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THE COMPETITION TRIBUNAL

IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended;

IN THE MATTER OF an application by the Commissioner of Competition under sections 79 and 77 of the Competition Act;

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

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- AND -

CANADA PIPE COMPANY LTD./TUYAUTERIES CANADA LTÉE

Respondent

**MEMORANDUM OF ARGUMENT OF
CANADA PIPE COMPANY LTD./TUYAUTERIES CANADA LTÉE**

(Redetermination Proceeding)

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PART I ~ OVERVIEW

1. This is a redetermination of the Tribunal's February 3, 2005, Reasons and Order (the "Original Tribunal Decision") with respect to an Application by the Commissioner of Competition same under sections 77 and 79 of the *Competition Act*¹ with respect to the Stocking Distributor Program introduced by Bibby-Ste-Croix, a division of Canada Pipe Company Limited in 1998. The Original Tribunal Decision was the product of six weeks of testimony (including 27 lay witnesses and 3 experts) and argument (the "Original Hearing").
2. In the Original Tribunal Decision, the Tribunal dismissed the Commissioner's Application on the basis that she had failed to prove her case under sections 77 and 79 of the Act. As discussed in greater detail below, the Commissioner appealed the Tribunal's Original Decision on the basis that the Tribunal had failed to apply the proper legal tests in respect of sections 77 and sections 79(1)(b) and 79(1)(c).
3. In June 2006, the Federal Court of Appeal issued its decision and granted the Commissioner's appeal in part, remanding the matter back to the Tribunal for a redetermination applying the legal tests for sections 79(1)(b) and 79(1)(c) and section 77, as articulated by the Court.
4. Bibby submits that the Commissioner's Application must be dismissed once again.
5. The Commissioner has not proven, as she is required to do under section 79(1)(b) of the Act, that the Stocking Distributor Program ("SDP") constitutes a practice of anti-

¹ R.S.C. 1985, c. C-34.

competitive acts, that is acts that have as their purpose an intended negative effect on a competitors that is predatory, exclusionary or disciplinary. While the Commissioner argues strenuously (in her Memorandum of Argument) that Bibby's subjective intent in implementing the SDP was to create a negative exclusionary effect on competitors and that the SDP has, in fact, impeded entry and expansion in the Relevant Markets (as defined below), she has not proved it. None of her allegations with respect to section 79(1)(b) have been established on the evidence before the Tribunal.

6. The SDP is not an anti-competitive act. Bibby's customers are not locked into the program and are provided with economic choices which they are fully able and free to exercise at any time. The SDP is pro-competitive in purpose and effect and has several valid business justifications that were dealt with in the evidence.
7. Among other things, the SDP promotes the use of cast iron DWV products and encourages distributors to inventory and promote such products against DWV products made from alternative materials. The SDP also minimizes free-riding by Bibby's competitors on Bibby's investments, including its investments associated with producing a full line of cast iron DWV products. Finally, the SDP helps Bibby to maintain a sufficient volume of production throughput of cast iron DWV products, thereby permitting Bibby to keep its production costs low and, thus, the cost of its products competitive as against DWV products made from other materials. All of this enures to the ultimate benefit of Canadian consumers.
8. The Commissioner has likewise failed to prove, as she is required to do under section 79(1)(c), that any of the Relevant Markets – in the past, present and future – would likely

be substantially more competitive but for the SDP. There is, again, simply no evidence to establish the Commissioner's claims that absent the SDP the Relevant Markets would benefit from greater competition, including substantially lower prices, increased switching between suppliers and substantially more entry and expansion by competitors.

9. Competition has in fact increased significantly since the SDP came into effect in 1998. Since its introduction, the first new domestic manufacturer of cast iron DWV products in over 30 years entered the Canadian market and the level of imports of cast iron DWV products has increased by over 122 percent. Moreover, in the face of vigorous competition, the prices of Bibby's products (and the prices of cast iron DWV products sold in Canada) have declined since the SDP came into effect. The Commissioner has not proved that competition would have increased even more, but for the SDP. On closer inspection, her arguments in this regard rest on conjecture and speculation alone.
10. For the same reasons, the Commissioner's section 77 claim must also be rejected. She has not proved on the evidence before the Tribunal that the SDP is likely to impede entry and expansion of competitors, or that it has any other exclusionary effects with the result that competition in any of the Relevant Markets is likely to be lessened substantially.
11. Even if the Tribunal somehow finds that the Commissioner has proven the required elements under sections 79 and 77, the Tribunal still maintains a discretion to grant or not grant a remedy, and to determine the scope and nature of any remedy that should be granted. The remedies sought by the Commissioner in this case are significant and in the Respondent's submission, entirely unnecessary and unreasonable. Among other things, they threaten to have a dramatic and negative impact on Bibby, as well as on small and

medium sized distributors that sell cast iron DWV products, without any likelihood of a corresponding "improvement" in the competitiveness of the Relevant Markets. Indeed, the opposite result is more likely to occur. Having proposed these remedies, the Commissioner has the burden of justifying them. However, the Commissioner makes no attempt whatsoever in her Memorandum of Argument to do so. In the circumstances, the Tribunal ought not to grant the requested orders.

PART II ~BACKGROUND

A. THE CANADIAN DWV INDUSTRY

1. *Canada Pipe/Bibby*

12. Canada Pipe is a small Canadian company that supplies the construction industry with cast iron DWV products through its Bibby Ste-Croix division (previously defined as "Bibby"). DWV products are used in a wide variety of structures to carry waste and drain water from appliances and drains and to vent plumbing systems. DWV products are manufactured using a variety of materials, including cast iron, plastic, copper, stainless steel, asbestos cement and glass. There are three components in a cast iron DWV system: pipe, fittings and mechanical joint ("MJ") couplings.²
13. Bibby manufactures over 780 types of DWV pipe and fittings, and imports over 70 types of MJ couplings from its sister companies in the United States. Bibby is the only company in Canada that manufactures and sells a full range of cast iron DWV products.³

² See Original Tribunal Decision at paras. 21, 22 and 34; Brief of Authorities of Canada Pipe Company Ltd. ("CPC Authorities"), Tab 1.

³ See *ibid.* at para. 266.

14. Canada Pipe owns a number of cast iron foundries in Canada which manufacture a variety of cast iron products. Bibby also manufactures a wide range of other cast iron products (e.g., castings and waterworks) at its foundry. Cast iron DWV fittings and pipe account for approximately fifty per cent of Bibby's production tonnage.⁴

2. *DWV Products*

15. DWV products are installed in virtually every kind of building application in Canada, including residential housing, institutional buildings, recreational facilities, commercial buildings, high rise residences and office buildings.⁵

16. DWV products made from various materials have different characteristics. For instance, plastic pipe is lighter and easier to handle and assemble than cast iron. However, cast iron pipe can be disassembled more easily than plastic and is considered by some to be more durable. Copper DWV pipe is easier to bend than cast iron and "in terms of cost and ease of installation, copper is generally more advantageous in diameters of 65mm or less".⁶ Asbestos cement DWV products are used in very large diameter pipes and, for regulatory reasons, only in Quebec and Ontario. Stainless steel is more costly and used in specific contexts where corrosion is an issue.⁷

17. The use of plastic DWV products has been increasing steadily since the early sixties and plastic has steadily replaced cast iron in virtually all DWV applications.⁸ Due to the

⁴ See Testimony of T. Leonard, Vol. 19, pp. 3868-71.

⁵ See Original Tribunal Decision at paras. 21, 37 and 39; CPC Authorities, Tab 1.

⁶ See *ibid.* at para 25.

⁷ See *ibid.* at paras. 25, 26, 87 and 94.

⁸ See *ibid.* at paras. 27-29.

increasing popularity of such alternative materials, the Tribunal found in its Original Decision that the cast iron DWV industry is a mature industry, and not one in which one expects great growth or innovation.⁹

18. Cast iron DWV products are imported into Canada from two main sources: the United States and the Far East, mainly China and India. In its Original Decision, the Tribunal noted that "quality pipe and fittings can be obtained from Asia, but quality couplings from Asia are more difficult to find".¹⁰

3. *Distributors*

19. Distributors of DWV products purchase from suppliers (either the manufacturer or an importer) and sell to the end user (such as contractors and builders). Distributors generally carry DWV pipe and fittings made of various materials.¹¹
20. There are three major distributors that have a national presence in Canada: Wolsley Canada Inc. ("Wolsley") (formerly Westburne), EMCO Ltd. ("EMCO") and Crane Supply ("Crane").¹² There are also a number of smaller distributors located throughout Canada. Representatives of four such distributors – McKeough Supply Inc. ("McKeough"), Nuroc Plumbing and Heating Supply ("Nuroc"), Niagara Plumbing & Supply ("Niagara") and Sherwood Plumbing Supplies ("Sherwood") – testified before the Tribunal at the Original Hearing.

⁹ See *ibid.* paras. 92, 116, 160 and 196.

¹⁰ *Ibid.* at para. 40.

¹¹ See *ibid.* at para. 37.

¹² See *ibid.* at para. 38.

21. There are numerous distributors in Canada who do not carry cast iron DWV products but do business with contractors and builders.¹³

4. *Contractors*

22. Contractors can purchase cast iron DWV products from distributors, importers (*e.g.*, Sierra Distributors ("Sierra") and Davcon) or, alternatively, may import those products themselves directly from offshore sources themselves (*e.g.*, William Kelly & Sons and LGC Plomberie).

5. *Bibby's Competitors*

23. Bibby has faced, and continues to face, stiff competition from a variety of sources, including Vandem Industries ("Vandem") (a domestic manufacturer of pipe and importer of fittings and couplings), as well as a variety of importers (*e.g.*, Sierra Distributors, Davcon, New Centurion and BMI Canada ("BMI")).

24. Contrary to the Commissioner's assertion at paragraphs 45 to 47 of her Memorandum of Argument, and as set out more fully below, the evidence before the Tribunal was that importers (including those who testified at the Original Hearing) have been able to effectively compete with Bibby and capture a relatively significant amount of market share in a short period of time, with limited investments and resources.

25. In this regard, the Tribunal found that "all the importers who testified before the Tribunal had increased their imports since 1998"(when the SDP was introduced).¹⁴ Indeed, the

¹³ See Testimony of T. Leonard, Vol. 19, p. 3878; Vol. 20, p. 4099, lines 4 to 24; Testimony of J. Vanderwater, Vol. 8, p. 1535, line 23 to p. 1536, line 9.

¹⁴ Original Tribunal Decision at para. 40; CPC Authorities, Tab 1.

evidence demonstrates that the average volume of imports of cast iron pipe and fittings increased by 72 percent in the five years between 1998 to 2002 – after the SDP was introduced – in comparison with the period between 1993 to 1997 – prior to the introduction of the SDP.¹⁵

26. With respect to Vandem, the Commissioner's assertions at paragraph 27 of her Memorandum of Argument that Vandem entered the DWV marketplace prior to the introduction of the SDP is not correct. The evidence before the Tribunal clearly establishes that Vandem did so after the fact. Vandem began selling couplings in Canada in January 1998, fittings in late 1998, and expanded to selling pipe in mid-1999.¹⁶ Despite having virtually no sales force, business strategy or financial forecasts, Vandem managed to capture 10 percent of sales in Canada, and by 2002 had become profitable.¹⁷ In its Original Decision, the Tribunal concluded that Vandem's "entry was effective, as shown by the competitive prices in Ontario which followed Vandem's entry".¹⁸
27. Sierra is an importer of cast iron DWV pipe, fittings and couplings based in British Columbia. Sierra entered the cast iron DWV industry gradually and began selling cast iron DWV fittings in 1998, and thereafter expanded to pipe and couplings. Contrary to the Commissioner's contention (at paragraph 47 of her Memorandum of Argument) that Sierra was "not able to penetrate any Relevant Market in Canada other than British Columbia, Alberta and the Prairies", the evidence of Sierra's principal/owner, Dave

¹⁵ See *ibid.* at para. 40.

¹⁶ See Testimony of R. Demeny, Vol. 5, pp. 1003–09; Testimony of J. Vanderwater, Vol. 7, pp. 1434-35.

¹⁷ See Original Tribunal Decision at paras. 148 and 244; CPC Authorities, Tab 1.

¹⁸ *Ibid.*

Kelm, was that he voluntarily chose to stay within British Columbia because of the "ease of doing business".¹⁹ In its Original Decision, the Tribunal found that "the evidence establishes that Sierra has not expanded further essentially because its owner decided not to further grow the company and not necessarily because of the SDP".²⁰

28. New Centurion is another importer of cast iron DWV products based in British Columbia. The evidence on the record before the Tribunal establishes that with no sunk costs, very little equipment and very few employees, New Centurion has been able to capture the business of Wolseley, one of Canada's largest distributors in Western Canada. Contrary to the Commissioner's statement (at paragraph 47 of her Memorandum of Argument) that New Centurion was not able to penetrate any Relevant Market in Canada (other than British Columbia, Alberta and the Prairies), there is no evidence on the record to suggest that New Centurion made any significant efforts to penetrate any Market outside of British Columbia, Alberta and the Prairies. Indeed, the evidence shows that New Centurion has consciously decided to limit its business in Western Canada to an exclusive relationship with Wolseley. The evidence also shows that New Centurion has expanded to doing business with Vandem in Eastern Canada.²¹
29. The Tribunal also heard evidence at the Original Hearing regarding the presence of numerous other importers of cast iron DWV products including Litech, Exclusive Impex

¹⁹ Testimony of D. Kelm, Vol. 11, p. 2271.

²⁰ Original Tribunal Decision at para. 254; CPC Authorities, Tab 1.

²¹ See Testimony of J. Lim, Vol. 12, p. 2417 lines 5 to 15.

