Competition Tribunal | Tribunal de la Concurrence

**PUBLIC**

Citation: Commissioner of Competition v. Canada Pipe, 2005 Comp. Trib. 3
File no.: CT-2002-006
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IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF an application by the Commissioner of Competition pursuant to sections 79 and 77 of the *Competition Act*;

AND IN THE MATTER OF certain practices by Canada Pipe Company Ltd. through its Bibby Ste-Croix Division.

B E T W E E N:

**Commissioner of Competition**
(applicant)

and

**Canada Pipe**
(respondent)

Before: Blanchard J. (presiding), A.L. Reny, P. Gervason
Dates of Hearing: 20030428 to 20030501, 20040301 to 20040305, 20040308 to 20040312, 20040315 to 20040317, 20040322 to 20040326, 20040525 to 20040528, 20040531 to 20040604, 20040830 to 20040902
Reasons and Order signed by: Mr. Justice E. Blanchard, Mrs. A.L. Reny, Mr. P. Gervason
Date of reasons and order: February 3, 2005

**REASONS AND ORDER**

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## I. INTRODUCTION

**[1]** The Commissioner of Competition (the "Commissioner") has brought an application under sections 79 and 77 of the *Competition Act*[1] (the "Act"), for an order against Canada Pipe Company Ltd. ("Canada Pipe" and the "Respondent"), acting through its division Bibby Ste-Croix ("Bibby"), prohibiting the Respondent from engaging in the practice of several specified anti-competitive acts leading to an abuse of dominant position, under section 79, as well as prohibiting the Respondent from continuing to engage in the practise of exclusive dealing under subsection 77(2) of the Act.

**[2]** The Commissioner alleges that the Respondent has brought about a substantial prevention or lessening of competition by abusing its dominant position in the supply and sale of cast iron Drain, Waste and Vent ("DWV") pipes, fittings and mechanical joint ("MJ") couplings in six Canadian regions: British Columbia, Alberta, the Prairies (Saskatchewan and Manitoba), Ontario, Quebec and Atlantic Canada (New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland) (collectively the "Geographic Markets"). More specifically, the Commissioner argues that, through its Stocking Distributor Program, Canada Pipe creates, enhances and preserves the market power which it exercises in the three relevant product markets - pipes, fittings and MJ couplings - and in the Geographic Markets.

**[3]** The Respondent is a Canadian company based in Hamilton, Ontario, which produces and sells a variety of products in Canada. Canada Pipe is a division of Ransom Industries, itself a division of McWane Inc., a company based in Birmingham, Alabama, which manufactures and sells ductile iron pipe, soil pipe, valves, hydrants and accessories. Canada Pipe acquired Bibby in April 1997.

**[4]** Bibby manufactures cast iron DWV pipe and fittings, as well as other cast iron items which are not at issue in the present application. DWV products are used in residential, commercial and institutional buildings, and other structures, to carry waste and drain water from appliances and drains to sewers, septic tanks or other outlets. There are three types of DWV products: pipe, fittings and couplings.

**[5]** The Stocking Distributor Program is a preferential rebate program whereby distributors of Bibby's cast iron DWV products obtain significant rebates and discounts in return for stocking only Bibby-supplied cast iron DVW products. However, these distributors are free to stock other companies' DVW products which are not made of cast iron.

**[6]** In these reasons, the Tribunal makes the following findings: under section 79 of the Act, (i) there are three relevant product markets, and six geographic markets, and the Respondent substantially controls these markets; (ii) the Respondent is not engaged in a practice of anti-competitive acts; (iii) the Commissioner has not shown that the alleged anti-competitive acts have substantially lessened or prevented competition. Under section 77, (iv) the Stocking

[1] *Competition Act*, R.S.C. 1985, c. C-34.

Distributor Program can be characterized as exclusive dealing; (v) Canada Pipe is a major supplier of a product in a market; (vi) there is insufficient evidence to show that the Stocking Distributor Program has impeded entry or expansion of firms, or that it is having any other exclusionary effect on the market, or that it has caused or is likely to cause a substantial lessening of competition.

## A. Preliminary Comments

*Purpose of the Abuse of Dominance Provision*

**[7]** The purpose of section 79 is to deal with firms that abuse their dominant position to restrain competition. As the Competition Tribunal (the "Tribunal") stated in *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.*

> It is important in interpreting legislation to keep in mind the purpose of the legislature. What then is the purpose of ss. 78 and 79 of the Act? It is not controversial, and it was not disputed before me, that the sections are intended to deal with abuses by dominant firms. The government's explanatory guide summarizes the objectives of the provision:
>
> > Anti-competitive behaviour on the part of dominant firms imposes artificial restraints on the competitive process, impeding the market from efficiently allocating resources. In a healthy, dynamic economy, goods and services are supplied by the firms which can produce them most efficiently and adapt to the ever-changing demands of the marketplace. The proposed abuse of dominance provision will ensure that dominant firms compete with other firms on merit, not through the abuse of their market power. The provision is of particular importance for the protection of consumers, new entrants and, in particular, the small business community.[2]
>
> These sections were intended to rectify some of the problems which had made the previous criminal law offence of monopoly largely ineffective. These included the fact that there was nothing inherently criminal in the pursuit or maintenance of a monopoly, the high burden of proof required of the Crown to prosecute successfully in a criminal context, the focus of the section on "public detriment" rather than on the anti-competitive conduct and the lack of flexible remedies.[3]

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[2] Consumer and Corporate Affairs Canada, *Competition Law Amendments: A Guide* (Supply and Services Canada, December 1985) at 21.

[3] (1995) 64 C.P.R. (3d) 216 at 222-223.

*Adverse Inferences*

**[8]** The Respondent has asked the Tribunal to draw negative inferences from the fact that the Commissioner has chosen to present some but not all the evidence she has gathered in preparing this case. The Tribunal has already dealt at length with the appropriateness of the test for the production of documents as being one of reliance rather than of relevance. (See *Commissioner of Competition v. Canada Pipe Company*[4] and *Commissioner of Competition v. Canada Pipe Company).*[5]

**[9]** However, negative inferences are another matter drawn from the rules of evidence. The Respondent asks the Tribunal to draw a negative inference from the fact that not all of the relevant information obtained by the Commissioner pursuant to section 11 orders, notably from a number of industry participants, has been presented to the Tribunal. This information would have been relevant, according to the Respondent, to the issues of market definition, barriers to entry, and, in turn, to substantial lessening of competition.

**[10]** The principle of adverse inference is explained as follows in *The Law of Evidence in Canada* by Sopinka, Lederman and Bryan:

> In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.[6]

**[11]** The principle applies not only to witnesses that are not called, but also documents or other material evidence, as stated in Wigmore on Evidence:

> The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his

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[4] Reasons and Order respecting certain provisions of the *Competition Tribunal Rules*, 2003 Comp. Trib. 15 (August 8, 2003).

[5] Reasons and Order Regarding Respondent's Motion for Examination of Persons and Documents Pursuant to Paragraph 21(2)(d.1) of the *Competition Tribunal Rules* and Regarding Scheduling Issues, 2004 Comp. Trib. 2 (January 23, 2004); affirmed [2004] F.C.J. No. 358 (F.C.A.).

[6] Sopinka et al. *The Law of Evidence in Canada Evidence in Trials at Common Law*, 2nd ed. (Toronto: Butterworths Canada Ltd., 1999) at 297.

> opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstances or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.[7]

**[12]** In *R. v. Jolivet,*[8] Mr. Justice Binnie dealt with the principles of adverse inference, and said:

> The circumstances in which trial counsel decide not to call a particular witness may restrict the nature of the appropriate "adverse inference". Experienced trial lawyers will often decide against calling an available witness because the point has been adequately covered by another witness, or an honest witness has a poor demeanour, or other factors unrelated to the truth of the testimony. *Other jurisdictions also recognize that in many cases the most that can be inferred is that the testimony would not have been helpful to a party, not necessarily that it would have been adverse: United States v. Hines*, 470 F.2d 225 (3rd Cir. 1972), at p. 230, certiorari denied, 410 U.S. 968 (1973); and the Australian cases of *Duke Group Ltd. (in Liquidation) v. Pilmer & Ors*, [1998] A.S.O.U. 6529 (QL), and *O'Donnell v. Reichard*, [1975] V.R. 916 (S.C.), at p. 929. [paragraph. 28] (our emphasis)[9]

**[13]** In its earlier decision in respect to disclosure, the Tribunal ruled that the Commissioner was bound to disclose only the evidence she would rely upon, although other evidence in her possession may well be relevant. In our view, the conditions required for an unfavourable inference to be drawn against the Commissioner are not present in this case. Essentially, the Rules specify the disclosure obligations and the Commissioner is not required to disclose all relevant information. It therefore cannot be said that "the most natural inference, ...", as expressed by Wigmore above, can necessarily be drawn. Given the high volume of materials usually obtained by the Commissioner in her investigations, an equally plausible inference is that since all of the information is not required to be produced, it is simply not all produced. In the circumstances, where the Tribunal Rules dictate the Commissioner's disclosure obligations that

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[7] Wigmore, JH. *Evidence in Trials at Common Law*, Vol. 2 Revised by J.H. Chadbourn (Boston: Lithe, Brown and Co., 1979) at 192.

[8] [2000] 1 S.C.R. 751.

[9] *Ibid.* at paragraph 28.

now require the Commissioner to produce only the information she relies upon, the most that can be inferred is that the information that has not been produced would not have been helpful to the Commissioner's case, not necessarily that it would have been adverse. More than speculation about the adverse nature of the undisclosed information is needed for an adverse inference to be drawn. In this case, the evidence and the Tribunal's Rules regarding limited disclosure do not support drawing a general adverse inference.

*Witnesses*

**[14]** The hearing was held in Ottawa over the course of several weeks, from March 2nd to March 26th and from May 25th to June 4th 2004. Final submissions were made from August 30th to September 2nd, 2004, after which the Tribunal reserved its decision. The Tribunal heard from 3 expert witnesses and 27 lay witnesses. The expert witnesses were Dr. Thomas Ross, for the Commissioner, and Dr. Roger Ware, for the Respondent. Both are economists and university professors. As well, the Commissioner called Mr. Jozef Zorko, who is a senior architect with the firm Desnoyers Mercure in Montreal and a Building Code consultant with a specialty in specification of materials.

**[15]** The parties argued about having Mr. Zorko recognized as an expert witness. The Respondent said that he was not an expert on economic or legal matters. More specifically, the Respondent argued that Mr. Zorko in both his report and his rebuttal report had considered the issue of the use of cast iron as opposed to plastic, a market definition issue, on which he was not qualified to give his opinion. Moreover, his testimony as to the building codes was largely based on a review of the legislation and code provisions. The conclusions to be drawn as to the use of materials because of legal or regulatory restrictions amounted to a legal issue which was for the Tribunal to decide. Counsel for the Respondent stated in his submissions, "many of the facts that he refers to, many of the conclusions that he reaches are clearly based on discussions he has had with others or documents he has reviewed. I think we established in cross-examination that he has conducted no scientific, technical or statistical studies, no surveys."[10]

**[16]** The Commissioner argued that given Mr. Zorko's expertise as a Building Code Consultant, he was "entitled to provide an opinion on the scope and application of the Building Code and its effect on the content, design and construction of buildings."[11]

**[17]** The Tribunal decided to allow Mr. Zorko's evidence:"..as a qualified architect specialized in building codes and based on his extensive experience, Mr. Zorko is entitled to give an opinion on the scope and application of building codes in Canada and their effects on the content, design and construction of buildings."[12]

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[10] Transcript at 15:2942, 23 March 2004.

[11] Transcript at 15:2899, 23 March 2004.

[12] Transcript at 15:3001, 23 March 2004.

**[18]** There were also submissions with respect to Dr. Ware's expertise. The Commissioner objected to having Dr. Ware recognized as an expert, arguing that he had no expertise on building materials and code requirements, and therefore substitutability. The Respondent replied that Dr. Ware was being presented as an expert in economic matters, and notably market definition and the competitive behaviour of firms. Dr. Ware conceded in cross-examination that he could not speak as an expert on "regulatory constraints" and that these could have an impact on the use of building materials.[13]

**[19]** The Tribunal ruled that Dr. Ware had the requisite qualifications to give opinion evidence on the subject matter raised in his Report, and that this opinion was necessary to assist the Tribunal. The Tribunal ruled during the hearing that it would determine the weight to be given to the expert opinion should the facts upon which the opinion was based not to be borne out by the evidence.[14]

**[20]** Twenty-seven lay witnesses testified. They were involved in the following sectors of the DWV industry:

**Manufacturers**

For the Commissioner:

Mr. Gary Nagel, an ex-employee of Bibby
Mr. Russell Robert Demeny and Mr. James Warren Vanderwater, respectively President and Vice-president of Vandem Industries
Mr. Michael Promoli, President of Crowe Foundry
Mr. Peter W. Kirkpatrick, National Sales Manager for Fernco
Mr. Chris Vansell, Vice-president of Mission Rubber
Mr. Matthew O'Brien, ex-employee, Gates Rubber/Ideal

For the Respondent:

Mr. Thomas Leonard, Vice-President and General Manager of Bibby Ste-Croix

**Distributors and buyers**

For the Commissioner:

Mr. Roy Byrne, Vice-President, Crane Supplies
Mr. Robert Johnston, National Vice-President, EMCO
Mr. Claude Beaulac, Director General, Octo Purchasing Group
Mr. Paul Lachance, President and CEO, Wolseley
Mr. Mark Thomas Corriveau , Vice-President of Marketing and Purchasing, Wolseley
Mr. Gregory Donald Tester, General Manager, Nuroc
Mr. Richard H. Elliott, President, McKeough Supply Inc.
Mr. Jack Keon, retired Vice-President and General Manager, Niagara Plumbing

[13] Transcript at 26:5091, 3 June 2004.

[14] Transcript at 25:4877, 2 June 2004.

For the Respondent:
Mr. Giulio Iaboni, President, Sherwood Plumbing Supplies

**Importers**
For the Commissioner:
Mr. Marc Bouthillette, President, BMI Canada
Mr. David Kelm, Owner, Sierra Distributors
Mr. Jit Hiang Lim, President, New Centurion

**Contractors**
For the Commissioner:
Mr. William Kelly, Plumbing Contractor, William Kelly & Sons
Mr. Jim Bornhorst, Mechanical Contractor, Bornhorst Mechanical Inc.

**Consultants**
For the Commissioner:
Mr. Terry Vivyurka, Consulting Engineer
Mr. Scott Philips, Mechanical Engineer, Stantec Consulting Ltd.

For the Respondent:
Mr. Benoît Lagueux, Engineer, Régie du bâtiment du Québec
Mr. Charles Mark Surgeonor, retired Mechanical Plans Examiner, City of Winnipeg
Mr. Gary Wasyliw, Engineer, Manager of the Building Division, City of Regina

## II. BACKGROUND FACTS

### A. DWV PRODUCTS INDUSTRY

**[21]** DWV products are essential components of residential, commercial, industrial and institutional buildings. DWV pipe, also referred to as soil pipe, is used to carry waste and drain water from appliances and drains, and to vent plumbing systems. There are three components to a DWV system: pipe, fittings and mechanical joint (MJ) couplings. Pipe, essentially tubes, comes in various diameters and lengths. Fittings join and re-direct pipes. MJ couplings mechanically join and seal DWV pipes together; they are primarily designed to couple pipes of the same material.

**[22]** Pipes and fittings can be manufactured in a variety of materials, including cast iron, plastic, copper, asbestos cement, stainless steel and glass, whereas MJ couplings are made of rubber (or neoprene) and stainless steel. One of the main issues for the parties was determining whether all DWV products should be considered as forming a single market, or whether cast iron DWV products form a distinct market. The Tribunal notes that the Commissioner's expert, Dr. Ross, went even further and identified three distinct cast iron DWV product markets, namely, pipe, fittings and MJ couplings. We will return to a fuller discussion of this issue when we deal with the elements of section 79 of the Act. The following section discusses the characteristics and applications of the various products utilized in the DWV industry.

**[23]** DWV products are bought by contractors either directly from manufacturers, or more often, from distributors who themselves have bought them from domestic or foreign manufacturers, or from importers. Contractors seek competitive prices from their suppliers, since the cost of materials is a major factor in winning a bid for a building contract.

**[24]** The use of different materials for drain, waste and vent applications is constrained in Canada by various building and plumbing codes (provincial and municipal). The content of these codes is based on national standards. In effect, the provinces and territories have adopted as a minimum standard (which some jurisdictions might have made more stringent) the *National Building Code* and the *National Plumbing Code*. These codes provide for the materials to be used for purposes of safety and soundness. Different regulations will apply according to the size, use and occupancy of various buildings and installations.

**[25]** Metal products, being non-combustible and having nil smoke development and flame spread ratings, can be used in virtually all construction. They include cast iron, copper and stainless steel. Copper and cast iron are the two most frequently used; stainless steel is more costly and used in specific contexts where corrosion is an issue. In terms of cost and ease of installation, copper is generally more advantageous in diameters of 65 mm or less, whereas cast iron is preferred for pipes and fittings of a diameter larger than 65 millimetres. This is confirmed by the testimony of Mr. Scott Philips, a Mechanical Engineer who works for Stantec Consulting Limited, a Building Consulting firm.[15]

**[26]** Other non-combustible materials are of limited use. For example, stainless steel is used in laboratory settings because it will not corrode, but it is expensive and thus not commonly used outside specific scientific or industrial applications; asbestos-cement composites are used in very large diameter pipes and, for regulatory reasons, only in Quebec and Ontario.

**[27]** The Tribunal heard a great deal of evidence about the use of plastic pipe instead of cast iron pipe. Mr. Gary Wasyliw, Manager of the Building Division in the City of Regina and witness for the Respondent, presented a brief history of the introduction of plastics in the DWV industry. His testimony was essentially not contradicted by other witnesses:

> **MR. G. WASYLIW**: Well, very briefly, it was around some time in the early sixties when the first material, ABS, would've been introduced which could be used in smaller installations.
>
> Basically, any building that would not have the designation of "non-combustible construction", who was a combustible building, ABS piping could be used. It became very popular in housing very quickly at that point.
>
> However, in non-combustible construction, there was a performance

[15] Transcript at 14:2725-2726, 22 March 2004.

> criteria that would limit or exclude ABS from those applications. Sometime in about the late seventies, the PVC material was introduced. That material can meet the performance specifications of the Building Code aside from three applications that are excluded; the three applications being installation in the vertical shaft of the building, installation in the return air plenum of a non-combustible building, and the third component is installation in a high building, high building being a defined Code in the term [sic] that needs to be calculated on various factors. So PVC could meet those qualifications.
>
> At that time there was yet a fourth condition it could not meet because it was not a material that could penetrate a fire separation.
>
> About the late eighties -- we estimate it to be about 1988 from materials we have in the office that are dated -- there were fire stopping devices introduced. These were devices that could be applied to a PVC pipe wherever it would penetrate a fire separation that would then allow PVC into the next category of building. Those were the major advancements. The advancement that we've seen in the recent past has been the introduction of a type of pipe designated as "XFR", which is a coating on a PVC pipe that lowers the flame and smoke rating of the pipe such that it can meet the performance criteria that is specified in the *Building Code*.
>
> When that pipe has that designation, it can now be installed in the return air plenum as well as in the high building. The exemption for the vertical shaft does not come with a performance criteria so it still does not meet that application.[16]

**[28]** Some confusion in respect to the use of plastics in specific applications, e.g. vertical shafts in high-rise buildings, is linked to the definition of combustible as opposed to non-combustible construction. As stated by several witnesses, combustible material may be used in non-combustible construction provided the performance criteria of smoke development and flame spread ratings are met. This point is confirmed by Mr. Wasyliw.[17]

**[29]** As stated above by Mr. Wasyliw, the pipe used in vertical shafts must be made of non-combustible material; it is not a matter of performance criteria, as in the case of return air plenums and high-rise construction. The evidence shows that, for practical reasons, the material used is cast iron. In air return plenums and high-rise construction, plastic is gradually being accepted, according to Mr. Wasilyw, although as Mr. Zorko indicated in his expert testimony, the rate of acceptance throughout Canada is not uniform. Mr. Wasyliw explained that in the two high-rise constructions of that year in Regina, plastic DWV products had been used throughout the buildings, a new phenomenon attributable to the development of coated XFR pipe, which

[16] Transcript at 24:4646-4647, 1 June 2004.

[17] Transcript at 24:4654-4656, 1 June 2004.

could meet all the performance requirements.[18] Since Mr. Wasilyw maintained that in vertical shafts, it was still compulsory to use non-combustible material, the Tribunal infers that in these two buildings either there were no vertical shafts, or that no DWV piping was installed within a vertical shaft.

**[30]** Mr. Benoît Lagueux, also a witness for the Respondent, is in charge of the plumbing sector for the Standards Directorate of the Quebec authority (Régie du bâtiment) responsible for the enforcement of the *Building Code*. He also testified that the XFR piping system was meeting the performance criteria for use in air return plenums and high-rise construction, but not in vertical shafts, for the purposes of non-combustible construction.[19]

**[31]** Mr. Philips, a witness for the Commissioner, testified that cast iron was the preferred material, because safety issues would not become a problem when it was used. The only problem with cast iron was possible corrosion if its use entailed corrosive waste (e.g. industrial or laboratory facilities). In his testimony, Mr. Philips, while highlighting the advantages offered by plastics to the contractors, nevertheless confirmed that cast iron is still the product normally used.[20]

**[32]** Cast iron continues to be the material of choice for some contractors and engineers because of its proven track record. This was confirmed by the evidence of Mr. Jim Bornhorst, Mechanical Contractor,[21] and Mr. Terry Vivyurka, Consulting Engineer,[22] who both testified for the Commissioner.

(1) Participants in the Industry

(a) Manufacturers

**[33]** In Canada, there are at the present time two manufacturers of cast iron soil pipe and fittings: Bibby and Vandem Industries. Couplings are for the most part imported. Fernco Connectors Ltd. ("Fernco") manufactures couplings, but not mechanical joint couplings. Rollee Industrial Products (1987) Ltd. is the only Canadian manufacturer of MJ couplings, but is not a major player. The main manufacturers of couplings are Tyler Couplings, Anaco, Ideal and Mission Rubber in the United States, and Asian manufacturers based in China, India and Korea.

