THIS EXAMINATION CONSISTS OF 9 PAGES

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THE UNIVERSITY OF BRITISH COLUMBIA

PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – APRIL 2023

LAW 464

Canadian Competition Law & Policy

Section 1

Professors Tougas & Wright

**TOTAL MARKS:** 92

**TIME ALLOWED:** 3 HOURS

Plus 30 minutes reading time
You may start writing the exam at any time.

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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 – 28 MARKS**

**PART B – 15 MARKS**

**PART C – 18 MARKS**

**PART D – 6 MARKS**

**PART E – 25 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 – 8 QUESTIONS (28 Marks)**

Raider Acquisition Ltd. (“**RAL**”) has determined to purchase 39% of the voting shares of Cible Canada Corporation (“**CCC**”) for $1.95 billion plus 25% of RAL’s shares, while CBC Inc. (“**CBC**”) will acquire 10% of the voting shares of CCC (the “**Proposed Transactions**”). CBC controls the voting shares of RAL. RAL amalgamated with Company B under the laws of Canada in 2010 and its shares are publicly traded on the Paris stock exchange. CBC is incorporated in China, operating from Hong Kong: a single person based in Singapore owns its shares. CBCt produces only paper products, including FH products, for sale throughout Asia, but primarily in China. RAL distributes CBC’s FH products to markets in Canada and the United States from RAL’s facilities in Canada. RAL’s 2022 audited financial statements disclose gross revenue from sales, in, from and into Canada, of $200 million of which $75 million were from sales into Canada from elsewhere, and its book value of assets was $59 million. CCC, a global producer of paper products, including FH products, is Canadian controlled and incorporated in Canada. Its shares are privately held. It operates several production and sales facilities throughout Canada and elsewhere. CCC had 2022 gross revenues from sales from and in Canada of $209 million, with no sales into Canada. Its book value of assets in 2022 was $30 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 FH products in Canada. You represent RAL, whose General Counsel now seeks your advice in respect of the competition law issues relating to the Proposed Transaction. Upon inquiry by the Bureau, CCC’s customers consistently indicate that they prefer CCC’s FH products over RAL’s and CBC’s, that CCC’s FH products are less expensive and better than RAL’s and CBC’s, and that they prefer Canadian-origin FH products. RAL and CCC compete against each other and there are other paper producers that could switch production processes to make FH products, and other suppliers that have previously obtained FH products from outside of Canada for sale in Canada. RAL supplies about 19% of the Canadian FH market from its facilities, and from CBC’s facilities. CCC supplies about 16% of that market, and 10 others supply the rest of that market from facilities inside and outside of Canada, each with between 3% and 7%. The Bureau has determined that FH products are the relevant product market for its analysis and that the geographic market of concern is British Columbia. The Bureau has compared the levels of pre-merger and anticipated post-merger competition, and has concluded that RAL and CCC compete directly and are close rivals when it comes to price. For example, customers say, and the parties’ internal documents demonstrate, that RAL has reacted to CCC pricing on several occasions. The Bureau’s competitive analysis demonstrates that absent a remedy, RAL likely will reduce its production volume while maintaining CCC’s production volume, and customers repeatedly warn the Bureau that RAL will reduce CCC’s quality. As a remedy, the Bureau requires that RAL divest one of its production facilities in Saskatchewan to another buyer within three months (the “**Divestiture**”).

**MARKS**

**1** 1. Are any of the Proposed Transactions notifiable under the Act? (Yes or No)

**3** 2. Explain your answer in Question 1 for each of the Proposed Transactions.

**2** 3. Are any of the Proposed Transactions subject to notice or review under the Investment Canada Act? Why or why not?

**4** 4. Assume that at least one of the Proposed Transactions is notifiable. The parties seek to complete the Proposed Transactions 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 filings 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, (g) how Bureau filing obligations might disrupt the parties’ plans to complete the Proposed Transactions and (h) the impact of the Bureau’s service standards on the parties’ plans to complete the Proposed Transactions.

**8** 5. Explain to RAL the reasons in favour of, and opposed to, the Commissioner, if he were to bring an application to require the Divestiture.

**4** 6. 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 RAL, 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 to inform you of the complaints. Advise RAL on limitations, process and validity of the complaints.

