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COMPETITION LAW SERVICE

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This publication through regulatory analysis and a comprehensive digest of cases, offers practical insight into what constitutes reasonable competitive practices - and what breaks the law. The publication includes the full text of the *Competition Act*, fully digested and up-to-date, the *Competition Tribunal Act* digested with amendments, the *Competition Tribunal Rules*, information bulletins and enforcement guidelines, new speeches from the Commissioner of Competition, public statements, international agreements, reports and consultation papers.

What's new:

Competition Tribunal - Summary of Procedure - Case Law - Proceedings -
The objections voiced by VAA regarding the witness statements of

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Stewart and Bishop implicated the rules of evidence to be applied by the Tribunal in its proceedings, and gave rise to the need for the Tribunal to clarify its approach in that respect. An administrative decision-maker's power to admit or exclude evidence "is governed exclusively by its empowering legislation and any policies consistent with that legislation". It is well accepted that the Tribunal has flexible rules of procedure and is master of its own procedure. The Tribunal is specifically directed, by subsection 9(2) of the *Competition Tribunal Act* to deal with proceedings before it "as informally and expeditiously as the circumstances and considerations of fairness permit." However, contrary to many other administrative tribunals, there is no specific provision, whether in the *Competition Tribunal Act* or in the Competition Tribunal Rules, relaxing the rules of evidence to be applied by the Tribunal. Nor is there a provision explicitly or implicitly stating that the Tribunal is not bound by the ordinary rules of evidence in conducting matters before it. The direction couched in subsection 9(2) of the *Competition Tribunal Act* is not sufficient to preclude the general application of the usual civil rules of evidence in Tribunal proceedings, especially when those evidentiary rules have evolved, at least in part, so as to ensure fairness. Indeed, in many cases, the Tribunal has effectively followed the ordinary rules of evidence. The Tribunal also underscored that the legislative history of the Tribunal, and its enabling legislation, reflect an intention to judicialize, to a substantial degree, the processes of the Tribunal. It has been repeatedly recognized in recent decisions that the judicial-like nature of the Tribunal, and the important impact that its decisions can have on a party's interests, mean that the Tribunal must act with the highest degree of concern for procedural fairness. In *B-Filer*, the Tribunal stated that the language of subsection 9(2) of the *Competition Tribunal Act* is "consistent with the fact that the Tribunal is not precluded from departing from a strict rule of evidence when it considers that to be appropriate". The Tribunal considered that this general principle remained valid. However, considering the recent decisions of the FCA in *Pfizer Canada* and *FCA Privilege Decision*, the significance that the legislative framework places on the rules of fairness, and the absence of specific provisions allowing the Tribunal to depart from the ordinary rules of evidence, the Tribunal was of the view that the range of circumstances where it will be appropriate to adopt more relaxed rules of evidence in its proceedings is now more narrow. Having regard to those considerations, a more cautious approach needs to be favoured. In short, the Tribunal considers that in the absence of an agreement between the parties, it must adhere more strictly and more closely to the usual rules of evidence applied in court proceedings. This is especially the case with respect to evidentiary rules that appear to be anchored in a concern for procedural fairness. As

such, absent consent, the Tribunal will be reluctant to depart from the regular and usual rules of evidence when the underlying rationale for the evidentiary rules is procedural fairness, as is the case for the hearsay rule or for the rules governing expert evidence. In the same vein, the more critical the evidence will be and the more it will go to the core of the issue before the Tribunal, the more closely the Tribunal will adhere to the rules of evidence. When applying other evidentiary rules that are not based on procedural fairness, the Tribunal may be prepared to be more flexible, considering that regular admissibility rules have been increasingly liberalized by the courts. Even considering and applying the ordinary civil rules of evidence governing lay opinion evidence and hearsay evidence, the Tribunal was satisfied that the evidence of Stewart and Bishop disputed by VAA was admissible: *The Commissioner of Competition v. Vancouver Airport Authority*, 2019 CarswellNat 6031, 2019 Comp. Trib. 6 (Comp. Tribunal).

This release also includes the addition of the following Consent Agreements: Consent Agreement CT-2020-002, dated February 13, 2020 in the matter of a consent agreement pursuant to section 74.12 of the *Competition Act* with respect to certain deceptive marketing practices of the respondents under paragraphs 74.01(1)(a) and section 74.001 of the *Competition Act*, Consent Agreement CT-2020-001, dated January 28, 2020 in the matter of the proposed merger PeroxyChem Holding Company LLC and Lullaby LLC, a wholly owned indirect subsidiary of Evonik Industries AG, and Consent Agreement CT-2019-004, dated December 17, 2019 in the matter of the proposed acquisition of the shares of 9462287 Canada Inc. by 11715216 Canada Inc. This release also includes the addition of the following to the to the Public Statements - Speeches tab: Competition in the digital age, The Competition Bureau's Strategic Vision for 2020-2024, A Message from the Commissioner, February 11, 2020, and Honest Advertising in the Digital Age, Remarks by Josephine Palumbo, Deputy Commissioner, Deceptive Marketing Practices Directorate, Canadian Institute 26th Annual Advertising and Marketing Law Conference, January 22, 2020. This release also includes the addition of Competition Bureau Submission to the OECD Global Forum on Competition - Competition Provisions in Trade Agreements, December 4, 2019 to the International Agreements tab. This release also includes the addition of the Competition Bureau Submission to the OECD Working Party No. 3 Roundtable on "Access to the Case File and Protection of Confidential Information", December 2, 2019 to the Reports and Consultation Papers tab.