Inc., Kent Sharp Company, Tiger Pipe, Liaoning Limeng Group Ltd., Sino-Canwest Trading Inc., Arredamientos, Schultz and LGC Plomberie.²²

30. Bibby has also faced, and continues to face, competition from couplings manufacturers such as Mission Rubber ("Mission"), Ideal, Fernco Connectors Ltd. ("Fernco") and Rollee Industrial Products (1987) Ltd., as well as from distributors of couplings such as Gates Rubber ("Gates"). Indeed, both Gates and Ideal entered and began to sell couplings into Canada after the SDP was introduced.²³
31. There is also no evidence supporting the Commissioner contention, at paragraph 48 of her Memorandum of Argument, that Mission was not an effective competitor. Rather, the only documents on the record regarding Mission's presence show ongoing price competition between Mission and Bibby, both before and after the SDP was introduced.²⁴

6. *Bibby's Stocking Distributor Program*

32. Since January 1998, Bibby has offered a loyalty-based rebate and discount program known as the SDP. The SDP is, as the Tribunal has already found,²⁵ completely transparent in nature and rewards distributors who choose to purchase all of their cast iron DWV products from Bibby with point-of-purchase discounts, as well as quarterly and annual rebates.

²² See Testimony of R. Demeny, Vol. 6, pp. 1201-09, 1216-22 and 1230-40; Testimony of T. Leonard, Vol. 19, p. 3880; Testimony of M. Corriveau, Vol. 10, p. 1980.

²³ See Testimony of C. Vansell, Vol. 13, p. 2651; Testimony of M. O'Brien, Vol. 11, p. 2206-2208.

²⁴ See documents JB 4-115, JB 20-989, JB 24-1172, JB 24-1177 and JB 24-1181.

²⁵ See Original Tribunal Decision at para. 206; CPC Authorities, Tab 1.

33. In order to qualify for the SDP, distributors are required to buy a minimum of one truckload (40,000 pounds) of DWV products from Bibby. To make it easier for distributors to satisfy this requirement, they can pool their purchases as part of a buying group. Once the truckload threshold is met, all distributors enjoy the very same rebates, regardless of their size or ultimate volume of purchases. Bibby does not require distributors to enter into signed contracts in order to join the SDP, and participating distributors are free to join or leave the SDP at any time.²⁶ Furthermore, distributors are free to purchase products from Bibby even if they choose not to participate in the SDP.²⁷
34. The structure of the SDP is the same across Canada. The point-of-purchase discounts are the most significant component of the Program, resulting in up-front discounts of up to 40% from Bibby's list price. The point-of-purchase discounts are made available at the time a distributor purchases product from Canada Pipe, and are retained by the distributor even if it later chooses to leave the SDP.²⁸
35. If a distributor chooses to purchase all of its cast iron DWV products from Bibby during a given three month period, the distributor is entitled to a quarterly rebate. The quarterly rebates offered range from 7% to 15% depending on the region, as well as the competitive environment. If a distributor stays on the SDP for an entire calendar year, the distributor will also be entitled to an annual rebate. The annual rebate is, and has

²⁶ See *Ibid.* at paras. 46-47; CPC Authorities, Tab 1.

²⁷ See *ibid.* at paras. 206 and 212; Testimony of R. Byrne, Vol. 4, p. 848 and Testimony of T. Leonard, Vol. 19, p. 3919, lines 14-24.

²⁸ See *ibid.* at paras. 44-45.

always been, the smallest component of the SDP. It ranges from 1% to 4% of a distributor's annual purchases.²⁹

36. Distributors are free to stock and sell DWV products made from materials other than cast iron, supplied by companies other than Bibby, without affecting their participation in the SDP. It is also to be noted that there are no restrictions on the resale of cast iron DWV products purchased by distributors who participate in the SDP. As a practical matter, participants in the SDP can and do in fact resell to non-participating distributors, who are thus able to share in the benefits associated with the SDP.³⁰
37. The terms of the SDP have changed from time-to-time since it was introduced in 1998. When the program was first introduced, for example, the quarterly and annual rebates were paid by providing credit memos rather than cheques. Tom Leonard, the General Manager of Bibby, testified that Bibby initially paid the rebates by credit memo rather than by cheque in order to encourage distributors to attribute the rebates to the sale of cast iron DWV products (rather than other DWV products) in their internal records. This ensured that customers' internal records properly reflected the profitability of the sale of Bibby's cast iron DWV products.³¹ As Mr. Leonard testified, and as a number of distributors confirmed in their evidence before the Tribunal, distributors will choose which DWV products to promote based on the margins of profitability offered by such product lines. Contrary to the Commissioner's suggestion at paragraph 53 of her

²⁹ See *ibid.* at para. 44.

³⁰ See *ibid.* at paras. 44-47 and 233. Testimony of C. Beaulac, Vol. 8, p. 1666-67; Testimony of T. Leonard, Vol. 19, p. 3919, line 22 to p. 3920, line 5.

³¹ See Testimony of T. Leonard, Vol. 19, p. 3924, line 13 to p. 3926, line 18.

Memorandum of Argument, there was no improper purpose behind the use of credit memos. Indeed, a number of distributors testified that the use of credit memos is standard or common practice in the industry.³² Moreover, it was expressly confirmed before the Tribunal at the Original Hearing, contrary to the Commissioner's assertion, that distributors were not "forced" to stay on the SDP in order to use any credits received from Bibby.³³

38. There are numerous distributors in Canada who have chosen to leave the SDP at a given point in time (*e.g.*, Wolseley), purchase from other suppliers while participating in the SDP, or purchase from Bibby's competitors (*e.g.*, McKeough, Nuroc and Niagara).
39. There are two large buying groups in Canada – Octo Purchasing Group Ltd. ("Octo") and 2258005 Canada Limited ("Canaplus"). These buying groups pool the purchases of their distributor members to secure volume discounts and rebates. Some members of Octo purchase cast iron DWV products from Bibby and participate in the SDP, while others purchase from the participating distributors.³⁴ Canaplus has chosen Vandem and not Bibby as its preferred supplier of cast iron and does not participate in the SDP.³⁵

³² See Testimony of R. Byrne, Vol. 4, p. 877, line 18 to p. 878, line 20; Testimony of G. Tester, Vol. 10, p. 1945, lines 3 to 13.

³³ See Testimony of G. Tester, Vol. 10, p. 1945, lines 14 to 22.

³⁴ See Original Tribunal Decision at para. 233; CPC Authorities, Tab. 1.

³⁵ See *ibid.* at para. 234.

B. ORIGINAL TRIBUNAL DECISION

1. *Relevant Markets*

40. In its Original Decision, the Tribunal concluded that each of pipe, fittings and couplings constitutes a separate product market. The Tribunal also determined that cast iron DWV products comprise a separate product market that does not include DWV products made from materials such as plastic, copper, stainless steel or asbestos cement.³⁶

41. With respect to the relevant geographic market, the Tribunal found that there were six geographic markets coinciding with Canada Pipe's six pricing regions. With six geographic markets and three product markets, the Tribunal held that there are a total of eighteen relevant markets.³⁷ These eighteen markets are collectively referred to as the "Relevant Markets".

2. *Market Power*

42. Having defined the Relevant Markets, the Tribunal proceeded to consider whether Canada Pipe possesses market power. The Commissioner relied on direct and indirect evidence in this regard. With respect to the direct evidence and, specifically, the Dr. Ross' presentation on high margins, the Tribunal found that "[w]hen studied closely, [that presentation] appears somewhat strained".³⁸ The Tribunal also noted that no gross margin analysis for couplings had been conducted by Dr. Ross, and that his gross margin analysis for DWV fittings performed was incomplete.³⁹ The Tribunal nonetheless

³⁶ See *ibid.* at para. 112.

³⁷ See *ibid.* at para.112.

³⁸ *Ibid.* at para. 124.

³⁹ See *ibid.* at paras. 124-28.

accepted the Commissioner's contention that Canada Pipe had "hefty margins" and that Canada Pipe's ability to lower prices in reaction to competition suggested that its initial prices (that is prior to lowering) must be supra-competitive. On this basis, the Tribunal concluded that the "direct" evidence indicated that Canada Pipe possessed market power in the Relevant Markets.⁴⁰

43. The Tribunal then considered the Commissioner's "indirect" evidence of market power, including evidence relating to Canada Pipe's market shares and barriers to entry. Without conducting a separate analysis for each of the Relevant Markets, the Tribunal concluded that Canada Pipe "controls between 80-90% of the market in cast iron DWV products".⁴¹
44. With respect to barriers to entry, the Tribunal specifically rejected the Commissioner's central argument that the SDP is itself the principal barrier to market entry, concluding that there is "no direct evidence that would support the conclusion that it is a barrier to entry".⁴² The Tribunal also concluded that the evidence with respect to barriers to entry in the cast iron DWV industry was "not entirely conclusive".⁴³ In reaching this conclusion, the Tribunal reviewed the evidence on the record with respect to sunk costs, costs of entry, incumbent advantage and Bibby's SDP. The Tribunal noted that "no specific evidence was provided in relation to sunk costs".⁴⁴ The Tribunal also concluded that the evidence showed that no special equipment or facilities was required to begin

⁴⁰ See *ibid.* at paras. 124-37.

⁴¹ *Ibid.* at para. 140.

⁴² *Ibid.* at para. 149.

⁴³ See *ibid.* at para. 161.

⁴⁴ *Ibid.* at para. 141.

importing cast iron DWV products.⁴⁵ Furthermore, the Tribunal found that the history of actual entry into the cast iron DWV market while the SDP has been in effect provides a "powerful counter-argument to Dr. Ross' contention that barriers to entry are preventing new entry".⁴⁶

45. With respect to entry, the Tribunal found that the entry which has occurred since 1998 has "taken various forms – whether manufacturing (Vandem), importing for distribution (Sierra and Wolseley) or importing directly for contracted work (Mr. Kelly)".⁴⁷ The Tribunal also concluded that "the evidence clearly shows that successful entry was achieved by suppliers who did not carry full lines of products (New Centurion, Sierra, Ideal, Vandem)".⁴⁸ The Tribunal also noted that despite Vandem's lack of business strategy or sales force, "Vandem managed within four years to capture 10 percent of sales in Canada".⁴⁹
46. Although the Tribunal did not specifically analyse Canada Pipe's market power in each of the Relevant markets, the Tribunal nonetheless concluded that the Commissioner's "indirect" evidence indicated, on balance, that Canada Pipe possesses market power.⁵⁰

⁴⁵ See *ibid.* at para. 143.

⁴⁶ *Ibid.* at para. 150.

⁴⁷ *Ibid.* at para 150.

⁴⁸ *Ibid.* at para. 141.

⁴⁹ *Ibid.* at para. 148.

⁵⁰ *Ibid.* at paras. 149, 150 and 161.

3. *Practice of Anti-competitive Acts – Section 79(1)(b)*

47. The Tribunal analysed the nature, purpose and effect of the SDP at length in its Original Decision and determined that the SDP is consistent in all respects with competition on the merits.
48. Among other things, the Tribunal highlighted the transparency to customers of the SDP's terms, and the fact that those terms were easy to meet, the limited duration of the commitment involved to receive the maximum benefit of the SDP, the non-retractable nature of the SDP discounts given to customers at the point-of-purchase, the absence of restrictions on the re-sale of items purchased with the benefit of the SDP, the freedom enjoyed by customers to leave and re-join the SDP as they please, the fact that Canada Pipe remained willing to supply any DWV products to customers who do not participate in the SDP, and the fact that the SDP has and continues to allow Canada Pipe to generate efficiencies necessary to offer customers the only full-line of cast iron DWV products available in Canada.
49. The Tribunal also found that distributors can and have left the SDP at various points in time, and for various lengths of time, to take advantage of more favourable offers made by competing suppliers of cast iron DWV products.⁵¹
50. Furthermore, the Tribunal concluded that distributors had other good reasons for choosing to stay on the SDP. For example, the Tribunal found that distributors choose to

⁵¹ See *ibid.* at paras. 203-12 and 224-26.

stay on the SDP due to Canada Pipe's quality of service or complete product line; both attributes of Bibby's superior competitive performance.⁵²

51. In argument before the Tribunal at the Original Hearing, Bibby offered a variety of different business justifications for the SDP, namely that the SDP: increases Bibby's production efficiencies; encourages the promotion of cast iron DWV products (which has the positive effect of levelling the competitive playing field between large and small distributors); is intended to (and does) minimize free riding on Canada Pipe's investments; and encourages the sale of complete systems of cast iron DWV products.⁵³
52. Ultimately, however, the Tribunal considered only two justifications: 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. The Tribunal's findings and conclusions with respect to the validity of those justifications were summarized by the Court of Appeal as follows:

"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.

⁵² See *ibid.* at paras. 232 and 237.

⁵³ See Original Tribunal Decision at para. 170; CPC Authorities, Tab 1.

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".⁵⁴

4. *Substantial Prevention or Lessening of Competition – Section 79(1)(c)*

53. The Tribunal rejected the Commissioner's arguments under section 79(1)(c) that the SDP had resulted in an actual or likely substantial prevention or lessening of competition. In reaching this conclusion, the Tribunal found that there is "significant evidence of competitive pricing notwithstanding the SDP",⁵⁵ and referred to extensive and repeated effective entry by domestic suppliers and importers of cast iron DWV products in the period after the SDP came into effect. Specifically, in this regard, the Tribunal found that entry by domestic suppliers as well as importers has had a "noticeable impact on prices of cast iron DWV products".⁵⁶

⁵⁴ FCA Decision at paras. 84-86; CPC Authorities, Tab 2.

⁵⁵ Original Tribunal Decision at para. 265; CPC Authorities, Tab 1.

⁵⁶ *Ibid.* at para. 265.

5. ***Exclusive Dealing – Section 77***

54. The Tribunal dismissed the Commissioner's exclusive dealing claims for largely the same reasons it dismissed the Commissioner's abuse of dominance application. Although the Tribunal found that Canada Pipe could be considered a "major supplier" of a product in a market, and that the SDP met the threshold definition of "exclusive dealing" in section 77(2) of the Act, it concluded that the required elements of section 77 had not been satisfied by the Commissioner because she had failed to establish that the SDP had any exclusionary effect in practice that resulted in a substantial lessening of competition.⁵⁷

PART III ~ POINTS IN ISSUE

55. The issues before the Tribunal in this redetermination proceeding are as follows:
- (a) whether, on the basis of the evidence currently on the record,⁵⁸ the test for sections 79(1)(b) of the Act has been met;
 - (b) whether, on the basis of the evidence currently on the record, the test for section 79(1)(c) of the Act has been met;
 - (c) whether, on the basis of the evidence currently on the record, the test for section 77(2) of the Act has been met; and
 - (d) if the Tribunal finds that the foregoing tests have been satisfied, whether a remedy should be granted.
56. Each of these issues will be considered in turn below.