**4** 7. The parties would like to sell the Divestiture facility to Rump Joint Venture Company (“**RJVC**”). RAL’s General Counsel asks you what criteria the Commissioner will use to assess whether RJVC may buy the Divestiture facility.

**2** 8. RAL’s General Counsel just read the decision of the Supreme Court of Canada in Tervita *v*. Canada (Commissioner of Competition) and wonders whether it might use the efficiencies from the Proposed Transactions to avoid the Divestiture. The first question is about the methodological standards (“methods”) for determining efficiency gains. Name the two methods.

**Part B – 1 QUESTION (15 Marks)**

In bustling but fictitious BC city known as Ebyville, there are a number of businesses which collect and transport demolition waste generated from residential and commercial construction projects. Demo waste collectors (DWC) are responsible for clearing the sites and then transporting the waste to the local government-operated transfer station.

As of 2015 to 2023, there are ten DWCs in Ebyville. Each operates a small business, sometimes with a handful of employees and one or two trucks. Some DWC are sole operators. The city is noted for vigorous competition amongst DWCs to secure project work which is mostly arranged by tender proposals in response to calls for tenders from construction companies and land owners. Since 2015, the rates paid to DWCs under such arrangements have tended to decline.

In 2020, seven of the DWCs from an association known as the Ebyville Collectors (or EC). The EC sought to develop more fair hours and conditions for the DWC working in the field. Concerned over ruinous competition, the EC published a suggested guideline of fees for the provision of demo waste services, both by hourly basis and by the volume of waste to be collected. The guidelines were developed by the members providing the president of the EC, also a DWC herself, with information including costs and the amounts of winning bids over the previous year (the bid amounts are revealed publicly after the tender is closed and a winner is selected). The EC expressly says that their guidelines are not binding.

By July 2023, there is growing frustration amongst EC members that the terms are unfair. Five of them decide to go-in house with three local construction firms, where they will be paid a salary and other benefits for providing demo waste collection. The other five DWC in the city remain independent.

In July 2023, the three construction firms who hire EC members as employees meet as a group with the 5 DWCs to discuss this transition. Amongst on things they discuss the needs of the workers including hours of work and whether they should be expected to supply their own vehicles or whether that should be the responsibility of the construction firms. They also discuss the problems with the amounts paid under the old tender model having regard to the EC guidelines. The construction firms agree to pay wages equal to no less than the figures recommended by the EC. They also agree they can share demo collectors in case one construction company is busy (or not) case may be, but on the understanding that a construction company not hire away such worker within six months of their working on a job.

The remaining 5 DWCs who did not go in-house are frustrated as business declines. They are unsure of the reason, but decide to stage a strike, refusing to bid on projects open for tender without a guaranteed hourly amount in the tender documents. They advise all potential tenders of this requirement in an email sent in August 2023.

**Marks**

**15** 1. Comment on the possible application of the Act arising out of this fact situation, but do not address any abuse of dominance issues (section 78 and 79).

**Part C – 2 QUESTIONS (18 Marks)**

Baggleys is an international chain of funeral homes with various locations in the US, Europe and across Canada. Baggleys’ offerings in Canada include: hosting funeral services, post-funeral receptions and selling caskets, urns and other items used in funerals. The overwhelming majority of funeral homes in Canada offer similar products. Baggleys operates about 30% of all funeral homes in Canada with a concentration in the Greater Toronto Area (GTA), where for several years it has operated 45% of all funeral homes. The second largest operator Hectors, has for years accounted for 15% of funeral homes in Canada and 30% of the funeral homes in the GTA.

The funeral home operators do not make caskets. There are two main manufacturers of caskets sold in Canada, one being Thompsons and the other being Baxters. Baxters is 49% owned by the same private equity fund that owns a majority of the stock of Hectors. Thompsons and Baxters do not sell caskets to the public, but instead only to funeral homes.

