Date: 20060623

Docket: A-106-05

Citation: 2006 FCA 236

CORAM: **DESJARDINS J.A.**
LÉTOURNEAU J.A.
PELLETIER J.A.

BETWEEN:

Commissioner of Competition

Appellant

and

Canada Pipe Company Ltd./Tuyauteries Canada Ltée

Respondent

Heard at Ottawa, Ontario, on February 7 and 8, 2006.

Judgment delivered at Ottawa, Ontario, on June 23, 2006.

REASONS FOR JUDGMENT BY: DESJARDINS J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.

DISSENTING REASONS BY: PELLETIER J.A.

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REASONS FOR JUDGMENT

DESJARDINS J.A.

[1] The Competition Tribunal (the Tribunal) dismissed an application by the appellant Commissioner of Competition (the Commissioner) seeking an order against the respondent (Canada Pipe or Bibby, which is a division of the respondent) under sections 77 and 79 of the *Competition Act* (reported as 2005 Comp. Trib. 3).

[2] The application related to the marketing strategy – referred to as the Stocking Distribution Program or SDP – adopted by Canada Pipe for the sale and supply of its cast iron drain, waste and vent (DWV) products. The Tribunal held that Canada Pipe is dominant in each of the relevant

markets in Canada for cast iron DWV products, that Canada Pipe is a "major supplier" of cast iron products, and that by marketing its cast iron DWV products using the SDP, Canada Pipe has engaged in a practice of exclusive dealing. The Tribunal further held, however, that the Commissioner had failed to establish that Canada Pipe has engaged in a practice of anti-competitive acts that has, is or is likely to result in a substantial lessening or prevention of competition in the relevant markets, or that Canada Pipe's practice of exclusive dealing is likely to impede entry or expansion of a firm in a market or have any other exclusionary effect in a market such that competition is or is likely to be lessened substantially.

[3] The appeal by the Commissioner is disposed of in separate reasons.

[4] We are seized of the cross-appeal whereby Canada Pipe claims that the Tribunal erred in its assessment of product market definition and market power.

[5] Canada Pipe's cross-appeal is confined to the Tribunal's treatment of paragraph 79(1)(*a*) of the Act and to its determinations concerning the issues of product market and market power. (In a footnote to its memorandum of fact and law, para. 119, Canada Pipe adds, however, that these submissions have equal application to the exclusive dealings provisions of the Act in subsection 77(2). The determination of whether a market participant is a "major supplier" of a product in a market within the meaning of subsection 77(2) also hinges on the issues of market definition and market power.)

[6] The purpose of defining the relevant product market is to identify the possibility for the exercise of market power (*Commissioner of Competition v. Superior Propane Inc. et al* (2000) 7 C.P.R. (4th) 385, 2000 Comp. Trib. 15 at para. 47, rev'd on other grounds [2001] 3 F.C. 185 (F.C.A.)). Market power has been defined as the ability to set prices above competitive levels for a considerable period of time (*Canada (Director of Investigations and Research) v. Southam, Inc.*, (1992), 43 C.P.R. (3d) 161 at 177 (Comp. Trib.); *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 at 28 (Comp. Trib.)).

[7] Canada Pipe submits that if the Tribunal had followed the analytical approach it was required by law to adopt in respect of these issues, it would have had to define the applicable product market to include competing DWV products made from a variety of different materials, including plastic, copper, stainless steel, asbestos cement and cast iron. Canada Pipe's market share in such a properly defined product market would not have exceeded approximately 10% at any relevant point in time. Canada Pipe says this is so regardless of the manner in which the applicable geographic markets are defined and regardless of whether the product market is further sub-divided into pipe, fittings and couplings. The issue of market power, says Canada Pipe, simply does not arise in respect of a market participant having a market share in the range of 10%. There has never been, it says, an abuse of dominance case brought against a market participant having a market share of less than 10% (memorandum of fact and law of the respondent Canada Pipe, para. 119).

PRODUCT MARKET – ANALYSIS OF THE LAW AND THE EVIDENCE

[8] Defining the relevant product market is a necessary first step under paragraph 79(1)(*a*) of the Act, as the Tribunal clearly recognized.

[9] Paragraph 79(1)(*a*) provides:

Prohibition where abuse of dominant position	**Ordonnance d'interdiction dans les cas d'abus de position dominante**
79. (1) Where, on application by the Commissioner, the Tribunal finds that	79. (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :
(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,	a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;
[Emphasis is mine.]	[Non souligné dans l'original.]

[10] The Tribunal was careful in defining the operative terms of this provision of the Act (para. 65, 66 and 67 of its reasons and order):

> 65 A "class or species of business" has been interpreted by the Tribunal in abuse of dominance cases to mean the relevant product market. The expression "Canada or any area thereof" is to be understood as the geographic market, while "control" has been found to be synonymous with market power (*Canada (Director of Investigation and Research) v. D&B Companies of Canada Ltd.* (1995) 64 C.P.R. (3d) 216; *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992) 40 C.P.R. (3d) 289; *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1; *Canada (Director of Investigation and Research) v. Tele-Direct* (1997) 73 C.P.R. (3d) 1.

[11] The Tribunal further explained:

> 66 The Act does not specify how the analysis under paragraph 79(1)(a) of the Act is to proceed. However, in the above-mentioned cases, the analysis begins with a definition of the product market. This approach is also the one adopted by the Competition Bureau's (the "Bureau") Enforcement Guidelines on the Abuse

> of Dominance Provisions (the "Guidelines"). Although the Guidelines have no binding effect on the Tribunal, they are useful in that they serve to indicate how the Bureau will proceed in an abuse of dominance case. At section 3.2.1 the Guidelines underscore the importance of defining the product market:
>
>> This paragraph [79(1)(a)] of the Act contains a number of elements that need to be separately clarified: (i) the existence of a class or species of business in Canada or any area thereof; (ii) the meaning of "control"; and (iii) the meaning of "one or more persons."
>>
>> 3.2.1(a) "Class or species of business" -- Product Market Definition
>>
>> A precondition for assessing market power is identifying existing competitors that are likely to constrain the ability of the firm or firms to profitably raise prices or otherwise restrict competition. The 1986 provisions adopted the term "class or species of business" rather than the term "market" in the context of the control element. The Bureau approach is to consider defining a "class or species of business" as synonymous with defining a relevant product. <u>The analysis begins by examining the product market(s) within which the alleged abuse of dominance has occurred or is occurring</u>.
>
> 67 The Tribunal restates the same principle in Tele-Direct, and adds that the exercise is also necessary for the purposes of section 77:
>
>> A necessary first step in deciding this case is to define the relevant market. This must be done for purposes of section 79 in order to determine if Tele-Direct, as alleged by the Director, "substantially or completely control[s] throughout Canada or any area thereof, a class or species of business". The Tribunal decided in Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd. (1995), 64 C.P.R. (3d) 216, [1995] C.C.T.D. No. 20 (QL) (Comp. Trib.), that "<u>class or species of business" means product market and "control" means market power</u>. ...
>>
>> [Emphasis is mine.]

[12] The Tribunal then explained (at para. 68 of its reasons and order) that in determining the relevant product market, it had to consider “substitutability”. This meant whether there exist sufficiently close substitutes to the product at issue, such that the market for that product includes those substitutes.

