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THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION – April 2019

LAW 464.001
Canadian Competition Law & Policy

Professors Tougas & Wright

TOTAL MARKS: 100

TIME ALLOWED: 3 HOURS

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NOTE:
1. THIS IS AN OPEN BOOK EXAMINATION. CANDIDATES MAY REFER TO AND USE ONLY PRINT MATERIALS.
2. ANSWER ALL QUESTIONS.
3. **DO NOT** PROVIDE ANSWERS ON THIS EXAMINATION (USE BOOKLETS OR COMPUTER BASED ANSWERS)

THIS EXAMINATION CONSISTS OF FIVE PARTS A, B, C, D & E:

PART A – 35 MARKS
PART B – 20 MARKS
PART C – 20 MARKS
PART D – 5 MARKS
PART E – 20 MARKS

***nb*: IN THIS EXAMINATION,**

"Act" means the *Competition Act* (Canada)
"Bureau" means the Competition Bureau
"Commissioner" means the Commissioner of Competition under the Act
All currency in Canadian dollars

Part A – 11 QUESTIONS (35 Marks)

Vuvuzela Inc. ("Vuvu") is a well-established privately-held company based in Botswana that operates in several countries, including Canada. In its last audited financial statements, Vuvu recorded worldwide sales of $1 billion, of which its gross revenues from, in or into Canada were $395 million, all of which were derived from the sale of non-prescription drugs, vitamins and health products, including blue algae, with global assets of $401 million, of which about $10 million are in Canada. Its enterprise value is $97 million. Vuvu intends to acquire 49% of Blue Comfort Inc. ("BluCo") in exchange for 37% of its own shares. Bluco is an Ontario company the shares of which are listed on the TSX with a market capitalization of $401 million that produces and sells blue algae for sale in pill form as a health aid. The most recent financial statements of Bluco disclose that it had assets in Canada of $97 million, but lost $97 million last year with gross revenues from, in or into Canada of only $7 million. On a positive note, Bluco's market capitalization is a whopping $1 billion. Both of Vuvu's and BluCo's products are commonly found in grocery stores, health food stores and pharmacies. Separate licences are required to produce and to sell blue algae, both of which are obtainable upon presentation of evidence of (i) sufficient existing equity capital and other financial resources, (ii) criminal record checks, (iii) Canadian residency of owners, (iv) Canadian place of business with dedicated research space that can only be used for blue algae quality assurance and microbial testing, and (v) payment of significant starting and annual licensing fees. Including Bluco, there are two large blue algae producers and sellers in Canada, each with about 50% share of Canadian production and each with about 30% share of Canadian sales. Including Vuvu, there are four large producers of blue algae elsewhere in the world, each with sporadic sales into Canada. The non-Canadian producers account for the remaining 40% share of sales in Canada, half of which are sales made into Canada by Vuvu (20% of Canadian total). You represent Vuvu, who now seeks your advice in respect of the competition law issues in connection with the transactions described above (the "Transactions").

MARKS

2 1. Which, if any, of the Transactions are notifiable under the Act?

4 2. Set out the analysis for determining whether a merger is notifiable under the Act and explain why any of the Transactions is or is not notifiable.

3 3. Are any of the Transactions subject to notice or review under the Investment Canada Act? Whose obligation is it to notify and whom does one notify? Explain your answers.

5 4. Assuming one or more of the Transactions is notifiable, name (a) all the types of notification filings that could be made with the Bureau, (b) the party or parties responsible for filing, (c) what type of filing you would recommend and the basis of your recommendation, (d) the circumstances in which the Bureau could ask for other information, whether Vuvu is required and what that information might entail.

3 5. The parties decide to proceed with the Transactions and submit filings to the Bureau. The Bureau advises you, as counsel for Vuvu, on the 5th day after you have notified the Bureau, that the Transactions have been classified as "complex". Your client intends to complete the Transactions in 5 days. Advise Vuvu whether to complete the Transactions in that time frame and what steps the Bureau might take in response?

1 6. The Commissioner advises that he may apply to block the Transactions. Before whom would he bring his application?

8 7. What arguments would you raise to convince the Tribunal that the Transactions should proceed to completion as notified and what might the Bureau argue? If there are issues to resolve, what advice would you give to Vuvu?

1 8. The parties have delayed completing the Transactions and over one year has passed since the filing of required information with the Bureau. Will the parties have to start the notification process again? Explain.