In 2020, Baggleys and Hectors formed an exclusive buying group and negotiated a discount ‎schedule with Thompsons for caskets with increasing tiers of discounts based on the aggregate volume of ‎caskets purchased in Canada by the two funeral home operators. Hectors also negotiated a contract with Baxters under which Baxters will only supply caskets in Canada to Hectors. ‎

Founded in 2021, Caskets2Go designs, makes and sells caskets in Canada. It does not operate funeral homes. Caskets2Go seeks to disrupt the incumbents both with innovative casket designs and varieties and offering online sales direct to consumers in addition to selling to funeral homes. The online price of a Caskets2Go casket is typically 50% less than the price of a casket sold at funeral homes.

In 2022, Baggleys adopts an integrity policy by which it refuses to allow caskets to be delivered to or used at their funeral homes unless sourced from a supplier accredited by the Funeral Home Operators Association (the “FHOA”). The FHOA policy, adopted in 2005, is not to accredit caskets unless the manufacturer has at least a five-year track record. The FHOA says this is done to give time to ensure that the quality and reputation is appropriate. The result is that while Thompsons and Baxter caskets have been accredited, Caskets2Go caskets are not. Starting in 2022, Baggleys refuses to allow Caskets2Go products to be used at funerals it operates. Within a few months, Hectors and most other funeral home operators in Canada adopt a similar integrity policy. By 2023, Caskets2Go has achieved very few online casket sales direct to consumers or funeral homes.

**Marks**

**12** 1. The Bureau investigates the conduct of Baggleys, Hectors and the FHOA under Part VIII of the Act. You are the assigned Bureau officer. Identify and explain briefly potential grounds for investigation, types of suspected competitive harm (if any), the substantive issues you expect to arise and further type of information the Bureau should obtain. You have been instructed **not** to address potential remedies at this stage.

**6** 2. After two years, the Bureau closes its investigation. Caskets2Go consults you, a private practice lawyer regarding options under the Act (that does not involve complaining to the Bureau), and remedies that may be sought to be imposed on the FHOA, Baggleys and Hectors. Provide a summary of your advice to Caskets2Go.

**Part D – 1 QUESTION (6 Marks)**

**Marks**

**6** 1. In 2022, Parliament passed amendments to the Act, with Royal Assent being received on June 23, 2022. ***Of the amendments that came into force in 2022,*** please identify the two amendments you consider to be the most significant and briefly justify your choices.

**Part E – 8 QUESTIONS (25 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 tied selling?

**2** 4. 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?

**4** 5. The Commissioner commences an inquiry under the Act in respect of the sales into Canada of widgets by a foreign entity incorporated outside of Canada. The foreign entity does not have a place of business in Canada but owns 60% of the voting shares of a company incorporated in Canada which itself has a place of business in Canada. That Canadian company does not sell or make widgets but sells gadgets in Canada (assume that gadgets are **not** the subject of the Commissioner’s inquiry). The Commissioner wishes to obtain records of the foreign entity located outside of Canada that are relevant to his investigation of the sales of widgets. Identify two ways the Commissioner could seek to compel production of such records (over the objections of the foreign entity, i.e. not by consent).

**6** 6. The 2022 amendments to the Act include references to “Drip Pricing (section 74.01(1.1) and section 52(1.3)). Explain what is drip pricing. On an application under Part VII.1, is it sufficient for the Commissioner to establish that a person engaged in drip pricing in order to secure an order? If not, what else must the Commissioner establish? What must a prosecutor establish (and with what standard of proof) in order to secure a conviction for drip pricing under section 52 of the Act?

**5** 7. The Commissioner enters a consent agreement with a party to resolve the Commissioner’s investigation of certain conduct of the party under Part VIII of the Act. Does the Commissioner have a duty to file such agreement with the Tribunal? Assuming the consent agreement is filed with the Tribunal, is it possible for a person who was not party to the agreement to bring an application to the Tribunal or to bring an action for damages in respect of the agreement? Please explain with reference to sections of the Act.

**2** 8. Canadian retailer, R, posts an advertisement, “Sale: Gabe’s Red Wine - 30% off.” R normally resells Gabe’s red wine, which is made by an unrelated third party, for $10 per bottle and R’s sale price is $7/bottle. However, all other competing retailers usually sell Gabe’s red wine in Canada for $8/bottle. Can the Commissioner seek an order against R under Part VII.1 of the Act? Explain.

**END OF EXAM**