

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

SUBMISSIONS OF THE COMMISSIONER OF COMPETITION

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PART I: THE OVERVIEW

Summary – The Overview

This is an application under sections 79 and 77 of the Competition Act brought by the Commissioner of Competition. It concerns the anti-competitive conduct of Canada Pipe Company Ltd. acting through its division, Bibby Ste-Croix, in the sale and supply of cast iron drain, waste and vent pipe, fittings and mechanical joint couplings (“cast iron DWV pipe, fittings and MJ couplings”) in six Canadian geographic markets.

The Commissioner submits that the creation, operation and effects of Bibby Ste-Croix’s Stocking Distributor Program (the “SDP”) creates, enhances and preserves market power exercised by Bibby Ste-Croix in the three relevant product markets and six relevant geographic markets. The SDP is central to the Commissioner’s application.

In January 1998, following the acquisition of Bibby Ste-Croix by Canada Pipe, Bibby Ste-Croix introduced its SDP. The SDP effectively induces distributors to purchase all of their cast iron DWV pipe, fittings and MJ couplings exclusively from Bibby Ste-Croix, thereby imposing both exclusivity and full-line forcing requirements. The SDP raises barriers to entry and expansion in the cast iron DWV industry by foreclosing the distribution network to new entrants and current competitors resulting in a substantial prevention or lessening of competition.

The evidence presented during the hearing confirms that Bibby Ste-Croix intended the SDP to restrict or eliminate competition.

Bibby Ste-Croix exercises market power in the sale and supply of cast iron DWV pipe, fittings and MJ couplings throughout Canada. Dr. Ross has given compelling and uncontradicted evidence that Bibby Ste-Croix has the ability to maintain prices above competitive levels for a non-transitory period of time and obtain supra-normal profits. This direct evidence of Bibby Ste-Croix’s market power was dramatically illustrated in the graphs in appendix 3 to Dr. Ross’ report.

There is equally strong indirect evidence of market power that corroborates the direct evidence. The indirect assessment of market power involves the analysis of two elements: (i) market share, and (ii) barriers to entry, in defined relevant (product and geographic) markets.

The boundaries of the relevant product markets turn on an analysis of whether competition from other products prevents the exercise of market power in the sale and supply of cast iron DWV pipe, fittings and MJ couplings. If competition from other products does not prevent the exercise of market power in the sale and

supply of cast iron DWV pipe, fittings and MJ couplings, then they can not be considered close substitutes. The use of the three relevant products is characterized by regulatory provisions contained in relevant building codes. In defining the relevant product markets through indirect assessment, an analysis of end use, trade views, strategies and behaviours of industry participants, physical and technical characteristics of cast iron and price relationships and relative prices must be done. On the evidence of Mr. Zorko, Bibby itself and other industry participants, other products used in the DWV industry such as plastics (including XFR), asbestos-cement and copper are not close substitutes for cast iron DWV products. Dr. Ross' evidence establishes that there are three relevant product markets: cast iron DWV pipe, fittings and MJ couplings.

The evidence of Bibby Ste-Croix itself shows a market share in excess of 82% in all relevant markets.

The main barrier to entry and expansion is the SDP. Along with the acquisition strategy of Bibby Ste-Croix, and its use of restrictive covenants, the SDP constitutes a practice of anti-competitive acts. This is confirmed by the evidence of Dr. Ross and of industry participants.

By foreclosing access to the distribution network to new entrants and current competitors, the exclusive dealing and full-line forcing elements of the SDP substantially prevent or lessen competition in the Relevant Markets.

Bibby Ste-Croix's practice of exclusive dealing, through the SDP, has impeded entry and expansion of firms in the relevant markets resulting in a substantial lessening of competition.

The Commissioner has proven her case under sections 79 and 77 of the Competition Act and therefore seeks the remedy described herein.

Sections 79 and 77

1. The Commissioner of Competition (the "Commissioner") seeks an order from the Tribunal pursuant to sections 79 and 77 of the *Competition Act* (the "Act"). The Commissioner has shown that a substantial prevention or lessening of competition has resulted, is resulting or is likely to result from abuse by the Respondent, Canada Pipe Company Ltd. ("Canada Pipe"), of its dominant position in the supply and sale of cast iron DWV pipe, fittings and MJ couplings (the "three relevant product markets") in six Canadian regions: British Columbia, Alberta, the

Prairies (Saskatchewan and Manitoba), Ontario, Quebec and Atlantic Canada (New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland). The six regions constitute the six relevant geographic markets (“six relevant geographic markets”). The combination of the three relevant product markets and the six relevant geographic markets constitute the relevant markets (the “Relevant Markets”).

2. Section 79 of the *Act*, authorizes the Tribunal to:

- (a) issue an order prohibiting a person from engaging in a practice of anti-competitive acts; and
- (b) directing the person to take such actions “as are necessary to overcome the effects of the practice”

where the person substantially or completely controls, throughout Canada or any part thereof, a class or species of business, the person has engaged in a practice of anti-competitive acts, and the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

3. A further discussion of section 79 and the applicable legal principles is contained in Part VI of this submission.

4. Section 77 of the *Act* authorizes the Tribunal to issue an order prohibiting a person from engaging in exclusive dealing. The order may contain “any other requirement that ... is necessary to overcome the effects thereof on the market and to restore competition in the market” where the person is a major supplier of a product in a market or because it is widespread in a market, the person has engaged in exclusive dealing, and the exclusive dealing is likely to

impede entry or expansion of a firm in a market, impede the introduction of a product into or expansion of sales of a product in a market, or have any other exclusionary effect in a market, with the result that competition is or is likely to be lessened substantially.

5. A further discussion of section 77 and the applicable legal principles is contained in Part VII of this submission.

6. Bibby Ste-Croix's market shares which is in excess of 82% in each of the Relevant Markets is *prima facie* evidence of market power. This market power has been preserved and enhanced by barriers to entry and expansion created by Bibby Ste-Croix's SDP, resulting in exclusive dealing and full-line forcing. The SDP, combined with Bibby Ste-Croix's acquisition strategy and use of restrictive covenants, constitutes a practice of anti-competitive acts. This practice is intended to have, has had and continues to have the effect of impeding entry into and expansion of firms in the Relevant Markets, and preventing or lessening competition substantially in the Relevant Markets.

7. Part IV of this submission includes a discussion and analysis of Bibby Ste-Croix's market history.

Abuse of Dominance: Direct Evidence of Market Power

8. Dr. Ross gave uncontroverted direct evidence that Bibby Ste-Croix exercises market power in the sale and supply of cast iron DWV pipe, fittings and MJ couplings. In particular, Dr. Ross examined changes in prices and margins over time. He reviewed these prices and margins, and changes in both, across all geographic markets. (See the graphs at Appendix 3 of Dr. Ross' report which dramatically illustrate prices in the Relevant Markets.) Dr.

Ross opined that there was a significant amount of direct evidence that Bibby Ste-Croix has market power in the Relevant Markets from:

- (a) the presence of high margins;
- (b) prices substantially above the levels at which imported product can be supplied;
and
- (c) evidence that Bibby Ste-Croix had the ability to lower prices in regions where entry occurred and still earn positive margins.

9. As set out above, the evidence is uncontradicted that Bibby Ste-Croix substantially controls the Relevant Markets. Bibby Ste-Croix has consistently earned gross profit margins of 25-65% for cast iron DWV pipe and fittings. Bibby Ste-Croix also maintained its prices 30-50% above import prices, and is still able to reduce its prices up to 30% in response to entry where it occurred. This is compelling evidence of market power.

10. The comprehensive analysis of the direct evidence of market power is contained in Part VI of this submission.

Abuse of Dominance: Indirect Evidence of Market Power

11. The indirect evidence of market power corroborates the conclusions made from the direct evidence of market power.

12. The indirect evidence of market power involves the analysis of two elements: (i) market share, and (ii) barriers to entry. Before assessing these elements, it is necessary to define the Relevant Markets.

(i) Market Definition

13. The evidence of Dr. Ross and Mr. Zorko is a fundamental starting point for the delineation of the relevant product markets and the relevant geographic markets.

14. This evidence combined with the evidence of Bibby Ste-Croix itself and other industry participants leads to the following conclusions:

- (a) the relevant product markets are: (i) cast iron DWV pipe (ii) fittings, and (iii) MJ couplings; and
- (b) the relevant geographic markets in Canada for the products are: British Columbia; Alberta; the Prairies (Saskatchewan and Manitoba); Ontario; Quebec; and the Atlantic Provinces (New Brunswick, Nova Scotia, Newfoundland & Labrador, and Prince Edward Island).

15. Products must be close substitutes in order to be placed in the same product market. On the evidence, there is no close substitute for cast iron DWV pipe, fittings, and MJ couplings in the six relevant geographic markets.

(ii) Market Share

16. Since 1998, Bibby dominated the Relevant Markets. By 2001 and thereafter, Bibby Ste-Croix dominated the market for DWV cast iron pipe and fittings and MJ couplings.

Bibby Ste-Croix's Market Share

Markets	October 2001-August 2002
B.C./ Alberta	82.5%
Prairies	91.7%
Ontario	89.1%
Quebec	93%
Atlantic Canada	94%

Reference: Ross Report, Appendix 3, Section 2.4, p. 70

17. The evidence of Bibby Ste-Croix itself shows a market share in excess of 82% in all Relevant Markets. Dr. Ross' calculation of Bibby Ste-Croix's market shares and the Herfindahl-Hirshmann Index ("HHI") are consistent with Bibby Ste-Croix's own evidence and this constitutes a *prima facie* determination of market power.

(iii) Barriers to Entry

18. The main barrier to entry and expansion is the SDP.

Practice of Anti-Competitive Acts

19. Bibby Ste-Croix's SDP is the principal anti-competitive practice at issue. The SDP is Bibby Ste-Croix's vehicle to induce exclusive dealing and full-line forcing. The SDP forecloses the distribution network to potential entrants and current competitors, thereby creating, entrenching and enhancing Bibby Ste-Croix's market power.

20. The SDP rewards customers who purchase their cast iron DWV pipe, fittings and MJ couplings exclusively from Bibby with preferential discounts and rebates. The discounts and rebates reduce the purchase price of the three relevant products to the stocking distributors. The exclusivity condition of the SDP is vigorously enforced by Bibby Ste-Croix resulting in exclusive dealing and full-line forcing.

21. Bibby Ste-Croix's acquisition strategy and its use of restrictive covenants also qualify as anti-competitive acts and form part of the practice.

Substantial Lessening or Prevention of Competition

22. By raising barriers to entry and expansion and enabling Bibby Ste-Croix to exercise market power, the SDP, the acquisition strategy and the use of restrictive covenants has had, is having and is likely to have the effect of substantially lessening or preventing competition in the Relevant Markets.

Conclusion: Abuse of Dominance s. 79

23. Based on the direct and indirect evidence of market power in the three relevant product markets and in the six relevant geographic markets identified, Bibby Ste-Croix has breached section 79 of the *Act*. The full discussion of the direct and indirect evidence of market power and the relevant product and geographic markets is contained in Part VI of this submission.

Conclusion: Exclusive Dealing s. 77

24. Bibby Ste-Croix's SDP contravenes section 77 of the *Act* prohibiting exclusive dealing. The full analysis of exclusive dealing is contained in Part VII of this submission.

Remedy

25. The remedies sought by the Commissioner are set out in Part VIII of this submission.

PART II: INDUSTRY PLAYERS, WITNESSES AND DEFINITIONS

Summary – Industry Players, Witnesses and Definitions

The cast iron DWV industry involves firms who focus on the sale and supply of cast iron DWV pipe, fittings and MJ couplings. The various definitions used throughout this submission in the DWV industry are set out in Appendix A. These definitions will be used throughout the submission. The past and present players and participants in the cast iron industry are reviewed in Section A. The industry witnesses are identified in Section B and more fully described in Appendix A.¹

SECTION A: CAST IRON and MJ COUPLINGS INDUSTRY

26. The chain of participants in the industry for the sale and supply of cast iron DWV pipe, fittings and MJ couplings are typical of those for other commodities. It consists of suppliers, who may be manufacturers or importers (or both), distributors (both national and regional) and the end-users. The latter group includes mechanical contractors who actually purchase and install significant volumes of DWV products. Also included are architects and mechanical engineers who typically specify the materials to be used for DWV applications. Several of these professionals testified during these proceedings.

(i) Principal Participants in the Canadian Cast Iron DWV Pipe, Fittings and MJ Couplings Industry

(a) Suppliers of cast iron DWV pipe, fittings and MJ couplings

27. Cast iron DWV pipe, fittings and MJ couplings are either manufactured domestically or imported into Canada from the U.S. or other countries.

¹ Throughout this submission, references to the Joint Book of Exhibits shall be abbreviated as “JB” followed by the volume and page number(s), e.g. JB-1-2 would be document 2, found in Joint Book Volume 1. Any numbers that follow the document number would refer to specific pages within that document, e.g. JB-1-2-1 would be page 1 of document 2 found in Joint Book Volume 1.

28. Bibby Ste-Croix ("**Bibby**") is a division of Canada Pipe Company Ltd./Tuyauteries Canada Ltée. At its foundry in Ste-Croix, Québec, Bibby manufactures cast iron products, including DWV pipe and fittings. Bibby imports MJ couplings from related U.S. companies Tyler Pipe, a division of Ransom Industries LP ("**Tyler Pipe**") and Anaco Inc. ("**Anaco**"). Current and former employees of Bibby testified at these proceedings.

29. Canada Pipe Company Ltd./Tuyauteries Canada Ltée ("**Canada Pipe**") is an Ontario corporation, with its head office in the city of Hamilton, Ontario. It is a subsidiary of McWane Inc. ("**McWane**"), a U.S. corporation. In 1997, Canada Pipe purchased Bibby Ste-Croix Foundries Inc. and related entities.

Reference: **JB-3-71; [Confidential Reference]**

30. Tyler Pipe previously sold cast iron DWV products in Canada until it withdrew from the Canadian market following Canada Pipe's acquisition of Bibby.

Reference: **Leonard XE p. 4147**

31. Total annual sales in Canada by Bibby of cast iron DWV pipe, fittings and MJ couplings in 1998-2001, and for January through July 2002, are set out in Table 1, below.

TABLE 1
BIBBY SALES OF CAST IRON DWV PRODUCTS
(all figures in CDN\$ millions)

	1998	1999	2000	2001	2002 to July
Cast Iron Pipe	Confidential	Confidential	Confidential	Confidential	Confidential
Cast Iron Fittings	Confidential	Confidential	Confidential	Confidential	Confidential

References to the transcript of these proceedings shall be by the relevant witnesses' surname (defined and described in more detail in Part II of this submission) followed by "DE" (direct examination), "XE" (cross-examination) or "RE" (re-examination), then the relevant page number(s).

MJ Couplings	Confidential	Confidential	Confidential	Confidential	Confidential
TOTAL	Confidential	Confidential	Confidential	Confidential	Confidential

Reference: Expert Report of Thomas W. Ross, Exhibit A-11, Appendix 3

32. Vandem Industries Inc. (“**Vandem**”) is the only other Canadian manufacturer of cast iron DWV pipe. Its pipe is produced at Crowe Foundry Limited (“**Crowe Foundry**”) in Cambridge, Ontario. Crowe Foundry owns a 50% interest in Vandem. Vandem also sells imported cast iron DWV fittings and MJ couplings. Representatives of Vandem and Crowe Foundry testified on behalf of the Commissioner during these proceedings.

Reference: Vanderwater DE p. 1432 - 33

33. Rollee Industrial Products (1987) Ltd., located in British Columbia, is the only Canadian manufacturer of MJ couplings.

Reference: Leonard DE p. 4461

34. The remaining suppliers in Canada of cast iron DWV pipe, fittings and MJ couplings are importers. In addition to Bibby (MJ couplings) and Vandem (cast iron DWV fittings and MJ couplings), the principal Canadian importers of cast iron DWV pipe, fittings and MJ couplings are set out in Table 2 below.

**TABLE 2
PRINCIPAL IMPORTERS OF CAST IRON
DWV PRODUCTS & MJ COUPLINGS**

Importer	Products	Geographic Market
Sierra Distributors Ltd.	Pipe, fittings and MJ couplings	British Columbia
New Centurion Import & Export Ltd.	Pipe, fittings	British Columbia
Davcon Distributors Inc.	Pipe, fittings	Alberta
John L. Schultz Ltd.	Pipe, fittings	Québec

Fernco Connectors Ltd.	MJ couplings	Canada
Mission Rubber Company	MJ couplings	Canada
LCG	Pipe	Québec
Mediterranean Trading Co. Ltd.	MJ couplings	Québec

Reference: Kirkpatrick DE p. 2158
Vansell DE pp. 2589-2590

(b) Distributors of cast iron DWV pipe, fittings and MJ couplings

35. Manufacturers and importers of cast iron DWV pipe, fittings and MJ couplings sell these products to distributors of construction materials. Distributors supply the construction industry with a variety of plumbing products including DWV materials. Distributors typically carry DWV pipe and fittings made of cast iron, plastic, copper and asbestos-cement and MJ couplings for use in DWV applications. DWV products, generally, and cast iron DWV products, in particular, represent a very small portion of the inventory carried and sold by distributors.

Reference: Elliott DE pp. 2116-17; Lachance DE pp. 1754-56

36. The major distributors in Canada are both national and regional in scope. National distributors are EMCO Limited (“**EMCO**”), Wolseley Canada Inc., formerly Westburne Wolseley Canada (“**Wolseley**”) and Crane Supply, a division of Crane Canada Inc. (“**Crane**”). Major regional distributors are Noble Trade Inc. (“**Noble**”) and Bartle & Gibson Co. Ltd. in Alberta, and Deschênes et Fils Ltée in Québec.

37. A number of smaller distributors in Canada are members of buying groups. The main purpose of buying groups is to pool members’ purchases to attain higher volume rebates from manufacturers and importers. The principal buying groups in Canada are Octo Purchasing

Group Ltd./Octo Groupe D'Achats Ltée (“**Octo**”) and 2258005 Canada Limited (known as “**Canaplus**”). Octo now has 41 members across Canada.

Reference: Beaulac DE pp. 1611 and 1619; Keon DE pp. 2795-96 and XE pp. 2827-28

38. Representatives of all the national distributors, one buying group, and of regional distributors testified on behalf of the Commissioner during these proceedings.

(c) Mechanical contractors and engineers

39. The principal purchasers of DWV products and MJ couplings from distributors are mechanical contractors. Mechanical contractors typically solicit bids from distributors to supply the materials specified for a construction project. Typically, the project architect or mechanical engineer will specify the type of DWV materials (*e.g.*, copper, cast iron, asbestos-cement). A number of small and large mechanical contractors gave evidence during these proceedings. Evidence was also given by mechanical engineers.

Reference: Vivyrka DE pp. 2447-48; Bornhorst DE p. 2680; Kelly DE p. 2836; Philips DE pp. 2719-20

(d) Building officials

40. The building officials and inspectors who examine building specifications and inspect DWV installations are also participants in the DWV industry. The materials used in a DWV system in a building must conform to the applicable provincial and municipal building codes, which are based on the NBC. Building officials oversee proper use and installation of DWV products in accordance with Code requirements. They are also involved in approval of use of new products such as XFR, and have experience with established products such as cast

iron. Three building officials testified during the proceedings. Codes specialists advise project managers, engineers and architects about the practical implications of the relevant building codes. Zorko has acted as a code specialist (or "code consultant") in respect of projects he has been involved in.

(e) Others

41. The Cast Iron Soil Pipe Association ("CISPA") is a sub-chapter of the Canadian Foundry Association ("CFA"). Leonard is the current President of the CFA. It promotes the use of cast iron DWV products against other DWV products. It has one member: Bibby.

Reference: Leonard DE pp. 3863-65

42. Various standards associations and testing agencies are also involved with the testing and approval of DWV products for use in Canada. Products such as DWV pipe, fittings and MJ couplings must comply with the Canadian Standards Association ("CSA") and Underwriters Laboratory of Canada ("ULC") specifications. An equivalent agency in the U.S. is American Society for Testing and Materials ("ASTM").

Reference: Promoli DE p. 554

(ii) Former participants in the Canadian cast iron market

43. Part IV of this submission will describe in more detail the companies that existed prior to the purchase of Bibby by Canada Pipe in 1997 and the exit from Canada of Tyler Pipe, a company related to Bibby. Those companies included Gestion Financière LaPerle Inc. (**LaPerle Foundry**), Gestion Financière Grand-Mère Inc. (**Grand-Mère Foundry**), **Coast Couplings**

Ltd., Titan Foundry, Associated Foundry, Cremco, BMI Canada Inc. (“BMI”) and AB&I (a U.S. company).

Reference: Leonard XE pp. 4135-36; 4147-59

SECTION B: WITNESSES

44. Twenty-seven fact witnesses and three expert witnesses gave evidence before the Tribunal during these proceedings. Twenty-two of the fact witnesses and two experts gave evidence on behalf of the Commissioner. Many of the individuals and representatives of companies who play significant roles in the cast iron DWV and MJ couplings industry in Canada testified during these proceedings.

45. Listed below are the names and employers of the fact witnesses. A detailed description of each fact witness and his evidence is attached in Appendix A. A detailed review of the expert witnesses is provided in Part III of this submission.

(a) Suppliers

Gary Nagel (“**Nagel**”) - Nagel was a sales representative at Bibby from 1990 to 1999.

Michael Promoli (“**Promoli**”) – Crowe Foundry’s President.

Russ Demeny (“**Demeny**”) – President of Vandem.

Jim Vanderwater (“**Vanderwater**”) – Vice-President of Vandem and co-founder with Demeny.

Peter Kirkpatrick (“**Kirkpatrick**”) – National Sales Manager for Fernco Connectors Ltd.

Matt O’Brien (“**O’Brien**”) - former Vice-President, Sales and Marketing Specialty Markets Division, with Gates Canada.

Dave Kelm (“**Kelm**”) - Owner and President of Sierra Marketing Inc. located in British Columbia.

Jit Lim (“**Lim**”) - President of New Centurion, a British Columbia supplier of imported cast iron pipe and fittings.

Marc Bouthillette (“**Bouthillette**”) - President of BMI Canada.

Chris Vansell (“**Vansell**”) - Vice-President with Mission Rubber Company in Corona, California

Tom Leonard (“**Leonard**”) – Vice-President and General Manager of Bibby since 1997.

(b) Distributors

Roy Byrne (“**Byrne**”) - Vice-President of Operations at Crane.

Bob Johnston (“**Johnston**”) - Vice-President of Procurement for EMCO.

Claude Beaulac (“**Beaulac**”) - Director General of Octo, a buying group.

Paul Lachance (“**Lachance**”) - President of Wolseley.

Greg Tester (“**Tester**”) - General Manager at Nuroc Plumbing and Heating Supplies, a division of Wolseley.

Mark Corriveau (“**Corriveau**”) – Vice-President Marketing and Purchasing at Wolseley.

Rick Elliott (“**Elliott**”) - President of McKeough Supply Inc.

Jack Keon (“**Keon**”) - Vice-President and General Manager of Niagara Plumbing Supply Co. Ltd.

Giulio Iaboni (“**Iaboni**”) – President of Sherwood Plumbing Supplies.

(c) Engineers and contractors

Terry Vivyurka (“**Vivyurka**”) – mechanical engineer at J.L. Richards Inc. in Ottawa.

Jim Bornhorst (“**Bornhorst**”) – mechanical contractor and President of Bornhorst Mechanical Inc. in Winnipeg, Manitoba.

Scott Philips (“**Philips**”) - mechanical engineer at Stantec Engineering in Calgary, Alberta.

