

CT-2002-006

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF THE *COMPETITION ACT*,  
R.S. 1985, C. c-34, as amended;  
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:**

**THE COMMISSIONER OF COMPETITION**

Applicant

- and -

**CANADA PIPE COMPANY LTD./ TUYAUTERIES CANADA LTÉE**

Respondent

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**REPLY OF THE COMMISSIONER OF COMPETITION**

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August 10, 2004

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**PART I: OVERVIEW****(i) Introduction**

1. This Reply ("Commissioner's Reply") should be read in concert with the Commissioner's main submissions ("Commissioner's Submissions") dated July 16, 2004. The definitions and defined terms are continued from the Commissioner's Submissions and are not repeated in the Commissioner's Reply. The Commissioner repeats the propositions set out in her Submission without alteration. In its Response, Bibby has said nothing to substantially impact the Commissioner's Submissions.

**(ii) Tone and Tenor: Failed Attacks on the Commissioner**

2. Bibby gave oral opening submissions in this case on March 1 and 2, 2004. As was pointed out by the Commissioner at the time, these opening submissions were highly aggressive, improper and largely final argument.

3. Like its oral opening through counsel, Bibby's Response is argumentative, hyperbolic and repetitive. The Response repeats irrelevant and offensive collateral attacks on decisions already made by the Tribunal and upheld by the Federal Court of Appeal concerning documentary production. At times, the submissions descend to *in personam* attacks on the Commissioner. By way of example, the following irrelevant, trivial and repetitive attacks from Bibby's Response are noted:

- (a) allegations of improper investigation by the Commissioner (attacks on the Commissioner);

**Reference:** Bibby Response, paras. 5, 9, 132, 207, 237, 248, 251, 260, 263, 374, 399, 405, 406, 444, 547, 548, 682, 805, 807, 809, 818, 819, 820, 821, 822, 823, 824

- (b) issues arising from allegations that the Commissioner improperly refused to produce documents (collateral attack on decisions made by the Tribunal and upheld in the Federal Court of Appeal);

**Reference:** Bibby Response, paras. 24, 25, 177, 207, 399, 405, 406, 444, 456, 547, 625, 662, 663, 665, 667, 668, 674, 680, 681, 682, 686, 699, 705, 789, 794-818

- (c) attacks on the Commissioner's motives; and

**Reference:** Bibby Response, paras. 22, 24, 25, 137, 199, 300, 430, 805

- (d) allegations that the Commissioner's case must fail and is untenable.

**Reference:** Bibby Response, paras. 13, 18, 24, 48, 104, 128, 129, 216, 280, 383, 385, 493, 549, 564, 584, 626, 633, 634, 635, 706, 751, 777, 786, 787, 788, 838, 840

4. All of the above submissions are unhelpful to the main issues raised in the case. They are obviously repeated throughout the Response in a manner that is excessive and confusing. The Bibby Response should therefore be read with scepticism and great care. The Bibby Response, therefore, obscures more than it elucidates.

5. The Bibby Response is significantly answered by the evidence of Dr. Ross. Dr. Ross' testimony is reviewed in full in Part II herein. This overview will merely summarize some of the significant points.

**(iii) Direct Evidence of Market Power**

6. The essence of Bibby's Response is that Bibby does not exercise market power. Bibby criticizes the direct evidence of market power put forward by Dr. Ross. In this regard, Bibby relies in part upon the report and evidence of Dr. Ware. The Commissioner asks that this Tribunal reject Bibby's submissions in this regard. Dr. Ross gave his evidence in a fair and balanced manner. His direct evidence of market power has not been effectively challenged in cross-examination or by the evidence of Dr. Ware.

**Reference: Commissioner's Submissions: Part VI, paras. 154-168**

**Reference: Bibby Response: Part VI, paras. 494-539**

**Reference: Commissioner's Reply: Part II**

7. Bibby put forward very limited evidence and no compelling explanation as to why it alleges Dr. Ross' cost information is inaccurate. Bibby merely asserts that it is. This is not an answer to Dr. Ross.

**Reference: Bibby Response: Part VI**

**Reference: Commissioner's Reply: Part II**

8. Bibby has not provided any credible explanation for the high profit margins calculated by Dr. Ross. This failure allows for only one conclusion: Bibby has the ability to and does set prices for cast iron DWV pipe, fittings and MJ couplings above competitive levels. It has charged supra-competitive prices since the introduction of the SDP and its acquisitions in Canada.

**Reference: Commissioner's Submissions: Part VI, paras. 154-168**

**Reference: Commissioner's Reply: Part II**

9. Dr. Ross' direct evidence of market power is conclusively illustrated in this case in the chart found at Appendix B of the Commissioner's Submissions. Dr. Ross prepared and gave evidence concerning this chart. With the companion charts, there is conclusive evidence of market power being exercised by Bibby. In that market power is being exercised, there must be defined product and geographic markets in which that power is being exercised. In short, the direct evidence of market power necessarily speaks to the relevant product and geographic markets. Bibby has no answer for this fundamental proposition.

**Reference: Commissioner's Submissions: Part VI, paras. 154-168**

**Reference: Commissioner's Reply: Part II**

10. The direct evidence of market power from Dr. Ross is entirely consistent with and corroborated by the indirect evidence of market power.

**Reference: Commissioner's Submissions: Part I, para. 11**

**Reference: Commissioner's Reply: Part II**

**(iv) Indirect Evidence of Market Power**

11. The indirect evidence of market power relies on the testimony of Dr. Ross, Mr. Zorko, Mr. Leonard, testimony of distributors, engineers and contractors and Bibby's documents. For reasons set out in the Commissioner's Submissions and above, Dr. Ross' evidence is to be preferred over that of Dr. Ware. Mr. Zorko's evidence cannot be said to be challenged by the evidence of Dr. Ware due to Dr. Ware's answers in cross-examination concerning Mr. Zorko's rebuttal report. In the battle of the experts, Dr. Ross is plainly to be preferred over Dr. Ware. The Bibby evidence, including the design, purpose and operation of the SDP supports the Commissioner's conclusions of market power relying upon the indirect evidence of market



power. The testimony of the industry participants also supports the existence of Bibby's market power and itself is to be preferred over the evidence of Dr. Ware.

**Reference: Commissioner's Submissions: Part VI, paras. 169-277**

**Reference: Commissioner's Reply, Part III**

12. Contrary to Bibby's misunderstanding, the Commissioner has not assumed the relevant product markets. The Commissioner has led evidence of experts and lay witnesses alike on the contours of the relevant product markets. As the extensive evidence shows, the relevant product markets are defined through the direct evidence of market power and through the indirect evidence of market power. This evidence is reviewed in detail in the Commissioner's Submissions.

**Reference: Commissioner's Submissions, Part VI**

**Reference: Commissioner's Reply, Parts III and IV**

13. Substitutability is a significant determinant of relevant product markets. Any conclusions about relevant product markets must be founded in the direct evidence of market power and the evidence of substitutability. End-use, an indicia of substitutability, is a necessary but not sufficient condition for two products to be in the same relevant product market. Dr. Ware had no expertise on the evidence of substitutability. Bibby therefore has no expert testimony on the point. The Tribunal is left with the direct and indirect evidence of Dr. Ross regarding market power and the evidence of Mr. Zorko and other industry participants, namely that plastics, copper, asbestos-cement and stainless steel are not close substitutes for cast iron.

**Reference: Commissioner's Submissions, Part VI**

**Reference: Commissioner's Reply, Parts III and IV**

14. Bibby has failed to lead or identify any probative evidence that would cause this Tribunal to conclude that the relevant product markets include materials other than cast iron DWV pipe, fittings and MJ couplings. Indeed, significant evidence of Mr. Leonard and Dr. Ware variously support the existence of relevant product markets identical to those identified by the Commissioner.

15. In comparison to the Commissioner who presented evidence of the existence of three relevant product markets, Bibby has not raised any credible argument to support the existence of only one relevant product market. The distributors have clearly expressed an interest in sourcing the three relevant products from multiple suppliers. The Tribunal should accept the definition of the relevant product markets identified by the Commissioner.

**Reference: Commissioner's Submissions, Part VI**

16. With regard to geographic market definition, Bibby has failed to answer or undermine the pricing evidence and statistical results given in evidence by Dr. Ross. Bibby's only answer to the relevant geographic markets deals with shipments and unsubstantiated assertions of arbitrage. Bibby's submissions are not realistic answers to the Commissioner's definition of the relevant geographic markets.

**Reference: Commissioner's Submissions, Part VI**

**Reference: Commissioner's Reply, Parts II, III and IV**

17. The key barrier to entry and expansion raised by the Commissioner is the SDP itself. Contrary to Bibby's Response, there is no circularity in the Commissioner's position identifying the SDP as a barrier to entry and expansion.

**Reference: Commissioner's Submissions, Parts V and VI**

**Reference: Commissioner's Reply, Parts III, IV and V**

18. The evidence of limited actual entry relied upon by Bibby is not an answer to the existence of the SDP as the barrier to entry and expansion. The actual market shares of any entrant supplying cast iron DWV products are extremely small in comparison to Bibby's market shares. None of these entrants has been able to discipline Bibby's prices in most of the relevant markets. Any reduction in prices has been transitory and does not deny Bibby supra-normal profits. The evidence is clear that niche players and small producers are not sustainable in the face of the SDP, except at the sufferance of Bibby.

**Reference: Commissioner's Submissions, Part VI**

**Reference: Commissioner's Reply, Parts III, IV and V**

19. The SDP requires that a new entrant must be able to satisfy all of a customer's demand and denies competition at the margin, that is for a small portion of a distributor's requirements. There is no evidence that any entrant can satisfy all of the demand of a customer. This barrier is an imbedded result of the operation of the SDP. This barrier lies at the crux of the Commissioner's argument that the SDP is a barrier to entry and expansion.

**Reference: Commissioner's Submissions, Parts V and IV**

**Reference: Commissioner's Reply, Parts III, IV and V**

20. Dr. Ross' analysis of mixing costs was appropriate and not effectively challenged by Bibby.

**(v) Practice of Anti-competitive Acts**

21. On the evidence, the SDP and its enforcement along with Bibby's acquisitions and its use of unreasonable restrictive covenants constitute a practice of anti-competitive acts.

22. The evidence of subjective intent of the SDP and the acquisitions made by Bibby underscore the motives lying behind these acts: namely, that they are exclusionary and disciplinary. Bibby has not contradicted this evidence of subjective intent leaving the Tribunal with only one conclusion: namely, that the SDP is a practice of anti-competitive acts.

**Reference: Commissioner's Submissions, Parts V and VI**

**Reference: Commissioner's Reply, Part V**

23. The SDP is unique in the plumbing industry in Canada. It contains powerful elements of exclusivity and full-line forcing. The SDP does not need written contracts to cause its anti-competitive effects. Distributors must participate in the SDP and remain on the SDP in order to obtain the discounts off the listed price and the rebates in order to achieve any profits on the sale of the cast iron DWV pipe, fittings and MJ couplings. The SDP and its enforcement are therefore properly described as a practice of anti-competitive acts.

**Reference: Commissioner's Submissions, Parts V and VI**

**Reference: Commissioner's Reply, Part V**

24. Bibby has therefore made no effective answer to the existence of a practice of anti-competitive acts.

25. Bibby has sought to raise justifications in support of the SDP. These justifications do not make sense. Significantly, they are not supported by the evidence. There is no evidence that the SDP effectively promotes cast iron DWV products or was designed to prevent "free riding" on Bibby's marketing of cast iron. The suggestion that the SDP creates a level playing field between distributors of different sizes is not a reasonable justification for the practice of anti-competitive acts inherent in the SDP and its enforcement. In any event, competition among distributors of DWV products is not the issue in these proceedings and there is no evidence on

the record to assess competition amongst distributors in various markets in which they compete.

There is certainly no evidence that the SDP results in a more competitive market.

**Reference: Commissioner's Reply, Part V**

**(vi) Substantial Lessening and Prevention of Competition**

26. The Commissioner has proved that the practice of anti-competitive acts identified in the evidence created, enhances or preserves Bibby's market power. The fact that prices are lower now in some of the relevant markets does not render those prices competitive. The evidence is that the Bibby's prices continue to generate supra-normal profits for Bibby in the relevant markets.

**Reference: Commissioner's Submissions, Part VI**

**Reference: Commissioner's Reply, Part VI**

27. Bibby argues that entry has occurred since the introduction of the SDP. This fact alone does not answer the substantial lessening and prevention of competition. Upon any superficial analysis of the entrants, they have had no significant impact on Bibby. Indeed, Bibby has taken active steps to confine any new entrant through threats and other forms of aggressive behaviour.

