THIS EXAMINATION CONSISTS OF 11 PAGES
PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER

THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION – APRIL 19, 2016
09h00

LAW 464.001
Canadian Competition Law & Policy

Professors Tougas & Wright

TOTAL MARKS: 125
TIME ALLOWED: 3 HOURS

***************

NOTE:
1. This is an **open book** examination. Candidates may refer only to print materials.
2. ANSWER ALL QUESTIONS.

THIS EXAMINATION CONSISTS OF PARTS A, B, C, D, E and F:

PART A – 8 QUESTIONS (35 MARKS)
PART B – 4 QUESTIONS (25 MARKS)
PART C – 6 QUESTIONS (30 MARKS)
PART D – 7 QUESTIONS (14 MARKS)
PART E – 6 QUESTIONS (8 MARKS)
PART F – 5 QUESTIONS (13 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 (35 Marks)

Three businesses formed a joint venture two years ago by incorporating a company called Twitz Supply Inc. ("TSI"), in Saskatchewan, that produces rapeseed oil. Sandy-Bob controls an Alberta corporation ("SBCO") that contributed equipment, Patsy-Bob is in a partnership with Jim-Bob ("BOBShip") that contributed know-how, while Sirivis Snipe directed an offshore company ("Haven") to contribute money to the venture and gave access to established sales channels and dealer relationships. Snipe controls TSI through a 34% interest, while SBCO and BOBShip each have 33%, but never vote together. The group has decided to expand the business of TSI by acquiring an interest in Genetically-Modified Foods Inc. ("GMO"), a company whose shares are publicly traded (the "GMO Transaction") and has rapeseed oil technology (the "Technology"). Despite an oversupply of rapeseed in Canada due to US and Chinese imports, TSI will acquire the rapeseed division (the “Division”) of Yellow Stuff Ltd., a wholly-owned subsidiary of GMO (the "Yellow Transaction"). GMO is the only competitor to TSI for production of rapeseed oil in Canada. TSI’s counsel, Hermine, calls for advice and informs you that:

• For $90 million, GMO will issue voting shares to TSI, whose gross assets in Canada are valued at $399 million, such that GMO will end with 36% of the issued voting shares of GMO. TSI holds no shares in GMO.

• The aggregate value of the worldwide assets of GMO is $401 million, while its Canadian assets are valued at $81 million, and the gross value of the revenues from those assets from, in and into Canada is $85 million.

• For $89 million, GMO will grant a licence to TSI for the Technology (the “Licence”), which is valued on its books at $90 million.

• For $50 million, TSI will acquire 100% of the assets of the Division, which is indebted to the bank for $60 million. The aggregate value of the assets of Yellow Stuff’s Canadian operations are $71 million, its gross value of revenues from, in and into Canada are $55 million and the assets of the Division in Canada are valued at $40 million and its gross value of revenues from and in Canada at $35 million.

• TSI and GMO will eliminate overlapping staff involved in sales and administration in their companies, and will combine their research and development efforts. Everyone that worked for the Division will keep their jobs for the foreseeable future, but they will use the Technology to increase production and lower costs.

-Except for the formation of TSI, the other three transactions described above are referred to herein as the "Transactions".

-Monetary values are recorded on the most recent relevant audited financial statements.

-According to the trade journal “Healthy Oils”, GMO and affiliates have about 10% of worldwide production and 40% of Canadian production, 90% of which is exported, and accounts for 4% of Canadian purchases by volume. TSI has the other 60% of Canadian production, with sales in Canada and the United States. Its sales in Canada account for 50% of Canadian volumes. Sales into Canada from 10 other sources make up the rest of Canadian purchases by volume.
Part A Questions (35 Marks)

MARKS

2 1. Is the GMO Transaction notifiable under the Act? Yes □ No □

6 2. Discuss why each Transaction, including the GMO Transaction, is or is not notifiable under the Act.

2 3. Hermine is worried that the formation of TSI by SBCO, BOBShip and Haven should have been notified to the government. Even if there was a notification obligation, she thinks there is an exemption from the substantive provisions of the Act for. Is she correct? Yes □ No □

5 4. Assuming the GMO Transaction is notifiable, name (a) all the types of notification filings that could be made with or required by the Bureau, (b) the party or parties responsible for filing, and (c) what type of filing you would recommend and the basis of your recommendation.

5 5. The parties decide to proceed with all the Transactions. You submit filings to the Bureau. The Bureau advises you, 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 Hermine of the parties’ ability to complete the Transaction in that time frame and what steps the Bureau might consider or take?

9 6. Assuming the Transactions are notifiable and the Commissioner applies to block the Transactions, before whom would he bring his application? What arguments would you raise to convince the Tribunal that the Transactions should proceed to completion as notified?

1 7. The parties have delayed completing the Transactions and over one year has passed since the filing of information with the Bureau. Will the parties have to start the notification process again? Why or why not?

5 8. Finally, the parties complete the Transactions. Six months later, the Bureau receives complaints from (1) a competitor, whose prices have plummeted since the GMO Transaction, (2) doctors who have expressed health concerns over GMO’s products, and (3) consumers regarding the similarity of prices for rapeseed oil in every region of Canada. The Bureau calls you to advise of the complaint. Advise Hermine.

