

THE UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – April 2021

LAW 556C.002
Canadian Competition Law and Policy

Professors Tougas and Wright

EXAM PASSWORD: YmRLaF
RESUME CODE: B156A0

TOTAL MARKS: 103

(8:50 AM PDT) **PREPARATION TIME ALLOWED: 10 MINUTES**

(9:00 AM PDT) **WRITING (INCLUSIVE OF READING) TIME ALLOWED: 3 HOURS**

8:50-9:00 AM Preparation Time (Exam writing not permitted) – This time is given to students to download/print your exam questions once the exam has been made available online on Canvas, to read the Exam Password on this exam coversheet, to enter the Exam Password for the exam in Exemplify, and to progress in Exemplify until you see the **STOP SIGN**, where you will **WAIT until 9:00 AM. DO NOT proceed past the STOP SIGN. DO NOT begin typing your exam answers in Exemplify until 9:00 AM!**

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This is an open book examination, meaning that you can refer to class notes, casebooks and other class readings. The use of library books is not permitted.

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ANSWER ALL QUESTIONS.

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

PART A – 33 MARKS

PART B – 21 MARKS

PART C – 10 MARKS

PART D – 15 MARKS

PART E – 24 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

“Tribunal” means the Competition Tribunal

All currency in Canadian dollars

Part A – 11 QUESTIONS (33 Marks)

European Chemical Company (“ECC”) determined to purchase all of the shares of US Chemical Company (“USCC”) for \$1.2 billion (the “**Proposed Transaction**”). USCC owns all of Canadian Chemical Company (“CCC”). ECC is a global, publicly traded firm based in Belgium that sells specialty chemicals, including a compound (“**EV Compound**”) used to extract copper concentrate. Copper concentrate is used in the manufacture of electric vehicles. ECC produces and distributes EV Compound at facilities in Edmonton (Alberta) and Ste.-Hyacinthe (Québec) through its Canadian affiliate (“**ECan**”). ECC had 2020 gross revenue from sales, in, from and into Canada, of C\$20 billion, including its C\$71 million in revenues from ECan. ECan’s book value of assets are C\$57 million. USCC is a global, privately-owned manufacturer of specialty chemicals, operating in Canada through CCC, with a single facility that produces an EV Compound product in Horsefly, British Columbia (BC). CCC had 2020 gross revenues from sales from and in Canada of \$24 million, but no sales into Canada; its book value of assets in 2020 amounted to C\$38 million. In Western Canada, the only region in Canada where the parties’ upstream and downstream products overlap, ECan and CCC supply EV Compound to industrial customers, primarily in the mining sector. The Bureau became aware of the proposed transaction by way of a complaint from a customer in the mining industry. USCC’s 2020 worldwide gross revenues were C\$10 billion and its book value of assets exceeded C\$5 billion. The US Federal Trade Commission and the European Commission have reviewed the Proposed Transaction; neither are opposed. The Bureau has advised the parties that a remedy is necessary to avoid the likely prevention or substantial lessening of competition that would result from the Proposed Transaction with respect to the supply of EV Compound in Western Canada. You represent ECC, who seeks your advice in respect of the competition law issues relating to the Proposed Transaction. Although EV Compound products vary by grade and concentration, the parties’ facilities in Western Canada

manufacture solely standard grade EV Compound. Upon inquiry by the Bureau, the parties' customers consistently indicate that there are not any viable alternatives to the product for use in the mining sector, and that EV Compound is the most suitable, cost-effective and environmentally friendly chemical available. For these reasons, the Bureau determines that standard grade EV Compound is the appropriate product market for its analysis. In evaluating the geographic market, the primary consideration is the significant freight costs of transporting EV Compound. The Bureau has determined that competitors who do not have production facilities in Western Canada or the US Pacific Northwest ("PNW") will not be able to constrain the merged entity from increasing prices for EV Compound substantially after the Proposed Transaction. The Bureau has determined that other North American EV Compound producers with numerous facilities located in the US Southeast and in Eastern Canada will be ineffective competitors in Western Canada because of the prohibitive freight costs of shipping product long distances. The Bureau has determined that Western Canada and the PNW is the appropriate geographic market for its analysis. Using these product and geographic market frameworks, the Bureau has compared the levels of pre-merger and anticipated post-merger competition. The Bureau's analysis concludes that ECan and CCC have competed directly, are close rivals and have historically constrained each other's pricing during bidding processes. There is significant evidence from customers and the parties' internal documents of competition between the parties where customers leverage that competition to obtain lower pricing for EV Compound. The Bureau's competitive analysis demonstrates that absent a remedy, Washco, a producer of EV Compound with a production facility in the PNW, will be the sole remaining competitor in the market. The Proposed Transaction would create, therefore, a duopoly market structure. In order to remedy the likely substantial lessening of competition, the Bureau requires that USCC divest CCC to ChemWorld, a global specialty chemicals manufacturer based in Dubai (the "**Divestiture**").

