

Date: 20060623

Docket: A-106-05

Citation: 2006 FCA 233

**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.
PELLETIER J.A.**

Date: 20060623

Docket: A-106-05

Citation: 2006 FCA 233

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

BETWEEN:

Commissioner of Competition

Appellant

and

Canada Pipe Company Ltd./Tuyauteries Canada Ltée

Respondent

REASONS FOR JUDGMENT

DESJARDINS J.A.

[1] This is an appeal from a decision of the Competition Tribunal (“Tribunal”), dated February 3, 2005, dismissing the application by the Commissioner of Competition (“Commissioner” or appellant) under sections 77 and 79 of the *Competition Act* (reported as 2005 Comp. Trib. 3). The Commissioner sought an order against Canada Pipe Company Ltd. (“Canada Pipe” or respondent), to prohibit the respondent from engaging in the practice of several purported anti-competitive acts leading to an abuse of dominant position under section 79, as well as to prohibit the respondent from continuing to engage in the practice of exclusive dealing

under section 77. This case also involves a cross-appeal by Canada Pipe, which is dealt with in separate reasons.

[2] This is the first time this Court has the opportunity to consider the tests for exclusive dealing and abuse of dominant position established respectively by sections 77 and 79 of the *Act*. Both of these provisions, generally speaking, authorize the Tribunal to make orders prohibiting a dominant firm from engaging in conduct that has had, is having or is likely to have the effect of substantially lessening competition. While the *Act* has been in force since 1986, and the Tribunal has elaborated its perspective on the requirements of sections 77 and 79 in several cases, these provisions have not to date been interpreted by any Canadian court.

[3] The conduct at issue in this case consists of a “loyalty rebate” program offered by the respondent and known as the Stocking Distributor Program (SDP). Under the SDP, distributors of the respondent’s cast iron drain, waste and vent (DWV) products obtain significant rebates and discounts in return for stocking only cast iron products produced by the respondent. These distributors are free to stock other companies’ DWV products which are not made of cast iron.

[4] According to the Commissioner, Canada Pipe is a dominant firm with respect to the product markets relevant in this case. Furthermore, the Commissioner asserts, the SDP constitutes both a practice of exclusive dealing with exclusionary effects and a practice of anti-competitive acts, and it is likely to have the effect of substantially lessening competition in the markets for DWV products by impeding the entry and expansion of competitors. The respondent

contends, by contrast, that it exercises no market power in relation to the relevant product markets, when the latter are properly defined. Moreover, according to the respondent, the SDP is neither exclusionary nor anti-competitive, but rather is a voluntary, non-exclusive, incentive-based program which encourages competition between DWV distributors, is compatible with competition on the merits between suppliers and is supported by valid business justifications.

[5] The Tribunal dismissed the Commissioner's application, based upon the following findings. With respect to the alleged abuse of dominant position under section 79, the Tribunal held that: (i) there are three relevant product markets, and six geographic markets, and the respondent substantially controls all these markets; (ii) the Stocking Distributor Program (SDP) is a practice, but does not qualify as an "anti-competitive act"; and (iii) the Commissioner had not demonstrated that the SDP had substantially lessened or prevented competition. With respect to the allegation of exclusive dealing contrary to section 77, the Tribunal found that: (i) the SDP can be characterized as a practice of exclusive dealing; (ii) the respondent is a major supplier of the products in the relevant markets; and (iii) there was insufficient evidence to establish that the SDP had impeded entry or expansion of firms, or that it is having any other exclusionary effect on the market, or that it has caused or is likely to cause a substantial lessening of competition.

[6] The Commissioner appeals from the Tribunal's decision.

[7] Broadly stated, the appeal challenges two aspects of the Tribunal's conclusions: first, the finding with respect to substantial lessening of competition for the purposes of both sections 77 and

79, and second, the finding concerning exclusionary effects under section 77 or anti-competitive acts under section 79. The cross-appeal by Canada Pipe, which concerns the Tribunal's conclusions as to the definition of the relevant product markets and the issue of market power for the purpose of paragraph 79(1)(a), is discussed in separate reasons, as stated earlier.

[8] In order to facilitate the reading of these reasons, I include the following table of contents:

<u>Table of Contents</u>	<u>Para.</u>
I. Facts	[9]
II. Legislative framework	[15]
III. Issues	[23]
IV. Analysis	[25]
(A) For the purposes of paragraph 79(1)(c), did the Tribunal err in its determination with respect to whether the SDP has had, is having or is likely to have the effect of preventing or lessening competition substantially?	[29]
(1) The legal test under paragraph 79(1)(c)	[35]
(2) Application of the statutory test for paragraph 79(1)(c)	[45]
(3) The Tribunal's paragraph 79(1)(c) decision	[49]
(4) Conclusion with respect to paragraph 79(1)(c)	[58]
(B) For the purposes of paragraph 79(1)(b), did the Tribunal err in its determination with respect to whether the SDP constitutes an "anti-competitive act"?	[59]
(1) The legal test under paragraph 79(1)(b)	[63]

(2) The Tribunal’s paragraph 79(1)(b) decision [74]

(3) The valid business justification and paragraph 79(1)(b) [84]

(4) Conclusion with respect to paragraph 79(1)(b) [92]

(C) For the purposes of subsection 77(2), did the Tribunal err in its determination with respect to whether the SDP has the result that competition is or is likely to be lessened substantially? [93]

(D) For the purposes of subsection 77(2), did the Tribunal err in its determination with respect to whether the SDP is likely to impede entry or expansion of a firm or a product in a market or have any other exclusionary effect in a market? [96]

V. Conclusion [100]

I. FACTS

[9] The respondent is a Canadian company based in Hamilton, Ontario, which produces and sells through its Bibby Ste-Croix division (“Bibby”) cast iron drain, waste and vent (DWV) products. DWV products are used in a wide variety of structures to carry waste and drain water, and to vent plumbing systems. There are three components to a cast iron DWV system: pipe, fittings and mechanical joint (MJ) couplings (collectively, “DWV products”).

[10] There are currently two domestic manufacturers of cast iron DWV products: Bibby and Vandem Industries (“Vandem”). Bibby manufactures cast iron DWV pipe and fittings, and imports MJ couplings from its sister companies in the United States. Vandem, which was founded in 1997 (according to the Tribunal; the respondent claims it was 1999, but little turns on this fact) by two

former officers of Bibby, manufactures DWV pipe and imports fittings and couplings. The only Canadian manufacturer of MJ couplings is Rollee Industrial Products (1987) Ltd., but it is not a major player. In addition, there are a limited number of other Canadian importers of cast iron DWV products, who generally import from the United States and the Far East (mainly China and India). Imports of cast iron DWV products for all of Canada, including imports by Bibby and Vandem, represented 5% of total sales in 2002. The respondent is the only company in Canada that manufactures and sells a full range of cast iron DWV products.

[11] Distributors buy DWV products from the suppliers (either manufacturers or importers), and in turn sell to the building, mechanical or plumbing contractors involved in construction or renovation projects. Distributors generally carry DWV pipe and fittings made of various materials; cast iron DWV products usually represent only a small proportion of their inventory and sales. In Canada, there are three major distributors, all with national presence: Wolseley Canada Inc., EMCO Ltd, and Crane Supply. There are also small distributors, some of whom are members of buying groups in order to improve their bargaining power and obtain volume discount advantages.

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

[13] The SDP was introduced by Bibby in January 1998. In contrast to the volume-based rebate programs typical in the industry, the SDP is premised on exclusivity, not the volume of purchases. Under the SDP, distributors of Bibby's DWV products obtain quarterly and yearly rebates as well as significant point-of-purchase discounts, in return for stocking only Bibby-supplied cast-iron DWV products. These distributors are free to stock other companies' DWV products which are not made of cast iron, but must purchase all three cast iron DWV products exclusively from the respondent. There are no signed contracts for the SDP: distributors can join at any time, and receive the quarterly and yearly rebates for each completed calendar quarter or year. Distributors who choose not to participate in the SDP are permitted to purchase products from Bibby, albeit at higher prices. There are no restrictions on the resale of cast iron DWV products purchased by distributors who participate in the SDP.

[14] The SDP discounts consist of point-of-sale discounts (for example, 55% of list price for stocking distributors, compared to 94% for non-stocking distributors), as well as quarterly and annual rebates (in 2002, the quarterly rebates were 7, 15 and 9 percent on pipe, fittings and MJ couplings respectively, and the annual rebate was 4 percent for all products). The point-of-sale discount and the rebates vary from one region to another. Any distributor can participate in the SDP, so long as a threshold minimum purchase is made; once this threshold is met, the rebates and discounts are the same for the given region, regardless of the size of the distributor's purchase. As a result, the SDP allows small- and medium-sized distributors to access the same prices as large distributors. The discount is applied at the time of purchase, so long as the

distributor has committed to participating in the program, and is not reimbursable even if the distributor leaves the program. Except for losing the rebates, there are therefore no penalties attached to opting out of the SDP.