3 9. Finally, the parties complete the Transaction. Six months later, the Bureau receives complaints from (1) a competitor, whose prices have plummeted since the Transaction, (2) doctors who have expressed doubts over the claimed health benefits of blue algae consumption, and (3) consumers regarding the similarity of prices for algae in every region of Canada. The Bureau calls you to inform you of the complaint. Advise Vuvu.

3 10. Explain what is meant by structural, quasi-structural and behavioural remedies.

2 11. What are the two methodologies for calculating efficiency gains discussed by the Supreme Court of Canada in Tervita *v.* Canada (Commissioner of Competition)?

Part B – 3 QUESTIONS (20 Marks)

The tropical island nation of Elixtria is renowned for the fruit of the Elixter plant, which contains potent anti-oxidants. Elixter is not grown anywhere else in the world. The nation hosts the headquarters of the corporations Peam Inc. (P), Leklje Ltd. (L) and Relque Co. (R), the three most significant producers of consumable products derived from Elixter fruit. These producers collectively buy over 90% of the Elixter fruit harvested each year, all of which is grown by independent firms. P and L produce Elixter juices. R makes an Elixter spread which can be applied or spread onto toasted bread.

All three corporations export their products. P distributes to the United States and Canada via a wholly owned subsidiary (P2) incorporated in Delaware, which has a head office and distribution facilities in New York and a small warehouse and office in Montréal, Québec. L has a facility in Illinois from which it ships its juices to independent distributors in Canada. R's spread has not

"caught on" in North America but R has had sporadic online sales to consumers in the United States and Canada from its base in Elixtria.

Since 2009, representatives P, L and R have met monthly to exchange statistics about the harvest of Elixter fruit by independent growers. They often discussed what would be "fair" allocations of the fruit amongst themselves and in 2013 started to write out non-binding guidelines for such allocations. These firms normally adhered to the guidelines. Each firm appreciated that the amount of Elixter products made and exported was directly proportional to the firm's supply of such fruit. Infrequently, the parties also discussed the pricing of their respective end products to distributors and customers in other countries, including Canada.

MARKS

12 1. Comment on the possible application to P, L and R of conspiracy laws under the Act. In so doing, briefly identify additional information (if any) you would reasonably need to advance your analysis.

5 2. In 2019, a Canadian vacationing in Elixtria accidentally stumbles upon representatives of P and L leaving one of their monthly meetings. Outside the meeting facility, the Canadian finds discarded papers showing projected Elixter fruit purchases and sales in each country of P and L juices, projected pricing by L to distributors in Canada and elsewhere, and printouts of emails from P to P2 listing prices to be charged by P2 to its distributors in the US and Canada.

The Canadian, an avid consumer in Canada of the L brand juice, consults you as their lawyer as to procedures they may initiate under the Act in view of this information. Briefly summarize your advice. As part of your answer, address whether the Canadian would have any recourse against L, P and/or P2.

3 3. The Commissioner indirectly hears about the various communications involving L, P and R and opens an inquiry under Section 10 of the Act. Putting aside any potential voluntary cooperation, how could the Commissioner compel production of records of P under the Act? As part of your answer, address whether in order to compel the documents under the Act the Commissioner would have to show that the Act likely had been violated.

Part C – 6 QUESTIONS (20 Marks)

Y Capital is a Toronto hedge fund owned by billionaire and philanthropist, Robby Y. Y Capital's strategy has been to take 50 percent voting share positions in various privately held leading firms in an industry (with options to buy out the remaining voting interests), to insert representatives on the boards of directors and to use such influence in the selection and direction of management, and ultimately in the control of the firm's pricing and marketing strategies.

Y Capital made 50% voting share investments in Canadian Firms A (acquisition closed February 2012), B (closed March 2013), C (closed October 2016) and D (closed July 2017), each of which makes "widgets". Only the acquisition of A was notifiable under Part IX of the Act. The Commissioner issued a "no action" letter before it closed. In 2013, the Commissioner entered a consent agreement with Y Capital in reference to Section 92 of the Act regarding its acquisition of the 50% interest in B. The terms of the agreement prevented Y Capital from directly or indirectly appointing or directing the management or commercial activities of B for a period of 8 years. The consent agreement was registered with the Tribunal.