28. The Commissioner has therefore proved that the SDP has caused a substantial lessening and prevention of competition in the relevant markets. Bibby has not tendered any evidence that permits the Tribunal to reach a contrary conclusion.

**(vii) Exclusive Dealing - s. 77(1)(b)**

29. The Commissioner's Submissions concerning exclusive dealing are a significant aspect of her case against Bibby.

**Reference: Commissioner's Submissions, Part VII**

**Reference: Commissioner's Reply, Part VII**

30. The SDP is a practice that induces the distributors to deal exclusively in cast iron DWV products supplied by Bibby. The SDP demands that distributors refrain from purchasing cast iron DWV pipe, fittings and MJ couplings from any other supplier.

**Reference: Commissioner's Submissions, Parts V and VII**

**Reference: Commissioner's Reply, Part V and VII**

31. The fact that the SDP does not limit purchases of DWV products made from non-cast iron materials is no answer for Bibby. Indeed, the very structure of the SDP demands exclusive dealing by distributors with Bibby cast iron DWV pipe, fittings and MJ couplings. The SDP has no impact on plastic, copper, stainless steel or asbestos cement DWV products. These two facts: namely, the exclusivity attached to cast iron DWV products and the disregard for DWV products made of other materials constitute significant pieces of evidence that the relevant product markets identified by the Commissioner are accurate.

**Reference: Commissioner's Submissions, Parts V and VII**

**Reference: Commissioner's Reply, Part VII**

**(viii) Remedy**

32. The remedy sought by the Commissioner necessarily flows from the evidence of the anti-competitive effects of the SDP and Bibby's other practices of anti-competitive acts.

**Reference: Commissioner's Submissions, Part VIII**

**Reference: Commissioner's Reply, Part VIII**

33. The allegations of the Commissioner is that the SDP used by Bibby, a dominant firm, along with the acquisitions and the use of unreasonable restrictive covenants, constitutes a practice of anti-competitive acts, that has had, is having and is likely to have the effect of preventing and lessening substantially competition in the sale and supply of cast iron DWV pipe, fittings and MJ couplings. The proposed remedies will address these concerns. The distribution market of DWV products is not at issue in these proceedings and there is no evidence on the record to assess competition amongst distributors in various markets in which they compete.

**Reference: Commissioner's Submissions, Part VIII**

**Reference: Commissioner's Reply, Part VIII**

**(ix) Conclusion**

34. The Commissioner's application under sections 79 and 77 of the *Competition Act* has been proven on the facts and expert evidence led at the hearing. The remedy sought is an appropriate response to the practice of anti-competitive acts identified. The Commissioner seeks an order accordingly.

**PART II: THE EVIDENCE OF DR. ROSS****(i) Introduction**

35. In order to properly answer the issues raised by the Bibby Response, it is necessary to summarize Dr. Ross' testimony. His written report and opinion is marked Exhibit A-11. His evidence in chief was given on March 24 and 25, 2004 beginning at p. 3253 and ending at p. 3535.

**(ii) Expert Qualifications**

36. Dr. Ross' expert qualifications were summarized in Appendix 1 of Exhibit A-11. His qualifications were reviewed at pp. 3253-3260. His expert qualifications were accepted by the Court.

**(iii) Two Questions Asked**

37. Dr. Ross was asked to express his opinion on two questions:

- (a) does Bibby have market power with respect to the sale of the relevant products in Canada or any part of Canada; and
- (b) what are the competitive effects of the SDP in the markets in which Bibby sells the relevant products.

Reference: **Exhibit A-11, Part 2, p. 5**

Reference: **Ross DE pp. 3261-3262**

**(iv) Answers to Questions Asked**

38. Dr. Ross rendered his opinions as follows:



- (a) Bibby does have market power in the relevant product and geographic markets;
- (b) Bibby's SDP harms competition in the relevant markets and preserves its market power by effectively deterring entry and limiting expansion by competitive, foreign and domestic producers; and
- (c) Bibby prevents competition when entry is blocked and lessens competition when it makes an entrant in the market non-viable, forced to exit or retreat or stay smaller than might otherwise be desirable from a social efficiency point of view.

Reference: Exhibit A-11, Par. 10

Reference: Ross DE pp. 3270-3271

(v) **Overview**

39. Dr. Ross gave evidence that there are two approaches to assess whether a firm has market power:

- (a) the first approach is to look for direct measures of market power, meaning the ability to profitably raise prices above competitive levels and to hold them there for a non-transitory period without competition driving the prices down; and
- (b) the second approach is derived from indirect measures of market power arrived at by defining markets and measuring market share within those markets once they are defined. If large market shares exist, then the analysis moves to barriers to entry. If there are large market shares protected by barriers to entry, then market power can be inferred through the indirect approach.

Reference: Ross RE pp. 3271-3273

40. Dr. Ross gave testimony that there is direct and indirect evidence of market power exercised by Bibby. The direct evidence of market power is analyzed in Part 6, Section 6.1 of Exhibit A-11. He analyzes the indirect evidence of market power in Part 6, Section 6.2.

41. Dr. Ross noted that direct evidence of market power is not always available. In this case, there was compelling direct evidence of market power. Dr. Ross concluded that the direct evidence in this case was sufficient to draw his conclusions on this evidence alone.

**Reference: Ross RE pp. 3273-3275**

**(vi) Direct Evidence of Market Power**

42. The direct evidence of market power is set out in Part 6, Section 6.1, paragraphs 12-31 of Exhibit A-11.

43. Dr. Ross used four techniques to assess whether Bibby's prices exceeded competitive price levels: (a) regional differences in final prices for the relevant products; (b) Bibby's profit margins; (c) comparison of Bibby's prices with the prices of imports of DWV products; and (d) Bibby's practice of cutting prices in response to entry. These techniques are used to determine whether prices are above competitive levels and profit margins are high.

**Reference: Ross DE pp. 3275-3313**

**Reference: Exhibit A-11, paras. 12-14 – introduction; paras 15-16 - ratio of relevant prices; para 17-19 - margins; para 20- margins combined with imports; paras 21-30 - impact of entry of imports in B.C. and Alberta and Vanden in Ontario**

**Reference: Ross DE pp. 3313-3351**

44. Dr. Ross concluded that there was good direct evidence of market power:

Mr. J.A. Campion: And this is good evidence of direct market power as you have now analyzed it?

Dr. R. Ross: In my opinion, it is.

Reference: Ross DE p. 3351

45. Dr. Ross noted that because there is direct evidence of market power exercised by Bibby across the regions in Canada and across products in Canada it was not necessary to complete the indirect analysis of market power. The indirect approach is therefore redundant.

Reference: Ross DE p. 3351

46. Dr. Ross testified that while the direct evidence showed market power, it did not precisely define the market boundaries.

Reference: Ross DE p. 3370

47. The relevant markets could be smaller but no larger than the relevant products.

48. He reiterated that it was not necessary to complete the indirect analysis to draw his conclusion that Bibby exercised market power. He testified that the indirect evidence confirmed the direct evidence.

Reference: Ross DE pp. 3370-3372

**(vii) Indirect Evidence of Market Power**

49. Dr. Ross' testimony concerning indirect evidence of market power is found in Section 6.2 of Exhibit A-11, paragraphs 32-77. The report is further subdivided as follows:

- (a) Introduction, paras. 32-33;
- (b) Cellophane trap, paras. 34-36;
- (c) Geographic markets, paras. 37-40;

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- (d) Product markets, paras. 41-48;
- (e) Statistical analyses, paras. 49-55;
- (f) Application of statistical analyses to geographic markets, paras. 56-59;
- (g) Application of statistical analyses to product markets, paras. 60-64;
- (h) Measurement of market shares, paras. 65-66; and
- (i) Barriers to entry, paras. 78-116.

**Reference: Ross DE pp. 3351-3368**

**Reference: Exhibit A-11**

50. Dr. Ross explained his statistical analyses and empirical techniques in detail in his evidence.

**Reference: Exhibit A-11, paras. 49-55**

**Reference: Ross DE pp. 3375-3405**

51. In his statistical analyses, he reviewed correlation coefficients and performed co-integration tests and Granger causality tests. He concluded that there are six relevant geographic markets, namely: Atlantic Canada, Quebec, Ontario, the Prairies, Alberta and British Columbia. He noted that there was considerable independence in the movement of prices across these relevant geographic markets.

**Reference: Ross DE pp. 3404-3405**

**Reference: Ross DE p. 3378**

**Reference: Ross DE p. 3391**

**Reference: Ross DE p. 3398**

52. Dr. Ross applied the same correlation test, co-integration test and Granger causality test to product markets. He concluded that there was considerable independence in prices for cast iron DWV pipe, fittings and MJ couplings. As a result, the three products are in separate relevant product markets.

**Reference: Ross DE pp. 3405-3409**

**Reference: Exhibit A-11, Appendix 3, pp. 55-68**

**Reference: Exhibit A-11, paras. 60-64**

53. Dr. Ross testified that in considering product market he was asked to assume that there existed significant applications for which alternatives to cast iron DWV products did not have close substitutes. In his affidavit, Dr. Ross states that the evidence regarding the market power currently held by Bibby is consistent with this assumption. In order for Bibby to have market power, it must be the case that Bibby's products do not have very close substitutes. His assumption and the evidence of Mr. Zorko and other industry participants is consistent with the evidence of Dr. Ware drawn from the Freedonia material which stated that:

Despite continued demand declines, cast iron drain, waste and vent (DWV) pipe will remain the preferred material in higher performance applications such as multi-storey buildings where greater structural strength is mandatory. Cast iron DWV is also frequently used as the main stack pipe in residential buildings due to its better sound deadening properties compared to plastic. Smaller drain markets for cast iron pipe will also decline over the forecast period as a result of competition from lighter and easier to install high density polyethylene pipe.

**Reference: "Competitive Piping Materials, Cast Iron Pipe – Markets", found at the 7th page of Exhibit B – Tab 4 to Dr. Ware's Expert Economist Report, Exhibit R-24**

**Reference: Ross Affidavit Par. 42**

54. In paragraphs 65 and 66, Dr. Ross measured the market shares held by Bibby and the Herfindahl-Hirschmann Index ("HHI") indicating concentration across the relevant geographic and product markets.

**Reference: Ross DE pp. 3420-3435**

55. As a result of the analysis of Bibby's market shares and the HHI showing concentration, Dr. Ross concluded that Bibby has "high market shares".

**Reference: Ross DE p. 3435**

56. Dr. Ross noted that market concentration in Ontario more than doubled between 1997 and 1998.

**Reference: Ross DE p. 3431**

57. Dr. Ross analyzed barriers to entry and expansion. He concluded that the most important barrier to entry and expansion is the SDP. He testified that the SDP "makes life extremely difficult for entrants, proposed and existing".

**Reference: Ross DE p. 3437**

**Reference: Exhibit A-11, paras. 67-74**

58. Dr. Ross testified that the SDP effectively locked established distributors into an induced exclusive dealing relationship. A new entrant will either have to use higher cost or lower quality distributors, or it will have to enter simultaneously in distribution. Either of these alternatives would significantly raise the cost of entry.

**Reference: Exhibit A-11, para. 88**

59. Dr. Ross noted other barriers to entry including that Bibby has excess capacity and that the industry is mature and tends to attract limited capital.

Reference: Ross DE pp. 3438-3439  
Reference: Exhibit A-11, paras. 67 - 73  
Reference: Ross DE pp. 3440-3441; 3442-3451

60. Dr. Ross analyzes the SDP in paragraphs 78-116 of Exhibit A-11.

**(viii) Practice of Anti-Competitive Acts and Substantial Lessening and Prevention of Competition**

61. Dr. Ross concluded that the SDP both limits and prevents competition. He testified that it preserves Bibby's market power by effectively deterring entry and limiting expansion by competitive foreign and domestic producers.