II. LEGISLATIVE FRAMEWORK

[15] Three legislative provisions govern the issues to be decided in this appeal, namely sections 77, 78 and 79 of the *Act*. These sections set out the various elements that must be proven by the Commissioner to establish exclusive dealing and abuse of dominant position, and provide some relevant statutory definitions.

[16] With respect to an alleged abuse of dominant position, the requisite elements for an order are described in subsection 79(1):

Prohibition where abuse of dominant position

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

Ordonnance d'interdiction dans les cas d'abus de position dominante

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

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

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

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

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.
---	---

[17] Subsection 79(4) further specifies that possible superior competitive performance must be considered in making the requisite determination under subsection 79(1) concerning competition:

Superior competitive performance	Efficienc e économique supérieure
<p>79. (4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.</p>	<p>79. (4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur.</p>

[18] The term “anti-competitive act”, which is a requisite element pursuant to paragraph 79(1)(b), is not defined in the *Act*. However, section 78 provides, under the heading “Definition”, a non-exhaustive illustrative list of eleven anti-competitive acts:

Definition of “anti-competitive act”	Définition de « agissement anti-concurrentiel »
<p>78. (1) For the purposes of section 79, “anti-competitive act”, without restricting the generality of the term, includes any of the following acts:</p> <p>(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated</p>	<p>78. (1) Pour l'application de l'article 79, « agissement anti-concurrentiel » s'entend notamment des agissements suivants :</p> <p>a) la compression, par un fournisseur intégré verticalement, de la marge bénéficiaire accessible</p>

customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

à un client non intégré qui est en concurrence avec ce fournisseur, dans les cas où cette compression a pour but d'empêcher l'entrée ou la participation accrue du client dans un marché ou encore de faire obstacle à cette entrée ou à cette participation accrue;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

b) l'acquisition par un fournisseur d'un client qui serait par ailleurs accessible à un concurrent du fournisseur, ou l'acquisition par un client d'un fournisseur qui serait par ailleurs accessible à un concurrent du client, dans le but d'empêcher ce concurrent d'entrer dans un marché, dans le but de faire obstacle à cette entrée ou encore dans le but de l'éliminer d'un marché;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

c) la péréquation du fret en utilisant comme base l'établissement d'un concurrent dans le but d'empêcher son entrée dans un marché ou d'y faire obstacle ou encore de l'éliminer d'un marché;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

d) l'utilisation sélective et temporaire de marques de combat destinées à mettre au pas ou à éliminer un concurrent;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

e) la préemption d'installations ou de ressources rares nécessaires à un concurrent pour l'exploitation d'une entreprise, dans le but de retenir ces installations ou ces ressources hors d'un marché;

(f) buying up of products to prevent the erosion of existing price levels;

f) l'achat de produits dans le but d'empêcher l'érosion des structures de prix existantes;

- | | |
|---|---|
| <p>(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;</p> | <p>g) l'adoption, pour des produits, de normes incompatibles avec les produits fabriqués par une autre personne et destinées à empêcher l'entrée de cette dernière dans un marché ou à l'éliminer d'un marché;</p> |
| <p>(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market;</p> | <p>h) le fait d'inciter un fournisseur à ne vendre uniquement ou principalement qu'à certains clients, ou à ne pas vendre à un concurrent ou encore le fait d'exiger l'une ou l'autre de ces attitudes de la part de ce fournisseur, afin d'empêcher l'entrée ou la participation accrue d'un concurrent dans un marché;</p> |
| <p>(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;</p> | <p>i) le fait de vendre des articles à un prix inférieur au coût d'acquisition de ces articles dans le but de discipliner ou d'éliminer un concurrent;</p> |
| <p>(j) acts or conduct of a person operating a domestic service, as defined in subsection 55(1) of the <i>Canada Transportation Act</i>, that are specified under paragraph (2)(a); and</p> | <p>j) à l'égard des exploitants d'un service intérieur, au sens du paragraphe 55(1) de la <i>Loi sur les transports au Canada</i>, les agissements précisés à l'alinéa (2)a);</p> |
| <p>(k) the denial by a person operating a domestic service, as defined in subsection 55(1) of the <i>Canada Transportation Act</i>, of access on reasonable commercial terms to facilities or services that are essential to the operation in a market of an air service, as defined in that subsection, or refusal by such a person to supply such facilities or services on such terms.</p> | <p>k) le fait pour l'exploitant d'un service intérieur, au sens du paragraphe 55(1) de la <i>Loi sur les transports au Canada</i>, de ne pas donner accès, à des conditions raisonnables dans l'industrie, à des installations ou services essentiels à l'exploitation dans un marché d'un service aérien, au sens de ce paragraphe, ou de refuser de fournir ces installations ou services à de telles conditions.</p> |

[19] With respect to exclusive dealing, a statutory definition is provided in sub-section 77(1):

Definitions

77. (1) For the purposes of this section,

“exclusive dealing” means

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

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

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

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

Définition

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

« exclusivité »

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

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

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

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

[20] Sub-section 77(2) sets out the elements required to be proven for an order to issue with respect to a practice of exclusive dealing:

Exclusive dealing or tied selling

77. (2) Where, on application by

Exclusivité ou ventes liées

77. (2) Lorsque le Tribunal, à la

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

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

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

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

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

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

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

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

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

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

[21] A parallel structure and logic is readily apparent between the requisite elements for exclusive dealing under ss.77(2) and abuse of dominant position under ss.79(1). First, both provisions require an initial determination that the firm in question occupies a position of dominance: subsection 77(2) refers to a “major supplier of a product in a market”, while paragraph 79(1)(a) requires that “one or more persons substantially or completely control. . . a class or species

of business”. Second, both provisions call for the identification of a particular type of conduct, namely a practice of exclusive dealing with an exclusionary effect in the case of ss.77(2), and a practice of anti-competitive acts in the case of ss.79(1). Third, both provisions require a finding of actual or likely substantial lessening of competition.

[22] While I would not conclude that the legal tests applicable under these two provisions would necessarily produce identical results in all cases, this parallel structure suggests that an overlapping analysis is to be expected.

III. ISSUES

[23] This appeal raises the following four issues:

- (A) For the purposes of paragraph 79(1)(c), did the Tribunal err in its determination with respect to whether the SDP has had, is having or is likely to have the effect of preventing or lessening competition substantially?
- (B) For the purposes of paragraph 79(1)(b), did the Tribunal err in its determination with respect to whether the SDP constitutes an “anti-competitive act”?
- (C) For the purposes of subsection 77(2), did the Tribunal err in its determination with respect to whether the SDP has the result that competition is or is likely to be lessened substantially?
- (D) For the purposes of subsection 77(2), did the Tribunal err in its determination with respect to whether the SDP is likely to impede entry or expansion of a firm or a product in a market or have any other exclusionary effect in a market?

[24] I will address each of these issues in turn. As the analysis of each issue depends heavily upon the Tribunal's particular findings and approach, I will summarize the Tribunal's decision in the context of my analysis of each question.

IV. ANALYSIS

[25] Before proceeding to an analysis of the issues listed above, a preliminary observation concerning analytic methodology and evidentiary limitations in the competition law context might be helpful. Each of the legislative provisions governing this appeal define a series of elements that must be proven in order to ground the particular order that is sought; if any of these elements is not established, the Commissioner's application must fail. Both section 77 and section 79 specify three distinct elements, and each of these elements is at issue in the appeal or cross-appeal in this case.

[26] The multi-element structures of sections 77 and 79 suggest that the applicable legal tests consist of several discrete sub-tests, each corresponding to a different requisite element. Indeed, this interpretation appears necessary to give effect to the "well-accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage" (*R. v. Proulx*, [2000] 1 S.C.R. 61 at para. 28; see also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 27). Each statutory element must give rise to a distinct legal test, for otherwise the interpretation risks rendering a portion of the statute meaningless or redundant.

[27] The difficulty arises, however, when the necessary distinct sub-tests are examined in light of the available evidence in a given case. In the abuse of dominance context, the economic concepts upon which the legal tests are based often cannot be readily extracted from the available evidence. For example, in many cases the foundational concept of market power cannot be established directly; instead, one must look to relevant indirect indicators. However, these indirect indicators are often relevant with respect to more than one element. As a result, the same evidence – for example, concerning barriers to entry, or market share – is potentially and unavoidably relied upon at several points in the analysis, in respect of different requisite elements. In its first abuse of dominance case, *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 [*NutraSweet*], the Competition Tribunal noted that this difficulty “is pervasive in competition law because the relevant factors in the different statutory elements are rarely distinct and it is impossible not to draw on common factors whenever required” (p. 28).

[28] However, it is important that the correct approach to the overlapping use of supporting evidence in the competition context be properly understood, so as to avoid the interpretive danger of impermissible erosion or conflation of the discrete underlying statutory tests. Although a particular piece of supporting evidence may be employed as an indirect indicator in respect of more than one element, the elements themselves must remain conceptually distinct. I will return to this point in my analysis of the questions at issue in the appeal at bar.