⁵⁷ See *ibid.* at paras. 279-82.

⁵⁸ See FCA Decision at para. 100; CPC Authorities, Tab 2.

PART IV ~ LAW AND ARGUMENT

A. SDP IS NOT AN "ANTI-COMPETITIVE ACT"

1. *Prior Tribunal Decisions and U.S. Authority Referred to and Relied on by the Commissioner*

57. As part of her submissions on the question of whether the SDP constitutes an "anti-competitive act" under section 79(1)(b), the Commissioner places heavy reliance and emphasis on two prior decisions of this Tribunal – specifically, *Canada (Director of Investigation and Research) v. NutraSweet Co.*⁵⁹ and *Canada (Director of Investigation & Research v. D&B Companies of Canada Ltd.*⁶⁰ – repeatedly attempting to draw parallels between the impugned arrangements in those cases and the SDP, and ultimately asserting that "the SDP is even more egregious than *[sic]* the clauses considered in previous cases by the Tribunal".⁶¹
58. The very same arguments by the Commissioner were carefully considered and rejected by the Tribunal in its Original Decision:

"Although the terms of the program, as noted earlier, could be seen as binding on its participants, the SDP bears none of the characteristics that were found offensive in *Nielsen, NutraSweet* or *Laidlaw*. The terms are clear. The full commitment is for only a year. Non-performance by a distributor (buying outside) leads to non-performance by Bibby (rebates are not paid). However, this is not comparable to penalty clauses or liquidated damages that would be additional to non-performance of a contract. Moreover, the main advantage of the program, the multiplier effect, is provided as soon as the distributor enters the program, and is only taken away from the moment the distributor chooses to leave the program. The distributor does not have to reimburse the discount applied at the time of purchase through the multiplier. This distinguishes the program significantly from the contracts in other abuse of dominance cases where non-performance would lead to heavy penalties".⁶² [emphasis added]

⁵⁹ (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) ["*NutraSweet*"]; CPC Authorities, Tab 3.

⁶⁰ (1995), 64 C.P.R. (3d) 216 (Comp. Trib.) ["*Nielsen*"]; CPC Authorities, Tab 4.

⁶¹ Commissioner's Memorandum of Argument at para. 72.

⁶² Original Tribunal Decision at para. 256, CPC Authorities, Tab 1.

59. As discussed in greater detail below, the Tribunal's conclusion that the SDP does not exhibit any of the characteristics that were present in the prior abuse of dominance cases involving exclusive dealing supports the conclusion that the anti-competitive intent present in those cases is absent here. In fact, in comparing the structure of the SDP with the program considered in *NutraSweet*, the Tribunal found that the "same exclusionary purpose and effect cannot be attributed to the SDP".⁶³
60. The Commissioner also refers in her Memorandum of Argument to the decision of the U.S. Court of Appeal for the Third Circuit in *LePage's v 3M*⁶⁴ in (apparently) suggesting that bundled rebates by dominant firms are virtually *per se* unlawful under section 2 of the *Sherman Act* (the equivalent to section 79).⁶⁵
61. It is to be noted, however, that a recently published report of the United State Antitrust Modernization Commission,⁶⁶ as well as the recent decision of the United States Court of Appeals for the Ninth Circuit in *Cascade Health Solutions v. PeaceHealth*⁶⁷ both explicitly consider and reject the *LePage's* approach to evaluating bundled discounts offered by dominant firms.
62. The bipartisan Antitrust Modernization Commission ("AMC") was recently struck by the U.S. government to review the state of antitrust laws in the United States and the need for any changes and/or improvements. As the AMC report points out, the crucial issue in the

⁶³ *Ibid.* at paras. 257-58.

⁶⁴ 324 F.3d 141 (3d Cir. 2003) ["*LePage's*"]; Commissioner's Brief of Authorities, Tab 7.

⁶⁵ See Commissioner's Memorandum of Argument at paras. 67-68.

⁶⁶ Antitrust Modernization Committee, Report and Recommendations (April 2007) ["AMC Report"]; CPC Authorities, Tab 12.

⁶⁷ No. 05-35627 (9th Cir. Sept. 4, 2007) ["*PeaceHealth*"]; CPC Authorities, Tab 5.

enforcement of section 2 of the *Sherman Act* in the United States is as follows: "whether a firm's conduct represents competition on the merits or improper 'exclusionary' conduct."⁶⁸ [emphasis added]

63. Further, the AMC considered the very passage from *LePage's* that is quoted at paragraph 67 of the Commissioner's Memorandum of Argument and stated:

"The fundamental criticism of the Third Circuit's decision is that it did not assess whether 3M's bundled rebates constituted competition on the merits. The court focused on the claimed harm to *LePage's*, including its loss of market share in the market for transparent tape and its loss of efficiencies in manufacturing. But as one critic points out, that a monopolist's conduct weakens a rival is not sufficient to trigger liability under Section 2. 'Price cutting may result ... in some competitors being driven out of the business, a result that is tolerated as a natural product of legitimate competition when an exit is the product of an inability to compete efficiently on the merits.' Lower prices may harm a rival but benefit consumers".⁶⁹ [citations omitted]

64. Ultimately, the AMC concluded that:

"[b]ecause the court failed to evaluate whether 3M's program of bundled rebates represented competition on the merits, its decision offers no clear standards by which firms can assess whether their bundled rebates are likely to pass antitrust muster. Therefore, the Third Circuit's decision is likely to discourage firms from offering pro-competitive bundled discounts and rebates to consumers".⁷⁰

65. In response to the lack of any clear or appropriate standard for evaluating whether competitive conduct is indeed exclusionary, and the concern that the standard articulated in *LePage's* would unnecessarily chill competitive conduct, the AMC made the following recommendation:

"Courts should adopt a three-part test to determine whether bundled discounts or rebates violate Section 2 of the Sherman Act. To prove a violation of Section 2, a plaintiff should be required to show each one of the following elements (as well as other elements of a Section 2 claim): (1) after allocating all discounts

⁶⁸ AMC Report at 81; CPC Authorities, Tab 12.

⁶⁹ *Ibid.* at 97.

⁷⁰ *Ibid.* at 94.

and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product; (2) the defendant is likely to recoup these short term losses; and (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition".⁷¹

66. The AMC specifically noted that the first element in its proposed test is intended to ensure that bundled discounts should be subject to scrutiny under Section 2 of the *Sherman Act* only if they could exclude a hypothetical equally efficient competitor.⁷²
67. The AMC's recommendation that the *LePage's* approach to evaluating bundled discounts be abandoned was adopted in the Ninth Circuit's most recent decision in *PeaceHealth*. In that case, the Court of Appeals specifically reviewed the *LePage's* standard and decided that it was problematic and should not be followed:

"Given the endemic nature of bundled discounts in many spheres of economic activity, we decline to endorse the Third Circuit's definition of when bundled discounts constitute the exclusionary conduct proscribed by §2 of the Sherman Act. Instead, we think the course safer for consumers and our competitive economy to hold that bundled discounts may not be considered exclusionary conduct within the meaning of §2 of the Sherman Act unless the discounts resemble the behavior that the Supreme Court in *Brooke Group* identified as predatory. Accordingly, we hold that the exclusionary conduct element of a claim arising under §2 of the Sherman Act cannot be satisfied by reference to bundled discounts unless the discounts result in prices that are below an appropriate measure of the defendant's costs".⁷³ [citations omitted]

68. In reaching this conclusion, the Court of Appeals discussed the pervasive and generally pro-competitive nature of bundled discounts:

"Bundled discounts are pervasive, and examples abound. Seasons tickets, fast food value meals, all-in-one home theatre systems – are all bundled discounts. [...] The fact that such diverse sellers offer bundled discounts shows that such discounts are a fundamental option for both buyers and sellers.

⁷¹ *Ibid.* at 99.

⁷² See *ibid.*

⁷³ *PeaceHealth* at 11221; CPC Authorities; Tab 5.

Bundled discounts generally benefit buyers because the discounts allow the buyer to get more for less. ... Bundling can also result in savings to the seller because it usually costs a firm less to sell multiple products to one customer at the same time than it does to sell the products individually".⁷⁴ [citations omitted]

69. The AMC's approach and the decision in *PeaceHealth* point to and underscore the extreme care which must be taken to distinguish competition on the merits by dominant firms from anti-competitive or "exclusionary" conduct which is designed to harm competitors. This Tribunal made precisely the same point in Canada (*Director of Investigation and Research*) v. *Tele-Direct (Publications) Inc.*,⁷⁵ highlighting the concern that normal and legitimate competitive behaviour by dominant firms not be chilled by unnecessary interference from the Tribunal:

"It would not be in the public interest to prevent or hamper even dominant firms in an effort to compete on the merits. Competition, even 'tough' competition, is not to be enjoined by the Tribunal but rather only anti-competitive conduct.

...

Decisions by the Tribunal restricting competitive action on the grounds that the action is of overwhelming intensity would send a chilling message about competition that is, in our view, not consistent with the purpose of the Act, as set forth in section 1.1".⁷⁶

70. The Commissioner's own *Enforcement Guidelines on the Abuse of Dominance Provisions* (the "Abuse Guidelines"), released in July 2001, reflect the same concern:

"The objective of the abuse of dominance provisions is to create a market framework within which all firms have an opportunity to either succeed or fail on the basis of their ability to compete. Providing such a framework, however, does not mean establishing equality among competitors. Rather, the objective of the abuse provisions is to promote effective competition and not the interests of any one competitor or group of competitors. The provisions are not intended to be used to attempt to tilt the playing field in favour of market participants who,

⁷⁴ *Ibid.* at 11208.

⁷⁵ *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.) ["*Tele-Direct*"]; CPC Authorities, Tab 6.

⁷⁶ *Ibid.* at 179bc and 200d.

for example, lack the ability to compete with more efficient or better-managed rivals.

Competition policy exists to encourage competition rather than to penalize efficient, well-managed firms that engage in aggressive but legitimate competitive behaviour. In all markets some businesses will be better positioned than others to compete. Some may have superior products, more efficient distribution methods or greater marketing expertise. Firms may also employ different competitive strategies, including varying degrees of vertical integration. It is part of the normal competitive process that some firms will succeed while others will fail. The abuse provisions establish the bounds of competitive behaviour for dominant firms and provide for corrective action where such firms go beyond legitimate competitive behaviour in order to damage or eliminate competitors so as to maintain, entrench or enhance their market power".⁷⁷ [emphasis added]

2. *Test for Section 79(1)(b)*

71. In its decision (the "FCA Decision") on the Commissioner's appeal from the Original Tribunal Decision, the Federal Court of Appeal determined that the proper focus of the analysis under section 79(1)(b) of the Act is upon the intended purpose of the impugned act vis-à-vis competitors.⁷⁸

72. Further, and critically for present purposes, the Court of Appeal was explicit and unequivocal that there must be evidence linking the practice to the requisite intended negative effect on a competitor:

"Obviously, if an act is to be found to be 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".⁷⁹ [underlining added; italics in original]

⁷⁷ Competition Bureau, *Enforcement Guidelines on the Abuse of Dominance Provisions* (Ottawa: Competition Bureau, 2001) at part 1.3; CPC Authorities, Tab 13.

⁷⁸ See *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233 at para. 68 [previously defined as the "FCA Decision"]; CPC Authorities, Tab 2.

⁷⁹ See *ibid.* at para. 78.

73. The Court stated that the intended negative effect may 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".⁸⁰

74. With respect to the business justification doctrine, the Court of Appeal explained that a valid business justification will be relevant to the question of whether the purpose of the impugned act was a predatory, exclusionary or disciplinary negative effect on a competitor:

"a valid business justification can, in appropriate circumstance, overcome the deemed intention arising from the actual or foreseeable negative effects of the conduct upon 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".⁸¹

75. The Court of Appeal provided further guidance in relation to what will constitute a valid business justification for the purposes of section 79(1)(b) stating:

"a business justification must be a credible 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".⁸²

76. The Court of Appeal also clarified that while the impact of the impugned acts upon consumers is not a relevant independent consideration for the purposes of section

⁸⁰ *Ibid.* at para. 72.

⁸¹ *Ibid.* at para. 87.

⁸² *Ibid.* at para. 73.

79(1)(b), and is more appropriately considered under section 79(1)(c), it may be relevant to assessing the credibility and weight to be given to a proffered business justification.⁸³

3. *Application of the Test for Section 79(1)(b)*

77. Canada Pipe submits that there is no evidence on the record to support the Commissioner's contention that the purpose of the SDP is an intended negative/exclusionary effect on Bibby's competitors.

78. The submissions which follow are organized with reference to the Final Framework for Redetermination dated October 25, 2007. Specifically, each of the following points are considered in turn below with reference to the evidence on the record and the factual findings made by the Tribunal in its Original Decision:

- (a) the nature of the intended negative effect of the SDP (if any) on Bibby's competitors;
- (b) the presence or absence of any link between the SDP and any intended negative effect on Bibby's competitors; and
- (c) the purpose or character of the SDP and, in particular,
 - (i) the actual or foreseeable effects of the SDP (if any) on Bibby's competitors;
 - (ii) Bibby's actual subjective intent;
 - (iii) valid business justifications for the SDP; and
 - (iv) the effect of the SDP on consumers as it relates to the assessment of the credibility and weight of the proffered business justifications.

