

# Intelligence MEMOS



From: Paul-Erik Veel

To: Canadians Concerned About Competition

Date: September 23, 2020

Re: **IMPLICATIONS OF AN EMPIRICAL ANALYSIS OF COMPETITION TRIBUNAL CASES**

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The Competition Tribunal is the most important body for adjudicating disputes under the *Competition Act*. It has exclusive jurisdiction over disputes relating to the unilateral conduct, merger, and civil competitor agreement provisions of the act. It also has concurrent jurisdiction with courts over civil deceptive marketing practices. Most Canadian economically important competition law comes out of the Competition Tribunal.

Given the centrality of the Tribunal's work in Canadian competition law, it is important to understand what happens in its cases. To investigate that, we prepared a [dataset](#) that included almost every Tribunal case from 2005 to the end of last year; 150 in all.

What are the key findings?

**Case selection is very important** – Of those cases at the tribunal started by the Competition Commissioner, our data showed that approximately 80 percent were registered consent agreements from the outset, while another 11 percent were concluded by consent agreements after the case was started.

This high rate of consent agreements has at least two potential causes. The first is that the Bureau is doing a good job at choosing meritorious cases. The second is that respondents enter consent agreements because the costs and reputational and business risks associated with litigating before the Tribunal exceed the costs of a consent agreement. These are likely both at play.

Whatever its cause, this high rate of consent agreements means that, as a practical matter, the Commissioner and the Bureau wield enormous influence over the state of Canadian competition law. In most cases, businesses' conduct will change not because the Tribunal as an adjudicative body decided that it needed to, but because the Commissioner decided to take action. The data support the [conclusions](#) that the Bureau is a de facto integrated competition agency, performing investigative, enforcement, and adjudicative functions.

**The Bureau's priorities and approaches are not static** – Take the Commissioner's approach to deceptive marketing practices cases. The number of deceptive marketing practices cases started by the Commissioner varies significantly year over year: in 2009, the Commissioner started 13 deceptive marketing practices cases, while in 2012, there were none (Figure 1). This variation is unlikely a reflection of the number of deceptive marketing practices in Canada; rather, it more likely represents decisions by the Bureau to focus resources on different enforcement approaches at different times.

Our data also showed that the agreed-upon penalties to resolve deceptive marketing practices cases have shifted. In the late 2000s, the Commissioner resolved allegations of deceptive marketing for the payment of an administrative monetary penalty between \$50,000 and \$200,000. By contrast, since 2012, every consent agreement in a deceptive marketing practice case that included an administrative monetary penalty required the payment of at least \$500,000, and virtually all were in excess of \$1 million. This suggests a shift in the Bureau's enforcement practices, either to demand more harsh penalties, or to target more serious conduct. Both likely play a role. It appears that recent consent agreements are more likely to involve larger companies that are well-known to consumers than was the case in the late 2000s. High profile deceptive marketing practices cases resolved in recent years include matters involving Bell Mobility, Volkswagen, Hudson's Bay, Live Nation, and a number of rental car companies.

**The lack of contested cases means less clarity for market participants** – Decisions from the Tribunal help businesses understand whether particular conduct is lawful. However, because most of its cases are resolved by consent agreements, there are relatively few decisions to guide businesses. Our analysis shows that, not including re-hearings following an appeal, there were only 10 cases brought by the Commissioner that went to a contested hearing on the merits between 2005 and 2019.

This lack of case law reinforces the need for the Bureau's detailed enforcement guidelines. If there is insufficient case law from the tribunal to guide businesses, it is imperative that it provide detailed reliable guidance for market participants.

**The Tribunal is efficient** – Among cases started by Notice of Application between 2005 and 2019, the average time to conclusion was 457 days (Figure 2). Among those cases that proceeded to a contested hearing, leaving aside one outlier under Section 100 (which allows the Commissioner to seek an interim injunction for a proposed merger, and must therefore be invariably heard quickly), the average time from start to disposition was 661 days. Compared to the speed of cases in Superior Courts or the Federal Court, an average time from start to finish of less than two years is impressive. While certain intellectual property trials are mandated to happen in Federal Court within two years, most take substantially longer. In some provincial Superior Courts, it is not unusual to take at least three or four years, if not longer, for a case to reach trial.

The average timelines at the Tribunal would still be long in respect of a merger waiting to close: this likely explains why merging parties are generally willing to enter into consent agreements to resolve the Commissioner's concerns rather than litigate. However, for other types of disputes, the Tribunal's timelines are entirely appropriate. For most case types, the data paint a picture of the Tribunal as a body that can effectively and efficiently adjudicate competition law disputes, but is not currently being used to its full potential.

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Figure 1: Cases Started by the Commissioner by Type

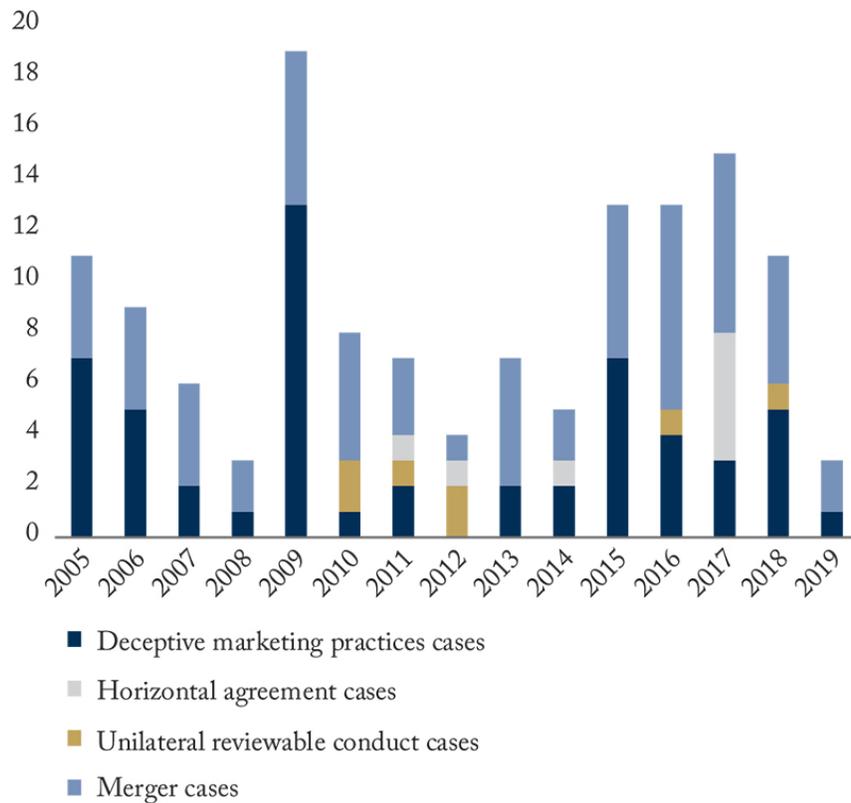


Figure 2: Time to Resolution of Cases brought by Commissioner (2005-2019)