End of Part A
Part B – 4 Questions (25 Marks)

Firms A and B each own a portfolio of patents governing methods of making products generally referred to as widgets. Widgets are heterogeneous in that the products are not all identical or commodity like although most widgets serve similar end uses acceptable to most customers. Indeed, Firms A and B each claim their respective widgets have advantages compared with other manufacturers’ widgets in view of proprietary features covered by their respective patents.

Of all widget sales in Canada, Firm A has had 45 percent (measured by gross revenues), Firm B has had 30 percent. There are 5 other firms that supply generic forms of widgets in Canada, but they lack any patent protection.

For many years, Firm A generally enter into 3 year supply agreements with all of its customers, which provided that the customer would earn a discount of 20% if they bought all of their widgets exclusively from Firm A. The contracts had automatic renewal clauses unless the customer gave notice at least 6 months before the term end.

For many years, Firm B did not have any written contracts with its customers. In 2012, while at a trade show, a sales rep for Firm A shared a copy of 3 of his firm’s contracts with a representative of Firm B. Starting in 2013, Firm B began entering into 4 year supply contracts that provided customers with a 25% discount if the agreed to buy all widgets from Firm B. Firm B’s pricing also became more similar to the prices shown on 2 of the 3 contacts disclosed by the Firm A sales rep to Firm B.

The other widget supplying firms have struggled to expand in the market in view of the significant volume of customers under contract to either Firm A or Firm B.

MARKS

8  1. Briefly identify and explain possible violations or issues raised under the Act by the conduct of Firms A and B (excluding Section 77).

3  2. Now assume that Firm X, a widget supplier, approaches Firm A and asks for a licence to use Firm A’s patent for the widgets of Firm X. Firm A refuses. What recourse, if any, does Firm X have under the Act in respect of such refusal (do not address the potential application of Sections 75 to 77)?

8  3. One year following the refusal by Firm A referenced in the preceding question, Firm A relents and agrees to licence Firm X. However, Firm A requires as part of the licence, that Firm X pay 5 percent royalties on all of its widgets (whether or not Firm X using the patented features) and to provide a customer list and translation list so that Firm A ensure that appropriate royalty payments are made. Further, Firm A requires Firm X to enter into a non-poaching agreement so that Firm X agree not to hire Firm A employees during the term of the license or for 1 year after
termination of the license. Firm X agrees, but then insists that Firm A also
give it a reciprocal non-poaching agreement with respect to hiring Firm X
employees. Discuss the issues under the Act raised by these
arrangements. Also, suggest any terms that could be added to the
licensing agreement between Firm A and Firm X to diminish risk of
violation of the Act.

Would the analysis in the preceding question change if instead of Firm X,
Firm A entered into a cross-licensing agreement with Firm B on the same
terms (but no non-poaching agreement)?

**End of Part B**
Part C – 6 Questions (30 Marks)

MARKS

6 1. Should the availability and process for private access to the Competition Tribunal be expanded or contracted, or is it “just right”? Briefly defend your position with reference to the history of private access under the Act and the current scheme.

4 2. Can conduct of the Commissioner prevent a party from seeking to bring a private proceeding before the Tribunal? Assuming the Commissioner’s conduct does not prevent the private application, can the Commissioner participate in such private proceeding? Could the Commissioner bring his own proceeding before the Tribunal in respect of the same conduct raised by the private party after the private party has sought access to the Tribunal?

Firm C provides building security services in Canada. It recently entered into a 5 year, renewable exclusive contract with certain government agencies to supply such services for buildings under the control of such agencies. In addition, it has grown its business in the last 5 years by expanding for work providing services to privately owned commercial buildings.

Firm C is a incorporated under a Federal Statute as a non-share and not for profit organization. Firm C seeks each year to set its prices so that on average, after accounting for all of its revenues from its services and all costs, it has zero profits. However, in some years, Firm C has had a deficit or surplus.

In much of Canada, Firm C has historically accounted for over 90 percent of the services provided to government agencies. In certain areas in Canada, it now accounts for 40 percent or more of the share, determined using gross revenues, of security services provided to commercial buildings. However, in other areas in Canada, its share of commercial building security services ranges from 10 to 30 percent.

In view of the growth of Firm C, Firm D, a for profit company based in Vancouver, BC, that provides building security services across Canada, approaches you, its competition lawyer, with questions about the application of the Act to Firm C.

2 3. Does the Act apply to Firm C in view of either its not for profit status and creation under federal statute? Explain briefly.

7 4. Assuming the Act applies to Firm C, on what basis could Firm D argue that Firm C may have violated the Act or engaged in conduct that could be the subject of a proceeding under the Act. Explain briefly and indicate the type of additional information, if any, you think would be reasonably required to evaluate such competition issues.
4 5. Assuming the Act applies to Firm C, Firm D asks you whether it can sue Firm C for damages in respect of the Act. Can it do so? If it could, before what bodies could it bring the action? Explain your answers briefly.

