

THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION – April 2020

LAW 464.001
Canadian Competition Law & Policy

Adjunct Professors Tougas & Wright

EXAMSOFT PASSWORD:
EXAMSOFT RESUME CODE:

TOTAL MARKS: 90

WRITING TIME ALLOWED: 3 HOURS
PREPARATION TIME ALLOWED: 10 MINUTES

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ANSWER ALL QUESTIONS.

DO NOT PROVIDE ANSWERS ON THIS EXAMINATION

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

PART A – 30 MARKS

PART B – 22 MARKS

PART C – 10 MARKS

PART D – 8 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 (30 Marks)

Zulu Inc. (“Zulu”) is a well-established privately-held company based in Botswana that operates in several countries, including Canada. In its last audited financial statements, Zulu recorded worldwide sales of \$1 billion, of which its gross revenues from, in or into Canada were \$10 million, all of which were derived from the sale of non-prescription drugs, vitamins and health products, including a variety of CBD products (CBD is derived from cannabis), with global assets of \$401 million, of which \$31 million are in Canada. Its enterprise value is \$99 million. Cold Comfort Inc. (“ColdCo”) will acquire all the shares of Zebra Corp, a company in which Zulu is a shareholder along with ten other individuals, in exchange for 37% of ColdCo’s shares. None of the shareholders of Zebra Corp, none of whom act as a voting group, will acquire more than 10% of ColdCo’s shares, except Zulu, which holds 15% of the shares of ColdCO already and will acquire another 4% in this transaction. ColdCo is an Ontario company controlled as to 51% by Canadian citizens. Its shares are listed on the TSX with a market capitalization of \$401 million that produces and sells CBD for sale in pill form as a health aid. The most recent financial statements of ColdCo disclose that it had assets last year in Canada of \$60 million, and last year had gross revenues from, in or into Canada of \$107 million, but lost \$100 million for income of only \$7 million. On a positive note, ColdCo’s market capitalization is a whopping \$1 billion. Both of Zulu’s and ColdCo’s products are found in licensed stores and available online. Separate licences are required to produce and to sell CBD, 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 CBD quality assurance and microbial testing, and (v) payment of significant starting and annual licensing fees. Including ColdCo and Zulu, there are five large CBD producers and sellers in Canada, each with about 20% share of Canadian production and sales. Including Zulu, there are several other producers of CBD elsewhere in the world, each with sporadic sales into Canada. The non-Canadian producers seem to sell into Canada only when the price rises up to the level of the US price, which is normally higher than the Canadian price. You represent ColdCo, 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.
- 1 3. Are any of the Transactions subject to notice or review under the Investment Canada Act?
- 5 4. Assuming one or more of the Transactions is notifiable, name (a) all the types of merger notification filings that could be made with the Bureau, (b) who is obligated to file, (c) what type of filing you would recommend and why, (d) the circumstances in which the Bureau could ask for other information, and (e) whether ColdCo is required to comply and what that information might entail.
- 2 5. The parties decide to proceed with the Transactions and submit filings to the Bureau. The Bureau advises you, as counsel for ColdCo, on the 5th day after you have notified the Bureau, that the Transactions have been classified as “complex”. The parties intend to complete the Transactions in 5 days. Advise ColdCo 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 ColdCo?
- 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.

- 2 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 CBD consumption, and (3) consumers regarding the similarity of prices for CBD in every region of Canada. The Bureau calls you to inform you of the complaint. Advise ColdCo.
- 2 10. Coldco wants to know whether it might be exposed to structural, quasi-structural and behavioural remedies, but just wants the difference between them. Explain briefly.
- 2 11. Coldco's inside counsel just read the decision of the Supreme Court of Canada in Tervita v. Canada (Commissioner of Competition) and asks you about two methodologies for calculating efficiency gains. Name the two methods.

Part B – 4 QUESTIONS (22 Marks)

During the 2020 pandemic demand for medical and other supplies have spiked.

Owing to foreign embargoes imposed on April 15, 2020, Canadian health care providers have to rely on domestic suppliers of ventilators used to treat patients with acute respiratory distress. There are three incumbent unaffiliated Canadian ventilator manufacturers, Tall (T), Grande (G) and Venti Ventilators (V). T and G are based in Ontario and V in Quebec, with shares of sales in Canada: T - 15%, G- 25% and V-60%. [It is possible that automobile manufacturers could convert facilities to make ventilators, but as of April 15 none had done so.]

Before the embargoes, the average price of ventilator sold in Canada was \$15,000. Following the imposition of the embargos, V announces in a press release that it was increasing its list price for ventilators from \$15,000 to \$20,000 taking account the risks associated with operating during a pandemic. G soon follows suit by increasing the list price of its ventilators from \$14,500 to \$19,975. T leaves its list price at \$16,000.

On April 22, representatives of V, G and T take part in an emergency meeting (by videoconference) of the Canadian Ventilator Association (CVA) to discuss issues associated with the pandemic. They discuss bottlenecks and inefficient overlap in delivery systems for ventilators. The CVA passes a non-binding resolution that in the interests of efficiency and public health, that going forward, V should focus supply in Quebec and eastern provinces; T in Ontario, and G in Southern Ontario, the western provinces and territories.

On April 29, G and T speak by phone to discuss coordinating their fleets of trucks used to distribute ventilators from their respective plants in Southern Ontario. They agree to temporarily pool their truck fleets together under the name "GT Delivery" and subject to the direction of the manager of G. Prior to April 2020, G and T allowed customers to

pick up ventilators at their facilities for a discount of \$1,000 per unit. On April 29, at the urging of the labour union representing workers at G and T which raised health and safety concerns, the two employers and union agree to amend the collective agreement to prohibit customers from attending their facilities and to require GT Delivery to impose a new temporary health and safety surcharge of \$2,000 for delivery of each ventilator.

