with this data set to help advise our clients who face competition law problems. In this report, we set out some of our high-level findings of our analysis of the Competition Tribunal's cases.

This report will refer to some basic statistical concepts. However, most of the content will be accessible to readers without any prior knowledge of statistics.

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Methodology and Qualifications

As part of this project, we reviewed file information and case documents for every case on the Competition Tribunal's website. The availability of Competition Tribunal data makes it an ideal adjudicative body whose decisions can be analyzed. The Competition Tribunal posts not only its decisions on its website, but also key documents with respect to all cases filed before it. One can be confident that the data set reflects all matters before the Competition Tribunal, rather than merely a subset of reported decisions.

In conducting our analysis, we reviewed every case on the Competition Tribunal's website, and we coded the overwhelming majority of those cases with over 70 different data points for each case. There were some exclusions from our data set. We excluded any decisions to vary or rescind existing consent agreements. In addition, our analysis is limited to decisions of the Tribunal. It does not reflect any appeals to the Federal Court of Appeal or rehearings following appeals. However, other than that, all cases were coded.

While our analysis below provides a comprehensive picture of the work of the Competition Tribunal, it is important that the data be properly understood as only the work of the Competition Tribunal and not all of the Competition Bureau's enforcement activity. There are several additional categories of enforcement activity that the Competition Bureau does that do not result in any proceedings before the Competition Tribunal:

1. Any investigations by the Bureau or informal resolutions reached with parties that do not result in a proceeding before the Competition Tribunal will not be reflected in the data set.
2. Criminal matters that are investigated by the Bureau and prosecuted by the Public Prosecution Service of Canada do not take place before the Tribunal.
3. There are certain provisions of the *Competition Act* that can be enforced before the Tribunal, but also before one or both of the provincial Superior Courts and the Federal Court. Indeed, in the past, the Commissioner of Competition has sometimes chosen to bring some proceedings before the provincial Superior Courts instead of the Competition Tribunal. The Competition Tribunal data set does not capture those, and thus it may understate the Bureau's work in that area.

While we coded almost every Competition Tribunal case, our analysis here only relates to cases for the 15-year period from the beginning of 2005 to the end of 2019. We limited our analysis to this period because we wanted a data set that was large enough for meaningful analysis, while recent enough to provide useful insights. Given that the private party access provisions in section 103.1 were added to the *Competition Act* in 2002, 2005 seemed to be a reasonable starting point for analysis.

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Volume of Cases

From the beginning of 2005 to the end of 2019, there were 150 cases (including the registration of consent agreements) filed at the Competition Tribunal. This means there was an average of just 10 cases per year filed at the Competition Tribunal. Of those 150 cases, 132 (88%) were started by the Commissioner, while 18 (12%) were started by private parties. Clearly, the Commissioner's enforcement efforts have dominated the Tribunal's docket.

There is significant year-over-year variation in the number of cases started by the Commissioner. Over the period we looked at, the Commissioner started as few as three cases and as many as 19 cases in a given year.

While there has been significant year-over-year variation, there appears to be no general trend over the entire 15 year-period. However, there does appear to be some evidence of year-over-year correlation in the number of cases brought. For example, between 2010 and 2014, the Commissioner commenced eight or fewer proceedings in each of those years. By contrast, between 2015 and 2018, the Commissioner commenced at least 11 proceedings in each of those years. These sample sizes are relatively small, and there is only a limited time frame we are looking at, so it is not possible to draw definitive conclusions. However, it does seem to suggest some clustering in enforcement action over time.