[13] The Tribunal adopted the definition of "substitutability" which is found in the decision of this Court in *Canada (Director of Investigation and Research) v. Southam Inc.,* [1995] 3 F.C. 557, para. 161, rev'd on other grounds [1997] 1 S.C.R. 748.

> 68 In determining the relevant product market one considers substitutability - in other words, whether there exist sufficiently close substitutes to the product at issue, such that the market for that product includes those substitutes. In Tele-Direct, the Tribunal cites the market definition set out in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1995] 3 F.C. 557 (F.C.A.), where the Federal Court of Appeal defines what is meant by substitutability:
>
>> Products can be said to be in the same market if they are close substitutes. In turn, products are close substitutes if buyers are willing to switch from one product to another in response to a relative change in price, i.e. if there is buyer price sensitivity. Direct evidence of substitutability includes both statistical evidence of buyer price sensitivity and anecdotal evidence, such as the testimony of buyers on past or hypothetical responses to price changes. However, since direct evidence may be difficult to obtain, it is also possible to measure substitutability and thereby infer price sensitivity through indirect means. Such indirect evidence focusses on certain practical indicia, such as functional interchangeability and industry views/behaviour, to show that products are close substitutes. (paragraph 161)
>>
>> [Emphasis is mine.]

[14] The Tribunal noted, at paras. 69 and 71, that no direct evidence was presented to the Tribunal on the cross-elasticity of demand – that is, whether increasing the price of DWV cast iron products would lead to an increased demand for DWV products made of other materials. Therefore, the product market could not be determined directly.

[15] Given the importance of determining whether other products would constrain price increases of cast iron DWV products, the Tribunal proceeded to consider the indirect evidence by reference to the topics enumerated in the *Enforcement Guidelines on the Abuse of Dominance Provisions* (the Guidelines), which include such headings as the views, strategies, behaviour and identity of buyers; trade views, strategies and behaviours; end use, physical and technical characteristics; price relationship and relative price levels; substitutability; and three product markets or one.

[16] The Tribunal thus correctly identified the legal principles applicable to the determination of the product market, and adopted an appropriate methodology to apply these principles in the particular case of Canada Pipe. The Tribunal considered the indirect evidence under each of the topics suggested in the Guidelines. Its conclusions on the basis of this evidence included the following findings.

[17] First, the Tribunal, at its para. 82 of the reasons and order, under the heading “The views, strategies, behaviour and identity of buyers”, made the finding that “in high-rise buildings, cast iron offers the advantage of meeting all requirements for fire and life safety purposes, and that only non-combustible materials, essentially cast iron, can be used in vertical shafts”.

[18] Second, with respect to end use, other advantages of cast iron were noted, namely strength, durability and lower level noise. The Tribunal then indicated (at para. 92 of the reasons and order)

that although plastic may eventually replace cast iron entirely, "this has yet to happen and cast iron continues to be in a class of its own" [my emphasis].

[19] Third, the Tribunal noted, at para. 97 of the reasons and order, under the heading "Price relationships and relative price levels", that the evidence showed that Canada Pipe had reacted to the entry of new cast iron suppliers, whether manufacturers (Vandem) or imports (Sierra, New Centurion), by aggressively lowering its prices. In Quebec and the Maritimes, where no such competition exists, prices had increased since 1998.

[20] Fourth, at para. 101 and 102 of the reasons and order, under the heading "substitutability" with regard to para. 102, the Tribunal said the following:

> 101 The competition with plastics appears to have had little effect on the prices of cast iron. Bibby devotes considerable effort to promoting the physical characteristics of cast iron products as compared to plastics, but these efforts do not lead to a reduction in price for cast iron products. From the evidence, it appears that the use of plastics is prevalent and increasing across the country. The prices of cast iron have not been decreasing with the increased use of plastics. Prices of cast iron DWV products have increased in Quebec and the Maritimes. They have decreased where Bibby has met cast iron competition - in Ontario with Vandem, in the West with importers. In other words, even though the Respondent claims that plastic is a competing material, there is no evidence that plastic products have had a constraining effect on prices of cast iron DWV products.
>
> 102 The experts on both sides agreed that there was a lack of data for calculating the elasticity of the demand, such that a direct measure of substitutability was impossible. The Tribunal does not have sufficient evidence to show whether consumers (in this case, distributors) would change their behaviour because of a rise in prices. In the present context, such an analysis is impossible, and not only because of a lack of data. The fact is that the choice to buy cast iron over other products is not only a matter of price; as seen earlier in these reasons, other important considerations come into play. From the evidence of Mr. Zorko and others, we find that for certain applications, such as in vertical shafts, non-combustible material remains the only acceptable material, which in practical terms means cast iron. In certain other applications, where considerations of safety and non-combustibility are paramount (based on use, occupancy, and height of building) the use of material other than metal will be

> constrained. For example, a sprinkler system may be compulsory or fire separation sealants will be required. The Respondent sought to convince the Tribunal that this situation was evolving, and that plastics in particular were offering true competition. On the evidence, the Tribunal is satisfied that for certain applications, cast iron has no economic substitute.
>
> [Emphasis is mine.]

[21] On the basis of its review of the indirect evidence, the Tribunal concluded as follows on product market and geographic markets (para. 112 of the reasons and order):

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

[22] The Tribunal was therefore of the view (para. 112 of the reasons and order) that cast iron still played a distinct role in the DWV industry and was treated as a separate market by distributors and contractors, and by Canada Pipe itself. It found that the product market was the cast iron DWV product market, within which three distinct markets were identified: cast iron pipe, fittings and MJ couplings. Moreover, because of the significant price variations in cast iron DWV products, from region to region, the Tribunal found there were six distinct geographic markets: British Columbia, Alberta, the Prairies, Ontario, Quebec and the Maritimes.

MARKET POWER – ANALYSIS OF THE LAW AND THE EVIDENCE

[23] The Tribunal then addressed the issue of market power. Its analysis in this regard was divided into two sections, titled "Direct approach" and "Indirect approach". The Tribunal explained the distinction between the two approaches as follows:

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

[24] Later in its decision, the Tribunal explained the principles underpinning the indirect approach:

> 138 As stated in Laidlaw and Nielsen, a large market share leads to a prima facie conclusion that the firm likely has market power. In order to establish market power, this conclusion must be supported by other findings on issues such as the existence of barriers to entry, the number of other competitors, excess capacity and the state of the market. Where barriers to entry are non-existent, even a very large market share will not support a finding of market power. In the case of cast iron DWV products, it would appear that the following barriers to entry should be considered: sunk costs, cost of entry, incumbent advantage and the Stocking Distributor Program.
>
> 139 The Tribunal must also review evidence of actual entry into the market, which would serve to negate the presence of barriers. Entry, of course, must be both effective and viable to be significant. In addition, the Tribunal must consider customer countervailing power and the state of the market.
>
> [Emphasis is mine.]

[25] It is apparent that the Tribunal correctly identified and articulated the principles applicable to the determination concerning market power, including both the direct and indirect approaches to this issue. The above-quoted passages show that the Tribunal properly understood the analytic

purpose and role of the different types of direct and indirect evidence adduced with respect to the issue of market power.