(A) For the purposes of paragraph 79(1)(c), did the Tribunal err in its determination with respect to whether the SDP has had, is having or is likely to have the effect of preventing or lessening competition substantially?

[29] I begin my analysis with the issue of substantial lessening of competition for the purposes of paragraph 79(1)(c), for it is on this question that I am most clearly convinced that this Court's intervention is required. My conclusion in this regard follows directly from an interpretation of the governing statutory language. In short, I have concluded that the Tribunal erred in law in its analytic approach with respect to the legal test applicable under paragraph 79(1)(c).

[30] Before this Court, the appellant argued that the Tribunal erred in law in its interpretation of paragraph 79(1)(c) and failed to apply the correct legal test. The appellant argued that the statutory language – and in particular the use of the relative concept “lessening” – mandates an assessment of the effect of the impugned practice on competition in the relevant markets, which can only be properly accomplished by comparing the competitiveness of the relevant markets in the presence and absence of the impugned practice. The appellant submitted that the correct legal test for assessing competitive effects therefore involves a “but for” analysis: would markets – in the past, present or future – be substantially more competitive *but for* the impugned practice? Or, in other words, *but for* the impugned practice, would markets be characterized by greater price competition, choice, service or innovation than exists in the presence of this practice? The Tribunal thus erred, the appellant contended, in that its assessment of substantial lessening of competition focussed virtually exclusively on the narrow question of whether the SDP prevented entry or switching of suppliers, or in other words, whether a substantial level of competition continued to exist in the relevant market. Rather, the Tribunal should have considered the broader question of whether the SDP impeded or hindered the competition that would otherwise exist if the program were absent from the market.

[31] In response, the respondent submitted two main arguments challenging the Commissioner's proposed "but for" test. First, the respondent argued that the "but for" test was a "novel approach", which the Commissioner had never before advocated before the Tribunal, either in this case or in prior proceedings under section 79. As a result, the respondent contended, the appellant is precluded from introducing this new argument at the appellate level. In this regard, the respondent cited this Court's comments in *Gravel and Lake Services Ltd. v. Bay Ocean Management Inc.* (2002), 298 N.R. 369, 2002 FCA 465 at para. 8, *SMX Shopping Centre Ltd. v. Canada* (2003), 314 N.R. 365, 2003 FCA 479 at para. 32, and *Naguib v. Canada* (2004), 317 N.R. 88, 2004 FCA 40 at para. 7 for the proposition that a new argument may not be raised for the first time on appeal if the responding party would be prejudiced by having had no opportunity to adduce evidence that could, if accepted, defeat the argument. In this case, the respondent maintained that the record contains little or no evidence to establish the likely characteristics of the necessary hypothetical "but for" market. Moreover, Canada Pipe would have argued its case very differently had it had notice at the Tribunal level of the Commissioner's new "but for" test; in particular, it would have retained experts to model the hypothetical comparator markets that would exist "but for" the SDP.

[32] Second, or in the alternative, the respondent asserted that the Tribunal adopted the correct, well-established approach in its determination under paragraph 79(1)(c), and properly considered all relevant factors. The Tribunal reached its conclusion by carefully exercising its considerable expertise in appraising and weighing the relevant factors, and the respondent argued that since its

conclusion on this question of mixed law and fact was not unreasonable, this Court should not interfere.

[33] Although initially appealing, the respondent's first argument cannot be sustained, for several reasons. The legal principle cited by the respondent, with respect to the impropriety of an appellate court considering an entirely new argument which had not been raised below and in relation to which additional evidence is required, is indeed well-established: see, for example, *Tordenskjold (The) v. Horn Joint Stock Co. of Shipowners* (1908), 41 S.C.R. 154; *R. v. Perka*, [1984] 2 S.C.R. 232 at 240; *R. v. Keegstra*, [1995] 2 S.C.R. 381 at para. 26; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 58. However, this principle is inapplicable in the instant case, for the appellant's argument is not in fact "entirely new" (*Perka, supra* at 240). As I explain further below, although the Competition Tribunal has not used the "but for" wording in its previous cases, this wording appears in *Enforcement Guidelines on the Abuse of Dominance Provisions* issued by the appellant, and the substance of this legal test has been articulated and applied by the Tribunal in prior decisions. The respondent thus had ample notice of this argument. Moreover, the primary concern underlying the general prohibition – namely, that the evidentiary record is insufficient to support the new argument (*Keegstra, supra* at para. 26) – also does not apply in this case, for the Commissioner bears the burden of establishing each statutory element; if insufficient evidence exists to meet the "but for" test, no order will issue.

[34] As to the respondent's second argument, I am not persuaded that the Tribunal's error with respect to its determination under paragraph 79(1)(c) is one of mixed law and fact. The appellant's

argument calls for an exercise of statutory interpretation, to determine whether the statutory language indeed mandates a particular analytic approach. As the Supreme Court of Canada noted in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 36 [*Southam*], questions of statutory interpretation “are generally questions of law”, as such questions have “the potential to apply widely to many cases”. In the case at bar, the Tribunal’s actual appraisal and weighting of different factors – that is, the question of mixed law and fact – is a secondary question, arising only once it has been determined whether the correct legal test was applied. While the Tribunal has economics and competition law expertise in relation to the determinations of fact and mixed law and fact required for the *application* of the correct legal test, this is not sufficient to displace the expertise of this Court with respect to statutory interpretation itself. As this Court has previously determined – and indeed, the parties do not dispute – the Tribunal’s conclusions on questions of law are to be reviewed on the standard of correctness: *Commissioner of Competition v. Superior Propane*, [2001] 3 F.C. 185 at para. 88 [*Superior Propane*].

(1) The legal test under paragraph 79(1)(c)

[35] In light of the appellant’s argument, I must consider the correct statutory interpretation of paragraph 79(1)(c), which, for convenience’s sake, I set out again:

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 :

...

(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,

[36] Two aspects of the scope of paragraph 79(1)(c) are immediately evident from the wording. First, the effect on competition is to be assessed by reference to up to three different time frames: actual effects in the past or present, and likely effects in the future. Second, the effect on competition which must be proven to ground an order prohibiting an abuse of dominance is one of substantial preventing or lessening. The requisite assessment is thus a relative one: it is not the absolute level of competition in a market which must be substantial, but rather the preventing or lessening of competition that results from the impugned practice must be substantial.

[37] The test mandated by paragraph 79(1)(c) is not whether the relevant markets would or did attain a certain level of competitiveness in the absence of the impugned practice, or whether the level of competitiveness observed in the presence of the impugned practice is “high enough” or otherwise acceptable. These are absolute evaluations, while the statutory language of “effect of preventing or lessening. . . substantially” clearly demands a relative and comparative assessment. In order to achieve the inquiry dictated by the statutory language of paragraph 79(1)(c), the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is “substantial”. This comparison must be done with reference to actual effects in the past and present, as well as likely future effects. Only through such a comparative approach can the Tribunal determine, as the statutory provision requires, whether the impugned

practice “has had, is having or is likely to have the effect of preventing or lessening competition substantially”.

[38] The comparative interpretation described above is in my view equivalent to the “but for” test proposed by the appellant. Apart from its arguments concerning the evidentiary difficulties involved in the application of such a test at the appeal stage in this case, the respondent did not advance any reasons of principle or statutory interpretation as to why this approach to paragraph 79(1)(c) is incorrect or inappropriate. I would therefore endorse the formulation of the legal test proposed by the appellant: the question that must be assessed for the purposes of paragraph 79(1)(c) is, would the relevant markets – in the past, present or future – be substantially more competitive but for the impugned practice of anti-competitive acts?

[39] It is important to note that the “but for” wording appears in the *Enforcement Guidelines on the Abuse of Dominance Provisions* issued by the appellant, which *Guidelines* are expressly intended to “help the general public, business people and their legal and economic advisors to better understand. . . the general approach taken by the Competition Bureau to enforce these provisions” (see Competition Bureau, *Enforcement Guidelines on the Abuse of Dominance Provisions* (Industry Canada: Ottawa, 2001) at page 5). In describing the Commissioner’s approach to assessing the effects of anti-competitive acts for the purposes of paragraph 79(1)(c), the *Guidelines* employ the “but for” wording (see page 19).

[40] The expression “but for” has also appeared in American antitrust jurisprudence. In *Concord Boat Corporation v. Brunswick Corporation*, 207 F.3d 1039 at 1055 (8th Cir. 2000), the Court referred to the difficulty of constructing a hypothetical market:

Notwithstanding the complex nature of the conduct at issue, Dr. Hall was required to construct a hypothetical market, a “but for” market, free of the restraints and conduct alleged to be anticompetitive. The difficulty of such a task has long been recognized by courts in antitrust cases.