7 6. Now assume you were never retained by Firm D but have been retained by Firm C itself to implement a competition compliance program. Assume the Act applies to Firm C. Firm C has asked you in particular to advise it of things it should try to do, and to avoid, when setting prices unilaterally for both its governmental and commercial security services, with reference to any sections of the Act that might raise an issue. In so doing, assume that Firm C does not require advice with respect to Sections 45 and 90.1 about any agreements or arrangements with competitors on pricing. However, assume that as part your response, you should give guidelines to Firm C about how it may respond in face of aggressively low pricing by any of its competitors.

End of Part C
**Part D – 7 Questions (14 Marks)**

**MARKS**

2 1. Name three anticompetitive thresholds mentioned in the Act.

2 2. Which of the following are *per se* offences under the Act? (Check as many as apply)
   - a. Predatory pricing. □
   - b. Price discrimination. □
   - c. Price fixing. □
   - d. None of the above are *per se* offences. □
   - e. All of the above are *per se* offences. □

2 3. What are the two main concerns with “gun-jumping”?

2 4. Match the following into pairs (e.g., a. and b.) [each has a match]

<table>
<thead>
<tr>
<th>a. SSNIP</th>
<th>e. Price Maintenance</th>
</tr>
</thead>
<tbody>
<tr>
<td>b. Quasi-structural remedy</td>
<td>f. Market definition</td>
</tr>
<tr>
<td>c. Refusal to supply</td>
<td>g. Grant of exclusive licence</td>
</tr>
<tr>
<td>d. Ample supply</td>
<td>h. Refusal to deal</td>
</tr>
</tbody>
</table>

2 5. Which of the following pairs are not market structures? (Check all that apply)
   - a. Monopoly and oligopsony. □
   - b. Effective competition and oligopoly. □
   - c. Monopsony and perfect competition. □
   - d. Duopoly and effective competition. □
   - e. All of the above are market structures. □
   - f. None of the above are market structures. □
6. The regulated conduct doctrine is available in the following circumstances: (choose one answer)

a. Where a merger substantially lessens competition, but is made between parties one of whom is regulated by a provincial government.
   □

b. Where a merger substantially lessens competition, but is made between parties one of whom is regulated by the federal government.
   □

c. Both of the above. □

d. Neither of the above. □

7. Binky's Ice Cream Inc. grants an exclusive franchise to Stinky's Donuts Limited for all of British Columbia respecting unique cream-filled frozen ice cream sandwiches. No one else supplies the product. One condition of the franchise is that Stinky's cannot sell its products outside British Columbia. Stinky's seeks your advice. Name the provisions of the Act, by name and section #, that might apply.

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

End of Part D
Part E – 6 Questions (8 Marks)

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

Yes □ or No □?

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

Yes □ or No □?

2 3. 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.

True □ or False□?

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

Yes □ or No □?

1 5. A performance claim that is not backed up by “adequate and proper testing” before the claim is made still will be lawful if it can be ultimately proved to be true.

True □ or False□?

2 6. A person who engages in deceptive marketing may establish a due diligence defence successfully if the person held a reasonable belief in a mistaken set of facts or law.

True □ or False□?

End of Part E
Part F – 5 Questions (13 Marks)

Jane’s Laundry & Drycleaning had been supplied by L&D Supply who recently went out of business. Now, she cannot seem to get enough wire hangers from either of the two laundry and drycleaning suppliers (ABC and XYZ) in her area. She has good access to the other products she needs to run her business, but the wire hanger shortage is causing her to lose business as she is only able to offer hanger service to some of her customers. Jane’s prices have been the lowest in Vancouver for several years, and she’s willing to pay the going price for the hangers, but if this goes on much longer, she’ll go out of business. She’s talked to both suppliers several times. ABC says they’ll supply her with hangers, but she has to buy plastic drycleaning bags, too; XYZ says they can’t sell to her because she’s not in their territory. She approaches you to discuss her options.

MARK

6  1. What claim(s) could Jane sustain under the Act? Why? Why not?

1  2. If she can sustain her claim(s), before whom should Jane bring them?

2  3. Assume the Bureau is not interested in pursuing a claim. Can she bring her own claim(s) and how is the adjudicative body to address the fact the Bureau did not pursue the claim(s)?

1  4. If Jane is successful in her claims, personnel from ABC or XYZ or both could be charged criminally. True □ or False □?

3  5. Which of the following statements is correct? [Check all that apply]

(a) The Commissioner must cause an inquiry to be made whenever the Commissioner has reason to believe a person has contravened an order made pursuant to section 92. □

(b) The Commissioner may choose not to cause an inquiry to be made when there is an application made by six persons resident in Canada who are not less than eighteen years of age and who are of the opinion that a person has contravened an order made pursuant to section 92. □

(c) The Commissioner, or his or her authorized representative, must make an ex parte application to a judge of a superior or county court, who must be satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 and that a person has or is likely to have information that is relevant to the inquiry, before a judge may order the person to produce to the Commissioner or the authorized representative of the Commissioner within a time and at a place specified in the order, a record, a copy of a record certified by affidavit to be a true copy, or any other thing, specified in the order. □

END OF EXAMINATION