⁸³ See *ibid.* at para. 79.

a. The SDP Does Not Have an Intended Exclusionary Purpose

79. Canada Pipe submits that there is no evidence on the record which establishes that the SDP has an intended exclusionary purpose.
80. As the Court of Appeal observed, the circumstances surrounding the commission of the impugned act are clearly relevant to determining the underlying purpose of the act.⁸⁴ Here, the absence of any intended negative effect on Bibby's competitors is confirmed by, among other things, the prevalence of rebate programs in the Canadian plumbing industry, as well as by the prevalence of loyalty-based rebate programs amongst both Canadian and U.S. cast iron DWV manufacturers.
81. As Mr. Leonard testified, and as was confirmed by a number of distributors in their testimony before the Tribunal, rebate programs are very popular in the plumbing industry in Canada.⁸⁵ Indeed, the evidence shows that Vandem offers its customers a multiplier discount, as well as a volume rebate program, as incentives for purchasing its products.⁸⁶ So does BMI.⁸⁷ As Mr. Lachance of Wolseley – which buys from New Centurion, as well as Bibby – stated: "any manufacturer that [Wolseley] buy[s] from, we buy at a multiplier also and a rebate on top of that".⁸⁸
82. Furthermore, the evidence demonstrates that loyalty-based rebate programs have historically been used in the cast iron DWV industry in Canada and the United States.

⁸⁴ See FCA Decision, at para. 72; CPC Authorities, Tab 2.

⁸⁵ See Testimony of T. Leonard, Vol. 19, p. 3878, line 23 to p. 3879, line 2.

⁸⁶ See Testimony of J. Vanderwater, Vol. 8, p. 1566, lines 14-16; Testimony of G. Iaboni, Vol. 22, pp. 4536-37; Testimony of R. Elliott, Vol. 11, pp. 2124-25.

⁸⁷ See Testimony of M. Bouthillette, Vol. 13, p. 2564, line 23 to p. 2565, line 22.

⁸⁸ Testimony of P. Lachance, Vol. 9, p. 1832, lines 13-16.

Titan Foundry used a loyalty rebate prior to being acquired by Canada Pipe in 1997, and Mr. Leonard's uncontradicted evidence was that all of the other North American manufacturers of cast iron DWV products have programs that are substantially identical to the SDP.⁸⁹ Bibby's SDP was, in fact, modelled on those programs.⁹⁰

83. Bibby's expert economist, Dr. Roger Ware, testified that the fact that programs similar to the SDP are used in a competitive market like the U.S. confirms that the program is efficient and pro-competitive:

"DR. R. WARE: Well, let me again make two points, if I can remember them this time. The first one is that in the United States, we have three major producers of cast iron DWV products. As we have heard from Mr. Leonard, those three producers all use loyalty programs which are similar if not identical to those of Bibby's SDP. Now that's a kind of very standard test in economics of whether or not a practice is efficient is to say that, well, if it's not efficient, it won't survive in a competitive market because, in a competitive market, you have to be efficient. You have to only use efficient practices in order to survive, otherwise, your costs will be too high and your competitors will eat away at your market share. That's the first point".⁹¹ [emphasis added]

84. The popularity of rebate programs in the Canadian plumbing industry, as well as the prevalence of loyalty-based rebate programs for cast iron DWV products, suggests that, in the circumstances, Bibby is merely providing a discount program that is similar to those used by its competitors as a competitive tool, such that the SDP constitutes (nothing more or other than) competition on the merits, rather than anti-competitive conduct.
85. As discussed in greater detail below, the Commissioner characterizes the SDP as "exclusionary" because some of Bibby's competitors temporarily lost market share or

⁸⁹ See JB 3-72; Testimony of T. Leonard, Vol. 19, p. 3876, line 4 to p. 3877, line 19; JB 3-104; JB 21-1047; JB 22-1087; JB 27-1294.

⁹⁰ See Testimony of T. Leonard, Vol. 19, p. 3877, lines 6 to 15.

⁹¹ Testimony of R. Ware, Vol. 26, p. 5004, lines 1 to 17.

experienced reduced sales. Canada Pipe submits that a temporary reduction in revenues between competitors is the very essence of competition and cannot be considered as evidence of the requisite anti-competitive (exclusionary) intent. As the Tribunal stated in *Tele-Direct*:

"While Tele-Direct's actions clearly made it more expensive for the entrants than it if had accommodated them, seizing market share from a rival by offering a better product or lower prices is not, in general, exclusionary since consumers in the markets concerned are made better off".⁹²

86. The Commissioner also argues (at paragraphs 95-98 of her Memorandum of Argument) that the SDP has an "exclusionary" effect because the Program makes it more difficult for entrants to compete with Bibby's full line of products and established reputation. However, this Tribunal has previously stated that it is not enough to find that a dominant firm has made entry less attractive:

"We do not take the Director to be proposing that an incumbent, even one with a dominant market position, is precluded from responding to entry. Entry would obviously be *encouraged* if the incumbent accommodated the entrant. It is, however, doubtful that anyone would suggest that this is a desirable competitive outcome. Anything short of accommodation is likely to make the post-entry prospects of an entrant less attractive than the pre-entry benefits enjoyed by the incumbent. It is, therefore, not enough for us to find that Tele-Direct's responses made entry less attractive".⁹³ [emphasis in original]

87. In sum, based on the evidence on the record, the only intention that can be ascribed to the SDP with respect to Bibby's competitors is the intention to use the SDP to engage in legitimate competitive behaviour as against Bibby's competitors. Indeed, Mr. Leonard testified that the SDP is but another form of price competition and, as discussed below, the SDP enables Bibby to keep its products cost competitive with DWV products made

⁹² *Tele-Direct* at 196ab; CPC Authorities, Tab 6.

⁹³ *Ibid.* at 195ab.

from other materials.⁹⁴ Surely the intention to compete against one's competitors cannot constitute an intended negative or exclusionary impact on a competitor within the meaning of section 79(1)(b) of the Act.

88. As discussed in greater detail below, not only does the evidence on the record reflect a complete absence of any negative intended or actual impact on Bibby's competitors, there are clear pro-competitive business justifications for the SDP.

b. No Link Between SDP and any Intended Negative Effect on Bibby's Competitors

89. At no time has the Commissioner or her economic expert (Dr. Tom Ross) alleged that the purpose of the SDP is predatory or disciplinary. In fact, Dr. Ross specifically acknowledged in his report filed with the Tribunal on the Original Hearing that there is no evidence on the record to suggest that Bibby's prices are predatory.⁹⁵ Rather, the Commissioner's allegations with respect to the SDP have always centered on the allegedly "exclusionary" nature of the SDP. Specifically, the Commissioner alleges that the SDP was "implemented for the purpose of excluding competitors from the Relevant Markets" by tying up distributors and preventing a foothold from being established.⁹⁶
90. Canada Pipe submits that there is no evidence on the record to support the Commissioner's contention that the (intended) impact of the SDP is to foreclose access to sales channels for Bibby's competitors.

⁹⁴ See Testimony of T. Leonard, Vol. 19, p. 3877, line 20 to p.3878, line 1; Vol. 21, p. 4205, lines 10-15.

⁹⁵ See Ross Report, Exhibit A-11, at paras. 21, 73 and 109.

⁹⁶ Commissioner's Memorandum of Argument at paras. 79, 81 .

91. The Commissioner relies exclusively upon the evidence given by Bibby's competitors in support of her position in this regard. She does not address the evidence of Canada Pipe's distributors, even though it is these distributors who are able to give the best evidence with respect to the impact (if any) of the SDP upon distribution channels in Canada. Her failure to do so is not surprising given the testimony of distributors who are or have been on the SDP that they did not, and do not, consider themselves to be "locked in" to the SDP or forced to purchase from Bibby but, rather, that their participation in the SDP reflects or reflected, as the case may be, a voluntary economic choice on their part.
92. Based on the evidence on the record, the Tribunal determined in its Original Decision that despite the presence of the SDP "[c]ompetitors can offer, and have successfully offered, better bargains to sway buyers away from Bibby".⁹⁷ New Centurion's success in taking Wolseley's business in Western Canada away from Bibby, as well as Vandem's success in taking business away from Bibby in Eastern Canada provide useful examples in this regard.⁹⁸
93. In addition, the Tribunal concluded that:

"although the SDP is an attractive program for a distributor, it does not prevent the distributor from considering other options, or from purchasing elsewhere if is more advantageous to do so. Distributors remain with Bibby for a variety of reasons, and notably because it is a reliable supplier and, in the case of large distributors, because the size of the market does not warrant searching for another supplier. The SDP is a factor in the decision, but both the economic and factual evidence on switching costs fail to establish that its purpose is predatory, exclusionary or disciplinary. It offers an attractive bargain to distributors, but it

⁹⁷ Original Tribunal Decision at para. 258; CPC Authorities, Tab 1.

⁹⁸ See Testimony of G. Tester, Vol. 10, p. 1932, line 13 to p. 1933, line 21; Testimony of R. Demeny, Vol. 5, p. 1109, line 15 to p. 1110, line 9; Testimony of J. Keon, Vol. 14, p. 2820, line 18 to p. 2821, line 25; JB 11-503, 505, 513, 517, 538 and 550; JB 14-738; JB 18-868; JB 19-965 and 970; JB 23-1145, 1146 and 1147; JB 24-1187 and 1190.

does not prevent other competitors from offering a better bargain, nor does it prevent distributors from switching to other suppliers. The switching costs were not demonstrated in economic terms to be significant. The Tribunal heard evidence of distributors staying with the program for reasons unrelated to the SDP and of distributors leaving the program without incurring switching costs".⁹⁹ [emphasis added]

94. With respect to Canada Pipe's major distributors, the Tribunal determined that "all three major distributors had different reasons for remaining with Bibby".¹⁰⁰
95. As regards the two buying groups in Canada, Octo and Canaplus, the Tribunal found that "they did not purchase their cast iron DWV products exclusively from Bibby".¹⁰¹
96. As for Wolseley, the Tribunal found that it had made an economic decision to leave the SDP in the West because its margins were too low with Bibby. For Emco, the Tribunal found that its "reluctance to change suppliers ... is not attributable to the SDP *per se*, but rather to the fact that it is not worth putting effort into changing suppliers because of the relatively small and eroding market for cast iron DWV products".¹⁰² In the case of Crane, the Tribunal concluded that the SDP was one of the factors in its economic decision not to switch suppliers, together with its "mistrust of Vandem as a reliable supplier".¹⁰³
97. Furthermore, the Commissioner's assertion that the SDP "forecloses" access to sales channels fails to take into account the many distributors throughout Canada that do not

⁹⁹ Original Tribunal Decision at para. 237; CPC Authorities, Tab 1.

¹⁰⁰ *Ibid.* at para. 227.

¹⁰¹ *Ibid.* at para. 227.

¹⁰² *Ibid.* at para. 231.

¹⁰³ *Ibid.* at para. 233.

participate in the SDP, and which are therefore available to entrants.¹⁰⁴ In addition, as Mr. Leonard testified, there are many distributors which do not currently carry cast iron DWV products, even though they supply plumbing and building contractors, who would also be available to entrants.¹⁰⁵

98. The evidence of Richard Elliott from McKeough Supply confirms the availability of such distributors to entrants. McKeough had ceased purchasing from Bibby in 1998 and in 1999 made a business decision to begin selling cast iron DWV products as a distributor for Vandem. Mr. Elliott testified that in 1998, McKeough purchased only about \$140 worth of cast iron DWV Products. However, since becoming a Vandem distributor, its purchases of cast iron DWV Products have grown tremendously:

"MR. R.H. ELLIOTT: Well, I think in -- trying to recall here, but I believe in 1997 our purchases from Bibby were something in the \$8,000 or \$8,500 range. I think the last year we have on record of purchases, which is '98, we filed about \$140 or something like that.

MS N.D. SAMSON: One hundred and forty dollars (\$140) in 1998?

MR. R.H. ELLIOTT: Yes.¹⁰⁶

...

MS N. SAMSON: Thank you. And could you please tell us what the value of the purchases you have made from Vandem as for the last few years, approximately?

MR. R. L. ELLIOTT: Well, it's been growing and it goes up and down depending on what projects we're successful on. Of course, projects involve more than just the rough in or the cast iron. But however, it has grown, I believe, in 2000, we -- roughly about a hundred and -- I think it was 140,000 in 2001 and moved up to somewhere in the neighbourhood of 250 and then we

¹⁰⁴ See Testimony of G. Nagel, Vol. 3, p. 465, lines 2 to 5; Testimony of J. Vanderwater, Vol. 8, p. 1535, line 23 to p. 1536, line 14; Testimony of G. Iaboni, Vol. 22, p. 4479, lines 4 to 10; Testimony of R. Ware, Vol. 25, p. 4976, lines 16 to 21.

¹⁰⁵ See Testimony of T. Leonard, Vol. 20, p. 4099, lines 5 to 23.

¹⁰⁶ Testimony of R. Elliott, Vol. 11, p. 2116, lines 6 to 15.

were close to -- we were over 300,000, I believe in 2002. We were back down to about the quarter million mark, I believe, in 2003.¹⁰⁷

...

MR. J. DORIS: Sir, you will agree that your sales or purchases of cast iron DWV products have increased substantially since 1999?

MR. R.H. ELLIOTT: Yes, sir.

MR. J. DORIS: And my understanding, sir, is that the Stocking Distributor Program came into effect in 1998?

MR. R.H. ELLIOTT: I believe that's correct, yes.

MR. J. DORIS: And at that time, prior to that, you said that your volume was approximately \$140.00, cast iron?

MR. R.H. ELLIOTT: Yes.

MR. J. DORIS: A hundred and forty dollars (\$140.00)?

MR. R.H. ELLIOTT: In 1998, the last purchase we have on record with Bibby.

MR. J. DORIS: So since the program has into effect, your purchases of cast iron DWV product have increased significantly; do you agree with that?

MR. R.H. ELLIOTT: Yes, they have.

MR. J. DORIS: And, sir, just so I understand the economic impact of Bibby's program, in 1998, you purchased \$140.00 -- part of the program, you purchased \$140.00 worth of product from Bibby. So assuming, sir, that you were not on the program and you were paying the non-stocking distributor price, you would agree that the economic impact to you would be insignificant based on that volume?

MR. R.H. ELLIOTT: When the change -- the change in our purchases of cast iron drainage products is as a result of our making a corporate decision to enter a marketplace that we hadn't been involved in.

MR. J. DORIS: That's right. And you entered that marketplace after the program came into effect?

MR. R.H. ELLIOTT: We entered the marketplace after that program came into effect and Vandem started business.

MR. J. DORIS: That's right. And again, Vandem started business after the program came into effect?

MR. R.H. ELLIOTT: That's correct.