MARKS

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| 2 | 1. | Is the Proposed Transaction notifiable under the Act? |
| 4 | 2. | Set out the analysis for determining whether a merger is notifiable under the Act and explain why the Proposed Transaction is or is not notifiable. |
| 2 | 3. | Is the Proposed Transaction subject to notice or review under the Investment Canada Act? Why? |
| 5 | 4. | Assume the Proposed Transaction 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 authority of, and the circumstances in which, the Bureau could ask for other information, and (e) whether the parties are required to comply, what that information might entail and the impact of filing obligations on timelines to complete the Proposed Transaction. |
| 1 | 6. | Before whom would the Commissioner bring his application to compel the Divestiture? |

- 8 7. Select which of the reasons below would support the Commissioner's position regarding the Divestiture before the Tribunal?
- a) the merged entity will have high post-merger market share, whether measured by capacity or sales
 - b) Washco has finite capacity, and it is unlikely that it would provide a sufficient constraint on the merged entity's ability to increase prices to EV Compound customers in Western Canada after the Proposed Transaction
 - c) The Bureau has been informed there would be upward pricing pressure, confirmed by merger simulation analyses conducted by its economic expert
 - d) The Bureau has concluded that the loss of rivalry resulting from the proposed transaction would likely substantially lessen competition for the supply of EV Compound in Western Canada.
 - e) The Bureau determined that de novo barriers to entry for the production of EV Compound are high due to the significant capital costs and time to build a production facility, the requirement for regulatory approvals and permits, and the mature nature of the market in Western Canada.
 - f) The Bureau has determined that timely, likely and sufficient entry would not be likely to constrain the substantial lessening of competition that would likely result from the Proposed Transaction.
- 1 8. The parties have delayed completing the Proposed Transaction 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.
- 4 9. Finally, the parties complete the Proposed Transaction. Six months later, the Bureau receives complaints from (1) a competitor, whose prices have plummeted since the Proposed Transaction, (2) other economic experts on behalf of ECC, who have expressed doubts over the reasons the Bureau has advanced for the Divestiture, and (3) customers regarding the disparity of pricing in Western Canada versus Eastern Canada. The Bureau calls you to inform you of the complaint. Advise ECC on limitations, process and validity of the complaints.
- 4 10. To assess the suitability of ChemWorld as a purchaser of CCC, the Commissioner considered its independence from the merged entity, whether they have the managerial, operational, and financial capability to compete effectively in the market, whether they are committed to competing in the market, and the likely impact on competition resulting from their proposed purchase of CCC. To assess these criteria the Bureau has reviewed internal business documents and sworn testimony from ChemWorld, and conducted interviews with a comprehensive set of relevant stakeholders, including EV Compound customers and suppliers in Western Canada and other potential purchasers of CCC. Following this review

process, the Bureau concluded that ChemWorld is a suitable buyer committed to competing vigorously in Western Canada's EV Compound market. If USCC fails to complete the Divestiture to ChemWorld or another purchaser approved by the Bureau during a confidential initial sale period, a divestiture trustee will be appointed to complete the Divestiture. ECC wants to know whether it might refuse to cooperate with the Divestiture and on what grounds. Explain briefly.

- 2 11. ECC'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 methodological standards for determining efficiency gains. Name the two methods.

Part B – 2 QUESTIONS (21 Marks)

The COVID-19 pandemic continues into 2021 and masks are all the rage.

Protective masks come with different specifications, offering degrees of protection, fit, comfort convenience and style. For many years in Canada, two independently-owned companies (A and B) have made high-quality protective masks (under the respective brand names, “Eh” and “Bee”), and have enjoyed combined shares of 80% of protective masks used by customers like medical professionals who require a high degree of superior filtering, durability and breathability. Unknown to most of the public, the technology and manufacturing process for Eh and Bee masks were developed by A in 2005. A and B formed a manufacturing joint venture in 2009 and that year completed a factory in Brampton, Ontario. The manufacturing process is subject to a patent owned by A and licenced to B. The patent and joint venture agreement expire in 2025.