William Kelly (“**Kelly**”) – President of William Kelly & Sons Ltd. (“**Kelly & Sons**”).

(d) Building officials

Chuck Surgeoner (“**Surgeoner**”) - a retired City of Winnipeg building official.

Benoit Lagueux (“**Lagueux**”) – chemical engineer with the Régie du Bâtiment du Québec.

Gary Wasyliw (“**Wasyliw**”) – engineer and Manager of the Building Division, City of Regina.

PART III: THE EXPERTS

Summary: The Experts

On the issue of expert evidence, the central contest between the experts is the existence of market power, the definition of product and geographic markets, the existence of barriers to entry and expansion and the substantial lessening or prevention of competition. For reasons set out more fully later, the evidence of Dr. Ross and Mr. Zorko is to be preferred over the evidence of Dr. Ware. Dr. Ware's evidence suffers technically and can only be seen as an advocate's position as opposed to a dispassionate expert. This contrast between the experts leaves Bibby with no reliable expert testimony.

SECTION A: THE EXPERT WITNESSES

Dr. Tom Ross (“Dr. Ross”)

46. Dr. Ross is the UPS Foundation Professor of Regulation and Competition Policy with the University of British Columbia, Faculty of Commerce and Business Administration. He obtained his Ph.D. in Economics from the University of Pennsylvania in 1981. Dr. Ross has been published extensively, and edits or co-edits scholarly journals. Dr. Ross is the former holder of the T.D. McDonald Chair in Industrial Economics with the Bureau. He has previously been qualified to testify before the Tribunal and House of Commons Committees. He has been engaged in the study of, has written about, and taught, economic issues relating to competition policy for over 20 years.

47. The Tribunal in this case accepted Dr. Ross’ qualifications as an expert, qualified as an economist, expert in the analysis of market and firm behaviour and competition issues.

Reference: Ross Report - Exhibit A-11

48. Two questions were essentially put to Dr. Ross. First, does Bibby have market power with respect to the sale of the relevant products in Canada or any part of Canada? Second,

what are the competitive effects of Bibby's SDP in the markets in which Bibby sells the relevant products?

49. Dr. Ross concluded that Bibby has market power in the relevant geographic and product markets. He also concluded that Bibby's SDP harms competition in the Relevant Markets. The SDP preserves Bibby's market power by effectively deterring entry and limiting expansion by foreign and domestic producers, and it both prevents and limits competition substantially.

Reference: Ross DE p. 3531

50. Dr. Ross was cross-examined extensively by counsel for Bibby. Dr. Ross' evidence was undiminished in cross-examination. Dr. Ross effectively explained the complex economic concepts and analyses in his report. He successfully defended his methods and his findings contained in his written and oral testimony in a fair and reasonable manner.

Mr. Josef Zorko ("Mr. Zorko")

51. An experienced architect with a firm in Montréal, Mr. Zorko graduated with honours from McGill University's School of Architecture. He has been involved in complex new construction and refurbishment projects. Mr. Zorko has a particular expertise respecting building codes and their impact on the design of building systems and materials employed in those systems. He has extensive professional experience and academic distinctions. He teaches a required course respecting building codes to Bachelor of Architecture students at McGill University. He also lectures students preparing for their professional architect examinations.

52. Mr. Zorko's Expert Report was entered as Exhibit A-10. His Rebuttal Expert Report of Dr. Ware's Expert Economic Report was entered as Exhibit R-24. Dr. Ware accepted

all of Mr. Zorko's rebuttal as the authoritative expertise on the topics reviewed. The Tribunal qualified Mr. Zorko as an expert witness, being a qualified architect specialized in building codes. Based on his extensive experience he 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.

53. Mr. Zorko's analysis and expert opinion confirmed there exist conditions in the construction industry and in the Codes such that the use of some materials for DWV applications is limited or restricted for certain types of construction or types of buildings. He examined the conditions imposed by the Codes and the viability of using alternate materials under such conditions.

54. Unlike Dr. Ware, Mr. Zorko has extensive experience in determining whether the NBC permits certain materials to be used for DWV systems in various types of buildings and construction. He was in the best position to give evidence respecting the functional interchangeability of various DWV materials. His conclusions are that the use of non-metallic DWV materials is heavily curtailed in a large segment of the construction industry. Further, the combination of Code requirements and materials costs result in cast iron being clearly favoured as the material of choice for DWV applications. His expert evidence is supported by evidence given by industry participants, including engineers, mechanical contractors, and distributors of DWV products who testified during these proceedings.

55. Dr. Ware has admitted in cross-examination that he has no expertise in building codes or building construction. Where Mr. Zorko has rebutted Dr. Ware's report, Dr. Ware has admitted that he has nothing to offer in reply.

56. Part VI of these submissions examines the evidence of Dr. Ross and Mr. Zorko in more detail. Dr. Ross' evidence clearly establishes that Bibby exercises market power in the relevant product and geographic markets.

Dr. Roger Ware (“Dr. Ware”)

57. Dr. Ware is a Professor with the Department of Economics at Queen's University, where he obtained his Ph.D. in Economics in 1981. He is also Director of the Toronto office of Law and Economics Consulting Group, a worldwide consulting group. Dr. Ware is the former holder of the T.D. McDonald Chair in Industrial Economics with the Bureau. He has previously been qualified to testify as an expert before the Tribunal.

58. The Tribunal in this case qualified Dr. Ware as an expert economist, qualified in the analysis of market and firm behaviour and competition issues, including issues of market power and the definition of product and geographic markets. His Expert Economic Report was entered as Exhibit R-24 and his Rebuttal of the Ross Report was marked as Exhibit R-12.

59. Cross-examination revealed the limitations and weaknesses in Dr. Ware's analysis and conclusions. He drew conclusions of fact, notwithstanding evidence to the contrary, without examining or explaining the possible effects of that contrary evidence. As an example, he assumed the role of trier of fact by failing to take into account or explain the evidence of Nagel or Bornhorst as to industry preferences for cast iron DWV pipe and fittings.

Reference: Ware XE pp. 4699-4702, 5072-73

60. Cross-examination of Dr. Ware respecting his qualifications exposed his partisanship. The extent of Bibby legal counsel involvement in the drafting of his expert report

is unknown. He was unable to identify which contributions were by him and which were by the lawyers for Bibby.

Reference: Ware XE pp. 4706-4707

61. As well, the strong and argumentative language used by Dr. Ware in his report reflects the role he assumed: that of advocate rather than dispassionate, objective analyst. This is evidenced in the very opening of the report wherein he states that "the Commissioner's allegations are misconceived". He also takes advocate positions throughout his report: "the product markets are simply untenable"; "there is no convincing evidence"; and "there is no basis for this". This is far beyond his role as an expert witness; it is argument for an advocate.

Reference: Ware XE p. 5217-5223

62. Dr. Ware was defensive and argumentative in the witness box. He rarely agreed with even the simplest proposition by Commissioner's counsel in cross-examination.

Reference: Ware XE pp. 5234-36

63. Dr. Ware relied on data obtained over the internet from an outfit called Freedonia Group Incorporated (at Exhibit B – Tab 4 to his expert report). The author or authors of the Freedonia materials are unknown to Dr. Ware. In fact, Dr. Ware did not know whether the section of the Freedonia materials appended to his report was all or part of the cited chapter. The Freedonia information relates to the U.S. market, not to Canada. Yet, he made no effort to draw the U.S. data into the Canadian context. On this ground alone, Dr. Ware's report fails in its main purpose.

64. In addition, having attempted in cross-examination to support the use of the Freedonia data, Dr. Ware then rejected that portion of the data from the same source which is the

very evidence supporting the Commissioner's view of the product markets. The data contains the following assertions:

Despite continued demand declines, cast iron drain, waste and vent (DWV) pipe will remain the preferred material in higher performance applications such as multi-story 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 Pipe Materials, Cast Iron Pipe – Markets", found at the 7th page of Exhibit B – Tab 4 to Ware's Expert Economist Report, Exhibit R-24.

65. One selection of Dr. Ware's cross-examination illustrates this point:

Mr. J.A. Champion: You note in paragraph 61 that you have been unable to obtain the long-term sales in Canada of DWV products?

Dr. R. Ware: That's correct, yes.

Mr. J.A. Champion: And that's why you rely upon the U.S. data?

Dr. R. Ware: Yes, that's correct.

Mr. J.A. Champion: And you even talk about it in Figure 3?

[...]

Dr. R. Ware: Well, Figure 3 is a graphical depiction of some U.S. data.

Mr. J.A. Champion: Right. And what I'm suggesting to you, sir, that similar to your comment earlier today, is that the U.S. data is unusable because you can't make it transfer, just like you say - tell me anyway that you can't transfer the comments made by Freedomia that I read to you that cast iron will remain the material of choice?

Dr. R. Ware: Well, I believe that the graph is a useful way of illustrating the long-run substitution in this industry.

Mr. J.A. Champion: But you would reject the statements in Freedonia about the fact that it will be the preferred material because it's American, but you accept the statistics because it's American?

Dr. R. Ware: It depends on the purpose. If I'm looking at the issue of long-run substitution, then I would be willing to accept the data as having some illustrative purpose, the data that is used in this graph here.

Mr. J.A. Champion: But you are going to disown the comments in the Freedonia report about the preferred material?

Dr. R. Ware: No.

Mr. J.A. Champion: Are you accepting them?

Dr. R. Ware: I accept them at face value. I have no idea what they're worth. I don't know from where they came, what they were based on or how they would have applied in the Canadian market.

Reference: Ware XE pp. 5170-5172

66. Dr. Ware's response to the Freedonia material is remarkable. His dismissal of the source material contained in his own report diminishes the value of his analysis and his credibility as an expert witness. This is a serious matter.

67. Further, this evidence that was rejected is entirely consistent with the evidence of Mr. Zorko, the Commissioner's building codes expert. Dr. Ware admitted without reservation that he has none of Mr. Zorko's expertise. Yet, he did not confine himself to economic matters. Instead, he purported to draw conclusions respecting the functional interchangeability of DWV products made from various materials and the application of the building codes, which is beyond his expertise.

68. Any suggestion that Dr. Ware was able to give economic opinion regarding the application and effect of building codes must be rejected. That is Mr. Zorko's area of expertise, not Dr. Ware's. In addition, this reveals a weakness in Bibby's case because it is an admitted misinterpretation of the building codes and practices of industry participants. In cross-examination, Dr. Ware properly accepted the weight and authority of Mr. Zorko's expertise and rebuttal points as follows:²

Mr. J.A. Campion: Para 1.7, he [Zorko] comments upon your 82 where you set out what you set out-- here is what he says:

[...]

Now, do you agree or disagree with Mr. Zorko's criticism?

Dr. R. Ware: Well, to the extent that his criticism concerns the building codes, I have no expert opinion to offer.

Reference: Ware XE pp. 5278-5279

Mr. J.A. Campion: Then it says this. This is 1.7:

[...]

Do you agree or disagree with the proposition, sir?

Dr. R. Ware: Well, this is a paragraph about building codes, as I understand it and, as I have said, I don't claim any expertise on building codes.

Reference: Ware XE, pp. 5283-5284

Mr. J.A. Campion: Mr. Zorko says as follows in paragraph 1.8 of his evidence:

[...]

² For ease of reference, the sections of Mr. Zorko's Rebuttal Report referred to in the quote but not reproduced here are attached in Appendix C.

Do you agree or disagree with Mr. Zorko's criticism?

Dr. R. Ware: My understanding was different but, as I said, I don't claim - this entire section appears to be about Codes and how they should- what they say and how they're interpreted, and I don't claim any expertise in that.

Reference: Ware XE pp. 5287-5289

Mr. J.A. Champion: Then he goes on in paragraph 1.9 to deal with your paragraphs 86 and 87 which themselves deal with building code requirements. I'm correct in that regard?

Dr. R. Ware: Yes that is correct.

Mr. J.A. Champion: Thank you. And Mr. Zorko says as follows, in his evidence:

[...]

Do you agree or disagree sir?

Dr. R. Ware: I would say what I said before, that this is an issue - everything that I see in this section 1.9 of Doctor - or Mr. Zorko's Report- is a statement about building codes and, whether he's right or wrong about that, I have no expertise to offer.

Reference: Ware XE pp. 5289-5292

Mr. J.A. Champion: Mr. Zorko says of your paragraph 93 as follows:

[...]

Do you agree or disagree with Mr. Zorko's criticism of your comments?

Dr. R. Ware: As far as I can tell, that is entirely a discussion of the correct interpretation of the Code and I don't have a comment on that.

Reference: Ware XE pp. 5298-5299

Mr. J.A. Champion: Then, in paragraph 94, you deal with some examples, which you've listed here.

Dr. R. Ware: Yes, that's correct.

Mr. J.A. Champion: And Dr. Ware says as follows- I'm sorry, Mr. Zorko's evidence is as follows:

[...]

Do you agree or disagree with Mr. Zorko's criticism of your evidence, sir?

Dr. R. Ware: I do not agree with his criticism of my evidence. I mean, again, to the extent to which his criticism has to do with the interpretation of the Codes, I have nothing to say about it, but he does say - I mean, I find it a little odd that he would apply this criticism to this paragraph because the paragraph simply says - and maybe I could read it. It says [...]. And I list some examples and he doesn't claim that these examples are false. So I don't - I don't - I don't agree with his criticism.

Mr. J.A. Champion: Well, you have no capacity, I take it, consistent with your earlier propositions, to criticize when he says that you don't understand the Code and he corrects it. You don't have expertise to answer that?

Dr. R. Ware: No, I don't.

Reference: Ware XE pp. 5299-5302

69. In summary, Dr. Ware could not confirm who wrote what parts of his report, he was selective in accepting portions of his own source material and he gave evidence that went beyond the scope of his expertise. Futhermore, Dr. Ware was partisan and he entered the arena of an advocate. Based on the foregoing, where there is any conflict with other expert or fact evidence, Dr. Ware's evidence is not to be preferred.

SECTION B: THE LEGAL PRINCIPLES

70. The general legal principles affecting the assessment of expert opinion testimony in Canada are reviewed in *The Law of Evidence in Canada*: Sopinka, Lederman and Bryant. The following are some of the applicable principles.

71. The testimony of experts is now commonplace in Canadian courtrooms but this was not always so. The early scepticism surrounding the evidence of experts revolved around the concern that an expert called by one side might give his or her evidence in a less than independent fashion. The concern about the adversarial nature of expert testimony is now dealt with as a matter of weight, rather than admissibility.

Reference: *The Law of Evidence in Canada*, p. 616, para. 12.25

72. Although relevant opinion evidence is not generally admissible, the trier of fact retains a discretion to exclude evidence on a number of grounds.

Reference: *The Law of Evidence in Canada*, p. 619, para. 12.34

73. Opinion evidence is regarded as hearsay evidence but is admitted as an exception to the hearsay rule. Before a court will receive the testimony of an expert, it must be demonstrated that the purported expert possesses special knowledge and experience in the field in which the witness' opinion is sought and the opinions given are within the expertise of the expert.

Reference: *The Law of Evidence in Canada*, pp. 622-23, para. 12.41

74. Counsel objected to the qualifications of Dr. Ware before his opinion testimony was received by the court, thereby preserving counsels' right to object to the admissibility of the testimony at this stage. Counsel always has the right to argue the weight to be given evidence.

If, as in the case of Dr. Ware, he admitted that he was beyond his expertise, the Tribunal should ignore that portion of his evidence. Because Dr. Ware's testimony on building codes is impugned on his own admission, his entire report on product market definition should be rejected.

Reference: *The Law of Evidence in Canada*, p. 624, para. 12.43

75. Almost all of the industry evidence, the United States technical data and the building code opinion lacks the requisite expertise to be admitted before the Tribunal. The evidence in this area is therefore inadmissible hearsay. For example, the United States technical data was not proven. Its relevance and applicability to Canada was not made out. The data was used to form the basis of Dr. Ware's opinion on product markets, in particular, the data was central to Dr. Ware's opinion on substitutability which lies at the heart of product market definition. The product market definition itself profoundly affects any opinion concerning barriers to entry, practices of anti-competitive acts and a substantial lessening and prevention of competition. The entire Dr. Ware evidence is therefore based on inadmissible hearsay. Dr. Ware's evidence is opinion wrongly based on unproven facts. Even if the Tribunal were to admit a portion of Dr. Ware's testimony, it should be given no weight and certainly accorded no persuasive standing over the opinion of any other expert.

Reference: *The Law of Evidence in Canada*, p. 654, para. 12.111

76. As set out above, one of the earliest concerns about expert testimony arose from the fear that an expert called by one side might give his or her opinion in a less than independent fashion. Dr. Ware submitted drafts of his opinion evidence to the lawyers who retained him on behalf of Bibby. These lawyers made comments which themselves were incorporated into the report. Dr. Ware destroyed all of his drafts and could not tell the Tribunal which parts were

made at the direction of the Bibby lawyers. The opinion itself contains numerous examples of advocacy. Together, these limitations on Dr. Ware's opinion render the entire document inadmissible or deserving of no weight.

**PART IV: BIBBY MARKET HISTORY:
ENTRY, ACQUISITION AND ELIMINATION OF COMPETITION**

Summary: Bibby Market History

Bibby is a cast iron company with a loyalty program that induces exclusivity and full-line forcing in only three products: cast iron DWV pipe, fittings and MJ couplings. This is Bibby's only loyalty program. The structure of this program is unique in the Canadian DWV industry.

Bibby set out to dominate the DWV industry for these three products. The McWane purchase of Bibby through Canada Pipe, the restrictive covenants sought and obtained by Canada Pipe and later by Bibby when it acquired competitors for their inventory, the SDP terms, operation and enforcement, were all intended to eliminate competitors in the Relevant Markets. The intent to eliminate competitors is not a necessary element of a successful change under sections 79 and 77 of the Act but its presence is a particularly significant factor in assessing the practice of anti-competitive acts.

Bibby's intent to eliminate competitors reinforces the conclusions of Dr. Ross that the SDP is a barrier to entry and that the SDP constitutes a practice of anti-competitive acts. The operation of the SDP therefore substantially prevents and lessens competition within the Relevant Markets.

Section A: Corporate Context

77. Bibby is a division of Canada Pipe Company Ltd. Canada Pipe is a subsidiary of Ransom Industries which itself is a division of McWane. McWane is a privately-held company owned by the McWane family.

Reference: Leonard XE pp. 4122-4138

JB-16-830

78. All of the McWane divisions and corporations produce cast iron products except for James Manufacturing, which produces fire extinguishers and propane and pressure tanks.

Reference: Leonard XE pp. 4128-4132

79. Anaco, a division of McWane, produces couplings and gaskets for use with cast iron DWV pipe. Tyler Pipe, a division of Ransom Industries LP, produces cast iron DWV pipe, fittings and MJ couplings.

Reference: Leonard XE pp. 4130-4131

80. Tyler Pipe had sales in Canada until 1997. Tyler Pipe withdrew from Canada after McWane, through Canada Pipe, purchased Bibby and related companies.

Reference: Leonard XE pp. 4147-4155

Section B: McWane Purchases Bibby Ste-Croix

81. In 1997, McWane, through Ransom Industries and Canada Pipe, purchased three foundries from their owner, Mr. Gooding: Grand-Mère Foundry, Laperle Foundry and Ste-Croix Foundry. Mr. Gooding retained ownership of Titan Foundry and Associated Foundry but sold the right to manufacture of cast iron of both Titan and Associated Foundry. Mr. Gooding also executed a non-competition clause in favour of Canada Pipe. These two foundries subsequently stopped producing any of the three relevant products.

Reference: Leonard XE pp. 4147-4156

Asset Acquisition Agreement, JB-2-64

82. [Confidential] As is later set out in this part, BMI, on the sale of its inventory was expected “not to sell cast iron products as long as he [Bouthillette of BMI] was on this earth”.

Reference: [Confidential Reference]

Bouthillette DE pp. 2544-45

83. McWane's arrival in Canada through Ransom Industries and Canada Pipe, and its subsequent purchase of Bibby led to the rationalization of the North American business under the direction of McWane. Thereafter, Tyler operated only in the United States and left Canada. Bibby was required to leave the United States and operate only in Canada.

Reference: Leonard XE pp. 4157-58

Demeny DE p. 934

Section C: Bibby's Acquisitions in Canada

84. Prior to McWane's purchases in Canada in April 1997, the following were active in the marketplace in Canada:

- (a) Titan Foundry was producing cast iron products;
- (b) Associated Foundry was producing cast iron products;
- (c) Cremco was operating in Canada;
- (d) Mission Rubber was operating in Canada;
- (e) Tyler Pipe was operating in Canada;
- (f) AB&I was operating in Canada;
- (g) Rollee, Gates and Fernco were operating in Canada;
- (h) John Schultz was operating in Canada; and
- (i) BMI was operating in Canada.

Reference: Leonard XE pp. 4177-4181

85. As at May 2004, the following was the state of the Canadian market:

- (a) Titan and Associated Foundries no longer exist;

- (b) Cremco was purchased by Bibby;
- (c) Tyler Pipe does not participate in the Canadian market; and
- (d) BMI's inventory was purchased by Bibby and it no longer operates in any of the Relevant Markets.

Reference: Leonard XE pp. 4174-4186; pp. 4201-4222; pp. 4222-4333

Section D: Bibby's Actions Toward Competitors

86. Mr. Gooding, the former owner of Bibby, also executed a non-competition clause in favour of Bibby that precluded him from being involved in the cast iron DWV industry in any capacity for seven years.

Reference: Asset Acquisition Agreement, JB-2-64

87. [CONFIDENTIAL]

88. The conclusion to be drawn from the evidence surrounding Bibby's acquisition policies, McWane's rationalization of the Canadian market after April 1997, Bibby's treatment of competitors in the marketplace, Bibby's introduction of the SDP, Bibby's monitoring of distributors on the SDP and its enforcement of the SDP, is that Bibby is intent on eliminating any competition in the Relevant Markets.

89. Where a distributor remains on the SDP, it is a distribution channel available exclusively to Bibby for the three relevant products. This is the design and purpose of the SDP. The distributors of the three relevant products are sophisticated and knowledgeable in the use of cast iron DWV products, permitting them to enjoy a major advantage in the marketplace in

selling the three relevant products. Entrants who are unable to sell through these distributors face an insurmountable barrier to entry and expansion, and are mostly confined small distributors.

Reference: Byrne DE pp. 694, 792, 802-804

Lachance DE pp. 1750-1751, 1754-1757

90. The two main groups of competitors that have attempted to enter in the Relevant Markets in the face of Bibby's SDP are: importers such as New Centurion and Sierra and suppliers such as Vandem and Mission Rubber.

91. Bibby's actions toward Wolseley and New Centurion illustrate the power of Bibby's enforcement and threat of enforcement of the SDP. Wolseley was a member of the SDP in all geographic markets from 1999 to 2002. Wolseley in Alberta decided in September of 1999 to purchase import products in Edmonton, Alberta. Bibby threatened to declare that Wolseley had breached the SDP in Alberta and withhold its quarterly rebate. Instead, Bibby agreed to pay the rebate if Wolseley became a member of the SDP throughout Canada, including

British Columbia. This required Wolseley to terminate its relationship with New Centurion, an importer who supplied Wolseley in the British Columbia market.

Reference: Leonard XE pp 4236-4256
Lim DE pp 2411-2412
Corriveau DE pp 1991-2001

92. Bibby admitted that as soon as Wolseley in British Columbia was a member of the SDP, it announced a price increase of 27%.

