

**THIS EXAMINATION CONSISTS OF 8 PAGES  
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**THE UNIVERSITY OF BRITISH COLUMBIA  
FACULTY OF LAW**

**FINAL EXAMINATION – APRIL 2022**

**LAW 464.001  
Canadian Competition Law & Policy**

Professors Tougas & Wright

**TOTAL MARKS: 90**

**TIME ALLOWED: 3 HOURS  
Plus 10 minutes reading time**

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- NOTE: 1. This is an open book examination, meaning that you can refer to class notes, casebooks and other class readings.

ANSWER ALL QUESTIONS.

**DO NOT PROVIDE ANSWERS ON THIS EXAMINATION**

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

**PART A – 33 MARKS  
PART B – 16 MARKS  
PART C – 14 MARKS  
PART D – 6 MARKS  
PART E – 21 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**

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### **Part A – 11 QUESTIONS (33 Marks)**

Baby Bully Ltd. (“**BBL**”) has determined to purchase 34% of the shares of Timid Target Corporation (“**TTC**”) for \$1.8 billion (the “**Proposed Transaction**”). Bully Acquisitions Inc. (“**BAI**”) controls the voting shares of BBL. BBL is a private company organized under the laws of Canada. BAI is a global, publicly traded firm based in China that produces conventional and “natural” cosmetics. BBL supplies BAI’s products to markets in Canada and the United States from BBL’s facilities in Canada. BBL had 2021 gross revenue from sales, in, from and into Canada, of \$300 million. BBL’s book value of assets were \$77 million. TTC, a global producer of health and beauty aids, including “natural” cosmetics, is organized under the laws of Canada. Its shares are publicly traded. It operates several production and sales facilities throughout Canada and elsewhere. TTC had 2021 gross revenues from sales from and in Canada of \$99.99 million, with no sales into Canada. Its book value of assets in 2021 were \$48 million. 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 “natural” cosmetics in Canada. You represent BBL, who seeks your advice in respect of the competition law issues relating to the Proposed Transaction. Upon inquiry by the Bureau, TTC’s customers consistently indicate that they prefer TTC products over BBL’s, that TTC’s products are less expensive and better than BBL’s, and that they want a Canadian-origin product. There are other competitors and possible suppliers: BBL supplies about 20% of the Canadian market, TTC supplies about 15%, and 13 others supply cosmetics in Canada from facilities inside and outside of Canada, each with between 3% and 7% of the supply of “natural cosmetics”. The Bureau has determined that “natural” cosmetics are the appropriate product market for its analysis and that the geographic market is Canada. The Bureau has compared the levels of pre-merger and anticipated post-merger competition, and has concluded that BBL and TTC have competed directly for several years and are close rivals. There is evidence from customers and the parties’ internal documents demonstrating that BBL has reacted to TTC pricing on several occasions. The Bureau’s competitive analysis demonstrates that absent a remedy, BBL will require that TTC impose a material price increase, reduce its quality or both. In order to remedy the likely substantial lessening of competition, the Bureau requires that BBL divest 20% of its production to another buyer within 3 months (the “**Divestiture**”).

#### **MARKS**

- 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. BBL seeks to complete the Proposed Transaction within 35 days after notifying the Bureau. Name (a) all the types of merger notification filings that could be made with the Bureau, (b) who is obligated to file a notification in this case, (c) what type of filing you would recommend and why, (d) the authority of, and the circumstances in which, the Bureau could request or demand other information, and (e) whether the parties are required to comply, (f) what that information might entail and (g) 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. Explain to BBL the reasons in favour of, and opposed to, if the Commissioner were to advance his position regarding the Divestiture.
- 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 BBL, 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 BBL on limitations, process and validity of the complaints.
- 4 10. The merging parties would like to hive off 25% of the merged entity as a standalone operating business as a solution to the Divestiture obligation and have identified Rump Joint Venture Company (“**RJVC**”) as a prospective purchaser. Name four substantive legal criteria the Commissioner might consider in determining whether to permit RJVC to acquire the operating business.
- 2 11. BBL’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 – 1 QUESTION (16 Marks)**

A and B are the two largest Canadian-based manufacturers of saddle-pads which provide a thin layer of cushioning between the horse's back and its saddle. C is a US-based manufacturer of saddle-pads with no operations or affiliates in Canada but C has the third highest sales of saddle-pads sold in Canada. None sell directly to consumers - they sell either through unaffiliated distributors or retailers.

The Horse Whisperers (“HW”) is a North American trade association comprised of firms who make accessories used in horse riding. During an annual meeting of HW held in 2022 in Seattle, members go “around the table”, each providing a summary of their 2021 sales and current average prices for each of 5 types of accessory products including saddle pads. It turns out that this has been a tradition of annual meetings of the HW since 2005. About a month after the meetings, HW releases a summary of the averages sales and prices. Membership in HW accounts for 95 percent of the horse riding accessory industry.

Representatives of A, B and C meet for dinner in Seattle after the 2022 HW annual meeting. In the course of the dinner, they address how to handle rising inflation. They discuss how they do not want to gouge customers but want to ensure that the rising costs that each must bear are fairly and evenly passed only to distributors and retailers. They discuss a formula pegged to the monthly government of Canada inflation rate plus a 0.5 percent admin fee. During the same dinner, they discuss funding a research project for the development of an integrated saddle and saddle pad, which would obviate the need to buy the items separately. The reps of A and C, referring to both the inflation adjustment and contributions to the research project say they are willing to fund the research once the inflation formula is settled. B’s rep says they will “sleep on it.”