[26] The Tribunal summarized the direct and indirect evidence adduced by the Commissioner on the issue of the market power (para. 114 to 117 of the reasons and order) in the following manner:

> 114 The Commissioner's case for market power relies heavily on Dr. Ross's analysis of the direct evidence - i.e. evidence that Bibby has the ability to raise and maintain prices above competitive levels for a significant period of time. Dr. Ross never defines what the competitive price levels would be; rather, he postulates that the direct information on prices and margins leads to the conclusion that Bibby's prices are supra-competitive. More specifically, Dr. Ross relies on three elements of direct evidence to conclude that Bibby has market power in the relevant markets: 1) high profit margins; 2) prices well above the landed prices of imports; and 3) Bibby's capacity to set prices, as shown by the high prices where no competition exists (Quebec and the Maritimes) and its capacity to lower its prices dramatically in the face of competition. (Expert Report of Dr. Ross at paragraph 31.)
>
> 115 There are as well, according to Dr. Ross, indirect indicators of Bibby's market power: Bibby's considerable market share and little or no sustained and successful entry for the last several years. His conclusions on this last point are summarized as follows:
>
> > While imports have made inroads periodically, they have been met by aggressive responses from Bibby, and Bibby's market share remains very high. Similarly, Vandem has been trying to establish itself as a largely domestic competitor, but has had considerable difficulty. (Expert Report of Dr. Ross at paragraph 32.)
>
> 116 Dr. Ross is of the view that there are several barriers to entry. First, he states that it would be difficult to establish a new foundry, or adapt a current foundry to produce cast iron DWV pipe and fittings. Secondly, since there is excess capacity in the industry, the industry may not be likely to attract new investment. Adapting an existing foundry to produce DWV cast iron products could represent risky sunk costs. Given the fact that Bibby itself holds much of the excess capacity, it could use or threaten to use this capacity to produce large quantities to be sold at low prices. (Expert Report of Dr. Ross at paragraph 68.) In addition, although not a barrier per se, both parties agree that the cast iron

> DWV industry is a mature industry, not one in which one can expect great growth or innovation.
>
> 117 Thirdly, Dr. Ross maintains that imports face barriers of their own. Bibby is a well-established manufacturer, offering complete lines of products. Imported product lines may be less complete, and buyers may be wary of their quality and of the warranties attached. Fourthly, Bibby's vigorous response to entry by imports and by Vandem may have had a chilling effect on potential entrants. Finally, and most importantly, the SDP program is itself a barrier to entry: entrants, whether importers or manufacturers, have difficulty having access to the distributors, already tied into Bibby's loyalty program.
>
> [Emphasis is mine.]

[27] The Tribunal then considered the direct and the indirect evidence concerning market power that was adduced before it, as the following summary and extracts demonstrate.

[28] The direct evidence related to Dr. Ross' submission in three main areas: high margins, prices substantially above import prices, and high prices absent competition with the corollary of being able to significantly lower prices where competition occurred.

[29] With regard to high margins, the Tribunal stated:

> 124 When studied closely, Dr. Ross's presentation on high margins appears somewhat strained. The margins are based on cost of production (fittings and pipe) and do not include MJ couplings (which Bibby imports). In addition, the analysis is centred on margins, not profits. Dr. Ross cautions that marginal costs do not necessarily give us an exact idea of Bibby's profits, because the costs are extrapolated from Bibby data without complete information on how those costs were established. We have no information on whether the costs include only variable costs, or also fixed costs. (Expert Report of Dr. Ross at paragraph 17 and footnote 6.) However, the Tribunal is prepared to accept Dr. Ross' calculations of production costs and variable costs, from which he derives gross profit margins and contribution margins. (Expert Report of Dr. Ross at Appendix 3, p.6.) We note that the marginal costs are only based on the cost of production of pipe and fittings; they therefore exclude MJ couplings, which Bibby does not manufacture but imports from a sister company.
>
> [Emphasis is mine.]

[30] The Tribunal was apparently very critical of Dr. Ross' analysis, as also shown in paras 127, 131 and 135, but nevertheless noted at para. 137 that Canada Pipe had offered no evidence to rebut the Commissioner's assertions of high margins.

[31] Turning to the indirect evidence of market power, the Tribunal first considered Canada Pipe's market share. It stated (at para. 140 of the reasons and order):

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

[32] The Tribunal considered under the heading of "Barriers to Entry": sunk costs, cost of entry, incumbent advantage, stock distributor program, and actual entry. Under the heading "Other factors", it considered countervailing power and the state of the market.

[33] Sunk costs were defined by the Tribunal as costs that cannot be recovered if investment is made to enter the market and that attempt fails. While sunk costs could be a significant barrier to entry, the Tribunal did not find them significant considering the paucity of explanation given by the Commissioner on the question (para. 141 of the reasons and order).

[34] The cost of entry, wrote the Tribunal, involved either refitting an existing foundry or buying imported goods. The Tribunal estimated that the viability of the current importers did not seem threatened and imports were steadily on the rise (paras. 142-143 of the reasons and order).

[35] On the topic of the incumbent advantage, the Tribunal noted that Canada Pipe was a well-known and well-established manufacturer and that a new entrant would probably have difficulty competing with the quality and quantity of products Canada Pipe was able to offer. No other supplier, it said, had a strong national presence (para. 144 of the reasons and order).

[36] With regard to the factor of Stocking Distribution Program, the Tribunal was satisfied that it had an impact in the market. There was, however, no direct evidence that would support the conclusion that it was a barrier to entry (para. 149 of the reasons and order).

[37] With respect to the factor of actual entry, the Tribunal came to the conclusion that successful entry was possible – but limited, considering that Canada Pipe maintained a considerable market share (para. 156 of the reasons and order).

[38] The Tribunal was of the view that distributors had little countervailing power, considering that Canada Pipe had maintained its SDP since 1998 (para. 159 of the reasons and order).

[39] The Tribunal accepted that the market was mature, i.e., it was a market with little real growth potential. This factor could therefore discourage more active entry (para. 160 of the reasons and order).

[40] Ultimately, the Tribunal accepted Dr. Ross' analysis that the direct and indirect evidence together established that Canada Pipe could and did exercise market power in the relevant markets (para. 161 of the reasons and order). This conclusion of the Tribunal will be considered in more detail further below.

THE STANDARD OF REVIEW AND ITS APPLICATION

[41] I agree with Pelletier J.A. that to be successful on the cross-appeal, Canada Pipe must demonstrate that the Tribunal acted unreasonably, considering that product market and market power raise issues of mixed fact and law. As examined in detail above, the Tribunal articulated the correct legal tests in the course of its determinations concerning product market and market power. The Supreme Court's conclusion in *Southam*, *supra*, therefore applies with equal force in this case: "if the Tribunal erred, it was in applying the law to the facts; and that is a matter of mixed fact and law" (para. 43).

[42] The nature of the question is an important factor in determining the standard of review according to the pragmatic and functional approach. In general, all else being equal, a question of mixed fact and law attracts the reasonableness standard of review. However, the jurisprudence has recognized the existence of different types of questions of mixed fact and law: as McLachlin C.J.

explained in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, a question of mixed fact and law "will call for more deference if the question is fact-intensive, and less deference if it is law intensive" (para. 34). In *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, the Court applied this analysis, observing that the question of mixed fact and law at issue in that case contained fact-intensive elements which did "not involve easily extracted and discretely framed questions of law" (para. 41).