**[34]** As earlier described, Bibby is a division of Canada Pipe which is a Canadian subsidiary

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[18] Transcript at 24:4660, 1 June 2004.

[19] Transcript at 23:4616, 31 May 2004.

[20] Transcript at 14:2725-2727, 22 March 2004.

[21] Transcript at 13:2682-84, 17 March 2004.

[22] Transcript at 12:2448, 16 March 2004.

of McWane Inc., a U.S. corporation based in Birmingham, Alabama. McWane Inc. owns a number of companies related to the soil pipe industry, notably Ransom Industries, the parent company of Tyler Couplings, Anaco Inc. and other soil pipe foundries, fitting foundries and rubber coupling manufacturers. Canada Pipe is the Canadian parent company of all Canadian companies belonging to McWane. Canada Pipe owns a number of foundries in Canada, but Bibby is the only one which produces soil pipe and fittings. Those items account for approximately 50 percent of its production tonnage. Bibby does not produce couplings. The couplings sold by Bibby are imported from Anaco or Tyler couplings, both sister companies situated in the U.S.

**[35]** Canada Pipe purchased Bibby in 1997, as well as other foundries, from Gooding Investments, a company belonging to Dave Gooding. At that time, DWV cast iron pipe and fittings were manufactured in Canada by various foundries, all belonging to Mr. Gooding. In addition to the Bibby foundries (Ste-Croix and LaPerle, since closed), two other Gooding foundries were producing cast iron DWV products. They were Associated Foundry and Titan Foundry. Mr. Gooding sold the right of the last two foundries to manufacture cast iron; they have since ceased production of cast iron DWV products.

**[36]** Vandem Industries was founded in 1997 by two former officers of Bibby, Mr. James Warren Vanderwater and Mr. Russell Robert Demeny. It concluded an agreement with the Crowe Foundry to start producing cast iron pipe. Vandem also imports and sells cast iron fittings and MJ couplings.

(b) Distributors

**[37]** Distributors of DWV products buy from suppliers, either the manufacturer or an importer, and sell to the building, mechanical or plumbing contractors involved in construction or renovation projects. Distributors generally carry DWV pipe and fittings made of various materials. Cast iron DWV products represent only a small proportion of their inventory and sales.[23]

**[38]** There are in Canada three major distributors, all with a national presence: Wolseley Canada Inc. (formerly Westburne), EMCO Ltd. and Crane Supply. All three are customers of Bibby, although in the Western region, Wolseley no longer purchases from Bibby. There are as well small distributors, and distributors who belong to members of buying groups, such as Octo Purchasing Group and Canaplus, in order to improve their bargaining power and obtain various advantages such as higher rebates or discounts.

[23] Mr. Roy Byrne, Vice-President, Crane Supply: Transcript at 4:812-841, 4 March 2004; Mr. Robert Johnston, National Vice-President, EMCO Transcript at 7:1374, 9 March 2004; Mr. Claude Beaulac, Director General, Octo Purchasing Group: Transcript at 8:1652-1653, 10 March 2004; Mr. Paul Lachance, President and CEO, Wolseley: Transcript 9:1755, 11 March 2004; Transcript at 9:1795, 11 March 2004; Mr. Richard H. Elliott, Mc Keough Supply Inc. Transcript at 11:2153, 15 March 2004.

(c) Contractors

**[39]** For the most part, contractors buy from distributors the DWV products needed for construction projects on which they bid. The bidding process is highly competitive, and contractors will try to obtain the best price possible in order to make their bids attractive. Although contractors may have some leeway in deciding what material to use in construction, they will generally buy the type of DWV product that has been specified by the architect or the mechanical engineer.

(d) Importers

**[40]** DWV products are imported into Canada from two main sources: the United States and the Far East, mainly China and India. Both Canadian manufacturers of pipe and fittings import couplings from the United States. Quality pipe and fittings can be obtained from Asia, but quality couplings from Asia are more difficult to find. All the importers who testified before the Tribunal had increased their imports since 1998. Dr. Ware, citing the Canadian International Merchandise Trade Data Base of Statistics Canada, asserted that imports of cast iron DWV pipe and fittings have increased significantly since 1998. The average annual volume of imports of cast iron pipe and fittings increased by 72 percent in the five-year period 1998-2002 in comparison with the 1993-1997 period. In terms of value, the increase is even more striking: annual average value of the same imports increased 122 percent from the 1993-1997 ($638,652) to the 1998-2002 period ($1,417,382). These figures must, however, be placed in the perspective of total sales of cast iron DWV products, which represent some 30 million dollars. In other words, as Dr. Ware admitted in cross-examination, imports have increased from 2.5 percent to 5 percent of total sales.[24]

**[41]** Importers and distributors insisted on the importance of obtaining CSA approval to be able to sell pipe and fittings on the Canadian market. Dr. Ware, in both his report[25] and his oral testimony[26] indicated that obtaining CSA approval for a full line of fittings and pipe would cost approximately $50,000. This figure was not disputed by the Commissioner, and little other evidence was presented as to the cost. The only other information on cost came from Mr. David Kelm, of Sierra Distributors. He stated that registering fittings could be quite expensive, costing about $1000 per fitting,[27] which explained why an importer would not be willing to offer as complete an array of fittings as Bibby.

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[24] Transcript at 27:5304, 4 June 2004.

[25] Expert Economic Report of Dr. Roger Ware (20 February 2004) exhibit R-24 at paragraph 101.

[26] Transcript at 25:4956, 2 June 2004.

[27] Transcript at 11:2378, 15 March 2004.

(2) Marketing

**[42]** Distributors testified that in the industry, the incentive for buying from one supplier rather than another is usually offered in the form of volume rebates. Bibby's program, the Stocking Distributor Program, also offers rebates, but they do not depend on volume.

(a) Volume Rebates

**[43]** Volume rebates are granted for the quantity purchased from a given supplier. Although they are not premised on exclusivity, they do reward exclusive buying indirectly, since the percentage of the rebate will usually increase with an increase in purchases. The distributors all agreed that volume rebates are the usual incentive offered to encourage purchase of DWV products from a given supplier, and that a volume rebate system clearly favours large distributors, since their greater purchases will entitle them to a higher percentage rebate than the small distributor who can only claim the rebate allotted to a smaller purchase.

(b) Stocking Distributor Program

**[44]** By contrast, the rebate offered to distributors under Bibby's Stocking Distributor Program ("SDP") does not change according to the volume of the purchases. Rather, the program rewards the exclusive stocking of Bibby cast iron products. Distributors can stock any other DWV product, but must buy all their cast iron products and MJ couplings for cast iron pipe only from Bibby to be entitled to rebates and discounts (the latter through a favourable multiplier). Variously described as exclusive dealing (by the Commissioner) or preferential dealing (by the Respondent), the SDP offers the wholesale distributors to whom Bibby sells its products a rebate program that rewards loyalty. If the distributor buys all its cast iron supplies and MJ couplings from Bibby, it is entitled to quarterly and yearly rebates, as well as a significantly lower price for items purchased through the application of a multiplier. The multiplier for pipe, for example, could be .55 for a stocking distributor, and .94 for a non-stocking distributor. Thus, at the time of purchase, the stocking distributor would pay 55 percent of the list price for pipe, while the non-stocking distributor would pay 94 percent of the list price. If the stocking distributor remained on the program for a full quarter, it would also receive a quarterly rebate. In 2002, for instance, the rebate was 7 percent on pipe, 15 percent on fittings and 9 percent on MJ couplings. Further, if it remains on the program for an entire calendar year, it receives the yearly rebate, which in 2002 was 4 percent on all products. If a stocking distributor leaves the program during a quarter, it loses the quarterly rebate and the annual rebate for the year to date. The distributor can restart the program in the following quarter, reinstating its right to the quarterly rebate and to the annual rebate for the remainder of the year. The multiplier is applied at time of purchase and is not reimbursable even if the distributor leaves the program.[28]

**[45]** The multiplier and rebates will vary from one region to another. Because of the low margins on these products, the rebates represent a significant portion of distributors' profits. Although distributors are told that obtaining supplies elsewhere for any of the three products will

[28] see Joint Book of Documents (JB)-1-11; JB-11-520; JB-15-803.

jeopardize both their quarterly and yearly rebates, there have been instances in which Bibby chose to turn a "blind eye" to exterior purchases and paid the yearly rebate as part of a bargain to retain or gain a customer. For example, Wolseley bought products outside, but was paid the rebate in return for adding the B.C. region to the SDP.[29] Nuroc was bought by Wolseley in August 2003, but continued being supplied by Vandem until December 2003 without jeopardizing Wolseley's rebates.[30]

**[46]** To be part of Bibby's SDP, a distributor must make a minimum purchase. Mr. Elliott of McKeough Supplies testified that he was told by Bibby that he needed to make a purchase of at least 40,000 pounds to qualify as a stocking distributor. However, once that threshold is met, the rebates and the multiplier are the same in a given region, no matter the size of a distributor's purchase. This is in marked contrast to the usual system of volume rebates. Smaller distributors thus have an advantage with the SDP that they would not have with volume rebates and it allows them to compete by offering contractors the same prices as those offered by large distributors.

**[47]** There are no signed contracts for the SDP. The distributor joins at any time, and receives quarterly and yearly rebates for each completed calendar quarter or year. The multiplier is applied at the time of the purchase, provided the distributor has committed to being part of the program. Except for losing the rebates, there are no penalties attached to opting out of the SDP.

## III. LEGISLATIVE FRAMEWORK

**[48]** The applicable statutory provisions are reproduced in Schedule A to these reasons.

## IV. ISSUES

**[49]** The Commissioner bears the burden of establishing each element in both subsection 77(2) and subsection 79(1) of the Act. It is clear, in both subsections, that the Tribunal must find each of the requisite elements for an order to issue. The burden of proof is the civil standard, that is, on the balance of probabilities. The Tribunal must weigh the evidence in order to determine if, on a balance of probabilities, the Tribunal is satisfied that each element has been established. Throughout, the burden is on the Commissioner.

**[50]** The various elements that must be proven define the issues in this case. Under subsection 79(1), the Tribunal must find that:

> a) The Respondent occupies a dominant position in the market. In this regard, the Tribunal must be satisfied that the Respondent exercises market power over a specific product market, in a specific geographic market. Thus, one important issue is the definition of the relevant product and geographic markets.

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[29] Transcript at 10:2001, 12 March 2004; Transcript at 10:2039-2940, 12 March 2004; Transcript at 2:212-213, 2 March 2004.

[30] Transcript at 9:1782-1783, 11 March 2004.

b) The Respondent has engaged in or is engaging in a practice of anti-competitive acts. Anti-competitive acts are defined by reference to section 78, which presents an illustrative but not exhaustive list of anti-competitive acts; and

c) the practice has had, is having or is likely to have the effect of substantially preventing or lessening competition in the relevant market.

**[51]** Moreover, the issuing of an order is discretionary. The Tribunal must be satisfied that prohibiting the practice will enhance competition.

**[52]** For the purposes of subsection 77(2), the Tribunal must find that:

a) The Respondent has engaged in exclusive dealing. In the instant case, this involves making a finding under paragraph 77(1)(b) that the Respondent has induced customers to refrain from dealing with a specified class or kind of product except as supplied by the Respondent, by offering more favourable terms of supply;

b) the Respondent is a major supplier of the relevant product;

c) the practice is likely to impede entry or expansion of a firm in a given market, or the introduction of a product or an expansion of its sales in the market, or have any other exclusionary effect; such that

d) competition is or is likely to be lessened substantially.

Again, the making of the order is discretionary.

## V. SECTION 79 ANALYSIS

**[53]** Section 79 requires the Tribunal to make findings about market control, the practice of anti-competitive acts, and the substantial lessening or prevention of competition. Market control has been determined in previous decisions of the Tribunal by first determining the scope of the market. Thus our approach will be to first consider the market definition, then market control. Since we conclude that Bibby does have market power, we then examine whether one can find a practice of anti-competitive acts and if so, whether the practice leads to the substantial lessening or prevention of competition. We conclude that the impugned practices are not anti-competitive, and that the evidence is insufficient to find a substantial lessening or prevention of competition.

## A. PARAGRAPH 79(1)(a)-Market Control

(1) Product and Geographic Markets

(a) Commissioner's Submissions on Product and Geographic Markets

**[54]** The Commissioner argues that it is not necessary to begin by defining the product market, because there is direct evidence of market power. This direct evidence will be discussed when we examine market control. Suffice it to say at this point that the Commissioner emphasizes the importance of market control in her approach to paragraph 79(1)(a), and deals with market definition as a means of supporting indirect evidence of market control, rather than as a necessary first step in determining the market. The Commissioner asked her expert to assume that there were no close substitutes for cast iron DWV products. Once market control was found, the Commissioner simply confirmed the existence of the market by indirect means, showing from the evidence that there were in fact no close substitutes.

**[55]** The Commissioner assumes a *de facto* product market, i.e. cast iron DWV products. Although the Commissioner argues that there are three relevant product markets, her argument in respect to all three i.e. pipe, fittings and MJ couplings is the same. The Commissioner's main argument is that cast iron DWV products are not substitutable, i.e. DWV products made of other materials cannot replace cast iron DWV products in all applications. The Commissioner emphasizes the following factors: the non-combustibility requirements of building codes, the additional measures to be taken when using plastics, the health consideration linked to the use of asbestos pipes, the reduced noise of cast iron compared to plastic pipes, the durability of cast iron and the higher price of other metals. Based on these factors, the Commissioner argues that DWV products made of cast iron are not fully interchangeable with those made of other materials. At the present time, according to the Commissioner, there is no substitute for cast iron DWV products for certain applications, which explains their continued use in construction.

**[56]** The Commissioner argues that by its conduct, Bibby is demonstrating that the relevant product market is cast iron products. Bibby lowered its prices in response to the entry of a competing manufacturer and of importers of cast iron. Bibby does promote the use of cast iron over other materials for DWV products, but its main target are other cast iron suppliers. The Commissioner submits that the SDP program is meant to encourage exclusive sourcing of cast iron products: it has no effect on sourcing of DWV products made of other materials.

**[57]** Prices are also an indicator of competing products. The Commissioner concedes that the lack of price data for DWV products made from materials other than cast iron makes it difficult to analyze in detail the relationship between prices for different materials. Nevertheless, the Commissioner argues from the evidence that pricing for other products is independent of price movements in the cast iron products sector. Copper is significantly more expensive in the larger diameters and asbestos-cement and plastic pipe are much cheaper than cast iron pipe. The price discrepancy would tend to show, according to the Commissioner, that prices of other products do not discipline cast iron product prices, and thus, that DWV products made of other materials are not part of the same relevant market.

**[58]** According to the Commissioner's expert, Dr. Ross, the evidence shows that there are in fact three relevant product markets: cast iron DWV pipe, fittings, and MJ couplings. After showing that cast iron products can be distinguished from other products in terms of uses, applications and prices, the Commissioner then submits that cast iron DWV products constitute three distinct product markets. Because of different cost considerations, different price pressures and various other competitive conditions, it is not appropriate, according to the Commissioner, to consider the DWV cast iron products as constituting a single market. Input and manufacturing processes vary, MJ couplings must be imported since there is no domestic production, various suppliers offer various choices, and not necessarily all three products. The Commissioner submits that the evidence shows that buyers would prefer to purchase the products separately, rather than as part of a system. This would indicate, from the Commissioner's reading of *Canada (Director of Investigation and Research) v. Tele-Direct (Publication) Inc. et al.*,[31] that the products should be considered to be separate markets.

**[59]** On the issue of the geographic market, the Commissioner argues that the evidence shows that there are six relevant geographic markets (British Columbia, Alberta, the Prairies, Ontario, Quebec and Atlantic Canada), which differ markedly in terms of pricing and represent the regions Bibby uses for its marketing. In any of the geographic markets thus defined, Bibby has at least an 82 percent market share. The Commissioner argues that the absence of strong correlations in prices, even for identical products, between the six regions is evidence that they form six distinct geographic markets. The difference in prices is unrelated to transportation costs. Surprisingly, prices for Bibby pipe and fittings are consistently higher in Quebec, where they are made, than in British Columbia, in spite of the transportation costs.

(b) The Respondent's Submissions on Product and Geographic Markets

**[60]** The Respondent submits that the first step in determining market power must necessarily be defining the relevant product market. Whereas the Commissioner considers the relevant product market as consisting of cast iron pipe and fittings, and MJ couplings, the Respondent submits that the product market is in fact much broader, and includes a range of products used for the same purposes, i.e. pipe, fittings and couplings made of various other materials including copper, asbestos-cement and plastic. This definition, if accepted, would decide the case. Since cast iron pipe, fittings and couplings represent only 11 percent of the DWV products market in Canada, Canada Pipe could not be said to be a dominant supplier.

**[61]** The Respondent argues that the Commissioner, in presenting her case, made a fundamental mistake in not attempting to first delineate the relevant product market. Rather, the Commissioner asked Dr. Ross to assume that there were no close substitutes for cast iron for DWV applications and that the product market was cast iron DWV products. He proceeded on this basis to find market power, starting with Bibby's significant market share (in the 80 - 90 percent range).

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[31] (1997), 73 C.P.R. (3d) 1 (Comp. Trib.) (*Tele-Direct*).

**[62]** The Respondent submits that, since Bibby competes with other products by promoting the use of cast iron rather than other materials, it considers the product market to be all DWV products, not just those made of cast iron. The main competition comes from plastics, which offer certain important advantages over cast iron, in particular price, lightness and ease of assembly.

**[63]** Regarding the geographic market, the Respondent contends that the Commissioner has wrongly defined it by relying on the pricing in the various regions. Prices can vary according to the conditions in various regions, in which some products will be more or less in demand for many reasons, not all related to price. For example, asbestos-cement is allowed in certain drain applications in Quebec and Ontario, but its use is prohibited for all applications in other provinces. Different buyers have different preferences and contractors are subject to various rules. The paucity of evidence on the pricing for various other materials renders a comparative analysis with cast iron figures impossible. According to the Respondent, cast iron prices, on their own, are of little use in determining the geographic market, since the DWV market includes products made of other materials.

**[64]** If, in the alternative, the market is to be defined as only cast iron, the Respondent submits that one needs to consider the fact that in Canada, cast iron DWV products are manufactured only in Quebec and Ontario. All other regions must bring in the pipe and fittings from elsewhere, either from within Canada, the U.S. or overseas. Moreover, MJ couplings are not produced in Canada, so they are imported. According to the Respondent, these factors support a wider geographic market than the six geographic markets advocated by the Commissioner. The Respondent submits the market is at the very least Canada-wide, if not wider, given that imports discipline prices in some regions.

(c) Tribunal's Analysis of Product and Geographic Markets

**[65]** A "class or species of business" has been interpreted by the Tribunal in abuse of dominance cases to mean the relevant product market. The expression "Canada or any area thereof" is to be understood as the geographic market, while "control" has been found to be synonymous with market power (*Canada (Director of Investigation and Research) v. D&B Companies of Canada Ltd.;*[32] *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.*[33] *Canada (Director of Investigation and Research) v. NutraSweet Co.,*[34] *Canada (Director of Investigation and Research) v. Tele-Direct*.[35]

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[32] (1995) 64 C.P.R. (3d) 216 (hereinafter *Nielsen* decision).

[33] (1992) 40 C.P.R. (3d) 289, [1992] C.C.T.D. No. 1 (*Laidlaw*).

[34] (1990), 32 C.P.R. (3d) 1 (*NutraSweet*).

[35] (1997) 73 C.P.R. (3d) 1 (*Tele-Direct*).

**[66]** The Act does not specify how the analysis under paragraph 79(1)(a) of the Act is to proceed. However, in the above-mentioned cases, the analysis begins with a definition of the product market. This approach is also the one adopted by the Competition Bureau's (the "Bureau") *Enforcement Guidelines on the Abuse of Dominance Provisions* (the "Guidelines"). Although the Guidelines have no binding effect on the Tribunal, they are useful in that they serve to indicate how the Bureau will proceed in an abuse of dominance case. At section 3.2.1 the Guidelines underscore the importance of defining the product market:

> This paragraph [79(1)(a)] of the Act contains a number of elements that need to be separately clarified: (i) the existence of a class or species of business in Canada or any area thereof; (ii) the meaning of "control"; and (iii) the meaning of "one or more persons."
>
> **3.2.1(a) "Class or species of business" — Product Market Definition**
>
> A precondition for assessing market power is identifying existing competitors that are likely to constrain the ability of the firm or firms to profitably raise prices or otherwise restrict competition. The 1986 provisions adopted the term "class or species of business" rather than the term "market" in the context of the control element. The Bureau approach is to consider defining a "class or species of business" as synonymous with defining a relevant product. The analysis begins by examining the product market(s) within which the alleged abuse of dominance has occurred or is occurring.