[41] In substance, the “but for” interpretation of paragraph 79(1)(c) is also accordant with the Tribunal’s interpretations in earlier abuse of dominance cases. Although the “but for” wording does not appear in the statutory provision or in previous Tribunal decisions, this legal test does not, as the respondent alleges, “amount[. . .] to an attempt by the Commissioner to re-write the Act at the appellate stage of this proceeding” (respondent’s Memorandum of Fact and Law, para. 102). Rather, the “but for” test reflects the plain meaning of the statutory language of paragraph 79(1)(c), and corresponds to the Tribunal’s analysis in its previous decisions with respect to this provision.

[42] The Tribunal’s use of a comparative and relative test for paragraph 79(1)(c) is evident in its descriptions, in previous abuse of dominance cases, of the appropriate analytic approach for determining whether there exists an actual or likely substantial lessening of competition. In *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 [Laidlaw], the Tribunal specifically endorsed an assessment based upon comparison of the competitiveness of the relevant markets with and without the impugned practice (at p. 344-346):

Laidlaw argues that the Director has not demonstrated that there has been any substantial lessening of competition in the relevant markets. It is argued that no analysis has been done of the state of competition in the markets before Laidlaw entered compared to what exists now. . . It is not just the number of competitors and comparative market shares which are relevant in considering whether a substantial

lessening of competition has occurred. . . [T]he 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.

[Emphasis added.]

Similarly, in *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.*

(1995), 64 C.P.R. (3d) [D & B], the Tribunal described as follows the appropriate approach to assessing the existence of a substantial lessening of competition (at p. 267):

First, we must establish what the conditions of entry would be without the exclusives [the impugned practice of anti-competitive acts] and, then, determine how the anti-competitive acts altered the prospects for economically feasible entry.

The correspondence between these formulations and the “but for” test described above is readily apparent.

[43] The Tribunal’s previous abuse of dominance decisions also highlight the centrality of *relative* comparison in the test mandated by paragraph 79(1)(c). The test for substantial lessening of competition articulated by the Tribunal in *NutraSweet, supra*, *Laidlaw, supra*, and *D & B, supra*, in all cases depends upon this relative comparative aspect:

The factors to be considered in deciding whether competition has been or is likely to be substantially lessened are similar to those that were discussed in concluding that NSC [NutraSweet Co.] has market power [that is, market share and entry barriers]. In essence, the question to be decided is whether the anti-competitive acts engaged in by NSC preserve or add to NSC’s market power. The issue with respect to the contract terms associated with exclusivity and the use of the United States patent as leverage in competing for Canadian customers is the degree to which these anti-competitive acts add to the entry barriers into the Canadian market and, additionally therefore, into the industry. (*NutraSweet, supra* at p. 47, emphasis added)

There is no reason to doubt that based solely on the economics of lift-on-board service that these should be highly competitive markets. The evidence shows, however, that the effect of the contracts is to make entry sufficiently difficult so that it no longer effectively polices the market. The evidence demonstrates that a new firm can acquire a certain number of customers but that it cannot establish a

customer base with sufficient rapidity to make entry attractive. In the markets in question there is no doubt that acquisition practices of Laidlaw buttressed by the creation of artificial barriers to entry through the contracts have resulted in a substantial lessening of competition. (*Laidlaw, supra* at p. 347-348, emphasis added)

The central issue to be decided in determining whether the Director has satisfied this third element [of sub-section 79(1)] is the effect of the exclusives with retailers and the long-term contracts with customers on the conditions of entry into the market. Or, to paraphrase the words of the tribunal in *Nutrasweet*, in essence, the question to be decided is whether the anti-competitive acts engaged in by Nielsen [D & B] preserve or add to Nielsen's market power. (*D & B, supra* at p. 266-267, emphasis added).

Clearly, the assessment envisaged and undertaken by the Tribunal in all these cases was not merely an absolute evaluation of the level of competition in the relevant markets, but rather a relative comparison: did the impugned practice result in a *preventing or lessening* of competition as compared to the conditions governing in the absence of the practice, and was this lessening of a degree sufficient to be considered *substantial*?

[44] Based upon the plain meaning of the statutory language, and supported by the interpretation advanced by the Tribunal in its earlier cases, I conclude therefore that paragraph 79(1)(c) mandates an approach that properly accentuates these comparative and relative aspects, and enables this analysis to be undertaken in respect of each of the three specified time frames (past, present and future). As I have explained, the “but for” test is one such approach. I must emphasize, however, as the Tribunal rightly implied in the passage from *Laidlaw* quoted in paragraph 39 above, that the “but for” test is not necessarily the only correct approach. I therefore expressly leave open the possibility that the Tribunal might in a future abuse of dominance case find evidence corresponding to a different test sufficient to discharge the burden placed upon the Commissioner by virtue of paragraph 79(1)(c). However, as the “but for” test describes an approach that corresponds to the

requirements mandated by the statutory language of paragraph 79(1)(c), it is one that the Tribunal must consider in all cases – although it may in future cases choose to consider other appropriate tests as well.

(2) Application of the statutory test for paragraph 79(1)(c)

[45] In practice, the application of the “but for” test, and in particular, determination of the appropriate methodology in any given case, is a matter for which the Tribunal is better qualified than this Court. This Court should not attempt to prescribe in the abstract the “correct” methodology, for “[s]uch a task is beyond the limits of the Court’s competence” (*Superior Propane*, supra at para. 159). As the Supreme Court of Canada observed in *Southam*, supra at para. 52, for the questions of mixed law and fact involved in the application of the legal tests set out in the *Competition Act*, “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”.

[46] As suggested by the parties in the case at bar, application of the “but for” test could conceivably involve the construction of a hypothetical comparator model, a market identical to reality in all respects except that the impugned practice is absent. In appropriate circumstances, the “but for” test might also be applied by comparing the competitiveness of the market across time, and treating the market conditions before and after the introduction of the impugned practice as proxies for the market with and without the practice. However, I would not want to be seen to suggest that any particular type of evidence would necessarily be required. Ultimately, the

Commissioner bears the burden of proof for each requisite element, and the Tribunal must be convinced on the balance of probabilities. The evidence required to meet this burden can only be determined by the Tribunal on a case-by-case basis.

[47] The *Act* does, however, provide some guidelines which should be borne in mind in undertaking the assessment mandated by paragraph 79(1)(c). In this regard, I would adopt *mutatis mutandis* the advice provided by Evans JA in *Superior Propane, supra* with respect to the methodology appropriate for determining the anti-competitive “effects” of a merger under section 96 of the *Act*:

Whatever standard is selected (and, for all I know, the same standard may not be equally apposite for all mergers) must be more reflective than the total surplus standard [the methodology adopted by the Tribunal in that case] of the different objectives of the *Competition Act*. It should also be sufficiently flexible in its application to enable the Tribunal fully to assess the particular fact situation before it.

Similarly, whatever methodology the Tribunal chooses in any given case in its application of the “but for” analysis required under paragraph 79(1)(c) must be sufficiently flexible to allow a full assessment of all factors relevant in the particular fact situation at issue, and must be reflective of the different objectives of the *Act*.

[48] In *Superior Propane, supra*, at paras. 104-112, this Court looked to the purposes provision of the *Act*, section 1.1, to inform its analysis of the meaning of the word “effects” in section 96. Similarly, for the purposes of paragraph 79(1)(c), in undertaking its assessment of whether there is an actual or likely substantial preventing or lessening of competition, the Tribunal must ensure that

the methodology chosen to apply the “but for” test reflects the multiple purposes or objectives set out in section 1.1. Four different purposes are described in section 1.1:

Purpose of Act	Objet
<p>1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.</p>	<p>1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l’adaptabilité et l’efficience de l’économie canadienne, d’améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d’assurer à la petite et à la moyenne entreprise une chance honnête de participer à l’économie canadienne, de même que dans le but d’assurer aux consommateurs des prix compétitifs et un choix dans les produits.</p>

All of these purposes must be reflected in the methodology adopted by the Tribunal to assess the existence of an actual or likely substantial lessening of competition for the purposes of paragraph 79(1)(c).

(3) The Tribunal’s paragraph 79(1)(c) decision

[49] Having articulated the legal test for paragraph 79(1)(c), I turn now to an analysis of what the Tribunal actually did in the case at bar. The Tribunal’s analysis directly concerning paragraph 79(1)(c) is brief, and I will therefore quote it in its entirety:

263 The Tribunal, as stated above, is satisfied that Bibby does exercise market control. This can be traced to a number of factors and specifically to the fact that Bibby is the only Canadian supplier able to supply full product lines. The SDP is certainly an instrument that helps Bibby market its products, but the

Tribunal is not satisfied that the SDP has been shown to be a practice of anti-competitive acts. If, however, the Tribunal has erred in this assessment, the Tribunal is also of the view that the SDP has not been shown to be a practice that has substantially lessened or prevented competition, for the reasons that follow.