Reference: Ross DE p. 3451

62. In reaching the conclusion about the SDP, Dr. Ross reviewed the following:

(a) exclusive dealing relationships in the economic literature;

Reference: Exhibit A-11, paras. 80-91

(b) the application of the literature to the SDP;

Reference: Exhibit A-11, paras. 92-95

(c) his conclusion that the SDP is a strong inducement to exclusivity;

Reference: Exhibit A-11, para. 96

(d) his evidence that Bibby sells 99% of its products through stocking distributors;

Reference: Exhibit A-11, para. 96

(e) his evidence that rebates are a significant consideration to distributors because they represent total profits on these products;

Reference: Exhibit A-11, paras. 97-98

- (f) his evidence that the approximated total value of multiplier discounts, quarterly and annual rebates ranging over five and three-quarter years is in excess of

**CONFIDENTIAL**); and

Reference: Exhibit A-11, **CONFIDENTIAL**

Reference: Ross DE pp. 3461-3471

- (g) his evidence that multiplier discounts and quarterly and annual rebates represent significant discounts off the list prices.

Reference: Exhibit A-11 **CONFIDENTIAL**

Reference: Ross DE pp. 3442-3471

63. Dr. Ross testified that the above factors showed why Bibby's SDP was successful at inducing distributors to participate and remain in the SDP.

Reference: Ross DE p. 3471

64. Dr. Ross testified that there were two ways in which the SDP induced exclusivity and deterred entry. The first is the penalty on leaving the SDP in the middle of the year. The second is that even at January 1<sup>st</sup>, the SDP makes it very expensive for a distributor to split its business between Bibby and any other entrant.

Reference: Exhibit A-11, paras. 105-111

Reference: Ross DE pp. 3473-3476

65. At paragraph 112 of Exhibit A-11, Dr. Ross testifies that the SDP is anti-competitive, that it raises a very significant barrier to entry for new firms including importers, that it is harmful to competition and to consumers and that it substantially prevents and lessens competition. He also concluded that Bibby is a dominant firm with market power in the relevant



product and geographic markets and that the SDP deters entry and expansion of current competitors and is therefore anti-competitive.

**Reference: Ross DE p. 3477; pp. 3485-3486**

**(ix) Dr. Ross Answers Dr. Ware's Rebuttal**

66. Dr. Ross did not agree with any of Dr. Ware's criticism of his written evidence.

**Reference: Ross DE p. 3487**

67. Dr. Ross' evidence dealt with the following answers to Dr. Ware's criticisms. Dr. Ware's criticisms fall into five categories:

(a) Product market definition;

**Reference: Exhibit R-12, paras. 3-4 and 16**

(b) Geographic market definition;

**Reference: Exhibit R-12, paras. 5-6**

(c) Direct evidence of market power;

**Reference: Exhibit R-12, para. 8**

(d) Impact of imports on prices in B.C. and Alberta; and

**Reference: Exhibit R-12, paras. 24-35**

(e) Economic effects to the SDP.

**Reference: Exhibit R-12, paras. 41-43**

68. Dr. Ross' responses are as follows:

- (a) in dealing with product market definition, Dr. Ross explained the appropriateness of the assumption that he made regarding substitutability of plastic and other materials for cast iron. Dr. Ross thought the assumption was appropriate because of the direct evidence of market power. The indirect evidence of market power is redundant in this regard;

**Reference: Ross DE pp. 3489 - 3491**

- (b) in dealing with geographic market definition, Dr. Ross testified that shipments across a territory can be useful information in establishing geographic markets but they are never sufficient information in that many companies will ship products over vast distances. The fact that a product has been shipped a long distance does not mean that there is one market along the entire transportation route. In this case, the prices move independently in different geographic markets in Canada. The fact that the Bibby products originated in Quebec is not material to the finding that there are separate geographic markets. What is significant is that there are different competitive characteristics in each of the regions leading to different prices and causing Dr. Ross to conclude that there are six different relevant geographic markets;

**Reference: Ross DE pp. 3491-92**

- (c) with respect to the direct evidence of market power, Dr. Ross answered four points raised by Dr. Ware. Firstly, Dr. Ross testified that the high margins identified by him are very likely supra-normal. The low margins identified by him are also possibly supra-normal. The only thing that can be drawn from the low margins is the fact of them being lower. It is not possible to know whether

they are as low as they could be with a vigorous competitive market. Dr. Ross testified that the few calculations which showed negative margins are not significant. The negative margins can be explained by unusual monthly events or serious promotions launched by Bibby. Secondly, Dr. Ross testified that there was no other explanation in any of the evidence that would account for the difference in prices in different geographic regions other than there is more competition in some regions than others; thereby producing low prices. Thirdly, as regards prices in B.C., Alberta and Ontario, there is no evidence that these prices are at competitive levels. While they are lower than other regions, there is no evidence that the competition to Bibby has enough influence to drive prices to competitive levels. Additionally, prices were low in B.C. and Alberta before Wolseley rejoined the SDP and rose once Wolseley became a stocking distributor. Fourthly, because Bibby does not import cast iron DWV pipe and fittings, it would appear that its manufacturing costs are lower than the landed cost of imports leading to the conclusion that it charges supra-competitive prices and earns supra-normal profits;

**Reference: Ross DE pp. 3492-3499**

- (d) dealing with the import prices in B.C. and Alberta, Dr. Ross answered the concern that his statistical results were allegedly not "robust". Dr. Ross referred to the chart at page 30 of Appendix 3. He noted the low prices in B.C. close to the beginning of the period, rising gradually over a period of several months to a fairly stable high level and then dropping again. The Alberta pattern is somewhat similar starting at a higher price, going a bit higher, plateauing, and then falling

precipitously. In Ontario, following Vandem's entry, prices in the same period fell over time but not as low as in Western Canada. He used very standard techniques to estimate Bibby's price reaction to entry. Dr. Ross explained why Dr. Ware's numbers were incorrect and concluded that he has confidence in his results; and

**Reference: Ross DE pp. 3499-3510**

- (e) on the economic effects of the SDP, Dr. Ross answered Dr. Ware's criticism based in economic theory about the anti-competitive effects of the SDP. Dr. Ross defined the term "switching costs" in economics as the cost of moving one's business from one supplier to another. Switching costs discourage people from switching from one supplier to another. There is no other supplier capable of supplying 100% of the cast iron DWV products. As a result, there is a "mixing cost" arising when a distributor must satisfy its needs from Bibby and another source. Purchasing from Bibby without the SDP is a very expensive proposition. Additionally, switching to a new supplier gives rise to doubt about quality which inhibits switching all of one's business to a single new supplier without Bibby as a backstop. Dr. Ross concluded that the SDP in fact and in theory has significant anti-competitive effects.

**Reference: Ross DE pp. 3510-3515**

**(x) Dr. Ross Criticism of Dr. Ware's Report**

69. Dr. Ross made seven criticisms of Dr. Ware's report. These are contained in Exhibit A-13. The seven points which Dr. Ross makes are as follows:

- (a) Dr. Ross' evidence of direct market power is a full answer to whether the product market definition developed in the indirect evidence is accurate or not. The existence of market power through direct evidence necessarily is conclusive of a relevant product market in which market power is being exercised.

**Reference: Ross DE pp. 3518-3520**

- (b) Dr. Ross testified that Bibby's pricing decisions reflect its desire to maximize its profits in the relevant markets.

**Reference: Ross DE. pp. 3520-3522**

- (c) Dr. Ross testified that the evidence clearly indicates three relevant product markets.

**Reference: Ross DE pp. 3522-2523**

- (d) Dr. Ross testified that the Tables 4, 5 and 6 found in Dr. Ware's report show different price patterns across various regions in Canada, thereby showing that price is determined by different forces in different regions, which itself indicates different relevant geographic markets.

**Reference: Ross DE pp. 3523-3524**

- (e) Dr. Ross rejects any efficiency effects of the SDP based upon promotion expenses for cast iron. Dr. Ross noted that even if the SDP had as its aim competition with plastic, the victims of the SDP are cast iron distributors and consumers. He testified that there were alternatives to the SDP which are not anti-competitive.

**Reference: Ross DE pp. 3525-3528**

- (f) Dr. Ross rejected Dr. Ware's suggestion that exclusive dealing arrangements are not anti-competitive in economic theory because the models are all based on there being at least two competitors fully capable of serving the needs of customers. This is not the case in the relevant markets.

**Reference: Ross DE. pp. 3528-3529**

- (g) Dr. Ross testified that mixing sources of product in Canada has an enormous cost because the mixing distributor cannot take advantage of Bibby's remarkable price reductions and rebates for any products. There is therefore a prohibitive cost of switching on January 1<sup>st</sup> for any stocking distributor.

**Reference: Ross DE pp. 3507-3509**

**PART III: DIRECT EVIDENCE OF MARKET POWER**

70. The direct evidence of market power described in paragraphs 154 to 168 of the Commissioner's Submissions are central to the Commissioner's position in this proceeding. As set out therein, the evidence is that Bibby has consistently earned gross profit margins of **CONFIDENTIAL** for its cast iron DWV pipe and fittings since 1998. Bibby has consistently maintained its prices 30-50% above import prices since 1998. Bibby has been able to reduce its prices dramatically in response to entry in cast iron DWV markets in Canada. This is unequivocal direct evidence that Bibby has market power.

71. This direct evidence of market power also establishes the outer bounds of the relevant product markets for cast iron DWV products. If there were close substitutes for Bibby's cast iron DWV products, the availability of these close substitutes would discipline Bibby's behaviour and Bibby would not be able to charge supra-competitive prices for the products for any non-transitory period of time. The fact that Bibby has consistently been able to charge supra-competitive prices without jeopardizing profitability establishes that the relevant product markets are no larger than the cast iron DWV products.

72. Bibby asserts that the direct evidence of market power tendered by the Commissioner is "unprecedented" and "unsound". Bibby also asserts that the direct evidence "is based almost entirely on three unproven assumptions". The allegedly unproven "assumptions" are: (1) Bibby's margins are supra-competitive and are, therefore, indicative of market power; (2) Bibby's pricing is supra-competitive; and (3) Bibby's ability to cut prices in response reflects market power.

**Reference: Bibby Response, para. 494**

73. Bibby confuses assumptions with evidence. The direct evidence of market power is not based on assumptions that Bibby's margins are high and prices are supra-competitive. The direct evidence *is* that Bibby's margins are high and prices *are* supra-competitive.

74. More generally, Bibby's comments reflect a fundamental misunderstanding of the economic theories that lie at the very heart of the economic analysis of market power and of market definition. This misconception pervades Bibby's comments. It is perhaps most starkly illustrated by the header, on page 270 of Bibby's Response "*Supra-Competitive Pricing Should Not Be the Subject of an Abuse of Dominance Claim*". Supra-competitive pricing is, in fact, central to abuse of dominance.

75. The economic theory that underpins the direct evidence of market power is uncontroversial and a fundamental cornerstone of anti-trust economic analysis. Indeed, as this Tribunal has recognized, market power *means* the ability to maintain prices above competitive levels for a considerable period of time, and to earn supra-normal profits as a result:

In deciding whether a firm has substantial or complete control of a market, one asks whether the firm has market power in the economic sense. Market power in the economic sense is the power to maintain prices above the competitive level without losing so many sales that the higher price is not profitable. It is the ability to earn supra-normal profits by reducing output and charging more than a competitive price for a product.

Reference: *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd. (1992)*, 40 C.P.R. (3d) 289 at p. 325 [hereinafter "*Laidlaw*"]



76. Consistent with this definition of market power, the *Enforcement Guidelines on the Abuse of Dominance Provisions* state that supra-competitive prices are “the most straightforward indication” of market power.

... The most straightforward indication of the existence of market power is the ability to profitably raise prices above competitive levels for a considerable period of time.

Reference: *Enforcement Guidelines on the Abuse of Dominance Provisions*, p.1

77. Reliance on direct evidence of market power - in the form of high profits and supra-competitive prices – has been endorsed by this Tribunal in *Tele-Direct*.

Reference: *Canada (Director of Investigation and Research) v. Tele-Direct (Publications Inc.) (1997)*, 73 C.P.R. (3d) 1 at pp. 83; 96; and 101 [hereinafter “*Tele-Direct*”]

78. The U.S. Federal Trade Commission (“FTC”) has also endorsed direct evidence of market power. In *FTC v. Staples, Inc and Office Depot, Inc.*, the FTC held that evidence of higher prices in markets with less competitors was direct evidence of market power in the markets with fewer competitors.

Reference: *FTC v. Staples, Inc. and Office Depot, Inc. (“Staples and Office Depot”)*, para. 11.

79. Where there is direct evidence of market power, a separate analysis of indirect indicators of market power (including the process of market definition) is redundant.