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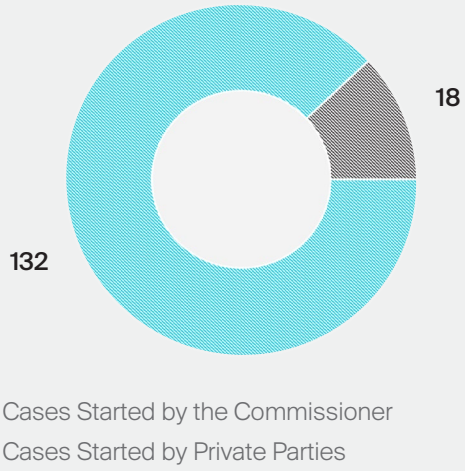
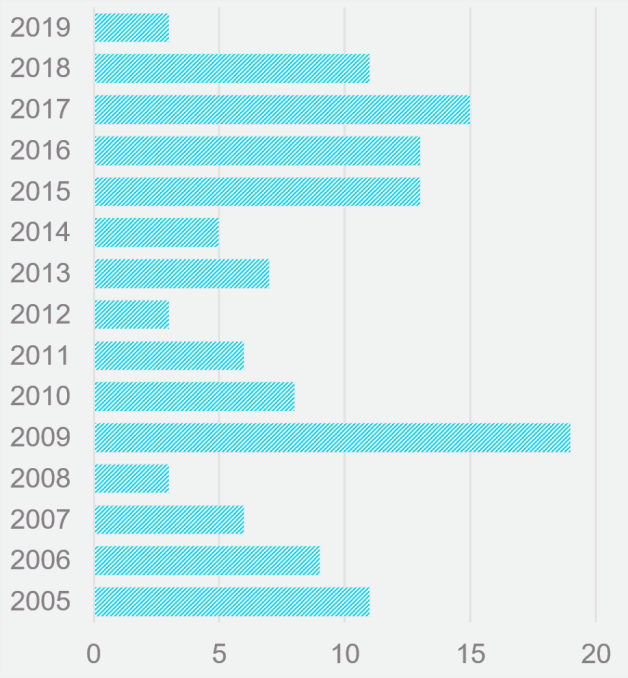
CASES STARTED BEFORE THE COMPETITION TRIBUNAL



CASES STARTED BY THE COMMISSIONER



Types of Cases

We categorized cases brought before the Competition Tribunal into four categories:

1. Deceptive marketing practices cases (which includes false advertising cases and ordinary selling price cases);
2. Unilateral reviewable conduct cases (which includes abuse of dominance cases, refusal to deal cases, exclusive dealing and tied selling cases, and resale price maintenance cases);
3. Horizontal agreement cases (which includes cases brought under section 90.1 of the *Competition Act*); and
4. Merger cases.

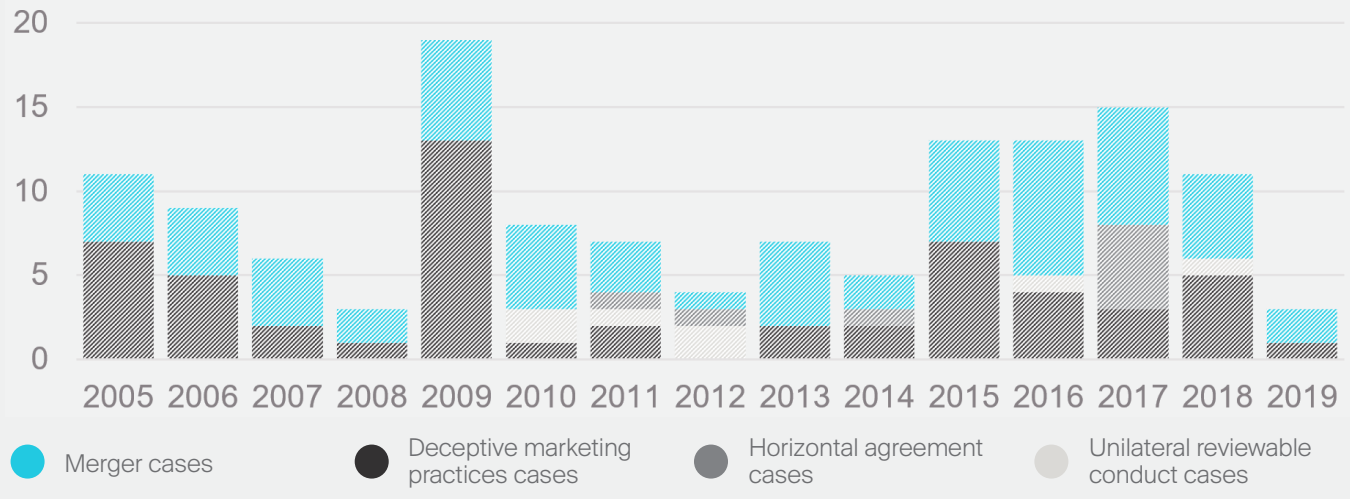
Over the 15-year period we looked at, merger and deceptive marketing practices cases (including registration of consent agreements) took up the lion's share of the Tribunal's case load. A total of 64 cases were started under the merger provisions of the *Act*, representing almost 48% of all cases, while 55 cases were brought under the false advertising provisions, representing 41% of all cases. By contrast, unilateral reviewable conduct cases represented just 5.2% of all cases, while horizontal agreement cases represented 6% of all cases.