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

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

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

[50] The Tribunal's substantive analysis for the purpose of paragraph 79(1)(c) is contained in two paragraphs, 265 and 266. Paragraph 265 considers the evidence with respect to the geographic

markets of Western Canada and Ontario, and paragraph 266 considers that with respect to Quebec and the Maritimes. The Tribunal's stated reasons for concluding that substantial lessening of competition had not been established are very different for the two geographic groupings. In both cases, however, the Tribunal's reasoning evinces errors of law.

[51] For Western Canada and Ontario, the reasons show that the Tribunal's conclusion was based upon its appreciation of three main factors: the existence of competitive pricing, the increasing presence of imported cast iron DWV products, and the effective entry of a new cast iron DWV manufacturer, Vandem. The Tribunal emphasized that these significant features have been observed "notwithstanding the SDP" and "while the SDP was in effect" (para. 265), and thus concluded that the SDP had not brought about a substantial lessening or prevention of competition in Western Canada or Ontario.

[52] The occurrence of entry, both by importers and a new manufacturer, was evidently the key consideration in the Tribunal's analysis with respect to the absence of substantial lessening of competition. In the context of its direct analysis of paragraph 79(1)(c), the Tribunal's explanation of its use, for the purposes of paragraph 79(1)(c), of the evidence concerning entry is very brief: it merely noted that "a new competing manufacturer has emerged for the first time in thirty years and has succeeded in capturing 10 percent of the market in Canada within four years, while the SDP was in effect", and concluded that "[t]here is clearly effective entry in the market by Vandem" (para. 265). The Tribunal also noted the "steadily increasing" presence of imports, which "although still

represent[ing] a relatively small portion of the cast iron DWV markets”, are said to “have had a noticeable impact on prices” (para. 265).

[53] This analysis of the occurrence of entry in the Western Canada and Ontario markets provides no indication that the Tribunal considered expressly whether the SDP was responsible for a *substantial increase* in the difficulty of gaining entry in the market, and hence a *substantial lessening* of competition. The occurrence of entry and the consequent existence of a certain level of competition relate to an absolute evaluation of the state of the market in the presence of the SDP, which is neither an equivalent of nor a substitute for the relative and comparative assessment that is required by the statutory language of paragraph 79(1)(c). The fact that entry has been observed in the presence of the SDP, and that barriers to entry are therefore not total, does not by itself address the question of whether, in the absence of the SDP, there would be substantially more competition in the relevant markets, in the past, present or future. In short, the Tribunal’s analysis with respect to these geographic markets does not address the “but for” question.

[54] The Tribunal provided different reasoning for its conclusion in this regard concerning the Quebec and Maritimes markets (at para. 266). In these geographic markets, the Tribunal acknowledged that competitive pricing is absent, but cautioned that this “does not necessarily lead to a conclusion that the SDP has caused the lack of competition”, as the Commissioner had not led any evidence concerning the period before the SDP was in effect. Without “historical data which would allow it to measure the state of competition before and after the SDP came into effect”, and in light of other markets considerations (Canada Pipe’s acquisition of the assets of another cast iron

DWV manufacturer, and Bibby's status as the only full-line supplier), the Tribunal concluded that "there is insufficient evidence for it to conclude that the SDP is responsible for a substantial lessening or prevention of competition" (para. 266).

[55] The legal error inherent in this portion of the Tribunal's paragraph 79(1)(c) analysis is manifest. As the Tribunal itself recognized in *Laidlaw, supra*, substantial lessening "need not necessarily be proved by weighing the competitiveness of the market in the past with its competitiveness as present", for "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" (p. 346). For the purposes of paragraph 79(1)(c), it is insufficient to conclude that the Commissioner had not met her burden because no historical data was provided, for the Tribunal was required to also consider whether the evidence on record demonstrated that the SDP had the effect of substantially lessening competition in the past, present or future, as compared to the markets' *likely* competitiveness in the absence of the practice. The failure to consider this possibility in this case constitutes an error of law.

[56] Can it be argued, as the respondent suggests, that the Tribunal implicitly took into account the relative and comparative considerations required under paragraph 79(1)(c)? In this vein, it could be argued that the Tribunal's paragraph 79(1)(c) reasoning depends implicitly upon its analysis undertaken in earlier sections of its decision, for the purposes of its determinations under paragraphs 79(1)(a) and (b), of the evidence concerning entry conditions and the effects of the SDP (paras. 141-156, and 204-254 and 260-261, respectively).

[57] However, the Tribunal's treatment in these earlier sections of its decision of the evidence concerning entry and effects reinforces my conclusion that it erred in law in its paragraph 79(1)(c) analysis. In general, this earlier analysis treats the question of entry in an absolute sense, and appears to be guided by such questions as, has entry been prevented completely, or is a certain level of competition observed in the presence of the SDP. The evidence of actual entry is explicitly accorded a dominant and even preeminent role in the Tribunal's analysis (see, for example, paras. 149, 156 and 161). Throughout the Tribunal's decision, evidence concerning entry or the effects of the SDP is considered against the standard of "prevention" in an absolute sense, rather than a more relative standard such as that implied by the words "impeding" or "lessening" (see paras. 150, 155, 207, 225-226, 237, 241, 245, 254-255, 260-261). The decision does employ the words "impede" or "lessening" at several points (see paras. 2, 6, 53, 113, 162, 263-266, 280, 282), but these occur when the Tribunal is citing the text of the statutory provisions or paraphrasing the Commissioner's submissions, and not in the context of the Tribunal's own conclusions or analysis. In short, these earlier sections of the decision provide little if any support for the argument that the Tribunal implicitly took into account the relative and comparative considerations required under paragraph 79(1)(c). To the contrary, a careful reading of the Tribunal's reasons indicates that the analysis throughout was conducted from the narrow, absolute perspective of preventing entry and competition, and not from the broader, relative and comparative perspective of "impeding" or "lessening".

(4) Conclusion with respect to paragraph 79(1)(c)

[58] In summary, the Tribunal should have turned its mind to the question of whether, in each of the relevant markets, competitiveness was substantially lessened in the presence of the SDP, as compared to the likely state of competition in the absence of this practice. In other words, the Tribunal should have considered whether, without the SDP, the relevant product market would be substantially more competitive. Proper examination of this question might include the following considerations: whether entry or expansion might be substantially faster, more frequent or more significant without the SDP; whether switching between products and suppliers might be substantially more frequent; whether prices might be substantially lower; and whether the quality of products might be substantially greater. In this regard, identification of the occurrence of entry, or reference to evidence of competition subsisting in the presence of the impugned practice, is insufficient. I conclude therefore that the Tribunal erred in law in its analysis, for the purposes of paragraph 79(1)(c), as to whether the SDP has had, is having or is likely to have the effect of preventing or lessening competition substantially in the relevant markets.

(B) For the purposes of paragraph 79(1)(b), did the Tribunal err in its determination with respect to whether the SDP constitutes an “anti-competitive act”?

[59] The statutory test for an abuse of dominant position set out in section 79 is a conjunctive one: each of the three distinct elements must be found if an order is to issue. The Tribunal found that the market control element required under paragraph 79(1)(a) was established, and this finding, which is the subject of the cross-appeal, is upheld by this Court in separate reasons. This Court must also determine whether the Tribunal erred in its findings with respect to paragraph 79(1)(b).

[60] Paragraph 79(1)(b) calls for a determination as to whether the respondent, through the SDP, “ha[s] engaged in or [is] engaging in a practice of anti-competitive acts”. The Tribunal had no difficulty recognizing the SDP as a “practice”. It wrote, at para. 171, that the term entails more than an isolated act but may be one occurrence that is sustained and systemic, or that has had a lasting impact on competition. It explained at para. 200 of its reasons that the SDP is structured, organized and applied throughout Canada, albeit with some variations in the multiplier and rebates in the different regions and that the various components of the program add up to a practice. The respondent does not appear to contest this particular finding. The dispute arises with respect to whether the SDP can be characterized as composed of “anti-competitive acts” (« agissements anti-concurrentiels »).

[61] The Commissioner argued that while the Tribunal stated the correct legal test for anti-competitive acts, which was established in previous Tribunal decisions, this was not the test that it ultimately applied in its analysis of the SDP. The Tribunal erred in law, the Commissioner asserts, by requiring proof of a link between the SDP and a decrease in competition, and by improperly extending the scope of the valid business justification doctrine. As a result, according to the Commissioner, the approach to paragraph 79(1)(b) adopted by the Tribunal conflated the discrete statutory tests established by paragraphs 79(1)(b) and 79(1)(c).

[62] This question is further complicated in the case at bar by the fact that this appeal represents the first time that a court has considered the legal test applicable for the purposes of paragraph 79(1)(b). The Tribunal has considered, in prior abuse of dominance cases, the legal test and

analytic methodology applicable in ascertaining the existence of an “anti-competitive act”. The Tribunal’s jurisprudence on these questions cannot by itself be determinative in the current case, as its views on questions of law are not binding on this Court. The Tribunal’s jurisprudence may however be indicative of what makes sense and what has been working in the past – if, at the same time, it corresponds to the wording of the Act.