Reference: *Salop*, as cited in *Ross*, FN 3

80. Bibby’s suggestion that market power cannot be assessed absent prior definition of relevant markets is clearly inconsistent with these principles. It also reflects a failure to understand the fundamental economic test for ascertaining relevant markets – the hypothetical

monopolist test. Conceptually, a relevant market is defined in terms of the *smallest* group of products and *smallest* geographic area in relation to which sellers, if acting as a single firm (a "hypothetical monopolist") that was the only seller of those products in that area, could profitably impose and sustain a significant and nontransitory price increase above competitive levels.

Reference: *Merger Enforcement Guidelines, Part III, Section III.1*

81. It necessarily follows that evidence that a seller has been able to maintain its prices above competitive levels for a non-transitory period of time *means* that the relevant product market can be no larger than the seller's products.

82. Bibby's purported theoretical concerns with the direct evidence of Bibby's market power are therefore without merit.

83. In addition to theoretical issues, Bibby alleges that the direct evidence of market power is flawed because (1) the cost data used by Dr. Ross are, according to Bibby, not reliable, (2) Dr. Ross did not examine Bibby's margins on its entire product line, (3) Dr. Ross did not consider all possible explanations of Bibby's high margins, and (4) Dr. Ross did not have any firm competitive benchmark to compare Bibby's margins.

84. Bibby also asserts: (1) that regional price differences cannot be used as evidence of market power; (2) that it is not appropriate to compare Bibby's prices to the price of imported cast iron DWV products; and (3) that the evidence of Bibby's ability to cut prices in response to entry is not evidence of market power.

85. In addition, Bibby asserts that the direct evidence of market power presented by Dr. Ross does not speak to the relevant markets proposed by the Commissioner.

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86. Finally, Bibby points to Mr. Leonard's evidence as an indication that Bibby's profit margins are not high.

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87. Each of these alleged flaws in the direct evidence is addressed below.

**(i) Reliability of Cost Data**

88. The cost data used by Dr. Ross are Bibby data.

**(ii) Scope of Margin Analysis**

89. The margins reported by Dr. Ross cover 73% of Bibby's sales of cast iron DWV pipe during the period running from January 1998 to July 2002, 12% of Bibby's sales of cast iron DWV fittings during the same period, and 63% of Bibby's sales of MJ couplings during the same period.

Reference: Exhibit A-11, **CONFIDENTIAL**

90. As Bibby itself notes, 20% of Bibby's cast iron DWV products account for 80% of Bibby's total sales of cast iron DWV products. Bibby also admits that the 20% of its products that account for 80% of its sales are high margin products.

Reference: Bibby Response, paras. 58 and 492

91. Bibby has not provided any evidence to show that Bibby's high profit margins on its top-selling DWV products are off-set by its margins on the remaining DWV products that it sells.

**(iii) Explanations of Bibby's High Margins**

92. Bibby argues that its high profit margins cannot be considered to be direct evidence of market power, as Dr. Ross has failed to consider all possible other explanations of

Bibby's high margins, such as special promotional or outstanding efforts by Bibby, one-time efforts by Bibby to win a customer's business or "any intangibles" such as creating new products or better ways of doing things.

Reference: Bibby Response, paras. 514-516

93. The margin data presented by Dr. Ross clearly show a consistent long-term pattern of high profits. Also, Bibby has failed to provide any evidence of promotional offers or other "intangibles" that might explain Bibby's high profit margins on its cast iron DWV products. In the circumstances, the only reasonable explanation of these margins is that Bibby has market power in the relevant markets for cast iron DWV products.

**(iv) Competitive Benchmark**

94. If profit margins are consistently very high over a non-transitory period of time, then market power is demonstrated.

95. In *Tele-Direct* the Tribunal expressly concluded that a profit margin of 40% evidenced market power, notwithstanding that no benchmark had been placed in evidence. As the Tribunal noted, given the fact that the ability to increase prices by 5% for a non-transitory period of time is generally considered to be sufficient to place products in separate relevant markets, a profit margin of 38% evidences market power:

... Even if *Tele-Direct* earns no economic profit on its operations beyond what it pays out to Bell Canada, its price to average cost margin is extraordinarily high. While no benchmark was placed in evidence, merger guidelines, both in the United States and Canada, place products in separate markets if their existence would not prevent a hypothetical monopolist, post-merger, from increasing prices by five percent. Even allowing as much as two percent for mailing costs, one is left with a margin of 38 percent. We are of

the view that the evidence of economic rents provides a direct indication of Tele-Direct's market power.

Reference: *Tele-Direct, supra*, p. 101

96. Similarly, Bibby's consistent profit margins on its cast iron DWV pipe and fittings of ~~25-35%~~ provide direct evidence of Bibby's market power.

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97. In any event, and as discussed below, Dr. Ross expressly considered a number of benchmarks to assess Bibby's prices and profit margins, including prices following entry. While post entry prices may not in fact be competitive, they clearly provide an appropriate benchmark for assessing prices absent entry and, by implication, profit margins.

98. Bibby notes that a few of the profit margins calculated by Dr. Ross are negative. None of the contribution margins calculated by Dr. Ross are negative. Also, all but two of the negative margins relate to gross profit margins on fittings in Western Canada. As Dr. Ross indicated, the cost data for fittings are much less robust than the cost data for pipe. In any event, the data clearly evidence a consistent pattern of profits in excess of ~~20%~~. The few instances of negative margins do not affect this conclusion.

Reference: *Ross DE*, pp. 3493-3494

(v) **Regional price discrepancies, import prices and entry**

99. Although the magnitude of Bibby's profit margins on its cast iron DWV products alone is sufficient to establish market power, Dr. Ross also considered three benchmarks for assessing the competitiveness of Bibby's prices – regional price discrepancies, import prices and price-cutting by Bibby in response to entry.

100. Bibby's only response to Dr. Ross's assessment of regional price discrepancies is to assert that the SDP is present across all regions of Canada. The presence or absence of the SDP is irrelevant to the direct evidence of market power.

101. As indicated above, in *Staples and Office Depot*, regional comparison of prices was expressly endorsed by the FTC as direct evidence of the ability to exercise market power.

102. With respect to import prices, Bibby argues that the evidence does not support the conclusion that import prices are 30-50% below Bibby's prices. In this regard, Bibby relies on statements by Mr. Kelly and Mr. Lim that prices for import product follow Bibby's prices. As discussed below, in response to import entry in the West, Bibby dropped its prices dramatically. The statements referred to by Bibby of Mr. Kelly and Mr. Lim are therefore entirely consistent with Dr. Ross' proposition.

103. There is also no evidence that imports are subsidized or that Bibby is selling its product below cost.

104. Bibby argues that Dr. Ross' model of the price effect of imports is mis-specified. In this regard, Bibby states that Dr. Ross' model assumes that cast iron DWV imports were zero when Wolseley was a stocking distributor. This is incorrect. Dr. Ross' model does not assume that imports were zero during this period; it assumes that the competitive pressure was lower in periods when Wolseley was a stocking distributor. For this reason, absolute precision in the dates used in the model to proxy Wolseley's participation in the SDP in Alberta is not critical.

Reference: Ross DE, pp. 3501-3502

105. Bibby also notes that Dr. Ware was unable to replicate Dr. Ross' results. This is not surprising since Dr. Ware used different and more aggregated data than Dr. Ross. Differences in Dr. Ware's results are also explained by his use of an endogenous measure of imports.

Reference: Ross DE, p. 3503 and pp. 3507-3509

106. Even a casual review of the graphs showing Bibby's prices over time and in different regions of Canada makes it clear that the entry of competing suppliers of cast iron DWV products in the different markets has had a dramatic impact on Bibby's prices. Bibby's ability to cut its prices in response to this entry clearly shows that Bibby's prices absent such entry are supra-competitive. This analysis does not establish that Bibby's prices, following entry, declined to competitive levels. The most that can be said is that where Bibby has cut its prices in response to entry, Bibby's prices are closer to competitive levels.

Reference: Ross DE, p. 3493

107. At paragraph 531 of its Response, Bibby tries to argue that the use of entry as a benchmark for assessing the competitiveness of Bibby's prices and profit margins is somehow akin to an allegation of anti-competitive "near predatory" behaviour which, according to Bibby, was rejected by the Tribunal in *Tele-Direct*. Neither the Commissioner nor Dr. Ross has ever suggested that Bibby is engaging in "near predatory pricing".

108. Dr. Ross' approach is in fact unequivocally supported by the final portion of the passage from *Tele-Direct* that is cited by Bibby at paragraph 531 of its Response. Specifically, use of entry as a benchmark for assessing the competitiveness of Bibby's prices and profit margins reflects the fact that "[a]n incumbent can be expected to behave differently when it faces entry than when it does not. One competes where there is competition." The FTC's use of

regional price differentials as a measure of market power in *Staples and Office Depot* is also based on this principle.

Reference: *Tele-Direct, supra*, p. 194 as cited in Bibby's Response, para. 531

**(vi) Relevant Markets**

109. At paragraph 535 of its final argument, Bibby states that the direct evidence of market power presented by Dr. Ross "could only be used to support the argument that the relevant market is cast iron DWV products across Canada." In subsequent paragraphs, Bibby faults Dr. Ross' analysis on the grounds that it does not assess Bibby's market power within cast iron DWV products used in buildings of a certain height and occupancy or within cast iron DWV products of certain diameters.

110. The Commissioner's position is that the relevant product markets in this case are cast iron DWV pipe, fittings and MJ couplings, respectively. As Bibby's comments indicate, the direct evidence of market power supports this definition of the relevant product markets.

111. The direct evidence also provides compelling evidence of the relevant geographic markets. As discussed below, Bibby's ability to price discriminate across its pricing zones, establishes that Bibby has market power in each of the pricing zones. Arbitrage across regions, if it exists, does not effectively discipline price discrepancies across regions. Each pricing zone must therefore be a separate relevant geographic market.

Reference: *Exhibit A-11, para. 42*

**(vii) Recent Financial Losses**

112. Bibby also adverts to Mr. Leonard's testimony that Bibby has recently experienced financial losses. These losses may be explained by any number of factors and, at



best, relate to the financial position of the company as a whole. Bibby has not provided any evidence that Bibby has experienced negative profit margins in the relevant markets, as defined by the Commissioner.

**PART IV – INDIRECT EVIDENCE OF MARKET POWER**

113. As indicated above, where there is direct evidence of market power, a separate analysis of indirect indicators of market power (including the process of market definition) is redundant. In this case, however, as in *Tele-Direct*, the Commissioner has also tendered detailed indirect evidence of Bibby's market power. The indirect evidence corroborates the direct evidence of Bibby's market power.

114. As described in the Commissioner's Submissions, the indirect analysis of market power turns on an assessment of market shares and barriers to entry in the relevant markets. A necessary step, prior to this analysis, is the definition of relevant product and geographic markets.

**(i) Relevant Product Markets**

115. As discussed in the Commissioner's Submissions, this Tribunal and the Courts have held that a fundamental test for ascertaining, indirectly, the boundaries of product markets is substitutability. The analysis focuses on whether there are close substitutes for the products in question, such that buyers would turn to substitutes in the event that the product price was raised above competitive levels by a significant amount for a non-transitory period of time. Product A can only be considered to be a close substitute for product B, if product A effectively disciplines any attempt by a seller to raise the price of product B above competitive levels.

116. Substitutability is assessed through a number of indicia including: physical and technical characteristics; end use (functional interchangeability); views and behaviour of buyers; views, strategies and behaviour of suppliers; and, price relationships and relative price levels. In any given case, some or all of these indicia may be relevant.

117. End use, or functional interchangeability, is a necessary but not sufficient condition to conclude that products fall within a single product market.

Reference: **Enforcement Guidelines on the Abuse of Dominance Provisions**, p. 11

118. The mere fact that products are functionally interchangeable does not mean that the products are in the same product market. As the Federal Court of Appeal stated in *Southam*, in the paragraph preceding the language quoted by Bibby at paragraph 250 of its Response:

In determining whether products are substitutes for one another, the qualities of the products are not to be viewed in the abstract. Products which seem similar may be found not to be substitutes while products that appear very different may serve the same end use and be considered in the same product market. **At the same time, the fact that two products are found to be functionally interchangeable does not necessarily lead to a finding that they are in the same product market. If buyers do not regard the products as substitutes for each other if only to a marginal degree then a broad market definition may be rejected on the basis that effective end use competition does not exist.**

Reference: *Canada (Director of Investigation and Research) v. Southam Inc.* (1995), 63 C.P.R. (3d) 1 at p. 50; Rev'd on standard of review grounds only (1997, 71 C.P.R.) (3d) 417 (S.C.C.)