Reference: JB-10-459; JB-10-474
Leonard XE pp 4267-4268

93. Leonard admitted that Wolseley's participation of the SDP in British Columbia was the *quid pro quo* for Wolseley Alberta receiving its rebate despite its breach of the SDP.

Reference: Leonard XE pp 4270-4271

94. Sierra is owned by David Kelm, a witness called by the Commissioner. Sierra, an importer to the British Columbia market, has been denied access to the main distribution channels because of the SDP. As a result, it operates in a niche market selling through small distributors and directly to contractors. Kelm is restricted to the lower mainland of British Columbia.

95. Kelm, Leonard and Albert discussed Kelm's operations in the context of whether Kelm would sell his business to Bibby. While the evidence is conflicting, Kelm testified that Bibby permitted him to operate as long as he remained a small, niche player. Leonard and Albert warned "don't let success be your demise". Kelm understood that he was not to expand to

the point where he would take a substantial share of Bibby's market in British Columbia. Bibby warned that it would wait until Sierra's yard was filled with product and then lower its price.

Reference: Leonard XE pp 4280-4304
Kelm DE pp. 2263-2266; 2287-2288
JB-17-857; JB-18-886

96. Bibby lowered its prices in Ontario to meet competition from Vandem. Bibby monitored and continues to monitor Vandem very closely. There are notations throughout the documentary evidence that Vandem has never been a major factor in the marketplace.

Reference: Leonard XE pp 4305
Vanderwater DE pp 1465-1466
Demeny DE pp 1048-1049
[Confidential Reference]
JB-10-474; JB-10-490; JB-11-503; JB-11- 513; JB-14-725; JB-14-738

97. Nuroc was a small distributor selling Vandem products in Ontario. Nuroc was purchased by Wolseley in August 2003. Bibby insisted that Nuroc become a member of the SDP. If it did not, Bibby threatened Wolseley with the loss of its quarterly and annual rebates. As a result, Nuroc did become a member of Bibby's SDP, thereby causing it to terminate its relationship with Vandem.

Reference: Leonard XE pp 4310-4312
Vanderwater DE pp 1452
Tester DE pp 1873-1874
Lachance DE pp 1782-1784; 1785-1787; 1791-1792

98. Vanderwater and Demeny testified that the SDP has precluded Vandem from successfully selling the three relevant products in Canada.

Reference: Demeny DE pp 1011-1013; 1031

Vanderwater DE pp 1450; 1454-1457

Section E: Conclusion

99. Bibby is part of a cast iron group of companies. Through its acquisition strategy and through the operation of the SDP, it has dominated the markets for the three products in the six geographic regions. Through the SDP, Bibby holds a practical, financial lock on the vast majority of the distribution network for DWV cast iron in Canada. Bibby's goal is to eliminate competition in the Relevant Markets so that it can maintain supra-competitive prices and supra-normal profits.

PART V: THE STOCKING DISTRIBUTOR PROGRAM

Summary: The Stocking Distribution Program

The Stocking Distributor Program enhances and preserves Bibby's market power in the three relevant product markets and six relevant geographic markets. The SDP induces distributors to purchase all of their cast iron DWV pipe, fittings and MJ couplings exclusively from Bibby. The SDP thereby imposes both exclusivity and full-line forcing requirements on distributors. From its introduction, the SDP forecloses the distribution network to new entrants and current competitors in the marketplace. The SDP therefore results in a substantial prevention and lessening of competition.

SECTION A: THE INTRODUCTION OF THE SDP INTO THE MARKETPLACE

100. Since January 1998, Bibby has promoted its cast iron DWV pipe, fittings and MJ couplings through a marketing program known as the SDP. The SDP specifies one level of unit price and rebates to distributors buying the three relevant products exclusively from Bibby, and a higher level of unit price and no rebates to non-exclusive customers. These price differentials induce distributors to buy their cast iron DWV pipe, fittings and MJ couplings exclusively from Bibby.

101. As discussed previously, McWane made a number of significant changes after it acquired Bibby. One such change was the switch from a volume-based rebate program for distributors of Bibby's cast iron DWV pipe, fittings and MJ couplings to a rebate program that would reward and encourage distributors' loyalty to Bibby.

Reference: Beaulac DE p. 1614
Demeny RE pp. 1302, 1304
Nagel DE pp. 360-361
Tester DE p. 1861
Keon DE pp. 2796-2797

Bouthillette DE pp. 2516-2517, 2523-2524

Vanderwater DE pp. 1406-1408

102. The SDP was intended by Bibby to address the issue of competitors making inroads in the Relevant Markets. McWane was determined to preserve Bibby's market share even at the expense of short-term profitability by locking up the distribution network.

Reference: JB-4-115; JB-9-426; [Confidential Reference]; JB 11-513

Demeny DE pp. 959, 960-961

Corriveau DE p. 2020

Leonard XE pp. 4385-86

Nagel DE p. 416

103. In the latter part of 1997, Gary Nagel began discussing the SDP with customers. On November 10, 1997, Bibby presented the details of the SDP to Wolseley. Bibby announced that as of January 1998, distributors would be eligible for quarterly and annual rebates only if they purchased all of their cast iron DWV requirements exclusively from Bibby.

Reference: Corriveau, DE pp. 1991-1992, 2020

Nagel DE pp. 364, 377-379, 380

Keon DE pp. 2796-2797

Tester DE pp. 1864-1865

SECTION B: THE TERMS OF THE SDP

104. Since January 1998, the SDP has offered substantial discounts off the unit list price, quarterly rebates, annual rebates and the marketing allowance to distributors who purchase their cast iron DWV pipe, fittings and MJ couplings exclusively from Bibby.

Reference: JB-1-3; JB-1-11; [Confidential Reference]; JB-3-68; JB-4-111; JB-6-256; JB-11-520; JB-15-803

105. Distributors who stock Bibby's cast iron DWV products exclusively, and are therefore eligible for program rewards, are known as stocking distributors.

106. Non-stocking distributors are those customers who do not purchase their cast iron DWV products exclusively from Bibby. Non-stocking distributors pay a higher unit price for Bibby's cast iron DWV products and are not eligible for quarterly and annual rebates and marketing allowance.

(i) Discounts off the List Price (Multipliers)

107. One of the strong inducements to a distributor becoming a stocking distributor and remaining exclusive to Bibby is the ability to enjoy significant discounts off Bibby's list price for the three relevant products.

108. Bibby offers these discounts by reducing the list unit price at the point-of-purchase by a certain percentage. That percentage is known as a "multiplier." To determine the unit price, the list price is multiplied by the "multiplier." For example, if the list price of one unit is \$1.00 and the multiplier is .70, the distributor will pay \$0.70 for each unit purchased.

Reference: [Confidential Reference]

Leonard XE p. 4362

109. The multipliers vary across the country. Accordingly, the point-of-purchase unit price for stocking distributors depends upon the multiplier applicable to the region in which they are located. Leonard testified that the stocking distributor multiplier averages approximately .55

across the country. Thus, stocking distributors pay approximately 55% of the list price for each unit of Bibby's cast iron DWV pipe, fittings and couplings purchased.

Reference: JB-19-925; JB-23-1152; JB-23-1154; JB-23-1156; JB-24-1178; JB-24-1179

Leonard DE pp. 3920-3921; XE, pp. 4359, 4362

110. Non-stocking distributors pay a significantly higher price for Bibby's cast iron DWV pipe, fittings and MJ couplings than do their stocking-distributor competitors. Non-stocking distributors are only entitled to a substantially smaller discount off the list price at the point of purchase. On average, non-stocking distributors across the country pay approximately 94% of the list price for Bibby's cast iron DWV pipe, fittings and MJ couplings.

Reference: Iaboni XE pp. 4510-4511

Leonard XE p. 4364

(ii) Quarterly and Annual Rebates

111. A further incentive of the SDP is that stocking distributors are eligible for quarterly and annual rebates cumulatively worth approximately 11% (on average) of the distributors' total purchases for the year.

Reference: JB-20-993

Leonard XE p. 4360

112. In 2004, Bibby's SDP offers stocking distributors the following quarterly rebates: four per cent on cast iron DWV pipe, ten per cent cast iron DWV fittings; and, eight per cent on MJ couplings. The quarterly rebate is the same in all regions of the Canada.³

³ In past years, the SDP offered the following rebates: 1998-Quarterly Rebate (7% on pipe, fittings and MJ couplings), Annual Rebate (5% on all); 1999- Quarterly Rebate (9% on pipe, fittings and MJ couplings); Annual Rebate (3% on all); 2000 - Quarterly Rebate (6% on pipe, 15% on fittings, 8% on MJ couplings), Annual Rebate

Reference: Leonard XE p. 4360
Iaboni XE pp. 4511-4512

113. In 1998, when the SDP was introduced, Bibby issued credit memos to stocking distributors for the amount of the quarterly rebates. Credit memos forced stocking distributors to continue to purchase from Bibby to benefit from the rebates. The SDP was modified in 1999 to permit the rebates to be issued by way of lump-sum payments. Quarterly rebates were initially payable only at the end of the year; however, following complaints from the distributors, Bibby modified this policy and rebates are currently paid out in the next quarter.

Reference: JB-7-336; JB-11-542
Leonard DE pp. 3922-3926; XE p. 4367
Tester DE pp. 1869-1870

114. The annual rebate on all three relevant products is currently four percent. The annual rebate is paid after year-end, generally in January of the following year.

Reference: [Confidential References]
Iaboni XE pp. 4512

115. **[Confidential]**

(iii) Marketing Allowance

116. The SDP also offers those distributors who are exclusive to Bibby a marketing allowance. In 2004, the marketing allowance is two percent on cast iron DWV pipe and MJ coupling purchases. The marketing allowance is earned and paid annually, at Bibby's discretion, to those stocking distributors who are deemed to have actively promoted Bibby. For example,

(3% on all); 2001- Quarterly Rebate (6% on pipe, 15% on fittings, 8% on MJ couplings), Annual Rebate (3% on all); 2002- Quarterly Rebate (7% on pipe, 15% on fittings, 9% on MJ couplings), Annual Rebate (4% on all); no

stocking distributors have earned the marketing allowance by distributing tape measures with Bibby's logo on one side, bringing customers to tour Bibby's facilities in Ste-Croix and putting Bibby decals on their trucks.

Reference: JB-14-738-2; JB-11-544;
Leonard DE pp. 3918 – 3919; XE p. 4141
Iaboni pp. 4512-4513

(iv) Other Incentives

117. To reinforce the loyalty of its stocking distributors, Bibby has provided additional incentives by doubling the quarterly rebate in certain regions for periods of time and issuing credit memos to its stocking distributors to enable them to compete on a job-by-job basis.

Reference: JB-11-542; JB-14-697; JB-23-1148
Leonard XE p. 4366; XE p. 4368-4369

118. The SDP is also enhanced by Bibby's direct-to-contractor marketing activities. Bibby has made lump-sum payments directly to plumbing contractors to induce them to purchase cast iron DWV products from Bibby's stocking distributors.

Reference: JB-21-1015; JB-21-1032; JB-23-1101-1; JB-23-1109; JB-23-1116;
JB-23-1123; JB-23-1130; JB-24-1164; JB24-1185; JB24-1197
Elliott DE pp. 2118, 2129-2133; XE pp. 2147-2198

(v) The Conditions

119. In order to become a stocking distributor, distributors must purchase a sufficient quantity of the three relevant products in a given quarter. Leonard testified that the minimum quantity varies by region. For instance, to qualify as a stocking distributor in Toronto a distributor must purchase a full truckload (40,000 pounds) each quarter.

Reference: Elliott DE pp. 2117-2118, 2149
Leonard XE p. 4370

120. To qualify for all of the discounts and rebates offered by Bibby, distributors are precluded from purchasing or carrying any cast iron DWV pipe, fittings or MJ couplings from suppliers other than Bibby. Stocking distributors must remain 100% exclusive to Bibby by providing Bibby the first opportunity to supply their needs. Bibby has excess capacity, therefore, this condition will always be fulfilled.

Reference: Leonard DE p. 3916, XE p. 4354
Keon DE pp. 2796-2797
Nagel DE pp. 364, 378-379, 388
Lachance DE pp.1759-1760
Corriveau DE pp. 1991-1992
Byrne DE pp. 742, 756, 765-766
Iaboni XE pp. 4509-4510, 4513-4515
Tester DE pp. 1864-1866
[Confidential Reference]
Elliott DE p. 2118

121. A stocking distributor who does not purchase the three relevant products exclusively from Bibby in a given quarter is demoted to non-stocking distributor status and must thereafter pay a higher unit price and forfeit its rebates for that quarter. Although a distributor may become a stocking distributor again in the next quarter, Bibby reserves the discretion to withhold a disloyal distributor's annual rebate. Bibby also reserves the right not to deal with a non-stocking distributor.

Reference: JB-3-68-4
Leonard DE pp. 3917-3918, XE p. 4217

Iaboni pp. 4521-4522

122. The SDP is limited to cast iron DWV pipe, fittings and MJ couplings. Bibby does not penalize stocking distributors who purchase DWV products made of other materials, such as plastic, copper, asbestos-cement or stainless steel from other suppliers.

Reference: JB-1-3

Iaboni XE p. 4534; RE p. 4538

Leonard DE pp. 3908, 3909; XE p. 4138

SECTION C: MONITORING AND ENFORCEMENT

123. The distributors' margins on cast iron DWV products are very small.

Reference: Iaboni XE pp. 4529

Leonard XE pp. 4360-4361

124. The cumulative effect of the multipliers, quarterly rebates, annual rebates and marketing allowance that accrue to stocking distributors is an effective reduction in the purchase price of Bibby's cast iron DWV pipe, fittings and MJ couplings to the stocking distributors. The SDP permits stocking distributors to realize a profit on the resale of those products. Rebates are

a significant portion of the distributors' net profit on the three products and go directly to their bottom line.

Reference: Leonard XE pp. 4360-4361
Johnston DE p. 1368
Iaboni XE pp. 4529-4531

125. With such significant amounts of money tied up in the SDP, stocking distributors are very careful not to jeopardize their quarterly and annual rebates.

Reference: Iaboni XE pp. 4530-4531
Keon DE pp. 2831-2832
Tester RE p. 1954
Corriveau DE p. 2005
Vansell DE p. 2603

126. Bibby ensures that stocking distributors are aware of the rules of the SDP and the risks attendant to purchasing product elsewhere. Bibby warns its stocking distributors not to cheat and advertises that it enforces the SDP.

Reference: JB-7-327
O'Brien DE pp. 2214-2215
Iaboni XE pp. 4513-4515, 4521-4522
Leonard DE p. 3903, 3910; XE pp. 4356-4357

127. Stocking distributors are reluctant to cheat on the SDP by purchasing any of the three relevant products from a supplier other than Bibby as they know there is good chance they will be caught and punished.

128. Further, stocking distributors are aware that Bibby monitors compliance with the exclusivity requirements of the SDP and that, if they are caught cheating, they will be punished.

129. Bibby regularly visits distributors' warehouses, yards and construction sites to ensure that its customers are stocking only Bibby cast iron DWV pipe, fittings and couplings. Further, Bibby considers its stocking distributors to be its "eyes and ears" in the marketplace. Stocking distributors will report to Bibby when they suspect or discover that another stocking distributor is carrying cast iron DWV products from another supplier.

Reference: JB-9-426; JB-9-429; JB-13-681; JB-18-910; JB-18-892-1
Leonard DE pp. 3903, 3927-29, 3932-33, 3945; XE pp. 4140, 4354-55
Corriveau XE pp. 2072-2074, 2075
Lachance DE p. 1787-1788
Nagel, DE pp. 387, 391- 393, 396, 399
Keon DE p. 2799, 2802-03, 2820
Iaboni XE p. 4515, 4519-4521
[Confidential Reference]

130. Bibby also analyzes customers' purchases for indications that any of the three relevant products is being obtained from a competitor. Bibby's optimal mix or purchase ratio is 50 per cent pipe, 25 per cent fittings, and 25 per cent MJ couplings. Bibby prepares pie charts detailing stocking distributors' purchasing ratios and distributors must satisfactorily explain any derogations from the expected pattern.

Reference: [Confidential References]; JB-7-317; JB-8-356; JB-10-494
Leonard DE pp. 3929-3932, XE p. 4354
Tester DE pp.1880 –1881
Nagel DE p. 415

(i) Bibby Punishes Cheaters

131. Since the introduction of the SDP, Bibby has withdrawn stocking distributor status and withheld rebates accumulated by a number of its customers for violations of the exclusivity requirements of the SDP.

(a) Crane

132. Crane purchased imported fittings from BMI in late 1998. On November 25, 1998, Bibby found a BMI shipping tag on a job site in Cambridge Ontario supplied by Crane. Bibby also purchased BMI fittings over the counter at one of Crane's stores in Hamilton, Ontario. As punishment for violating the SDP, Bibby withheld part of Crane's 4th quarter rebate for 1998. Crane went back on the SDP in 1999.

Reference: JB-8-361; JB-7-317; JB-7-318; JB-7-323

Byrne DE pp.743-747

Nagel DE pp.399, 405-8

Leonard DE pp. 3942-3943

(b) EMCO

133. Towards the end of 1998, EMCO purchased **[Confidential]** couplings in Alberta. When Bibby found out, it refused to pay EMCO's fourth quarter Alberta rebates valued at **[Confidential]**.

Reference: [Confidential Reference]

Johnston DE pp. 1361, 1371

Leonard DE pp. 3943-3944

(c) Noble

134. In October 1998, Noble purchased imported fittings from BMI. Bibby partially withheld Noble's rebates for the fourth quarter of 1998 after discovering a crate of BMI fittings on a job site supplied by Noble. Noble went back on the SDP in January 1999.

Reference: JB- 6-257; JB-7-303
Beaulac DE pp. 1640-1641
Nagel DE pp. 399, 405-408
Leonard DE pp. 3939-3941

(d) Nuroc

135. Bibby withdrew Nuroc's stocking distributor status in the spring of 2000 after discovering that Nuroc had purchased cast iron DWV products from Vandem.

Reference: Tester DE pp. 1871- 1872

(e) Wolseley

136. In April 2002, Wolseley resumed purchasing imported cast iron DWV products from New Centurion and advised Bibby it was no longer on the SDP. Bibby withheld \$59,000 worth of rebates earned during the first quarter of 2002 because Wolseley had placed an order for the second quarter from another supplier.

Reference: Lachance DE pp. 1779-1781
Corriveau DE pp. 2016-2017

137. The stories of those who have deviated from the SDP and been caught are known in the market and act as an effective deterrent to cheating and inducement to remain exclusive to Bibby.

Reference: Iaboni XE pp. 4526-4528

Beaulac DE pp. 1635, 1640-1641

(ii) *Bibby Threatens to Punish*

138. In addition to using actual punishments to enforce compliance with the SDP, Bibby has also effectively used the threat of withholding rebates to induce distributors to ensure their participation in the program.

(a) *Getting Wolsley on the SDP in B.C. in 1999*

139. Initially, Bibby's SDP was enforced on a regional basis. This permitted large national distributors to opt out of the SDP in one region of the country but continue to receive rebates in regions in which it was participating in the program.

Reference: JB1-11-1

140. In early 1999, Wolsley was on the SDP in all regions except British Columbia. When Bibby discovered that Wolsley stores in Alberta had purchased imported cast iron DWV fittings, Wolsley's year-to-date quarterly and annual rebates valued at more than [CONFIDENTIAL] were in jeopardy. In order to preserve its Alberta rebates, Westburne (Wolsley) agreed to join the SDP in British Columbia. To comply with its agreement to become exclusive to Bibby in B.C., Wolsley stopped buying cast iron DWV products from New Centurion.

Reference: JB-10-465; JB-10-475: [Confidential Reference]; JB-6-267; JB-10-469; JB-10-480

Leonard XE pp. 4264-66, 4270-71

Corriveau DE pp. 1997-99, 2001-04, 2005; XE pp. 2070-71

Lachance DE pp. 1788-1789

Lim DE p. 2411-2412

(b) *Getting Nuroc on the SDP*

141. In August 2003, Wolseley acquired Nuroc, a regional wholesale distributor in Ontario. At that time, Nuroc was not a Bibby customer. As a condition of Wolseley's continued participation in the SDP and of retaining its rebates in Ontario valued at approximately \$80,000, Bibby required that Nuroc become a stocking distributor.

Reference: Leonard XE pp. 4310-12
Lachance DE pp. 1782-87, 1791-92
Tester DE p. 1874
Demeny DE pp. 1026-27
Vanderwater DE pp. 1452-53

142. Bibby's monitoring and enforcement are effective deterrents of disloyalty. Since 1999, Bibby has not caught any distributor derogating from the terms and conditions of the SDP.

Reference: Leonard DE p. 3938

SECTION D: THE SDP IS AN ANOMALY IN THE PLUMBING INDUSTRY

143. Until the SDP was introduced in 1998, Bibby offered all of its customers volume-based rebates on their purchases of cast iron DWV products. Volume-based rebates are the norm in the plumbing industry and are the reason that buying groups such as Octo and Canaplus were created.

Reference: Beaulac DE pp. 1611, 1614
Demeny RE pp. 1302, 1304
Nagel DE pp. 360-361, 531
Tester DE p. 1861
Keon DE pp. 2796-2797

Johnston DE p. 1360

Vanderwater DE p. 1408

144. Bibby's SDP, which requires 100% exclusivity to Bibby in order to qualify for rebates, is unique in Canada. Lachance, CEO of Wolseley, testified that none of Wolseley's other 400 suppliers insist that Wolseley either buy all of their products from them or lose rebates. Many other witnesses corroborated this evidence.

Reference: Beulac DE pp. 1642-1643
Iaboni XE pp. 4503-4504
Johnston DE pp. 1356-1357
Tester DE pp. 1864-1866
Keon DE pp. 2803-2904
Nagel RE p. 531
Lachance DE p. 1761
Bouthillette DE p. 2586
Kirkpatrick DE p. 2168

145. The evidence overwhelmingly demonstrates that distributors both on an off the SDP do not like the program as it limits choice in the marketplace and is not flexible enough to accommodate the unique circumstances of each distributor.⁴

Reference: JB-14-697-3
Leonard XE pp. 4256, 4329, 4389
Byrne DE pp. 779-80
[Confidential Reference]; DE 1785-1787

⁴ The only witness who testified that he likes the SDP was Iaboni, the only stocking distributor called by Bibby. However, Iaboni's evidence on this point must be viewed with a degree of caution in light of the clear partisanship that he demonstrated and the fact that his evidence does not accord with the preponderance of the evidence. Further, Iaboni admitted in cross-examination that he is careful not to jeopardize his rebates and relies on Bibby's supply of cast iron. See Iaboni XE pp. 4492-4493, 4517, 4530-4531; DE pp. 4481-4482.

Corriveau DE pp.1982 - 1984 and 1988 – 1989

Keon DE pp. 2798, 2803

Elliott DE 2119

Johnston DE p. 1357

Nagel DE p. 397

SECTION E: COMPETITORS BELIEVE THE SDP IS A BARRIER TO ENTRY AND EXPANSION

146. A number of witnesses testified that they believe Bibby's SDP has hindered the ability of competitors to increase sales of their cast iron DWV pipe, fittings and MJ couplings in Canada. Because the large national distributors are locked in to the SDP and estopped from purchasing even a portion of their cast iron DWV pipe, fittings or MJ couplings requirements from a supplier other than Bibby, a significant segment of the market for the products is foreclosed to Bibby competitors.