¹⁰⁷ Testimony of R. Elliott, Vol. 11, p. 2126, lines 8 to 23.

MR. J. DORIS: And the program didn't prevent Vandem from coming into business; right?

MR. R.H. ELLIOTT: Not to -- well, no, obviously not.¹⁰⁸

...

MR. J. DORIS: You've been able to compete for business without being a Bibby stocking distributor?

MR. R.H. ELLIOTT: We have grown that part of our business in the last four years although it's still a relatively small piece of our business.

MR. J. DORIS: But it's increased even though you are not a Bibby stocking distributor?

MR. R.H. ELLIOTT: That's correct.

MR. J. DORIS: And even though that program has been in place?

MR. R.H. ELLIOTT: That's correct".¹⁰⁹

99. Even if the Commissioner could demonstrate that the SDP does somehow foreclose a significant channel of distribution (which she cannot), the evidence on the record before the Tribunal clearly shows that distribution channels are not crucial in this industry. By choosing to import DWV products directly, contractors such as William Kelly and LGC Plomberie have circumvented the distributor channel entirely.¹¹⁰ In addition, Dave Kelm of Sierra successfully started up his business selling cast iron DWV products directly to contractors.¹¹¹

100. The fact that it may be easier for entrants to sell to distributors rather than contractors does not make the intended purpose or effect of the SDP anti-competitive or exclusionary.

¹⁰⁸ Testimony of R. Elliott, Vol. 11, p. 2141, line 20 to p. 2143, line 19.

¹⁰⁹ Testimony of R. Elliott, Vol. 11, p. 2153, line 20 to p. 2154, line 6.

¹¹⁰ See Original Tribunal Decision, at paras. 111 and 120; CPC Authorities, at Tab 1.

¹¹¹ See *ibid*, at para. 154.

c. Overall Purpose or Character of the SDP is not Anti-Competitive

(i) SDP Has Not had Any Actual or Reasonably Foreseeable Exclusionary Impact on Bibby's Competitors

101. As already noted, the Court of Appeal has explicitly stated that there must be "evidence linking the impugned practice to the intended negative effect on a competitor".¹¹² Evidence of such purpose can be gleaned from an analysis of the actual impact of the SDP upon competitors.
102. There is little, if any, (reliable) evidence on the record that Canada Pipe's competitors have experienced any actual increased difficulty entering into the cast iron DWV industry or expanding in that industry because of the SDP.
103. Again, the Commissioner places virtually exclusive reliance on the testimony of Bibby's competitors in seeking to satisfy the test under section 79(1)(b). As discussed in greater detail below, that testimony is inherently suspect given the obvious self-interest of those witnesses in the success of the Commissioner's Application. Indeed, the Tribunal expressly discredited and ultimately rejected the evidence the two Vandem witnesses called by the Commissioner. It is also to be noted that the Commissioner's submissions mischaracterize and inaccurately describe the evidence of Bibby's competitors.
104. What the Commissioner describes as "specific examples of the exclusionary effect of the SDP on competitors to Bibby" are discussed below.

¹¹² FCA Decision, at para. 78; CPC Authorities, at Tab 2.

(A) *Mission*

105. The Commissioner's submissions with respect to the alleged actual effect of the SDP on Mission begins with an inaccurate description of Mission's own evidence on this very point. At paragraph 102 of her Memorandum of Argument, the Commissioner asserts that Mission's sales dropped to "virtually nothing in 1999 to 2001 – within just one year after the introduction of the SDP".
106. In fact, Mr. Vansell's testimony before the Tribunal was that Mission's sales of MJ couplings in Canada remained the same between 1998 and 1999. With respect to 2000, Mr. Vansell testified that Mission's sales were "very low ... in Western Canada down to virtually nothing".¹¹³ [emphasis added] He did not testify that his overall sales in 2000 were virtually nothing for all of Canada, as the Commissioner implies, but rather only in Western Canada. Although Mr. Vansell's evidence was that Mission "did and do[es] still have some customers in the eastern provinces",¹¹⁴ he did not give a figure for Mission's total Canadian sales in 2000. Mr. Vansell also testified that Mission's sales of MJ couplings in 2001 were approximately \$500,000 (again contrary to the Commissioner's submissions) and increased thereafter, to approximately \$1 million in 2003.¹¹⁵
107. In summary, Mr. Vansell testified that:

- in 1998, Mission's sales of MJ couplings in Canada were approximately \$800,000;¹¹⁶

¹¹³ Testimony of C. Vansell, Vol. 13, p. 2601, lines 12-13.

¹¹⁴ Testimony of C. Vansell, Vol. 13, p. 2601, lines 17-18.

¹¹⁵ See Testimony of C. Vansell, Vol. 13, p. 2655, line 1.

¹¹⁶ See Testimony of C. Vansell, Vol. 13, p. 2600, line 22 to p. 2601, line 2.

- in 1999, Mission's sales were also approximately \$800,000;¹¹⁷
- in 2000, Mission's sales dropped such that they were "very low ... in Western Canada down to virtually nothing";¹¹⁸
- in 2001, Mission's sales were approximately \$500,000;¹¹⁹
- in 2002, Mission's sales were about \$800,000 to \$850,000;¹²⁰ and
- in 2003, Mission sales were approximately \$1 million.¹²¹

108. In considering the evidence with respect to Mission, it is also to be noted that the Commissioner put forward no documentary evidence confirming Mr. Vansell's evidence as to Mission's sales in Canada, nor was any evidence presented by the Commissioner's showing Mission's profitability in Canada.

109. Similarly, the Commissioner's assertion (at paragraph 102 of her Memorandum of Argument) that Mission was unable to expand beyond British Columbia, is contradicted by the evidence led by the Commissioner's own counsel which establishes that Mission had customers in Eastern Canada and to Wolseley in Alberta and the Prairies.¹²² The extent of Mission's sales in Canada (and, more particularly, outside of British Columbia) is unknown because the Commissioner failed to produce any documents on this point.

110. Even if the Tribunal is prepared to accept Mr. Vansell's uncorroborated evidence, Mission's sales figures (as "reported" by Mr. Vansell) do not demonstrate that the SDP somehow prevented or even impeded Mission from competing successfully in Canada.

¹¹⁷ See Testimony of C. Vansell, Vol. 13, p. 2601, lines 1 to 6.

¹¹⁸ See Testimony of C. Vansell, Vol. 13, p. 2601, lines 12 to 13.

¹¹⁹ See Testimony of C. Vansell, Vol. 13, p. 2601, lines 19 to 22.

¹²⁰ See Testimony of C. Vansell, Vol. 13, p. 2655, lines 2 to 3.

¹²¹ See Testimony of C. Vansell, Vol. 13, p. 2655, line 1.

¹²² See Testimony of C. Vansell, Vol. 13, lines 17-18.

Although Mission's sales fell in 2000, the Commissioner has not established, as she is required to do under the test articulated by the Court of Appeal, a causal nexus between Mission's loss of sales in that year and the SDP.

111. In this regard, it should be noted that the SDP had been in effect for two years before Mission's sales declined in 2000. In addition, since Mission did well both before and after 2000 (while the SDP was in effect), this suggests that the decline in 2000 was an anomaly and cannot be attributed to the SDP. Moreover, Mission's reported drop in sales in 2000 coincided with Mission's restructuring of its sales and distribution network in the Canadian DWV industry and, in particular, its decision to replace Vandem as the distributor of its products in Canada.¹²³ On this point, Mr. Vanderwater of Vandem acknowledged before the Tribunal that Mission had been unhappy with Vandem's sales efforts on its behalf in Canada since early 1999 and finally terminated its distribution arrangement with Vandem in 2000.¹²⁴ Mission's apparent drop in sales also coincided with the entry of another couplings competitor – Ideal.¹²⁵ Clearly, there are numerous factors which may have contributed to Mission's decline in sales in 2000.
112. The evidence on the record confirms that distributors are not precluded or even impeded from doing business with Mission by the SDP. Rather, distributors can and do make their own choice as to whether to participate in the SDP based on the economics of the situation. Wolseley (the single largest distributor in Canada), for example, continued to

¹²³ See Testimony of C. Vansell, Vol. 13, p. 2640, lines 12 to 25; JB 15-770.

¹²⁴ See Testimony of J. Vanderwater, Vol. 8, p. 1529, lines 11-20.

¹²⁵ See Testimony of C. Vansell, Vol. 13, p. 2651, lines 10 to 15.

purchase from Mission until April 1999¹²⁶ (even though the SDP came into effect in January 1998). Similarly, Wolseley chose to leave the SDP in the Western provinces (and not just in British Columbia as the Commissioner states at paragraph 102 of her Memorandum of Argument) and resumed purchasing couplings from Mission in 2002.¹²⁷ As Mr. Vansell testified, "Wolsley is a big wholesaler" and Mission does "business with them in the Western provinces" and because of this business, Mission's sales "were better at the year end 2002".¹²⁸

113. Given that Mission's sales in 2003 exceeded the level they were at when the SDP was first introduced, it is clear that any impact the SDP may have had on Mission was only short term in nature. The short term nature of any impact suggests that the SDP constitutes competition on the merits rather than exclusionary conduct. As the Tribunal noted in *Tele-Direct*, it is "not enough for us to find that Tele-Direct's responses made entry less attractive ... A reasonable likelihood of significant long run detriment must exist if these tactics are to be discouraged".¹²⁹ [emphasis added]

(B) Gates

114. Prior to 2002, Gates was a distributor of couplings manufactured by Ideal. The Commissioner relies on the uncorroborated testimony of Matt O'Brien, a former Gates employee, to prove that the SDP caused Gates to experience difficulty with its sales of Ideal couplings in Canada.

¹²⁶ See Testimony of C. Vansell, Vol. 13, p. 2601.

¹²⁷ See Testimony of C. Vansell, Vol. 13, p. 2656, lines 16 to 25, p. 2659, lines 19 to 22.

¹²⁸ Testimony of C. Vansell, Vol. 13, p. 2602, lines 3-7.

¹²⁹ *Tele-Direct* at 195 and 199; CPC Authorities, Tab 6.

115. Contrary to the Commissioner's contention (at paragraph 109 of her Memorandum of Argument) that Gates "was unable to develop any significant sales", Mr. O'Brien's testimony clearly established that Gates was able to obtain a 5% share of the sales of couplings in Canada in its first year, despite the SDP.¹³⁰
116. Even if one were to accept that Gates had difficulty expanding its presence in Canada (which Bibby denies), the Commissioner has failed to establish a link between the SDP and Gates' alleged inability to develop significant sales. In fact, Mr. O'Brien's testimony concerning the effect of the SDP on Gates' sales efforts was, at best, ambiguous and speculative, and consisted of little more than his personal opinions:

"MS C.A. LAWRENCE: And what was the response of these target customers?

M. O'BRIEN: 'Lukewarm' would be my description to you.

We had a number of presentations to some of the key plumbing distributors across the country and most of those presentations resulted in absolutely no orders, no business but, over and above that, resulted in -- in a conversation that was similar to what I am going to share with you now and that is that: "You must know that I can't do this, and if you don't know, you should know," is one of the things that was said to me personally.

MS C.A. LAWRENCE: Let's try and get into a little more specifics here. This was after the launch of the product, I imagine?

M. O'BRIEN: Yes.

MS C.A. LAWRENCE: Who were some of these customers or potential customers that you met with specifically?

M. O'BRIEN: I personally met with Westburne [now Wolseley] who, at the time, was one of Canada's largest plumbing distributors across the country.

MS C.A. LAWRENCE: What was the name of the individual that you met with at Westburne?

M. O'BRIEN: Ron Wise was the individual. He was head of Purchasing. I'm not certain what his title was.

¹³⁰ See Testimony of M. O'Brien, Vol. 11, p. 2212, lines 1 to 15; and p. 2228, lines 13 to 23.

MS C.A. LAWRENCE: Could you describe the conversation that you had with him, to the best of your recollection?

M. O'BRIEN: I guess I got ahead of myself because part of the conversation that I had with Ron was that he was happy with the current supplier and that he didn't see an opportunity for us at the time at Gates but through the Ideal no hub couplings or mechanical joint couplings, he didn't see us gaining a market share with the Westburne group. And when I pushed him or pressured him a bit, he said what I said earlier which is that:

"Matt, if you don't know, you should know that this is just not something that interests me at this time."

MS C.A. LAWRENCE: Did he elaborate further as to why that was?

M. O'BRIEN: He did not.

MS C.A. LAWRENCE: Was any mention of Bibby Ste-Croix made during the course of this conversation?

M. O'BRIEN: Only -- my recollection, only that they were currently sourcing from Bibby Ste-Croix.¹³¹

...

M. O'BRIEN: And that was one of the key components of the results of our survey was that you need to be in all three parts of the business.

MS C.A. LAWRENCE: Do you know why that was? Why did your survey tell you that?

M. O'BRIEN: I don't know exactly why. I had my own ideas why.

MS C.A. LAWRENCE: Can you share those ideas, please, for the Tribunal?

M. O'BRIEN: I believe that the customers we'd approached had been led to believe that if they broke away any segment of their business, that monies owing them would be withheld. So, therefore, our business was not very attractive to them.

MS C.A. LAWRENCE: Now, 'broke away' from whom?

M. O'BRIEN: Bibby Ste-Croix".¹³² [emphasis added]

117. Mr. O'Brien's testimony establishes only that distributors were not interested in doing business with Gates and were "happy with the current supplier". No distributor stated or even suggested that the reason for their lack of interest in Gates was the SDP. Mr.

¹³¹ Testimony of M. O'Brien, Vol. 11, p. 2208, line 8 to p. 2210, line 12.

¹³² Testimony of M. O'Brien, Vol. 11, p. 2214, line 20 to p. 2215, line 12.