119. The Commissioner has provided a detailed review of the evidence in relation to the indicia of substitutability in this case in paragraphs 175 to 232 of the Commissioner's Submission. Consistent with the direct evidence of market power, this evidence establishes that the relevant product markets are cast iron DWV pipe, fittings and MJ couplings, respectively.

120. Some of the most compelling indirect evidence of the relevant markets emanates from Bibby documents and actions. In this regard, Bibby's response to entry by competing suppliers of cast iron DWV products, as well as Bibby documents, reveal a very intense competitive response to entry by suppliers of cast iron DWV products. There is no evidence of a

similarly intense response or monitoring by Bibby of the actions of suppliers of DWV products made from other materials. There is also no evidence that prices for cast iron DWV products have been affected by prices of DWV products made from other materials. The limited evidence cited by Bibby at paragraphs 265-269 of its Response, including Mr. Leonard's speculation about Bibby's ability to increase its prices in the future, does not establish that prevailing prices for cast iron DWV products are affected by the prices of DWV products made from other materials. (Since asbestos-cement DWV products are not used at all in the geographic markets other than Ontario and Quebec, Mr. Leonard's speculation that asbestos-cement prices might affect Bibby prices in the future is not even a theoretical possibility in most of the relevant markets.)

**Reference: Bibby Response Paras. 265 – 269**  
**Exhibit R-24, para. 67**

121. In *Tele-Direct*, the Tribunal stated that the type and intensity of the alleged competitive response is a factor to be considered in determining whether products are close substitutes. Substitutability is always a question of degree. The intensity of the reactions to players admitted to be competitors and those alleged to be competitors can assist to determine where to draw the line in a given case.

**Reference: *Tele-Direct, supra*, p. 66**

122. Bibby attacks the Commissioner's indirect assessment of the relevant product markets in this case on the grounds that the Commissioner has altered her position on the relevant product markets in the course of the proceeding, has "assumed" the product market, has "led virtually no expert economic evidence with respect to the relevant product market", and has improperly relied on evidence provided by Mr. Zorko.

**Reference: Bibby's Response, paras. 123 – 126**

123. Bibby's comments reflect a misunderstanding of the product markets endorsed by the Commissioner as well as the Commissioner's approach to market definition and her use of the evidence of Mr. Zorko.

124. As stated above, the Commissioner's position is that the relevant product markets in this case are cast iron DWV pipe, fittings and MJ couplings, respectively. This has been the Commissioner's position from the outset of this proceeding.

125. Clearly, the Commissioner has not assumed the market. The Commissioner has presented direct evidence of market power as well as detailed evidence in relation to substitutability of cast iron and non-cast iron DWV products. This evidence defines the relevant product markets.

126. Dr. Ross also did not assume the product market. Dr. Ross assumed that there are significant applications for which alternatives to cast iron DWV products are not close substitutes. As Dr. Ross clearly noted in his evidence, this assumption is consistent with the direct evidence of market power. In order for Bibby to have market power, it must be the case that Bibby's products do not have very close substitutes.

**Reference: Exhibit A-11, paras. 41-42**

127. The Commissioner's approach is also entirely consistent with the *Enforcement Guidelines on the Abuse of Dominance Provisions*. Significantly, it is Bibby's economic expert who appeared to be unfamiliar with the approach in the Guidelines.

**Reference: Ware XE, pp. 5363-5364**

128. Bibby's position appears to be that unless evidence of substitutability is blessed by an "economic expert", the evidence has no value, and markets cannot be defined. This is clearly not correct. In many if not most cases, an economist will have limited if any expertise in relation to the various indicia of substitutability. An economist also has no expertise in assessing the weight to be afforded to evidence on substitutability. At best, the economist must rely on the evidence of other experts and on the evidence of buyers and suppliers. It may be that in some cases an expert economist can provide some useful economic assessment of this evidence. However, assessment of some or all of the evidence by an economic expert is clearly not an absolute necessity.

129. Bibby also appears to misunderstand the scope of Mr. Zorko's expertise and the Commissioner's reliance on Mr. Zorko's evidence. Based on his extensive experience, Mr. Zorko was qualified to give an expert opinion on the scope and application of building codes in Canada and their effects on the content, design and construction of buildings.

**Reference: Zorko DE, p. 2898; p. 3001**

130. Clearly, Mr. Zorko was not, as Bibby suggests, "merely" qualified to speak on the scope and application of building codes. Mr. Zorko's expertise extends to the impact of the building codes on the "content, design and construction of buildings" and, by implication, the selection of DWV materials in light of these factors.

131. In addition, the Commissioner has never suggested that Mr. Zorko's evidence defines the product market. Mr. Zorko's evidence speaks to two indicia of substitutability: end use and preferences of buyers. Mr. Zorko's evidence establishes that combustible DWV products (e.g., traditional plastic DWV products) are not functionally interchangeable with non-

combustible DWV products in buildings that are required to be of non-combustible construction. Mr. Zorko's evidence also establishes that the requirements of the building codes combined with other factors, such as cost and architectural design requirements, mean that cast iron is the material of choice of architects and engineers for many DWV applications.

132. Mr. Zorko's evidence is consistent with the U.S. Freedonia evidence presented by Dr. Ware which states that cast iron DWV products "will remain the preferred material in higher performance applications such as multi-story buildings where greater structural strength is mandatory".

Reference: *Supra* at para. 53

133. Finally, Mr. Zorko's limited exposure to XFR is indicative of the general lack of acceptance of this product in the marketplace to date. In light of this and Mr. Zorko's experience in this area, Mr. Zorko's expert opinion is that XFR is not likely to gain significant presence in the marketplace over the near to medium term.

134. In addition to these general points, there a number of flaws and errors in Bibby's assessment of the relevant product markets. They include the following:

- (a) Bibby's understanding of the building code requirements is incorrect. At paragraph 51 of its Response Bibby states: "The Building Codes require that DWV materials used in buildings exceeding certain heights (depending on the end use) must be non-combustible ..." In fact, and as Mr. Zorko states at paragraph 58 of his Expert Affidavit, the requirement that a building be of non-combustible construction depends on a number of factors including use and occupancy,

building area, building height, accessibility from public roads, and the presence of automatic sprinkler systems;

- (b) Bibby's off-the-cuff dismissal of safety concerns about asbestos cement DWV products, on grounds of vagueness, flies in the face of Bibby's own evidence. Bibby documents underscore the dangers associated with asbestos cement products. Asbestos cement DWV products are not used anywhere in Canada other than Ontario and Quebec due to safety concerns. In Ontario and Quebec, use of asbestos cement DWV products is very limited due, again, to safety concerns;

**References: Bibby Response, para. 227.**

**Exhibit R-24, para. 67**

**JB03-0078**

**JB16-0812**

**JB23-1138**

**JB23-1141**

- (c) Bibby's assertion that stainless steel DWV products are in the same product market as cast iron DWV products is not supported by the evidence of its economist. Dr. Ware does not include stainless steel in the relevant product market for cast iron DWV products;

**Reference: Exhibit R-24, para. 10**

- (d) Bibby's assessment of the relevant product markets completely ignores the cellophane fallacy. Simply put, the cellophane fallacy cautions against concluding that two products fall in the same relevant market in an abuse of



dominance case simply because there is some substitution between the products at prevailing prices. A dominant supplier will always raise prices to a level where some substitution occurs. Substitution at these supra-competitive prices is not indicative of effective competition between the products. Dr. Ware confirmed, in cross examination, that the mere existence of some substitution among products says nothing about whether or not products should be considered to be in the same product market unless substitution occurs at prices that are known to be competitive. Notwithstanding this, neither Bibby nor Dr. Ware conducted any assessment of the competitiveness of the prevailing prices for cast iron DWV products. The only evidence on the record on this issue is the Commissioner's direct evidence of market power. This evidence shows that Bibby's prices are well *above* competitive levels;

Reference: Ware XE pp. 5123-5124

- (e) Bibby's assertion that the market for cast iron DWV products is declining is incorrect. At paragraphs 113 – 116 of his affidavit, Dr. Ross sets out the results of his review of sales data for the Canadian markets for cast iron products. These results show that Bibby's unit sales of cast iron products have been stable or have increased in the period running from April 1997 to September 2003. As Bibby notes, imports have also grown during this period from 2.5% to around 5% of total cast iron DWV sales in Canada. Also, Vandem has entered some markets. The evidence, including Bibby's expert, does not support Bibby's assertion that cast iron DWV markets are in decline;

**References: Exhibit A-11, paras. 113 - 116**  
**Exhibit R24, Table 4 -6**

- (f) Bibby's assertion that IPEX marketing documents do not suggest that traditional plastic DWV products cannot compete with cast iron DWV products is contradicted by the IPEX literature cited by Bibby at paragraph 193 of its Response. This document, as quoted by Bibby, states: "Typically non-combustible buildings that **had to have** Cast Iron and Copper installed into them can now utilize the benefits of the SYSTEM 15 system." (emphasis added) (In fact, System 15 does not satisfy building code requirements as its smoke development rating exceeds 50. XFR is the only plastic DWV product that has a smoke development rating of less than 50);

**References: Bibby Response par. 193**  
**Exhibit A10, Table 3**

- (g) Bibby's analysis of whether cast iron DWV pipe, fittings and MJ couplings should be considered as a single product, or separate products, for market definition purposes ignores key evidence. It is also incomplete and incoherent;
- (h) There is evidence on the record that buyers are interested in acquiring cast iron DWV pipe, fittings and MJ couplings separately. There are suppliers of individual products. (Contrary to Bibby's statement at paragraph 279, BMI was a supplier of fittings, not couplings.) The SDP also confirms that customers do not necessarily purchase cast iron DWV pipe, fittings and MJ couplings as a system from a single supplier. If these products were in fact always purchased together

as a system from a single supplier, there would be no need for Bibby to include a full-line forcing requirement in the SDP;

- (i) Bibby has also not provided any evidence that the sale of cast iron DWV pipe, fittings and MJ couplings as a system is efficient. A demonstration of efficiency is an essential element of the test endorsed by Bibby for determining whether it might be appropriate to treat a bundle of products as a single product for market definition purposes;
- (j) In any event, if it were efficient to sell the products as a bundle, every supplier should supply all three products. Clearly this is not the case;
- (k) Cast iron DWV pipe, fittings and MJ couplings are complements, not substitutes. They are manufactured by different entities, using different inputs and different production processes. Not surprisingly, in these circumstances, Dr. Ross' analysis showed that the prices for cast iron DWV pipe, fittings and MJ couplings move independently. This is clear evidence that cast iron DWV pipe, fittings and MJ couplings fall in distinct relevant product markets; and
- (l) More generally, treatment of the three relevant products as a single relevant product market would represent a complete failure to respect the hypothetical monopolist test. That test is based on substitution.

**(ii) Relevant Geographic Markets**

135. Bibby maintains that the relevant geographic market for cast iron DWV products is at least as big as Canada. Bibby's position is inconsistent with the pricing data and is based on unsubstantiated assertions.

136. Bibby states, for example, that there is "significant evidence of arbitrage" across the geographic markets proposed by the Commissioner. The evidence cited by Bibby cannot be considered to be "significant" or compelling.

**Reference: Bibby Response, para. 355**

137. If, in fact, there were significant arbitrage across the geographic markets proposed by the Commissioner, then the price discrepancies and differences in price movements across regions that are clearly demonstrated by the evidence could not exist.

138. Furthermore, the mere fact that product is shipped long distances does not mean that the entire route over which the product is shipped is a single relevant geographic market. If prices move independently in different regions, then the regions exhibit different competitive characteristics and must be separate relevant markets.

**Reference: Ross DE, pp. 3451-3452**

139. The Commissioner's assessment of the relevant geographic market, which is based on Dr. Ross' expert economic analysis, is firmly grounded in Bibby's pricing data for cast iron DWV products. Price relationships and relative price levels are expressly identified in the *Enforcement Guidelines on the Abuse of Dominance Provisions* as a factor that is relevant to the assessment of relevant geographic markets. Transportation costs are also identified as a factor that is relevant to the assessment of geographic markets. Dr. Ross' assumptions regarding

transportation costs are based on common sense and Bibby has not provided any basis for altering these assumptions. Since Bibby produces all of its cast iron DWV pipe and fittings in a single location in Quebec, it is self-evident that transportation costs must be higher for product that is sold in British Columbia and Alberta, than for product that is sold in Quebec.