Reference: O'Brien DE pp. 2208-2212

Demeny DE pp. 1011, 1031

Leonard, XE p. 4141 – he agreed that SDP precludes Vandem access to “their distributors”

Kirkpatrick DE pp. 2167-2168

Bouthillette DE p. 2529

Vansell DE pp. 2602-2603

[Confidential Reference]; 1647

Kelm pp. 2245-2246

Lim DE pp. 2411-2412

Corriveau DE p. 2019

Promoli DE pp. 561-562

Vanderwater DE PP. 1450-51, 1454-56

PART VI: ABUSE OF DOMINANCE

Summary: Abuse of Dominance

All of the fact evidence, expert opinion, inferences, legal principles and applications of findings to the necessary elements to show abuse of dominance under section 79 of the Act are considered in Part VI.

The direct evidence of market power defines the broad outlines of the Relevant Markets. The indirect evidence of market power lead in the case defines the contours of the three relevant product markets and the six relevant geographic markets. The indirect evidence of market power lead in this case confirms that Bibby has a market share in excess of 82% in the Relevant Markets.

In this context, the SDP represents a major barrier to entry and expansion and, along with the acquisition strategy and restrictive covenants, a practice of anti-competitive acts.

Based on all of the evidence, the SDP and Bibby's other anti-competitive acts have caused a substantial prevention and lessening of competition in the Relevant Markets.

147. This part is divided into the following sections:
- (a) Section A – Abuse of Dominance: Section 79
 - (b) Section B – Section 79(1)(a): Direct Evidence of Bibby's Market Power
 - (c) Section C – Section 79(1)(a): Indirect Approach to Bibby's Market Power
 - Relevant Product Markets
 - Relevant Geographic Markets
 - Market Share
 - Barriers to Entry
 - (d) Section D – Section 79(1)(b): Bibby's Practice of Anti-Competitive Acts
 - (e) Section E – Section 79(1)(c): Substantial Lessening or Prevention of Competition

Section A – Abuse of Dominance: Section 79

148. Section 79 of the *Act* states:

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

- (a) one or more persons substantially or completely control throughout Canada or any area thereof, a class or species of business,
- (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
- (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

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

149. To find abuse of dominance, the Tribunal must first assess dominance. Second, the Tribunal must identify a practice of anti-competitive acts. Third, the Tribunal must determine the effect of the practice in terms of competition in a market.

Reference: *Canada (Director of Investigation & Research) v. D&B Companies of Canada Ltd. (1996)*, 64 C.P.R. (3d) 216 at p. 223 [hereinafter referred to as “Nielsen”]

Enforcement Guidelines on the Abuse of Dominance Provisions [Sections 78 and 79 of the Competition Act], Competition Bureau Canada, July 2001, p. 1 [hereinafter referred to as “Abuse of Dominance Guidelines”]

150. The Tribunal has determined that the terms used in para. 79(1)(a) should be interpreted as follows: “control” means market power; “throughout Canada or any area thereof”

refers to the geographic market; and “class or species of business” refers to product market. As a whole, para. 79(1)(a) demands proof of market power.

Reference: *Nielsen, supra*, at p. 232
Canada (Director of Investigation & Research) v. Tele-Direct (Publication Inc.) (1997), 73 C.P.R. (3d) 1 at p. 33

Abuse of Dominance Guidelines, supra, at p. 1

151. The most straight-forward indication of the existence of market power is the ability to profitably raise prices above competitive levels for a considerable period of time, and to earn supra-normal profits as a result. Market power can also be established indirectly through evidence of high market shares and barriers to entry. High market share is a necessary but not sufficient condition to establish market power. Absent barriers to entry, even a firm with a high market share cannot exercise market power.

Reference: **Abuse of Dominance Guidelines, supra**, at pp. 1-2.

152. Satisfaction of the second element of subs. 79(1) requires proof that Bibby has engaged in a practice of anti-competitive acts. The Tribunal has determined that a “practice” occurs where the activities in question are more than an isolated act or acts. An act will be considered to be anti-competitive if its purpose is to prevent entry in the Relevant Markets or achieve some other exclusionary purpose. Put otherwise, an act will be considered to be anti-competitive if its purpose is to have a negative effect on a competitor that is “exclusionary, predatory or disciplinary”.

Reference: *Canada (Director of Investigation & Research) v. NutraSweet Co.* [1990], 32 C.P.R. (3d) 1 at p. 34 (Comp. Trib.) [hereinafter referred to as “NutraSweet”]
Tele-Direct, supra, at p. 180

Abuse of Dominance Guidelines, p. 2

153. A practice of anti-competitive acts will be considered to result in a substantial lessening or prevention of competition if it serves to preserve, entrench or enhance a firm's market power. In any given case, the degree of dominance, the nature and severity of the anti-competitive acts and the degree of competition remaining in the market will all form part of the assessment.

Reference: Abuse of Dominance Guidelines at p. 3

Section B: Section 79(1)(a): Direct Evidence of Bibby's Market Power

154. Evidence that a firm has been able to maintain prices in excess of competitive levels for a non-transitory period of time constitutes direct evidence of market power. Dr. Ross has given such evidence in his report and in his discussion of regional price differences, profit margins, import prices and response to entry.

155. Direct evidence of market power necessarily contemplates the outer boundaries of the Relevant Markets.

156. Dr. Ross has given forceful direct evidence of Bibby's market power. Dr. Ware made comment about the evidence of Dr. Ross. Dr. Ware's concerns did not undercut the main conclusions about market power drawn by Dr. Ross. In any event, for reasons set out in Part III, wherever Dr. Ross differs from the testimony and opinion of Dr. Ware, it is submitted that Dr. Ross is to be preferred. Dr. Ware was an advocate for Bibby and diminished the value of his expertise to the Tribunal accordingly. Dr. Ware's evidence suffers from inconsistencies and improper use of source material.

157. Dr. Ross used four techniques to assess whether Bibby's prices exceeded competitive price levels.

158. First, Dr. Ross examined the regional differences in the final prices charged by Bibby for its top-selling cast iron DWV pipe, fittings and MJ couplings.

159. Figure 1 (attached as Appendix B) illustrates Bibby's prices for its top-selling cast iron DWV pipe in Bibby's six pricing zones.

160. As Figure 1 shows there are very significant differences in Bibby's prices for identical products in different regions of the country. This is one indication that Bibby is not pricing at competitive levels. Differences in price levels across regions might not be an indicator of anti-competitive prices, if the differences could be explained by transportation costs. That is not the case here however. Bibby's cast iron DWV pipe, fittings are produced in Quebec in a single foundry, and are shipped from Quebec throughout the country. Despite the greater distance from its production facilities, Bibby's prices in B.C., for example, are generally lower, and sometimes much lower, than Bibby's prices in Quebec. This evidence strongly suggests that Bibby's prices, at least in the higher priced regions, exceed competitive levels.

Reference: Ross Report, paras. 14-16
Ross DE pp. 3288 and 3347

161. Second, Dr. Ross computed Bibby's profit margins on its top-selling pipe and fittings products in Bibby's six pricing regions for the months from January 1998 to September 2003. The profit margins are reported in Section 1.3 of Appendix 3 of Ross' Report. In general, Bibby's profit margins on its top-selling cast iron DWV pipe and fittings were in the 45-65% range, with Alberta and B.C. often a bit lower. Bibby's profit margins on its top-selling cast iron DWV fittings products are somewhat more varied, but are generally concentrated in the 25-50% range.

Reference: Ross Report, paras. 17-19

Ross DE p. 3301

162. Clearly Bibby's prices on its top-selling cast iron DWV pipe and fittings are well in excess of its costs. This evidence also indicates that Bibby has been able to price these products above competitive levels.

163. Third, Dr. Ross compared Bibby's prices with the prices of imported cast iron DWV products. If Bibby could import DWV products more cheaply than it can produce them, it would be more profitable for Bibby to import DWV products than to produce the products in Canada. The evidence is that import prices are between 30 and 50% less expensive than Bibby's products. This differential corresponds to Bibby's profit margins and is consistent with the conclusion that Bibby's prices are *at least* 30-50% higher than its costs of production.

Reference: Ross Report, para. 20

Ross DE pp. 3323-3324

164. Fourth, Dr. Ross examined Bibby's practice of cutting its prices in response to import entry in the West, and of entry by Vandem in the East. The evidence is that Bibby was able to drop its prices substantially in response to this entry and still earn positive margins, suggesting that, at least prior to entry, Bibby's prices were well in excess of its costs and of competitive price levels. A simple inspection of Figure 1 suggests that imports of cast iron DWV products had a substantial downward effect on prices in B.C. and Alberta, and that Vandem's entry in Ontario resulted in significant price declines. Dr. Ross also performed a number of statistical tests to assess the relationship between Bibby's prices and import entry in the West and entry by Vandem in the East. The results of these statistical tests show that import entry caused Bibby to lower its prices in B.C. and Alberta for its cast iron DWV pipe by 14-24%, for its cast iron DWV fittings by 7-29%, and for its MJ couplings by 12-30%. Similarly, in

Ontario, the statistical tests show that the entry by Vandem in the Ontario markets for cast iron DWV products caused a 11-22% drop in Bibby's prices for pipe, and a 14-28% drop in Bibby's prices for fittings. These results indicate that Bibby's prices at least in the absence of competitive entry in the cast iron business are significantly above competitive levels.

Reference: JB-10-472; JB-10-459; JB-10-474; JB-12-575-4; JB-11-517; JB-11-568

Ross Report, paras. 21-30

Ross DE pp. 3326; 3344

165. In sum, the evidence is that Bibby has consistently earned gross profit margins of 25-65% since 1998 for cast iron DWV pipe and fittings. Bibby has consistently maintained its prices 30-50% above import prices in this period. It has been able to reduce its prices 7-30% in response to entry in cast iron DWV markets in Canada. This is unequivocal direct evidence that Bibby has market power.

166. The direct evidence of Bibby's market power also speaks to the relevant product markets. 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 three relevant products.

Reference: Ross DE p. 3350

167. In *Tele-Direct*, the Tribunal found that the high economic rents earned by Tele-Direct provided direct evidence of Tele-Direct's market power:

... Even if Tele-Direct earns no economic profit on its operations beyond what it pays out to Bell, 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%. 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*, at p. 101

168. Similarly, the direct evidence in this case establishes that Bibby has market power.

Section C: Section 79(1)(a): Indirect Approach to Bibby's Market Power

Introduction

169. The purpose of the indirect approach to market power is the assessment of high market share and barriers to entry and expansion. However, the first step is to define the Relevant Markets.

170. The evidence strongly suggests three relevant product markets: cast iron DWV pipe, fittings and MJ couplings. Equally strongly, the evidence shows six relevant geographic markets: British Columbia, Alberta, the Prairies, Ontario, Quebec and Atlantic Canada. The evidence indicates that Bibby, in 2002, had a minimum market share in excess of 82% in any of the Relevant Markets.

171. Bibby's significant market share is protected by barriers to entry and expansion in the Relevant Markets.

Relevant Product Markets

172. According to the Competition Tribunal, a fundamental test for determining the boundaries of the product markets is substitutability. Products must be close substitutes in order to be placed in the same relevant product market. The analysis focuses on whether there are close substitutes for the products in question, such that buyers would turn to the substitutes in the event that the product price was raised above competitive levels by a significant amount for a non-transitory period of time.

Reference: *Tele-Direct, supra*, at pp. 34-35

Canada v. Southam Inc., [1995] 3 F.C. 557 (C.A.) [rev'd on appeal but not on this point at [1997] 1 S.C.R. 748] at p. 632

Abuse of Dominance Guidelines, p. 11

173. Substitutability is assessed through a number of indicia including: physical and technical characteristics; end use (functional interchangeability); views and behaviours of buyers; views, strategies and behaviours of suppliers, and; price relationships and relative price levels.

Reference: **Abuse of Dominance Guidelines, p.11**

174. The assessment of the evidence in relation to substitutability must be conducted with regard to the over-riding purpose of the market definition exercise. That purpose is to determine whether other products provide effective competitive discipline for prices of the three relevant products.

Reference: *Tele-Direct, supra*, at p. 39

Canada v. Southam Inc., [1995] 3 F.C. 557 (C.A.) [rev'd on appeal but not on this point at [1997] 1 S.C.R. 748] at, p. 632-633

(i) Physical and Technical Characteristics

175. There are a number of important differences between DWV products made of cast iron and DWV products made from other materials that affect the substitutability of these products.

Combustibility

176. The combustibility or non-combustibility of DWV products is a driving factor in the selection of DWV materials in different types of construction. As discussed in more detail below, due to safety concerns, the use of combustible DWV products in buildings that are required to be of non-combustible construction is limited.

177. Cast iron, copper, and asbestos-cement DWV products are not combustible. These products can be used without restriction in non-combustible construction.

Reference: Zorko Report para. 58 - 63, 65

178. Plastic DWV products are inherently combustible. Bibby's evidence is that in a fire, plastic DWV products "give off poisonous gases", "produce clouds of black smoke" and "produce large quantities of deadly hydrogen cyanide or hydrogen chloride gas, even when exposed to relatively low temperatures near a fire area". It is these health risks that underpin the Code restrictions on use of combustible DWV materials, such as plastic, in buildings that are required to be of non-combustible construction.

Reference: JB6-239-10; JB13-656

179. IPEX's System 15 line of products are plastic products, which are combustible and do not satisfy the smoke developed requirements for non-combustible applications. System 15 cannot, therefore be considered as an alternative to cast iron where combustibility or surface

burning characteristics are limiting factors. IPEX recognizes that there are outright prohibitions against and significant limitations on the use of System 15.

Reference: JB-11-527

Zorko, Rebuttal Report, para. 29, 68

180. IPEX's XFR DWV pipe, fittings and couplings are made of plastic and therefore are combustible. The flame-spread and smoke-developed qualities of this product are reduced by the application of a coating to the outside of the product. It is important to maintain the integrity of the intumescent coating on the product in order for the flame-spread and smoke-developed ratings to be respected. Proper installation of XFR is therefore critical.

Reference: Zorko Report, para. 79

JB-22-1072; JB-28-1323-1

Lagueux XE p. 4633

181. Even where plastic products are permitted in non-combustible construction, including products such as XFR, the Code imposes fire-stopping requirements on the use of the materials, again to minimize fire safety risks. Fire stopping for cast iron simply requires the application of fire caulking. In contrast, for plastics, special fire-stopping doughnuts must be installed. In the case of XFR the integrity of the coating must be maintained.

Reference: Zorko Report, paras. 77-80

JB-10-449; JB-9-424-1; JB-22-1072; JB-28-1323

Vivurka DE pp 2458-2459

Asbestos-Cement Health and Safety Risks

182. Although asbestos-cement DWV products are non-combustible, use of these products is extremely limited, and in some provinces, prohibited, due to the perceived health and

safety risks associated with working with asbestos-cement products. Leonard testified that asbestos-cement cannot be used in the United States and that it can only be used within Canada in the provinces of Quebec and Ontario. Bibby distributes marketing material suggesting that this product is hazardous. As a result, asbestos-cement is largely confined to rain water leaders.

Reference: JB-16-812
JB-14-738
Zorko RE pp. 3250-3251
Leonard XE pp. 4342-4343

Noise

183. Cast iron DWV pipe is generally considered to reduce the noise generated by the flow of water through the system relative to DWV materials made from other materials, such as plastic.

Reference: JB-14-743
Phillips DE p. 2733
Kelly DE p. 2837
Vivyurka DE p. 2449

184. Mr. Zorko said that he would consider sound as a factor in the selection of materials. The flow of water within plastic pipes has higher volume than in cast iron piping. Where design requirements suggest a particular sensitivity to sound, for example, in a low-rise residential project, depending on the location of the shaft, Mr. Zorko would highly recommend cast iron piping, notwithstanding that he would have a choice.

Reference: Zorko DE p. 3054

Durability

185. Cast iron is resistant to impact and has proven durability.

Reference: JB-6-239; JB-8-344
Phillips DE pp. 2725-2727
Bornhorst DE p. 2284
Zorko Report, para. 90

Thermal Expansion Rates

186. Cast iron pipe expands and contracts at a low rate, similar to that of other materials such as steel, concrete and masonry, eliminating the need for costly expansion joints. This is particularly relevant to multi-storey buildings.

(ii) Functional Interchangeability/ End Use

187. The materials used in a DWV system in a building must conform to the applicable provincial and municipal building codes. These provincial and municipal codes are based on the National Building Code (“NBC”) developed by the National Research Council of Canada, and are adopted by provincial legislation.

Reference: Zorko Report, pp. 5-6

188. The NBC establishes two categories of buildings - buildings that are required to be of non-combustible construction and those that are not. Classification of a building within these categories depends primarily on height and occupancy. Generally speaking, all buildings designated as high-rise buildings in the NBC must be of non-combustible construction. In some cases, lower buildings are also required to be of non-combustible construction due to the intended use of the facilities. For example, restaurants, schools, auditoriums, and libraries that

are more than two stories above grade are required to be of non-combustible construction. The rationale for this is self-evident. In high-rise buildings and buildings where members of the public are expected to congregate, fire safety concerns are paramount. Accordingly, use of materials that burn and/or generate smoke is strictly limited by building codes.

Reference: Zorko DE pp. 3009-10; 3019-20

189. Restrictions applicable to buildings that are required to be of non-combustible construction are set out in Part III of the NBC. The basic rule established by the NBC is that use of combustible materials in a building required to be of non-combustible construction is prohibited.

“Within the construction industry, with respect to the Code, there are two building types: buildings that are permitted to be of combustible construction and buildings that are required to be of non-combustible construction. In buildings that are required to be of non-combustible construction, there are clauses that restrict or prohibit the use of plastic piping for DWV applications in such a way that, in all but very rare cases, would it be possible or practical to introduce plastic into the non-combustible buildings.”

Reference: Zorko Report, paras. 11-12

Zorko DE pp. 3016-3017

190. The NBC contains a number of detailed provisions dealing with piping generally and DWV pipe in particular. The effect of these provisions is that if the pipe is not located in a vertical shaft, DWV pipe made of combustible materials can be used in buildings required to be of non-combustible construction if:

- (a) the pipe has a flame spread rating of 25 or less;

- (b) in high-rise buildings as defined by 3.2.6 of the NBC if the pipe has a smoke-developed rating of 50 or less; and
- (c) certain product-specific sealing requirements are satisfied whenever the DWV system penetrates a fire separation.

Reference: Zorko Report, para. 53

191. Combustible pipe can never be used in a vertical shaft. A vertical shaft is a vertical space, running up the entire height of the building without horizontal separations. As there are no fire separations in a vertical shaft to prevent spread of fire and smoke throughout the entire height of the building, use of combustible materials in a vertical shaft is an unacceptable fire safety hazard.

Reference: Zorko Report, paras. 56

192. Cast iron, copper, stainless steel and asbestos-cement DWV products are non-combustible. Therefore, use of these products is not restricted by building code requirements. As will be discussed, they are not close substitutes for cast iron DWV products in buildings that are required to be of non-combustible construction.

Reference: Zorko Report, para. 65-70

193. Plastic DWV products are inherently combustible. Accordingly, use of plastic DWV materials in buildings required to be of non-combustible construction is strictly limited by building codes. Specifically, plastic DWV products cannot be used in buildings required to be of non-combustible construction unless the product has a flame spread rating of 25 or less, the product has a smoke developed rating of 50 or less (a requirement for high-rise buildings), and

the product is sealed with a fire-stopping doughnut whenever the system penetrates a fire separation. This is graphically represented in Exhibit "E" to Mr. Zorko's Report.

Reference: **Zorko Report, paras. 68-70, 94**
 Zorko Rebuttal Report, p. 3, paras. 15-16, 23-24

194. In addition to the restrictions on use of combustible DWV products, the building codes in some provinces prohibit the use of asbestos-cement DWV materials. This prohibition is based on the perceived safety hazards of working with asbestos-cement. According to Mr. Zorko, it has a very limited application. Indeed, in cross-examination, Mr. Zorko said that even its use as a rain water leader was rare.

Reference: **Ware Report, para 67**
 Zorko DE p. 3048; XE p. 3210; RE p. 3244

195. In sum, under the building codes, there are no restrictions on the use of cast iron but there are important restrictions on the use of combustible materials such as plastics in buildings that are required to be of non-combustible construction.

196. According to the jurisprudence, products must be functionally interchangeable in end use in order to be included in the same relevant product market. Functional interchangeability is simply a preliminary filter that serves to exclude from the relevant product market all those products that do not have the same end use as the product in issue.

Functional interchangeability is simply a preliminary filter to exclude those products which evidently do not have the same end use as Yellow Pages advertising. ...

Reference: **Tele-Direct, supra, at p. 46**
 Abuse of Dominance Guidelines, p. 11 (definition of end use)

197. The determination of whether or not products are functionally interchangeable or have a common end use turns on usual uses of the products, not mere possibilities.

This is not to say that these media cannot be used for directional advertising in any circumstances. It is a possibility, but in deciding whether various media serve the same end use, one must look to usual uses and not mere possibilities unsupported by the evidence.

Reference: *Tele-Direct, supra*, at p. 46

198. The evidence establishes that cast iron DWV products cannot be used interchangeably with plastic DWV products in non-combustible construction. It follows that plastic DWV products are not close substitutes for cast iron DWV products. The mere possibility that a plastic DWV product, such as XFR, may in the future be considered to satisfy building code requirements, does not qualify under the jurisprudence as functionally interchangeable in end use for the purposes of market definition.

(iii) Views and Behaviour of Buyers

199. Buyers of DWV products, and persons responsible for selecting DWV products, including Mr. Zorko, building inspectors, mechanical engineers and contractors testified in this proceeding that: (i) plastic DWV products are not generally used in buildings that are required to be of non-combustible construction; (ii) use of asbestos-cement DWV products is restricted to a few limited applications; and (iii) use of copper DWV products is generally limited to small diameter applications of three inches or less and cast iron DWV products are generally used in larger diameter applications. However this has not prevented Bibby's ability to exercise market power for cast iron DWV products for small diameter applications.

Plastic

200. Buyers and other users of DWV products testified that plastic DWV products do not generally compete with cast iron DWV products in buildings that are required to be of non-combustible construction:

- (a) Lagueux emphasized the importance of the use of non-combustible DWV materials in non-combustible construction including high rise buildings.

Reference: Lagueux XE p. 4606

- (b) Kelly, Bornhorst, Vivyurka, Surgeonor, Elliot and Philips all testified that there is reluctance by experienced professionals to use plastics for DWV systems generally.

Reference: Kelly DE pp. 2836-37

Bornhorst DE pp. 2684-85, 2695-96

Vivyurka DE pp. 2448-50

Surgeonor DE pp. 4577-78

Elliot DE pp. 2137-38

Philips DE pp. 2721-23

- (c) Philips stated that for high-rise buildings, he does not allow anything but cast iron and copper because of fire barrier penetration and flame and smoke spread concerns.

Reference: Philips DE pp. 2722-23, 2725-27, 2733

- (d) Keon stated that fire separation has been the problem with products other than cast iron and copper in the high-rise sector.

Reference: Keon DE pp. 2786-2788

201. Even in the area where there is a choice, there are significant design and performance considerations that serve to extend the dominance and influence of cast iron. Mr. Zorko noted specific factors in detail in both his report and his *viva voce* testimony.

202. Mr. Zorko testified that as an architect, his professional role was to advise his clients as to risk, design buildings to be safe, and to have proper fire separations in order to reduce the risk associated with fires. He would not recommend the use of plastic piping because it provides for additional risk in the building. The fact that plastic piping is combustible and produces toxic smoke while burning, constitutes additional risk in the building to the occupants.