There are no further communications but a month later, after the Canadian government announces the inflation rate, A and C immediately announce price increases that follow the formula discussed over the earlier dinner. B increases prices but an amount just above the rate of inflation but less than would apply under the formula.

A, B and C then increase the minimum advertised prices under their respective Minimum Advertised Price Policies (MAP) that apply to their Canadian distributors and retailers. It turns out that the language of each MAP is identical. Under the MAPs, the resellers may be terminated if they advertise for resale a product at less than the price set by the MAP. However, the MAPs do not have language that would prevent resellers from selling the products at a lower amount. It turns out that all retailers and distributors of A, B and C follow the MAPs not only in their advertised prices but their actual prices. Soon after that, the retailers increase prices for saddle-pads sourced from other manufacturers who do not have MAPs.

Julianne and Liz, two keen horse-riders, are upset to see prices rising. They consult you, their lawyer, as to options they have under the Act. Julianne buys a saddle pad made by B after B increases its prices. Liz buys a saddle pad made by another manufacturer (other than A, B or C) at an increased price.

**MARKS**

- 16**    1.    Comment on the possible application of the Act to the conduct of A, B and C and the remedies and options that may be available to Julianne and Liz. In so doing, briefly identify additional information (if any) you would reasonably need to advance your analysis.

**Part C – 3 QUESTIONS (14 Marks)**

FarmCo has developed useful technology and know-how for the harvesting of durum wheat which it has kept secret (FarmCo personnel are bound by confidentiality agreements). FarmCo uses this technology in the operation of its farms in western Canada.

FarmCo proposes to acquire IntheDellCo, which owns a patent portfolio covering certain methods of harvesting and processing wheat. In exchange for a royalty payment, IntheDellCo grants one year licences under these patents to FarmCo and hundreds of other farmers in Western Canada who compete with FarmCo for the sale of durum wheat. IntheDellCo's practice has been to reissue the licences at the end of each one year term.

A coalition representing 90% of Canadian prepackaged bread makers (BMakers), who rely on wheat as an input in making their bread products, is unhappy with this proposed acquisition and complains to the Bureau. BMakers learns that FarmCo plans to terminate the patent licenses of all rival farmers and selectively enter into new licenses with only half of the farmers (with plans to bring vigorous patent infringement actions against unlicensed farmers who continue to use the patented technology). FarmCo would also entice bread makers with volume discounts of 20% if and when the bread maker agrees to secure all of its durum wheat from FarmCo, and a 10% discount if the bread maker secures at least 50% of its wheat from FarmCo.

A consumer organization (ConOrg) is concerned that the cost of bread will increase because the cost of durum wheat will increase in view of these developments.

**MARKS**

- 4     1.     The Bureau investigates the proposed acquisition of IntheDellCo, under Section 92 on the basis that FarmCo's acquisition of the patent portfolio is anticompetitive. FarmCo argues that there is no basis for review because it is only acquiring patent rights) and the Act respects intellectual property rights( ,and there could be no SLPC because FarmCo itself does not own any patents. Are FarmCo's arguments well-founded?
  
- 6     2.     Assume there is no merger investigation and the acquisition closes. Discuss whether the conduct of FarmCo. may give rise to an order of the Tribunal under provisions of Part VIII of the Act other than merger provisions, keeping in mind that FarmCo will assert throughout that it is entitled to exercise the intellectual property rights associated with the patent portfolio.
  
- 4     3.     ConOrg complains to the Bureau that the higher wheat and bread prices amount to "anti-competitive practices" under Section 79 of the Act. Briefly evaluate ConOrg's argument and discuss whether the higher wheat and bread prices are otherwise relevant to an investigation under Section 79.

**Part D – 1 QUESTION (6 Marks)****MARKS**

- 6      1.      Recently, the Canadian government announced an intention to modernize the Act through amendments. Assuming you are in charge, identify two changes to the Act (one a change to the substantive law, the other to process) that you would prioritize. Briefly explain your decision, having regard to the history of competition law and policy in Canada.

**Part E – 10 QUESTIONS (21 Marks)****MARKS**

- 2 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 and the other is regulated by the federal government.
- 2 2. Explain whether and the extent to which the regulated conduct doctrine is available where a business with a dominant position in an industry engages in a practice of anticompetitive acts that substantially lessens competition.
- 2 3. Explain the differences between the anticompetitive threshold for mergers and the threshold for refusal to deal?
- 2 4. ABC Inc. advertises that its AA batteries “last the longest”. ABC is confident that if the Bureau were to bring a proceeding under Part VII.1 of the Act, that ABC would be able to find an expert to testify that this statement is literally true when the batteries are used in a particular children’s toy. Identify two reasons why, even if such an expert’s evidence were accepted, that ABC may have violated Part VII.1.
- 2 5. Can the false and misleading representations provisions in Part VII.1 of the Act apply to a materially false representation made verbally in a private meeting? Briefly explain.
- 2 6. Can a private action for damages under Section 36(1) of the Act be made based on the allegation that a representation violated Section 74.01(1)(a)? Is it otherwise possible to bring a private action for damages under Section 36(1) based on a materially false or misleading representation?
- 2 7. A few employees anonymously post fake online reviews of their employer’s product on the employer’s website. What is this practice known as? Could the employer be held responsible under the Act for such conduct?
- 4 8. Identify two provisions in the Act (other than Section 79) where unilateral refusals to supply a product could give rise to a Tribunal order. Briefly explain what would have to be shown under each provision.
- 1 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?
- 2 10. Is a person examined under section 12 compellable and is that person entitled to make a claim of privilege?

**END OF EXAM**