[43] The issues raised in the case at bar contain fact-intensive elements which do not involve easily extracted and discretely framed questions of law.

[44] I agree with Pelletier J.A. that the analysis of the categories or factors referred to in the Guidelines as indirect evidence for the determination of product market (namely the views, strategies, behaviour and identity of buyers; trade views, strategies and behaviours; end use; physical and technical characteristics; and price relationships and relative price levels) is a matter of weighing evidence. It therefore falls within the province of the Tribunal. Consequently, unless the Tribunal's conclusion is unreasonable, it is of no concern to this Court. Substitutability is always a question of degree (*R. v. S.W. Mills & Sons Ltd.*, [1968] Ex.C.R. 275, cited with approval in *Southam*, [1997] 1 S.C.R. 748). Since the Tribunal considered the appropriate elements and arrived at a reasonable conclusion, its finding on product market is therefore immune from judicial intervention.

[45] I do not share Pelletier J.A.'s view, however, that the Tribunal's findings on market power in four of the six geographic markets, namely British Columbia, Alberta, the Prairies and Ontario, are flawed and warrant the intervention of this Court.

[46] My analysis with respect to the Tribunal's determination on market power is the following.

[47] As stated earlier, the Tribunal was highly critical of Dr. Ross' analysis of the direct evidence of market power, as evidenced in paras 124 to 137 of the reasons and order, and of Canada Pipe's lack of response on the topic (para. 137 of the reasons and order).

[48] The Tribunal, with hesitation, I would say, accepted Dr. Ross' calculations of production costs and variable costs from which he derived gross profit margins and contribution margins. However, the Tribunal noted (at para. 124 of the reasons and order) that the marginal costs were only based on the cost of production of pipe and fittings: they therefore excluded MJ couplings which Canada Pipe did not manufacture but imported from its sister company. The Tribunal indicated that Dr. Ware, for Canada Pipe, cast some doubt on Dr. Ross' calculations.

[49] The Tribunal concluded, at para. 136 and 137 of the reasons and order:

> 136 Notwithstanding the statistical debate between the two experts, the fact remains that prices in the West are significantly lower than prices in the East, and the obvious explanation, confirmed by witnesses appearing before the Tribunal, is the presence of imports. Prices for Bibby products are lower in British Columbia than in Quebec, yet the products are manufactured in Quebec, and the cost of transport has to be added to the cost of production for items sold in British Columbia. The Tribunal is therefore satisfied, from consideration of the price differentials, particularly in British Columbia and Alberta, that imports have had an impact on prices of cast iron DWV products. Similarly, the Tribunal is satisfied that Vandem's entry in Ontario has exerted downward pressure on the

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

[50] The Tribunal bolstered the conclusions derived from the direct evidence with a careful analysis of the elements contained in the indirect approach, stressing the positive elements and the drawbacks. The Tribunal then concluded:

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

[51] Considering the evidence, with all its flaws, left uncontradicted by Canada Pipe, it was open to the Tribunal to conclude on the direct approach that Canada Pipe was pricing pipe and fittings with "hefty margins" (para. 137 of the reasons and order), and that for pipe, fittings and MJ couplings, Canada Pipe had a "significant ability to vary prices across the regions" (para. 137 of the reasons and order). This indicated supra-competitive pricing. On the indirect approach, it was open to the Tribunal, on the balance of the evidence, to conclude that Canada Pipe had market power.

CONCLUSION

[52] The Tribunal correctly interpreted and applied the law with respect to paragraph 79(1)(*a*) throughout in its reasons. Market power is not an easy concept to handle. In *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at para. 101, the Supreme Court of Canada noted that with regard to para. 79(1)(*a*) of the Act (formerly section 51), alleged holders of a dominant position must be shown to "substantially or completely control, throughout Canada or any other area thereof, a class or species of business". Gonthier J. for the Court added "The required degree of market power under s. 51 of the Act comprises 'control' and not simply the ability to behave independently of the market". The Tribunal in the case at bar complied with this analysis.

[53] The factual analysis by the Tribunal is sometimes not as clearly stated and analyzed as one might have wished. This may be explained in part by the variety of factors the Tribunal was called upon to consider. But one cannot ignore, on the point raised by Pelletier J.A., that the Tribunal considered not only the direct evidence of market power, <u>but also</u> extensive indirect evidence. On both approaches, it was satisfied that Canada Pipe exercised market power. I cannot say that the Tribunal acted unreasonably in so concluding: the Tribunal demonstrably "had its reasons for doing so, and those reasons cannot be said to be without foundation or logical coherence" (SCC, *Southam, supra* at para. 68).

[54] Considering the standard of review and the intense fact-finding character of these issues, the further intervention of this Court is, in my view, unwarranted.

[55] I would dismiss this cross-appeal with costs.

"Alice Desjardins"
J.A.

"I concur.
Gilles Létourneau J.A."

PELLETIER J.A. (Dissenting Reasons)

INTRODUCTION

[56] In response to the Commissioner's appeal of the dismissal of her application, Canada Pipe has cross-appealed from the Competition Tribunal's (the Tribunal) finding that it dominated the market for cast iron DWV pipes, joints and fittings. Canada Pipe attacks both aspects of that finding, namely the definition of the product and geographic markets, as well as the finding that it has market power in the relevant markets.

[57] As my colleague Desjardins J.A.'s reasons allowing the Commissioner's appeal make clear, the Tribunal was required to decide a number of discrete questions in disposing of the Commissioner's application for an order against Canada Pipe pursuant to section 79 of the *Competition Act* R.S.C. 1985 c. C-34 (the Act). The Commissioner's appeal deals with two of those questions, namely whether Canada Pipe's Stocking Distributor Program (SDP) was a practice of anti-competitive acts, and whether the SDP had the effect of substantially preventing or lessening competition in a market. This cross appeal deals with the issue of whether Canada Pipe occupies a dominant position in that market; in other words, does Canada Pipe "substantially or completely control, throughout Canada or any area thereof, a class or species of business", to use the words of paragraph 79(1)(*a*) of the Act?

[58] That question can be broken down into two other questions: the definition of the product and geographic markets in which Canada Pipe trades, and whether Canada Pipe exercises market power within those markets. The Tribunal decided that there were three product markets, namely the markets for cast iron pipe, cast iron fittings and cast iron joints, and six geographical markets,

namely British Columbia, Alberta, the Prairies, Ontario, Quebec and the Maritimes. It also decided that Canada Pipe exercised market power in all those markets and that, as a result, the conditions of paragraph 79(1) (*a*) of the Act were satisfied. It is those conclusions which are in issue in this cross-appeal.

[59] As an aside, the Tribunal decision refers to Canada Pipe as Bibby because the Stocking Distributor Program is operated by its Bibby-St. Croix division. In these reasons, I will refer to the cross-appellant as Canada Pipe and to the respondent by cross-appeal as the Commissioner.

THE TRIBUNAL DECISION

[60] The first question which the Tribunal had to address was the definition of the product and geographic markets in which Canada Pipe trades. This question is fundamental because any finding of abuse of market dominance must be in relation to those markets.