O'Brien's unconfirmed speculation is just that. Further, his hearsay evidence is inadmissible as confirmed by the rulings of the Presiding Member during the Original Hearing.¹³³

118. The evidence on the record also suggests that distributors may have had other reasons for choosing not to purchase from Gates. Mr. O'Brien testified that he had been turned down by Vandem because Gates' pricing was not "aggressive enough".¹³⁴
119. It should also be noted that Mr. O'Brien identified Canaplus and Westburne (now Wolseley) as the potential customers approached by Gates which supposedly declined to do business with his former employer because of the SDP.¹³⁵ However, the evidence on the record shows that Canaplus chose not to participate in the SDP and instead made Vandem its preferred supplier.¹³⁶ Similarly, Wolseley decided to leave the SDP in 2002 and chose Mission as its supplier, not Gates. Again, such evidence suggests that distributors had other reasons for choosing not to do business with Gates. Moreover, the evidence of Wolseley and Canaplus clearly contradicts the Commissioner's assertion (see paragraph 110 of her Memorandum of Argument) that customers could not "break away" any segment of their demand due to the SDP.
120. A final point regarding the alleged impact (which Bibby denies) that the SDP may have had on Gates' sales, is that (as with Mission and every other Bibby competitor called to

¹³³ See The Chairperson, Vol. 20, pp. 4013–14.

¹³⁴ Testimony of M. O'Brien, Vol. 11, p. 2216-17.

¹³⁵ See Testimony of M. O'Brien, Vol. 11, p. 2211, lines 13-25.

¹³⁶ See JB 25-1228; Testimony of R. Demeny, Vol. 6, p. 1285, lines 1 to 7 and Original Tribunal Decision at para. 227; CPC Authorities, Tab 1.

give evidence) the Commissioner provided the Tribunal with no documents from Gates bearing on this issue.

121. The Commissioner states in her Memorandum of Argument that in 2002 "Gates exited the Canadian market for the sale of MJ couplings in Canada".¹³⁷ It must be noted that there is no evidence to show that this exit was in any way related to the SDP. It was Mr. O'Brien's evidence that Gates stopped distributing Ideal couplings in Canada when Ideal assumed responsibility for selling directly into Canada.¹³⁸ The evidence on the record establishes that sometime in late 2000 or early 2001, Ideal began selling couplings through Vandem.¹³⁹ Mr. O'Brien testified that he had no idea what Ideal's sales were at the time of the Original Hearing.¹⁴⁰ He had been out of the cast iron DWV industry since August 2002.¹⁴¹

(C) *Fernco*

122. The Commissioner relies on the evidence of Peter Kirkpatrick of Fernco to argue that the SDP has prevented Fernco from increasing its couplings sales in Canada. However, as discussed below, Mr. Kirkpatrick's testimony (which, yet again, is unsupported by any documents showing Fernco's sales or profits) does not establish the necessary link between Fernco's supposed inability to increase its overall sales of MJ couplings and the SDP.

¹³⁷ Commissioner's Memorandum of Argument at para. 111.

¹³⁸ See Testimony of M. O'Brien, Vol. 11, p. 2218, lines 7 to 18 and p. 2229, lines 6 to 22.

¹³⁹ Testimony of C. Vansell, Vol. 13, p. 2651; Testimony of R. Demeny, Vol. 6, p. 1245, lines 7-12.

¹⁴⁰ See Testimony of M. O'Brien, Vol. 11, p. 2229, line 23 to p. 2230, line 1.

¹⁴¹ See Testimony of M. O'Brien, Vol. 11, p. 2226, line 17 to p. 2227, line 11.

123. An additional qualification on and limit of Mr. Kirkpatrick's testimony was that it was confined to the (alleged) impact of the SDP on Fernco's ability to sell its MJ couplings to "large distributors who buy from Bibby".¹⁴² Mr. Kirkpatrick was not asked by Commissioner's counsel about, and did not give evidence concerning, Fernco's ability to sell to smaller distributors or distributors which are not participating in the SDP.
124. The evidence on the record clearly establishes that there are a number of distributors that either do not currently sell cast iron DWV products or chose not to purchase their products from Bibby.¹⁴³ These same distributors would be available to Fernco if it wanted to expand its business in Canada. In this regard, Marc Bouthillette, the President and part-owner of BMI, testified that when BMI first entered the Canadian DWV market it targeted the local branches of national distributors because it believed that cast iron DWV products were not being sold in these local branches due to the popularity of plastic DWV.¹⁴⁴
125. In addition, the evidence demonstrates that large distributors, such as Wolseley, have left the SDP at times and yet have not purchased significant amounts of couplings from Fernco.¹⁴⁵ In the face of such evidence, it is reasonable to assume that there must be reasons, apart from the SDP, why such distributors have chosen not to purchase from Fernco.

¹⁴² Testimony of P. Kirkpatrick, Vol. 11, p. 2170, lines 5-14.

¹⁴³ See Testimony of T. Leonard, Vol. 20, p. 4099; Testimony of G. Iaboni, Vol. 22, p. 4479.

¹⁴⁴ See Testimony of M. Bouthillette at Vol. 12, p. 2518, line 21 to p. 2519, line 6.

¹⁴⁵ See Testimony of P. Kirkpatrick, Vol. 11, p. 2166, line 20 to p. 2167, line 3.

126. Indeed, Mr. Kirkpatrick testified that the primary difficulty Fernco faces in attracting business from major customers is that its prices are higher than those of its competitors. In this regard, he said that Fernco's prices are not where "they need to be in the marketplace".¹⁴⁶
127. Apart from its uncompetitive pricing, Fernco's difficulties (if any) may be due to the fact that one of Fernco's competitors is also Fernco's couplings supplier. That manufacturer, in addition to selling to Fernco, also sells directly to Fernco's major customers:

G.M. LAW: Now, in general, how do Fernco's prices compare to those of its competitors in Canada for MJ couplings?

P.W. KIRKPATRICK: On MJ couplings, we're generally a few pennies higher than the manufacturer of the couplings, given that we buy -- we're a buy-sell operation. We purchase from the manufacturer who, in turn, does have the opportunity of selling directly to the major customers that I have.¹⁴⁷

G.M. LAW: Any other customers, types of customers?

P.W. KIRKPATRICK: The opportunity has arisen in the past where one of the major customers has asked us to quote on MJ couplings. We have done so.

We have been successful on one occasion, but generally because of our pricing structure we are not successful.¹⁴⁸

G.M. LAW: Is Fernco interested in expanding its sales of MJ couplings in Canada?

P.W. KIRKPATRICK: Absolutely.

G.M. LAW: In general terms, what is the potential upside or gain to Fernco for sales of MJ couplings in Canada?

P.W. KIRKPATRICK: I would say we could probably increase our volumes to equal that or exceed those in the retail market currently.

G.M. LAW: Are you able to put a rough dollar figure on that?

P.W. KIRKPATRICK: We could probably increase our business by \$100,000.

¹⁴⁶ Testimony of P. Kirkpatrick, Vol. 11, p. 2164, lines 16 to 22 and p. 2167, line 17 to p. 2168, line 1.

¹⁴⁷ Testimony of P. Kirkpatrick, Vol. 11, p. 2163, line 17 to p. 2164, line 1.

¹⁴⁸ Testimony of P. Kirkpatrick, Vol. 11, p. 2164, lines 14 to 22.

G.M. LAW: Has Fernco attempted to increase its sales by selling to these large wholesalers, Wolseley and Emco, for example?

P.W. KIRKPATRICK: A number of times.

G.M. LAW: Okay.

And what have been the results of those attempts?

P.W. KIRKPATRICK: My overtures have been accepted nicely and rejected as our pricing would not be -- where do we need to be in the marketplace and also would affect the relationship in joint with those companies with the Bibby Loyalty Program".¹⁴⁹ [emphasis added]

128. Based on the evidence before the Tribunal relating to Fernco, Canada Pipe submits that the Commissioner has not established that the SDP has had any impact whatsoever on Fernco's sales.

(D) BMI

129. The Commissioner relies upon the evidence of Mr. Bouthillette of BMI as allegedly showing the "exclusionary" impact of the SDP upon Canada Pipe's competitors. She has mischaracterized the evidence regarding BMI.
130. The Commissioner claims (see paragraph 115 of her Memorandum of Argument) that BMI had plans to expand into cast iron DWV pipe and that this expansion was impeded by the introduction of the SDP. At the Original Hearing, Mr. Bouthillette testified that in 1995 – 3 years prior to the introduction of the SDP – BMI had considered expanding its operations to include cast iron DWV pipe. However, contrary to the Commissioner's claims, it was Mr. Bouthillette's evidence that BMI decided not to expand into cast iron DWV pipe because BMI was not certain that it could sell cast iron DWV pipe as a result of quality concerns, and due to the additional investments and costs associated with

¹⁴⁹ Testimony of P. Kirkpatrick, Vol. 11, p. 2167, line 4 to p. 2168, line 3.

carrying cast iron DWV pipe.¹⁵⁰ BMI's decision not to expand into cast iron DWV pipe was, in fact, unconnected to the introduction of the SDP.

131. Similarly, the Commissioner asserts that BMI sold its inventory of fittings to Bibby and permanently exited the Ontario and Quebec market for cast iron DWV fittings "solely because of the SDP".¹⁵¹ Again, this assertion is flatly contradicted by the evidence of Mr. Bouthillette who testified that BMI chose to leave the cast iron DWV segment in Canada to focus on other activities.¹⁵² As the Tribunal found in its Original Decision: "Mr. Bouthillette explained that BMI had a choice in that it could opt to get out of the cast iron market and concentrate on its other strengths, if that was best for its clientele".¹⁵³
132. As with Bibby's other competitors, the link which the Commissioner alleges exists between the SDP and any intended or actual negative effect upon BMI is simply non-existent. Mr. Bouthillette's testimony regarding the impact of the SDP upon BMI's sales is vague and circumspect. He testified that he heard about the SDP in the fall of 1998 (at least nine months after it was introduced) from his partner, Michel Bond. Mr. Bouthillette testified that Mr. Bond had spoken to some customers, and he and Mr. Bond realized that they would not be able to convince customers to stay with BMI.¹⁵⁴
133. Mr. Bouthillette did not testify that BMI had attempted to make any sales to customers and were rejected because of the SDP. Also, and unfortunately, Mr. Bouthillette's

¹⁵⁰ Testimony of M. Bouthillette, Vol. 12, p. 2519, line 23 to p. 2521, line 2.

¹⁵¹ Commissioner's Memorandum of Argument at para. 117.

¹⁵² See Original Tribunal Decision at para. 246; CPC Authorities, Tab 1.

¹⁵³ Original Tribunal Decision at para. 246; CPC Authorities, Tab 1.

¹⁵⁴ See Testimony of M. Bouthillette, Vol. 12, p. 2527, line 23 to p. 2528, line 19, p. 2529, lines 10-18.

evidence does not provide any context or explanation for his conclusion that it would have been difficult for BMI to convince customers to stay with BMI. The necessity and desirability of such context or explanation is highlighted by Mr. Bouthillette's testimony that BMI's sales continued to increase in 1998 (the year the SDP was implemented) and that BMI did not lose any customers in 1998.¹⁵⁵

134. One possible explanation for why BMI believed it would be unable to convince distributors to stay with BMI is that Bibby's SDP offered very attractive overall pricing. There is no evidence on the record, however, comparing the pricing of a complete package of DWV products from other suppliers (including BMI's fittings) and the pricing for Bibby's full package of products (*i.e.*, pipe, couplings and fittings) under the SDP. If the SDP represented a better and more competitive overall price, it would not be surprising that distributors chose to do business with Bibby rather than BMI Canada Pipe should not be penalized for offering a more competitive pricing package than its competitors. To suggest that the intended negative effect of such price competition is "exclusionary" would be to characterize all competitive conduct as "exclusionary", and therefore anti-competitive.

135. Furthermore, Mr. Bouthillette did not testify that any distributor ever suggested that they would be prevented from doing business with BMI because of the SDP. In fact, the evidence shows that distributors continued to purchase from BMI even after the SDP came into effect, and in some cases purported to participate in the SDP, collecting the

¹⁵⁵ See Testimony of M. Bouthillette, Vol. 12, p. 2525-26.

applicable SDP discounts and rebates from Bibby, while continuing to purchase from BMI.¹⁵⁶

136. In fact, the evidence on the record clearly shows that distributors made the purely economic choice as to whether to participate in the SDP or purchase from BMI. For instance, Mr. Byrne of Crane testified:

"J. DORIS: But sir, you would agree that the reason that Crane would go off the program was because it could receive a better price elsewhere?

R. BYRNE: Yes.

J. DORIS: So the impact of not enjoying the higher discount would be offset by a lower price received elsewhere?

R. BYRNE: Yes.

J. DORIS: And Crane is fully able to calculate whether it is better off economically to be on or off the program?

R. BYRNE: Yes.

J. DORIS: And you, in fact, did so with respect to BMI?

R. BYRNE: Yes".¹⁵⁷ [emphasis added.]

137. The Commissioner concludes her submissions with respect to BMI by stating that "in the absence of the SDP, BMI would have continued serving the Quebec and Ontario markets and may have expanded their operations to include cast iron DWV pipe".¹⁵⁸ Again, this statement is simply not supported by the evidence on the record. As discussed above, the evidence clearly demonstrates that BMI had serious reservations about expanding into cast iron DWV pipe and that these reservations had nothing to do with the SDP.

¹⁵⁶ See Testimony of R. Byrne, Vol. 4, p. 857, line 23 to p. 859, line 25.

¹⁵⁷ Testimony of R. Byrne, Vol. 4, p. 851, line 22 to p. 852, line 11.

¹⁵⁸ Commissioner's Memorandum of Argument at para. 118.

Furthermore, Mr. Bouthillette testified that customers in Quebec had always expressed some reluctance about purchasing products which were not manufactured in Quebec.¹⁵⁹

(E) *Vandem*

138. In her Memorandum of Argument, the Commissioner relies (as she did at the Original Hearing) on the testimony of Vandem's principals – Messrs Vanderwater and Demeny – concerning that company's alleged lack of financial success, in support of the her claim the SDP has had an exclusionary impact on Vandem.
139. In considering the Commissioner's submissions regarding the impact of the SDP on Vandem, it is to be noted as a preliminary matter that the Tribunal has already made a finding that there is "cause to question the credibility of [Messrs. Vanderwater and Demeny's] testimony" and that it ultimately rejected their evidence that Vandem had "met with little success because of the loyalty program".¹⁶⁰ [emphasis added]
140. The only credible evidence on the record shows that since it entered the market in 1999, Vandem has [CONFIDENTIAL].¹⁶¹ The only documents that the Commissioner has disclosed to Bibby or the Tribunal with respect to Vandem's financial performance are documents which, [CONFIDENTIAL].¹⁶² Indeed, the very fact that Vandem has been able to capture a national market share of 10% in the cast iron DWV industry, despite having no business plan or sales force, and despite entering the market after the SDP was introduced, speaks to the complete lack of any exclusionary impact from the SDP.