**[67]** The Tribunal restates the same principle in *Tele-Direct*, and adds that the exercise is also necessary for the purposes of section 77:

> A necessary first step in deciding this case is to define the relevant market. This must be done for purposes of section 79 in order to determine if Tele-Direct, as alleged by the Director, "substantially or completely control[s] throughout Canada or any area thereof, a class or species of business". The Tribunal decided in *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.* (1995), 64 C.P.R. (3d) 216, [1995] C.C.T.D. No. 20 (QL) (Comp. Trib.), that "class or species of business" means product market and "control" means market power. ...
>
> A market must also be defined in order to consider the allegation of tying, brought under section 77. Under subsection 77(2), the Tribunal must find that "tied selling, because it is engaged in by a major supplier of a product in a market ... is likely to" have a number of detrimental effects.[36]

**[68]** In determining the relevant product market one considers substitutability - in other words,

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[36] *Tele-Direct* at 33-34.

whether there exist sufficiently close substitutes to the product at issue, such that the market for that product includes those substitutes. In *Tele-Direct*, the Tribunal cites the market definition set out in *Canada (Director of Investigation and Research) v. Southam Inc.,*[37] where the Federal Court of Appeal defines what is meant by substitutability:

> Products can be said to be in the same market if they are close substitutes. In turn, products are close substitutes if buyers are willing to switch from one product to another in response to a relative change in price, i.e. if there is buyer price sensitivity. Direct evidence of substitutability includes both statistical evidence of buyer price sensitivity and anecdotal evidence, such as the testimony of buyers on past or hypothetical responses to price changes. However, since direct evidence may be difficult to obtain, it is also possible to measure substitutability and thereby infer price sensitivity through indirect means. Such indirect evidence focusses on certain practical indicia, such as functional interchangeability and industry views/behaviour, to show that products are close substitutes.[38]

**[69]** No evidence was presented to the Tribunal in this case on the cross-elasticity of demand - whether increasing the price of DWV cast iron products would lead to an increased demand for DWV products made of other materials. Dr. Ware stated that the data available was insufficient to allow for such calculations.[39] Dr. Ross did not consider cross-elasticity, since his mandate was to determine market power and the anti-competitive effect of the SDP, while assuming that there were no close substitutes for cast iron. In that regard he said:

> For the purposes of this affidavit I have been instructed to assume that there are significant applications for which the alternatives to cast iron DWV products are not close substitutes. For this reason then, I am assuming that DWV products not made of cast iron are excluded from the relevant product market.[40]

**[70]** As indicated in *Canada (Commissioner of Competition) v. Superior Propane Inc.,*[41] cross-price elasticity is of limited value when several products may compete in the same market. The more relevant question is whether other products constrain the ability to raise the price of the target product:

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[37] [1995] 3 F.C. 557 (F.C.A.).

[38] *Ibid.* at paragraph 161.

[39] Transcript at 27:5232-5234, 4 June 2004.

[40] Expert Report of Dr. Thomas Ross (19 February 2004) exhibit A-11 at paragraph 41.

[41] (2000), 7 C.P.R. (4th) 385.

> The more important limitation on the use of the concept of cross-price elasticity of demand to delineate markets is its indirect relevance to the exercise of market power. The definition of the relevant competition market does not depend on identifying particular substitutes in some pairwise fashion. Rather, the important question is whether, on a price increase by a firm, enough of its sales would be lost to all competing products, regardless of their number or identity, to make the price increase unprofitable. If this were the case, then a relevant competition market would not be found; that firm would not be able to exercise market power. A cross-elasticity estimate may identify a substitute and can be helpful in delineating a market, but it does not directly measure the ability of a firm to raise the price.[42]

**[71]** In the absence of direct evidence about price elasticity and given the importance of determining whether other products would constrain price increases of cast iron DWV products, the Tribunal considered the indirect evidence on the topics enumerated in the Guidelines.

*The Views, Strategies, Behaviour and Identity of Buyers.*

**[72]** The evidence from distributors indicates a particular market for cast iron DWV products. Contractor requirements or building code specifications may dictate the choice of cast iron over other materials. According to the evidence, distributors stock a great deal more than cast iron DWV products.

**[73]** Distributors buy cast iron products to satisfy their own clients' needs; clients in turn buy cast iron to meet specific requirements. The evidence of Mr. Elliott, President of McKeough Supply Inc. and a witness for the Commissioner, confirms this point and expresses the reluctance of buyers to wholeheartedly endorse plastics:

Examination-in-chief of Mr Elliott:

> **MR. R.H. ELLIOTT**: I think there's still some trepidation in the marketplace about using PVC products on high rise-type projects or major institutional commercial-type projects.
>
> It's just a product that seems to have had trouble moving forward very far in the Ontario -- I mean, it certainly has grown but it's got some smoke issues and the flame issues and things like that.
>
> And at one time -- I don't even know what the rules are now but I believe, at one time, it couldn't be used in a building over six storeys high. I think that's changed now.
>
> I'm not sure what the code is actually on the product now but it's -- there's still been some reluctance in the marketplace by contractors to use.

[42] *Superior Propane* at paragraph 61.

So it doesn't come out on specifications very often and I guess that's what I'm leading up to.

We go by what's specified. When we get a tender request in from a contractor, generally, it's cast iron and copper DWV that's specified.[43]

**[74]** When options are provided to contractors by mechanical engineers, the evidence of some contractors was that they opt for cast iron for certain applications:

Examination-in-chief by counsel for the Commissioner of Mr. Bornhorst, Mechanical Contractor:

**MR. J. BORNHORST**: If it's a job designed by a mechanical engineer, he may specify that the underground may be plastic or cast iron. Someone may have their choice.

Or he may specify that certain portions of it to be done in plastic, certain portions to be done in cast, and that would go for above-ground installations as well. He would specify whether he wanted cast iron or plastics to be used, you know, code permitting.

And if it were design-build, we would have our choice of materials, code permitting again, to tell the owner which we prefer and why we'd prefer it.

**MR. G.M. LAW**: And typically, when you as contractor have your choice of materials, what materials do you use for drain, waste and vent?

**MR. J. BORNHORST**: Below ground, PVC; in crawl spaces, we would use PVC on occasion, the majority of the time; and for above ground, I would say above main floor installations, we would use cast iron.[44]

*Trade Views, Strategies and Behaviour*

**[75]** The use of the various materials in DWV applications is regulated in a variety of provincial and municipal building codes, which are all based on the *National Building Code* developed by the Canadian Research Council. Mr. Zorko, an expert witness for the Commissioner, is a Building Code Consultant. He gave evidence both in his report and in oral testimony about the impact of the building codes on the use of materials in construction.

**[76]** The major issue relating to the use of cast iron is the question of combustibility. In this regard, cast iron offers advantages that no other material can offer. Among non-combustible materials (metal, concrete and asbestos) it offers the best price (compared to copper, stainless steel), durability (compared to aluminum or concrete) and general safety (compared to asbestos). Mr. Zorko explained that in non-combustible construction, combustible materials may be used in certain buildings, provided various conditions are met (depending on the type of building). This is best illustrated by quoting article 3.1.5.15 of the *National Building Code:*[45]

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[43] Transcript at 11:2137-2138, 15 March 2004.

[44] Transcript at 13:2681, 17 March 2004.

[45] *National Building Code* (1995 Edition).

3.1.5.15 Combustible Piping Materials

(1) Except as permitted by Clause 3.1.5.2.(1)(e) and Sentences (2) and (3), combustible piping and tubing and associated adhesives are permitted to be used in a building required to be of noncombustible construction provided that, except when concealed in a wall or concrete floor slab, they

a) have a flame-spread rating not more than 25, and

b) if used in a building described in Sub-section 3.2.6, have a smoke developed classification not more than 50.

(2) Combustible sprinkler piping is permitted to be used within a sprinklered floor area in a building required to be of noncombustible construction. (See also Article 3.2.5.14.)

(3) Polypropylene pipes and fittings are permitted to be used for drain, waste and vent piping for the conveyance of highly corrosive materials and for piping used to distribute distilled or dialyzed water in laboratory and hospital facilities in a building required to be of noncombustible construction, provided

a) the building is sprinklered throughout;

b) the piping is not located in a vertical shaft, and

c) piping that penetrates a fire separation is sealed at the penetration by a fire stop system that, when subjected to the fire test method CANCSI 15-M, "Standard Methods of Fire Test of Firestop Systems," has an FT rating not less than the fire-resistance rating of the fire separation.

**[77]** Mr. Zorko then adds:

> There are further indirect requirements relating to flame-spread and smoke developed characteristics restrictions in sentence (1) of article 3.6.4.3. - Plenum Requirements of the NBC [*National Building Code*], copy of which is provided within Exhibit D, for piping in horizontal service spaces (between floor and ceiling, or ceiling and roof) used as a plenum. The restrictions regarding materials used inside such plenums are the same as those specified in sentence 3.1.5.15. (1) quoted above.[46]

**[78]** Mr. Zorko also discussed in his report the use of XFR piping in non-combustible construction. XFR pipe is made of PVC, but with an additional coating which, when exposed to flames, actually acts as a fire retardant. The flame spreading rating of XFR is 0, and smoke development is rated 35. In other words, XFR pipe can be used in almost all non-combustible applications, except in vertical shafts where all materials must be non-combustible.

**[79]** Mr. Zorko is of the opinion that the acceptance of XFR pipe will be gradual, and not immediate. The installation requirements for the pipe is one drawback, since the protective coating must be stripped to allow exposure and assembly by bonding. The coating is then reapplied. Thus the fire-protection feature is highly dependent on field conditions, workmanship and the general level of knowledge which workers and contractors have of this material. Moreover, where non-combustible material is required, XFR pipe would still not be acceptable because it is essentially combustible.

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[46] Expert Report of Mr. Josef Zorko (20 February 2004) exhibit A-10 at paragraph 8.

**[80]** Although Mr. Zorko does not exclude the possibility that eventually code requirements will be revised throughout Canada to allow a more general use of plastic piping materials, he expresses the view that, at the present time, the current regulatory restrictions favour and will continue to favour the use of cast iron for DWV applications.

**[81]** On cross-examination by counsel for the Respondent, it was established that Mr. Zorko had in fact never used XFR pipe in a building design, nor had he spoken personally with anyone who had done so nor to any representative of the IPEX company.[47] Although knowledgeable about the *National Building Code*, Mr. Zorko did not have specific information about the degree of acceptance of the XFR product by authorities in provinces other than Quebec and Ontario.

**[82]** That being said, the Tribunal believes that the information provided by Mr. Zorko as to the preference for the use of cast iron in code restricted buildings, and the restrictions imposed on the use of plastic piping, notably in vertical shafts, is valid and significant. No information was provided as to the proportional use of cast iron compared to other materials, and especially plastic. The Tribunal therefore finds that in high-rise buildings, cast iron offers the advantage of meeting all requirement for fire and life safety purposes, and that only non-combustible materials, essentially cast iron, can be used in vertical shafts.

*End Use*

**[83]** Functional interchangeability appears in the Guidelines under the heading "End Use." It is important, in this respect, as the Tribunal pointed out in *Tele-Direct* , to take context into account:

> The criterion of functional interchangeability in end use should not be treated at such a high level of generality that it precludes objective yet contextual analysis. To say that, for example, automobiles and bicycles are in the same product market because they both provide a means of transportation would make the level of generality so high that no meaningful analysis could be performed as a result of it. Some consideration must be given to context.[48]

**[84]** In both *Southam* and *Tele-Direct*, functional interchangeability is considered a critical element of the analysis. The Tribunal held in *Tele-Direct*:

> We conclude that consideration of functional interchangeability is essential in assessing indirect evidence of whether two or more products are in the same market. But this does not exclude other relevant evidence which may reinforce or undermine what functional interchangeability implies.[49]

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[47] Transcript at 16:3100-3107, 24 March 2004.

[48] *Tele-Direct* at 41.

[49] *Ibid.* at 39.

**[85]** DWV products are integrated into buildings. As explained elsewhere in these Reasons, different materials offer different advantages, and although there may be some overlap in use, there appear to be specific uses for different materials. The Tribunal heard a great deal of evidence about whether plastic pipe and fittings were directly competing with cast iron, thus forming a single market.

**[86]** Cast iron offers advantages which plastic does not. Several witnesses noted the fact that cast iron pipes are less noisy than plastic pipes. Bibby itself uses that characteristic to convince buyers of cast iron's superiority. However, in cross-examining some witnesses, Respondent's counsel sought to bring out the fact that the plastic industry, and IPEX in particular, is trying to establish that plastic pipes are in fact comparable to cast iron pipes in terms of noise level. It would appear, from the whole of the evidence, that cast iron still offers a certain advantage in respect to noise. For now, we accept the evidence of those witnesses who spoke of the relative advantage of cast iron in terms of noise characteristics.

**[87]** While plastic pipe is lighter and easier to handle and assemble, the evidence also shows that cast iron pipe can be disassembled more easily than plastic pipe, which can be assembled only once, since the elements, once glued together, cannot be taken apart. Cast iron is non-combustible and durable, thus meeting all requirements in building codes. Fire-proofing the site where a pipe goes through a fire-proof floor or wall requires only caulking in the case of a cast iron pipe, while it requires the installation of a special device when the pipe is plastic. Cast iron offers greater strength and load-bearing abilities, hence its widespread use in multi-level buildings. Finally, the low thermal expansion rate of cast iron is a significant factor in a country of temperature contrasts such as Canada. Cast iron pipe expands and contracts at a low rate, similar to that of other building materials such as steel, concrete and masonry.[50]

**[88]** Dr. Ware, the Respondent's expert economist, presented evidence of the increasing importance of plastics in the DWV market. This evidence was based on research done by the Freedonia Group Incorporated, a company which studies market trends in various industry sectors. The report tendered in evidence[51] from Freedonia indicated the following: Freedonia is a U.S.-based company, established in 1985, which has published a number of studies covering such areas as building materials, chemicals, pharmaceuticals, plastics and many other industries. Each study includes information on growth markets, market shares, product analyses and forecasts as well as market analyses and forecasts. The study on the U.S. pipe industry, which was the subject of the report tendered in evidence, placed particular emphasis on plastic pipe. Information and data on the pipe industry were obtained from a variety of primary and secondary sources, including government, trade associations, publications, industry participants and online databases.

[50] JB 6, Tab 239, p.11.

[51] Expert Economic Report of Dr. Roger Ware (20 February 2004) Exhibit B - Tab 4.

**[89]** The report that was presented to the Tribunal was actually an extract of a report published on Freedonia's website. The authorship of the report was unknown. The Tribunal notes that the information, whatever its value, deals with the situation of the pipe industry in the United States. In brief, the data indicate the increasing use of plastics in the construction sector and the corresponding decrease in the use of cast iron. Counsel for the Commissioner emphasized the point that although the report does state that plastics are becoming more and more prevalent in DWV applications, it also acknowledges that "... cast iron pipe will remain the material of choice in uses such as multi-story buildings because of the material's superior high pressure capabilities, sound deadening properties and flame resistance."[52] After reviewing various documents, including the Freedonia material, and holding discussions with industry participants, Dr. Ware came to the following conclusion:

> I conclude that the industry has been characterized for four decades by a steady substitution of plastic DWV products for cast iron products, and that this trend is expected to continue.[53]

**[90]** No data similar to that in the Freedonia report were presented for Canada, since they were apparently unavailable, but various participants in the industry confirmed this trend of shifting to plastic DWV products in Canada. However, the Tribunal cannot know at what pace it is progressing, given the absence of concrete Canadian data. Moreover, it is probable that the different regulatory regimes have an impact on materials used in Canada for the same applications.

**[91]** From the evidence heard, both from contractors and engineers, the Tribunal finds itself in agreement with the following statement found in Mr. Zorko's rebuttal report (in which Mr. Zorko disputes Dr. Ware's assertions that IPEX Inc.'s XFR line of products can replace cast iron in any type of construction):

> Although he is correct in stating that IPEX Inc.'s line of products is certified as compliant with the requirements applicable to combustible DWV piping materials used in buildings where non-combustible construction is required, Mr. Ware's [sic] here again fails to make the appropriate distinctions as to where this allowance exists and where it does not. Indeed, in the case of many types of buildings as well as in many types of systems configurations, not only contractors but owners as well are still obligated by Codes to use non-combustible piping materials, among which cast iron enjoys a distinct price advantage. The acceptance by building inspectors of fire-resistant coated PVC DWV systems that Mr. Ware mentions in closing, can not be understood as covering all and

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[52] *Ibid*. Section VII - Drain, Waste and Vent Pipe, 1st page.

[53] Expert Economic Report of Dr. Ware (20 February 2004) exhibit R-24 at paragraph 25.

any building governed by the Codes as such acceptance can only extend to what is specifically allowed.[54]

**[92]** The Tribunal accepts that cast iron offers the advantages mentioned above - strength, durability and lower noise level. Although plastic may eventually replace cast iron entirely, as predicted by Mr. Johnston from Emco, this has yet to happen, and cast iron continues to be in a class of its own:

> **MR. R. JOHNSTON:** ... It's a mature market at $34 million, declining 5 percent a year, which primarily is going to plastic-type material.
>
> Given our market share desire 20 percent of that, parallel to that, we supply what our customer asks us for and/or what is specified, ...
>
> That material -- there is less of that material being consumed going forward and it's going -- at some point, will be a crossover into plastic.[55]

*Physical and Technical Characteristics*

**[93]** As stated in the two previous sections, significant evidence was adduced that the physical and technical properties of the materials used for DWV products are very important to the ultimate buyers, i.e. engineers, contractors and builders, and that these properties differed widely.

**[94]** Some materials are non-combustible, such as cast iron, copper, stainless steel and asbestos-cement. They also have specific characteristics. Cast iron is load-bearing and durable, but heavier and costlier than plastic. Copper is easier to bend than iron and in smaller diameters, has a better flow-through. In larger diameters, it offers no significant advantage over cast iron, but would be more expensive. Stainless steel's use is restrained by its cost; it is used only when necessary, where non-corrosive material is required, as in laboratory settings. Asbestos-cement is not allowed in building applications in any other province but Quebec and Ontario. Plastic is a combustible material, but recent improvements allow for its use in various industrial and commercial settings where before this would not be possible. Plastic offers many advantages over cast iron, including lower prices, lightness and ease of installation. Several witnesses indicated that the use of plastic was increasing. However, it still cannot replace cast iron in all its applications, nor does it offer the same characteristics.

**[95]** There was considerable evidence to show that end users would have definite preferences for one material over the other. Insofar as cast iron was concerned, not only do building codes require the use of non-combustible material in some cases, there is also evidence that in older buildings, where cast iron had originally been used, the preference would be to continue with the use of cast iron.

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[54] Rebuttal Report on the Expert Economic Report of Dr. Roger Ware (27 February 2004) exhibit R-12 at paragraph 1.12.

[55] Transcript at 7:1369-1370, 9 March 2004.

*Price Relationships and Relative Price Levels*

**[96]** According to the Guidelines,

> the absence of a strong correlation in price movements between two products over a significant period of time generally suggests that the products are not in the same relevant market. Similarly, if the prices of one firm have historically constrained the price movements of another, this is an indication that the two firms' products compete in the same market.

**[97]** It is generally accepted that the test to determine whether two or more products are close substitutes will be whether they act to constrain prices. In this case, we have no evidence on the correlation of price movements between cast iron DWV products and products made of other materials. Bibby itself acknowledges the competition with cast iron products in its pricing policies. The evidence shows clearly that Bibby has reacted to the entry of new cast iron suppliers, whether manufacturer (Vandem) or imports (Sierra, New Centurion) by aggressively lowering its prices. In Quebec and the Maritimes, where no such competition exists, prices have increased since 1998. Although it is shown that Bibby monitors the prices for plastic DWV products, there is no evidence of the prices of plastic products having a disciplinary effect on the price of the cast iron products.

**[98]** Both Mr. Wasyliw and Mr. Surgenor testified to Bibby's zeal in defending cast iron against the incursion of plastic. The evidence heard from Mr. Thomas Leonard,[56] Mr. Wasyliw[57] and Mr. Charles Mark Surgeonor[58] on the competition from plastics suggests that Bibby sought to show the advantages of cast iron over plastics, but not that Bibby modified its prices to compete with plastics.

**[99]** Bibby's SDP agreement with the distributors includes a "marketing allowance", whereby the distributor may be rewarded for promoting (Bibby's) cast iron products. Ultimately, such an allowance will impact on the price paid by distributors. However, this marketing allowance is of minimal value when compared to the value of rebates and the multiplier offered for stocking only Bibby's cast iron products.

**[100]** As was stated in *Tele-Direct*, the intensity of the competitive response is an indicator of its true importance:

> The respondents submit that evidence of "broad competition" places all local media in the same product market. The respondents say that differences in the type or intensity of response to different

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[56] Transcript at 19:3855; 3865-3866; 3893-3894; 3901; 25 May 2004; Transcript at 20:4058, 26 May 2004.

[57] Transcript at 24:4650, 1 June 2004; Transcript at 24:4662-4664, 1 June 2004.

[58] Transcript at 23:4567-4569, 31 May 2004.

> "competitors" should not eliminate some "competitors" from the relevant market. We cannot agree. The type and intensity of the alleged competitive response is an element for consideration in determining if the products argued to be in the same market are close substitutes. Substitutability, as pointed out in the *J.W. Mills* case quoted above, is always a question of degree. Differences in the intensity of the reaction to players admitted to be competitors by Tele-Direct and those alleged to be competitors by Tele-Direct can help us to determine where to draw the line in this case.[59]

**[101]** The competition with plastics appears to have had little effect on the prices of cast iron. Bibby devotes considerable effort to promoting the physical characteristics of cast iron products as compared to plastics, but these efforts do not lead to a reduction in price for cast iron products. From the evidence, it appears that the use of plastics is prevalent and increasing across the country. The prices of cast iron have not been decreasing with the increased use of plastics. Prices of cast iron DWV products have increased in Quebec and the Maritimes. They have decreased where Bibby has met cast iron competition - in Ontario with Vandem, in the West with importers. In other words, even though the Respondent claims that plastic is a competing material, there is no evidence that plastic products have had a constraining effect on prices of cast iron DWV products.

*Substitutability*

**[102]** The experts on both sides agreed that there was a lack of data for calculating the elasticity of the demand, such that a direct measure of substitutability was impossible. The Tribunal does not have sufficient evidence to show whether consumers (in this case, distributors) would change their behaviour because of a rise in prices. In the present context, such an analysis is impossible, and not only because of a lack of data. The fact is that the choice to buy cast iron over other products is not only a matter of price; as seen earlier in these reasons, other important considerations come into play. From the evidence of Mr. Zorko and others, we find that for certain applications, such as in vertical shafts, non-combustible material remains the only acceptable material, which in practical terms means cast iron. In certain other applications, where considerations of safety and non-combustibility are paramount (based on use, occupancy, and height of building) the use of material other than metal will be constrained. For example, a sprinkler system may be compulsory or fire separation sealants will be required. The Respondent sought to convince the Tribunal that this situation was evolving, and that plastics in particular were offering true competition. On the evidence, the Tribunal is satisfied that for certain applications, cast iron has no economic substitute.

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[59] *Tele-Direct* at 66.