[61] This Court took up the question of the definition of a product market in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1995] 3 F.C. 557 (*Southam FCA)* where the following appears:

> [161] …Products can be said to be in the same market if they are close substitutes. In turn, products are close substitutes if buyers are willing to switch from one product to another in response to a relative change in price i.e. if there is buyer price sensitivity.

Whether products are close substitutes for one another can be proven either directly or indirectly:

> [161] …Direct evidence of substitutability includes both statistical evidence of buyer sensitivity and anecdotal evidence, such as the testimony of buyers on past or hypothetical responses to price changes. However, since direct evidence may be difficult to obtain, it is also possible to measure substitutability and thereby infer price sensitivity through indirect means. Such indirect evidence focuses on certain practical indicia, such as functional interchangeability and industry views/behaviour, to show that products are close substitutes.

The Tribunal noted that direct evidence of substitutability was not available and went on to examine the indirect evidence. It considered the views, strategies, behaviour and identity of buyers, the trade's views, strategies and behaviour, end use, physical and technical characteristics, price relationships and relative price levels, and substitutability.

[62] Under the heading of views, strategies, behaviour and identity of buyers, the Tribunal noted that while contractors used both plastic and cast iron products, cast iron was the product of choice for certain applications. As for the trade's views and strategies, the Tribunal found that the fact that the National Building Code specifies cast iron for certain applications, notably vertical shafts in high rise buildings, was an important consideration. The industry view appeared to be that there was no substitute for cast iron in that application, notwithstanding the development on non-combustible plastic pipe. The Tribunal's conclusion was that "in high-rise buildings, cast iron offers the advantage of meeting all requirements for fire and life safety purposes, and that only non-combustible materials, essentially cast iron, can be used in vertical shafts" (Tribunal reasons, paragraph 82).

[63] The Tribunal then considered the issue of functional interchangeability under the heading of "end use". In other words, are plastic DWV (Drain, Waste and Vent) products and cast iron DWV products interchangeable? The Tribunal reviewed the evidence as to the advantages and disadvantages of each material. It noted the growing prevalence of plastic products in Canada, but could draw no conclusion as to the pace of change, in the absence of detailed data for the Canadian marketplace. In the end, the Tribunal concluded that, by reason of its strength durability, lower

noise level as well as non-combustibility, cast iron "continues to be in a class of its own" (Tribunal reasons, paragraph 92).

[64] Under the heading of physical and technical characteristics, the Tribunal briefly touched upon the same physical properties as in prior parts of its analysis.

[65] The Tribunal then considered the issue of price relationships and relative price levels. It quoted a passage from *the Enforcement Guidelines on the Abuse of Dominance Provisions*, (Competition Bureau, 2001) (*Enforcement Guidelines*) to the effect that the absence of a correlation in price movements between two products over a significant period of time is an indication that the two products are not in the same market, while the presence of such a correlation is an indication that the two products compete in the same market (Tribunal reasons, paragraph 96).

[66] The Tribunal specifically noted the absence of evidence of relative price movement between cast iron DWV products and products made from other materials. However, it also noted that Canada Pipe's prices dropped where it faced competition from other cast iron product suppliers, whereas prices increased in those markets where there was no such competition. (Tribunal reasons, paragraph 97). This is not to say that Canada Pipe ignored competition from plastic products; the Tribunal found that it devoted considerable marketing resources to persuading buyers of the advantages of cast iron over plastic. But these efforts did not include price reductions. The Tribunal's key conclusions on this issue are found in the following passage:

> [101] …The prices of cast iron have not been decreasing with the increased use of plastics. Prices of cast iron DWV products have increased in Quebec and the Maritimes. They have decreased where [Canada Pipe] has met cast iron competition – in Ontario with Vandem, in the West with importers. In other words, even though the Respondent [Canada Pipe] claims that plastic is a competing material, there is no evidence that plastic products have had a constraining effect on prices of cast iron DWV products.

[67] The Tribunal concluded its analysis of the market definition by considering the issue of substitutability. It noted that the question of whether to use cast iron DWV products or plastic DWV products is not simply a question of price. Cast iron is the only material which, in practical terms, meets current National Building Code requirements as to the use of non-combustible materials. On balance, the Tribunal concluded that "for certain applications, cast iron has no economic substitute." (Tribunal reasons, paragraph 102).

[68] Having regard to the fact that "all three products [pipe, fittings and joints] can be bought separately from different suppliers and the pricing trends for each appear independent", the Tribunal decided that there are three relevant product markets, namely cast iron pipe, cast iron fittings and cast iron joints.

[69] On the issue of geographic markets, the Tribunal attributed some importance to the fact that while Canada Pipe has a national presence, its competitors do not. The result is that competition is regionalized so that prices are constrained by competition from cast iron products in Ontario, for example, but they are not so constrained in Quebec and the Maritimes. This led the Tribunal to conclude that there are six geographic markets, defined by the competitive environment, namely British Columbia, Alberta, the Prairies, Ontario, Quebec, and the Maritimes.

[70] The Tribunal then turned to the second step of its inquiry under paragraph 79(1)(*a*) of the Act, the issue of market power. Market power is defined as the ability to raise and maintain prices above competitive levels for a significant period of time. *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc*. (1997), 73 C.P.R. (3d) 1 at 82.

[71] As in the case of close substitutes, market power can be proven directly or indirectly. In this case, the Tribunal considered both the direct and the indirect evidence of market power. It considered high margins, prices substantially above import prices, high prices absent competition (or lower prices in the presence of competition) as direct evidence of market power.

[72] The Tribunal found that the evidence of high margins was not persuasive. The Commissioner's expert purported to calculate Canada Pipe's profit margins on the basis of partial data supplied by Canada Pipe. However, there was no way of comparing Canada Pipe's margins with those of other vendors. In any event margins varied across geographic regions: consistently high in Quebec and the Maritimes, but dipping into the negative for considerable periods of time in Alberta, the Prairies and British Columbia (Tribunal reasons, paragraph 127).

[73] The Tribunal considered the evidence of the Commissioner's expert Dr. Ross, who attempted to show that Canada Pipes prices were above competitive levels by comparing them to the price of imported products. The Tribunal discounted this evidence because of an absence of raw data, and an absence of information on the pricing philosophy of offshore producers, who may be selling at artificially low prices to achieve market penetration.

[74] Finally, the Tribunal considered the argument that regional price disparities suggested that prices were above competitive levels in the high price regions. For example, certain Canada Pipe products cost the same in Ontario, where they are produced, and in British Columbia. It is clear that if prices were at competitive levels, the price would be higher in British Columbia given the cost of transporting the product from Ontario to British Columbia.

[75] The Tribunal was persuaded that the price differentials between those regions where Canada Pipe faced competition from cast iron products and those regions where it did not indicated that prices in the latter areas were above competitive levels.

[76] The indirect evidence of market power related to market share, barriers to entry and the state of the market.

[77] Based upon its definition of the product market, the Tribunal concluded that Canada Pipe had an overwhelming share of the market, somewhere between 80% and 90% of the market for cast iron products. However, market share alone does not indicate market power if there are no barriers to entry to that market. The Tribunal noted that there was little evidence of sunk costs as a barrier to entry. In particular, the importation of product does not require a significant physical plant.