We noted above that there is significant year-over-year variation in the number of cases brought by the Commissioner. A visual inspection of the data suggests that this year-over-year variation is largely driven by the number of deceptive marketing practices cases started by the Commissioner in any given year. These vary substantially year-over-year. For example, in 2012, the Commissioner commenced no deceptive marketing practices cases whatsoever. Conversely, in 2009, the Commissioner commenced 13 deceptive marketing practices cases.

By contrast, the number of merger cases started is more stable year-over-year. The Commissioner commenced at least one merger case in every year in our sample, and the maximum number of merger cases commenced by the Commissioner in any given year was eight.

"Over the 15-year period we looked at, merger and deceptive marketing practices cases took up the lion's share of the Tribunal's case load."

CASES STARTED BY THE COMMISSIONER BY TYPE



Basic descriptive statistics confirm these findings. Over the period 2005-2019, the Commissioner commenced an average of 3.67 deceptive marketing practices cases per year, but the standard deviation in the number of cases commenced in any given year was 3.37. By contrast, the Commissioner commenced an average of 4.27 merger cases per year over the period 2005-2019, though the standard deviation in the number of merger cases commenced was only 2.02. This indicates a much more consistent stream of merger activity than deceptive marketing practices cases.

For unilateral conduct and agreement cases, the total number of cases commenced are much lower, so it is hard to draw much insight from those cases. However, it is worth noting that single events can give rise to a large percentage of these cases. For example, of the eight cases commenced by the Commissioner under section 90.1 of the *Competition Act* since it was introduced in 2009, six of them represented consent agreements with players relating to an alleged anti-competitive agreement in the eBooks market.

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Outcomes of Cases

The Commissioner was able to resolve cases with parties in the vast majority of the matters brought before the Tribunal. Slightly over 80% of cases started by the Commissioner involved the registration of a consent agreement right at the outset of the matter, while another 11% of cases were resolved by way of a consent agreement sometime after the Notice of Application was issued. Of the remaining cases, approximately 1.5% were discontinued or withdrawn by the Commissioner after the case was brought. Of those, the balance of the cases proceeded to a hearing. Approximately 3% of all cases brought went to a hearing in which the Commissioner was successful, while approximately 4.4% of cases went to a hearing in which the Commissioner was unsuccessful.

Broken down by type of case, the data is more complicated. In each of merger cases, deceptive marketing practices cases, and horizontal agreement cases, the rates of consent agreements are very high. In merger cases, 87.5% of cases were consent agreements from the outset, while a further 6.25% of cases were subsequently resolved with a consent agreement. In horizontal agreement cases, although there were only eight of them in our sample, every single one of them was resolved by either a consent agreement at the outset or by a consent agreement after the issuance of a Notice of Application. Finally, in deceptive marketing practices cases, 82% of cases were resolved by a consent agreement at the outset, while a further 10.7% were resolved with a consent agreement after a Notice of Application.

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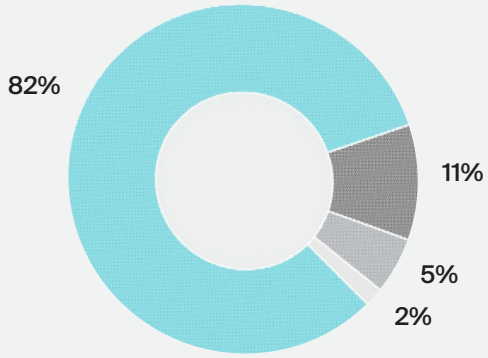
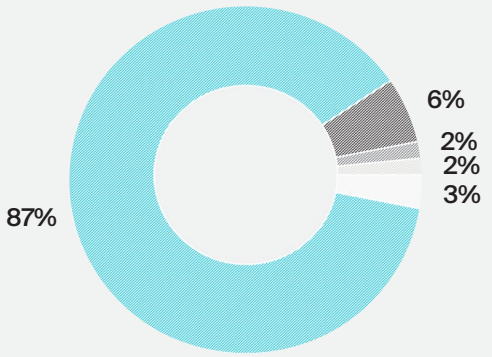
DECEPTIVE MARKETING PRACTICES CASES BY OUTCOME



- Consent agreement from the outset
- Consent agreement after Notice of Application
- Cases allowed after hearing on merits
- Cases dismissed after hearing on merits

MERGER CASES BY OUTCOME



- Consent agreement from the outset
- Consent agreement after Notice of Application
- Cases allowed after hearing on merits
- Cases dismissed after hearing on merits
- Case discontinued/withdrawn/stayed/dismissed on consent