¹⁵⁹ See Testimony of M. Bouthillette, Vol. 12, p. 2514.

¹⁶⁰ Original Tribunal Decision at paras. 243-44; CPC Authorities, Tab 1.

¹⁶¹ See [CONFIDENTIAL].

¹⁶² See [CONFIDENTIAL].

141. Even if one were to accept that Vandem has experienced difficulty expanding its sales, the Commissioner has failed to establish the required link to the SDP. Instead, as the Tribunal has already determined, Vandem's lack of success (if any) is attributable to a variety of sources, unconnected to the SDP:

"At the outset, the Tribunal notes that the major distributors were unconvinced of Vandem's capacity to service their needs. From the evidence, the Tribunal is of the view that the doubt would have subsisted even if Bibby had volume-rebate scheme in place. Further the evidence provided by Mr. Demeny was severely tested on cross-examination. Mr. Demeny answered in chief that 75 to 90 percent of Vandem's sales were to the U.S. In cross-examination, he had to admit that in fact, over 70 percent of Vandem's sales were to the Canadian market. As well, the Commissioner provided no financial documents concerning Vandem's business situation – no business plan, no financial statements, no financing documents. We have no sales figures after the year 2000. What is known is that Vandem, in the space of four years, has captured 10 per cent of sales in Canada and by 2002 had become profitable. Mr. Vanderwater testified that Vandem needed 15 per cent of the market to remain viable, but given the paucity of financial information on Vandem's circumstances, the Tribunal has no way of knowing if whether Vandem is or will be viable. There is also evidence that Vandem's financial difficulties may well be unrelated to the SDP. Mr. Demeny testified that Vandem's sales had been hurt by the increasing value of the Canadian dollar as well as by the increase in the price of scrap metal".¹⁶³
[emphasis added.]

142. The reluctance of contractors and distributors to do business with Vandem because of doubts concerning Vandem's ability to service their needs is illustrated by the testimony of William Kelly (of William Kelly & Sons):

G.M. LAW: Mr. Kelly, are you familiar with a company called "Vandem Industries"?

W. KELLY: I'm not familiar. I have heard of it.

G.M. LAW: Have you ever purchased drain, waste or vent materials from Vandem?

W. KELLY: No.

G.M. LAW: Have you ever had discussions with Vandem personnel about buying from Vandem?

¹⁶³ Original Tribunal Decision at para. 244; CPC Authorities, Tab 1.

W. KELLY: Yes. They called me on a couple of occasions and wanted to establish a market out west in Vancouver and they wanted to know if they come out there with their product, would I be interested. I said I was always interested in looking at prices but they'd have to assure me that they had established a stocking distributor in the Vancouver area and, number one, be able to produce enough cast iron to service our contracts. They done neither one of these so we never done any business with them".¹⁶⁴ [emphasis added]

143. Similarly, Mr. Iaboni (of Sherwood) testified that he does not do business with Vandem because he does not trust Messrs. Vanderwater and Demeny:

J. DORIS: Are you familiar with a company named 'Vandem'?

G. IABONI: Yes, we are.

J. DORIS: Are you familiar with the principals of that company?

G. IABONI: Yes, I am.

J. DORIS: Mr. Vanderwater and Mr. Demeny?

G. IABONI: Mr. Demeny, yes.

J. DORIS: Have they ever solicited business from you?

G. IABONI: Yes, they have.

J. DORIS: And when was that?

G. IABONI: It was early 2000, I believe, if I recall correctly. Russ Demeny did.

J. DORIS: And have you purchased product from them?

G. IABONI: No, we haven't.

J. DORIS: And why is that?

G. IABONI: I don't trust the two figures.

J. DORIS: And why is that?

G. IABONI: Through past dealings with them from Ideal in '89 and Noble in '93 and my own dealings with them in 2000. Like, I don't trust them and they lied to me, so no reason to trust them".¹⁶⁵ [emphasis added]

¹⁶⁴ Testimony of W. Kelly, Vol. 14, p. 2852, line 12 to p. 2853, line 8.

¹⁶⁵ Testimony of G. Iaboni, Vol. 22, p. 4486, line 11 to p. 4487, line 12.

144. Vandem's supposed difficulties could also be explained by its inadequate capitalization, lack of investment and expenditures in sales- and marketing-related activities, and (voluntary and intentional) lack of market presence outside of Ontario. Vandem has essentially no sales force, and does little or nothing to promote its products or the use of cast iron DWV products against competing products.¹⁶⁶
145. Vandem has also been affected adversely by the increased availability of low-cost imported cast iron DWV products in Canada. Mr. Demeny conceded in cross-examination that the reason Wolseley has not purchased from Vandem in Western Canada has nothing whatsoever to do with the SDP and, instead, has everything to do with the low prices of imported cast iron DWV products:

"K. E. THOMSON: And the real reason that Westburne [now Wolseley] hasn't purchased any cast iron DWV products from Vandem since 2002 is because of the incredibly low price of imports into the market, not because of Bibby's Stocking Distributor Program. They are buying products from whoever they want. Do you not accept that?

R. R. DEMENY: I will accept that, because they are not on the program, yes".¹⁶⁷

146. In addition to competition from imports, Vandem has made various business decisions that could easily account for its lack of success in the marketplace. For example, Vandem directly employs only one salesperson – Mr. Demeny – to service the entire country.¹⁶⁸ In addition, the principals of Vandem chose not to pursue direct sales to contractors as they felt that this wasn't the "best way to approach the market".¹⁶⁹

¹⁶⁶ See Testimony of R. Demeny, Vol. 6, p. 1295, line 7 to p. 1296, line 15.

¹⁶⁷ Testimony of R. Demeny, Vol. 5, p. 1114, lines 3 to 11.

¹⁶⁸ See Testimony of R. Demeny, Vol. 6, p. 1281, line 1 to p. 1282, line 5.

¹⁶⁹ Testimony of J. Vanderwater, Vol. 7, p. 1409, lines 15 to 25.

However, other entrants, such as Mr. Kelm (of Sierra), have sold directly to contractors and have been successful in doing so.

147. As noted in the above excerpt from the Tribunal's Decision, Mr. Demeny and Mr. Vanderwater both also conceded that [CONFIDENTIAL].¹⁷⁰

148. [CONFIDENTIAL].¹⁷¹

149. Ultimately, in light of the foregoing, there is simply no merit to the Commissioner's assertion that "[t]he exclusionary and full-line forcing effects of the SDP negatively affected Vandem's sales and market share".¹⁷²

(F) Sierra

150. The Commissioner contends (at paragraph 129 of her Memorandum of Argument) that Sierra was forced to "operate as a niche player" as a result of the SDP's "exclusionary" impact. Yet again, the Commissioner's contention is not supported by the evidence before the Tribunal.

151. Far from being a so-called "niche" player, the evidence shows that between 1998 and 2004 (while the SDP has been in effect), despite Mr. Kelm's inexperience in marketing and selling DWV products, Sierra grew rapidly, capturing five to ten percent of the BC market. Sierra achieved this growth while operating from Mr. Kelm's farm and yard with only one or two employees:

¹⁷⁰ See [CONFIDENTIAL].

¹⁷¹ See {CONFIDENTIAL}.

¹⁷² Commissioner's Memorandum of Argument at para. 126.

"K.E. THOMSON: And what you have been able to achieve in the last five or six years, as someone who had no previous experience in marketing and selling DWV products and in circumstances where you've got one or two employees operating from your farm in Surrey and from your yard as well, is you have been able to achieve sales of about \$800,000 a year?

D. KELM: Yes.

K.E. THOMSON: And if you take B.C., in terms of the B.C. cast iron business, you've been able to achieve or capture something like five to ten per cent of the B.C. business in cast iron DWV product; correct?

D. KELM: If you tell me that. I don't know what the total sales are but that probably sounds about right, yeah.

K.E. THOMSON: And your sales have increased year after year?

D. KELM: Not for the last two years, no.

K.E. THOMSON: But the last two years they've been basically the same at \$800,000?

D. KELM: Kept it, yes.

K.E. THOMSON: Okay. The distributors that you are competing with include, among others, some who are customers of Canada Pipe?

D. KELM: Yes.

K.E. THOMSON: When I say 'Canada Pipe' ---

D. KELM: Yes.

K.E. THOMSON: --- I mean Canada Pipe and Bibby, it's the same company?

D. KELM: Yes.¹⁷³

K.E. THOMSON: Right. So for my purposes, just to be clear, since January of 1998, which is when the Stocking Distributor Program came into effect ---

D. KELM: Right.

K.E. THOMSON: --- Sierra has entered the cast iron DWV business; correct?

D. KELM: Yes.

K.E. THOMSON: It has expanded the number of products that it has sold?

D. KELM: Yes.

K.E. THOMSON: It has expanded the types of products that it sells?

¹⁷³ Testimony of D. Kelm, Vol. 11, p. 2313, line 8 to p. 2314, line 16.

D. KELM: Yes.

K.E. THOMSON: It has expanded its revenues?

D. KELM: Yes.

K.E. THOMSON: And it has expanded the number of contractors that it sells to?

D. KELM: Yes".¹⁷⁴

152. It also clear from the evidence (including Mr. Kelm's own testimony) that Sierra could have expanded its business and become a more effective competitor, but that Mr. Kelm consciously (and voluntarily) chose not to do so because, among other things, he did not want to work "that hard" and wants to make the most money he can with the least amount effort:

"J.A. CAMPION: Now, could you expand or could you have expanded your business in the years `02 and `03 by adding employees and was there a market there to do that?

D. KELM: Yes.

J.A. CAMPION: Did you?

D. KELM: No.

J.A. CAMPION: Why not?

D. KELM: A few reasons. One, as I'm getting older, I kind of want to work less and, financially, to expand the market I need more inventory. I need more receivables. I need more employees. I really didn't want to go down that road.

J.A. CAMPION: Why?

D. KELM: I just -- this creates more work. I just didn't want to do that. And also, I want to make as much money as I can, I guess, for the less amount of work I can do...".¹⁷⁵

153. Further, the Commissioner's assertion (see paragraphs 128 and 129 of her Memorandum of Argument) that the SDP has prevented Sierra from doing business with distributors is

¹⁷⁴ Testimony of D. Kelm, Vol. 11, p. 2318, line 15 to p. 2319, line 9.

¹⁷⁵ Testimony of D. Kelm, Vol. 11, p. 2257, line 14 to p. 2258, line 11.

simply unsupported by the evidence. Clearly, and at a bare minimum, Mr. Kelm could have chosen to pursue a sales relationship with distributors that are either currently not carrying cast iron DWV or are not purchasing from Bibby. Given that other entrants (e.g., Vandem and New Centurion) were able to find distributors that either were not participating in the SDP and/or were able to convince distributors to leave the SDP, it is not credible to suggest that the SDP "forced" Mr. Kelm to adopt the business approach he did.

154. The lack of any connection or link between the SDP and Sierra's success in the B.C. market is also confirmed indirectly by the fact that Sierra has secured little, if any, business from Wolseley, even though Wolseley has been off the SDP in the Western provinces since 2002:

"K.E. THOMSON: Can you assist the Tribunal as to the volume of sales that Sierra has made to Westburne since `98?

D. KELM: Since `98?

K.E. THOMSON: Yes.

D. KELM: It was quite small, actually. They would only buy from me when they were out of product, so if their containers were late from offshore or if they miscalculated they would come and buy from me. Some months it would be nothing. Maybe other months it might be \$5,000 type of thing. Now that was at the start. When they went back on the Bibby rebate program, there was no sales and then when they came back off it was the same thing. Some months I might not get anything. Last month I probably did \$30,000 with them because they were out of product. So it really varies. They only deal with me strictly when they're out of product.

K.E. THOMSON: Okay".¹⁷⁶

155. Finally, there is no merit to the Commissioner's claim (at paragraph 129 of her Memorandum of Argument) that Sierra's chosen *modus operandi* is more costly than

¹⁷⁶ Testimony of D. Kelm, Vol. 11, p. 2325, line 21 to p. 2326, line 17.

selling through distributors. There is no evidence before the Tribunal with respect to the comparative cost of doing business with contractors. Mr. Kelm's only testimony on this point was to say that doing business with distributors was "the easy way".¹⁷⁷ If anything, the fact that Mr. Kelm has been able to sell close to a million dollars of product a year, to hundreds of contractors, using only three to four employees (who also assist him in his concrete business) contradicts the Commissioner's assertion that entry of this nature involves increased costs or increased difficulty.¹⁷⁸ The most that one could take from Mr. Kelm's testimony is, perhaps, that doing business with distributors is "easier" (but not necessarily more costly) than doing business with contractors.

(G) *New Centurion*

156. The Commissioner relies on the evidence of Mr. Lim, the proprietor of New Centurion – an importer with only four employees (three of which are members of his family) – to establish the purported "exclusionary" impact of the SDP on Bibby's competitors.
157. Again, the Commissioner mistakes (or, less charitably, seeks to blur the distinction between) the competitive impact of the SDP (where distributors choose to purchase from Bibby rather than Bibby's competitors) with an impermissible exclusionary impact.
158. The evidence before the Tribunal shows that in 2002 New Centurion re-established its supply relationship with Wolseley with respect to all of its cast iron DWV needs in Western Canada. Mr. Lim testified that he sells to Wolseley exclusively in Western

¹⁷⁷ Testimony of D. Kelm, Vol. 11, pp. 2246-47.

¹⁷⁸ See Testimony of D. Kelm, Vol. 11, p. 2247, line 20 to p. 2248, line 1.