[78] The Tribunal considered whether the SDP itself operated as a barrier to entry. The emergence of another cast iron manufacturer, Vandem, suggested that the SDP was not an effective barrier to entry. Entry is one thing, viability is another. The Tribunal did not have evidence before it of Vandem's viability but it did have evidence that it had captured a not insignificant share of the market in a relatively brief period of time. Canada Pipe, however, continued to have by far the largest market share. Importers had also succeeded in establishing themselves in the West. But both Vandem and the importers had achieved only limited market penetration.

[79] A final consideration is the state of the market. The market for cast iron DWV products is a mature market in the sense that there is not likely to be significant growth in the size of the market, which operates to discourage entry since growth potential is limited.

[80] The Tribunal concluded that Canada Pipe "can and does exercise market power in the three product markets and the six geographic regions" (Tribunal reasons, paragraph 161). In particular, the Tribunal found that Canada Pipe's ability to lower prices to meet competition indicated that prices in the areas where there was no competition were supra-competitive. As regards the indirect evidence of market power, the Tribunal found that Canada Pipe's "large market share, its range of products and national presence, the limited penetration of competitors and the fact that this market offers only limited growth potential are sufficient to establish that [Canada Pipe] does control a substantial part of the cast iron DWV products market" (Tribunal reasons, paragraph 161).

[81] In the end result, the Tribunal found that the conditions of paragraph 79(1)(*a*) of the Act were satisfied.

STANDARD OF REVIEW

[82] Given that any challenge to the Tribunal's conclusions must be assessed through the lens of the appropriate standard of review, I propose to deal with that question first.

[83] It was in the course of disposing of a competition law case, *Canada (Director of Investigation and Research) v. Southam Inc*., [1997] 1 S.C.R. 748, (*Southam SCC*), that the Supreme Court of Canada recognized the possibility of a standard of review other the correct or the patently unreasonable decision, namely the reasonable decision. Given that this appeal raises many

of the same questions as were raised in *Southam SCC,* it seems to me that one can usefully refer to that case in undertaking the pragmatic and functional analysis with respect to this appeal.

[84] The Supreme Court noted at paragraphs 30 and 31 of its decision that there is a statutory right of appeal under the Act. In the same way, this case raises no issues of jurisdiction, save for one discreet argument by the Commissioner to the effect that since leave was not obtained to appeal questions of fact, this Court has no jurisdiction to consider an appeal on the question of the definition of the product and geographic markets because those determinations are findings of fact. That argument leads into the second question in the pragmatic and functional analysis, namely the nature of the question before the Court.

[85] In *Southam FCA,* this Court held that the question of the analytical framework to be applied in defining a product market was a question of law, and therefore a matter on which the Court owed no deference to the Tribunal's decision. Before the Supreme Court, the argument turned on whether the Tribunal had in fact properly applied the test for defining the product market. In *Southam SCC*, the Supreme Court held that if the Tribunal erred, it was in the application of the law to the facts, a question of mixed fact and law. It was therefore entitled some deference on the part of the Court.

[86] The question as to whether Canada Pipe exercised market power is, it seems to me, a question of the same order. There is no particular dispute as to the nature of the factors to be considered; the disagreement is as to whether those factors were properly considered. In the circumstances, I conclude that both questions raised by the cross appeal are questions of mixed law and fact.

[87] The next issue is the purpose of the statute administered by the Tribunal. The Supreme Court referred to the purpose clause found at section 1.1 of the Act to conclude that the aims of the legislation are more economic than legal. Concepts like "the efficiency and adaptability of the Canadian economy" and the effect of foreign competition on Canadian companies are better understood by businessmen and economists than by judges. This is as true in this case as it was in *Southam SCC*.

[88] This led the Court to consider the expertise of the Tribunal. The Court recognized the Tribunal's expertise in economics and commerce. The Court's review of the Tribunal's expertise in light of the problem which it had before it is particularly apposite to this case:

> ¶ 52 The particular dispute in this case concerns the definition of the relevant product market -- a matter that falls squarely within the area of the Tribunal's economic or commercial expertise. Undeniably, the determination of cross-elasticity of demand, which is in theory the truest indicium of the dimensions of a product market, requires some economic or statistical skill. But even an assessment of indirect evidence of substitutability, such as evidence that two kinds of products are functionally interchangeable, needs a variety of discernment that has more to do with business experience than with legal training. Someone with experience in business will be better able to predict likely consumer behaviour than a judge will be. What is more, indirect evidence is useful only as a surrogate for cross-elasticity of demand, so that what is required in the end is an assessment of the economic significance of the evidence; and to this task an economist is almost by definition better suited than is a judge.

The problem before this Court is exactly the same problem as was before the Court in *Southam SCC*. I have little difficulty in coming to the same conclusion as the Supreme Court did on this issue, which is that the Tribunal is better equipped to decide such questions than are the courts.

[89] Having reviewed these factors, the Supreme Court found that they called for a standard less deferential than the patently unreasonable decision but more deferential than correctness. This led it to conclude that the standard of review of a decision of the Competition Tribunal on the issue of market definition was reasonableness. In my view, that conclusion applies equally well to this case

in so far as the issue of market definition is concerned. The question of market power raises the same kinds of issues as does the question of market definition and leads to the same conclusion with respect to the standard of review.

[90] I therefore conclude that the standard of review of the Tribunal's decision with respect to the issues raised in this cross appeal is that of the reasonable decision.

ANALYSIS OF CANADA PIPE'S GROUNDS OF APPEAL

[91] Canada Pipe's position on the issue of product market definition is that the relevant product market includes competing DWV products made from a variety of materials. In support of its position, it refers to a number of discrete arguments which I reproduce below in a summary way:

a) the Tribunal ignored its own conclusion that there was competition between cast iron products and those made of other materials in all applications except vertical shafts in high rise buildings;

b) the Tribunal ignored evidence that manufacturers market their products by comparing products made of different materials to each other;

c) the Tribunal erred in requiring complete overlap in the applications in which competing DWV products can be used;

d) the Tribunal failed to quantify the extent of the use of cast iron pipe in vertical shafts in high rise buildings in order to determine if it was material to the issue;

e) the Tribunal failed to consider whether Canada Pipe is able to price discriminate based upon end use in applications for which it has no substitute; and

f) the Tribunal ignored evidence of price relationships between cast iron and other materials.

[92] As noted earlier, the issue with respect to market definition is whether products are close substitutes for each other. All are agreed that there was no direct evidence on that issue. Consequently, the Tribunal proceeded on the basis of the indirect evidence of close substitutability. In *Southam SCC*, this Court noted that the Tribunal considered the following as *indicia* of close substitutes:

> [16] …Accordingly, the members determined that recourse should be had to "indirect evidence" of substitutability. Indirect indicia of substitutability include (at p. 179) "the physical characteristics of the products, the uses to which the products are put, and whatever evidence there is about the behaviour of buyers that casts light on their willingness to switch from one product to another in response to changes in relative prices". Also relevant are "[t]he views of industry participants about what products and which firms they regard as actual and prospective competitors".