*Three Product Markets or One*

**[103]** Dr. Ross opined, based mainly on an analysis of prices, that the cast iron DWV product market was in fact composed of three distinct markets - pipe, fittings and MJ couplings. For all three product markets, however, the allegations of the Commissioner are the same: the abuse of dominant position is occurring in all three product markets, the common factor is cast iron (MJ couplings are not made of cast iron but are used with cast iron), and the SDP applies to the three products. Dr. Ross based his opinion about distinct markets on the different pricing trends. These differences are no doubt at least partly due to the fact that the products do not all originate from the same source. Couplings are not made of the same material as pipe and fittings, and are not produced by the same manufacturers. Pipe and fittings can be produced by the same foundry, but not necessarily. The Tribunal finds, since all three products can be bought separately from different suppliers and the pricing trends for each appear independent, that there are three distinct product markets.

**[104]** In respect to the geographic market, the issue turns on whether "...within Canada or any area thereof...,"[60] there is sufficient competition to discipline prices. The price of the relevant product may act as an indicator of geographic market. If prices show homogeneity in a given region as compared to another region, each of these regions could be considered a separate geographic market; in an integrated geographic market, lower-price goods will simply move into the areas where higher prices are charged, thus providing effective price discipline.

**[105]** When products are manufactured outside Canada, one can argue that the geographic market may extend beyond the boundaries of Canada. In *NutraSweet*, the fact that the entire supply of aspartame was imported was not the deciding factor in the Tribunal's determination of the geographic market. Instead, the Tribunal considered the prices charged for aspartame in both the EEC and Canada, and concluded that prices differed significantly. The Tribunal therefore found that Canada was a distinct geographic market for the purposes of evaluating the effects of NutraSweet's marketing practices.

**[106]** Consumer behaviour is also an indicator of the geographic market. In *Laidlaw*, the Tribunal had to decide whether the Courtney-Comox-Cumberland area was part of the same geographic market as Campbell River for the provision of lift-on-board garbage collection and disposal service. Evidence showed that the extensive area between those two regions with very little population made the provision of service by the same provider unlikely. In other words, consumers in one area would not be likely to choose a provider operating in the other area. Thus, no price discipline was imposed by the operators of the other area. For this reason, the Tribunal held that the two areas formed distinct geographic market areas.

**[107]** Dr. Ross, in his report, found that there were six relevant geographic markets, based on the regions which Bibby uses for marketing and pricing purposes. Given the great variation in prices from one region to the next, Dr. Ross concluded that different competitive forces were at work in the different regions, thus defining separate geographic markets. Dr. Ware stated that

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[60] 79(1)(a) of the *Competition Act*.

the relevant geographic market was Canada, perhaps even beyond, given the level of imports and the fact that products were not being produced everywhere in Canada, and thus had to be shipped from one region to another. Dr. Ware added, in the course of his examination-in-chief, that he believed that in fact the geographic market was not essentially relevant to market power in this case, since the broad features of the industry tended to be the same across Canada and the Commissioner was arguing market power in each of the six markets.

**[108]** The Tribunal notes the very significant price differences from one region to the next, and concludes that this in fact does differentiate various geographic markets. Different forces appear to be at work in setting the prices of cast iron DWV products, notably when one compares the pricing situation in British Columbia to the one which prevails in Quebec or the Maritimes. As was stated in *Laidlaw*, the geographic market is determined by the area within which competition should occur:

> The general test for determining the geographic dimensions of a market is the same as that used to determine the product dimensions: identification of the universe of effective competition. That is, in so far as the relevant geographic dimensions are concerned, for the purposes of this case one asks what are the boundaries of the geographic area within which competitors must be based if they are to provide effective competition to Laidlaw. Effective competition means that the competitor provides a significant restraint on Laidlaw's ability to raise prices above the competitive level.[61]

**[109]** The evidence in the instant case shows that although Bibby has a national presence, its competitors generally do not. Thus, the disciplining effect on prices (or at least, a lowering of the prices) is felt in Ontario because of the entry of Vandem, while in the West, importers are causing prices to drop. The absence of significant cast iron competition in Quebec and the Maritimes leads to high prices being maintained. Thus, different market forces are operating in the six regions, which would justify a finding that six different markets exist (although, arguably, Quebec and the Maritimes could be placed together, and, to a lesser extent, Alberta and British Columbia).

**[110]** The Respondent argues that shipment movements and the importance of imports indicate a wider geographic market than regional-based markets as suggested by the Commissioner. Shipment movements from Quebec and Ontario to the rest of the country and imports from the U.S. and overseas support, according to the Respondent, defining a geographic market that could be Canada and could even be wider and include at least North America. However, given the very different forces operating in the different regions of Canada, the argument is not convincing.

**[111]** Imports are properly included as products that compete in the cast iron DWV market. The evidence establishes that imports are interchangeable with domestic products and their

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[61] *Laidlaw* at 316.

presence in the market has caused prices to drop. Unlike the circumstances in *NutraSweet*, there is insufficient evidence before the Tribunal to consider whether the market extends beyond the borders of Canada. The only evidence received on prices in the U.S. is that prices are lower. Mr. William Kelly, who as a plumbing contractor imports cast iron DWV products for his business, indicated that he had different suppliers in Calgary and in San Diego (the two places where he runs his business), because the prices in the U.S. were lower, particularly in San Diego.[62] Within Canada, prices vary markedly between regions. The different regions react to their own competitive factors. The fact that the product is shipped from Quebec, from the U.S. or from overseas does not create one homogeneous market for Canada or a wider market extending beyond Canada. The evidence shows that cast iron DWV products are submitted to different market forces throughout Canada, as evidenced by the significant price variations from one region to the next. This fact alone argues for separate geographic markets.

d) Tribunal's Conclusions on Product Market and Geographic Markets

**[112]** The evidence reflects a market that is changing because of the increasing importance of plastics in the DWV industry. We find the American data presented by Dr. Ware on plastics replacing cast iron of limited assistance in the Canadian context, given the impact of Canadian regulations on the choice of materials and the absence of statistical evidence showing a similar trend in Canada. From the evidence we have heard, however, plastics seem to offer a number of advantages to the construction industry and appear to be increasingly used. Nevertheless, the Tribunal is of the view that cast iron still plays a distinct role in the DWV industry, and it is treated as a separate market by distributors and contractors. More importantly, it is treated differently by Bibby itself, in its marketing and its pricing policies. In consequence, the Tribunal finds that the product market is the cast iron DWV product market, within which three distinct markets can be identified: cast iron pipe and fittings and MJ couplings. Because of the significant price variations in cast iron DWV products from region to region, we find that there are six distinct geographic markets: British Columbia, Alberta, the Prairies, Ontario, Quebec and the Maritimes.

**[113]** Because of the findings that there are three product markets and six geographic markets, the Commissioner must show that Bibby controls the market in eighteen different markets, and has substantially prevented or lessened competition in those eighteen markets, through its practice of anti-competitive acts.

(2) Market Power

(a) Commissioner's Submissions on Market Power

**[114]** The Commissioner's case for market power relies heavily on Dr. Ross's analysis of the direct evidence - i.e. evidence that Bibby has the ability to raise and maintain prices above competitive levels for a significant period of time. Dr. Ross never defines what the competitive price levels would be; rather, he postulates that the direct information on prices and margins

[62] Transcript at 14:2852, 22 March 2004.

leads to the conclusion that Bibby's prices are supra-competitive. More specifically, Dr. Ross relies on three elements of direct evidence to conclude that Bibby has market power in the relevant markets: 1) high profit margins; 2) prices well above the landed prices of imports; and 3) Bibby's capacity to set prices, as shown by the high prices where no competition exists (Quebec and the Maritimes) and its capacity to lower its prices dramatically in the face of competition.[63]

**[115]** There are as well, according to Dr. Ross, indirect indicators of Bibby's market power: Bibby's considerable market share and little or no sustained and successful entry for the last several years. His conclusions on this last point are summarized as follows:

> While imports have made inroads periodically, they have been met by aggressive responses from Bibby, and Bibby's market share remains very high. Similarly, Vandem has been trying to establish itself as a largely domestic competitor, but has had considerable difficulty.[64]

**[116]** Dr. Ross is of the view that there are several barriers to entry. First, he states that it would be difficult to establish a new foundry, or adapt a current foundry to produce cast iron DWV pipe and fittings. Secondly, since there is excess capacity in the industry, the industry may not be likely to attract new investment. Adapting an existing foundry to produce DWV cast iron products could represent risky sunk costs. Given the fact that Bibby itself holds much of the excess capacity, it could use or threaten to use this capacity to produce large quantities to be sold at low prices.[65] In addition, although not a barrier *per se*, both parties agree that the cast iron DWV industry is a mature industry, not one in which one can expect great growth or innovation.

**[117]** Thirdly, Dr. Ross maintains that imports face barriers of their own. Bibby is a well-established manufacturer, offering complete lines of products. Imported product lines may be less complete, and buyers may be wary of their quality and of the warranties attached. Fourthly, Bibby's vigorous response to entry by imports and by Vandem may have had a chilling effect on potential entrants. Finally, and most importantly, the SDP program is itself a barrier to entry: entrants, whether importers or manufacturers, have difficulty having access to the distributors, already tied into Bibby's loyalty program.

(b) Respondent's Submissions on Market Power

**[118]** Canada Pipe's response to these arguments is that barriers to entry are low or non existent. The Respondent's first line of argument is that there can be no market power, since Bibby's market share, in a market which includes all DWV products, is only around 10%. If the product market is confined to cast iron, Bibby does not dispute the figures relating to its share of

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[63] Expert Report of Dr. Ross at paragraph 31.

[64] Expert Report of Dr. Ross at paragraph 32.

[65] Expert Report of Dr. Ross at paragraph 68.

the cast iron DWV market,[66] although in cross-examination, some doubt was cast on Dr. Ross' calculations, since the market share for cast iron had been extrapolated from figures supplied by Bibby concerning all of its perceived competitors, including suppliers of plastic, copper and asbestos pipe and fittings.[67] That being said, the market share would still be irrelevant, according to the Respondent, since no barriers to entry exist.

**[119]** To support this argument, the Respondent relies on various examples of entry since the SDP came into effect. In his report, Dr. Ware specifically refutes Dr. Ross' allegations that it would be expensive to enter the market. In the case of an importer, it is a matter of finding a foreign supplier. No special equipment is needed to transport, handle or store DWV products. CSA registration is less than $50,000 to register a full line of pipe and fittings. A number of foreign manufacturers have already registered their cast iron DWV products with the CSA.[68]

**[120]** Various routes are available for the marketing of cast iron products, and Dr. Ware gives examples of each. Importers may act as distributors to the general contractors; such is the case for Sierra Distributors in British Columbia and Davcon in Alberta. Contractors may import directly, such as William Kelly in British Columbia. Distributors who are not now stocking cast iron DWV products may be encouraged to do so. This appears to have been the strategy of entry for Vandem, whose customers include wholesale distributors who are not clients of Bibby. Finally, distributors may opt out of Bibby's program and choose to buy imported cast iron DWV products, as has been the case for Wolseley, a major distributor of plumbing products, in Western Canada.[69]

**[121]** Dr. Ware also states that retooling an existing foundry would be a relatively inexpensive proposition; several Canadian foundries have excess capacity, and might be willing to partner with an entrant pipe and fittings producer. This was precisely the case for Vandem, which manufactures pipe at the Crowe foundry in Ontario. The only point on which both economists agree is the unlikelihood of greenfield entry, given the existing foundry capacity, the cost of starting up such a manufacturing process and the competitiveness of imports from Asian countries.[70]

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[66] Transcript at 27:5305, 4 June 2004.

[67] Transcript at 18:3750-3753, 26 March 2004.

[68] Expert Report of Dr. Ware at paragraphs 100-101.

[69] Expert Report of Dr. Ware at paragraphs 102-104; paragraph 135 and footnote 83 page 51.

[70] Expert Report of Dr. Ware at paragraphs 105-108; Expert Report of Dr. Ross at paragraph 67.

(c) Tribunal's Analysis of Market Power

(i) Direct Approach

**[122]** Market power is defined as the ability to set prices above competitive levels for a considerable period. The direct approach involves showing that prices are indeed above the competitive level. In *Tele-Direct*, for example, the Tribunal found that the very large accounting profits were a direct indication of market power. However, as was the case in *Laidlaw*, *Nielsen* and *NutraSweet*, this approach is not always feasible. If a market is monopolized or not perfectly competitive because of a trade restraint imposed by a major supplier, it may be difficult to determine what would be the relevant competitive benchmark. In such a case, an indirect approach can be taken, which will consider such indicia as market share, barriers to entry and customer countervailing power.

**[123]** In his report, Dr. Ross stated that there was a significant amount of direct evidence in support of his claim that Bibby has market power, focussed in three main areas: high margins, prices substantially above import prices, and high prices absent competition, with the corollary of being able to significantly lower prices where competition occurs. Each of these will be considered in turn.

*High Margins*

**[124]** When studied closely, Dr. Ross's presentation on high margins appears somewhat strained. The margins are based on cost of production (fittings and pipe) and do not include MJ couplings (which Bibby imports). In addition, the analysis is centred on margins, not profits. Dr. Ross cautions that marginal costs do not necessarily give us an exact idea of Bibby's profits, because the costs are extrapolated from Bibby data without complete information on how those costs were established. We have no information on whether the costs include only variable costs, or also fixed costs.[71] However, the Tribunal is prepared to accept Dr. Ross' calculations of production costs and variable costs, from which he derives gross profit margins and contribution margins.[72] We note that the marginal costs are only based on the cost of production of pipe and fittings; they therefore exclude MJ couplings, which Bibby does not manufacture but imports from a sister company.

**[125]** We are not provided with any evidence as to how these margins compare to the margins of other cast iron DWV suppliers**. [CONFIDENTIAL][73][CONFIDENTIAL]**.[74] This shows that profits are important to an understanding of whether margins are excessive, in an economic sense.

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[71] Expert Report of Dr. Ross at paragraph 17 and footnote 6.

[72] Expert Report of Dr. Ross at Appendix 3, p.6.

[73] Confidential Transcript at 2:12-14, 8 March 2004.

[74] Confidential Transcript at 1:6, 5 March 2004.

**[126]** In *Tele-Direct*, the Tribunal found that accounting profits of over 40 percent were a sufficient indicator of market power. The Tribunal did not accept the Respondent's argument that accounting profits could not be considered economic profits. The evidence established that Tele-Direct was paying 40 percent of its collected revenues directly to the telephone companies for which it published a directory. This, according to the Tribunal, was sufficient evidence of profit, and hence of considerable market power.

**[127]** The evidence on profit margins in the present case is not as clear as it was in *Tele-Direct.* Whereas in the latter case Tele-Direct was able to consistently pay 40 percent of its revenues to the telephone companies, in this case margins vary from one region to the next. They are consistently high in Quebec and the Maritimes, but dip in other regions, to the point of being negative for considerable periods of time in Alberta, the Prairies and British Columbia.

**[128]** Dr. Ware points out in his Rebuttal at paragraph 22 that Dr. Ross' analysis based on margins provides little evidence of market power in Ontario (where margins were sometimes low, but never negative), Alberta and BC, which together make up 75 percent of Bibby sales of cast iron DWV products in Canada. The margins are high and remain high in 25 percent of the market (Quebec and the Maritimes). They vary in the other markets, sometimes rising, sometimes dipping. They are considerably lower in fittings than in pipe, though we note that the data for fittings is incomplete.

**[129]** When looking at the summary of gross profits margins, the numbers seem high, though negative in some cases, as stated above. Dr. Ross himself, in his report, cautions the reader as to the interpretation of these figures. Dr. Ross made his calculations based on limited data provided by Bibby, but cannot say how those costs were established by Bibby nor what they include. Moreover, he adds, even high margins do not necessarily lead to a conclusion of high economic profits, because the extra revenues (beyond marginal costs) might be necessary to cover fixed costs. Further, the Tribunal has no data on Bibby's ratio of fixed costs to variable costs.

*Import Prices*

**[130]** In order to show that prices are above competitive levels, Dr. Ross attempts to compare Bibby's prices with import prices. According to Dr. Ross, two assumptions must be made: one, that the price of imports reflects their full opportunity costs, and two, their quality is equivalent to that of Bibby's products. Dr. Ross writes in his report that "imports may be between 30 and 50% less expensive than Bibby's products,"[75] an order of magnitude roughly similar to that of the margins calculated from Bibby's costs. Import prices can be seen, according to Dr. Ross, "as a bit of a benchmark"[76] of Bibby's costs - if they were lower, then Bibby would stop producing and import as well. All this serves to confirm, states Dr. Ross, the high margins and the fact that Bibby's prices are supra-competitive.

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[75] Expert Report of Dr. Ross at paragraph. 20.

[76] Transcript at 17:3498, 25 March 2004 (Ross examination in chief).

**[131]** There are several problems in using import prices to lend support to Bibby's high margins. First, Dr. Ross gives us no raw data on import prices to support his assumption that import prices are "between 30 and 50%" lower than domestic prices. Dr. Ross was cross- examined on this very point by counsel for the Respondent. Dr. Ross indicated that he had obtained this information from Mr. Kelly. Yet Mr. Kelly's evidence was that imports were around 25 percent cheaper, and that this difference had decreased over the years.[77]

**[132]** Second, the calculation is based on the assumption of full opportunity costs and similar quality. Although some witnesses testified to the quality of Chinese products being similar to that of Canadian products, we have no evidence as to the pricing policy of Chinese sellers, who may be intent on penetrating the Canadian market and pricing at below full opportunity cost. The fact is, the Tribunal has insufficient evidence to decide whether the assumptions are valid and applicable.

**[133]** Third, the conclusion that import prices can serve as a benchmark for Bibby's costs cannot be drawn from the evidence that we have before us. Dr. Ross' assumption is that the decision to continue to produce in Canada will necessarily be based on a comparison between import prices and production costs. Several factors come into play in deciding to continue producing pipe and fittings as opposed to importing them, including the cost of shutting down some production lines, workers' severance packages, the future value of Canadian currency, and the stability of supply coming from overseas. In other words, the decision to replace Bibby products with imports entails a great deal more than a simple, straight-forward calculation of the difference between the price of imports and the cost of production. Therefore, in the Tribunal's view, the price of imports cannot serve as a benchmark of Bibby's costs. Moreover, as stated earlier, there are no hard data provided as to the price of imports. In consequence, based on the evidence, the import prices cannot help confirm that Bibby's margins show supra-competitive prices.

*Significant Variation in Prices and Ability to Lower Prices*

**[134]** According to Dr. Ross the third indicator that shows direct evidence of supra-competitive prices is the significant variation in prices between regions and the fact that Bibby has been able to meet competition head-on by lowering its prices. From Dr. Ross' report:

[77] Transcript at 18:3728-3732, 26 March 2004.

> ... the very significant differences in price levels for identical products across the country is one indication that Bibby is not pricing at competitive levels (in at least the higher price regions). This would not necessarily be true if the higher price regions were associated with higher costs, perhaps for transportation, but the information I have seen does not suggest this is the explanation.
>
> More strikingly, when we compare Bibby's prices in B.C. to the prices for the same products in Quebec (where most of them are made and transportation costs would be minimized) we find that, generally, prices are lower (sometimes much lower) in B.C. despite the greater distance from the production facilities. ...
>
> For some months, the prices in B.C. and Ontario are seen to be much lower (30% and more lower) than the prices for the same products in Quebec. Under such circumstances it is hard to see how prices, particularly in Quebec, can be at competitive levels.[78]

**[135]** The Commissioner submits that the capacity to lower prices shows that prices were supra-competitive to begin with. It also shows, according to the Commissioner, Bibby's market power. Dr. Ross gave statistical evidence to show that Bibby lowered its prices in the West in response to import entry. Dr. Ware cast some doubt on Dr. Ross' calculations. In Dr. Ross' model, the variable used to show the impact of imports was in fact, according to Dr. Ware, whether Westburne, the major distributor, was buying from Bibby or importing its supplies. Dr. Ware pointed out two deficiencies with this method: first, while Westburne was on the SDP in Alberta starting in July 1998, Dr. Ross assumed that the Alberta branch was importing throughout 1998; second, according to Dr. Ware, Statistics Canada figures relating to DWV cast iron imports are a more reliable measure of import activity than Westburne's participation in the SDP. Using Statistics Canada's figures, Dr. Ware showed that the movement of Bibby's prices in relation to imports was not statistically significant.[79] The issue was left unresolved.

**[136]** Notwithstanding the statistical debate between the two experts, the fact remains that prices in the West are significantly lower than prices in the East, and the obvious explanation, confirmed by witnesses appearing before the Tribunal, is the presence of imports. Prices for Bibby products are lower in British Columbia than in Quebec, yet the products are manufactured in Quebec, and the cost of transport has to be added to the cost of production for items sold in British Columbia. The Tribunal is therefore satisfied, from consideration of the price differentials, particularly in British Columbia and Alberta, that imports have had an impact on prices of cast iron DWV products. Similarly, the Tribunal is satisfied that Vandem's entry in Ontario has exerted downward pressure on the prices in that province. No such movement is noted in Quebec and the Maritimes.

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[78] Expert Report of Dr. Ross at paragraphs 14-16.

[79] Rebuttal Report of Dr. Ware (27 February 2004) exhibit R-12 at paragraphs 25-28.

**[137]** It is somewhat puzzling that Bibby offers no evidence to rebut the Commissioner's assertions of high margins. Dr. Ware and counsel for the Respondent certainly have shown the frailties of the Commissioner's position, but the Tribunal notes that no cost calculations are provided in response. It would have been within Bibby's power to present the true profitability of pipe and fittings sales. No such evidence is before us. We are left with Bibby's hefty margins and its significant ability to vary prices across the regions.

(ii) Indirect Approach

*Market Share*

**[138]** As stated in *Laidlaw* and *Nielsen*, a large market share leads to a *prima facie* conclusion that the firm likely has market power. In order to establish market power, this conclusion must be supported by other findings on issues such as the existence of barriers to entry, the number of other competitors, excess capacity and the state of the market. Where barriers to entry are non-existent, even a very large market share will not support a finding of market power. In the case of cast iron DWV products, it would appear that the following barriers to entry should be considered: sunk costs, cost of entry, incumbent advantage and the Stocking Distributor Program.

**[139]** The Tribunal must also review evidence of actual entry into the market, which would serve to negate the presence of barriers. Entry, of course, must be both effective and viable to be significant. In addition, the Tribunal must consider customer countervailing power and the state of the market.