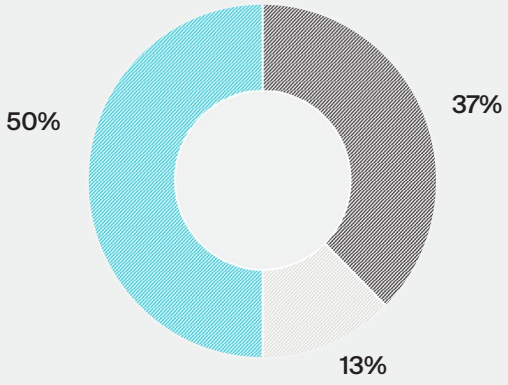
In the unilateral reviewable conduct cases, the situation is different. Of the eight cases brought by the Commissioner to the Tribunal, only one of them was resolved by a consent agreement from the outset, and only three more were resolved by a consent agreement after the Notice of Application was issued. The remaining four went to hearings.

In cases when the Commissioner litigates before the Tribunal, the Commissioner has a reasonable rate of success overall. The Commissioner has won (at first instance) four out of 10 cases that have proceeded to a contested hearing, while the Commissioner has lost (at first instance) six out of those 10 cases.

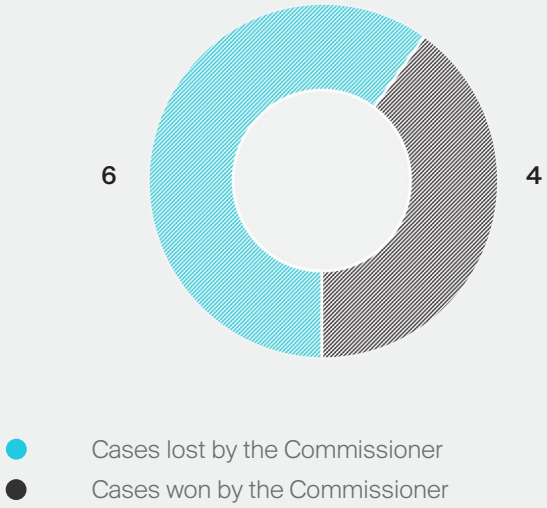
However, these success rates vary substantially by the type of case. Before the Tribunal, the Commissioner won one of the two merger cases he brought that went to a contested hearing and lost one. In deceptive marketing practices cases, of the four cases that went to hearings, the Commissioner prevailed in three of them. By contrast, of the four unilateral reviewable conduct cases that went to the Tribunal, the Commissioner was unsuccessful in each of them. Importantly, this understates the Commissioner's success, as the Commissioner has been successful in some of these cases following an appeal, such as the Toronto Real Estate Board case. This greater difficulty in succeeding in unilateral reviewable conduct cases at first instance likely reflects the lack of an established jurisprudence in this area, difficulties in selecting appropriate cases, and/or the challenges that the Commissioner faces in establishing unilateral reviewable conduct.

"In cases when the Commissioner litigates before the Tribunal, the Commissioner has a reasonable rate of success overall."

UNILATERAL CONDUCT CASES BY OUTCOME



CASES BROUGHT BY THE COMMISSIONER THAT PROCEED TO HEARING ON MERITS BY OUTCOME



Deceptive Marketing Practices Cases

We also looked in detail at the outcomes of deceptive marketing practices cases. In particular, we looked at the outcomes in all deceptive marketing practices cases where the Commissioner was either successful following a hearing or where a consent agreement was reached. In our data set, there were 50 cases between 2005 and 2019 that met these criteria. There are a range of remedies available under the deceptive market practices provisions of the *Act*, so there is value in ascertaining how often particular remedies are ordered and how large monetary remedies may be.

The outcomes reveal a range of remedial approaches:

- In every single one of those 50 cases, the disposition included some type of behavioural disposition, generally an order that the person cease making the false advertising.
- In 40 (80%) of those 50 cases, there was an order that the respondent implement a credible and effective compliance policy.
- In 33 (66%) of those cases, there was an order that the respondent pay an administrative monetary penalty.
- Finally, in 12 (24%) of those cases, some form of restitution was also ordered.

Among the 33 cases where an administrative monetary penalty was ordered or agreed to, the average administrative monetary penalty ordered was approximately $1.58 million. However, within those cases, there is substantial variation as to the amount ordered or agreed to. The lowest administrative monetary penalty ordered was merely $2,000, while the highest made in a single order was $15 million (which represented orders against two related entities in the same case).

> "Administrative monetary penalties in this area show a significant trend. In the late 2000s, the Commissioner focused on smaller cases with smaller outcomes. In recent years the Commissioner's approach has clearly shifted to targeting larger players and more significant matters."