Reference: **Enforcement Guidelines on the Abuse of Dominance Provisions,**  
p. 12

140. More generally, Bibby's ability to price discriminate across its pricing zones means that Bibby has market power in these geographic areas. This, in turn, implies that the geographic areas constitute distinct relevant geographic markets.

**(iii) Market Shares**

141. Dr. Ross calculated that Bibby's market shares for cast iron DWV pipe, fittings and MJ couplings ranged, in the period from October 2001 to August 2002, **CONFIDENTIAL** the different regions of Canada.

142. At paragraphs 280 and 540 to 548 of its Response, Bibby alleges that the Commissioner's case must fail because the Commissioner has not tendered market share numbers for each of the relevant markets identified by the Commissioner and because the Commissioner did not conduct an "independent assessment" of market share.

143. Dr. Ross' calculations of Bibby's market shares are based on data provided by Bibby. Bibby has not provided any basis for rejecting these data and Dr. Ross' computation, using these data, of Bibby's market shares.

144. It is true that the data available to the Commissioner did not permit the computation of separate market shares for Alberta and B.C. It is also true that the data did not permit a precise computation of the market shares for cast iron DWV pipe, fittings and MJ couplings separately. In view, however, of Bibby's evidence that 99% of its customers are stocking distributors (and hence buy all three of the products exclusively from Bibby) and that distributors purchase the three products in fixed proportions, Bibby's shares of the cast iron DWV pipe, fittings and MJ couplings markets respectively should be very similar to Bibby's share of sales of cast iron DWV pipe, fittings and MJ couplings in total.

Reference: Exhibit A-11, para 96

145. As discussed above, the Commissioner also relies on the direct evidence of market power. The market share data presented by Dr. Ross is wholly consistent with the direct evidence of market power.

**(iv) Barriers to Entry and Expansion**

146. In *Laidlaw*, the Tribunal recognized that in an abuse of dominance case, the most significant barrier to entry may be the anti-competitive acts engaged in by the dominant supplier. Other barriers to entry in the relevant markets in issue in *Laidlaw* were considered to be "very low".

Reference: *Laidlaw, supra* p.331

147. The Commissioner's position in this case is that the primary barrier to entry and expansion in the relevant markets is the SDP. As *Laidlaw* confirms, there is nothing circular or inappropriate about this position.

148. As discussed in paragraphs 252 – 261 of the Commissioner’s Submissions, the SDP effectively forecloses access to distribution channels for cast iron DWV products and therefore acts as a significant barrier to entry and expansion. As a result of the SDP, any new entrant must be able to satisfy all of a distributor’s requirements for cast iron DWV products in order to obtain that distributor as a customer. Toe-hold entry and expansion is therefore precluded by the SDP.

149. Bibby contends that the requirement that a competitor be able to satisfy all of a customer’s cast iron DWV requirements is a new barrier to entry that has been raised for the first time by the Commissioner in its Submissions.

150. Exclusivity is clearly a key element of the SDP and the crux of the Commissioner’s assessment of the competitive effects of the SDP.

151. Dr. Ross’ discussion of mixing costs, which is set out at paragraphs 100 to 104 of Dr. Ross’ Expert Affidavit and discussed in both Dr. Ross’ examination-in-chief and cross-examination, speaks directly to this issue. Dr. Ross concludes that the SDP makes it financially prohibitive for a distributor to source a portion of its cast iron DWV products from a supplier other than Bibby.

152. Bibby’s allegations that Dr. Ross’ analysis of mixing costs is faulty and misleading are entirely without merit. Neither Bibby nor its economic expert, Dr. Ware, challenged the validity of Dr. Ross’ modeling of the mixing costs or the resulting calculation of mixing costs. Bibby’s only response is that distributors that leave the SDP do not purchase cast iron DWV products from Bibby. According to Bibby, “these distributors are easily able to

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purchase products from other suppliers or even to purchase Bibby's products from other distributors that participate in the SDP and have the benefit of the SDP multiplier.”

**Reference:** Bibby Response, para. 467

153. Bibby's position is inconsistent with Mr. Leonard's assertion that access to Bibby's full product line is essential to the ability to meet the requirement for cast iron DWV products of even a single construction project.

**Reference:** Leonard DE, p. 3827 as cited in Bibby Response, para. 610

154. Furthermore, if resale of Bibby products by stocking distributors were in fact, commonplace, as Bibby suggests, Bibby would not be able to maintain the SDP. It is also entirely illogical for Bibby to suggest that stocking distributors ask Bibby to vigorously enforce the exclusivity provisions of the SDP, but that these stocking distributors also willingly supply non-stocking distributors (that can source product from anywhere) at stocking distributor prices.

155. The evidence is clear that on January 1 of every year, in order to be able to compete at the margin, that is for a small portion of a distributor's requirements, for any of the relevant products to a distributor, a competing supplier must compensate the distributor (1) for all the rebates and discounts that would be offered by Bibby to the distributor under its stocking distributor program, and (2) for the additional costs that the distributor bears by sourcing product from Bibby and another supplier. The sum of these two elements constitute the "mixing costs" identified by Dr. Ross. Dr. Ross' evidence is that the value of all discounts and rebates offered by Bibby is "CONFIDENTIAL" and that mixing costs are huge.

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**Reference:** Exhibit A-11

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Ross DE, pp. 3505 – 3509



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156. The evidence is also clear that no competing supplier of the relevant products has the ability to supply a full product line.

Reference: Leonard XE, p. 4141

157. Bibby relies extensively on actual entry since the introduction of the SDP to counter the Commissioner's evidence that the SDP is a barrier to entry and expansion. As discussed in the Commissioner's Submissions, isolated instances of entry do not establish that barriers to entry and expansion do not exist. In addition, entry must be viable and effective in order to be relevant. The evidence clearly establishes that entry has been limited. Imports, while they have grown, represent a very small portion of cast iron DWV sales in Canada and are primarily concentrated in western markets.

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s. Most telling of all, notwithstanding the fact that, absent the SDP, barriers to entry and expansion in the relevant markets do not appear to be significant.

Reference: Exhibit A-11, para. 65

Vanderwater DE confidential, p. 4; pp. 43-45

Ware XE, p. 5304

158. Bibby's assertion that the SDP has not impeded expansion by Sierra, Gates and Mission, and that direct sales to contractors is a viable means of distributing cast iron DWV products is also directly contradicted by the evidence. Mr. Kelm (Sierra) was told by Bibby to stay small. Mr. O'Brien testified that despite a concerted effort to expand sales of MJ couplings in Canada over about a year and a half, Gates was unable to expand sales of Ideal couplings in Canada by any significant amount. Similarly, Mr. Vansell testified that Mission had been unable to expand its sales of couplings in Canada since the introduction of the SDP. Finally, Mr.

Bouthillette testified that BMI considered trying to sell product directly to contractors, but concluded that this was not viable because BMI would have been competing directly with its customers for other products.

References:           Kelm DE, pp. 2263-2265; p. 2277  
                          O'Brien DE, pp. 2208-2212; pp. 2216-2218  
                          Vansell DE, pp. 2600 - 2603  
                          Bouthillette DE, pp. 2531-2533.

159.           Bibby also misrepresents and misquotes the Commissioner's discussion of Bibby's allegation that large distributors have countervailing power. Bibby contends that the Commissioner states that "Dr. Ware wrongly speculated that large distributors, such as Emco and Wolseley have significantly larger revenues than Bibby". Bibby omits, however, to quote the second half of this sentence. The sentence reads in full: "Dr. Ware wrongly speculated that large distributors, such as Emco and Wolseley have significantly larger revenues than Bibby and accordingly have the ability to discipline Bibby's market power." There is no issue that distributors like Emco and Wolseley have significantly larger revenues than Bibby. The issue is whether the size of Emco and Wolseley implies countervailing power. The evidence firmly establishes that it does not. As Bibby admits in paragraph 382 of its Response, "Bibby's large distributors have been unsuccessful in negotiating lower prices".

160.           Finally, Bibby maintains that *NutraSweet* does not support the Commissioner's position that the SDP constitutes a barrier to entry because (1) inducements to exclusivity were not the only anti-competitive acts in issue in *NutraSweet*, (2) the inducements to exclusivity under the SDP are, according to Bibby, not akin to the "all-or-nothing" choice imposed on customers by the inducements to exclusivity in *NutraSweet* since *NutraSweet* involved the

leveraging of a patent monopoly, and (3) in *NutraSweet* there was direct subjective evidence of exclusionary purpose and intent.

161. In *NutraSweet*, the Tribunal expressly concluded that the logo and advertising discounts offered by NutraSweet created an all-or-nothing choice for customers:

The logo and advertising discounts create an "all-or-nothing" choice for consumers. In the event that customers decide that they would prefer not to use the logo for a particular product line or not to commit themselves to use it on all of that line, they are forced to purchase all of their supply from another supplier because it is too expensive to buy from NSC without the logo and advertising discounts. This means that new suppliers must become sufficiently established so that potential customers are willing to entrust all of their needs for a product line to the new supplier.

Reference: *Canada (Director of Investigation and Research) v. NutraSweet Co.*  
[1990], 32 C.P.R. (3d) 1 at p. 41 [hereinafter *NutraSweet*]

162. The conclusion that the logo and advertising discounts created an all-or-nothing choice that impeded toe-hold entry was not predicated, in any way, on other anti-competitive acts, the fact that the product had previously been patented, or the evidence of NutraSweet's purpose or intent. In any event, NutraSweet's patent on the product had expired in 1987, well before the case came before the Tribunal in 1990. Furthermore, there is direct subjective evidence in this case that Bibby's purpose and intent of the SDP is exclusionary.

163. It is also important to note that the contracts between NutraSweet and its customers had a term of one year only. Accordingly, the case did not involve long term written contractual commitments to buy exclusively from NutraSweet.

164. NutraSweet also was not involved in any full-line forcing activities. Clearly full-line forcing is an additional factor which is in play in this case.

165. Later, in its assessment of the impact of NutraSweet's anti-competitive acts on competition, the Tribunal concluded:

The Tribunal is convinced that the exclusivity in NSC's contracts, which includes both clauses reflecting agreement to deal only or primarily in NutraSweet brand aspartame and the financial inducements to do so, impedes "toehold entry" into the market and inhibits expansion of other firms in the market. Since exclusive use and supply clauses appear in virtually all of NSC's 1989 contracts, and thus cover over 90 percent of the Canadian market for aspartame, it is clear that during the currency of those contracts there is little room for entry by a new supplier.

Reference: *NutraSweet, supra* p. 48

166. Bibby's assertion that the facts in *NutraSweet* and this case are not identical is self-evident and provides no basis for concluding that the SDP is not a barrier to entry and expansion. In every case, the facts as a whole must be considered in assessing the impact of anti-competitive acts and the existence of barriers to entry and expansion.

167. The evidence in this case is that the financial inducements created by the SDP impede toe-hold entry and inhibit expansion of new entrants in the relevant markets. As well, given Bibby's market shares, and the fact that virtually all of Bibby's sales of cast iron DWV products are to stocking distributors, it is clear that there is little room for entry or expansion by other suppliers.

168. The conclusion that the SDP constitutes a very significant barrier to entry and expansion is consistent with the direct evidence of market power. In order for Bibby to be able to exercise the market power exhibited in the direct evidence, there must be significant barriers to entry and expansion in the relevant markets. Since the parties are agreed that there do not appear to be other significant barriers to entry, it necessarily follows that Bibby's practice of

anti-competitive acts, including most notably, the SDP, must be a significant barrier to entry and expansion in the relevant markets.

**PART V: BIBBY'S EFFORTS TO JUSTIFY ITS ANTI-COMPETITIVE PRACTICES**

**(i) The SDP**

169. Throughout its submission, Bibby attempts to justify the anti-competitive effect of the SDP by pointing to other collateral consequences of the SDP that are said to be beneficial to Bibby and some of its customers. Specifically, Bibby argues that:

- (a) the SDP enables Bibby to lower its cost of cast iron DWV products relative to plastic products by increasing its sales;
- (b) the SDP encourages distributors to promote cast iron DWV products;
- (c) the SDP levels the playing field between small and large distributors;
- (d) the SDP prevents free-riding by Bibby's competitors; and
- (e) the SDP is not anomalous.

**Reference: Bibby Response paras. 594 - 613**

170. These justifications are clearly integral to Bibby's defence. It is clear that none of the justifications proffered has solid, or indeed any, evidentiary support.