**[140]** The concentration of the market in Bibby's hands, through the various buy-outs, consolidations and marketing arrangements with American sister companies, has given Bibby an overwhelming share of the market. Evidence shows that Bibby controls between 80 and 90% of the market in cast iron DWV products. Market share can be a significant indicator of market power, absent evidence of ease of entry for competitors (*Tele-Direct*). What needs to be considered, therefore, is whether the barriers to entry or other factors preclude other competitors from entering the market.

*Barriers to Entry*

Sunk Costs

**[141]** Sunk costs, that is, costs that cannot be recovered if investment is made to enter the market and that attempt fails, can be a significant barrier to entry. Dr. Ross simply stated in his Expert Report[80] that given the fact that the industry already has excess capacity, establishing a new facility or refitting an existing foundry "could represent risky, sunk investments." He then added, "As sunk costs represent, to a considerable extent, the risk associated with entry into a

[80] Expert Report of Dr. Ross at paragraph 68.

new market, they are generally recognized to be an important type of barrier to entry."[81] Nothing further was added on the subject. No specific evidence was provided in relation to sunk costs. The Commissioner has consistently maintained in argument that to compete with Bibby would require significant investment in order to deliver a full line of products. The Commissioner has not explained why only larger full line suppliers could compete with Bibby, when the evidence clearly shows that successful entry was achieved by suppliers who did not carry full lines of products (New Centurion, Sierra, Ideal, Vandem).

Cost of Entry

**[142]** The cost for entering the market involves either refitting an existing foundry, or buying imported products. **[CONFIDENTIAL]** Mr. Vanderwater admitted in cross-examination that Vandem was the first new entrant in Canada in over thirty years in the manufacturing of cast iron pipe and fittings. It remains to be seen whether this entry will remain viable in the long term.

**[143]** No figures were given for the cost of starting an importing business, save the cost of the CSA accreditation, which would be about $50,000. Obtaining the registration was a relatively easy process, although Mr. Marc Bouthillette from BMI thought the process had been rather slow, intimating that this might have been due to Bibby's representatives on the Board of the CSA, opposing the registration.[82] Nevertheless, the Tribunal heard evidence that a number of Asian foundries had obtained CSA approval without difficulty (Sino-Canwest Trading;[83] Sierra Distributors[84]). Costs of purchasing are probably recoverable, and the evidence from at least two importers, namely New Centurion and Sierra Distributors, was that no special equipment or facilities was necessary for this type of business. The viability of the current importers did not seem threatened; moreover, it appears that imports, according to Statistics Canada figures supplied by Dr. Ware, and not contested by the Commissioner, have steadily increased from 1992 to 2002.

Incumbent Advantage

**[144]** Bibby is a well-known and well-established manufacturer. A new entrant would probably have difficulty competing with the quality and quantity of products Bibby is able to offer. The various distributors testified to the fact that Bibby offered the full product line and that the quality of its products was certain, definitely factors in choosing a supplier. No other supplier has a strong national presence.

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[81] *Ibid* at paragraph 68.

[82] Transcript at 12:2512, 16 March 2004.

[83] Transcript at 6:1238, 8 March 2004 JB Vol. 7, Tab 308.

[84] JB Vol. 14 Tab 718, Transcript at 6:1241, 8 March 2004.

Stocking Distributor Program

**[145]** As was pointed out in *NutraSweet*, the analysis in an abuse of dominant position case raises the question of how to determine control from the evidence when this same evidence includes the alleged anti-competitive acts and their effects:

> The structure of the section does, however, raise a question regarding how far it is necessary to go into the evidence on control since it may include an examination of the alleged anti-competitive acts and their effects. If all of the evidence is taken up here then the three principal elements in paras. (a), (b) and (c) of s-s. 79(1) may become melded in the evaluation of the first element. This is pervasive in competition law because the relevant factors in the different statutory elements are rarely distinct and it is impossible not to draw on common factors whenever required.[85]

**[146]** The question arises here since the SDP is considered both as a barrier to entry to show market control and as the impugned practice which allegedly leads to an abuse of the dominant position. In its Guidelines, the Bureau specifically states that it may consider as a barrier to entry "the conduct allegedly engaged in by the dominant firm" (paragraph 3.2.1(d)). Thus, although the reasoning may appear circular, there is precedent for considering the impugned conduct as a barrier to entry.

**[147]** Both Mr. Demeny and Mr. Vanderwater testified that Vandem has had difficulty expanding because a number of large distributors feel locked into the SDP program. Part of Bibby's strategy was certainly to use the SDP to ensure distributor loyalty, as shown by internal company memos as well as Mr. Leonard's testimony. Vandem and various suppliers testified to the fact that the SDP prevents distributors from considering other options for their stocking arrangements.

**[148]** The witnesses from Vandem argued that the SDP was a barrier to entry. As conceded by Mr. Demeny in cross examination,[86] no evidence was presented of Vandem's business plans, financial forecasts, or sales projections. There appears to be no business strategy in terms of deploying a sales force. Yet even so, Vandem managed within four years to capture **[CONFIDENTIAL]** of sales in Canada. **[CONFIDENTIAL]** Given the caution with which the Tribunal views their testimony (for reasons discussed below) and given the absence of financial data **[CONFIDENTIAL]**, the Tribunal cannot conclude that for Vandem, the SDP was a barrier to entry. Entry was effective, as shown by the competitive prices in Ontario which followed Vandem's entry. It appeared viable, since Vandem captured **[CONFIDENTIAL]** of the market. The Tribunal is not in a position to make a more definitive finding on Vandem's viability, because the Commissioner has chosen not to provide further evidence on Vandem's financial situation. We cannot therefore conclude that Vandem is not a viable entrant.

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[85] *NutraSweet* at 29.

[86] Transcript at 5:1053-1060, 5 March 2004.

**[149]** The Tribunal did not hear further evidence of the SDP as a barrier to entry. Some of Bibby's competitors spoke of the impact of the SDP on their operations (BMI, Fernco, New Centurion, Sierra). We will have occasion to consider this evidence when we deal with the SDP as an anti-competitive practice. From the evidence, the Tribunal is satisfied that the SDP has had an impact in the marketplace, but there is no direct evidence that would support the conclusion that it is a barrier to entry. We do have evidence of entry after the implementation of the SDP, as we shall see in the following section.

*Actual Entry*

**[150]** The Commissioner's argument, that barriers to entry exist, is weakened by the presence of new entrants in the market. There have been new entrants since 1998, and as Dr. Ware writes in his report, these entries have taken various forms - whether manufacturing (Vandem), importing for distribution (Sierra and Wolseley) or importing directly for contracted work (Mr. Kelly). These new entrants provide a powerful counter-argument to Dr. Ross' contention that barriers to entry are preventing new entry. The fact that the new entrants have not been able to gain a larger share of the market is probably due to various factors, and it is rather misleading to conflate all geographic markets on this issue. The evidence shows that there is competition in British Columbia, with a resulting drop in prices. The evidence also shows that Bibby's share of the market in that province is decreasing, to the benefit of new competitors. In 1999, Bibby held 93 percent of the market, Sierra 1 percent; by August 2002, these figures are respectively at 82 percent and 7 percent. Vandem maintains a 5 percent of the market in Quebec from 1999 to August 2002, and approximately 6 percent for the same period in Ontario.

**[151]** It is difficult to assess the significance of these new entries in the context of determining whether or not barriers to entry exist. In *Tele-Direct*, the Tribunal concluded that the entry of local directories was not significant because it had had no impact on prices. Tele-Direct had not reacted to these new entries, which showed that it did not perceive them as competitors. Tele-Direct had reacted to the entry of broadly-scoped directories, but the Tribunal declined to conclude from isolated entry that barriers had been shown not to exist.

**[152]** Entry must be shown to be both effective and viable. In this instance, entry by various players, especially in the West and to a lesser extent in Ontario, has certainly had an effect on prices. From Bibby's reaction to these new entrants, it can be said that they are perceived as competitors. Thus entry has been effective where it has occurred. Its viability remains to be determined.

**[153]** In Ontario, Vandem has been able to build itself a market since 1998. Its sales, according to the testimony of Mr. Demeny at the hearing, are in the range of **[CONFIDENTIAL]**. Vandem has had some difficulty marketing itself to distributors that are on Bibby's SDP, but there are others who have been happy to give Vandem their business. One example was McKeough Supply Inc., which had ceased buying Bibby products in 1998. According to Mr. Elliott, President of McKeough, the firm had chosen not to become a stocking distributor because of the minimum purchase requirement of 40,000 pounds. Since then, they have become distributors for Vandem products, and their cast iron business had increased a great deal. Mr. Elliott admitted in cross-examination that the firm would have no trouble today meeting the

40,000-pound requirement, but he remains with Vandem. Vandem is also a preferred supplier of Canaplus, one of two major buying groups in Canada. Bibby does not appear as a preferred supplier on Canaplus' website.[87]

**[154]** Mr. Kelm, owner of Sierra Distributors, testified that the SDP had prevented him from selling to distributors. However, he has been able to build Sierra's business by selling to contractors. At first, contractors were reluctant because Sierra could not supply all three products. However, it can now supply pipe, fittings and couplings. In the last few years, Mr. Kelm could have expanded his business but has chosen not to. He has been able to build a business of some $800,000 in sales without major capital investments. He rents a truck to unload the pipe and fittings from China that arrive by boat. He rents a yard to store the equipment before delivery to the contractors. Mr. Kelm has built up his sales of cast iron DWV products since 1998, the year the SDP was first implemented.

**[155]** Another competitor for Bibby's business is New Centurion. Mr. Jit Hiang Lim, its President, testified that his company had started importing cast iron pipe and fittings in 1982, and was supplying Westburne until 1999. When Westburne decided to be supplied by Bibby, New Centurion suffered a deep loss. Nevertheless, since 2002, New Centurion is again supplying Westburne, which has been bought by Wolseley. The SDP did not prevent New Centurion from successfully competing for Wolseley's business.

**[156]** There is therefore significant evidence that it is possible to enter the market successfully. However, we note that entry is limited as shown by Bibby maintaining a considerable market share.

*Other Factors*

Countervailing Power

**[157]** Another factor to consider, in assessing the presence of market power, is whether customers (here, the distributors) have countervailing power. In the absence of competition, countervailing power is difficult to exercise, as the *NutraSweet* case illustrates: despite the tremendous economic power of both the Coca-Cola and Pepsi Corporations, because there were no alternate viable source of aspartame, NutraSweet could set the price. The Respondent argues that its customers do have countervailing power, and cites as examples Emco and Wolseley, which managed to get rebates even after obtaining cast iron DWV products from other suppliers while on the SDP.

[87] JB Vol. 25, tab 1228.

**[158]** It seems that distributors and contractors do have leverage, or at least are offered better bargains, in the face of competition. Mr. Kelm, from Sierra Distributors, gave evidence that contractors will attempt to get a better price from Bibby by presenting Sierra's list prices. Special deals were offered to Ontario distributors when Vandem appeared on the market, according to Mr. Elliot of McKeough Supply. The Octo Group in Quebec, did appear to have some bargaining power in their dealings with Bibby, to the extent that the group managed to negotiate an agreement that not all members of the group had to be part of the SDP program for SDP members to earn their rebates.

**[159]** However, this countervailing power is weak. Despite the fact that large distributors profess to prefer a volume-based rebate, as opposed to a loyalty program, Bibby has maintained the SDP since 1998.

State of the Market

**[160]** Witnesses on both sides agreed that the market for cast iron DWV products was a mature market, i.e. a market with little real growth potential. Even the complainant, Mr. Demeny, acknowledged this fact.[88] Such a market gives an advantage to the firm or firms already entrenched, as new investors will be reluctant to invest in a market with limited prospects. In this case, the Tribunal accepts that we are dealing with a mature market and that this constitutes a factor which may discourage more active entry.

(d) The Tribunal's Conclusion on Market Power

**[161]** The Tribunal is of the view that Bibby can and does exercise market control in the three product markets and the six geographic regions. The evidence provided by the direct approach was incomplete, since the high margins dealt only with two of the three products. For those two products, the Tribunal finds that Bibby is pricing above marginal cost. For all three products, Bibby's ability to lower prices indicates supra-competitive pricing. With regards to the indirect approach, the Tribunal finds that on balance the evidence indicates that Bibby has market power. The evidence on barriers to entry is not entirely conclusive. However, Bibby's large market share, its range of products and national presence, the limited penetration of competitors and the fact that this market offers only limited growth potential are sufficient to establish that Bibby does control a substantial part of the cast iron DWV products market.

**[162]** In the following two sections, the Tribunal will consider and determine whether there exists a practice of anti-competitive acts, and whether it has substantially lessened or prevented competition.

[88] Transcript at 6:1176, 8 March 2004; Transcript at 6:1289, 8 March 2004.

### B. Paragraph 79(1)(b)-A Practice of Anti-Competitive Acts

#### (1) Commissioner's Submissions on a Practice of Anti-Competitive Acts

**[163]** The Commissioner submits that the SDP is a practice of anti-competitive acts, implemented in order to eliminate and to restrict competition. According to the Commissioner, Bibby has locked in the vast majority of distributors of cast iron DWV products in the SDP. Once they are part of the program, it becomes so costly to withdraw from it that Bibby's competitors are unable to entice distributors to deal with them. It is the Commissioner's submission that because of Bibby's significant advantage as the entrenched firm with a very large market share, the SDP, by forcing distributors to buy all or nothing from Bibby, is an anti-competitive practice because distributors will not be willing to risk their source of supply and try the competitors' products. Bibby is the only supplier to carry a full product line, and therefore the only single firm able to answer all the distributor's needs. The purpose of the program is clearly, according to the Commissioner, to eliminate competition. The nature of the program is inherently anti-competitive, since it forecloses the possibility of entry.

**[164]** Moreover, Bibby's acquisition strategy and the use of restrictive covenants form an integral part of its plan to eliminate competition. The Commissioner argues that Bibby acquires rival firms (or their inventory) in order to eliminate competition, and that the SDP then serves to further entrench its market power by forcing distributors to carry only its DWV cast iron products.

#### (2) The Respondent's Submissions on a Practice of Anti-Competitive Acts

**[165]** The Respondent states that the acquisitions of Bibby and Cremco, which go back to 1997 and 1998 respectively, are statute-barred under the limitation provision found in subsection 79(6) of the Act, which states that no application under the abuse of dominance provisions may be made more than three years after the practice has ceased. Moreover, the acquisitions were discrete acts, based on sound business reasoning, and not part of a "practice." They were reviewed by the Bureau, who did not at the time question these mergers. The third acquisition, purchasing of BMI's inventory, was also done in 1998. Since that time, Bibby has not sought to acquire any competitor nor any new entrant.

**[166]** The two agreements covering the acquisition of Bibby and Cremco included restrictive covenants, which the Respondent argues are standard business practice. The Respondent submits that they did not prevent Mr. Gooding, the former owner of Bibby, from building a foundry in China. Those restrictive covenants did not prevent the first new entrant in cast iron pipe and fittings manufacturing in over thirty years from entering the market. The two founding members of this new company, Vandem, were former executive officers of Bibby. One of those covenants expired in April 2004; the other will expire in June 2005. Finally, the agreement to buy BMI's inventory contained no restrictive covenant.

**[167]** The SDP, according to the Respondent, cannot be considered anti-competitive. As a matter of fact, argues the Respondent, it is pro-competitive: it helps cast iron compete against other materials by encouraging wholesalers to stock it, and it encourages competition between

wholesalers, by creating a more level playing field between small and large distributors, who are all entitled to exactly the same rebates, rather than the usual volume-based rebates. In doing so, the SDP is in fact carrying out one of the objects of the Act, which is "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy."

**[168]** The Respondent submits that the SDP is not a contract and does not lock in distributors. Distributors choose to remain in it because it offers them an economic advantage; if it did not, they would choose to exit, as Wolseley, a major distributor, has chosen to do. The program is based on rewards, not penalties. There are no liquidated damages and no long term commitment. Every January 1st, the distributor is free to choose other suppliers, without losing any of the previous year's advantages and rebates. Even switching suppliers during the calendar year brings minimum penalties. The distributor will lose his yearly rebate, and if within a quarter, the rebate for that quarter. By far the most important cost consideration is the multiplier, which is not lost when one withdraws from the program for purchases already made. For future purchases, presumably, the distributor has found a better deal elsewhere.

**[169]** The Respondent argues that the program is not exclusive. Distributors are free to deal with other suppliers for DWV products made from materials other than cast iron. In addition, a distributor can always buy products from Bibby without being a stocking distributor; the incentive to remain on the program is the lower price, but there is no threat of losing supply. Contrary to the Commissioner's assertions, argues the Respondent, the SDP has not prevented entry nor competition. Imports have increased since its implementation in 1998, the number of importers has increased, a new manufacturer has captured 10 percent of sales in Canada.

**[170]** The Respondent further contends that there are valid business justifications for the SDP. Its purpose is to protect Bibby's investment in all product lines, by promoting cast iron to the wholesalers. The lower prices and rebates are advantageous to them, and help Bibby move its entire production. By increasing the sales of all cast iron products, Bibby can realize better efficiencies and lower its cost of production allowing it to continue to offer a full product line. Finally, the program prevents free-riding by competitors. Bibby alone promotes the use of cast iron over other materials, through lobbying efforts and research funding.

(3) Tribunal's Analysis of a Practice of Anti-Competitive Acts

(a) The Law

**[171]** The term practice entails, as the Bureau explains in the Guidelines, more than an isolated act but may be one occurrence that is sustained and systemic, or that has had a lasting impact on competition. The more difficult task is defining an "anti-competitive act". Examples of anti-competitive acts are given in Section 78, but the Tribunal has stated in all abuse of dominance cases that this list is not exhaustive. In order to determine whether acts are anti-competitive, the Tribunal must consider the nature and purpose of the acts in question, as well as the impact they have or may have on the relevant market.[89] In both *Tele-Direct* and *Laidlaw*, the Tribunal assessed the alleged anti-competitive practices by taking into account what effect they had had on competitors.

[89] *Nielsen* at. 257; *Laidlaw* at 333; *NutraSweet* at 34.

**[172]** The Tribunal found a practice of anti-competitive acts in each of the cases mentioned above. In the section below, we review how the Tribunal has defined anti-competitive acts.

**[173]** In *Nielsen*, the firm had contracts with all major grocery retailers and several drug retailers, including the largest, giving it exclusive access to their scanner data (provided by electronic scanning of the bar-code label at the check-out counter). The exclusivity provision in the contract stated essentially that the retailer undertook not to provide the data to anyone else. Nielsen paid the retailers for these data; some contracts provided that if the data were supplied to another company, Nielsen would pay less, and the retailer would be required to reimburse Nielsen for previous payments. The standard term of these contracts was five years. The Tribunal found that "[t]he unquestionable effect of the standard exclusivity provisions is to exclude all potential competitors from obtaining the retailer scanner data,"[90] and added that Nielsen could be presumed to have intended this effect. The Tribunal noted that the staggering of the contract renewals confirmed the intent to exclude potential competitors.

**[174]** One obvious effect of the exclusivity provisions was to give Nielsen the ability to set the price at which a would-be entrant could obtain the data. The Tribunal found no efficiency rationale to justify the exclusivity clauses. They did not serve to improve scanner penetration or data quality, i.e. they did not create benefits that other firms would be able to appropriate. Nor did the exclusivity provide an advantage to retailers. Exclusivity simply made the data more valuable to Nielsen. There was evidence of a strategy to "lock-up " business in the face of potential entry, by obtaining long-term agreements (3 to 5 years) with customers. The Tribunal ruled that self-interest was not a valid business justification.

**[175]** In *NutraSweet*, the Tribunal considered the contract between NutraSweet and its customers as a whole. There were a number of clauses in the contract which taken together had an exclusionary effect. The Tribunal refused, however, to consider each clause as an anti-competitive act.

**[176]** In Canada, NutraSweet held the patent on aspartame until 1987. Thereafter, it negotiated exclusive supply and use agreements with its customers. One of the main components of its contracts was a "branded ingredient strategy," i.e. the very significant rebate it paid to its customers for displaying the NutraSweet logo and promoting NutraSweet aspartame in advertisements for their products containing aspartame. The rebate amounted to 40 percent of the price for NutraSweet brand aspartame. The contracts also featured a meet-and-release clause, whereby NutraSweet promised to match the price offered by any other competitor, or else the customer was free to buy from the competitor, and a most-favoured-nation clause, which guaranteed to certain customers that they were paying the lowest price available to any customer of NutraSweet.

[90] *Nielsen* at 259.

**[177]** The Tribunal held that it was the constellation of these clauses that exhibited an exclusionary purpose. The Tribunal saw little purpose in determining if each clause constituted an anti-competitive act. In finding that the contracts did have an exclusionary effect, the Tribunal stated that it was virtually impossible for a competitor to enter the market because of the many factors tying the buyers to NutraSweet. From a situation of monopoly created by the patent rights, NutraSweet had moved to a position of significant market share (95 percent) which it maintained through the exclusive use and supply clauses, the logo display and advertising allowances and the general reluctance of soft drink makers (by far the most important buyer of aspartame) to move away from NutraSweet if other soft-drink producers kept the logo on their labels.