(1) The legal test under paragraph 79(1)(b)

[63] The *Act* does not provide an express definition of “anti-competitive act”. Section 78 provides a list of eleven anti-competitive acts, expressly “without restricting the generality of the term”. These examples are thus illustrative only, and indeed the Tribunal has recognized in its previous decisions that conduct not specifically mentioned in section 78 can constitute an anti-competitive act (*Nutrasweet, supra* at p. 34; *Laidlaw, supra* at p. 331-332; *D & B, supra* at p. 257; *Canada (Director of Investigation and Research) v. Tele-Direct* (1997), 73 C.P.R. (3d) 1 at 180 [*Tele-Direct*]). While clearly non-exhaustive, the illustrative list in section 78 provides direction as to the type of conduct that is intended to be captured by paragraph 79(1)(b): reasoning by analogy, a non-enumerated anti-competitive act will exhibit the shared essential characteristics of the examples listed in section 78.

[64] In *Nutrasweet, supra*, the Tribunal applied this interpretive approach to paragraph 79(1)(b), and suggested (at p. 34) the following working definition of “anti-competitive act”:

A number of the acts [mentioned in section 78] share common features but. . . only one feature is common to all: an anti-competitive act must be performed for a purpose, and evidence of this purpose is a necessary ingredient. The purpose common to all acts, save that

found in paragraph 78(f), is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary. (Emphasis added.)

[65] I adopt the above definition, which is very close in substance to the core characteristic of the enumerated list of section 78, save at paragraph 78(f). This exception was noted by the Tribunal in *Nutrasweet, supra*.

[66] Two aspects of this definition should be noted. First, an anti-competitive act is identified by reference to its purpose. Second, the requisite purpose is an intended predatory, exclusionary or disciplinary negative effect on a competitor. I will elaborate on each of these aspects in turn.

[67] First, the meaning of the term purpose deserves some comment. As the Tribunal observed in *Tele-Direct, supra* at p. 180, “‘purpose’ is used in this context in a broader sense than merely subjective intent on the part of the respondent. . . it might be more apt to speak of the overall character of the act in question” (emphasis added). In order to apply paragraph 79(1)(b), the purpose or character of the impugned conduct must therefore be determined. Relevant factors to be considered and weighed to determine this overarching “purpose” include the reasonably foreseeable or expected objective effects of the act (from which intention may be deemed, as I explain further below), any business justification, and any evidence of subjective intent, if available (see *Tele-Direct, supra* at p. 180).

[68] The second aspect describes the type of purpose required in the context of paragraph 79(1)(b): to be considered “anti-competitive” under paragraph 79(1)(b), an act must have an

intended predatory, exclusionary or disciplinary negative effect on a competitor. The paragraph 79(1)(b) inquiry is thus focused upon the intended effects of the act *on a competitor*. As a result, some types of effects on competition in the market might be irrelevant for the purposes of paragraph 79(1)(b), if these effects do not manifest through a negative effect on a competitor. It is important to recognize that “anti-competitive” therefore has a restricted meaning within the context of paragraph 79(1)(b). While, for the *Act* as a whole, “competition” has many facets as enumerated in section 1.1, for the particular purposes of paragraph 79(1)(b), “anti-competitive” refers to an act whose purpose is a negative effect on a competitor.

[69] Adopting this interpretive approach to section 79, it is conceivable that a practice might be found to be composed of anti-competitive acts within the meaning of paragraph 79(1)(b), but at the same time, for the purposes of paragraph 79(1)(c), be held not to have the effect of preventing or lessening competition substantially in the market in question.

[70] A final comment should be made with respect to the evidence required to establish an anti-competitive purpose within the meaning of paragraph 79(1)(b). It is clear from the legislative history of paragraph 79(1)(b) that evidence of subjective intent, although certainly probative if available, is not required in order to find that a given act is anti-competitive within the meaning of paragraph 79(1)(b). When Bill C-91, which eventually became the *Competition Act*, was first introduced in Parliament in December 1985, the text of paragraph (b) of the abuse of dominance provision (then section 51) read as follows:

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

51. (1) Lorsque le Tribunal, à la suite d'une demande du directeur,

that

...

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and the object of the practice is to lessen competition, and

conclut :

...

b) que cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels dont le but est de réduire la concurrence, et

Perceived problems with the subjective intent requirement implied by the latter part of the proposed paragraph (b) were frequently raised in testimony before the House of Commons Legislative Committee on Bill C-91 (see Canada, House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91*, First session of 33rd Parliament, 1986 at pages 2:8-9, 3:7-9, 3:17, 5:13, 5:15, 5:63-64, 6:9-10; 9:20-21; note also the contrary view expressed at 4:55-56, 6:57-58; 7:55-57, 7:60-63 [*Minutes of Committee on Bill C-91*]). In response, the reference to “the object of the practice” was deleted in paragraph (b), in order to remove any subjective intent requirement from the statutory test for abuse of dominant position (see *Minutes of Committee on Bill C-91, supra* at pages 11:3 and 11:32-33).

[71] On the basis of this legislative history, I would endorse the following comment by the Tribunal in *Laidlaw, supra* at p. 342, with respect to the proper role of evidence concerning subjective intent within paragraph 79(1)(b):

Proof of subjective intention on the part of a respondent is not necessary in order to find that a practice of anti-competitive acts has occurred. Such intention is almost impossible of proof in many cases involving corporate entities unless one stumbles upon what is known as a “smoking gun”. (A document which makes it clear that the purpose of the conduct in question was to exclude competitors from the market.) Section 79 of the Act provides for a civil proceeding and civil remedies. In that context corporate actors and individuals are deemed to intend the effects of their actions.

[72] Proof of the intended nature of the negative effect on a competitor can thus be established directly through evidence of subjective intent, or indirectly by reference to the reasonably foreseeable consequences of the acts themselves and the circumstances surrounding their commission, or both.

[73] Even though evidence of subjective intent is neither required nor determinative, intention remains an important ingredient of paragraph 79(1)(b). In particular, intention is relevant in the sense that while a respondent cannot disavow responsibility for the reasonably foreseeable consequences of its acts, a respondent might nevertheless be able to establish that such consequences should not, in the context of the paragraph 79(1)(b) inquiry, be considered the intended “purpose” or “overall character” of the acts in question. In appropriate circumstances, proof of a valid business justification for the conduct in question can overcome the deemed intention arising from the actual or foreseeable effects of the conduct, by showing that such anti-competitive effects are not in fact the overriding purpose of the conduct in question. In essence, a valid business justification provides an alternative explanation as to why the impugned act was performed. To be relevant in the context of paragraph 79(1)(b), a business justification must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts. The appropriate application of the valid business justification doctrine in the context of paragraph 79(1)(b) will be further considered below, in my discussion of the Tribunal’s analysis in the case at bar.

(2) The Tribunal’s paragraph 79(1)(b) decision

[74] In the case at bar, it would appear that the Tribunal correctly articulated the legal test. At para. 171 of its reasons, at the outset of its review of the Tribunal’s definition of “anti-competitive acts” in its previous cases, the Tribunal stated:

171 . . . In order to determine whether acts are anti-competitive, the Tribunal must consider the nature and purpose of the acts in question, as well as the impact they have or may have on the relevant market. [Note: *Nielsen* at 257; *Laidlaw* at 333; *Nutrasweet* at 34] In both *Tele-Direct* and *Laidlaw*, the Tribunal assessed the alleged anti-competitive practices by taking into account what effect they had had on competitors.

[Emphasis added]

In the course of quoting a longer passage from *Tele-Direct*, the Tribunal reproduced (at para. 178) the key sentence from *Nutrasweet*, *supra* at p. 34, to the effect that the feature common to anti-competitive acts is that they are all performed for a “purpose”, namely “an intended negative effect on a competitor that is predatory, exclusionary or disciplinary”. This formulation was also repeated in the concluding section of the Tribunal’s decision (at para. 284).

[75] However, despite this correct articulation of the test, the Tribunal’s analysis of the salient features of the applicable legal test is a cause for concern. At the end of the portion of its paragraph 79(1)(b) analysis entitled “The Law”, the Tribunal summarized as follows its understanding of key aspects of the legal test (at para. 191):

The Tribunal [in *Tele-Direct*] has stated that there must be a link between the impugned practice and a decrease in competition. Moreover, if a practice does not appear to have an exclusionary effect or cause detriment to the consumer, it cannot be said to be anti-competitive.

[Emphasis added.]

[76] This statement is incorrect, in at least two respects.

[77] First, for the purposes of paragraph 79(1)(b), a link need not be proven between the impugned practice and a decrease in competition. Quite simply, such a causal link is not part of the legal test for an anti-competitive act. Moreover, an emphasis upon evidence of this type runs the risk of obscuring the correct focus of the paragraph 79(1)(b) test. An anti-competitive act is one whose purpose is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary. The focus of analysis is thus on the act itself, to discern its purpose. The questions as to whether a decrease in competition in the market is evident, or whether any such decrease can be causally attributed to the impugned practice, are not directly relevant for this task. Certainly, such findings are not requisite elements of the test for an anti-competitive act.