171. As set out in paragraphs 281 and 295 of the Commissioner's Submissions, the express purpose of the SDP, the acquisition strategy and Bibby's use of unreasonable restrictive covenants was to eliminate and restrict competition. It is also clear on the evidence that the

inevitable consequence of the SDP and the acquisition strategy has been to eliminate competition.

172. In the face of this evidence, Bibby's after-the-fact purported justifications are without merit.

**(a) The SDP enables Bibby to lower its costs of cast iron products relative to plastic products by increasing overall sales**

173. Bibby states that the purpose of the SDP is to increase its overall sales of cast iron DWV products, to increase its capacity utilization rate at its foundry and to drive down its overall costs. Bibby could achieve all of these objectives by simply lowering the price of its products to stimulate sales.

**(b) The SDP encourages distributors to promote cast iron DWV products**

174. Bibby argues that "the SDP encourages distributors to promote cast iron DWV products over plastic DWV products by making it more profitable for them to do so". There is no evidence before the Tribunal on the relative profitability to distributors of selling cast iron DWV products over plastic DWV products. In any event, the best way to promote cast iron DWV products would be to lower its prices.

**(c) The SDP levels the playing field between small and large distributors**

175. Bibby argues that "the SDP provides small and medium-sized distributors with an equitable opportunity to compete in this industry against their much larger distributors". Bibby could provide a level playing field to distributors of all sizes of cast iron DWV products by offering the same uniform unit price to any distributor without requiring the exclusivity and full-line forcing components of the SDP.

**(d) The SDP prevents Free-Riding by Bibby's competitors**

176. Bibby argues that the SDP prevents importers and other cast iron manufacturers to promote the use of cast iron DWV products against other products. This argument is very much an *ex post facto* justification, which is inconsistent with Bibby's own evidence.

177. Bibby requires stocking distributors to:

"...make a commitment to promote Bibby DWV Product and [to] purchase and carry in their inventory sufficient quantities of Bibby DWV Product so as to be able to effectively service customer requirements." [Emphasis added]

Reference: JB17-0848 - 28

178. From Bibby's perspective, the SDP plays a role in promoting its own cast-iron DWV products. This is moreover, reflected by the marketing allowance that it gives to distributors who are:

"...making specific commitment to promote Bibby product through advertising or other promotional strategies." [Emphasis added]

Reference: JB17-0848 - 28

179. Thus, the SDP is not to promote cast iron DWV products in general, but Bibby products in particular.

180. In the *Director of Investigation and Research v. The NutraSweet Company*, NutraSweet claimed that its marketing allowances were used to promote aspartame. However, the Competition Tribunal concluded that:

In fact, NSC does not promote aspartame, but rather its own name and mark.

Reference: *NutraSweet, supra, p. 40*

181. A similar conclusion should be reached here. There is no evidence that the SDP is motivated by an overarching motive to advance cast iron products in general. In fact, the evidence is just the opposite; the evidence is that Bibby's overarching motive was to eliminate competition.

182. Additionally, there is no evidence that other cast iron DWV producers were free-riding. In other words, the "mischief" to which the SDP is allegedly designed to control has not been established. Moreover, there is no evidence of a correlation between the alleged cost to Bibby of free-riding and the rebate. The total value of the discounts and rebates exceed approximately ~~CONFIDENTIAL~~ per annum. If the SDP is directed to the prevention of free-riding, it is wholly disproportionate to the mischief which it is designed to address.

Reference: Exhibit A-11 ~~CONFIDENTIAL~~

183. In previous decisions, the Tribunal has been sceptical of arguments based on justification. In *The Director of Investigation and Research v. The D&B Companies of Canada Ltd.*, the Competition Tribunal stated, on page 261, that:

"In determining whether the various exclusive agreements have the necessary anti-competitive purpose, we considered that Nielsen might have had a valid business justification for its actions. However, the arguments advanced by Nielsen, which are reviewed in detail below, did not persuade us that there was any credible efficiency or pro-competitive business justification for the exclusives. We do not accept that self-interest constitutes such a justification. We note that Nielsen's experts also failed to provide any efficiency rationale for the exclusives." [Emphasis added]



Reference: *Canada (Director of Investigation and Research) v. D&B Companies of Canada Ltd.* (1996), 64 C.P.R. (3d) 216 at p. 261 [hereinafter Nielsen]

184. The Tribunal also stated, on page 262, that:

“Even if Nielsen had been able to establish that there was some justification for the exclusives in the early stages of development, it would have been necessary to weigh the justification in light of any anti-competitive effects to establish the overriding purpose of the exclusives.”

Reference: *Nielsen, supra*, p. 262

185. There is no evidence to suggest that the alleged pro-competitive effects of the SDP argued by Bibby outweigh the anti-competitive effects of the practice of anti-competitive acts. It is the Commissioner's submission that Bibby fails to make a case on the first part of the test, and hence the Tribunal is not required to undertake a weighing or balancing exercise.

**(e) The SDP is not anomalous**

186. Bibby argues that the SDP is not anomalous. In this regard, it is noteworthy that Bibby cannot point to any similar rebate program across the entire scope of the plumbing industry in Canada. Industry representatives, large and small, found it unique and offensive. Indeed, it is counter-intuitive to business practices and to the *Competition Act* to restrict consumer choice.

Reference: Johnson DE, pp. 1356 - 1357

Lachance DE, p. 1761

Tester DE, pp. 1785 - 1786

187. Bibby is forced to turn to American industry for support for this practice. This is, of course, an entirely irrelevant consideration.

Reference: *Laidla, supra*, pp. 342 -343

**FOR PUBLIC  
RELEASE****(ii) The Acquisitions and Use of Restrictive Covenant.**

188. Bibby argues in its Response that the acquisitions included in the Commissioner's Application occurred more than three years prior to the Application being filed and that because of this, the limitation period in subsection 79(6) has expired. Because Bibby included unreasonable restrictive covenants of seven years in its acquisition agreements, the limitation period was not triggered until the seven-year periods expired. One seven-year period expired in April 2004 while the other expires in 2005.

**PART VI: SUBSTANTIAL LESSENING AND PREVENTION OF COMPETITION**

189. In *Nielsen* the Tribunal explained the approach to establishing a substantial lessening of competition (i.e. whether the anti-competitive acts engaged by a firm preserves or adds to the firm's market power):

- (a) the Tribunal must establish what the conditions of entry would be without the exclusives; and,
- (b) determine how the anti-competitive acts altered the prospects for economically feasible entry.

Reference: *Nielsen, supra*, pp. 266 - 267

190. As set out in Part II of this reply submission and in the Commissioner's main submissions, she has proved that the practice of anti-competitive acts identified in the evidence preserves Bibby's market power. It is not necessary to repeat the evidence of substantial lessening and prevention of competition. The fact that prices are lower in some of the relevant markets absolutely does not render those prices competitive. The evidence is that Bibby's prices continue to be supra-competitive and enable Bibby to generate supra-normal profits in the relevant markets.

191. Bibby argues that entry has occurred since the introduction of the practice of anti-competitive acts submitted into evidence by the Commissioner. This fact alone does not answer the substantial lessening and prevention of competition. Upon any superficial analysis of the entrants, they have had no significant impact on Bibby. Indeed, Bibby has taken active steps to confine any new entrant through threats and other forms of aggressive behaviour.

192. It must be noted that even if the Tribunal were to accept Bibby's argument at paragraph 622 of its Response that "a competitor does not need to compete for all of Bibby's distributors, but can compete for each distributor one at a time", the issue of the substantial lessening and prevention of competition would not be solved. The purpose of the Commissioner's Application is to "open" the relevant markets to competition such that any supplier of cast iron DWV products could compete not for distributors' entire business but for each unit sold of any of the relevant products in any of the relevant geographic markets to any distributors. In other words, the purpose of the Application is to make competition *within* the market possible.

193. The Commissioner has therefore proved that the practice of anti-competitive acts has caused a substantial lessening and prevention of competition in the relevant markets. Bibby has not tendered any evidence which permits the Tribunal to reach a contrary conclusion.

**PART VII: EXCLUSIVE DEALING**

194. The Commissioner's Submissions concerning exclusive dealing are a significant aspect of her case against Bibby.

195. The SDP is a practice that induces the distributors to deal exclusively in cast iron DWV products supplied by Bibby. The SDP demands that distributors refrain from purchasing cast iron DWV pipe, fittings and MJ couplings from any other supplier.

196. The fact that the SDP does not limit purchases of DWV products made from non-cast iron materials is no answer for Bibby. Indeed, the very structure of the SDP demands exclusive dealing by distributors with Bibby DWV cast iron products and MJ couplings. The SDP has no impact on plastic, copper, stainless steel or asbestos cement DWV products.

197. Paragraph 77(1)(b) of the *Competition Act* defines exclusive dealing as "any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraphs (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms and conditions if the customer agrees to meet the conditions set out in either of those subparagraphs". Bibby's argument that there must be a written long term contractual obligation of exclusivity flies in the face of the express language of paragraph 77(1)(b). It is also inconsistent with the jurisprudence.

Reference: *Tele-Direct, supra*, pp. 172 - 173

198. Bibby's argument at paragraph 773 of its Response that the word product is somehow synonymous with product market is patently ridiculous. The language of paragraph 77(1)(b) clearly refers to a product or the products of the supplier.

**PART VIII: REMEDY**

199. The remedy sought by the Commissioner necessarily flows from the evidence of the anti-competitive effects of the SDP and Bibby's other practices of anti-competitive acts. The Commissioner repeats her main submissions at Part VIII.

200. The allegations of the Commissioner is that the SDP used by Bibby, a dominant firm, along with the acquisitions and the use of unreasonable restrictive covenants, constitutes a practice of anti-competitive acts, that has had, is having and is likely to have the effect of lessening and preventing substantially competition in the sale and supply of cast iron DWV pipe, fittings and MJ couplings. The proposed remedies will address these concerns. The distribution market of DWV products is not at issue in these proceedings and there is no evidence on the record to assess competition amongst distributors in various markets in which they compete.

201. The remedies requested seek to prohibit Bibby from engaging in the practice of anti-competitive acts in accordance with subsection 79(1). The Commissioner is not requesting relief under subsection 79(2). To the extent that the remedies requested go beyond a mere prohibition on engaging in the SDP and acquisitions, the remedies seek to prohibit Bibby from achieving the same result as the SDP through alternative schemes.

202. Bibby maintains that the remedies requested by the Commissioner would handicap Bibby's ability to compete against manufacturers of DWV products made from other materials. As discussed above, the evidence demonstrates that cast iron DWV pipe, fittings and MJ couplings do not compete with DWV products made from other materials.

203. Bibby also contends that the remedies requested by the Commissioner "will inevitably result in the adoption of a volume based rebate program that would disadvantage small and medium-sized distributors and confer an advantage on substantially larger and national distributors." This would not be the case if Bibby would refrain from using a pricing scheme based on exclusivity and full-line forcing but would instead specify a uniform unit price for its products available to distributors of any size.

**PART IX: ATTACKS ON THE COMMISSIONER****(i) Bibby's Flawed and Offensive Submissions**

204. The burden of the attacks on the Commissioner revolves around the operation of the *Competition Tribunal Rules* (the "Rules") regarding documentary disclosure and an allegation that the Commissioner should have used its powers to obtain further documentation in Bibby's favour and produce it.

205. The Notice of Application in this proceeding was filed by the Commissioner on October 31, 2002. On November 14, 2002, the Commissioner served a Disclosure Statement pursuant to section 4.1(1) of the Rules including, *inter alia*, a list of records **to be relied on at the hearing**.

206. Bibby brought a motion challenging the applicability and appropriateness of the "reliance standard" of production of documents under the Canadian Bill of Rights, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

207. Bibby's request for production of all relevant documents (the "relevance standard") in the Commissioner's possession was dismissed. Justice Blanchard concluded that section 4.1 did not violate Bibby's right to a fair hearing.

208. By way of a second motion brought by Bibby on December 9, 2003, Bibby sought an order requiring the Commissioner to produce all documents in her possession that related to the matters in issue pursuant to section 21(2)(d.1) of the Rules.

209. By reasons rendered on January 23, 2004, the Competition Tribunal dismissed Bibby's motion relating to the discovery of documents. Justice Blanchard noted that the Rules



apply a standard of "reliance" for general disclosure. Sections 4.1 and 5.1 of the Rules had been amended as of February 13, 2002 and had replaced the former standard of "relevance".