**[178]** In *Tele-Direct*, the Tribunal emphasized the difficulty that may arise when distinguishing competitive and anti-competitive behaviour. The distinguishing feature drawn from the examples given in section 78 is "purpose," in a broad sense:

> Competition, even "tough" competition, is not to be enjoined by the Tribunal but rather only anti-competitive conduct. Unfortunately, distinguishing between competition on the merits and anti-competitive conduct, as the Tribunal has noted in the past, is not an easy task.
>
> The Tribunal established in NutraSweet that the list of anti-competitive acts set out in section 78 is not exhaustive. The Tribunal held that the common feature of the acts included in section 78 is that they are all performed for a "purpose", namely "an intended negative effect on a competitor that is predatory, exclusionary or disciplinary." The Tribunal's approach to assessing whether acts are anti-competitive was set out most recently in *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd:*
>
> > ... in evaluating whether allegedly anti-competitive acts fall within s. 78, the tribunal must determine the "nature and purpose of the acts which are alleged to be anti-competitive and the effect that they have or may have on the relevant market" ... The required analysis will take into account the commercial interests of both parties to the conduct in question and the resulting restriction on competition ... The decision in Laidlaw makes it clear that, although such proof may be possible in a particular case, it is not necessary for the Director to prove subjective intent to restrict competition in the relevant market on the part of a respondent. The respondent will be deemed to intend the effects of its actions ...(D & B, at 257). The Tribunal must determine the "purpose" of the act that is alleged to be anti-competitive. *"Purpose" is used in this context in a broader sense than merely subjective intent on the part of the respondent. As counsel for the*

> *Director pointed out, it might be more apt to speak of the overall character of the act in question.*[91]
> [Our emphasis]

**[179]** The Tribunal then reviewed a series of acts alleged by the Director to be anti-competitive, and assessed these acts for their effects on competitors in order to determine if they were truly anti-competitive. In assessing the acts, i.e., in determining if the act is, on balance, "exclusionary, predatory or disciplinary," relevant factors will include "evidence of the effects of the act, of any business justification and of subjective intent which, while not necessary, may be informative in assessing the totality of the evidence." In turn, the business justification is defined:

> A "business justification" must be a "credible efficiency or pro-competitive" business justification for the act in issue. Further, the business justification must be weighed "in light of any anti- competitive effects to establish the overriding purpose", of the challenged act:
>
> > The mere proof of some legitimate business purpose would be, however, hardly sufficient to support a finding that there is no anti-competitive act. All known factors must be taken into account in assessing the nature and purpose of the acts alleged to be anti-competitive.[92]

**[180]** In *Tele-Direct*, the Director alleged that one of the anti-competitive acts was Tele-Direct's refusal to include the independent directories for the purpose of obtaining a Tele-Direct commissionable account. If an agency placed advertising in an independent directory, that did not help them to qualify for the commissionable account; thus, the Director argued, agencies were discouraged from placing advertising in the independent directories.

**[181]** The Tribunal rejected that contention, first because it did not believe the agencies would not act in the client's best interest rather than in their own narrow interest. Secondly, because the Tele-Direct directory is so widespread, it would almost always be the first recommendation of the agency, followed by an independent directory, if money was available. In other words, the act was not anti-competitive because it did not bring about the change of behaviour that was imputed to it.

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[91] *Tele-Direct*, at 179-180, quoting *NutrSweet* at 34 and *Nielson* at 222-223.

[92] *Tele-Direct* at 180, quoting *Laidlaw* at 265.

**[182]** The Tribunal also did not find that targeting entrants in response to competition was in itself an anti-competitive act. The Tribunal first considered whether the actions of Tele-Direct, in reacting forcefully to perceived competition, were helpful or harmful for the consumer (in this case, the advertisers). It came to the conclusion that the response to entry had clearly been to the advantage of the advertisers, by increasing quality and decreasing price. The question then became whether future entry would be precluded, so that the potential negative effect would outweigh the immediate benefits of competition. However, the Tribunal noted that the Director had provided no objective criteria to help it determine whether the conduct was beneficial or harmful. It was impossible to predict what the long term effects would be. The Tribunal thus summed up the difficulty:

> . . . In effect, because of the absence of any criteria, the Tribunal is being asked by the Director to place itself in the shoes of a potential entrant with a view to assessing the credibility of the alleged "threat" being issued by Tele-Direct by its responses to entry. The Tribunal must determine whether the response in the initial markets in which entry occurred was so "overwhelmingly intense" that an entrant would be intimidated and future entry or expansion deterred. What may seem to be a response of "overwhelming intensity" to one person may not to another. It is inevitably a highly subjective exercise. Decisions by the Tribunal restricting competitive action on the grounds that the action is of overwhelming intensity would send a chilling message about competition that is, in our view, not consistent with the purpose of the Act, as set forth in section 1.1. We are concerned that, in the absence of some objective test, firms can have no idea what constitutes a "competitive" versus an "anti-competitive" response when responses like those used by Tele-Direct in this case are involved (e.g., price freezing or cutting, incentives, product improvements, increased advertising).[93]

**[183]** Given the difficulty of circumscribing the term "targeting" so as to not discourage desirable competitive behaviour, the Tribunal concluded that it could not find that Tele-Direct's response to entry, i.e. dropping prices and improving quality amounted to anti-competitive acts.

**[184]** Another series of anti-competitive acts were alleged in regard to the way Tele-Direct refused to deal with consultants. The consultants' business in this context was to give advice to advertisers and help them reduce their Yellow Pages advertising costs, by reducing size, colour, etc. Obviously, their interest ran counter to that of Tele-Direct. The business justification of efficiency may not be entirely convincing; nevertheless, the underlying business justification of not helping the person who seeks to decrease one's sales is understandable and, was according to the Tribunal, acceptable. Thus, refusing to deal with the consultants was not an anti-competitive act. However, effectively precluding the advertisers from seeking advice of the consultant, by discriminating against advertisers who had done so, was an anti-competitive act. In that situation, there can be no business justification, because the negative impact on customers

[93] *Tele-Direct* at 200.

outweighed any advantage of business efficiency argued by Tele-Direct. Any statement or action to discourage advertisers from dealing with consultants was an anti-competitive act, because it led to an unsatisfactory result for the consumer, who was actively discouraged from exercising his freedom to choose the suitable level of service.

**[185]** In *Laidlaw*, the Tribunal found that the cumulative effect of Laidlaw's acquisitions, the terms of its contracts and its aggressive use of threatened litigation amounted to anti-competitive acts. Customers were tied to long term contracts, and threatened with lawsuits if they wished to terminate the contract. The contract provided for automatic price increases. Laidlaw's pattern of acquisitions had effectively done away with any meaningful competition in certain regions of British Columbia.

**[186]** The acquisitions were clearly made with the intent of setting up a monopolistic position and eliminating competitors. The Tribunal came to this conclusion by considering the frequency, timing and result of the acquisitions. In one region, the only two competitors were acquired within one day; in another region, the only three competitors were acquired within a period of five months. Laidlaw argued that the acquisitions were designed to achieve growth, a legitimate business purpose. The Tribunal found this explanation unconvincing, since it was clear that Laidlaw sought to be the only participant in the relevant markets.

**[187]** The contracts Laidlaw concluded with its customers contained a number of clauses designed to lock in the client: a three-year term, an automatic roll-over provision, the inability to cancel the contract within two months of the end of the term, the significant liquidated damages and the exclusivity provision. Those terms effectively prevented a customer from accepting an offer from a competitor, unless the customer was careful to make arrangements prior to the final 60 days of the term. Entry was thus clearly difficult for would-be competitors.

**[188]** From the case law, the following criteria emerge to help define anti-competitive acts: the Tribunal found binding contracts with heavy opt-out penalties (*Nielsen, Laidlaw)* to be anti-competitive, since would-be entrants were precluded from competing for locked-in customers; exclusivity clauses in such a setting were found to be an additional barrier to competition (*Nielsen*), which offered no economic advantage. A systematic acquisition policy (*Laidlaw*) to do away with all competitors, combined with an attempt to buy out other reluctant competitors was found to be anti-competitive; self-interest was not a sufficient business justification.

**[189]** Aggressive pricing policies or making competitors less attractive for the customers were not found in *Tele-Direct* to be anti-competitive acts. Indeed, in that case, the Tribunal found that in the absence of criteria defining what made a practice anti-competitive, firms wanting to compete lawfully could be confused. What did lead to findings of anti-competitive acts in that case were actions that in the end harmed customers, by depriving them of a true choice, or harmed competitors because Tele-Direct was powerful enough to step in between competitors and suppliers. In other words, direct interference in business relationships, whether between competitors and customers or between competitors and suppliers were anti-competitive acts.

**[190]** Clauses which encouraged customer loyalty were found to have an exclusionary effect in the context of a comprehensive contract that included exclusive supply and use provisions, as

well as other provisions designed expressly to preclude competition, such as a meet-and-release clause (*NutraSweet).*

**[191]** In contrast, the Tribunal has found that measures designed to enhance the competitive status of the firm such as an aggressive lowering of prices (*Tele-Direct*) are not anti-competitive acts. The Tribunal has stated that there must be a link between the impugned practice and a decrease in competition. Moreover, if a practice does not appear to have an exclusionary effect or cause detriment to the consumer, it cannot be said to be anti-competitive. In the absence of objective criteria, defining anti-competitive behaviour too broadly would cause a chilling effect counter to the objectives of the Act.

(b) Alleged Anti-Competitive Acts

**[192]** In the instant case, the Commissioner has alleged three practices of anti-competitive acts: the acquisitions, the restrictive covenants contained in the agreements related to these acquisitions, and the SDP.

(i) Acquisitions

**[193]** In the instant case, Canada Pipe bought an important company, Bibby, as well as a number of other foundries, from a single owner, Gooding Investments. Bibby is a manufacturer whose foundries are all in the eastern part of the country. It then bought a rival, Cremco, an importing company operating mainly in the West. It also bought the inventory of a third company, BMI, a supplier of various plumbing products, whose owner was willing to sell its cast iron DWV inventory consisting of fittings. This last agreement contained no restrictive covenant; the first two did.

**[194]** Since 1998, there have been no further acquisitions, yet new players have entered the market, and others have increased their sales. Bibby competes by lowering its prices and ensuring customer loyalty; its strategy since 1998 has not been to buy out the competition. The Tribunal is of the view that in such circumstances, and especially in contrast to Laidlaw's actions which were found to be anti-competitive, that Canada Pipe's acquisitions do not fit into a pattern of a "practice of anti-competitive acts."

**[195]** In *Laidlaw*, the pattern of acquisitions was seen as, in itself, an anti-competitive act. The Tribunal stated that, notwithstanding the fact that mergers were covered by other provisions of the Act, there was nothing to preclude a consideration of the acquisitions under section 79, when they were clearly linked to an abuse of dominant position.

**[196]** In the case at bar, the acquisitions occurred more than three years before the Commissioner applied for an order under section 79. It would seem, therefore, that the limitation provided in subsection 79(6) applies. Moreover, the acquisitions can be seen as a rational move in a market that, as both parties admit, is a harvest market in a mature industry. Witnesses from both sides confirmed that consolidation of foundries has been occurring steadily over the last twenty to thirty years; the trend is present in both the United States and Canada.

**[197]** In *Laidlaw*, the Tribunal stated that acquisitions were not anti-competitive *per se.* There might exist business justifications for a company to seek to increase its presence by buying competitors or potential competitors. What made the act anti-competitive in the *Laidlaw* case was the fact that the acquisitions were clearly designed to create a monopolistic market. Laidlaw systematically bought out the competition in two regions, and attempted to buy emerging competitors.

(ii) Restrictive Covenants

**[198]** The Commissioner alleges that the restrictive covenants are anti-competitive acts. By definition, restrictive covenants are meant to restrain trade. However, it is hard to regard them as a practice of anti-competitive acts. They are a normal part of business, and any agreement to sell a business usually contains a similar clause. Common law courts, as was stated in *Laidlaw*, will interfere with such covenants if they are deemed unreasonable. In *Laidlaw*, the restrictive covenants, which applied to a 300-kilometre zone in an industry where competition is usually in a much closer radius, were found to be unreasonable. Even so, the Tribunal did not go so far as to say that they were anti-competitive, but merely that they were a further indicator of Laidlaw's intent to monopolize the market.

**[199]** The agreement for the acquisition of BMI's cast iron fittings did not include a non-compete clause. Mr. Demeny from Vandem acknowledged that the non-compete clauses for the acquisition of the foundries constituted a reasonable measure for Canada Pipe to take to ensure that Mr. Gooding, after selling his business to Canada Pipe, did not reenter the market.[94] These clauses did not prevent Mr. Gooding from opening a foundry in China. Moreover, from Mr. Leonard's evidence, Bibby displayed good will in assisting the Crowe foundry when Vandem needed advice on how to set up a spinning machine to produce cast iron pipe. Finally, two of Bibby's former executive officers, Mr. Vanderwater and Mr. Demeny, are the founding officers and directors of Vandem. It is apparent on the evidence that Bibby did not make an issue of the fact that two of its former officers are now operating its direct competitor. In the end, the Commissioner has not shown, in the circumstances, that the restrictive covenants are unreasonable.

(iii) The Stocking Distributor Program

**[200]** By far the most important part of the Commissioner's case is the allegation that the SDP is a practice of anti-competitive acts. The Tribunal has no difficulty recognizing the SDP as a practice. The program is structured, organized and applied throughout Canada, albeit with some variations in the multiplier and rebates in the different regions. The various components of the program add up to a practice. The more difficult question is whether the SDP is anti-competitive.

[94] Transcript at 6:1181-1182, 8 March 2004.

**[201]** The Commissioner argues that the program as a whole is anti-competitive, and more particularly, that the requirement for the wholesale distributors who are Bibby's customers to buy all of their cast iron DWV products from Bibby, is anti-competitive. Indeed, in the remedy sought, the Commissioner targets the exclusivity and full-line forcing aspects of Bibby's program.[95] The Commissioner seeks an order which would eliminate the loyalty program based on incentives to buy all three products exclusively from Bibby.

**[202]** The Commissioner argues that with its SDP program, the Respondent continues to entrench the market power it established through acquisitions by forcing wholesalers to deal exclusively with Bibby. The Commissioner maintains that this has significantly hampered entry or growth by Bibby's competitors.

**[203]** To study the alleged anti-competitive nature of the SDP, the Tribunal considered four aspects of the issue: the contractual nature and binding effect of the SDP, its business justification, the impact of the SDP on Bibby's competitors and switching costs. Both economic experts agreed that switching costs were the determining factor in deciding whether the SDP was anti-competitive or not.

*Contractual Nature of the Program*

**[204]** The Respondent argued that the program was not a contract, in that the distributors were free to join or leave at any time, without further consequences. The Commissioner submitted that the SDP agreement was a contract, tying the distributors to Bibby if they wanted to obtain their rebates.

**[205]** There is no doubt that there is something of a contractual character to an agreement where both sides must perform their side of the bargain. There is offer, acceptance and consideration. That being said, the terms of the program are not onerous, as they were for example in *Laidlaw* or *Nielsen*.

**[206]** At the beginning of every calendar year, distributors are free to terminate the arrangement, without any loss. Every quarter, they can review their participation. If they opt out, they will lose the rebate for the year to date. They can reinstate the program the following quarter. The terms are known and transparent, and all arrangements end with the calendar year, unless renewed. Thus, contrary to the situation in *Nielsen*, competitors will know when the distributors might be interested in switching, and contrary to *Laidlaw*, the conditions of exit are easy to manage. Again, there are no penalties or liquidated damages. The decision to remain or leave thus becomes a straight cost-benefit analysis, based on the future interest of the distributor.

**[207]** In the Tribunal's view, the SDP does not pose a significant legal obstacle to changing suppliers. Distributors are attracted to the program because of the discounts and rebates it offers. Since these represent a significant part of the distributors' profits, the distributors naturally weigh their options very carefully before switching suppliers. They are, however, not prevented from doing so by reason of contractual constraints in the SDP.

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[95] Commissioner's Final Submissions, paragraph 347.

*Business Justification*

**[208]** One of the Respondent's main arguments in defence of the SDP is that it in fact encourages competition, by creating a level playing field for small and large distributors. Whereas most programs in the industry offer rebates based on volume of sales, the SDP pays the same percentage for rebates, whatever the size of the purchase (beyond a certain threshold quantity necessary to enter to the program, according to the evidence of Mr. Elliot from McKeough Supplies). The uniform rebate was seen, predictably, as a positive feature by small distributors and as a negative feature by large distributors, who claim that they must now compete against smaller distributors with lower overheads.

**[209]** In support of its argument, the Respondent cites the Act, and especially section 1.1, which in describing the purpose of the Act includes the statement that the purpose is in part "...to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy ...". While the Tribunal acknowledges this to be an enunciated purpose of the Act, the Tribunal is of the view that this purpose is unrelated to the issue of abuse of dominance. Competition between distributors is not at issue. Rather, the case is about competition between Bibby and other suppliers of cast iron DWV products. The equitable characteristics of the SDP as it relates to distributors have little to do with whether Bibby is exercising its market power in a way that precludes competition between suppliers of the product. In consequence, this argument of business justification must fail.

**[210]** Another business justification advanced by Bibby is the argument that the SDP allows it to maintain full product lines. There are in Canada other suppliers of pipe, fittings and couplings, but none able to offer, like Bibby, a complete array of products. Bibby argues that to be able to maintain a complete line of products, high volumes are necessary. Higher margins on high volume items allow Bibby to maintain production of less frequently sold items.

**[211]** Mr. Byrne of Crane Supplies testified that Bibby was able to offer full lines of product, an important feature for the distributor, and Bibby has argued that to maintain that capacity, it had to be certain that it would be able to move a considerable volume. "Exotic" pipe and fittings, as Mr. Byrne called them, i.e., the pipe and fittings of unusual sizes used in small quantities, represent a small part of the market, but an essential component of any building. Witnesses agreed that Bibby is an important and reliable supplier that can fill any order for cast iron pipe and fittings. Bibby argues that to maintain this ability, it must generate high-volume sales and that the SDP promotes such volumes.

**[212]** High-volume sales are also important in a business which is volume-driven, as Mr. Leonard, General Manager of Bibby, explained. Bibby argues that it needs the sales to ensure efficiencies and to lower its cost of production; the Commissioner did not challenge this assertion. The rebate structure provided for in the SDP does encourage distributors to deal with Bibby for all three products if they choose Bibby to supply one of them and in consequence Bibby's sales are increased. As was stated in *Laidlaw*, the self-interest justification is not sufficient. However, in this case, the Tribunal accepts, based on Mr. Leonard's evidence, that high volumes allow Bibby to maintain in inventory smaller, less profitable but nevertheless important products. As a result, items that are used less often remain available in the market.

This availability serves the interests of distributors and contractors, whether or not they belong to the SDP, and ultimately benefits the consumer. It is true that if bought outside of the SDP, these items are more expensive, but in any case, they would not have generated the bulk of the rebates or constituted the majority of items to which the multiplier would apply.

*Switching Costs*

Economic Evidence on Switching Costs

**[213]** The Respondent argues that the SDP cannot be considered to be an exclusive dealing arrangement, since a distributor could still deal with Bibby without participating in the program. Dr. Ross indicated the this was a very rare occurrence, since numbers showed that over 98 percent of Bibby's sales were to its stocking distributors. It is noted that this figure relates to the three top sellers in pipe, fittings and MJ couplings, not to all of Bibby's sales.[96]

**[214]** The incentive structure of the program, argues the Commissioner, is one which induces exclusivity. The program rewards loyalty; those distributors who buy cast iron products from other suppliers lose their potential reward. In such a program, both experts agreed, the anti-competitive effect depends on switching costs.

**[215]** In his report, Dr. Ware explains the two models whereby an exclusive dealing arrangement can be anti-competitive:

> ... there are two standard models in which exclusive dealing can be anti-competitive: - the *Aghion Bolton* model (AB) - this works by getting the buyer(s) to commit to an exclusive dealing contract with substantial penalties for a breach. The exercise of this penalty clause in the event that a low cost entrant appears provides a way of "taxing" the entrant to the benefit of the manufacturer. Bibby does not even have contracts with buyers, so they obviously could not have any such breach penalties. The Bureau may argue (in fact they appear to be doing so in 1.3, p. 80) that Bibby's rebates act as exactly this kind of "breach penalty". However, this claim does not bear close examination: at the end of every quarter, there are no "switching costs" in the form of rebates that would be foregone by a distributor in changing to a new supplier. That leaves the annual rebate, which is much too small to play a role like the Aghion-Bolton model, and in any case, at the end of every year, there are no annual rebate "switching costs" either. Thus, the markets for supply of cast iron products to distributors is completely contestable every quarter and certainly every year. Thus, this anti-competitive model of exclusive dealing contracts cannot apply to Bibby's relationships with distributors.
> (Aghion P. And Bolton P., "Contracts as a Barrier to entry", *American Economic Review* 77(3): 388-401, (1987)).

[96] Expert Report of Dr. Ross at paragraph 96, and Appendix 3 to the Report, p.71.

> - *Rasmusen, Ramsey and Wiley* (RRW)- (the "Naked Exclusion" model). In this model the manufacturer exploits a lack of coordination among buyers by getting some buyers to sign an exclusive agreement which effectively forecloses the market to entry by new suppliers. A feature of this model is that buyers are treated asymmetrically, some are under an exclusive contract, and some are not and must pay higher prices at the margin. There is no such asymmetry among Bibby's distributors- in any geographic "market" (say those defined by the Bureau) all distributors are treated the same. Thus this model cannot be applied to the Bibby circumstances. (Rasmusen, E., Ramseyer, J. And Wiley, J., "Naked Exclusion", *American Economic Review* 81: 1137-45(1991).[97]

**[216]** Dr. Ross stated that exclusive dealing could be efficient, then stated how exclusive dealing could hurt competition:

> Exclusive dealing is one of those vertical restraints that can represent an efficient arrangement between sellers (often manufacturers) and buyers (typically distributors), or an attempt to restrict competition at some level of the distribution chain. It can be efficient if it helps to protect certain kinds of investments firms make. For example, if a manufacturer invests a lot of resources into creating a certain type of product and marketing it extensively to bring people into its retailers' stores, it might worry that the retailers would then switch customers over to a rival manufacturer's copy-cat product that was developed at lower cost (because it was a copy) and not advertised. ... By forcing the retailers to stock the first manufacturer's product exclusively, their ability to switch customers is removed.
> Exclusive dealing can also have negative effects on competition. There are at least two principle [sic] mechanisms through which anti-competitive effects can be realized. ...
> [The first is collusion but it is not relevant] ...
>
> The [second] mechanism by which exclusive dealing can hurt competition is by disadvantaging or even excluding some competitors.[98]

[97] Expert Report of Dr. Ware at footnote 78 at paragraph 117.

[98] Expert Report of Dr. Ross at paragraphs 86-88.