Administrative monetary penalties in this area show a significant trend. In particular, the data suggests that in the late 2000s, the Commissioner focused on smaller cases with smaller outcomes. The average administrative monetary penalty agreed to or ordered between 2005 and 2008 ranged between approximately $22,000 and $200,000. However, in recent years the Commissioner's approach has clearly shifted to targeting larger players and more significant matters. From 2011 onward, in every year where administrative monetary penalties were imposed for a deceptive marketing practices contravention, they were in excess of $500,000, and were in excess of $1 million in almost all. This certainly appears to be an area where there has been a conscious shift in priorities by the Commissioner.

Length of Time to Resolution

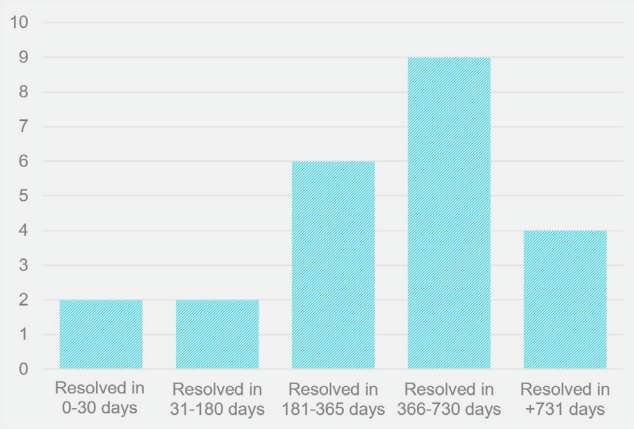
A final issue we looked at was the length of time between the start of the case (the date the Notice of Application was issued) and the date the case was resolved, either by consent agreement, withdrawal of the case by the Commissioner, or a disposition by the Tribunal. (Again, this data only includes proceedings before the Tribunal, and does not include time relating to appeals or rehearings.)

Of the 132 cases that were started by the Commissioner before the Competition Tribunal between 2005 and 2019, 109 were consent agreements that were registered. Only 23 were started by Notice of Application. On average, cases that were started by Notice of Application took 457 days to be concluded in some fashion.

Looking only at the set of cases that actually went to a contested hearing, the timelines are longer. Of the eight cases that were started by the Commissioner from 2005 onward that ultimately went to a contested hearing, the average time from start to initial disposition by the Tribunal was 579 days. Removing one case brought under section 100 of the *Competiton Act*, the average time increased to 661 days. In fact, leaving aside the case brought under section 100, no case was resolved by the Tribunal in less than a year.

> "On average, cases that were started by Notice of Application took 457 days to be concluded in some fashion."

TIME TO RESOLUTION OF CASES BROUGHT BY THE COMMISSIONER



TIME TO RESOLUTION OF CASES BROUGHT BY THE COMMISSIONER, CONTESTED HEARINGS ON MERITS ONLY

Conclusion

The analysis in this report shows the type of information that empirical analysis of legal disputes can provide. However, this report only scratches the surface. Our data set includes many additional variables pertaining to Competition Tribunal cases that can help better understand and characterize the cases before that body. Depending on the issues faced by clients and the information that matters to them, this data set can help provide objective advice, grounded in real-world data.

Our Competition and Antitrust Practice

Lenczner Slaght has extensive experience in all areas of competition litigation. We regularly act in cases involving alleged breaches of the *Competition Act*, including misleading advertising, price fixing and conspiracy cases. We also represent defendants in class actions alleging violations of the *Act*. Our clients include leading multinational electronics manufacturers, auto parts companies, and technology companies, among others.

Our lawyers' courtroom experience, combined with their deep understanding of strategic business issues, allows our firm to provide effective representation for both Canadian and international clients in the most vigorously contested disputes. In addition, our lawyers have a wealth of experience in successfully guiding clients through all types of regulatory and criminal investigations, including those conducted by the federal Competition Bureau.

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About the Author

Paul-Erik's commercial litigation practice focuses on class actions, competition law, intellectual property matters, complex commercial disputes, and professional liability. His clients include major technology companies, financial institutions, professional services firms, pharmaceutical companies, retailers, and franchisors. Paul-Erik has extensive trial experience, having acted as counsel in trials involving a number of industries and subject-matters, and appearing repeatedly before both the Supreme Court of Canada and the Ontario Court of Appeal. Paul-Erik is an adjunct professor at the University of Toronto Faculty of Law and a sessional lecturer in the graduate program in the Department of Economics, where he teaches Economic Analysis of Law. He is a strong proponent of quantitative analysis of legal decision-making.

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