MARKS

- 12** 1. Comment on the possible application of the criminal and civil conspiracy laws under the Act. In so doing, briefly identify additional information (if any) you would reasonably need to advance your analysis.
- 6** 2. On May 1, 2020 a group of operators of privately-operated nursing homes across Canada form a coalition to negotiate with V, G and T over what they characterize as unjustified policies and cost increases in the supply of ventilators.
- (a) Are there any implications under the Act if the nursing homes negotiate as a group with the ventilator suppliers?
- (b) Can the suppliers, acting through the CVA, lawfully negotiate terms of supply with the nursing home coalition in response to the invitation of that coalition?
- (c) If the suppliers and nursing homes were to meet (by videoconference) to negotiate, are there any precautions they should take in view of the Act?
- 2** 3. The announcements of V, G and T attract the attention of the Bureau. The Bureau wants to compel information and records but does not feel it should use search warrants during the pandemic. What formal steps can the Bureau take to compel such items from V, G and T?
- 2** 4. Upon the price increase announcements of April 15, a watchdog accuses V and G of price gouging and complains to the Competition Bureau. Can the Bureau act on the complaint under the abuse of dominance provisions of the Act?

Part C – 1 QUESTION (10 Marks)

ReallyBig Real Co. (RBGC) owns a chain of shopping malls across Canada. FancyMalls Ltd. (FM) controls various shopping malls in Western Canada.

The (fictitious) city of Vicloops British Columbia has a thriving population of 250,000 and two main shopping mall complexes on the outskirts of the city, located within one and a half kilometres of one another, both accessible by the one highway that connects the city to the rest of the province. RBGC and FM each control one of the shopping malls. Together, sales from the two malls account for 60% of all household retail goods sold in Vicloops (40% RBGC and 20% FM) and over 80% (55% RBGC and 25% FM) of the household retail sales for the area within a three kilometre radius of the malls.

Vagrancies (V) is the world's leading retail cosmetics chain. V seeks to locate its stores in prime retail centres within cities. For twenty years, V had a store in RBGC mall and then, in a result of a merger with a former rival in 2017, V also has store in the FM mall. V's stores account for over 70 percent of the retail sales of cosmetics in Vicloops.

In 2019, V approached RBGC with a proposal to contribute to a refresh of the mall. V would license copyrighted artwork it owned to RBGC to be displayed on exterior facia and signage not only at the Vicloops malls but other RBGC malls in Western Canada. V would contribute members of its international design team to assist RBGC with designs of the renovations. V agreed to expand its store at the RBGC Vicloops malls and to build three new stores at other RBGC malls in Western Canada. V renegotiated its lease at RBGC Vicloops to extend the term by 10 years and to include a new clause that it be the only store allowed to sell cosmetics at that mall. RBGC was prepared to agree to this new exclusivity term in view of the substantial benefits conferred by its enhanced business relationship with V.

The V store at the FM mall in Vicloops operates under five year leased entered in 2016 signed by the former rival where the lease payment would drop by 20% if FM allowed another cosmetic store to enter that mall. FM has not allowed another cosmetics firm to operate at that mall since 2016.

At the time of the 2019 lease renegotiation, V had contemplated an option of closing its RBGC store and expanding instead at the FM store. V was aware of a rumour that rival cosmetics chain Lexonia (L) was seeking to enter into Vicloops at one of the malls. It turned out that both RBGC and FM refused to lease space to L. While available retail space in Vicloops was limited, eventually, in 2020, L opened a store in Vicloops on a less prestigious street located within a kilometre of the malls.

MARKS

- 10** 1. On a complaint from L, the Bureau opens an investigation under the abuse of dominance provisions into the retail cosmetics market(s) in Vicloops, You are the assigned Bureau officer. Prepare your assessment of the situation including the recommendations to Bureau management whether to pursue the case, and your evaluation of anticipated defences that might be raised if there was an application to the Tribunal under Section 79.

Part D – 2 QUESTIONS (8 Marks)**MARKS**

- 3** 1. In absence of a relevant order of the Tribunal, can parties avoid their obligations under contracts on the basis of “non-compliance” or “violation” of a provision of Part VIII of the Act?
- 5** 2. Identify the provisions in the current Act that empower private persons resident in Canada (i.e. other than the Commissioner, Attorney General or other public figure) to take steps directly. For each provision identify its historical root as addressed in the lectures or lecture notes - i.e., the first time the provision or similar provision was introduced in the Act or other Canadian legislation.

Part E – 9 QUESTIONS (20 Marks)

MARKS

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| 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 differences between the anticompetitive threshold for mergers and the threshold for refusal to deal? |
| 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. | Do consumers have to rely on an advertising claim for the claim to be considered misleading? |
| 2 | 6. | Is it true that as long as an advertising claim is “material” for the general misleading advertising sections of the <i>Competition Act</i> that is enough to establish intent under section 52? |
| 1 | 7. | Can a claim that is literally true violate the general misleading advertising provisions? |
| 3 | 8. | Stovetop Ltd. grants an exclusive franchise to Palpitor s-r-U's Inc. for all of Nova Scotia to sell deep-fried, cream-filled bananas, on condition that it not sell product online. Is it an offence for Stovetop to limit sales in this manner? If so, what is the penalty? What remedy is available under the Act to stop Stovetop from enforcing this restriction? |
| 3 | 9. | If you were advocating for the Commissioner, on which purpose in s. 1.1 would you advance a monopsony claim if there was no harm to consumers? |

END OF EXAMINATION