Reference: Zorko DE pp. 3050-3051

203. With respect to XFR, witnesses clearly testified that this was a new product with very limited acceptance in current marketplace:

- (a) Philips testified that while it is important for his clients to have options in order to gain control of pricing, he has concerns about new products. His concern is that products “hit the street” before they are truly understood in terms of their long-term viability. Philips also testified that he has not seen a decline in cast iron products in high rise buildings;

Reference: Philips DE pp. 2730-2732

- (b) Lagueux agreed that builders may be reticent to use a new product when they can use a product like cast iron that they know well. He also agreed that the fact that a new product may be used does not necessarily mean that it will be used in the field. He admitted that he did not know whether engineers have in fact modified their specifications to accommodate the use of XFR;

Reference: Lagueux DE p. 4634

- (c) Iaboni admitted that Sherwood, which caters to cast iron users, had never placed an order for XFR;

Reference: Iaboni DE p. 4535

- (d) The evidence is that XFR has to date only been used in a handful of buildings across Canada. Most of these buildings were not required to be of non-combustible construction and/or XFR was not used exclusively throughout the building.

Reference: Ware Report, para. 94

- (e) Vivyurka has never specified XFR; and

Reference: Vivyurka DE p. 2453

- (f) Kelly is not familiar with XFR and has never used it.

Reference: Kelly DE p. 2837

204. XFR has been on the market since 2001 and has a very marginal presence in the market and there is no reasonable expectation that this presence will grow significantly over the near to medium term. As noted by Mr. Zorko, XFR faces two hurdles to penetrating the cast iron market: first, XFR cannot be used in vertical shafts. Second, installation requirements of XFR are more complicated than traditional plastic piping.

Reference: Zorko, Report, para. 77-80

JB-28-1323-1

205. Mr. Zorko would not recommend the combination of XFR outside of a vertical shaft and cast iron within a vertical shaft. He noted the additional costs and practical problems

associated with having two sub-trades, the difficulty of joining two different materials and the concern of the general contractor over accountability for the DWV system as a whole.

Reference: Zorko DE p. 3062

206. Mr. Zorko does not believe XFR will replace cast iron. He testified that plumbing system designers and specifiers will be reticent towards the use of such a product as a substitute for cast iron pipe products, which are well established in standard trade practices. In his Expert Report, Mr. Zorko noted:

The recent emergence of products that can be substituted in some cases for cast iron piping is not likely, in the short term, to substantially mitigate the prevalence of cast iron in drain/waste/vent applications. For the long term, the viability of such substitutes remains speculative, owing to the legitimate reservations affecting these newly introduced materials as well as the limits imposed on their use by Code requirements.

...it therefore does not appear reasonable for anyone to assume that these products constitute an obvious substitute for cast iron.

Reference: Zorko Report, paras. 11, 80, 93

Zorko DE p. 3063

207. Zorko testified that the viability of XFR had yet to be established, as it had been on the market for too short a time. Zorko noted, however, that it would not make significant inroads unless the NBC requirements changed.

Reference: Zorko DE pp. 3072

Asbestos-Cement

208. Buyers and users testified that use of asbestos-cement is very limited and it is not considered to be a close substitute for cast iron:

- (a) Keon testified that Niagara did not stock asbestos-cement and that “in the last few years there has been virtually little of that product used”.

Reference: Keon DE pp. 2814-2815

- (b) Asbestos-cement composites are used mainly for very large diameter pipe such as collectors at buildings connections to public utilities.

Reference: Zorko Report, para 72

Copper

209. Buyers and users of DWV products stated that copper and cast iron are used in distinct applications: copper is used in small diameter applications of less than three inches and cast iron is used in larger diameter applications of three inches and above. The reason for this is cost. Copper is not economical in the larger diameters; cast iron is not competitive with copper in the smaller diameters. Specifically, witnesses stated:

- (a) Building officials such as Surgeoner and Wasyliw testified that they rarely saw copper DWV materials over 2 inches or cast iron under two inches in diameter;

Reference: Surgeoner DE pp. 4549-50, 4581-82;

Wasyliw DE p. 4660

- (b) Bornhorst testified that use of copper is restricted to smaller diameters, usually under three inches;

Reference: Bornhorst DE p. 2695

- (c) Phillips discussed the economics of copper vs. cast iron and stated that “copper is pretty pricey at the larger sizes”;

Reference: Philips DE pp. 2725-2727

- (d) Keon stated that the products sold most frequently for use in the high-rise commercial sector were copper (up to three inch) and cast iron for three inches and above;

Reference: Keon DE pp. 2786-2788

- (e) Mr. Zorko noted that copper is, like cast iron, non-combustible. Also, as far as total material and installation costs are concerned, copper piping is less expensive to use for diameters up to 75 mm and cast iron is more economical for diameters above 75 mm. Therefore, as a general rule, copper pipes and fittings commonly used are 75 mm diameters and less and cast iron pipes and fittings are usual for larger diameters; and

Reference: Zorko Report, para. 67

- (f) Mr. Zorko testified that based on experience and set practice, the standard approach to the design of drain/waste/vent plumbing systems using metal piping materials is to choose copper for all elements having a diameter of 75 mm or less and cast iron for all greater dimensions. However, most of the drain/waste/vent system elements in buildings listed in Tables 1 and 2, for reasons of the load inherent to uses and scales listed, will be required to have diameters greater than 75 mm. Therefore cast iron piping will invariably be selected except in rare occurrences.

Reference: Zorko Report, para. 101

210. Nevertheless, and as mentioned above, copper DWV products have not prevented Bibby from exercising market power in the sale and supply of cast iron DWV products of all sizes, including those of 75 mm diameter or less.

Other Products

211. Users and buyers testified that the use of DWV products made from other materials such as borosilicate glass and stainless steel is limited to very specific applications. As for aluminium, they testified that it is no longer used at all:

- (a) Borosilicate glass is used mainly in laboratories where corrosive chemicals such as concentrated acids or alkalis could damage drainage pipes;

Reference: Zorko Report, para 71

- (b) Stainless steel is used for drainage in industrial process installations;

Reference: Zorko Report, para 73

- (c) Vivyurka stated that stainless steel pipe is generally more expensive than cast iron;

Reference: Vivyurka DE p. 2495-2496

- (d) Aluminium has not been used since the 1980's because of performance issues;

Reference: Bornhorst DE pp. 2693-2695

Surgeoner DE p. 4580

212. The net effect of this evidence is that asbestos-cement, plastic and copper DWV products are not considered by buyers and users of these products to be close substitutes for cast iron DWV products in DWV applications in buildings that are required to be of non-combustible construction. Plastic and asbestos-cement products are not used in this construction, while copper and cast iron each occupy different markets based on the diameter of the application.

(iv) Views, Strategies and Behaviour of Suppliers

213. The actions of suppliers can yield critical insight into whether or not products are treated as close substitutes.

Bibby

214. Bibby's pricing behaviour, building code-enforcement activities, and other documentary evidence confirm that Bibby's cast iron DWV products are not close substitutes for plastic, copper or asbestos-cement DWV products. Significantly, Bibby's prices are not effectively disciplined by the competitive pressure of DWV products made from other materials, thereby proving that the three products are separate relevant product markets.

215. The evidence shows that Bibby responds vigorously to cast iron competition. Bibby responded to competition from imported cast iron DWV products in the West with significant price declines and then raised prices, by in excess of 25%, when these imports had effectively been shut out of the market by the SDP.

Reference: Ross Report and testimony as cited above in Section B of Part VI herein

JB-10-472; JB-10-459; JB-10-474; JB-12-575-4

216. Similarly, Bibby reduced the prices for its cast iron DWV products dramatically in Ontario in response to entry by Vandem.

Reference: Ross Report and testimony as cited above in Section B of Part VI herein

JB-11-517; JB-11-568; JB-12-575-4

217. This behaviour is in stark contrast to the absence of any evidence of similar competitive response by Bibby to competition from DWV products made from other materials.

218. Bibby's intense competitive response to entry by suppliers of cast iron DWV products, and the absence of any evidence of any similar competitive response to entry or pricing of DWV products made from other materials, is compelling evidence that DWV products made from other materials are not part of the relevant product markets.

219. There is also no evidence of a consistent monitoring by Bibby of plastic, copper and asbestos-cement prices.

220. In addition to its pricing behaviour there are numerous indications in Bibby documents that Bibby considered that its DWV products competed alone for use in DWV applications in buildings required to be of non-combustible construction, and that this was the target and primary use of the relevant products. For example, Bibby documents state:

- (a) "We have no idea of the tons or \$ of plastic sold in this segment as it is not a market we watch. We follow the traditional cast iron markets ...";

Reference: JB3-078

- (b) Bibby keeps no reference to statistics for single family homes; all statistics are high-rise;

Reference: JB-21-1059

- (c) Bibby targets high-rise and institutional markets;

Reference: JB-13-656-1

- (d) "Although *we have managed to maintain market share*, our secret is out and I think that we will have to react province wide to stem the tide. We are always

going to be viewed as the bullies of the *soil pipe market* so we may as well live up to our undeserved reputation";

Reference: JB-23-1124-11

- (e) Bibby tracks percentages for housing, commercial, industrial and multi-story construction differently;

Reference: JB-22-1077

- (f) Bibby has 95% of *the soil business*; and

Reference: JB-12-575-4

- (g) Nagel stated that plastic and cast iron cannot compete in buildings over a certain height.

Reference: Nagel DE p. 540

221. Bibby efforts to ensure strict enforcement of the NBC confirms that Bibby considers that cast iron does not compete with plastic DWV products in non-combustible construction, by reason of the building code limitations on the use of combustible materials in these buildings.

Reference: JB-16-833-2

JB-17-844-1

222. Finally, numerous Bibby documents indicate that use of asbestos-cement is confined to rain-water leaders.

Reference: JB-7-339; JB-3-78; JB-23-1138-1; JB-16-812; JB-16-12-1; JB-16-812-2

IPEX

223. IPEX marketing documents for XFR indicate that traditional plastics (that is, plastics other than XFR) have not and do not compete with cast iron.

References: JB-28-1323

224. The Tribunal held that the type and intensity of the competitive response of suppliers to products that are alleged to be close substitutes is an element in determining if products are close substitutes:

... The type and intensity of the alleged competitive response is an element for consideration in determining if the products argued to be in the same market are close substitutes. Substitutability, as pointed out in the J.W. Mills case quoted above, is always a question of degree. Differences in intensity of reaction to players admitted to be competitors to Tele-Direct and those alleged to be competitors by Tele-Direct can help us to determine where to draw the line in this case.

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

225. The evidence is that Bibby reacted strongly and decisively to competition from cast iron DWV products – through the introduction of the SDP and dramatic price adjustments - and that Bibby reacted little, if at all, to competition from DWV products made from other materials. On the jurisprudence, this behaviour is consistent with a conclusion that cast iron DWV products are in separate relevant product markets from DWV products made from other materials.

(v) Price relationships and relative price levels

226. Detailed analysis of the relationships between the prices for DWV products made from different materials and of the relative price levels of these products is not possible, due to the absence of price data for DWV products made from materials other than cast iron.

227. There is evidence, however, that the price of copper pipe of larger diameters is dramatically higher than the price of cast iron pipe of the same diameter. Documents filed by Bibby, for example, set out a price for 4-inch copper pipe that is 193% higher than the price for cast iron pipe of the same diameter.

Reference: JB21-1021; JB21-1033

228. Given the nature of the product and its use, and the absence of significant differences in the physical and technical characteristics of copper and cast iron DWV products, price differentials of this magnitude are not consistent with competition between these products. Therefore, copper DWV products cannot be part of the relevant product market.

229. Similarly, Bibby's evidence is that asbestos-cement DWV products are 30-50% cheaper than cast iron DWV products. Due to the dramatic price differential, asbestos-cement should replace cast iron in any market where the two products were close substitutes. Since asbestos-cement DWV products do not discipline cast iron prices, asbestos-cement DWV products cannot be part of the relevant product markets.

Reference: JB-7-339-3

230. Finally, the evidence is that the installed price of plastic DWV products is 15-30% less than cast iron DWV products. The price discrepancy between plastic and cast iron DWV product would indicate that DWV products made of plastic do not discipline the price of cast iron DWV products and cannot be part of the relevant product market.

Reference: Ware Report, para 65

Ware XE pp. 5179-5180

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

Reference: Abuse of Dominance Guidelines at p. 12 (definition of price relationships and relative price)

232. The evidence in this case does not support the conclusion that DWV products made from copper, asbestos-cement and plastic have constrained the prices of cast iron DWV products.

Conclusion on Substitutability of Cast Iron, Asbestos-Cement, Copper and Plastic DWV Products in Non-Combustible Construction

233. A close examination of the DWV industry establishes that cast iron DWV products cannot be used interchangeably with DWV products made from all other materials in non-combustible construction in the relevant product markets. Plastic and asbestos-cement have very limited presence in this segment of construction, due to health and safety concerns, resulting Code restrictions and buyer preferences. The only plastic product that qualifies at all for any use in buildings required to be of non-combustible construction – XFR – cannot be used in all applications, has negligible acceptance in the marketplace, and on the evidence, there is no reasonable expectation that it will gain any significant presence in the marketplace in the near to medium term. XFR is therefore not a close substitute for cast iron. Nor do copper and cast iron compete with one another in this segment of construction. Finally, the evidence establishes that the use of DWV products made from glass and stainless steel is limited to very specialized applications. With respect to aluminium, the evidence establishes that it is no longer used at all.

Three Relevant Product Markets

234. Dr. Ross testified that the evidence in this case is consistent with the conclusion that cast iron DWV pipe, fittings and MJ couplings form three relevant product markets.

235. Cast iron DWV pipe, fittings and MJ couplings are complements, not substitutes. These products would not typically be considered therefore to fall within a single relevant product market.

236. Dr. Ross testified that where products are subject to different price pressures, due to differences in demand, costs or other competitive conditions causing the prices of the products to move differently, it is not appropriate to treat them as a single product.

Reference: Ross Report, paras. 43-45
Ross DE pp. 3361-63

237. There are different suppliers of cast iron DWV pipe and fittings and of MJ couplings and buyers could and would – absent the SDP – source these products from different suppliers. Even Bibby obtains its MJ couplings from a third (albeit non arms length) supplier.

Reference: Ross Report, para. 43
Ross DE p. 3362

238. There are also obvious differences in the inputs and manufacturing processes for cast iron DWV pipe, fittings and for MJ couplings. The costs of these products will necessarily move independently.

Reference: Ross Report, para. 45
Ross DE p. 3362

239. Dr. Ross performed a number of statistical tests on the prices for cast iron DWV pipe, fittings and MJ couplings over time and within the relevant geographic markets which confirm that the prices for these products do in fact move independently.

**Reference: Ross Report, paras. 46 and 60-64;
Ross DE p. 3276**

240. There is clear evidence on the record that buyers are interested in acquiring the three relevant products separately.

**Reference: Kirkpatrick DE pp. 2164, 2167-2168
O'Brien DE pp. 2208-2212, 2213, 2216-2218
Bouthillette DE p. 2529**

241. In *Tele-Direct*, as part of its analysis of tied selling under section 77(1) of the *Act*, the Tribunal considered whether products should be considered as a system or separate products for market definition purposes. The Tribunal concluded that it must consider first whether purchasers of the products would like to buy them separately. If this question is answered in the affirmative, the products should be considered in separate product markets, unless there is evidence that it is more efficient to sell the products as a bundle.

Our approach will be to examine first the evidence pertaining to the demand side of the equation, to determine whether the Director has proven buyer, in this case advertiser, interest in acquiring space and service separately. By this we mean an answer to the question: "Is there a significant set of advertisers who actually want the items separated?" If this question is answered in the affirmative, then we will turn to evidence relating to whether it is efficient to separate the products.

Reference: *Tele-Direct, supra, at p. 120*

242. The evidence and jurisprudence are consistent with the conclusion that cast iron DWV pipe, fittings and MJ couplings constitute three separate relevant product markets.

Relevant Geographic Markets

243. Dr. Ross testified that the evidence in this case is consistent with the conclusion that there are six relevant geographic markets in Canada for each of the Products: B.C., Alberta, the Prairies (Saskatchewan and Manitoba), Ontario, Quebec, and Atlantic Canada (New Brunswick, Nova Scotia, Newfoundland and Labrador and PEI).

244. Figure 1 (at Appendix B) starkly illustrates that prices in the regions are not only very different in terms of absolute levels, but that there is no strong correlation between prices in the six regions. Dr. Ross also performed a number of statistical tests to assess the possible correlation of the prices of Bibby's top-selling cast iron DWV products across the six regions. The tests confirm that there is no strong correlation between the prices of identical products across regions. This leads to the conclusion that each region cannot be part of the same relevant geographic market.

Reference: Ross Report, paras. 37-39 and 56-59

Ross DE pp. 3358; 3376; 3380

245. Prices for an identical product cannot differ, for any significant period of time, in a single geographic market, by more than transportation costs. As discussed above, the differences in Bibby's prices across the six regions of Canada cannot be explained by transportation costs. In fact, prices are lower in the regions where transportation costs would be expected to be higher – the West – and higher in the region where transportation costs would be expected to be lowest – Quebec.

246. The basic test for ascertaining the boundaries of the relevant geographic market is the same as the test used to determine the relevant product market - the universe or region of effective competition:

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

Reference: *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 at p. 316 (Comp. Trib.) [hereinafter referred to as "*Laidlaw*"]

247. Similarly, in *NutraSweet*, the Tribunal stated:

... However, this consideration does not address the critical question required to be answered in defining geographic markets, namely, **whether an area is sufficiently insulated from price pressures emanating from other areas so that its unique characteristics can result in its prices differing significantly in any period of time from those in other areas.**

[emphasis added]

Reference: *NutraSweet, supra*, at p. 20-21

248. The uncontraverted evidence that cast iron DWV prices are uncorrelated in the six pricing zones used by Bibby and the absence of any relationship between the price differences and transportation costs implies that the six regions constitute distinct relevant geographic markets.

Market Share

249. Using data provided by Bibby, Dr. Ross calculated Bibby's market shares and Herfindahl-Hirshmann Indices for the relevant products.⁵ Dr. Ross estimated that Bibby's market shares for the products ranged, in the period from October 2001 to August 2002, from 82% to 94% in the different regions of Canada. The HHIs for these regions during the same time period ranged from 0.69 to 0.886.⁶ These numbers represent very high levels of concentration.

Reference: Ross Report, paras. 65-66

Ross DE pp. 3428

250. In *Tele-Direct*, the Tribunal stated that it would require evidence of "extenuating circumstances, in general, ease of entry" to over-come a *prima facie* determination of control based on market shares of 80% and higher.

Reference: *Tele-Direct, supra*, at p. 85

Abuse of Dominance Guidelines at pp. 14-15.

251. Bibby has a market share that is well in excess of 80% in each of the Relevant Markets. In the circumstances, evidence of ease of entry is necessary to overcome the *prima facie* inference that Bibby has market power in each of the Relevant Markets.

Barriers to Entry and Expansion

252. Bibby's SDP is the primary barrier to entry and expansion in the Relevant Markets. The SDP effectively induces distributors to purchase all of their cast iron DWV pipe, fittings and MJ couplings exclusively from Bibby, imposing both exclusivity and full-line

⁵ The data for B.C. and Alberta are aggregated. Also, the data are not broken down by pipe, fittings and MJ couplings. Accordingly, market shares and HHIs were calculated for all products and five regions: B.C./Alberta, the Prairies, Ontario, Quebec, and the Maritimes.

⁶ Bibby's market shares and HHIs for different years are set out in Section 2.4 of Appendix 3 of Dr. Ross' Report.

forcing requirements. The SDP effectively forecloses the distribution network to new entrants and current competitors of Bibby.

253. A distributor that purchases *any* cast iron DWV pipe or fittings or MJ couplings from someone other than Bibby, loses its stocking distributor status, and must pay non-stocking distributor prices for the cast iron DWV products and MJ couplings that it purchases from Bibby. It also loses the quarterly and annual rebates in addition to being disqualified for the marketing allowance. As discussed in Part V, stocking distributors, with rebates and multipliers, pay significantly less for Bibby's products than non-stocking distributors. This price differential includes rebates that are equal to or greater than distributors' profit margins on these products. Starkly, it is not economic for distributors to purchase Bibby's cast iron DWV products at non-stocking distributor prices.

254. Dr. Ross testified that the effect of the SDP makes it prohibitively costly for a distributor to source a portion of its cast iron DWV pipe, fittings and MJ couplings from Bibby and source its remaining needs from a competitive supplier.

Reference: Ross Report, paras. 100-104
Ross DE pp. 3449 and 3473

255. The SDP precludes toe-hold entry by new entrants. In order to get a distributor's business, a new entrant must be able to satisfy all of the distributor's cast iron DWV requirements. Leonard has testified that Bibby is fully able to supply all needs. On the evidence of Vandem, Mission Rubber and Sierra, the capacity of a Bibby competitor to satisfy all needs of a distributor needing cast iron DWV pipe and fittings and MJ couplings is non-existent in Canada.

Reference: Leonard XE p. 4141

256. Due to the SDP, a supplier of only one or two of the three products cannot satisfy a distributor's requirements for all cast iron DWV products and is therefore precluded from entry.

Reference: Vansell DE pp. 2602-03
O'Brien DE p. 2214

257. As Dr. Ross testified, to a competing supplier carrying all three relevant products the need to satisfy *all* of a distributor's cast iron DWV requirements is also an enormous barrier to entry and expansion, to a competing supplier carries all three products – pipe and fittings and MJ couplings. First, it would be very difficult for a new entrant to supply the full range of sizes and variations of cast iron DWV pipe, fittings and MJ couplings. This is consistent with the evidence of Vandem and Sierra. Leonard testified that Bibby carried over 1,000 types of cast iron DWV pipe, fittings and MJ couplings. Second, distributors will not hand over all of their business to a new entrant due to concerns about the quality of a new, untested product, and about whether the new entrant will be viable and remain in the market.

Reference: Ross Report, paras. 105-109
Ross DE pp 3449 and 3476

258. Johnston testified that EMCO would be reluctant to source all of its inventory from a new, unproven vendor selling unproven products. Other distributors testified that they did not like to source product uniquely from Bibby; it was their preference to source product from multiple suppliers. If suppliers have to be forced to source product solely from Bibby – with its lengthy track-record and proven products – then they will not source product solely from a new entrant.

Reference: Johnston DE pp. 1366

Keon DE p. 2788

Lachance DE p. 1784

Corriveau DE pp. 1978-79

Byrne DE pp. 779-780

Elliott DE p. 2119

Tester DE p. 1880

259. Dr. Ross concluded that the SDP creates an important barrier to entry in the Relevant Markets.

Reference: Ross Report, para. 112

Ross DE pp. 3451

260. The DWV industry is mature. It is also characterized by excess capacity. New entrants are reluctant to enter mature industries that are characterized by excess capacity.

Reference: Ross Report, paras. 68-69, 112

Ross DE pp. 3438 and 3451

261. Dr. Ross' conclusion is consistent with the abuse of dominance jurisprudence. This Tribunal has recognized that exclusionary practices preclude toe-hold entry and, in doing so, create barriers to entry.

262. Dr. Ware has suggested that the SDP is not a barrier to entry and expansion because new entrants do not need to distribute their products through stocking distributors. Specifically, he proposed that new entrants could: (1) distribute the products through distributors that do not currently carry cast iron DWV products; (2) establish a new distribution network; and (3) sell directly to contractors.