Senior Bureau Officer, Charles (Chuck) Lane has doggedly pursued Y Capital for many years. However, only in early 2019 did Lane and others at the Bureau learn of Y's investments in C and D. By that point, Firms A, B, C and D enjoyed collectively a share of 80% of the widgets sold in Canada broken down as follows: A (10%), B (30%), C (25%) and D (15%).

In 2015, Firm B developed a propriety method for constructing widgets that cut the production costs in half. Firm B did not apply for patent protection, but maintained the secrecy of its method. Firm B licensed the technology to A, C and D.

Firm E, a widget maker in which Y Capital has no interest, started in 2017. Through aggressive pricing, E grew its sales so that by 2018, it enjoyed a 10% share of Canadian widget sales. E then sought a licence from B for its proprietary widget-making technology, but B refused. It is now April 2019. E's share has dropped to 5%. It has been forced to raise prices to cover its growing production costs. Similarly, in March 2019, B refused to grant a licence to Firm F, a new entrant in the widget industry also unconnected to Y Capital.

MARKS

1 1. Can the Bureau now seek an order of the Tribunal in respect of Y Capital's investments in C and D under Section 92 of the Act?

3 2. Can the Bureau now seek an order of the Tribunal under any other section(s) of the Act in respect of Y Capital's investments in C and D? If so, briefly explain the allegations the Bureau might make in support of such an order.

3 3. Discuss whether, other than under Section 75, an order could be sought under the Act in respect of the refusal of B to grant licences to E and F of its widget-making technology.

3 4. Would the analysis in question 3 differ if instead, B had a Canadian patent over the technology and refused to provide a licence to E and F under the patent?

5. In the course of the Bureau investigation, an employee of B gives Officer Lane a tip that Robby Y and Y Capital have been working back-channels to pressure the president of B to withhold its technology from any company in which Y Capital does not have an interest.

2 (a) Is there a provision in the Act that might prevent Officer Lane from disclosing this tip to E and F? Explain your answer.

3 (b) Assuming that E and F learn of the tip lawfully, would they have any recourse under the Act (apart from making a complaint to the Bureau)? Explain your answer.

5 6. In December 2019, B relents and grants licences to E and F to its (unpatented) technology. As a condition of the licences, E and F are required to pay royalties to B amounting to 5% of their pre-tax profits of widget sales (they must provide detailed supporting records to B showing the profits) and to share with B any technological improvements they develop over B's technology. Under the licence, B is allowed to (and does) share with A, C and D the information received from E and F. Briefly discuss whether these licence arrangements may establish grounds for an order under Part VIII of the Act.

Part D – 1 QUESTION (5 Marks)

MARKS

5 1. Over the last several years, government and private antitrust enforcement of "no poach" agreements has ramped up in the United States. A no poach agreement generally involves an agreement between two or more unaffiliated employers not to compete for employees. Briefly discuss if you would expect a similar trend to develop in Canada with respect to public and private enforcement of the Act.

Part E – 9 QUESTIONS (20 Marks)

MARKS

4 1. Explain whether and the extent to which the regulated conduct doctrine is available where a conspiracy is made between parties one of whom is regulated by a provincial government.

2 2. Explain whether and the extent to which the regulated conduct doctrine is available where a merger substantially lessens competition, but is made between parties one of whom is regulated by the federal government.

2 3. Explain the difference between the anticompetitive threshold for abuse of dominant position and the threshold for mergers?

2 4. Name the circumstances, if any, that a person could be found to have failed to conduct adequate and proper tests prior to making a performance claim yet not be found to have made a false and misleading statement under s. 74.01(1)(a).

1 5. Does a claim have to relate to a product to fall under the misleading advertising sections of the *Competition Act*?

1 6. Do consumers have to rely on a claim for the claim to be misleading?

2 7. Is it true that as long as an advertising claim is "material" for the general misleading advertising sections of the *Competition Act* that is enough to establish intent under section 52?

1 8. Can a claim that is literally true violate the general misleading advertising provisions?

5 9. ACME Ice Cream Inc. grants an exclusive franchise to Bugsy's Donuts Limited for all of British Columbia respecting frozen, single serving dessert pies. No one else supplies the product. One condition of the franchise is that Bugsy's cannot sell its products outside British Columbia. Stinky's seeks your advice whether ACME can restrict Bugsy's in this manner under the Act and what the consequences might be for doing so.

END OF EXAM