Following the terms of the joint venture agreement and patent licence, since 2009 A and B have met annually to discuss the recommended wholesale and suggested retail prices for masks manufactured at their common Brampton factory. Invariably, since 2009 the parties have followed the recommended wholesale prices. Starting in 2014, A implemented a Most Excellent Pricing (MEP) policy which require authorized resellers of Eh masks to offer the products for sale at no less than 133.33% of the recommended wholesale prices. Starting in 2015, B followed suit and implemented a similar MEP for the Bee masks sold in Canada. Under the joint venture agreement, A and B agreed not to independently develop or sell other protective masks. As of 2021, the wholesale and MEP prices of Eh and Bee are \$15 and \$20.

In early 2021, a new entrant from France (“F”) starts selling high quality protective masks in Canada known as “Le Soleil”. F has newly-issued world-wide patents (including in Canada) over a feature that allows the masks to be effectively and easily cleaned and reused by users, unlike the Eh and Bee masks which are specified in the user manuals to be one-time use only. F also offers direct sales of its masks at \$14 to customers (including end-customers) through a website. F does not charge different prices to wholesalers, retailer or end-users.

After F starts selling to customers in Canada, A commences a lawsuit in Federal Court alleging that F’s masks infringe A’s Canadian patent. F vigorously disputes infringement and counterclaims that A’s Canadian patent is invalid. Eventually, A, B and F meet on the French territory of St Pierre and Miquelon and negotiate a resolution to the litigation. F discontinues its counterclaim and agrees stop selling its masks in Canada except under licence from A. A grants a licence to F where F must pay a royalty of \$10 per Le Soleil mask, unless F’s price to customers is over \$25, in which case F will pay to A royalties of \$5 per Le Soleil mask. The licence agreement runs until 2027. A and B agree to take a 5 year licence from F under its Canadian patent and they agree to pay F a lump sum royalty of \$1 million for exclusivity of the licence (under the terms, only A, B and F are allowed to make and sell masks covered by F’s patent). However, A and B have little intention of making reusable masks following the teaching of the F patent and once the licence starts, they make no attempt to make or sell any such masks.

MARKS

- 15** 1. Comment on the possible application of the Act to the above-scenario (however, do not address the merger provisions). In so doing, briefly identify additional information (if any) you would reasonably need to advance your analysis.
- 6** 2. As an alternative to the patent litigation and settlement, assume the following happens (comment on the possible application of the Act):

Soon after F starts selling Le Soleil in Canada, A and B each approach hospitals and factories which buy Eh and Bee masks for use by their personnel. A and B express concerns that the reuse of protective masks is neither hygienic nor safe. A and B separately indicate to their customers that mask supply priority will be given to facilities which ban the use of reusable protective masks. Subsequently, almost 75% of the hospitals and factories in collective bargaining agreements with workers amend their collective bargaining agreements to ban the use of reusable masks. Thereafter, F's sales of Le Soleil masks in Canada decline significantly.

Part C – 1 QUESTION (10 Marks)

Since 2005, Blue Zone Inc. (“**BZI**”) has operated a peer-reviewed guide to legal professionals recognizing distinguished lawyers in Canada in various fields. Recognized lawyers receive “Bluebody” awards. Each year, BZI updates the list of Bluebody recipients. For certain types of work, most general counsel will refuse to consider retaining an external lawyer unless they are on the current Bluebody list. Lawyers on the Bluebody list are normally able to charge \$200 more per hour compared with lawyers who are not on the list.

While there are other lawyer rating agencies in Canada, none has the prestige, recognition or acceptance of the Bluebodies.

In 2021, representatives of 4 large Toronto law firms secure appointments as directors of BZI. BZI then decides to reform its system. First, in order to vote on Bluebody awards, lawyers must become members of BZI at a fee of \$1,000.00 (before membership in BZI was not required to vote). Second, membership is required in order to be eligible to win an award. Third, in order to receive a Bluebody, the putative winner must buy from BZI a silver-plated plaque at the cost of \$10,000.00. Fourth, Bluebody recipients are no longer allowed to publish or promote ratings or awards they received from other ratings agencies.

After implementation of these changes, the number of lawyers who vote on the Bluebodies shrinks in half, and the participating members and winners become more heavily skewed to firms with more than 50 lawyers. The advertising revenues generated by two of the next most prominent ratings agencies decline as fewer prominent lawyers openly acknowledge those designations.