Reference: Ware Report, paras. 134-138

Ware DE pp. 4953; 4974-4977

263. Distributors of construction products that do not carry cast iron DWV products clearly do not cater to this sector of the construction industry, and have no expertise in these products. Dr. Ware's second proposal – that a new entrant supplier of cast iron DWV products establish a new distribution network – would be extremely costly, uneconomic, and represent an additional barrier to entry and expansion. Dr. Ware's third option - selling directly to contractors – is also impractical, highly labour intensive, extremely costly, inefficient and an unlikely method of distribution on any significant scale.

Reference: Ross Report, paras. 70-71
Ross DE p. 3439
Kelm DE pp. 2246-2247

264. Kelm of Sierra testified to the difficulties of establishing a new distribution network. His business has been restricted to small distributors who are not members of Bibby's SDP and to contractors. Kelm now sells to hundreds of contractors rather than through distributors who themselves have relationships with contractors. Sales directly to contractors increase costs, complicate internal accounting and result in increased shipping to contractors. Kelm's business is necessarily restricted to local markets due to the high cost of freight to markets lying outside the range of his single truck. Plainly, this method of marketing is ineffective except in unique local conditions.

Reference: Kelm DE pp. 2246-2247

265. 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. Dr. Ware had no basis for this statement. In fact, the

distributors have no such countervailing power. The evidence is undisputed that Bibby can and has forced large distributors to comply with the SDP and accept a single price for all distributors regardless of size. The large distributors have given testimony that they strongly oppose this regime but accept it in any event.

Reference: Ware Report, paras. 139-141
Ware XE p. 4985

266. Relative size, in and of itself, is not evidence of countervailing market power.

Reference: Ross Rebuttal Report, paras. 15-16

267. The evidence by Bibby and large distributors is that large distributors have **not** been able to negotiate reduced prices for Bibby's DWV products. Despite the concerted efforts of large distributors to negotiate volume rebates, Bibby made it clear that it would not negotiate on the rebate structure in the SDP.

Reference: Ross, Rebuttal Report, para. 15
Corriveau XE pp. 2053-2054

268. Finally, Dr. Ware argues that the evidence of actual entry and declining prices since the introduction of the SDP means that the SDP cannot be a barrier to entry and expansion. Again, Dr. Ware's lack of a nuanced understanding of the industry reduces the value of his opinions. The actual entry on the evidence such as Vandem and Sierra are isolated and local. Vandem is not a viable entrant into the Relevant Markets and Sierra has not been an effective competitor. The jurisprudence is clear that isolated instances of entry do not establish that barriers to entry and expansion do not exist. Moreover, any entry must be sustainable in order to rebut the *prima facie* conclusion that a firm with a market share of in excess of 80% does not have market power.

Reference: Ware Report, pp. 143-165
Ware XE p. 4892

269. As discussed above, the evidence is that Bibby's market share is varies from 82% to 94% in the Relevant Markets.

270. **[CONFIDENTIAL]**

271. In response to Dr. Ware's position that prices have decreased, Dr. Ross has shown that Bibby's prices are above competitive levels. That is the only relevant test.

Reference: Ross Rebuttal Report, paras. 19-20

272. In three of the four abuse of dominance cases considered by the Tribunal, it has held that preferred supplier clauses are a barrier to entry.

273. The Tribunal also held in *NutraSweet* that inducements to exclusivity that create an all-or-nothing choice for customers impede two-fold entry into the market and expansion of firms in the market and are a barrier to entry:

The logo and advertising discounts create "all-or-nothing" choice for customers. 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 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.

...

The Tribunal is convinced that the exclusivity in NSC's contracts, which includes both the 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 the expansion of other firms in the market. Since

exclusive use and supply clauses appear in virtually all of the 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*, pp. 41, 48-49

274. With respect to the issue of countervailing power, in *NutraSweet*, the Tribunal rejected arguments that Coke and Pepsi, which are very large companies, could effectively discipline the market power of NutraSweet. Relative size, in and of itself, therefore is not evidence of market power.

275. Finally, while the Tribunal has recognized that observed entry can “provide some indication of the existence or non-existence of barriers to entry”, it has made it clear that niche entry that has little competitive impact does not discipline market power and isolated instances of entry do not necessarily imply that barriers to entry are low. As the Tribunal stated in *Tele-Direct*:

The Respondents urge us to conclude that because White and DSP managed to enter in particular markets and have remained in business, entry barriers are low enough that *Tele-Direct* has no market power. We decline to place so much emphasis on two isolated instances of entry in answering these questions. To answer both questions properly, we must review the arguments on entry conditions for broadly-scoped independent directories in some detail.

Reference: *Tele-Direct, supra*, at pp. 86 and 88

276. Furthermore, in order to overcome a *prima facie* finding of control based on market shares of 80 percent or higher, it is not sufficient to establish that entry has occurred; it must be demonstrated that entry is sustainable and viable:

The Tribunal in *Laidlaw*, and also in *Southam Inc.*, stated that entry is to be understood as sustainable or viable entry. In evaluating whether entry into a market is easy it is necessary to consider not only whether it is easy for a newcomer to place a foot in the door but also whether it is likely that the firm will survive.

Reference: *Nielsen, supra*, at p. 269

277. In light of the jurisprudence, the inescapable conclusion is that the SDP is a barrier to entry and expansion in the Relevant Markets. Furthermore, given the absence of evidence of ease of entry, Bibby's market shares of more than 80% necessarily imply that Bibby has market power in the Relevant Markets.

Section D : Section 79(1)(b): Bibby's Practice of Anti-Competitive Acts

278. The second element of section 79(1) requires proof that Bibby has engaged in (i) a practice (ii) of anti-competitive acts.

279. Bibby's SDP alone qualifies as a practice. In addition, Bibby's strategy of acquiring rival firms and/or their inventories of competing product and its use of restrictive covenants also forms part of this practice.

The SDP

280. In this case, there is evidence that Bibby's subjective intent of the SDP and of its acquisition strategy was to exclude and discipline existing and potential competitors. The evidence also establishes that the necessary consequences of these acts are anti-competitive.

281. The evidence of Bibby's subjective intent is to eliminate and restrict competition through implementation of the SDP. It is also clear on the evidence that the inevitable consequence of the SDP has been to eliminate and restrict competition:

- (a) Nagel indicated that foreign and domestic competition were not going to be accepted by Bibby. Bibby is able to achieve this by enforcing the SDP.

Reference: Nagel DE p. 416

- (b) Corriveau testified that during a meeting held on November 10, 1997, Leonard indicated that he wanted to eliminate importers. There was also an indication during that meeting that McWane had done that to a company in the U.S.

Reference: Corriveau DE pp. 2020 and 2034

282. The evidence shows that Bibby has locked-in virtually all distributors of cast iron DWV products into the SDP. All of the major distributors (with the exception of Wolseley in the West) deal exclusively with Bibby and 90% of cast iron DWV pipe, fittings and MJ couplings sales in Canada are made through Bibby's stocking distributors.

283. The SDP induces distributors to deal exclusively with Bibby as the loyalty requirement makes the price of the last unit of purchase from Bibby very low (even negative) and the price of moving the last purchase to a competitor very high as a distributor would have to surrender significant rebates on all its previous purchases.

Reference: Ross Report, p. 30, 100

284. As described above, Bibby offers, through the SDP, significant discounts off Bibby's list price in addition to quarterly and annual rebates to stocking distributors, i.e., to distributors that purchase all of their cast iron DWV products from Bibby during a year.

285. As a result, a new or existing competitor of Bibby has two alternatives. The first is to compete at the margin, that is solely for small portions of a distributor's requirement. The second is to compete for the buyer's total requirements.

286. Competition at the margin has proven to be unsuccessful as 99.9% of Bibby's sales of cast iron DWV pipe, fittings and MJ couplings are made through stocking distributors.

Reference: Ross Report, Appendix 3, Section 3.1, p. 71

287. As such, the SDP has eliminated competition *in* the market, that is, competition at the margin. The only type of competition that remains is periodic rivalry for each buyer's *total* requirement.

288. This would not be in itself anti-competitive if a large number of firms were able to compete with Bibby on roughly equal terms for each distributor's total requirement.

Reference: Ross Report, p. 32, 105 to 107

289. However, because of the significant advantages that Bibby has over its rivals, the SDP represents a barrier to entry and expansion in the Relevant Markets and, as such, a practice of anti-competitive acts. One such advantage is reputation. A distributor may be reluctant to entrust all their need to an unknown and untested new supplier.

Reference: Ross Report, at 105

NutraSweet, supra, at p. 70

290. A second advantage is that Bibby is the only supplier of cast iron DWV products that carries a full product line and therefore is the only firm that can satisfy all of a distributor's requirements.

291. In the circumstances, the SDP has created, entrenched and enhanced Bibby's market power in the Relevant Markets.

292. Dr. Ware has argued that the SDP protects the investment that Bibby has made and is marketing cast iron.

293. As discussed above, the evidence is that Bibby's intent in creating the SDP was to eliminate and restrict competition.

294. There is also no evidence that protection of Bibby's investment in the marketing of cast iron DWV products outweighs the anti-competitive effects of the SDP, nor can Bibby's self-interest justify an anti-competitive act.

Acquisition Strategy and Restrictive Covenants

295. Bibby's expressed purpose of its strategy of acquiring rival firms or their inventories of competing product and its use of restrictive covenants on the vendors was also to eliminate competition and raise prices:

- (a) Demeny stated that the strategy was to buy the markets by eliminating competitors and being free to move price up to increase returns on investment. Demeny was told by his employer, Bibby, to assess competition in the marketplace and to eliminate Cremco. The philosophy was to dramatically and rapidly reduce the price in the trading area of Cremco and increase the price in the other regions where Cremco was not operating. Bibby's view was that it had bought the Canadian market and controlled it and there was no room for such a competitor.

Reference: Demeny DE pp. 943, 949-952, 977-976

- (b) Leonard told Bouthillette he hoped that BMI wouldn't sell any more cast iron products as long as he was on this earth.

Reference: Bouthillette DE pp. 2534-45

296. The inevitable consequence of this strategy was to eliminate and restrict competition:

- (a) Tester explained that when BMI was purchased by Bibby, prices subsequently went up.

Reference: Tester DE p. 1868

- (b) Demeny stated that withdrawal of Tyler from the Canadian market allowed Bibby to start to ratchet prices upwards very dramatically.

Reference: Demeny DE p. 1930

Conclusion

297. Bibby's SDP, its pattern of acquisitions and use of restrictive covenants qualify as an anti-competitive act in that the purpose of these acts is exclusionary.

298. As discussed above, the Tribunal tests for anti-competitive purpose by asking whether an act is done for a predatory, exclusionary or disciplinary reason. The verbal or written statements of the personnel of a company are likely to establish subjective intent. Consideration of the act itself may lead to an inferred purpose, because persons are assumed to intend the necessary and foreseeable consequences of their acts.

Reference: *Laidlaw, supra*, at pp. 342-343

Nielsen, supra, at p. 257

Abuse of Dominance Guidelines at p. 18.

299. Proof of an efficiency or pro-competitive business justification can be used to refute the alleged anti-competitive nature of the acts in question. However, the Tribunal has cautioned that the existence of some legitimate business purpose will not on its own be sufficient to justify the use of anti-competitive acts when a party enjoys substantial market power.

Reference: *Nielsen, supra*, at p. 265

300. The Tribunal has also held self-interest does not constitute a business justification that merits consideration in this context.

Reference: *Nielsen, supra*, at p. 261

301. Finally, any business justification must be weighed in light of any anti-competitive effects to establish the over-riding purpose of the challenged act.

Reference: *Tele-Direct, supra*, at p. 180

302. As discussed above, the Tribunal has held that preferred supplier clauses, like the SDP, constituted a practice of anti-competitive acts. In fact, the SDP is even more egregious than the clauses considered in previous cases, because it involves both exclusivity and full-line forcing. The Tribunal has also held, in *Laidlaw*, that a pattern of acquisitions coupled with evidence of surrounding circumstances, including restrictive covenants, constituted a practice of anti-competitive acts.

Reference: *Laidlaw, supra*, at p. 333

303. In this case, the evidence is that Bibby's intent of the SDP and its acquisitions was and is to eliminate and restrict competition. The evidence also establishes that the elimination and restriction of competition is a necessary and foreseeable consequence of these acts. Finally,

there is no evidence of a credible business justification that outweighs the anti-competitive effects of Bibby's practice of anti-competitive acts.

Section E: Section 79(1)(c): Substantial Lessening or Prevention of Competition

304. The evidence in this case demonstrates that the SDP and Bibby's acquisition strategy and its use of restrictive covenants have had, are having or are likely to have the effect of preventing or lessening competition substantially in the Relevant Markets.

305. As discussed above, the exclusivity and full-line forcing elements of the SDP have effectively foreclosed access to the distributors of cast iron DWV products by new entrants and existing competitors. By raising barriers to entry and expansion, the SDP has therefore clearly resulted in a substantial lessening or prevention of competition in the Relevant Markets.

306. Bibby's strategy of acquiring rivals or their inventories of cast iron DWV products and the use of restrictive covenants have eliminated competitors and therefore have also resulted in a substantial lessening or prevention of competition in the Relevant Markets.

Pattern of Acquisitions

307. As part of the acquisition of Bibby by Canada Pipe, Tyler withdrew from the Canadian markets. Subsequently Bibby's parent, Canada Pipe, purchased Cremco and the cast iron DWV inventory of BMI. These competitors are no longer active in the Relevant Markets.

308. The intent of these acquisitions was to eliminate competition and raise prices:

- (a) Demeny stated that the strategy was to buy the markets by eliminating competitors and being free to move price up to increase returns on investment.

Demeny was told by his employer, Bibby, to assess competition in the marketplace and to eliminate Cremco. The philosophy was to dramatically and rapidly reduce the price in the trading area of Cremco and increase the price in the other regions where Cremco was not operating. Bibby's view was that it had bought the Canadian market and controlled and there was no room for such a competitor.

Reference: Demeny DE pp. 943, 949-952, 977-976

- (b) Leonard told Bouthillette he hoped that BMI would not sell any more cast iron products as long as he was on this earth.

Reference: Bouthillette DE pp. 2534-2545

309. There is also uncontradicted evidence that following the acquisitions, Bibby raised its prices:

- (a) Tester explained that when BMI was purchased by Bibby, prices subsequently went up;

Reference: Tester DE pp. 1868

- (b) Demeny stated that withdrawal of Tyler from the Canadian market allowed Bibby to start to ratchet prices upwards very dramatically.

Reference: Demeny DE p. 1930

The SDP

310. As discussed in Part V, Bibby's expressed purpose of the SDP was to eliminate competition in the Relevant Markets.

311. Dr. Ross opined that the SDP had and was resulting in a substantial lessening and prevention of competition in the Relevant Markets.

Reference: Ross DE p. 3531

312. The evidence is that Vandem is not viable because of the SDP:

(a) “Vandem jobs continue to be scarce. I have encountered 2 jobs with Vandem product during January.”

Reference: JB18-869-1

(b) **[CONFIDENTIAL]**

(c) Promoli indicates that the business proposition made by Demeny and Vanderwater to Crowe Foundry was a viable business proposition. He says they both knew the market. Nevertheless, Vandem has not been successful.

Reference: Promoli DE p. 546

(d) Beaulac says that there was significant information circulating in the market that the longer the [Tribunal] hearings last, the less viable becomes Vandem. The clear implication is that without a remedy by the Tribunal, Vandem is not viable.

Reference: Beaulac DE pp. 1640-1641

313. The evidence is that importers are small niche players due to the SDP:

Importers have minimal market share in the Relevant Markets.

Lim testified that the impact was huge; “it was 75% of our business was with Wolseley, so when that ended very abruptly it had a big impact.”

Reference: Lim DE pp. 2411-2412

Kirkpatrick testified that the SDP limits Fernco Connectors market to small and independent distributors.

Reference: Kirkpatrick DE p. 2164

314. Notwithstanding Bibby's prices, competitors cannot sell their product due to the SDP:

- (a) Vansell says that there was no longer any need for Bibby to worry about price because it locked up all of its distributors with its loyalty program, which from 1998, Bibby was able to sell in the market MJ couplings from 15 to 30 percent more expensive than Mission. He also reiterates that none of the distributors would take the chance to purchase from it since they are tied in. Even though Mission's prices show a 25 percent difference less expensive than Bibby Mission has never been able to encourage customers to abandon Bibby for it.

Reference: Vansell DE pp. 2631-2632 and 2643-2644

- (b) Promoli testified that the price of imports are significantly below North American pricing and despite lower prices imports have difficulties to enter into Canada.

Reference: Promoli DE p. 628

- (c) Keon said that price of imports was lower. BMI prices were 20 to 25 percent cheaper than Bibby but still it was unable to sell its fittings into the market.

Reference: Keon DE p. 2800

315. The evidence is that Bibby was able to increase its prices in 1999 by more than 25%, when Bibby locked Wolseley back into the SDP in B.C.:

- (a) Corriveau testified that when Wolseley brought B.C. into the SDP in 1999 prices in B.C. started increasing.

Reference: Corriveau DE pp. 2009-2010

- (b) Bibby states “With Westburne on board in Western Canada, we have announced price increases for the next year of 27%”.

Reference: JB10-459 & JB10-474

316. The evidence is that the SDP has precluded entry and restricted the expansion of potential and existing competitors in the Relevant Markets:

- (a) Kelm testified that he does not want to expand too much. The reason for this is that Bibby told him during a meeting “Don’t let success be your demise”. If Kelm expands too much Bibby has told him that it will drop prices 30%.

Reference: Kelm DE pp. 2263-2265

- (b) Beaulac states that Bibby’s SDP has had an impact on BMI, Idomax and Mission. The impact was either they are no longer in the market or they have had little chance to expand in the market.

Reference: Beaulac DE p. 1641

- (c) O’Brien said that after efforts over about a year and a half had resulted in getting sales that represented less than 1% of their total sales in their total business in Canada he felt it was in Ideal’s best interest to take back the responsibility for the

sale of MJ couplings in Canada. In August 2002 when O'Brien left Gates Canada Gates had no involvement with MJ couplings.

Reference: O'Brien DE pp. 2213 and 2216-2218

- (d) Bouthillette said that customers who previously bought cast iron DWV fittings from BMI advised that they could no longer support BMI in 1999 because of Bibby's new program. He said that they were successfully competing with Bibby in 1997, business was growing every year. In 1997 BMI's margins on cast iron fittings were around 30 to 35% and cast iron fittings sales represented approximately 15% of BMI's total sales. He also said that at that time they were looking to add products to the line. When the SDP was put in place, BMI decided to not go ahead with the expansion.

Reference: Bouthillette DE pp. 2514 and 2519-2523

317. As set out above, a practice of anti-competitive acts will be considered to result in a substantial lessening or prevention of competition if it serves to preserve, entrench or enhance a firm's market power. In any given case, the degree of dominance, the nature and the severity of the anti-competitive acts and the degree of competition remaining in the market will all form part of the assessment.

318. In *Laidlaw*, the Tribunal set out the following tests for assessing the impact of the anti-competitive acts on the Relevant Markets:

... the substantial lessening which is to be assessed need not necessarily be proved by weighing the competitiveness of the market in the past with its competitiveness at present. Substantial lessening can also be assessed by reference to the competitiveness of the market in the presence of the anti-competitive acts and its likely competitiveness in their absence.

Reference: *Laidlaw, supra*, at p. 346

319. The Tribunal has also held that “Where a firm with a high degree of market power is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from the conduct will meet the test of being “substantial” than where the market situation was less uncompetitive to begin with.”

Reference: *Tele-Direct, supra*, at p.247

320. Given Bibby’s market share of more than 80 percent in the Relevant Markets, a small impact on competition resulting from Bibby’s practice of anti-competitive acts is sufficient to establish a lessening or prevention of competition that is substantial. However, in this case, the impact on competition is severe.

321. Bibby, through the SDP, its acquisition strategy and its use of restrictive covenants was able to create, entrench and enhance its market power. The practice of anti-competitive acts resulted in a substantial lessening of competition when Bibby forced competitors to exit the Relevant Markets and raised its prices. The practice of anti-competitive acts also resulted in a substantial prevention of competition by precluding entry and restricting expansion of potential and existing competitors in the Relevant Markets. This prevented Bibby’s prices from falling and preserved Bibby’s high profit margins.

PART VII: EXCLUSIVE DEALING

Summary: Exclusive Dealing

Section 77 of the Act defines exclusive dealing. Bibby is a major supplier of cast iron DWV pipe, fittings and MJ couplings in the relevant geographic markets. Moreover, Bibby's practice of exclusive dealing is widespread in the Relevant Markets. On the evidence, the exclusivity resulting from the SDP impedes entry into and expansion in the Relevant Markets. Distributors are required to purchase all three cast iron DWV products from Bibby or lose extraordinary pricing advantages. The SDP also places at risk rebates on a quarterly and annual basis. These rebates represent most of a distributor's profits for the year.

The exclusivity requirement is strictly monitored and so effectively enforced that no distributor on the SDP has chosen to fully leave the program. Other distributors are compelled to join the SDP when they have been purchased by existing Bibby distributors.

The relevant and necessary elements of section 77 have been met on the evidence.

322. Section 77(2) of the Act states:

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

- (a) impede entry into or expansion of a firm in a market,
- (b) impede introduction of a product into or expansion of sales of a product in a market, or
- (c) have any other exclusionary effect in a market,

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

323. For the purposes of this provision, “exclusive dealing” is defined in subs. 77(1) as follows:

“exclusive dealing” means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to (i) deal only or primarily in products supplied by or designated by the supplier or the supplier’s nominee, or (ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or nominee, and

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

324. In order to obtain a remedy under section 77(2), the Commissioner must establish that Bibby has engaged in exclusive dealing, as defined in subsection 77(1), that Bibby is a major supplier of the relevant products, and that the practice of exclusive dealing, because it is engaged in by a major supplier or is widespread in a market, has had an exclusionary effect on a market with the result that competition is or is likely to be lessened substantially.

325. A practice of anti-competitive acts will be considered to result in a substantial lessening or prevention of competition if it serves to preserve, entrench or enhance a firm’s market power. In any given case, the degree of dominance, the nature and severity of the anti-competitive acts and the degree of competition remaining in the market will all form part of the assessment.

326. Bibby’s SDP satisfies all of the elements of section 77(2).

327. This portion of the submission is logically divided into three parts: (i) exclusive dealing; (ii) major supplier/ widespread use; and (iii) substantial lessening of competition.

(i) Exclusive Dealing

328. The SDP qualifies as exclusive dealing. For all the reasons discussed above, the SDP constitutes a practice.

329. It is also clear from para. 77(1)(b) that a practice that induces a customer to deal exclusively in products supplied by the supplier or that induces a customer to refrain from purchasing products from other suppliers qualifies as “exclusive dealing” for the purposes of section 77.

330. In order to obtain the very substantial discounts and rebates offered under the SDP, a customer must purchase all of its cast iron DWV pipe, fittings and MJ couplings from Bibby and cannot purchase DWV pipe, fittings and MJ couplings from any supplier other than Bibby. Distributors that participate in the SDP pay highly discounted prices for the three relevant products. The evidence has established that a distributor cannot be competitive or profitable at non-stocking distributor prices.

331. In this regard, the SDP is analogous to the preferred supplier clauses that were before the Tribunal in *NutraSweet*. In that case the Tribunal concluded that financial incentives to exclusivity qualified as exclusive dealing within the meaning of paragraph 77(1)(b) of the *Act*:

Therefore we conclude that the financial incentives and exclusivity clause amount to exclusive dealing within the meaning of paragraph 77(1)(b): the customers clearly agreed to deal only or primarily in the products of NSC and in return received various rebates whose existence depends on exclusive use of Nutrasweet brand aspartame.