**[217]** Dr. Ross goes on to explain[99] how, in his view, the SDP is anti-competitive since it raises a new entrant's costs, because in effect the new entrant must cover the distributor's switching costs, or more exactly, his mixing costs, by making up for the lost rebates:

> The rebate components of Bibby's SDP provide, in fact, a very nice example of how contracts can serve as a barrier to efficient entry in the famous model by Aghion and Bolton [1987]. In their model, in order to leave its current supplier to give business to an entrant, the buyer must pay liquidated damages to the incumbent dominant firm. The required payment can be large enough that even an entrant pricing at a very low (i.e. marginal cost) level will not be able to induce buyers to switch. In the present case, the forgone rebates play the role of the liquidated damages since they are monies "owed" to the buyer by the incumbent which the buyer will forfeit if it buys from the entrant.[100]

**[218]** According to Dr. Ross, the 100 % loyalty requirement and consequent rebate structure makes partial withdrawal from the program very costly. Dr. Ross is willing to concede that switching on the 1st of January entails no switching costs. Such behaviour, however, is very unlikely, according to him. There is no one single supplier to whom a distributor may turn to replace Bibby. Consequently, the distributor will only replace Bibby partially, losing all the potential rebates and the multiplier he would enjoy by staying with the program.

**[219]** The cost of switching 100 percent of purchases is rather straightforward: nil on January 1st, approximately 4 percent of the cost of supplies bought in a given year if the switch is done at the beginning of a quarter, and an additional 7 percent of the purchases for a quarter or so if the switch is done during that quarter. According to Mr. Byrne from Crane Supplies, losing the rebate for the quarter entails losing only the portion of the yearly rebate related to that quarter, in the event the distributor comes back to the SDP for the remainder of the year.[101] In the Bibby documents describing the program, Bibby states that the year to date rebate will be lost if the distributor leaves the program, but that the program can be reinstated in the following quarter.[102]

**[220]** Both Dr. Ross and Dr. Ware offered calculations of what it would cost for a distributor to switch away from Bibby and use another supplier for its supplies. Dr. Ross concludes that the partial switching cost (he refers to a "mixing cost") is such that unless the customer is prepared to give 2/3 of its business to a competitor who is offering prices at 50 percent of Bibby's non-stocking prices (assuming rebates of 10 percent and a multiplier of .75), it is more economical to remain with Bibby. For a switch of 50 percent of the business to be worthwhile, the entrant

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[99] Expert Report of Dr. Ross at paragraphs 89-104.

[100] Expert Report of Dr. Ross at paragraph 101.

[101] Transcript at 4:756, 4 March 2004.

[102] JB-1-11; JB-11-520; JB-15-803.

would have to offer prices at 66 percent below full prices. Finally, even if the entrant gave the product away, the buyer would have to give the entrant more than a third of his business to make the switch attractive.[103]

**[221]** Dr. Ware counters by saying that the actual cost of enticing a client away from Bibby is rather low. At the beginning of every year, the competitor must simply match the multiplier price. At the beginning of each subsequent calendar quarter, the only cost is the annual rebate, currently at 4 percent.

**[222]** The obvious difference is that whereas Dr. Ware bases his calculations on a total switch, Dr. Ross considers partial switching, or "mixing":

> **DR. T. ROSS:** The term "switching cost" in economics refers to the cost of moving your business from one supplier to another. Sometimes this is costs associated with retraining of employees, with penalty clauses and contracts if they exist or whatever. We call those "switching costs." Switching costs certainly do discourage people from switching. Where are the switching costs in the Stocking Distributor Program?
>
> Well, if by switching you're referring to 100 percent switching, that is, moving all of your business from one supplier, Bibby, to another, an entrant, then the switching costs are correctly characterized by Dr. Ware as just the rebates that you would lose by switching.
>
> So if you had accumulated a value of rebates because it's December and you're getting near a quarter and near a calendar year and you're getting ready for your rebate cheque, that would represent a switching cost prior to the end of the year. Fine, we agree on that.
>
> January 1st, though, you just receive your rebate cheques. There is no loss of rebates by moving your business to an entrant.
>
> However, you will have to fall out, drop out of the Stocking Distributor Program, if you move even partially. If you wanted to move only some of your business to an entrant, you have what you might call a switching cost, but I'm happy to re-label, if it's less confusing -- I think Dr. Ware suggests a "mixing cost". Mixing your suppliers becomes very expensive.
>
> So if we want to reserve the term "switching" to talking about moving 100 percent of your business, I'm fine with that. And we'll use the term "mixing" for when you're going to switch less than 100 percent of your business.
>
> I agree on January 1st there is no switching cost, so defined, but I would argue that ... there is a mixing cost going forward if you want to mix your business.[104]

**[223]** As Dr. Ware notes,[105] the cost of mixing suppliers also arises in the context of volume rebates. When rebates are based on volumes, buyers will be entitled to rebates which will vary

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[103] Expert Report of Dr. Ross at paragraphs 102 and 103.

[104] Transcript at 17:3511-3512, 25 March 2004.

[105] Rebuttal Report of Dr. Ware (27 February 2004) at footnote 20 on page 18.

according to the volume bought. The percentage of the rebate will change as the buyer reaches certain milestones. If a distributor mixes suppliers, he is less likely to reach with a given supplier the thresholds necessary to obtain higher rebates. Thus, as a number of witnesses agreed, volume rebates also encourage loyalty.[106]

**[224]** Dr. Ross says that it is not feasible for a distributor to leave the program entirely, because supplies will not be found elsewhere for the full three product lines. Since Bibby is the only company to offer the full product lines for all three products, it may be that the distributor who wants to supply the whole of a construction contract will have to buy from Bibby, even if he has chosen other suppliers for the majority of his pipe, fittings and couplings requirements. The rule of the industry seems to be that it is relatively easy to find 80 to 90 percent of the most commonly used products from a number of suppliers; the balance are more difficult to find, and Bibby would be the most likely to supply them. That supply would be bought at a higher cost if the distributor was not on the SDP.

**[225]** Yet the distributors' evidence shows that it is possible for suppliers and contractors to be supplied outside the SDP for the majority of their supplies, with reliance on Bibby if necessary for items that are more difficult to find. From the economic evidence on switching costs, the Tribunal concludes that the Commissioner has failed to establish that switching costs would be a sufficient deterrent to prevent distributors from changing suppliers. The switching costs for changing suppliers entirely are negligible. This is acknowledged by both experts. The mixing cost hypothesis proposed by Dr. Ross is not convincing. Distributors say they will choose other suppliers if they are offered a better bargain, the benefits of which outweigh the mixing costs. It is true that Bibby's products are much more expensive if the distributor is not on the SDP (or does not have access to an alternative source of Bibby products as Wolseley in the Western region buying from its eastern counterpart or Octo members buying from SDP participants). Because of this, it is probable that distributors will move the majority or all of their purchases away from Bibby if they choose to rely on other suppliers. Indeed, this is confirmed by Mr. Lachance and Mr. Mark Thomas Corriveau from Wolseley.[107] As seen earlier, the evidence establishes that there exist other sources of supply for the most commonly used products. In other words, the Tribunal is of the view that mixing costs will not have the deterrent effect suggested by Dr. Ross. Practically, those mixing costs will be marginal and limited to the acquisition of "exotic" items available through Bibby.

**[226]** Dr. Ross' argument is that mixing costs prevent "toe-hold entry." Small-scale entry is impossible, according to Dr. Ross, since new entrants cannot hope to gain part of the distributors' business. The Tribunal rejects this argument. Nothing prevents the distributor from seeking out *several other* suppliers, as is the case for Wolseley. Nor does the SDP prevent the new entrant from making arrangements with another supplier to offer a complete line in order to compete with Bibby's program, as Vandem has done with Mission Rubber and Ideal.

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[106] Transcript at 8:1661, 10 March 2004.

[107] Transcript at 9:1773, 11 March 2004; Transcript at 10:2014-2015, 12 March 2004.

Distributors' Evidence on Switching Costs

**[227]** The Tribunal heard evidence from several distributors and buyers about what switching costs meant for them. The three major distributors, Wolseley, Crane and Emco, had different reasons for remaining with Bibby. The two large buying groups, Octo and Canaplus, did not purchase their cast iron DWV products exclusively from Bibby. Certain small distributors were supplied by Bibby, others by Vandem or by importers.

**[228]** Wolseley (formerly Westburne) is a very large distributor of plumbing supplies, and its operations are divided in two main regions: East (Ontario, Quebec and the Atlantic provinces) and West (Prairies, Alberta, British Columbia). In the East, Wolseley is a stocking distributor for Bibby. In the West, it has opted out of the program since April 2002. The choice was based on a economic calculation: in the West, the price of imports is such that it is more economical for Wolseley to deal in imports.[108]

**[229]** Mr. Corriveau stated that Wolseley had left the program in the West because of price erosion, i.e., Wolseley's benefit margins were too low. Wolseley has remained on the SDP in the East. When Wolseley bought Nuroc, an Ontario distributor, it forced Nuroc to leave Vandem, because for Nuroc to remain with Vandem would endanger the rebates for all the Ontario region. According to Mr. Lachance, it was an economic calculation, despite his misgivings at having to remain with a single supplier.[109] The Commissioner sought to present this as an example of the coercive nature of the SDP. Yet buying Nuroc was Wolseley's decision, not Bibby's. Once Nuroc entered the Wolseley fold, supplier decisions moved up the chain of command. Wolseley had to consider the economic consequences of breaching its agreement with Bibby. The conclusion might have been the same, with or without the SDP. If the supplier used by Wolseley offered better terms than the supplier used by Nuroc, Wolseley would certainly demand that Nuroc, which it now owned, change suppliers. The economic calculation might have been the same if Bibby offered a volume-rebate scheme.

**[230]** Both Crane and Emco, the other two large distributors in Canada, are part of the SDP program. Speaking on behalf of Emco, Mr. Johnston testified that the decision to stay with the SDP was primarily motivated by the size of the market:

> **MR. R. JOHNSTON:** Our determination is based on the size of the market. It's a mature market at $34 million, declining 5 percent a year, which primarily is going to plastic-type material.
>
> Given our market share desire of around 20 percent of that, parallel to that, we supply what our customer asks us for and/or what is specified, for us to go out and find another supplier is not warranted.
>
> (...)
>
> **MR. D.J. RENNIE:** Right, okay.
>
> So do I take it, sir, that there is no incentive for you to switch?

[108] Transcript at 9:1773, 11 March 2004.

[109] Transcript at 9:1783-84, 11 March 2004.

You see no reason to switch given the existence of the program in the market as you see it today?

**MR. R. JOHNSTON:** Based on how the size of the market is the prime driver to us.

And what I mean by that, if the market was large enough then it would encourage us to search elsewhere in the world for product based on the returns we would get with added expenses.

So it's a market size driven decision. (...) It's what we call a "harvest market".

**MR. D.J. RENNIE:** A harvest market, and by that you mean what?

**MR. R. JOHNSTON:** That material -- there is less of that material being consumed going forward and it's going -- at some point, will be a crossover into plastic.[110]

**[231]** Mr. Johnston is saying that switching suppliers would not be justified given the state and size of the market. The reluctance to change suppliers, according to this witness, is not attributable to the SDP *per se*, but rather to the fact that it is not worth putting effort into changing suppliers because of the relatively small and eroding market for cast iron DWV products.

**[232]** Mr. Byrne, testifying from Crane Supplies, stated that his company had weighed a number of factors before deciding not to switch. When specifically asked why Vandem had not been considered as a supplier, he replied that since Vandem simply did not seem to have sufficient inventory, Bibby would have continued to be a major supplier. Given the rebate program, the switch to Vandem was not worth the cost.[111] In such circumstances, the distributor clearly indicated that because of the loyalty program, he would move all of his business, or none. The loyalty program therefore weighs in the economic decision to remain with Bibby. We also learn from Mr. Byrne's evidence that another significant factor in the decision is the mistrust of Vandem as a reliable supplier.

**[233]** The Tribunal heard the evidence of Mr. Beaulac, the director general of Octo Group, one of two major buying groups in Canada, the other being Canaplus. Mr. Beaulac testified that not all members of his buying group who purchased cast iron DWV products were supplied by Bibby. Two important facts emerged from Mr. Beaulac's testimony. First, certain members of the buying group had balked at Bibby's insistence that all members of the buying group be part of the SDP in order to benefit from the rebates and discounts. As a result, Bibby's proposal of exclusive supply to Octo was ultimately not implemented.[112] Second, members of the buying group who are not part of the SDP can be supplied by members who do participate in the SDP.

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[110] Transcript at 7:1370-71, 9 March 2004.

[111] Transcript at 4:802-03, 4 March 2004.

[112] Transcript at 8:1668, 10 March 2004.

This shows some flexibility in the application of the SDP, in that non-participating members can benefit from lower prices than those offered to other distributors who are not part of the SDP and not members of the buying group.[113]

**[234]** No witness from Canaplus appeared before the Tribunal. However, the Tribunal heard witnesses from two small distributors, both members of Canaplus. Mr. Elliott, from McKeough Supplies, and Mr. Jack Keon, from Niagara Plumbing Supplies. They both indicated that they bought cast iron pipe and fittings from Vandem. As for Canaplus itself, the only indication of its source of cast iron DWV products is the information which appears on its Website[114] which shows what companies are the approved suppliers of Canaplus. According to this information, an approved supplier has to supply at least five members of Canaplus. Under the "Cast Iron Soil Pipe and Fittings" heading, the only name that appears is Vandem Industries Inc.

**[235]** Mr. Elliott from McKeough Supplies testified that his company did not buy cast iron DWV products from Bibby. They had ceased being supplied by Bibby in 1998, because of the requirement to buy at least 40,000 pounds of products. McKeough Supply had started buying from Vandem in the year 2000. It now buys a quantity of cast iron products well above Bibby's minimum requirement.

**[236]** The Tribunal also heard evidence from Mr. Giulio Iaboni, President of Sherwood Plumbing Supplies, a small distributor who is part of the SDP program. According to Mr. Iaboni, the rebates offered make Bibby's program a profitable proposition. The structure of the rebates in the SDP allowed Sherwood Plumbing to compete with major distributors such as Emco or Crane.[115] Mr. Iaboni clearly stated that he kept Bibby as a supplier because its rebate structure had been very profitable for him.[116] Mr. Iaboni indicated he had not considered Vandem as a supplier because he mistrusted its principals.[117] He would consider switching to imports if the rebate structure were altered to become a volume-based structure, since such a change would remove his ability to compete with the larger distributors.[118]

**[237]** The Tribunal concludes, on the issue of switching costs, that although the SDP is an attractive program for a distributor, it does not prevent the distributor from considering other options, or from purchasing elsewhere if it is more advantageous to do so. Distributors remain with Bibby for a variety of reasons, and notably because it is a reliable supplier and, in the case of large distributors, because the size of the market does not warrant searching for another supplier. The SDP is a factor in the decision, but both the economic and factual evidence on

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[113] Transcript at 8:1666-67, 10 March 2004.

[114] JB Volume 25 Tab 1228.

[115] Transcript at 22:4483, 28 May 2004.

[116] Transcript at 22:4481-4483, 28 May 2004.

[117] Transcript at 22:4487, 28 May 2004.

[118] Transcript at 22:4483, 28 May 2004.

switching costs fail to establish that its purpose is predatory, exclusionary or disciplinary. It offers an attractive bargain to distributors, but it does not prevent other competitors from offering a better bargain, nor does it prevent distributors from switching to other suppliers. The switching costs were not demonstrated in economic terms to be significant. The Tribunal heard evidence of distributors staying with the program for reasons unrelated to the SDP and of distributors leaving the program without incurring switching costs.

*The SDP's Impact on Competitors*

Economic Evidence on the SDP's Impact on Competitors

**[238]** The Commissioner argues that Bibby has further entrenched its dominant position by locking the distributors into a program that prevents other competitors from entering the market. Dr. Ross indicated that a loyalty program where loyalty is induced but there is no formal exclusivity, such as the SDP, will inhibit small-scale entry, but cannot stop a competitor from imitating the incumbent; the question therefore becomes whether such entry is possible.[119]

**[239]** Dr. Ross is of the view that the SDP harms competition by deterring entry and by limiting the expansion of other suppliers. Large-scale entry may be difficult, mainly because there may be problems of credibility and reliability for the new entrant and buyers are unwilling to jeopardize their established relationship with the incumbent. Moreover, consumers (those who buy from the wholesale distributors) do not care whether the distributor offers variety or not, since the product is standard, and therefore provide no incentive to distributors to offer a variety of product brands. As well, the SDP discourages small-scale entry, according to Dr. Ross, since distributors will not be willing to split their purchases between Bibby and other new suppliers.

**[240]** The Respondent submits that the SDP cannot be considered a barrier to entry, given that competition has increased since the program was first implemented in 1998. Dr. Ware pointed out that the SDP has not foreclosed access to distribution. It might modify the incentives for existing distributors, but entrants have other avenues: they can sell directly to contractors. They can set up their own distribution facilities, they can encourage distributors who do not sell cast iron DWV products to start selling them. All these avenues have been used successfully, according to Dr. Ware.

**[241]** The Commissioner's arguments about the effect of competitors was based mainly on the mixing-cost issue which we dealt with earlier. As stated above, there was no economic evidence that mixing costs *per se* will prevent small-scale entry; in fact, they have not. As to large-scale entry, the difficulties posed would seem related, from the evidence, both to the fact that Bibby has enjoyed a near monopoly because of the concentration and consolidation of the industry before the advent of the SDP and to the fact that DWV cast iron products form a mature market where little growth is forecast, thus discouraging major investment.

[119] Expert Report of Dr. Ross at paragraph 76.

Competitors' Evidence on the SDP's Impact on Competitors

**[242]** The Tribunal heard the evidence of various competitors who blamed the SDP as an obstacle to their continued expansion. These competitors included Vandem, the complainant and only other manufacturer of cast iron pipe and fittings in Canada, as well as the evidence of importers of MJ couplings and of cast iron pipe and fittings.

**[243]** Mr. Vanderwater and Mr. Demeny from Vandem testified that they met with little success because of the loyalty program. The Tribunal, however, has cause to question the credibility of their testimony.

**[244]** At the outset, the Tribunal notes that the major distributors were unconvinced of Vandem's capacity to service their needs. From the evidence, the Tribunal is of the view that the doubt would have subsisted even if Bibby had had a volume-rebate scheme in place. Further, the evidence provided by Mr. Demeny was severely tested on cross-examination. Mr. Demeny answered in chief that 75 to 90 percent of Vandem's sales were to the U.S. In cross-examination, he had to admit that in fact, over 70 percent of Vandem' s sales were to the Canadian market.[120] As well, the Commissioner provided no financial documents concerning Vandem's business situation - no business plan, no financial statements, no financing documents. We have no sales figures after the year 2000. What is known is that Vandem, in the space of four years, has captured 10 percent of sales in Canada and by 2002 had become profitable. Mr. Vanderwater testified that Vandem needed 15 percent of the market to remain viable, but given the paucity of financial information on Vandem's circumstances, the Tribunal has no way of knowing if whether Vandem is or will be viable. There is also evidence that Vandem's financial difficulties may well be unrelated to the SDP. Mr. Demeny testified that Vandem's sales had been hurt by the increasing value of the Canadian dollar as well as by the increase in the price of scrap metal.

**[245]** Mr. Bouthillette from BMI products testified that once the SDP program was set up, it became much more difficult for BMI to sell the cast iron fittings it was importing from China to wholesale distributors in Canada. Starting in 1998, BMI was told by the distributors that Bibby's loyalty program would prevent them from buying from BMI in the future, despite the very good prices and the quality of service offered by BMI.

**[246]** Mr. Leonard had apparently left the door open to negotiations should BMI ever decide to sell its inventory of cast iron fittings. In December 1998,[121] BMI sold its inventory to Bibby. No restrictive covenant was attached to the sale.[122] Mr. Leonard jokingly ("*à l'amiable*" is the term used by

[120] Transcript at 6:1162-1169, 8 March 2004, Cross-examination of Mr. Demeny by Counsel for the Respondent.

[121] JB vol. 7 tab 333.

[122] Transcript at 12:2544, 16 March 2004.

Mr. Bouthillette) said that he hoped BMI would never sell cast iron fittings again as long as he was on this earth, but no further measure was taken. Mr. Bouthillette explained that BMI had a choice in that it could opt to get out of the cast iron market and concentrate on its other strengths, if that was best for its clientele.[123]

**[247]** In the West, the SDP had a clear impact on New Centurion, an importing company that sourced its products in China. Mr. Lim testified for New Centurion that Westburne, its main client, ceased ordering from New Centurion because it had agreed to be part of the SDP program throughout the Western region (B.C., Alberta, the Prairies). In 2002, however, Wolseley (which had acquired Westburne) renewed its supply contract with New Centurion.

**[248]** As far as another importer in British Columbia, Sierra Distributors, was concerned, its owner Mr. Kelm testified that the SDP had prevented him from dealing directly with the wholesalers. Instead, Mr. Kelm had found a niche market selling to plumbing contractors. Mr. Kelm reported being told by Mr. Leonard and Mr. Albert from Bibby that he would be allowed to be successful, to a point. He was told that if his enterprise became too considerable, Bibby would drop prices by 30 percent. Sierra Distributors, according to Mr. Kelm, has reached sales of some $800,000 a year. Mr. Kelm stated the company could have expanded, but he was satisfied with its present size.[124]

**[249]** While examining Mr. Kelm, counsel for the Commissioner led evidence relating to Bibby's competition strategy in regards to Sierra. The evidence concerns pricing and supply capacity. Mr. Kelm was told by Mr. Leonard and Mr. Albert that he should limit his growth, or else Bibby would drop its prices to cause him difficulty. In various exchanges between Bibby officials, reference is made to either dropping of prices or allowing Mr. Kelm to overextend himself, thus encouraging buyers to come back into Bibby fold because Sierra cannot supply them.[125] In other words, the tools Bibby uses to compete with Sierra are Bibby's ability to lower prices and its capacity to supply DWV products. These are related to Bibby's market power, which the Tribunal acknowledges.

**[250]** Mr. Peter W. Kirkpatrick of Fernco Connectors Ltd. also testified to the difficulties allegedly encountered by his company because of the SDP. Fernco is a manufacturer of flexible couplings, and an importer of MJ couplings. Mr. Kirkpatrick stated that wholesale distributors would not stock his MJ couplings because of the SDP. Were it not for this program, according to him, Fernco would be able to increase its sales by some $100,000 a year.[126]

**[251]** During the examination-in-chief, Mr. Kirkpatrick was asked whether in fact Fernco had the ability to supply the wholesale distributors. His answer was as follows:

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[123] Transcript at 12:2534, 16 March 2004.