[93] At paragraph 158 of the Court's reasons in *Southan FCA*, the Competition Bureau's *Enforcement Guidelines* were quoted at length and were incorporated into the Court's analysis. I do not propose to reproduce them here due to their length but I note that they identify the following as indications that products are close substitutes: Views, Strategies, Behaviour and Identity of Buyers, Trade Views, Strategies and Behaviour, End Use, Physical and Technical Characteristics. These are the very criteria which the Tribunal applied in this case.

[94] The *Enforcement Guidelines* are not binding on this Court, but they are an indication of the Competition Bureau's views as to the factors to be considered. Given the Competition Bureau's role in the enforcement of the legislation, the *Enforcement Guidelines* are an element to be taken into account in the interpretation of the legislative requirements. The ultimate question is always one for the Court, but it may find some assistance in the Competition Bureau's views.

[95] If these are the appropriate factors to take into account in deciding whether products are close substitutes, then the weight to be assigned to those factors is a matter for the Tribunal. The parties, or this Court, might assign them more, or less, weight than did the Tribunal but in the end, it is the Tribunal's assessment which is to prevail. In this case, the Tribunal acknowledged that there was competition between DWV products made from different materials but discounted this apparent competition because it found it had no effect on prices (Tribunal reasons, paragraph 101). It treated the evidence of comparison marketing between products made from different materials in the same way (Tribunal reasons, paragraph 98).

[96] The Tribunal did not misapprehend the evidence when it noted that, for all practical purposes, cast iron is the only product to be used in vertical shafts in high rise buildings. The weight to be assigned to that evidence is a matter for the Tribunal. The fact that there was no quantitative evidence in support of that conclusion does not detract from the Tribunal's ability to take it into account.

[97] The fact that price discrimination by end-use may be evidence of different markets (as set out in paragraphs 148-150 of Canada Pipe's Memorandum) does not mean that the opposite is true, namely that the inability to price discriminate according to end use indicates a common market.

[98] It is true that the Tribunal did not consider evidence of price relationships between cast iron and other products; it is not true to say that it ignored such evidence since even Canada Pipe agrees that there was no such evidence before the Tribunal (see Canada Pipe's Memorandum of Fact and Law). The Tribunal cannot ignore what is not before it. The Tribunal did attach considerable

significance to the fact that the price of cast iron products dropped in the presence of competition from cast iron products but that it remained high when there were no other cast iron suppliers in a given geographic market.

[99] As Iacobucci J. pointed out in *Southam SCC*, "…the weighing of criteria in a balancing test must be largely a matter of discretion. The very purpose of a multi-factored test, such as the one that the Tribunal used to determine the dimensions of the relevant product market, is to permit triers of fact to do justice in diverse particular cases." (*Southam, supra,* paragraph 66). The Tribunal exercised its discretion in the weighing of the various factors which it considered and defined the product market accordingly. Having regard to the evidence and to its reasons, I cannot say that it conclusion was unreasonable.

[100] The Tribunal's conclusions with respect to market power is another matter.

[101] Section 79 of the Act provides as follows:

79. (1) Where, on application by the Commissioner, the Tribunal finds that	79. (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :
(*a*) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,	*a*) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;
(*b*) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and	*b*) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;
(*c*) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,	*c*) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.	le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

[102] The expression "market power" does not appear in section 79. What does appear is the requirement that a person "substantially or completely control a class or species of business." The use of market power as a proxy for the element of control is one which has been developed in the jurisprudence, both that of the Tribunal and of this Court.

[103] That position is expressed with admirable concision in the Enforcement Guidelines:

> 3.2.1.(d) Once the universe of existing competitors is delineated, it is necessary to assess the extent to which these rivals constrain any market power that the dominant firm(s) might otherwise possess. The Bureau considers control to be synonymous with market power, where market power is the ability to profitably set prices above competitive levels for a considerable period of time.

The same idea appears frequently in the Tribunal jurisprudence:

> A necessary first step in deciding this case is to define the relevant market. This must be done for purposes of section 79 in order to determine if Tele- Direct, as alleged by the Director, "substantially or completely control[s] throughout Canada or any area thereof, a class or species of business". The Tribunal decided in *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.* (1995), 64 C.P.R. (3d) 216, [1995] C.C.T.D. No. 20 (QL) (Comp. Trib.), that "class or species of business" means product market and "control" means market power. The remaining phrase, "throughout Canada or any area thereof", refers to the geographic market. Therefore, in order for section 79 to apply, the Tribunal must first conclude that Tele-Direct has market power.
>
> *Canada (Director of Research and Competition) v. Teledirect (Publications) Inc.*(1997), 73 C.P.R. (3d) 1 at 33
>
> The respondent's view is that "control" is most meaningfully treated as synonymous with "market power". Market power is generally accepted to mean an ability to set prices above competitive levels for a considerable period. While this is a valid conceptual approach, it is not one that can readily be applied; one must ordinarily look to indicators of market power such as market share and

> entry barriers. The specific factors that need to be considered in evaluating control or market power will vary from case to case.
>
> The tribunal is persuaded that the respondent's position is in keeping with the logic of the section and the Act.
>
> *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 at 28

[104] The same theme is found in the Tribunal's decision in *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992) 40 C.P.R. (3d) 289 at 325:

> In deciding whether a firm has substantial or complete control of a market, one asks whether the firm has market power in the economic sense. Market power in the economic sense is the power to maintain prices above the competitive level without losing so many sales that the higher price is not profitable. It is the ability to earn supra-normal profits by reducing output and charging more than the competitive price for a product. As was said in the NutraSweet decision supra (at p. 28): "Market power is generally accepted to mean an ability to set prices above competitive levels for a considerable period.").

This Court has not been previously called upon to consider this question. It has addressed the question of market power, but in the context of the review of a transaction likely to substantially lessen competition. Market power was defined as follows in *Southam FCA* :

> ¶ 113 It is universally accepted that a merger must be examined in terms of its likely effect on competition within a relevant market. The central concern is with respect to exercise of market power by a single dominant firm or a group of firms acting collectively. In turn, *market power is recognized as the ability to profitably raise prices above competitive levels without losing a significant portion of business to rival firms or firms that may become rivals as a result of the price increase*: (citations omitted)

[105] Finally, the Supreme Court of Canada considered the question of market power in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, a case involving a prosecution under the *Combines Investigations Act* (repealed) the pre-cursor of the Act. Speaking of market power in relation to conspiracies to lessen competition, the Court described market power as the "ability to behave relatively independently of the market."(paragraph 100). However, the Court went on to say that in the case of the abuse of dominance provisions, market power meant control and not simply

the ability to behave independently of the market. This simply reflects the language of paragraph 79(1)(*a*) and its precursor, paragraph 51(1)(*a*) of the *Combines Investigation Act*. The Supreme Court's comments simply confirm the Tribunal's position with respect to market power as the test for control.

[106] In this case, the Tribunal defined market power as "the ability to set prices above competitive levels for a considerable period", a definition is entirely consistent with the jurisprudence.