[78] Obviously, if an act is to be found anti-competitive, there must be evidence linking the impugned practice to the requisite intended negative effect on a competitor: the practice must be found to cause or at least contribute to the intended negative effect. Such a negative effect on a competitor must also be found to be the “purpose” of the practice in question, and to this end, all relevant factors must be taken into account and weighed to determine if the requisite purpose is established. One must remember, however, that in the context of paragraph 79(1)(b), evidentiary factors are relevant only insofar as they shed light upon the paragraph 79(1)(b) statutory test, that is upon the purpose of the act vis-à-vis competitors. Evidence concerning other types of effects of the impugned act that are not related to competitors – while perhaps pertinent in respect of the paragraph 79(1)(c) assessment of competition – are not directly relevant for paragraph 79(1)(b). Similarly, evidence concerning the general competitive state and structure of the relevant market, and whether such features can be causally attributed to the impugned act, are not the direct focus of the paragraph

79(1)(b) analysis, and are more properly considered under paragraph 79(1)(c). In short, paragraph 79(1)(b) simply concerns whether the act displays the requisite intended effect on competitors; it is not directly concerned with the state of competition in the market or the general causes thereof. In directing itself to the contrary, and requiring proof of a causal link between the impugned act and a decrease in competition, the Tribunal erred.

[79] Second, the Tribunal appears mistakenly to suggest in the above-quoted passage that the impugned practice's effects on the consumer should or could be considered within the paragraph 79(1)(b) analysis. However, contrary to what the Tribunal implies in the above quotation, "detriment to the consumer" is not a relevant independent consideration for the purposes of paragraph 79(1)(b), as evidence of this type does not relate directly to whether an act has the requisite defining characteristic of an intended negative effect on a competitor. The effect of an act on consumers may in some circumstances be relevant in assessing the credibility and weight of a proffered business justification, as I explain further below. Otherwise, however, such evidence is largely irrelevant for the purposes of the paragraph 79(1)(b) assessment, and is more appropriately considered under paragraph 79(1)(c). To the extent that the Tribunal suggests in the above-quoted sentence that "detriment to the consumer" is an independently relevant consideration for the purposes of paragraph 79(1)(b), the Tribunal therefore erred.

[80] The Tribunal thus embarked on its paragraph 79(1)(b) analysis from an incorrect foundation: it erroneously believed itself obliged to consider factors which are not relevant in the correct legal test. The Supreme Court stated in *Southam, supra* at para. 41 that "[i]f the Tribunal did

ignore items of evidence that the law requires it to consider, then the Tribunal erred in law”.

Logically, this statement can be extended to encompass the situation of the case at bar: if the Tribunal considered items of evidence that the law requires it not to consider, then the Tribunal also erred in law. Moreover, these irrelevant factors may well have played a decisive role in this case: according to the Tribunal’s own articulation, evidence of a link between the practice and a decrease in competition was considered to be *required* for the purposes of paragraph 79(1)(b). Thus, to the extent that the Tribunal misdirected itself as to the applicable legal test, and as a consequence considered irrelevant factors in making its paragraph 79(1)(b) determination, the Tribunal committed a reversible error of law.

[81] The Tribunal’s erroneous interpretation of the paragraph 79(1)(b) test played a significant role in its analysis of the SDP. It is clear that in concluding that the SDP was not anti-competitive, the Tribunal relied heavily upon its mistaken understanding that a demonstrable link must exist between the impugned act and a decrease in competition. Indeed, the Tribunal expressly stated that this factor was “the most striking” basis for its conclusion:

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

[82] As this passage shows, the Tribunal's incorrect assumption that a link to a reduction in competition was required under paragraph 79(1)(b) critically influenced its reasoning. Instead of enquiring as to whether the SDP's purpose was an intended negative effect on competitors, the Tribunal asked whether there was evidence of a decrease in competition in the relevant market, in the abstract, and whether the identified competitive problems could be causally attributed to the SDP and hence be considered its "effects". This approach, of focussing on the general state of competition in the market rather than on the purpose of the impugned act, led the Tribunal to adopt an unwarrantedly and incorrectly narrow test for paragraph 79(1)(b): essentially, the Tribunal's reasoning would imply that unless an impugned act prevents entry of competitors or otherwise prevents competition, or unless it is the (predominant) cause of the uncompetitive attributes observed in the market, the act cannot be considered anti-competitive. This result is clearly incorrect.

[83] In my view, the Tribunal's error of law with respect to paragraph 79(1)(b) is partly attributable to a conflation of the legal test for paragraph 79(1)(c) with that applicable for paragraph 79(1)(b). As I mentioned above at the outset of my analysis, the multi-element structure of section 79 suggests that upon proper interpretation, each statutory element must give rise to a distinct legal test. To repeat, paragraph 79(1)(b) relates to whether the impugned act exhibits the requisite anti-competitive purpose vis-à-vis competitors, while paragraph 79(1)(c) concerns the broader state of competition, and whether the practice has the effect of substantially lessening competition in the relevant market. A particular indirect evidentiary indicator may serve subtly different – yet importantly distinct – purposes in regards to paragraph 79(1)(b) as compared to paragraph 79(1)(c).

Since paragraph 79(1)(b) focuses on whether the impugned act was performed for a particular purpose with respect to competitors, the relevant factors – that is, evidence concerning its foreseeable effects on competitors, business justifications for its adoption, and subjective intent – are to be interpreted in this particular light. By contrast, paragraph 79(1)(c) mandates an assessment of the substantiality of the practice’s actual or likely effects on competition in the relevant market(s), a task that proceeds from the vantage point of the market as a whole and invites consideration of a wider range of effects of the practice in question. The approach adopted by the Tribunal in this case does not properly recognize or maintain these important conceptual distinctions between the statutory elements of paragraph 79(1)(b) and 79(1)(c).

(3) The valid business justification and paragraph 79(1)(b)

[84] The Tribunal’s conflation of the legal tests for paragraph 79(1)(b) and 79(1)(c) is also apparent in its discussion of the business justification arguments proffered by the respondent. The Tribunal noted two business justifications suggested by the respondent: first, that the SDP’s uniform rebate structure encourages competition, by creating a level playing field between small and large distributors; and second, that the SDP makes possible the high-volume sales necessary to enable Bibby to maintain a full line of products.

[85] The Tribunal rejected the first business justification proposed by the respondent, but was persuaded by the second. With respect to the first justification, the Tribunal concluded (at para. 209) that although the creation of equitable opportunities for small- and medium-sized enterprises to

participate in the Canadian economy is an objective of the *Act* set out in section 1.1, this is not a relevant consideration for the purposes of section 79:

While the Tribunal acknowledges this to be an enunciated purpose of the Act, the Tribunal is of the view that this purpose is unrelated to the issue of abuse of dominance. Competition between distributors is not at issue. Rather, the case is about competition between Bibby and other suppliers of cast iron DWV products. The equitable characteristics of the SDP as it relates to distributors have little to do with whether Bibby is exercising its market power in a way that precludes competition between suppliers of the product. In consequence, this argument of business justification must fail.

[86] The Tribunal was persuaded, however, by the second business justification put forward by the respondent. It explained its reasoning as follows (at paras. 212 and 259):

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

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

[87] This analysis is problematic, as the Tribunal appears to have lost sight of the role of the valid business justification doctrine *within paragraph 79(1)(b)*, and instead seems to grant it an independent role. A business justification for an impugned act is properly relevant only insofar as it is pertinent and probative in relation to the determination required by paragraph 79(1)(b), namely the determination as to whether the purpose for which the act was performed was a predatory, exclusionary or disciplinary negative effect on a competitor. As I explained above in the discussion

of the intentionality aspect of the paragraph 79(1)(b) test, a valid business justification can, in appropriate circumstances, overcome the deemed intention arising from the actual or foreseeable negative effects of the conduct on competitors, by demonstrating that such anti-competitive effects are not in fact the overriding purpose of the conduct in question. In this way, a valid business justification essentially provides an alternative explanation as to why the impugned act was performed, which in the right circumstances might be sufficient to counterbalance the evidence of negative effects on competitors or subjective intent in this vein.

[88] The valid business justification doctrine is not an absolute defence for paragraph 79(1)(b). Rather, a business justification is properly employed to counterbalance or neutralize other evidence of an anti-competitive purpose, prior to making a determination under 79(1)(b). As the Tribunal observed in *D & B, supra*, a business justification proffered by a respondent must therefore be “weigh[ed]. . . in light of any anti-competitive effects to establish the overriding purpose” of the impugned act (at p. 262, also quoted in *Tele-Direct, supra* at p. 180). In *D & B, supra*, the Tribunal properly emphasized this balancing exercise (at p. 265):

Proof of the existence of a business motive for long-term contracts [the impugned conduct] that was unrelated to an anti-competitive purpose would undoubtedly be relevant to an evaluation of an allegation of anti-competitive acts. The mere proof of some legitimate business purpose would be, however, hardly sufficient to support a finding that there is no anti-competitive act. All known factors must be taken into account in assessing the nature and purpose of the acts alleged to be anti-competitive.