Reference: *NutraSweet, supra*, at p. 54

(ii) Major Supplier/ Widespread Use

332. A major supplier “is one whose actions are taken to have an appreciable or significant impact on the markets where it sells”. Market share is a good indicator of its importance, along with characteristics such as financial strength and record as an innovator, and possibly other factors depending on the industry.

Reference: *Canada (Director of Investigation and Research) v. Bombardier Ltd. (1980)*, 53 C.P.R. (2d) 47 at p. 55 (as cited in *NutraSweet*)

333. A firm with market power clearly qualifies as a “major supplier”.

Reference: *Tele-Direct, supra*, at p. 107

334. A practice has been found to be widespread in a market where virtually all customers buy pursuant to requirements contracts from a supplier.

Reference: *NutraSweet, supra*, at p. 55

335. As set out above, Bibby has market power in the relevant geographic markets for cast iron DWV pipe, fittings and MJ couplings. Bibby’s actions have also clearly had an appreciable impact on the Relevant Markets.

336. Bibby’s market share is well in excess of 80% in all of the Relevant Markets.

337. The following factors also establish that Bibby has a significant impact on the Relevant Markets: only Bibby can supply a full line of the three relevant products; all of the major distributors (with the exception of Wolseley in Western Canada) deal exclusively with Bibby; 90% of cast iron DWV pipe, fittings and MJ couplings is sold through Bibby stocking

distributors; and Bibby's reputation and financial strength is unparalleled in the Relevant Markets.

338. The evidence also clearly establishes that Bibby's practice of exclusive dealing is widespread in the Relevant Markets. Again, all of the major distributors (with the exception of Wolseley in the West) deal exclusively with Bibby and 90% of cast iron DWV pipe and fittings and MJ couplings is sold through Bibby stocking distributors.

(iii) Substantial Lessening of Competition

339. Paragraphs (a), (b) and (c) of section 77 require an assessment of whether the exclusive dealing behaviour is likely to impede entry into or expansion of a firm in a market, impede the introduction of a product into or expansion of sales of a product in a market or have any other exclusionary effect in a market with the result that competition is or is likely to be lessened substantially.

340. In *NutraSweet*, the Tribunal held that paragraphs (a), (b) and (c) are appropriately considered as part of the overall question of whether the exclusive dealing results in a substantial lessening of competition:

There remains the further question of whether there has been a "substantial lessening of competition". Paragraphs (a), (b) and (c) of subsection 77(2) are most conveniently, and logically, considered as part of the overall question of whether the exclusive dealing results in a substantial lessening of competition in the market. These paragraphs provide clarification of how such an effect on competition can be achieved. This was the approach adopted in *Bombardier* [at p 56]:

Whether exclusive dealing by a supplier impedes expansion or entry of competitors in the market is most easily and meaningfully considered as part of the determination of

whether there is or is likely to be a substantial lessening of competition as a result of the practice.

Reference: *NutraSweet, supra*, at pp. 55-56

(iv) Conclusion

341. In concluding in *NutraSweet* that the preferred supplier clauses satisfied this third element of section 77, the Tribunal held that the test for substantial lessening of competition is the same under sections 77 and 79 of the *Act*.

The effect on competition of exclusivity and the related contractual terms, specifically the logo display allowance and cooperative marketing funds, have been discussed thoroughly in the context of section 79. Since the fundamental test of substantial lessening of competition is the same in both sections of the *Act*, the same conclusions apply.

Reference: *NutraSweet, supra*, at p. 56

342. For all the reasons discussed above, Bibby's practice of exclusive dealing, under the SDP has impeded entry and expansion of competitors in Canadian markets for cast iron DWV pipe, fittings and MJ couplings, resulting in a substantial lessening of competition.

PART VIII: REMEDY

Summary: Remedy

Under s. 79, the choice of remedy should address the substantial lessening or prevention of competition created by the practice of anti-competitive acts used by the dominant firm in the relevant market.

The remedy must prohibit Bibby's practice of anti-competitive acts and restore competition to the point it would be if the practice of anti-competitive acts had not occurred.

343. Bibby was purchased by the McWane group of Companies in 1997 through a McWane subsidiary, Canada Pipe. Canada Pipe insisted upon non-competition covenants from the vendor of Bibby and its related companies that were owned by Gooding. The non-competition covenants excluded Titan Foundry and Associated Foundry from competing with Bibby in the Canadian market. At the same time, McWane caused Tyler Pipe to withdraw from the Canadian market, thereby continuing its attempt to exert enhanced market power in Canada. After Bibby had an opportunity to get to understand the Canadian market, it eliminated competition by purchasing companies or inventory. In particular, it purchased Cremco and purchased the inventory of BMI.

344. With respect to the rest of any potential competitors, Bibby intentionally created the SDP in the words of Leonard, Bibby's highest-ranking Canadian officer, to "eliminate importers". The elimination of competition was a consistent theme in Bibby's actions towards importers (New Centurion, Sierra and Mission Rubber) and towards Vandem, the only domestic supplier and new entrant in the cast iron pipe fitting and MJ coupling industry. The terms of the SDP demanded exclusivity and full line-forcing in relation to the three products. Through its enforcement and monitoring techniques, Bibby ensured that the SDP was followed to the letter

and that the distributors knew that Bibby was willing in the future to enforce the SDP by asking them to leave the program or receive diminished rebates. The reduced prices and rebates to those who joined the stock distributor program amounted to effective prices which were up to 70% less than those who did not join the SDP. The rebates represented a significant portion of profits of a distributor for cast iron DWV pipe, fittings and MJ couplings. The impact of the SDP is to raise prices and margins for Bibby so that it can obtain super-normal profits.

345. The combined effect of the above is a substantial prevention and lessening of competition through the foreclosing of the distribution network.

346. The harm is a substantial lessening or prevention of competition in the Relevant Markets. The practice of anti-competitive acts is centered on Bibby's SDP. In addition, Bibby's acquisition strategy and its use of restrictive covenants form part of this practice. Together, they amount to a practice that has expressly and impliedly eliminated and prevented competition. As a result, Bibby was able to achieve and maintain a market share in excess of 82% in the Relevant Markets.

347. In fashioning a remedy, the remedial action requested must match the harm but not extend beyond the actual harm determined. The central remedy is the elimination of the exclusivity and full-line forcing from any loyalty program put forward by Bibby.

348. The question of the appropriate remedy was examined in detail by the Supreme Court of Canada in *Director of Investigation v. Southam Inc.*, [1997] 1 S.C.R. 748 at 788:

The evil to which the drafters of the Competition Act address themselves is substantial lessening of competition. See Competition Act section 92 (1). It hardly needs arguing that the appropriate remedy for a substantial lessening of competition is to

restore competition to the point at which it can no longer be said to be substantially less than it was before the merger.

349. The Supreme Court went on to say at page 791 that :

If the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy does not go far enough event o reach the acceptable level, then surely the former option must be preferred. At the very least, a remedy must be effective. If the least intrusive of the possible effective remedies overshoots the mark, that is perhaps unfortunate but from a legal point of view, such a remedy is not effective.

350. In the circumstances of this case, and having regard to the long-standing conduct of Bibby in exercising market power through the SDP, the following orders are appropriate:

- (a) an order pursuant to s. 79 (1) and (2) of the *Competition Act* prohibiting the Respondent from engaging in the practice of anti-competitive acts specified herein and directing the Respondent to take such actions as are reasonable and necessary to overcome the effects of the said practice, including:
 - (i) that the Respondent be prohibited from adopting a rebate or loyalty program that provides a rebate structure based on exclusive purchases of any of the three relevant products from Bibby or any other entity controlled by, or agent or affiliate of, the Respondent;
 - (ii) that the Respondent be prohibited from entering into, or enforcing, any contracts with distributors or end-users that provide a rebate structure based on exclusive purchases of any of the three relevant products from Bibby or any other entity controlled by, or agent or affiliate of, the Respondent in any of the six relevant geographic markets;

- (iii) that the Respondent be prohibited from offering any discounts or rebates based on purchases of previous years;
- (iv) that the Respondent be prohibited from offering any inducement to distributors or end-users to buy exclusively any of the three relevant products from Bibby or any other entity controlled by, or agent or affiliate of, the Respondent in any of the six relevant geographic markets;
- (v) that the Respondent be prohibited from continuing to engage in exclusive dealing and full-line forcing with its customers in respect of the three relevant products;
- (vi) declaring null and void all provisions, terms and conditions in Bibby's contracts with its customers providing for a rebate structure based on exclusive purchases of the three relevant products from Bibby or any other entity controlled by, or agent or affiliate of, the Respondent in the six relevant geographic markets;
- (vii) that the Respondent, its affiliates, officers or agents be prohibited from any acquisition or establishment, direct or indirect, of any interest or control in or over the whole or a part of the business of any manufacturer, supplier or distributor of cast iron DWV pipe, fittings and MJ couplings in Canada for the three years following the date of the order; and,
- (viii) requiring the Respondent and its affiliates, officers or agents to notify the Merger Notification Unit of the Competition Bureau of any such

acquisition or establishment in Canada for the three years following the initial three-year period in subparagraph (vii), even if the party-size and transaction-size thresholds found in sections 109 and 110 of the *Act* are not exceeded;

- (b) an order pursuant to s. 77(2) of the *Competition Act* prohibiting the Respondent from continuing to engage in the practice of exclusive dealing and to take such further steps as are necessary to restore or stimulate competition in the market, including:
 - (i) that the Respondent be prohibited from adopting a loyalty program based on exclusive purchases of any of the three relevant products from Bibby or any other entity controlled by, or agent or affiliate of, the Respondent;
 - (ii) that the Respondent be prohibited from entering into or enforcing any contracts with distributors or end-users that provide a rebate structure based on exclusive purchases of any of the three relevant products from Bibby or any other entity controlled by, or agent or affiliate of, the Respondent in any of the six relevant geographic markets;
 - (iii) that the Respondent be prohibited from offering any discounts or rebates based on purchases of previous years from Bibby or any other entity controlled by, or agent or affiliate of, the Respondent;
 - (iv) that the Respondent be prohibited from offering any inducement to distributors or end-users to buy exclusively any of the three relevant

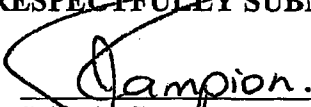
products from Bibby or any other entity controlled by, or agent or affiliate of, the Respondent in any of the six relevant geographic markets;

- (v) that the Respondent be prohibited from continuing to engage in exclusive dealing and full-line forcing with its customers in respect of the three relevant products; and,

declaring null and void all provisions, terms and conditions in contracts between Bibby and its customers that provide for a rebate structure based on exclusive purchases of the three relevant products from Bibby or any other entity controlled by, or agent or affiliate of, the Respondent in any of the six relevant geographic markets.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date:



John A. Campion
On behalf of all counsel and the Commissioner

Counsel for the Commissioner of Competition

APPENDIX A

SECTION A: DEFINITIONS

351. In addition to those terms already defined in Parts I and II, the following terms will be used throughout this submission and have the following meanings:

“Asbestos-cement” DWV products – pipe and fittings made of a material comprised of a mixture of asbestos and cement.

“Cast iron” – A hard, brittle, non-malleable iron-carbon alloy, made in a foundry and cast into shape.

Cast iron **“pipe”** - Cast iron DWV pipes **are** hollow cylinders or tubes, of varying length and diameter, made of cast iron in a foundry. Also called “soil pipe”.

“Copper” DWV products – copper alloy metal DWV pipe and fittings that are generally of small diameters.

Drain, waste and vent (**“DWV”**) – a system in a building for the disposal of wastewater. Drainage refers primarily to rainwater from roofs and other horizontal surfaces; waste applies to water from sinks, toilets and other fixtures and appliances; venting permits air into the drainage and waste systems.

"Final Price" - the effective price of the top selling Bibby products for stocking distributors. It is the price once the multipliers and quarterly and annual rebates are deducted from the list price.

Cast iron **“fittings”** - Cast iron fittings are moulded cast iron shapes used to connect and re-direct pipe in a DWV system. They come in a variety of configurations (*e.g.*, elbow, ell, tee, cross, hex) and diameters. In this case, scrap iron is heated and placed in moulds for the various fitting shapes.

“Fire-stopping” – the procedure for sealing an opening in a fire separation through which DWV piping must pass, such as through a wall or barrier, or between floors in a multi-story building. The space between the outside of the pipe (or fitting) and the hole must be sealed so as to prevent the spread of flame and smoke from one area to another. Caulking is generally used for cast iron while fire-stopping devices known as “doughnuts” are generally used for plastic.⁷

“MJ couplings” – Mechanical joint, or “MJ” couplings, consist of multiple stainless steel bands that are attached to a corrugated stainless steel shield over a moulded one-piece rubber sealing sleeve. MJ couplings come in a variety of dimensions and are used to bind and seal fittings to pipes and one pipe to another. MJ couplings are not usually made in a foundry. They are also known as “no-hub” couplings.

Reference: Kirkpatrick DE p. 2157-58.

National Building **Code** of Canada (“NBC”, or the “**Code**”) – the model building and construction regulation developed for Canada by the National Research Council. Adopted without modification by some provincial, territorial and municipal authorities,

⁷ Bornhorst described a doughnut as a metal collar surrounding intumescent material, which material will expand to approximately 13 times its normal size when heated, thus sealing the pipe and the opening: Bornhorst DE p. 2688.

or adopted with modifications to suit local conditions by some authorities. The current version was revised in 1995.

Reference: Expert Report of Josef Zorko, Exhibit A-10, at p. 5

“Plastic” DWV products – essentially two types of polymer plastics are used for DWV applications although others exist.⁸ One is Acrylonitrine-Butadiene Styrene (**“ABS”**), the other is Polyvinyl Chloride (**“PVC”**).

“Plenum” – a horizontal space in a building, such as between floors or between a ceiling and a roof, which sometimes contains DWV and other building services.

Reference: Zorko DE p. 3026

“Stocking distributor” – a distributor that is on the SDP and thus buys all of its cast iron DWV pipe and fittings and MJ couplings from Bibby. A **“non-stocking distributor”** is one who does not to participate in the SDP.

“Top-Selling Cast Iron DWV Pipe and Cast Iron DWV Fittings” - in Appendix 3, Section 1 of his report, Dr. Ross analyzed Bibby's sales by year for its three top selling cast iron DWV pipe and cast iron DWV fittings and MJ couplings.

“Vertical shaft” – a hollow, usually **rectangular**, space running from the foundation of a building to the roof, usually containing DWV systems, ducting systems, wiring and other building services. The DWV system in a vertical shaft is sometimes called the **“vertical stack”**.

Reference: Zorko DE p. 3036-37

⁸ A more complete list appears in the Expert Report of Josef Zorko, Exhibit A-10, at p. 12, Table 3.

“XFR” – a recently introduced PVC product, manufactured in Canada by IPEX Inc. (“IPEX”). Pipe and fittings are coated with an intumescent coating that limits flame spread and smoke development.

WITNESSES APPEARING ON BEHALF OF THE COMMISSIONER OF COMPETITION

SECTION B. SUPPLIERS AND FORMER BIBBY EMPLOYEES

(i) Russell Demeny

Formerly Vice-President of Sales and Marketing for the Mechanical Division of Bibby until 1997. Demeny is the President of Vandem, which he started with Vanderwater in 1999 to compete with Bibby. He stated that 25% to 40% of Vandem’s \$4 million in annual sales were in the Canadian markets.

Demeny testified that the SDP was designed to address the problem of Bibby’s cast iron competitors. Mr. Nolan, a Ransom Industries employee, told him the SDP would virtually tie up distributors and they would not be able to consider alternative sources of supply. Demeny also gave evidence that the introduction of the SDP was to help Bibby control the cast iron market and would allow it to drive up prices in the absence of a competitor. He testified that prior to the SDP, Bibby paid rebates based on volume purchased and did not require exclusivity.

He described Canada Pipe’s strategy of buying the markets by eliminating competitors such as Cremco and Tyler Pipe, leaving Bibby free to move prices up. Moreover, he indicated that the intent of the acquisitions was to increase pricing.

He also testified that Vandem does not have access to large distributors due to the SDP. He also explained that because of the SDP a new entrant must be able to supply all of a distributor’s cast iron DWV requirements in order to get the distributor’s business. He agreed that Vandem has entered the cast iron market notwithstanding it is a mature industry, and in the face of the SDP.

(ii) Jim Vanderwater

Vanderwater was the CEO of Bibby until 1997. He is the Vice-President and co-founder of Vandem. He explained how Vandem commenced operations as the first new cast iron manufacturer in Canada in 30 years.

He testified that because of the SDP, Bibby’s distributors do not want to purchase from Vandem. In particular, the SDP ties together cast iron DWV pipe and fittings, and MJ couplings, and a distributor has to purchase 100% of their products from Bibby. He also described how Vandem lost Nuroc’s business following Nuroc’s acquisition by Wolseley, by reason of Bibby enforcing its SDP against all of Wolseley’s business in 2003.

He explained Vandem's financial situation as of March 2004. [Confidential] He conceded that Vandem put less effort into the Western Canada due to cheaper imports and the freight costs to ship to that market.

(iii) Michael Promoli

President of Crowe Foundry, located in Cambridge, Ontario. Crowe Foundry produces cast iron pipe for Vandem and owns 50% of the company.

Promoli testified that Vandem has not had sufficient success in establishing a presence in the Canadian market. Although he considered Demeny's and Vanderwater's initial business proposal to Crowe Foundry was a viable one, and that Vandem produces quality products, it has not been able to make inroads with the major distributors. The reticence of national distributors is linked to Bibby's SDP and to Vandem's inability to supply adequately. Promoli also described the difficulties he expected would be encountered in order to start producing fittings, and the difficulties encountered by importers to enter the markets despite their lower prices.

Although he has no personal knowledge, he has information from Vandem that it faces competition from plastics, in general, and that IPEX was a threat. He was not, however, asked in which markets this might occur. He believes Bibby was expected to lower its prices in response to Vandem entering the market.

(iv) Gary Nagel

An employee of Bibby Ste-Croix from 1990 to 1999. He testified about the implementation and terms and conditions of the SDP. In particular, he explained the main distinction of the SDP between stocking distributors and non-stocking distributors. Stocking distributors enjoy significant preferential discounts by virtue of discounts and rebates. He explained that in order to obtain stocking distributor status, a distributor must purchase all its cast iron pipe and fittings and MJ couplings exclusively from Bibby.

Nagel also described Bibby's enforcement of the SDP by controlling and monitoring the market. He testified the SDP does not allow any alternative source of supply and eliminates competition. Prior to the SDP, Bibby had a volume-based program. He gave evidence that following the acquisition of Bibby, Canada Pipe caused Tyler Pipe to exit the Canadian market.

He also testified that cast iron is mainly used in high-rise and commercial buildings and that cast iron and plastics cannot compete over a certain height. Although he was asked about other DWV products competing in general against cast iron, such as copper and asbestos-cement, he was not asked to describe in which markets that occurs.

Nagel was nervous giving testimony. He was concerned there could be repercussions to his livelihood from Bibby or McWane.

(v) Peter Kirkpatrick

National Sales Manager of Fernco, an importer and reseller of MJ couplings in Canada from the U.S. Fernco's couplings are offered at volume discounts.

He explained the differences between flexible and MJ couplings. He testified that Bibby is the dominant player in the MJ couplings markets in Canada. He said that due to the SDP, Fernco is forced to sell MJ couplings to small and independent distributors who are not part of the SDP. Fernco is precluded from selling to large distributors due to the SDP. Distributors have advised Fernco that they are tied up to the SDP. Even with a recognized name, a large sales force and customer service features, Fernco is still prevented by the SDP from obtaining business from the large distributors. Fernco was able to sell to Wolseley on one occasion only because Bibby was unable to meet the demand. He testified that no other Canadian suppliers have programs like Bibby's.

(vi) Matt O'Brien

Formerly the Vice-President Sales and Marketing, Specialty Markets Division with Gates Canada. He attempted to sell MJ couplings manufactured by Ideal Corporation in the U.S. into Canada with little success.

In the fall of 1999 Gates Canada did a number of presentations to some of the key plumbing distributors across the country but most of these presentations resulted in absolutely no orders. His information upon entering the MJ couplings market in Canada was that the market represented between \$4 million and \$5.5 million annually. Gates Canada's sales for 2000 were just under \$250,000 and there was no growth in 2001. After his efforts over about a year and a half had resulted in sales that represented less than 1% of Gates Canada's total sales, O'Brien felt it was in Ideal's best interest to take back the responsibility for the sale of MJ couplings in Canada. He understood that Bibby's customers believed their rebates would be withheld if they broke away any segment of their business from Bibby. In August 2002 when O'Brien left Gates Canada, it had no involvement with MJ couplings in Canada.

(vii) Dave Kelm

Owner and President of Sierra Marketing Inc. located in British Columbia.

He testified that when he approached distributors in 1998 to sell cast iron pipe and fittings he was told that they could not do so because they were tied into the SDP. To get around this he had to sell directly to contractors. This was much more difficult because he needed to deal with all of them and it meant a lot of smaller deliveries. He also explained that to be a serious player in the business, he needed all three products (cast iron pipe, fittings and MJ couplings). He stated that after Wolseley left the SDP in Western Canada, prices dropped by approximately 30%. He believes the market is now more competitive and prices are lower than when Sierra first entered.

During a meeting with Leonard, a Bibby representative warned him that success could be Sierra's demise. He was told by Bibby that it would drop the prices 30% once Sierra had

accumulated inventory in its yard, placed more orders and hired employees. He understood this to mean Bibby would permit Sierra to operate but not to get too successful.

(viii) Jit Lim

President of New Centurion, a British Columbia supplier of imported cast iron pipe and fittings. Its sole customer is Wolseley.

He testified to the effect that it is difficult to find a good product (imports) because there are difficulties associated with identifying a good source of supply in China. There are, however, no quality issues with imports and there are many foundries in China. Lim started looking for a source in 1982 but did not start supplying until 1995. The CSA approvals took a number of years to obtain and he had to deal with Chinese government and administration officials. New Centurion has little overhead in its operations: no warehouse, trucks or yard. Lim said that New Centurion follows Bibby's pricing in the market. The impact was huge on New Centurion because Wolseley represented 75 per cent of their business. After Wolseley stopped purchasing cast iron pipe from New Centurion in 1999, the price of pipe and fittings rose. However, since he re-entered the market in January 2002, Bibby's prices dropped significantly.

(ix) Marc Bouthillette

President of BMI, which supplied imported cast iron fittings to Canadian markets from 1993 to 1998.

BMI once looked into adding more products to its line. By the time Bibby's rebates changed, BMI had not yet found a satisfactory foundry for cast iron pipe, so it did not proceed with expansion plans. Bouthillette testified that the fact BMI did not sell cast iron pipe was problematic with certain distributors. He said BMI was successfully competing with Bibby in 1997 and business was growing every year. In 1997 the sale of cast iron fittings was profitable for BMI. In 1997, BMI's margins on cast iron fittings were approximately 30% to 35%. Cast iron fittings sales represented approximately 15% of BMI's sales. Clients were satisfied and there was no problem with the products.

Bouthillette testified how Bibby's rebate program changed after McWane acquired Bibby. There was no loyalty component prior to the acquisition. At the end of 1998, Michel Bond of his office spoke to BMI customers to attempt to convince them to continue to buy cast iron fittings from BMI but they could not be convinced because of Bibby's new SDP. BMI ultimately sold its remaining inventory to Bibby and exited the market in early 1999. Bouthillette also said that the process of obtaining CSA approval was lengthy (more than 1½ years) for cast iron DWV fittings.