[124] Transcript at 11:2257-2258, 15 March 2004.

[125] Transcript at 11:2264-2310, 15 March 2004.

[126] Transcript at 11:2167-2168, 15 March 2004.

> **MR. G.M. LAW:** Does Fernco have the capacity to sell to these larger wholesalers?
> **MR. P.W. KIRKPATRICK:** I would say, yes, we do but we would have to come to a more amicable arrangement with our current supplier.[127]

**[252]** During the cross-examination, Mr. Kirkpatrick admitted that he had the ability to sell to Wolseley, and had in fact sold to Wolseley in the past.

**[253]** Fernco is supplied by Ideal, an American company that attempted to enter the Canadian market through a company called Gates Canada. Mr. Matthew O'Brien, now with Grant Brothers Sales (an automotive company), testified that while working for Gates Canada he had tried to sell Ideal couplings to Canadian wholesalers, with little success, because of the SDP. In cross-examination, Mr. O'Brien stated that he had had no further contact with the DWV industry after August 2002, when he changed jobs. He did not dispute that Vandem was now selling Ideal couplings in Canada.

**[254]** The Tribunal finds that the SDP has had an impact on competitors, as described by Mr. Bouthillette and Mr. Kelm. However, it has not prevented the entry of Vandem, nor the expansion of New Centurion or Sierra. The evidence establishes that Sierra has not expanded further essentially because its owner decided not to further grow the company and not necessarily because of the SDP.[128] Sierra has now expanded its line of products sufficiently to answer the needs of plumbing contractors. Such an option is open to other wholesale distributors, as is the case with New Centurion and Wolseley.

**[255]** Competing suppliers of MJ couplings have entered the Canadian market since 1998, both in the East and in the West. The SDP has had an impact on certain distributors who expressed no interest in changing suppliers. However, as shown by the evidence, this has not prevented Ideal from becoming the supplier of couplings associated with Vandem's pipe and fittings, nor has it prevented Wolseley from finding satisfactory sources of MJ couplings in the West. On the Canaplus Website, Fernco, Mission Rubber and Preper are listed as preferred suppliers.[129] Bibby does not appear on the list.

(4) Tribunal's Conclusion on the SDP Being a Practice of Anti-Competitive Acts

**[256]** The evidence in this case falls short of establishing the anti-competitive nature of the SDP. Although the terms of the program, as noted earlier, could be seen as binding on its participants, the SDP bears none of the characteristics that were found offensive in *Nielsen*, *NutraSweet* or *Laidlaw*. The terms are clear. The full commitment is for only a year. Non-performance by the distributor (buying outside) leads to non-performance by Bibby (rebates are not paid). However, this is not comparable to penalty clauses or liquidated damages that would be additional to non-performance of a contract. Moreover, the main advantage of the program,

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[127] Transcript at 11:2168, 15 March 2004.

[128] Transcript at 11:2257-2258, 15 March 2004.

[129] JB Vol. 25 Tab 1228.

the multiplier effect, is provided as soon as the distributor enters the program, and is only taken away from the moment the distributor chooses to leave the program. The distributor does not have to reimburse the discount applied at time of purchase through the multiplier. This distinguishes the program significantly from the contracts in other abuse of dominance cases, where non-performance would lead to heavy penalties.

**[257]** Although the rebate structure in the SDP is an inducement to exclusive dealing (see further the analysis under section 77), the Tribunal does not find in this case that the program has an exclusionary effect. In *NutraSweet*, buyers were tied to NutraSweet not only by the rebate inducement, but by the whole structure of the contract, including the exclusivity requirements (using only NutraSweet aspartame in a given line of products) and the meet-and-release clause, which effectively precluded competitors from ever offering a better bargain to the customers of NutraSweet. The same exclusionary purpose and effect cannot be attributed to the SDP.

**[258]** In the instant case, rebates and the multiplier discount are premised on buying cast iron products exclusively from Bibby, but these represent only a financial incentive to adopt the SDP program. In *NutraSweet*, the logo allowance for label display and advertisement, which was worth some 40 percent of the purchase price, added significant complications to switching aspartame brands. Customers could not simply end the contract with NutraSweet. Changes had to be made to labels and promotional campaigns, and manufacturers were reluctant to lose the goodwill that might be associated with the NutraSweet brand. In the present case, there are no similar costs, nor is there an arrangement comparable to the meet-and-release clause. Competitors can offer, and have successfully offered, better bargains to sway buyers away from Bibby.

**[259]** The Respondent's business argument that Bibby needs to sell a certain volume in all three products to be able to maintain full production of all product lines is valid. There are certainly recognizable advantages in having a reliable source able to manufacture and supply a full line of cast iron pipe DWV products for the Canadian market.

**[260]** Further, the switching costs argument has failed to convince the Tribunal that the SDP is anti-competitive. There may be a certain cost linked to leaving the program partially, but the significant mixing costs predicted by Dr. Ross are, in the Tribunal's view, unlikely to be experienced. We agree with Dr. Ross that there could be significant mixing costs if a distributor were to leave the SDP and still continue to be supplied by Bibby for a large portion of its needs. The Tribunal is of the view that this is not likely to happen. The more likely scenario is that a distributor that leaves the program will be supplied elsewhere for its major purchases for which it obtained a better deal and continue to be supplied by Bibby for only the "exotic" components. In such circumstances the mixing costs are not as great. As most distributors explained, the decision boils down to a cost-benefit analysis: whether the distributor will benefit by switching to another supplier. The SDP does not prevent that cost-benefit analysis from being conducted nor from being acted upon if a more competitive supplier is identified. The evidence before the Tribunal shows that this has happened for both small and large suppliers (e.g. in the case of Wolseley and in the case of small suppliers which are part of the Canaplus buying group).

**[261]** The most striking argument against the alleged anti-competitive effect of the SDP is the fact that it has not prevented entry nor competition in certain regions. The SDP has not prevented an increase in imports, nor has it prevented the emergence, for the first time in thirty years, of a new manufacturer of cast iron DWV products. For a practice to be found anti-competitive, it must have a negative effect on competition. As was stated in *Tele-Direct*, there has to be a link between the practice and its alleged anti-competitive effect. In the instant case, the link has not been established to the Tribunal's satisfaction. The Tribunal recognizes that entry may be difficult, but this appears unrelated to the SDP. Several other factors come into play : Bibby is a known manufacturer that offers a complete line of products; the market is not a growth market, thus limiting investment potential. Yet, it has been possible for competitors to match Bibby's prices and offer a reliable supply, to the point of making it an interesting proposition for distributors or contractors to change suppliers. This has occurred, notwithstanding the SDP, as illustrated by new entrants such as Sierra and Vandem, and by new arrangements such as Wolseley's change of suppliers.

**[262]** For all of the above reasons, the Tribunal finds that the Commissioner has failed to establish that the SDP is a practice of anti-competitive acts.

### C. Paragraph 79(1)(c)

**[263]** The Tribunal, as stated above, is satisfied that Bibby does exercise market control. This can be traced to a number of factors and specifically to the fact that Bibby is the only Canadian supplier able to supply full product lines. The SDP is certainly an instrument that helps Bibby market its products, but the Tribunal is not satisfied that the SDP has been shown to be a practice of anti-competitive acts. If, however, the Tribunal has erred in this assessment, the Tribunal is also of the view that the SDP has not been shown to be a practice that has substantially lessened or prevented competition, for the reasons that follow.

**[264]** The Tribunal has accepted the Commissioner's submission that there are three distinct product markets, and six geographic markets. Therefore, the Commissioner has the onus of establishing a substantial lessening or prevention of competition in eighteen separate markets. Yet the Commissioner has not established to the Tribunal's satisfaction that the SDP has led to substantial lessening or prevention of competition in any of these markets.

**[265]** In Western Canada and in Ontario, which represent approximately 75 percent of Bibby's market, there is significant evidence of competitive pricing, notwithstanding the SDP. This competitive pricing is due to imports and to the emergence of a new manufacturer. Although imports still represent a relatively small portion of the cast iron DWV markets, they have been steadily increasing and have had a noticeable impact on prices of cast iron DWV products. In addition, a new competing manufacturer has emerged for the first time in thirty years and has succeeded in capturing 10 percent of the market in Canada within four years, while the SDP was in effect. There is clearly effective entry in the market by Vandem, as evidenced by the lowering of prices for cast iron DWV products in Ontario. As discussed earlier, in these reasons, its viability remains to be determined. It is the Tribunal's view, however, that the evidence shows that a number of factors, unrelated to the SDP, will bear on Vandem's future. In consequence, the Tribunal is of the view that the SDP has not brought about a substantial lessening or

prevention of competition for the Ontario and Western markets.

**[266]** The Tribunal acknowledges that for Quebec and the Maritimes, which represent 25 percent of the market, prices appear not to have been constrained by competition. This, however, does not necessarily lead to a conclusion that the SDP has caused the lack of competition. The data provided by the Commissioner relate only to the period of time when the SDP was operating. Dr. Ross based his arguments concerning market power on pricing information covering the period of January 1998 to September 2003.[130] The Tribunal has no historical data which would allow it to measure the state of competition before and after the SDP came into effect. Canada Pipe bought the assets of Canada's only manufacturer of cast iron DWV products, the Gooding foundries, a well-established player with no significant rivals. As well, Bibby has been and continues to be the only producer of a full line of products. The Tribunal therefore finds that there is insufficient evidence for it to conclude that the SDP is responsible for a substantial lessening or prevention of competition.

**[267]** Finally, the Tribunal is mandated by the Act to consider whether the impugned practice (the SDP) is a result of superior competitive performance. This point was not argued by the parties. Subsection 79(4) of the Act provides as follows:

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|---|---|
| (4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance. | (4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur. |

**[268]** The Bureau's Guidelines state that "[s]uperior competitive performance is only a factor to be considered in determining the cause of the lessening of competition, and not as a justifiable goal for engaging in an anti-competitive act. The Guidelines also provide:

> Having lower costs, better distribution or production techniques, or a broader array of product offerings can put a firm at a competitive advantage that, when exploited, will lessen competition by leading to the elimination or restriction of inferior competitors. This is the sort of competitive dynamic that the Act is designed to preserve and, where possible, enhance, as it ultimately leads to a more efficient allocation of resources. (Enforcement Guidelines on the Abuse of Dominance Provisions, Section 5.3.2. Subsection 79(4) - "Superior competitive performance")

[130] See Expert Report of Dr. Ross at paragraph. 17 and Appendix 3, Section 1; the competitive effects of the SDP are also measured in terms of figures available for the 1998-2003 period see Expert Report of Dr. Ross at paragraphs. 113-116 and Appendix 3, Section 3).

**[269]** In the present case, there is no question that Bibby's Canada-wide distribution network, and certainly its "broader array of product offerings" give it an advantage over its competitors. The Tribunal has already recognized Bibby's ability to maintain a full line of products as a positive factor, which is consistent with "the sort of competitive dynamic" discussed in the Guidelines.

**[270]** On considering the whole of the evidence, the Tribunal finds that there has not been a substantial lessening or prevention of competition attributable to the SDP. The Tribunal concludes that the Commissioner has failed to establish all of the required elements of subsection 79(1).

## VI. SUBSECTION 77(2) ANALYSIS

**[271]** In the instant case, the SDP is the main impugned practice under both sections 79 and 77 of the Act. This no doubt explains why the parties have chosen to deal only briefly with section 77 and have devoted the bulk of their submissions to section 79.

**[272]** For an order relating to exclusive dealing to issue pursuant to Section 77, four elements must be established: 1) a reviewable practice which, for the purposes of this case is exclusive dealing, 2) by a major supplier, 3) an exclusionary effect in the market, and 4) the fact or likelihood of substantial lessening of competition.

### A. Parties' Submissions on Subsection 77(2) Analysis

**[273]** Both parties deal with section 77 only summarily. The bulk of the submissions were made under section 79. Both parties appear to adopt the position that if their case under section 79 is established, there is no further need to argue section 77.

#### 1. Commissioner's Submissions on Subsection 77(2) Analysis

**[274]** The Commissioner contends that the SDP is a practice that induces distributors to deal exclusively with Bibby for their supplies of DWV cast iron products. The SDP only applies to cast iron products, and thus has no impact on any other type of DWV products. Bibby's position as a major supplier, according to the Commissioner, is established by the fact that Bibby has a market share in excess of 80 percent in all relevant markets, is the only supplier that can supply the full line of the three relevant products, and supplies all major distributors in Canada with the exception of Wolseley in the West. Moreover, the SDP is widespread in the applicable market, since the evidence showed that over 90 percent of Bibby's sales of DWV cast iron products are sold through distributors who are part of the SDP.

**[275]** The Commissioner submits that the test for substantial lessening of competition is the same under section 77 as under section 79, as was stated in *NutraSweet*, and therefore simply refers the Tribunal to her section 79 arguments on lessening and prevention of competition.

### 2. Respondent's Submissions on Subsection 77(2) Analysis

**[276]** The Respondent argues that exclusive dealing is a reviewable practice, not one that is unlawful *per se*. For this reason, section 77 is structured so that it is insufficient to simply make a finding of exclusive dealing; the other elements are equally important.

**[277]** The Respondent submits that exclusive dealing can be found only if the relevant product market is cast iron DWV products, which the Respondent denies vigorously. The product market is much wider, and thus the SDP cannot be covered by paragraph 77(1)(b); for the same reason, Bibby cannot be considered a major supplier and the SDP is not "widespread" in the market, since the latter is composed of all DWV products.

**[278]** In the alternative, the Respondent argues that even if the relevant product market is cast iron DWV products, the SDP has not been shown to have an exclusionary effect or to result in a substantial lessening of competition.

## B. Tribunal's Analysis and Conclusion

**[279]** The Tribunal is of the view that under the definition given at 77(1)(b), the evidence is sufficient to conclude that the SDP is indeed a practice of exclusive dealing. Through the SDP, Bibby induces its customers to refrain from dealing in a specified kind of product except as supplied by Bibby. Distributors on the SDP program are precluded from stocking other cast iron DWV products if they want to obtain their rebates and be entitled to an advantageous multiplier. In addition, there is no difficulty in finding that Bibby is a major supplier, given its large market share.

**[280]** For the Tribunal to make an order prohibiting the exclusive dealing practice, it must find that the practice is likely to impede entry of a firm or introduction of a product or to have some other exclusionary effect, such that competition is or is likely to be lessened substantially.

**[281]** We have concluded under section 79 that the SDP is not an anti-competitive practice because we found insufficient evidence to show that the SDP in itself had an exclusionary effect. In *NutraSweet*, the Tribunal stated that the test for substantially lessening of competition was essentially the same in sections 79 and 77:

> The effect on competition of exclusivity and the related contractual terms,... have been discussed thoroughly in the context of section 79. Since the fundamental test of substantial lessening of competition is the same in both sections of the Act, the same conclusions apply.[131]

[131] *NutraSweet* at 56.

**[282]** For the same reasons therefore as in our analysis under section 79, we find that the Commissioner has failed to establish that the exclusive dealing practice impedes or is likely to impede entry of a new competitor or have any other exclusionary effect, and has failed to establish that it has lessened competition substantially. The Tribunal therefore concludes that the Commissioner has not shown under section 77 that the SDP is a practice that has substantially lessened competition.

## VII. CONCLUSION ON THE APPLICATION

**[283]** The purpose of the *Competition Act*, as stated in section 1.1, is to "maintain and encourage competition in Canada." The Tribunal must ensure that its decisions and orders do not have a negative effect on competition. The jurisprudence of this Tribunal clearly establishes that aggressive competition in the marketplace is not *per se* anti-competitive.

**[284]** In the final analysis, the Tribunal found that the purpose of the SDP was not shown to have an intended negative effect on a competitor that is predatory, exclusionary or disciplinary. In weighing the conflicting evidence, and particularly the absence of significant switching costs, the Tribunal applied its expertise and concluded that the SDP is not a practice of anti-competitive acts.

**[285]** In an abuse of dominance case with allegations of exclusive dealing, such as the case at bar, the burden of establishing the various elements under sections 79 and 77 of the Act properly rests with the Commissioner. In the instant case, the Commissioner has failed to discharge her evidentiary burden to show that the SDP has or is likely to substantially lessen or prevent competition. She has also failed to establish to the Tribunal's satisfaction that the Respondent is not competing in the marketplace on merit and is abusing its market power through a practice of anti-competitive acts. As a result, the Commissioner's application under sections 77 and 79 of the Act for an order against Canada Pipe Company Ltd. is dismissed.

## VIII. COSTS

**[286]** At the hearing, the Respondent indicated that it would wish to make further submissions on costs. If there is no agreement on costs, the parties may address the Tribunal in writing in accordance with the following schedule:

1. the Respondent shall serve and file its written submissions on costs, if any, not to exceed ten pages, and a draft bill of costs within 10 days of the date of these reasons;

2. the Commissioner shall, within 10 days of the filing of the Respondent's draft bill of costs, serve and file her written submissions on costs, if any, also not to exceed ten pages;

3. the Respondent shall serve and file its reply, if any, not to exceed five pages, within five days of the filing of the Commissioner's submissions.

## IX. ORDER

**[287]** The Tribunal orders:

1. The application is dismissed.

2. The decision on costs is reserved. The Respondent shall file its draft bill of costs and the parties shall make submissions on costs, if any, in accordance with paragraph 286 of these reasons.

## X. DIRECTIONS TO THE PARTIES

**[288]** In light of these confidential reasons for order, the parties are directed as follows:

1) To enable the Tribunal to issue a public version of these reasons, the parties shall meet and endeavour to reach agreement upon the redactions to be made to these confidential reasons, if any, in order to properly protect information that should be kept confidential. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Tuesday February 8, 2005, setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons.

2) If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from the reasons. Such submissions are to be served and filed by the close of the Registry on Friday February 11, 2005.

DATED at Ottawa, this 3rd day of February, 2005.

SIGNED on behalf of the Tribunal by the panel members.

(s) Edmond P. Blanchard

(s) Andrée L. Reny

(s) Paul Gervason

## SCHEDULE A

**[289]** *Competition Act*, R.S. 1985, c. C-34.

**1.1** The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

**77.** (1) For the purposes of this section, "exclusive dealing" means

(*a*) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(*b*) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (*a*)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

**1.1** La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits

**77.** (1) Les définitions qui suivent s'appliquent au présent article.

«exclusivité»

*a*) Toute pratique par laquelle le fournisseur d'un produit exige d'un client, comme condition à ce qu'il lui fournisse ce produit, que ce client :

(i) soit fasse, seulement ou à titre principal, le commerce de produits fournis ou indiqués par le fournisseur ou la personne qu'il désigne,

(ii) soit s'abstienne de faire le commerce d'une catégorie ou sorte spécifiée de produits, sauf ceux qui sont fournis par le fournisseur ou la personne qu'il désigne;

*b*) toute pratique par laquelle le fournisseur d'un produit incite un client à se conformer à une condition énoncée au sous-alinéa *a*)(i) ou (ii) en offrant de lui fournir le produit selon des modalités et conditions plus favorables s'il convient de se conformer à une condition énoncée à l'un ou l'autre de ces sous-alinéas.

...

(2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(*a*) impede entry into or expansion of a firm in a market,

(*b*) impede introduction of a product into or expansion of sales of a product in a market, or

(*c*) have any other exclusionary effect in a market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

(...)

(2) Lorsque le Tribunal, à la suite d'une demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, conclut que l'exclusivité ou les ventes liées, parce que pratiquées par un fournisseur important d'un produit sur un marché ou très répandues sur un marché, auront vraisemblablement :

*a*) soit pour effet de faire obstacle à l'entrée ou au développement d'une firme sur un marché;

*b*) soit pour effet de faire obstacle au lancement d'un produit sur un marché ou à l'expansion des ventes d'un produit sur un marché;

*c*) soit sur un marché quelque autre effet tendant à exclure,

et qu'en conséquence la concurrence est ou sera vraisemblablement réduite sensiblement, le Tribunal peut, par ordonnance, interdire à l'ensemble ou à l'un quelconque des fournisseurs contre lesquels une ordonnance est demandée de pratiquer désormais l'exclusivité ou les ventes liées et prescrire toute autre mesure nécessaire, à son avis, pour supprimer les effets de ces activités sur le marché en question ou pour y rétablir ou y favoriser la concurrence.

**79.** (1) Where, on application by the Commissioner, the Tribunal finds that

(*a*) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(*b*) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

**79.** (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :

*a*) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;

*b*) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;

(*c*) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market
...

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

...
(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

2002, c. 16, s. 17.)

*c*) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

(2) Dans les cas où à la suite de la demande visée au paragraphe (1) il conclut qu'une pratique d'agissements anti-concurrentiels a eu ou a pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché et qu'une ordonnance rendue aux termes du paragraphe (1) n'aura vraisemblablement pas pour effet de rétablir la concurrence dans ce marché, le Tribunal peut, en sus ou au lieu de rendre l'ordonnance prévue au paragraphe (1), rendre une ordonnance enjoignant à l'une ou l'autre ou à l'ensemble des personnes visées par la demande d'ordonnance de prendre des mesures raisonnables et nécessaires dans le but d'enrayer les effets de la pratique sur le marché en question et, notamment, de se départir d'éléments d'actif ou d'actions.
(...)

(4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur.
(...)

(6) Une demande ne peut pas être présentée en application du présent article à l'égard d'une pratique d'agissements anti-concurrentiels si la pratique en question a cessé depuis plus de trois ans.

REPRESENTATIVES:

For the Applicant:

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| Commissioner of Competition | |
| John A. Campion<br>Donald J. Rennie<br>Graham M. Law<br>Catherine A. Lawrence<br>Nicole D. Samson | |

For the Respondent:

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| Canada Pipe | |
| Kent E. Thomson<br>George N. Addy<br>James Doris<br>Edward Babin<br>Milos Barutciski<br>Anita Banicevic<br>Davit D. Akman<br>Charles Tingley | |