MARKS

- 10** 1. A small law firm in Vancouver grows disgruntled with the changes with the Bluebodies and complains to the Bureau, which opens an investigation under Sections 77 and 79 of the Act. You are the assigned Bureau officer. Prepare your (brief) assessment of the situation including the recommendations to Bureau management whether to pursue the case and what additional information should be acquired.

Part D – 3 QUESTIONS (15 Marks)

ACME operates a chain of stores that sell anvils. Its only retail competitor in the relevant geographic market is Roadrunners. Roadrunners and ACME each sell comparable quantities of anvils each year.

ACME publishes a flyer entitled “Spring Sale” with a subheading “Below Roadrunners’ prices”. The flyer shows photos of 10 different anvil models available from ACME with text in the following format beside each photo:

Sale Price \$ X.xx - Save \$Y.yy

For example:

Sale Price \$174.99 - Save \$18.00

ACME generated the \$Y.yy figures in “Save \$Y.yy” by subtracting the ACME sale price for that item from the price ACME charged immediately prior to the sale period.

Roadrunners also sells the 10 anvil models at its stores. Roadrunners’ regular prices for those anvils are either equal to or higher than the ACME sale prices. For 3 out of the 10 models, the Roadrunners’ regular price is equal to or higher than the regular ACME price for the same item. ACME and Roadrunner sell other anvil models not featured in the flyer and for certain of those models, the Roadrunners’ price is lower than the ACME price.

MARKS

- 3 1. Based on the information set out above, does this flyer contravene Part VII.1 of the Act? Explain with reference to any applicable subsections/subparagraphs of the Act.

- 2 2. Assuming there is a contravention of Part VII.1, identify a specific way ACME could modify the flyer to better comply with Part VII.1 (but continuing to show the savings for the items compared with the regular ACME prices).

3. Wile E. Coyote is a loyal ACME customer. After making up his mind to buy a particular anvil, Model A767, he sets out on his rocket-powered roller-skates to the ACME store. Upon entering, he is pleasantly surprised to see for the first time in the flyer available at the front of the store that Model A767 is on sale. Two and a half years later, following an unfortunate incident involving his anvil, Wile is upset with ACME. Amongst other things, he approaches a competition lawyer, mentions the flyer he saw in the store and asks if he can sue ACME under the Act. The lawyer retains a costly private investigator to conduct research and the PI determines that after the ACME flyer was first published but before Wile bought the anvil, Roadrunners lowered its price for Model A767 below the ACME promotional price.

(a) Wile complains to the Bureau under Part VII.1 of the Act that the statement in the flyer - "Below Roadrunners' prices" was materially false or misleading.

1 (i) Under Part VII.1, must the Bureau show that Wile or another member of the public was aware of the lower Roadrunners prices at the time they purchased Model A767 from ACME? Why (or why not)?

3 (ii) Can ACME defend a Bureau application for an order under Part VII.1 on the basis that the Roadrunners' price for Model A767 was higher when the ACME flyer was first published and that at the time Wile visited the ACME store, ACME was unaware that Roadrunners had lowered its price for the A767 model?

1 (iii) Is Wile himself able to sue ACME under Part VII.1 of the Act?

5 (b) Other than Part VII.1, are there other provision(s) in the Act under which Wile could attempt to sue ACME in respect of its flyer? Identify any such provisions and explain briefly what Wile would have to demonstrate, the types of relief available to him, and arguments and defences you expect ACME would raise in defence.

Part E – 10 QUESTIONS (24 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. |
| 3 | 4. | Explain the main differences in the requirements to obtain an order under Section 11 of the Act versus a search warrant under Section 15 of the Act. |
| 2 | 5. | Can the Attorney General of <i>British Columbia</i> bring a proceeding under the Act (apart from under Section 36)? If so, identify the applicable section(s). |
| 2 | 6. | Explain whether and the circumstances (if any) in which the testimony of an individual under a Section 11 order under the Act may be used to prosecute that individual. |
| 2 | 7. | Explain whether the Bureau is permitted to share information from a voluntary interview of a Canadian citizen with competition authorities in another country. |
| 3 | 8. | 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? |
| 2 | 9. | What was the title of the head of the Bureau immediately before the position became known as “Commissioner of Competition”? When did the change take place? |
| 2 | 10. | Explain whether three judicial members may sit on a Tribunal panel hearing an application under the Act. |

END OF EXAM