[107] While there appears to be broad agreement as to the use of market power as a proxy for control of the market, there is some difference of opinion as to how that factor is to be proved. In the passage cited above from the *NutraSweet* decision, the Tribunal indicates that some regard must be had for market share and barriers to entry. These are regarded as indirect proof of market power. But where direct evidence of market power is available, it should be considered:

> …, the Tribunal also recognized that where the available evidence does not allow the definition of market power to be applied directly, it is necessary to look to indicators of market power, such as market share and barriers to entry. NutraSweet, supra, footnote 3; Laidlaw, supra, footnote 24; D & B, supra. The Tribunal has never ruled out the possibility, however, that direct indicators of market power might be available as evidence in an appropriate case. Direct indicators of market power relate to the performance of the firm or firms in question or to their behaviour. The broad question that is posed is whether the observed performance results (e.g., profits) or observed patterns of conduct (e.g., pricing policy) are more likely to be associated with a firm or firms that are competitive or with those that have market power. While there are difficulties in applying direct indicators of market power, if the evidence is available this avenue should not be excluded.
>
> *Teledirect*, *supra*, at page 82.

As will be seen, this is a case in which the direct evidence is available and, in my view, determinative.

[108] Canada Pipe's attack on the Tribunal's conclusions with respect to market power can be summarized as follows:

1- The Tribunal incorrectly relied upon evidence of high margins.

2- The Tribunal incorrectly relied upon Canada Pipe's ability to lower prices.

3- The Tribunal erred in finding market power without conclusive evidence of barriers to entry.

[109] It is true that the Tribunal was critical of the evidence of high margins put forward by the Commissioner's expert, Dr. Ross, as can be seen from the following paragraph in the Tribunal's reasons:

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

It is also true that the Tribunal appears to have given this evidence some credit in that it relies upon it to conclude that in two of the product markets, Canada Pipe is pricing above marginal cost. The two markets in question are the markets for pipe and fittings (Tribunal reasons, paragraph 124).

[110] Looking at the evidence of high margins, I may not have come to the same conclusion as did the Tribunal.. But as Iacobucci J. said in *Southam SCC*:

> [79] It is possible that if I were deciding this case de novo, I might not dismiss so readily as the Tribunal did what is admittedly weighty evidence of inter-industry competition. In my view, it is very revealing that Southam's own expert, an American newspaper consultant, identified the community newspapers as the source of Southam's difficulties in the Lower Mainland. To find, in the face of such evidence, that the daily newspapers and the community newspapers are not

> competitors is perhaps unusual. In that sense, the Tribunal's finding is difficult to accept. However, it is not unreasonable. The Tribunal explained that, in its view, Southam was mistaken about who its competitors were; and though I may not consider that reason compelling, I cannot say that it is not a reason for which there is a logical and evidentiary underpinning. More generally, I notice that the Tribunal seems to have been preoccupied with the definition of the relevant market. It is possible that the members may occasionally have lost sight of the ultimate inquiry, which is whether the acquisition of the community newspapers by Southam substantially lessened competition. But again, I cannot say that the Tribunal's approach was unreasonable.

[111] Faulty as the evidence of high margins appears to be, it was for the Tribunal to assess it. The fact that I may have come to a different conclusion does not make its conclusion unreasonable.

[112] The more compelling argument against Canada Pipe's possession of market power in all 18 markets identified by the Tribunal is its reaction to the emergence of competitive suppliers. The Commissioner relied on the evidence of price reductions in response to competition to argue that the ability to reduce prices indicated that they were above competitive levels to begin with. But if prices have become competitive as a result of the emergence of competing suppliers, the significance of non-competitive prices at an earlier point in time is not obvious.

[113] Since market power is defined in terms of price, the best evidence of market power is a supplier's pricing following changes in the market. One would think that a supplier who is able to maintain prices above competitive levels (however defined) would be impervious to the emergence of competing suppliers. How did Canada Pipe react to the emergence of competing suppliers of cast iron DWV products?

> [97] …The evidence shows clearly that Bibby [Canada Pipe] has reacted to the entry of new cast iron suppliers, whether manufacturer (Vandem) or imports (Sierra, New Centurion) by aggressively lowering its prices. In Quebec and the Maritimes, where no such competition exists, prices have increased since 1998. Although it is shown that Bibby [Canada Pipe] monitors the prices for plastic DWV

> products, there is no evidence of the prices of plastic products having a disciplinary effect on the price of the cast iron products.(Tribunal Reasons)

If Canada Pipe's prices were supra-competitive in the absence of competition, they became competitive when new suppliers of cast iron products emerged. What was the effect of these price reductions?

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

[114] In my view, this passage documents the Tribunal's acceptance of the fact that in some markets, margins were not high, though they were in others. It also shows that the Tribunal ultimately accepted that Canada Pipe's price reductions, in those regions where they occurred, were the result of competition from new suppliers:

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

Given the definition of market power, it is difficult to see on what basis the Tribunal could conclude that Canada Pipe had market power in British Columbia, Alberta, the Prairies and Ontario after the emergence of competing suppliers of cast iron products in those regions. The fact of reducing prices to respond to the emergence of new competitors is inconsistent with "the ability to set prices above competitive levels for a considerable period".

[115] Seen in this light, Canada Pipe is only in a position to exercise market power in Quebec and the Maritimes, where it faces no competition, and where prices have risen, not fallen.. In the other four geographic markets, it is constrained by the presence of importers and manufacturers of cast iron products to reduce its prices significantly. Those reductions are inconsistent with possession of market power.

[116] In its concluding paragraph on this issue, the Tribunal summarizes its position on market power, as disclosed by the indirect evidence, as follows:

> [161] The evidence on barriers to entry is not entirely conclusive. However, Bibby's [Canada Pipe's] large market share, its range of products and national presence, the limited penetration of competitors and the fact that this market offers only limited growth potential are sufficient to establish that Bibby [Canada Pipe] does control a substantial part of the cast iron DWV products market.

If there is a test of control other than market power, the Tribunal has not articulated it. If the test is market power, then the Tribunal's failure to recognize the significance of the price reductions which followed the emergence of new entrants in the market in Ontario and the western geographic regions is unreasonable.

[117] Canada Pipe also attacks the Tribunal's finding on barriers to entry. The Tribunal found that:

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

In my view, this passage incorporates two findings of fact which are conclusive against a finding of market power on the part of Canada Pipe. New suppliers did emerge, so that barriers to entry ,if

present, were not determinative, and the new suppliers had an effect on Canada Pipe's prices, which is inconsistent with the latter exercising market power.

[118] As a result, I find that the Tribunal's conclusion that Canada Pipe had market power in British Columbia, Alberta, the Prairies and Ontario is unreasonable as it is inconsistent with its own definition of market power, the test of whether Canada Pipe had control or substantial control of the 18 markets which the Tribunal defined. As a result, the Tribunal's finding as to market power applies only to the three product markets in two of the six geographic markets which it defined, namely Quebec and the Maritimes.

CONCLUSION

[119] Having regard to the evidence which the Tribunal had before it, as well as the standard of review applicable to these questions, I find that the Tribunal's definition of the product markets do not justify this court's intervention. However, I am of the view that we must intervene with respect to the question of Canada Pipe's market power in British Columbia, Alberta, the Prairies and Ontario, four of the six geographic markets identified by the Tribunal. The fact that Canada Pipe was required to lower in prices in response to competition from other suppliers of cast iron products in those markets is inconsistent with the definition of market power. Consequently, I would return the matter to the Competition Tribunal with a direction for reconsideration on the basis of these reasons.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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