[89] In the case at bar, the Commissioner argued that the business justification accepted by the Tribunal is actually a self-interest argument based on selling more product, and therefore cannot qualify as a business justification for the purposes of paragraph 79(1)(b). The respondent countered

that this was a mischaracterization of the Tribunal's reasons, as in its view the business justification actually accepted by the Tribunal related to the maintenance of a full product line and the consequent benefits for consumers: according to the respondent, "it is crystal clear from the Tribunal's reasons that the Tribunal accepted the SDP's business purpose on the basis of its benefits to customers and end consumers, rather than Canada Pipe" (Respondent's Memorandum of Fact and Law at para. 83, original emphasis).

[90] In my view, the respondent's interpretation of the Tribunal's reasons with respect to the second business justification is apt. However, this reasoning, which relies solely upon consumer welfare benefits to establish the business justification, is at the core of the Tribunal's error. Simply stated, improved consumer welfare is on its own insufficient to establish a valid business justification for the purposes of paragraph 79(1)(b). A valid business justification must provide a credible efficiency or pro-competitive explanation, unrelated to an anti-competitive purpose, for why the dominant firm engaged in the conduct alleged to be anti-competitive. The business justification must therefore be attributable to the respondent, for it is the latter's allegedly anti-competitive conduct which is sought to be explained.

[91] In the case at bar, the Tribunal's reasons do not establish the requisite efficiency-related link between the SDP and the respondent, and hence do not supply a legitimate explanation for the latter's choice to engage in the impugned conduct, unrelated to an anti-competitive purpose. Without such a link, self-interest remains as the only justification for the SDP which is attributable to the respondent for the purposes of paragraph 79(1)(b). The Tribunal thus erred in concluding, on the basis of the reasoning provided in its decision, that the respondent had established a valid

business justification for the SDP. While this error may not ultimately have been determinative, in that a valid business justification is at most a factor to be balanced within the paragraph 79(1)(b) determination, it may well have played an important supporting role in the Tribunal's decision with respect to paragraph 79(1)(b).

(4) Conclusion with respect to paragraph 79(1)(b)

[92] In sum, the aspects of the Tribunal's decision discussed above admittedly represent short extracts of a long and complex analysis. However, the identified errors suggest a basic misapprehension and misapplication of the legal test for paragraph 79(1)(b), and a troubling conflation between paragraphs 79(1)(b) and (c). Thus, at the very least, the extracts highlighted above render suspect the Tribunal's analysis of the relevant factors in the context of paragraph 79(1)(b). I can only conclude that the matter should be returned to the Tribunal for a reconsideration of its paragraph 79(1)(b) determination in light of the correct legal test.

(C) For the purposes of subsection 77(2), did the Tribunal err in its determination with respect to whether the SDP has the result that competition is or is likely to be lessened substantially?

[93] As I described above at paragraph 21 of these reasons, there is a parallel structure and logic between the requisite statutory elements for exclusive dealing under subsection 77(2) and abuse of dominant position under subsection 79(1). The parties did not present separate arguments with respect to the substantial lessening of competition element of subsection 77(2), and instead simply referred the Court to their arguments concerning this element in the context of section 79. This

same approach was adopted by the Tribunal, which concluded, “[f]or the same reasons. . . as in our analysis under section 79,” that the Commissioner had failed to establish that the exclusive dealing practice has lessened competition substantially (para. 282).

[94] In *Nutrasweet, supra*, the Tribunal observed that “the fundamental test of substantial lessening of competition is the same in both sections of the Act [section 79 and subsection 77(2)]” (p. 56). The similarity between this element in section 79 and subsection 77(2) is indeed strong, in that both provisions employ the key concepts of substantial lessening and competition. However, the two provisions also contain some differences in wording. In particular, the scope of section 79 appears to include events of the past, which are not expressly included for the purposes of subsection 77(2): paragraph 79(1)(c) encompasses three time frames (“has had, is having or is likely to have”), while subsection 77(2) refers to only two (“is or is likely to”).

[95] For the purposes of this appeal, I need not consider whether the differences in wording between paragraph 79(1)(c) and subsection 77(2) might in particular cases properly yield substantively different results with respect to the substantial lessening of competition element. In the case at bar, it is clear that the Tribunal simply adopted the same legal test and analysis in respect of the substantial lessening of competition element for both section 79 and subsection 77(2). To the extent that the Tribunal erred in law in the context of paragraph 79(1)(c) in its interpretation of the test for substantial lessening of competition, the same errors of law apply with respect to subsection 77(2).

(D) For the purposes of subsection 77(2), did the Tribunal err in its determination with respect to whether the SDP is likely to impede entry or expansion of a firm or a product in a market or have any other exclusionary effect in a market?

[96] The parallel structure of subsection 77(2) and 79(1) is also apparent in comparing the second elements required by the two statutory provisions: both provisions call for the identification of a particular type of impugned conduct, namely a practice of exclusive dealing with an exclusionary effect in the case of subsection 77(2), and a practice of anti-competitive acts in the case of paragraph 79(1)(b). The parties did not present separate arguments concerning this element of subsection 77(2), but rather appear to have assimilated this element into their arguments concerning section 79.

[97] The Tribunal was satisfied that the SDP was a practice of exclusive dealing according to the statutory definition provided in paragraph 77(1)(b) (para. 279). However, the Tribunal concluded that an exclusionary effect had not been established, based on its analysis under section 79:

281 We have concluded under section 79 that the SDP is not an anti-competitive practice because we found insufficient evidence to show that the SDP in itself had an exclusionary effect. . .

282 For the same reasons therefore as in our analysis under section 79, we find that the Commissioner has failed to establish that the exclusive dealing practice impedes or is likely to impede entry of a new competitor or have any exclusionary effect. . .

[98] For the purposes of this appeal, I need not decide the precise scope or nature of the similarity between the statutory element of subsection 77(2) concerning exclusionary effects, and paragraph 79(1)(b). There may well be differences between the two provisions, which could prove pertinent in a future case. However, it is sufficient in the circumstances of this case to note that the exclusionary effects required under subsection 77(2) are clearly of a relative nature, as indicated by use of the word “impede” in paragraph 77(2)(a) and (b), rather than a more categorical verb, such as

“prevent”. I have already considered in detail the Tribunal’s treatment of the evidence concerning barriers to entry and the effects of the SDP, and it is unnecessary to repeat this analysis here. My conclusion, stated above at paragraph 58, is equally applicable for the purposes of the Tribunal’s determination with respect to the exclusionary effects element of subsection 77(2): the Tribunal’s analysis of the evidence concerning barriers to entry and the effects of the SDP was conducted from the narrow perspective of prevention, and not the broader perspective implied by the word “impede”. The adoption of this unduly narrow perspective constitutes reversible error.

[99] Moreover, it should be noted that like subsection 79(1), subsection 77(2) establishes distinct statutory elements, each of which must be established before an order prohibiting exclusive dealing can issue. These distinct statutory elements must not be conflated: the existence of the various exclusionary effects described in paragraph 77(2)(a), (b) and (c) must be considered separately from the question of whether there has been a substantial lessening of competition. Since the Tribunal relied, for the purpose of its subsection 77(2) determination concerning exclusionary effects, upon its erroneous paragraph 79(1)(b) reasoning, its conclusion in this regard cannot stand.

V. CONCLUSION

[100] For the above reasons, I would allow the appeal with costs, I would set aside the Tribunal’s decision in this regard, and I would refer the matter back to the Tribunal for a redetermination in accordance with these reasons and on the basis of the evidence currently on record.

“Alice Desjardins”

J.A.

“I agree.
Gilles Létourneau”

“I agree.
J.D. Denis Pelletier”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-106-05

STYLE OF CAUSE: THE COMMISSIONER OF
COMPETITION
v.
CANADA PIPE COMPANY
LTD. / LES TUYAUTERIES
CANADA LTÉE

PLACE OF HEARING: Ottawa

DATE OF HEARING: February 7-8, 2006

REASONS FOR JUDGMENT BY: Desjardins J.A.

CONCURRED IN BY: Létourneau J.A.
Pelletier J.A.

DATED: June 23, 2006

APPEARANCES:

Mr. Randall Hofley FOR THE APPELLANT
Ms. Leslie Milton
Mr. Kent Thomson FOR THE RESPONDENT
Mr. James Doris
Mr. Charles Tingley

SOLICITORS OF RECORD:

Johnston & Buchan LLP, Ottawa, Ontario FOR THE APPELLANT
John Sims, Deputy Attorney General of Canada,
Gatineau, Quebec
Davies Ward Phillips & Vineberg LLP, Toronto, FOR THE RESPONDENT
Ontario