(x) Chris Vansell

A Vice-President with Mission Rubber Company located in Corona, California, a U.S. manufacturer that exports MJ couplings into Canada.

Vansell testified that the SDP ties together the sale of cast iron pipe, fittings and MJ couplings and forces DWV distributors to buy all three products directly from Bibby. Due to the SDP, Mission's market opportunities with distributors are basically closed. Some customers told him

that they can no longer do business with him because of the SDP and they were not willing to risk losing the Bibby rebates, even if Mission would give its MJ couplings to distributors for free.

He stated that there was no need for Bibby to worry about prices because it had locked up all its distributors with the SDP and can charge the prices it wants. Even though Mission's prices are 24% less than Bibby's, Mission has never been able to get business or encourage customers to abandon Bibby. He testified that the SDP has excluded Mission from selling into Western Canada. He believes that Bibby's agreement to purchase from Mission for a time was an effort to placate Mission.

SECTION C: DISTRIBUTORS

(i) Roy Byrne

Vice-President of Operations at Crane. He testified about Crane's experience as a stocking distributor and the effect of the SDP.

Byrne explained his understanding of the SDP: a distributor has to purchase all of its cast iron pipe, fittings and MJ couplings from Bibby and would lose its rebates if it did not buy them exclusively from Bibby. Byrne did not like the SDP because he did not like being told how to run his business, or to have his opportunities restricted. He would prefer to otherwise look to purchase elsewhere to enhance Crane's margins. The SDP restricted his opportunities because if Crane chose to purchase elsewhere that would jeopardize the rebate program.

He explained that Crane would lose its rebates if they were caught cheating. Byrne testified that after joining the SDP, Crane purchased cheaper fittings from BMI. As a result, Crane was paid only a reduced percentage of the SDP program in Ontario.

He testified that Crane used to buy cast iron products from Tyler in the 1990's, but ceased purchasing from Tyler when it left the Canadian market. At that time, his understanding was the Tyler would be in the U.S. and Bibby would be in Canada. Crane used to buy cast iron fittings from BMI but had to stop in 1999 because BMI's inventory was purchased by Bibby.

Byrne said the SDP was not an advantage to Crane because the smaller distributors get the same level of rebates as Crane and he would have expected it to be different for larger players such as Crane. Based on Crane's volumes he would have expected better prices. Crane never bought from Vandem because it did not have a national presence and because Crane did not believe that Vandem could adequately supply it. This forced Crane to go back to Bibby for a large amount of its business.

(ii) Robert Johnston

The Vice-President of Procurement for EMCO, a national wholesale distributor of plumbing products including cast iron DWV pipe, fittings and MJ couplings. EMCO is a Bibby stocking distributor.

Johnston testified that cast iron is typically used for high-rise construction and that plastic pipe is used for housing. He stated that prior to Bibby's acquisition, EMCO was purchasing products from suppliers other than Bibby. In Johnston's experience, the SDP with its loyalty rebates and 100 percent exclusivity component is unique in the industry, and these are an inducement to remain on the program and purchase from Bibby. He expressed his concerns about having only one supplier but also said that almost half of EMCO's profit for cast iron DWV products is represented by the loyalty rebates. EMCO faced a penalty from Bibby in Alberta when it purchased cast iron DWV product from another supplier. EMCO would have reservations about switching to a new vendor with unproven product, including Vandem.

(iii) Paul Lachance

President of Wolseley Canada Inc. Wolseley has been both a stocking and a non-stocking distributor. Its operations are divided into Western and Eastern Canada.

Lachance explained his understanding of the SDP. The SDP provides a distributor discounts and quarterly and annual rebates, based on a percentage of quarterly and annual sales. To earn these rebates a distributor must purchase 100% of its cast iron pipe, fittings and MJ couplings from Bibby. The distributor must be 100% loyal; otherwise, it loses its quarterly rebate for the quarter in which the distributor is not loyal and it would lose its annual rebate. In the first quarter of 2002, Wolseley did not get its quarterly rebate since Bibby did not feel Wolseley had been loyal. **[Confidential]**

In August 2003, following the acquisition by Wolseley of a non-stocking distributor, Nuroc, Bibby told Lachance that Nuroc had to join the SDP in January 2004 otherwise Wolseley would lose its stocking distributor status and its rebates. Leonard himself delivered this message. Lachance was concerned about being dictated to and the effect on Wolseley's ability to choose sources of product. Wolseley was forced to switch Nuroc's operations to purchase products from Bibby at the risk of losing its \$80,000 Ontario rebates.

Lachance explained the reason Wolseley left the SDP in Western Canada was its margins were not high enough when purchasing from Bibby. It could purchase the same products at a lower price by buying imports and therefore increasing its margins.

(iv) Greg Tester

Tester is the General Manager at Nuroc Plumbing and Heating Supplies, now a division of Wolseley in Ontario.

He testified that the SDP requires a distributor to purchase all of its cast iron pipe, fittings and MJ couplings in order to receive rebates. He felt the SDP was unique and limited his options. He described enforcement of the SDP. Nuroc was caught purchasing from Vandem, which resulted in a Bibby sales representative advising Nuroc that it was off the SDP, without further discussion. Tester further explained how Bibby monitors compliance with the SDP. Bibby uses ratios of pipe, fittings and MJ couplings purchases to ensure distributors are purchasing the proper mix of products. He also testified that Bibby gave distributors credit notes as part of the

SDP rebates. Distributors therefore had to continue purchasing from Bibby to minimize the impact of switching to Vandem.

He also explained that following the acquisition of BMI's inventory by Bibby, prices increased.

(v) Mark Corriveau

Vice-President of Marketing and Purchasing at Wolseley. He described his company's experience with the SDP in various geographic markets. He testified that the SDP was unique due to its exclusivity requirements.

In 1997, Tyler would not sell to Wolseley in Canada because of the relationship with its sister company, Bibby. Canada was a territory reserved for Bibby only.

Corriveau testified about a meeting he had with Bibby representatives in November of 1997 where they discussed the SDP. During the meeting Leonard said he wanted to eliminate importers. Corriveau's view of the SDP was it did not recognize the volumes that a company like Wolseley could give Bibby. There was no distinction between sales volumes of different companies and the rebates that would be offered. Wolseley tried to persuade Bibby that if it wanted Wolseley's business they would have to allow flexibility for a larger company to earn higher rebates. Bibby was not willing to do this.

Corriveau explained that Wolseley initially did not join the SDP in B.C. and Alberta. It then felt forced to join the SDP in Alberta because McWane had purchased Cremco, which had been supplying Wolseley. In 1999, Wolseley joined the SDP in B.C. in order to keep its rebates for Alberta, having been caught purchasing imported pipe in Alberta. Bibby's prices then increased in B.C., Alberta, Saskatchewan and Manitoba. However, Bibby kept the price lower in B.C. because of competition from imports. He testified that Bibby would decrease its prices whenever imported products came into a region.

Corriveau described how Wolseley began importing products into Alberta from New Centurion in 2002. Bibby withheld Wolseley's first quarter rebate for 2002, notwithstanding that Wolseley did not receive products from New Centurion until after the first quarter. After the first quarter of 2002, Wolseley stopped purchasing from Bibby in all of Western Canada.

Corriveau testified about the difficulties with purchasing imported product. Wolseley had to market the product itself rather than relying on Bibby's efforts. It was also facing Bibby's network of sales people who were marketing Bibby product. Wolseley did not buy from Vandem. Lachance was unsure there would be enough business outside the SDP for Vandem to survive.

(vi) Rick Elliott

President of McKeough Supply Inc., which carries cast iron DWV pipe, fittings and MJ couplings in Ontario. McKeough is a member of the Canaplus buying group.

When Bibby introduced its SDP, McKeough and all other distributors were required to purchase a minimum 40,000-pound order to qualify as a stocking distributor. At that time, McKeough did not have the business base to support those sales requirements. To qualify as a stocking distributor, McKeough would also have had to carry cast iron product only from Bibby. He was troubled by this exclusivity component because as a wholesale distributor he needs options. McKeough subsequently entered the cast iron DWV market in 1999 using Vandem as its supplier.

Elliott testified that if Vandem ceased to operate, he might consider exiting that particular part of the market because he feels there really are no other options. Despite likely being able to purchase 40,000 pounds annually, he does not want McKeough to be tied exclusively to Bibby. As a non-stocking distributor McKeough would not be able to compete against Bibby's stocking distributors. He feels McKeough does not have enough cast iron DWV sales to justify importing. He also testified he knew about three or four projects for which Bibby gave some quantity of free pipe to contractors. A manufacturer dealing directly with a contractor was unusual. The effect was to lower the cost to the contractor. This incentive favoured Bibby product being used for the job. Elliott saw Bibby's conduct as an attempt to push McKeough out of the way because it does not have room in its margins to offer such a discount.

In Elliott's experience, PVC is not specified very often for DWV systems. Generally contractors specify cast iron (larger diameters) and copper (smaller diameters).

(vii) Jack Keon

Formerly the Vice-President and General Manager of Niagara Plumbing Supply Co. Ltd., a wholesale supplier of plumbing products in Niagara Falls and a Canaplus member. He retired at the end of 2002 after over 47 years in the plumbing industry.

Keon said it is very important for distributors to carry cast iron products. He testified that copper (up to three inch diameter) and then cast iron (three inches and up) were the products sold most frequently for use in the high-rise commercial sector. Fire separation has been the problem with product other than cast iron and copper. Niagara did not stock asbestos-cement because in the last few years there has been little of that product used.

Niagara purchased its cast iron DWV products from Bibby until 2001 when it switched to Vandem. In 1998, Bibby's rebate program changed from volume-based to periodic rebates based on purchasing all cast iron DWV pipe, fittings and couplings exclusively from Bibby. Keon testified that the SDP's exclusivity requirement is the exception in the industry. Keon reacted strongly to Bibby's enforcement of the SDP. He explained that Bibby's sales representatives visit job sites, which is not common in the industry. After McKeough purchased some cheaper BMI product, he received a visit from a Bibby representative who threatened to terminate McKeough from the SDP. Keon was told McKeough would not get its rebates unless it was exclusive to Bibby. Keon testified that a distributor considering leaving the SDP would delay making the decision. To maximize profitability on purchases in a quarter, a distributor would wait until after that quarter before deciding whether to leave the SDP.

Keon testified about the importance of being a member of a buying group for small distributors. He said that of 32 Canaplus members, only three or four started buying cast iron from Vandem when it entered the market. Prices fell in Ontario when Vandem entered the market. Keon also testified that the price of imports was lower: BMI's prices were 20%-25% cheaper than Bibby's.

(viii) Claude Beulac

Director General of Octo, a buying group with 41 members across Canada.

[Confidential]

Beulac currently manages 180 agreements with manufacturers in 2004. Bibby is the only manufacturer that has a loyalty component to its program; the others have volume-based programs. Octo also has an agreement with Bibby for waterworks products that is based on volumes, not loyalty. Bibby did not have a loyalty component between 1994 and 1997.

Beulac testified about Bibby's use of its sales network to monitor and enforce the SDP. It visits job sites and monitors product ratios. Beulac explained that customers always have a choice whether to remain on the SDP but loss of the rebates is the price to pay if they are not exclusive to Bibby.

He testified the SDP has had an impact on competing suppliers BMI, Idomax and Mission. They are either no longer in the market or they have had little chance to expand.

SECTION D: ENGINEERS AND CONTRACTORS

(i) Terry Vivyrka

A Mechanical Engineer with J.L. Richards & Associates Limited in Ottawa.

Vivyrka testified that typically the project architect or contracting engineer will specify the type of DWV materials required for a project. He testified about the unique characteristics of cast iron (performance history, noise, strength and fire-stopping installation). He stated that cast iron pipe is generally considered to better reduce the noise generated by the flow of wastewater, and is highly regarded for fire safety. He prefers to see cast iron with the fire caulking around it versus the more expensive, special fire-stopping doughnuts that must be installed for plastic pipe.

Vivyrka testified that the use of copper is restricted to smaller diameters, usually under two or three inches. He also testified that stainless steel pipes are more expensive than cast iron. He indicated that asbestos-cement is generally not acceptable, particularly above grade. He testified that there is reluctance by experienced professionals to use plastic for DWV systems. He has never used or heard about the IPEX product called XFR.

(ii) Scott Philips

Philips is a professional mechanical engineer who works for Stantec Engineering in Calgary. Elliott has worked on buildings up to 13 stories, and on low-rises. The health care sector is a primary focus of his experience (usually six and seven stories or less).

Stantec's Master Specifications provide for cast iron and copper as the base DWV material, and requires that further discussion be held before other materials will be used. He testified the engineer ultimately decides the type of material to be used. He stated the choice of material is more an issue of height than occupancy.

Philips testified that cast iron and copper are viewed in mechanical engineering as good products that will be accepted under virtually any circumstances. Copper is only used for small diameter piping because of its cost. Stantec specifies cast iron and copper in high-rise buildings and in any other buildings where they would have concerns related to fire barrier penetration and to flame and smoke spread ratings. He stated cast iron is a very durable product and is less noisy than plastics. Although plastics are light and easy to manipulate, he usually sees plastics used in low-rise buildings. He gave the example of coated aluminium DWV products in stating concerns about use of new products before their long-term viability is truly understood.

(iii) Jim Bornhorst

President of Bornhorst Mechanical Inc. in Winnipeg. He is a mechanical contractor and has been involved in multi-residential, institutional and commercial constructions up to four stories throughout Manitoba.

Bornhorst testified that the mechanical engineers typically specify the DWV materials. Sometimes engineers will specify cast iron for an entire DWV system. When he as mechanical contractor has a choice of DWV materials, such as for a design-build job, he uses cast iron. It is used mainly above ground and in vertical stacks.

He testified that cast iron is resistant to impact, has proven durability and is highly regarded for fire safety. He testified that aluminium pipe appeared briefly in the industry but is no longer used. He stated that asbestos-cement pipe is generally not acceptable, particularly above grade. He also testified that use of copper is restricted to smaller diameters, usually up to two inches. He stated there is reluctance by experienced professionals to use plastic for DWV systems.

(iv) William Kelly

Kelly and his company, Kelly & Sons, operate as a large mechanical and plumbing contractor in British Columbia, Alberta and San Diego. He has extensive experience in high-rise construction.

After Canada Pipe acquired Titan, Kelly & Sons imported cast iron directly from China (Tiger Pipe). He obtained the offshore cast iron pipe at prices 25% lower than Bibby. Kelly & Sons now buy imported pipe from New Centurion. He had also switched his source for MJ couplings to Ideal because Cremco had been purchased by Bibby. Kelly & Sons still refuse to buy from Bibby. The prime reason is he considers Bibby pricing is not competitive. Also, Bibby will not offer price protection.

Kelly & Sons have not purchased from Vandem because it is unable to assure it can produce enough cast iron to service Kelly & Sons' contracts. Kelly also requires that Vandem have an established stocking distributor in the Vancouver area.

Kelly testified that cast iron is considered to reduce noise generated by the flow of wastewater through a DWV system. Unlike plastics, cast iron does not present a problem for penetrating fire separations. He also stated there is a reluctance by professionals to use plastics for DWV systems. He has never heard of nor used XFR.

WITNESSES APPEARING ON BEHALF OF THE RESPONDENT

SECTION A: SUPPLIERS

(i) Tom Leonard

General Manager of Bibby since 1997. Part of the McWane group of companies dedicated almost exclusively to the production of cast iron products or associated products.

Product and geographic markets

Leonard agreed that copper is more expensive than cast iron, even twice the price. He agrees that plastic can smoke in a fire be a dangerous to building occupants. Bibby had advertised that fact. Leonard admitted that XFR is not used everywhere and knew of only seven or eight examples of its use. He also agreed that asbestos-cement can be a health hazard. Leonard confirmed Bibby offered the same price for customers in the different pricing areas.

Market power

Leonard testified that Bibby has always been able to lower its price from time to time to meet competition. He also agreed that "long-term market share is more important than short-term profitability" and that he operated under that principle.

SDP as a barrier to entry

The SDP is about cast iron; it applies only to cast iron pipe and fittings and the complementary MJ couplings. Leonard agreed that stocking distributors get a substantial price advantage over non-stocking distributors, almost 50%. The SDP requires a distributor to purchase all of its cast iron requirements from Bibby to obtain their quarterly and annual rebates. Bibby even doubled its rebates in Ontario temporarily, to encourage use of its products. Bibby also provides customers with a marketing allowance of 1% of sales to promote Bibby products.

Leonard agreed the SDP precludes access to Bibby distributors. He testified that 70% of Bibby's sales are through large distributors. This is contrary to the assertion that the SDP is for "the little guy". When Bibby lowered prices in B.C. Wolseley had expressed its disappointment at that action. A Bibby representative advised Wolseley that prices could be held high if Wolseley remained on the SDP.

Leonard explained how Bibby used the leverage of a potential loss of rebate for Wolseley's Alberta branch to force Wolseley to join the SDP in B.C. Once Wolseley joined, Bibby announced a price increase of 27%. Leonard agreed that with Wolseley on board in B.C., Bibby could proceed to increase prices. Yet, in the face of this evidence, Leonard denied that Bibby used the SDP as a method of raising prices. He also testified that when Wolseley purchased Nuroc in August 2003, Bibby insisted that Nuroc also start purchasing from Bibby.

Bibby relies on distributors to be its "eyes and ears" and on its sales representatives to provide market intelligence. They visit job sites and distributors' yards. Bibby also uses pie charts to monitor ratios of purchases among the three products. If Bibby catches a distributor cheating, the distributor will lose its quarterly rebate and perhaps the annual rebate. That is at Bibby's discretion. Leonard said that distributors know full well that the terms of the SDP will be enforced, including loss of rebates.

Other barriers to entry

Leonard admitted that it dropped prices after Wolseley had stocked its yard with imported product. This lowered the value of the Wolseley product. He agreed Bibby would do the same with Sierra. While Leonard denied that he said to Kelm "Don't let your success be your demise," Leonard's explanation of what was said to Kelm was not put to Kelm in cross-examination.

Acquisitions of competitors

Leonard also described Canada Pipe/Bibby's various acquisitions of cast iron and MJ couplings competitors in Canada. He admitted that Cremco was purchased in order to eliminate a competitor. Between 1996 and 2001, Bibby's market share increased and the number of its competitors decreased.

SECTION B: DISTRIBUTORS

(i) Giulio Iaboni

President of Sherwood Plumbing Supplies, a one-branch distributor of plumbing rough-in pipe, valves and fittings, operating in Southwestern Ontario.

Iaboni described Sherwood's business is a cast business and Sherwood's niche of customers as cast users. He stated that 90% of Sherwood's revenues are derived from the "institutional, industrial and apartment market" and only 10% from low-rise residential. Sherwood is a small distributor which has greatly benefited from Bibby's SDP. The manner in which he gave his evidence clearly reflects that strong relationship.

Sherwood opened in 1997 and has been on the SDP since its inception. Sherwood needs a supply of cast iron, and having that supply helps to obtain the entire rough-in contract for a project. Iaboni believes the SDP as a non-volume based program allows Sherwood to compete on cast iron DWV products against larger distributors. Yet, he agreed Sherwood received volume based discounts on other products on which he competes against the larger distributors.

He acknowledged that in order to qualify for rebates and discounts from Bibby, Sherwood must buy 100 % of the three products from Bibby. Iaboni has seen lower advertised prices for these products but remained exclusive to Bibby. He will not jeopardize \$250,000 of rebates because they are a significant part of his net profit. Margins on cast iron DWV pipe, fittings and MJ couplings are very small. Iaboni knows of people who have strayed from the SDP and lost their quarterly rebates. Contrary to an assertion by Leonard, Sherwood includes rebates as part of its overall profit rather than the prices charged and profit earned on products.

After Bibby purchased BMI's inventory, Sherwood purchased fittings from Bibby in early 1999 that had been BMI inventory. Sherwood returned them because if it had bought those imported fittings directly from BMI it would have paid less for them. Sherwood buys other products from Fernco and BMI but has never bought cast iron from them because of the SDP. He agreed that the SDP does not penalize Sherwood for buying DWV products made from other materials.

Iaboni speculated that Bibby will have its work cut out over the next three to five years due to the emergence of XFR. Iaboni has never placed an order for XFR products.

SECTION C: BUILDING OFFICIALS

(i) Benoit Lagueux

Lagueux is an engineer with the Régie du Bâtiment du Québec. He is responsible for the plumbing section of the Codes Branch and for the development and interpretation of the provincial Plumbing Code. The Régie does not have jurisdiction over all cities in Québec, such as greater Montréal. Plumbing codes in those cities may be stricter than the NBC.

He is not an inspector. Inspectors, engineers, architects, and plumbing contractors consult him as to whether a particular material can be used and under what conditions. Lagueux said that cast iron can be used everywhere because it is a non-combustible material.

In 2002, he advised Regional Directors that XFR met the NBC requirements for flame spread and smoke development. He agrees XFR must not be used in a vertical shaft because it is a combustible product. Moreover, it must be installed correctly, according to the manufacturers' specification (the protective coating must be of a certain thickness to meet standards). Lagueux agreed that the installation of XFR requires the use of fire-stopping devices and that this installation is more complicated than fire-stopping cast iron. All of the information he has about the actual use of XFR comes from third parties. He has never visited a site where XFR has been installed. Lagueux agreed that the fact that a new product can be used does not necessarily mean it will be used in the field. He agreed contractors might be reticent to use a new product when they can use a product they know well, such as cast iron.

(ii) Chuck Surgeoner

A retired from City of Winnipeg mechanical plans examiner. He was a plumbing mechanical inspector from 1984 to 1990.

Surgeoner testified there no limitations on the use of cast iron DWV products in buildings that are required to be of non-combustible construction. He stated that he rarely saw copper DWV material over two inches in diameter or cast iron under two inches. He said that cast iron and plastics compete head-to-head in residential and low-rise construction. He indicated that aluminium pipe appeared briefly in the industry but it is no longer used. He agreed there is reluctance by experienced professionals to use plastic for DWV systems. He stated that some engineers limit their liability by using non-combustible pipe.

Even though he approved the use of XFR in a building project in Winkler, Manitoba, he has very limited experience with high buildings. He relied upon and favoured use of sprinkler systems for fire safety. His comments regarding the growth of plastic pipe are generally limited to residential housing and low apartment blocks.

(iii) Gary Wasyliw

Wasyliw is a Professional Engineer with the City of Regina. He is Manager of the Building Division and has a Level Three Building Official designation for Saskatchewan. He was a building inspection engineer with City of Regina from 1990 to 2000. He recently approved use of XFR in three buildings, first in a return air plenum then in two high-rise residences.

Wasyliw testified there no limitations on the use of cast iron DWV products in buildings that are required to be of non-combustible construction. He testified that he rarely saw copper DWV material over two inches in diameter or cast iron under two inches. He described the evolution of plastic pipe products, first ABS then PVC, but he agreed this evolution excluded the high-rise market.

Wasyliw's evidence is that XFR is a new product. It had not been used in other jurisdictions with which he consulted. He agreed that XFR was not permitted in vertical shafts. It is a combustible product. He explained that neither of the two high-rise buildings in Regina in which XFR was installed had a vertical shaft, and that fire-stopping was required at every floor. He is aware that the XFR coating must be removed to attach XFR fittings to the pipe, and a layer of coating must be re-applied once they are assembled. In practice, contractors are applying an extra coating.

He stated that unusual steps were required in order to obtain approval for XFR. The City consulted with the testing agency that tested XFR. In addition, due to Bibby's and CISPA's inappropriate level of intervention, extra steps were required for approval of the fire-stopping devices. This included involvement of the City of Regina's insurers and legal department.