210. The Tribunal had heard lengthy argument concerning the unfairness of the reliance standard. Bibby sought a declaration that the reliance standard contained in the Rules 4.1 and 5.1 violated the respondent's right to a fair hearing. Justice Blanchard found that "Nor am I convinced that an unfairness will result if the information is not disclosed".

**Reference: 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 dated 2004-01-23 at paragraph 53**

211. Justice Blanchard also noted that the Commissioner is not a normal adversary. She is a public officer with a statutory obligation to act fairly. He further noted that the reliance standard was to be applied in this context.

**Reference: 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 dated 2004-01-23 at paragraphs 62 and 64**

212. Justice Blanchard's decision was appealed to the Federal Court of Appeal. The appeal was dismissed.

213. Prior to the hearing in this case, Bibby served subpoenae *duces tecum* on the Commissioner's witnesses requiring that the witnesses bring documents to the Tribunal. During the cross-examinations, counsel for Bibby sought to obtain additional documentary disclosure through these witnesses and the subpoenae. The Commissioner successfully brought a motion to quash the subpoena *duces tecum*.

**Reference:** Reasons and Orders regarding the Commissioner's motion to quash subpoenas *duces tecum* dated 2004-03-10, paras. 7-9

214. During the course of the hearing, Bibby from time to time raised the issue of the production of documents based on a reliance standard. Bibby complained that the relevance standard should have been adopted. In Bibby's Response, it again raised the issue that the Commissioner improperly refused to produce documents, as follows:

- (a) at paragraph 24 of Bibby's Response, Bibby alleged that the Commissioner repeatedly failed and refused to disclose evidence, including important documentary evidence that "goes to the very heart of the matters in issue". Bibby suggested that it was grossly unfair for the Tribunal to make findings against Bibby where it was "patently obvious that the Commissioner has concealed evidence that has a direct bearing on the findings the Commissioner now asks the Tribunal to make";
- (b) at paragraph 25, Bibby suggests that the Tribunal has been left in "a most invidious position";
- (c) at paragraph 177, Bibby alleges that the Commissioner refused to produce responses she received from 19 industry participants and suggested that these would have "undermined the Commissioner's case rather than support it";
- (d) at paragraph 207, Bibby complains that the Commissioner's refusal to request or produce documents must lead to the inference that "such documents would have supported Canada Pipe's case rather than the Commissioner's";

- (e) at paragraph 399, Bibby complains that the Commissioner has failed or refused to obtain certain information;
  - (f) at paragraphs 405 and 406, Bibby complains that the Commissioner failed or refused to produce any documentation bearing on Vandem's cost of entry;
  - (g) at paragraph 444, Bibby complains that the Commissioner has failed to obtain or produce evidence from Sierra Distributors;
  - (h) at paragraph 547, Bibby again complains that the Commissioner failed to ask questions or disclose data about market share;
  - (i) at paragraph 625, Bibby complains that the Commissioner has failed to produce any documents from Bibby's competitors concerning the impact of the SDP on their business and ability to compete;
  - (j) at paragraphs 662, 663, 665, 667, 668, 674, 680 and 681 Bibby complains that the Commissioner has failed or refused to disclose any documents that would permit the Tribunal to reach conclusions concerning Vandem's financial success. Bibby complains that this was a matter of "fundamental fairness that goes to the integrity of the Tribunal's fact finding processes";
  - (k) at paragraph 682, Bibby complains that the Commissioner produced no documents from Mission that would confirm its sales or profitability;
  - (l) at paragraph 686, Bibby complains that the Commissioner has not produced documents from Gates, a distributor of couplings;
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- (m) at paragraph 699, Bibby complains that the Commissioner has produced no documents from New Centurion;
- (n) at paragraph 705, Bibby complains of the Commissioner's failure or refusal to obtain or produce any documents relating to the fact that the SDP substantially lessens and prevents competition;
- (o) at paragraph 789, Bibby asks the Tribunal to draw an adverse interest against the Commissioner based on the alleged but not proved failure or refusal of the Commissioner to disclose highly relevant documents;
- (p) at paragraphs 794-818, Bibby raises the procedural history of the documentary production issue and asks the Tribunal to draw inferences relying upon its description of adverse inference found at paragraphs 792 and 793 of Bibby's Response.

215. In this and other contexts, Bibby also makes unfounded allegations of improper investigation by the Commissioner:

- (a) at paragraph 132, Bibby complains that the Commissioner should have used s. 11 orders to gather pricing information;
- (b) at paragraph 237, Bibby complains that the Commissioner did not obtain information about IPEX;
- (c) at paragraph 248, Bibby complains that the Commissioner did not collect information about the use of cast iron in high-rise buildings;

- (d) at paragraph 251, Bibby complains that the Commissioner did not seek information concerning the proportion of the DWV industry that is attributable to non-combustible buildings;
- (e) at paragraph 260, Bibby complains that the Commissioner did not collect data concerning price correlations;
- (f) at paragraph 263, Bibby complains about the lack of data concerning prices and says that the absence of data is “entirely the fault of the Commissioner”;
- (g) at paragraph 374, Bibby complains that the Commissioner made no effort to obtain market share data;
- (h) at paragraph 548, Bibby asks the Tribunal to draw an adverse inference against the Commissioner due to an alleged failure to gather market share data;
- (i) at paragraph 805, Bibby alleges that the Commissioner did not conduct the proceeding fairly by making adequate disclosure on a timely basis of documentary evidence that bears directly on the central issues in the case. Bibby alleges that the Commissioner sought to obtain a “significant strategic advantage by using the concealment of relevant documents to impair the ability of Bibby to challenge effectively the oral evidence she now purports to rely upon”. In the same paragraph, Bibby alleges that the Commissioner “neglected to obtain from her witnesses highly relevant documents that bear directly on the veracity of the evidence those witnesses were asked to give”; and

- (j) at paragraphs 819-824, Bibby alleges that the Commissioner failed to call witnesses who could have given testimony relevant to the outcome of the proceedings.

216. The above allegations about documentary production and the Commissioner's investigation in the context of the earlier findings of the court and in the context of the fair manner in which this proceeding was conducted by the Tribunal are irrelevant. The strength of these allegations carry with them a very serious concern that they are gratuitously offensive. The allegations appear to step beyond the accepted practice expected in proceedings before administrative tribunals in Canada.

217. As if this were not offensive enough, Bibby has also attacked the Commissioner's motives in words and phrases that went beyond the most aggressive statements considered appropriate in adversarial proceedings. By way of example:

- (a) at paragraph 22, Bibby alleges that the Commissioner did not proceed in a fair and balanced manner in presenting her case. Bibby says that she "has ignored, hidden or concealed those facts that did not support it [her case]...";
- (b) at paragraph 24, Bibby suggests that the Commissioner was "grossly unfair";
- (c) at paragraph 25, Bibby suggests that the Commissioner has left the Tribunal in "a most invidious position in this case". Bibby suggests that the Commissioner has provided "incomplete and biased summaries of evidence";
- (d) at paragraph 137, Bibby calls into question "the *bona fides* of the Commissioner's position...";

- (e) at paragraph 199, Bibby repeats an allegation about the *bona fides* of the Commissioner's position and complains that the Commissioner's actions go to the "fundamental issues of fairness";
- (f) at paragraph 300, Bibby states that the criticisms of Dr. Ware by the Commissioner "appear to emanate from the Commissioner's 'win at all costs' approach to this case. An approach which is flatly inconsistent with the Commissioner's overarching duty of fairness";
- (g) at paragraph 430, Bibby again calls into question the *bona fides* of the Commissioner's position;
- (h) at paragraph 432, Bibby states that the Commissioner appears "to have now realized that she erred in her laundry list approach to barriers to entry..."; and
- (i) at paragraph 805, Bibby complains that the Commissioner did not conduct the proceeding fairly due to the failure to produce documents.

218. Throughout Bibby's Response, Bibby repeated the mantra that "the Commissioner's case must fail and is untenable".

**Reference:** Bibby Response, paras. 13, 18, 24, 48, 104, 128, 129, 216, 280, 383, 385, 432, 493, 549, 564, 584, 626, 633, 634, 635, 706, 751, 777, 786, 787, 788, 838, 840

**(ii) The Commissioner's Answer**

219. Whatever conclusion the Tribunal draws as to the gratuitous, offensive and inaccurate statements made by Bibby about the Commissioner, the allegations have no connection to the drawing of an adverse inference.

220. Adverse inferences are not drawn because one party has made it more difficult for the other party to challenge, through cross-examination, the evidence adduced. The adverse inference is not, as Bibby appears to frequently suggest, a remedy for procedural unfairness. It is a *non sequitur* to claim that an adverse inference should be drawn because the failure to make disclosure impaired Bibby's ability to make full answer and defence.

221. An adverse inference is only drawn where: (1) there is a particular, identifiable document or piece of witness testimony that has not been adduced by a party, (2) that piece of evidence would, in the normal course, be presumed to support the party's case, (3) it was exclusively in the power of that party to call the evidence, and (4) there is no other reasonable explanation (*i.e.*, other than the fear of its adverse nature) for the party's failure to adduce the evidence. Much of the alleged missing evidence fails to fulfil one or more of these requirements.

222. In essence, Bibby argues that all the documents in the Commissioner's possession are relevant, and since they were not introduced into evidence it must be presumed that they are unhelpful to the Commissioner's case. It was not, however, incumbent upon the Commissioner to adduce every piece of relevant evidence; the Commissioner, in its prosecutorial discretion, could choose the evidence to be relied upon and introduce only so much evidence as was required to prove the case. Where sufficient evidence has been adduced to establish a particular point, it is not necessary to call further evidence that might also have proven that point: *Mercier v. Royal & SunAlliance Insurance Co. of Canada* (2003), 48 C.C.L.I. (3d) 26 (Ont. Sup. Ct.) at para. 68; *Panarctic Oils Ltd. v. Menasco Manufacturing Co.*, [1983] A.J. No. 889 (C.A.) at para. 36. The Commissioner is entitled to exercise her discretion not to produce documents on the grounds that they are "more of the same".



223. In any event, there is no evidence that the Commissioner has any documents that were relevant or determinative on any given point that she had not produced.

224. An adverse inference is a sanction imposed because a party has failed to place before the court evidence that the court requires to determine an issue. Where the court is deprived of evidence that may reasonably be presumed to be material on a given point, the court may fill this evidentiary gap with an adverse inference. However, if there is sufficient evidence before the court, the inference should not be drawn: *Mercier v. Royal & SunAlliance Insurance Co. of Canada, supra.*

225. An adverse inference should not be drawn where the allegedly absent evidence is before the court in some other form. For example, the court will not draw an adverse inference from the failure to call a doctor as a witness when a medical report prepared by the doctor has been filed in evidence pursuant to provisions of the *Evidence Act*: *Dunn v. Mississauga (City)* (2003), 44 C.C.L.I. (3d) 211 (Ont. Div. Ct.) at para. 11; *Muir v. Alberta* (1996), 132 D.L.R. (4<sup>th</sup>) 695 (Q.B.) at para. 74. Similarly, in this case, the court should not draw an adverse inference with respect to any Vandem documents, when Vandem representatives gave testimony and could have been cross-examined on any relevant matter that might have been addressed in those documents.

226. No adverse inference should be drawn from the failure of the Commissioner to call certain witnesses whose identities were known to Bibby, since Bibby could have called these witnesses if it was of the view that their testimony was helpful to Canada Pipe's defence: *Robb Estate v. Canadian Red Cross Society* (2001), 9 C.C.L.I. (3d) 131 (Ont. C.A.) at paras. 161-62.

These witnesses were not particularly in the Commissioner's control and therefore were available to be called by Bibby.

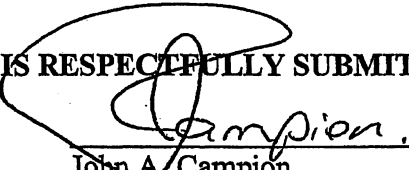
227. With respect to the suggestion that counsel for the Commissioner conceded that a failure to disclose documents could support an adverse inference, this does not assist Bibby. The passage quoted concerns any adverse inference that Bibby might draw, not the Tribunal. In any event, counsel was merely drawing the usual evidentiary principles to the attention of the Tribunal. He was not conceding that the requisite elements for the inference could be drawn.

228. There is no evidence upon which to base an analysis of adverse inference.

229. The other attacks appear to be legally gratuitous. While they are all the more offensive for having been made, the Commissioner does not choose to further comment on them.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

August 10, 2004

  
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John A. Campion

On behalf of all Counsel and the Commissioner

Counsel for the Commissioner of Competition