Canada, and that he also supplies Vandem in Eastern Canada.¹⁷⁹ Again, Wolseley is one of the very largest distributors in Canada. Mr. Lim agreed that the SDP did not prevent Wolseley from leaving Bibby and deciding to purchase from New Centurion.¹⁸⁰

159. In its Original Decision, the Tribunal observed that while the SDP may have had an initial competitive impact on New Centurion, it was able to re-capture Wolseley's business.¹⁸¹ This ability shows that any impact upon New Centurion was short-lived.¹⁸² Again, short-term losses in sales and market share are entirely consistent with competitive markets and are not, as the Commissioner alleges, evidence of exclusionary conduct.
160. At paragraph 136 of her Memorandum of Argument, the Commissioner asserts that "there is no apparent reason, other than the SDP, that New Centurion was unable to expand its pipe and fitting sales in the B.C. markets". However, the evidence on the record before Tribunal suggests at least two "apparent reasons":
- (a) New Centurion chose to expand its business to Eastern Canada and has been doing business with Vandem;¹⁸³ and
 - (b) Mr. Lim testified that New Centurion has decided to sell only to Wolseley in Western Canada and, therefore, not compete actively for other business in this area.¹⁸⁴

¹⁷⁹ See Testimony of J. Lim, Vol. 12, p. 2417, lines 5 to 15.

¹⁸⁰ See Testimony of J. Lim, Vol. 12, p. 2428, line 9 to p. 2429, line 21.

¹⁸¹ See Original Tribunal Decision at para. 155; CPC Authorities, Tab 1.

¹⁸² Original Tribunal Decision at paras. 155, 247 and 254; CPC Authorities, Tab 1.

¹⁸³ See Testimony of J. Lim, Vol. 12, p. 2417, lines 8-15.

¹⁸⁴ See Testimony of J. Lim, Vol. 12, p. 2417, lines 1-7.

161. Mr. Lim' s testimony also shows that even small companies with virtually no employees or investment can lure significant customers away from Bibby and that the SDP does not impede them from doing so, or exclude them from competing for such business.
162. As a general comment, it should not be surprising that not all of Bibby's competitors have been able to significantly increase their sales year-over-year due to the increased amounts of competition that they are all facing. In British Columbia, for example, (where 3 of the competitors discussed above are based and do business), since the SDP was introduced, the cast iron DWV market has seen entry from numerous sources, including Sierra and Ideal.¹⁸⁵
163. In sum, for the reasons given above, there is simply no basis in the evidence for the Tribunal to find that Bibby's competitors have been, are being or will be negatively effected in their ability to enter or expand their respective businesses by the SDP. For the same reasons, it was not reasonably foreseeable that the SDP would result in a "negative exclusionary effect on competitors".¹⁸⁶

(ii) No Evidence Establishing an Actual Subjective Anti-Competitive Intent

164. The Commissioner claims that Bibby's internal documents and the oral testimony of witnesses "clearly establish that Bibby's subjective intent in introducing the SDP was to

¹⁸⁵ See Testimony of R. Demeny, Vol. 6, pp. 1201-1209; pp. 1216-1222; and pp. 1230-1254.

¹⁸⁶ Commissioner of Competition's Memorandum of Argument at para. 138.

exclude competitors from the relevant markets".¹⁸⁷ This statement mischaracterizes both the relevant documents and the *viva voce* evidence heard by the Tribunal.

165. With respect to documents, the Commissioner claims that there are a "number of 'smoking gun' documents".¹⁸⁸ In fact, out of the over 1300 documents produced by Bibby at the Original Hearing,¹⁸⁹ the Commissioner has identified only two such purported "smoking guns" – document JB-4-115 and document [CONFIDENTIAL] – both of which are red herrings.
166. The Commissioner describes document [CONFIDENTIAL].¹⁹⁰ In fact, this document is [CONFIDENTIAL]. It is not an internal Bibby document, nor was it created by Bibby. Also, those [CONFIDENTIAL]. As the Tribunal noted at the Original Hearing, there is no direct reference in the [CONFIDENTIAL].¹⁹¹ At most, as discussed more fully below, [CONFIDENTIAL].
167. Further, the evidence on the record shows that when the [CONFIDENTIAL] were put to Mr. Leonard on cross-examination, he testified that [CONFIDENTIAL] in question.¹⁹² Mr. Leonard was never asked by Commissioner's counsel whether [CONFIDENTIAL].
168. The Commissioner has also quoted selectively from the [CONFIDENTIAL]. A fair reading of that document reveals [CONFIDENTIAL]. Indeed the document refers to an

¹⁸⁷ Commissioner of Competition's Memorandum of Argument at para. 81.

¹⁸⁸ *Ibid.* at para. 82.

¹⁸⁹ This figure does not fully reflect the number of documents provided to the Commissioner by Bibby pursuant to section 11 orders and voluntary information requests.

¹⁹⁰ *Ibid.* at para. 83.

¹⁹¹ See Closing Submissions, Vol. 28, p. 5496, line 20 to p. 5497, line 6.

¹⁹² See Testimony of T. Leonard, Vol. 21, p. 4384, lines 5-12.

[CONFIDENTIAL],¹⁹³ and states that [CONFIDENTIAL]".¹⁹⁴ This same document states [CONFIDENTIAL].¹⁹⁵

169. At best (from the Commissioner's perspective), the [CONFIDENTIAL] show that [CONFIDENTIAL]. The generalized intent (of a third party) to compete with one's competitors surely should not and cannot be considered sufficient to meet the test of subjective anti-competitive intent. Indeed, such an intent is the very intent that antitrust laws are designed to promote and protect.
170. The only other document that the Commissioner points to as (purported) evidence of Bibby's impermissible "subjective intent" is document JB 4-115, an internal memo dated October 22, 1997, wherein Fred Albert (a Bibby Sales Manager) refers to Mission's pricing and then suggests that Bibby could "allow [its] loyalty program to address the problem".¹⁹⁶ Oddly, although the Commissioner once again relies heavily on this document (as she did at Original Hearing), Mr. Leonard was not asked any questions by Commissioner's counsel about this alleged "smoking gun", despite the fact the memo was addressed to him, and his handwritten notes appear on the document.
171. The Commissioner speculates that the "problem" referred to in Mr. Albert's memo is Mission's lower prices, and that Bibby believed that the SDP would address the "problem" by insulating it from price competition with Mission. This interpretation is entirely speculative and, more importantly, inconsistent with the evidence on the record.

¹⁹³ [CONFIDENTIAL].

¹⁹⁴ [CONFIDENTIAL].

¹⁹⁵ [CONFIDENTIAL].

¹⁹⁶ Commissioner of Competition's Memorandum of Argument at para. 84.

Since this document was never put to Mr. Leonard, the Tribunal does not have the benefit of his evidence on this point. As a general matter, however, Mr. Leonard did explain in his evidence before the Tribunal that a reduction in Bibby's prices could be seen as a "problem" by Bibby's customers as it would result in a devaluation in the value of their inventory. Mr. Leonard's evidence, in this regard, (which was confirmed by Roy Byrne of Crane, Marc Corriveau of Wolseley, and Gary Tester of Nuroc) was that distributors often do not view reductions in list price favourably and would prefer price reductions through increased rebates.¹⁹⁷ Accordingly, a more plausible explanation (than the one suggested by the Commissioner) is that the "problem" referred to in Mr. Albert's memo is another reduction in Bibby's list price (in response to Mission's pricing), and corresponding devaluation in distributors' inventory. This "problem" could be dealt with through Bibby's SDP because Mission's prices would be met through increased rebates, rather than by reductions in Bibby's list price. This alternative explanation is corroborated by evidence of significant price competition between Mission and Bibby since the SDP was introduced.¹⁹⁸

172. The only other "evidence" relied upon by the Commissioner to prove Bibby's anti-competitive "subjective intent" is uncorroborated hearsay, much of it from Bibby's

¹⁹⁷ See Testimony of T. Leonard, Vol. 20, p. 4077, line 17 to p. 4078, line 7; this was confirmed by R. Byrne at Vol. 4, p. 871, line 3 to p. 872, line 2; and by M. Corriveau at Vol. 10, p. 2098, line 17 to p. 2099, line 9; and by G. Tester, Vol. 9, p. 1867, lines 4-23.

¹⁹⁸ See JB 24-1172; JB 24-1181; JB 4-167; JB 5-171; JB 9-417; JB 12-581; JB 14-731; JB 15-760; JB 15-806; JB 20-989; JB 21-1018; JB 22-1085; JB 22-1095; JB 23-1111.

competitors,¹⁹⁹ which, contrary to what the Commissioner suggests, does not establish that Bibby had an improper exclusionary purpose in introducing the SDP.

173. Indeed, the Commissioner relies heavily upon Mr. Demeny's hearsay testimony regarding statements allegedly made by Mr. Nolan, the President of Ransom Industries. That testimony is uncorroborated and Mr. Demeny and the Commissioner were unable to point to a single document to confirm or support Mr. Demeny's evidence as to the alleged substance of his conversation with Mr. Nolan, or even his claim that the alleged meeting actually took place. Mr. Demeny's testimony should be disregarded because it is pure hearsay²⁰⁰ or, alternatively, because of Mr. Demeny's doubtful credibility and reliability as a witness as found by the Tribunal.²⁰¹
174. The hearsay evidence of Mr. Nagel and Mr. Corriveau should also be disregarded. In any event, at best (from the Commissioner's perspective) that evidence points to Bibby's intention to compete vigorously against imports.
175. Canada Pipe submits that far from having an impermissible intent to harm its competitors, or competition, Canada Pipe had legitimate motives for introducing the SDP, including to "continue to improve its product line in order to provide [its distributors] with a wide array of products" reflected in its marketing manual.²⁰² In addition, the evidence shows that Canada Pipe went to great lengths to make sure that the Competition Bureau did not object to the Program.

¹⁹⁹ See Commissioner's Memorandum of Argument at paras. 85-88.

²⁰⁰ See The Chairperson, Transcript Vol. 20, p. 4013-14.

²⁰¹ See Original Tribunal Decision at para. 243; CPC Authorities, Tab 1.

²⁰² See JB3-68-3.

176. Canada Pipe reviewed the structure of the SDP with the Competition Bureau at the time of the Bureau's consideration of Canada Pipe's proposed acquisition of Bibby in 1997.²⁰³ The Bureau received extensive submissions from Canada Pipe about the structure and purpose of the SDP and did nothing to restrain Bibby from implementing the Program.²⁰⁴ Mr. Leonard testified before the Tribunal that the only step that the Bureau asked Bibby to take was to send a letter to its distributors explaining how the SDP worked and to take couplings off the SDP.²⁰⁵ Prior to sending this letter, Bibby provided a draft to the Bureau for its review and comment.²⁰⁶ The draft, as approved by the Bureau, was then sent by Bibby to distributors.²⁰⁷
177. Bibby submits that its efforts to make the Bureau aware of the SDP, its structure and purpose, are completely inconsistent with any notion that Bibby had any anti-competitive design or intent with respect to the introduction of the SDP.

(iii) Valid Business Justifications for the SDP

178. As discussed above, in its decision, the Court of Appeal clarified that a valid business justification may be pertinent and probative in relation to the determination required by section 79(1)(b), namely "whether the purpose for which the act was performed was a predatory, exclusionary or disciplinary negative effect on a competitor".²⁰⁸ Provided that

²⁰³ See Testimony of T. Leonard, Vol. 19, p. 3910, line 6 to p. 3915, line 6; Vol. 22, p. 4444, line 13 to p. 4454, line 14.

²⁰⁴ See Testimony of T. Leonard, Vol. 20, p. 4103, line 14, to p. 4108, line 8; Exhibits R-19, R-20, R-22, R-23; JB 3-107; JB 3-108; JB 4-128.

²⁰⁵ See Testimony of T. Leonard, Vol. 22, p. 4450, line 19 to p. 4451, line 17; Exhibit R-22.

²⁰⁶ See Exhibit R-22; Testimony of T. Leonard, Vol. 22, p. 4452, line 4 to p. 4453, line 8.

²⁰⁷ See JB 6-256.

²⁰⁸ FCA Decision at para. 87; CPC Authorities, Tab 2.

it offers a "credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent",²⁰⁹ such a justification may, in appropriate cases (such as the case at bar), counterbalance the evidence of negative effects on competitors (of which Bibby says there is none) or subjective intent (of which Bibby says there is none) in this regard by offering an alternative explanation as to why the impugned act was performed.²¹⁰

179. Far from having an exclusionary purpose, there are numerous business reasons for the SDP which provide "a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent" which are sufficient to overcome and counterbalance any of negative effects on competitors and/or impermissible subjective intent of the SDP (both of which are expressly denied by Bibby).
180. As discussed at greater length below, Mr. Leonard testified before the Tribunal that one of the primary purposes of the SDP is to provide an incentive to distributors to carry and promote a full line of cast iron DWV products as alternatives to DWV products made from other materials. This business justification is clearly pro-competitive as it not only increases competition between DWV products (which benefits consumers) but also ensures greater consumer choice. In addition, the SDP helps Bibby maintain a sufficient amount of production throughput of cast iron DWV products which permits Bibby to realize significant production efficiencies (and cost savings) in the production of not only its cast iron DWV products but also other cast iron products produced at its foundry.

²⁰⁹ *Ibid.* at para. 87.

²¹⁰ See *ibid.* at para. 73.

These production efficiencies enable Bibby to continue producing a full line of cast iron DWV products which again benefits consumers, as well as keeping its DWV products cost competitive against imports and DWV products made from other materials. The SDP also protects Bibby's investments in a full line of cast iron DWV products, the promotion of cast iron DWV products and in developing new products which were recognized as a valid business justification by Dr Ross.²¹¹

181. In short, the SDP has at least four valid business justifications or rationales (as defined by the Court of Appeal):
- (a) SDP increases Bibby's production efficiencies;
 - (b) SDP encourages the promotion of cast iron DWV products;
 - (c) SDP is intended to (and does in fact) minimize free riding on Canada pipe's investments; and
 - (d) SDP encourages the sale of a complete system of cast iron DWV products.
182. Each of these justifications is discussed in turn below.

(A) *SDP Increases Bibby's Production Efficiencies*

183. As was perhaps not made sufficiently clear at the Original Hearing, Canada Pipe is not, as the Commissioner suggests, focussed on selling increased volumes of DWV products purely for its own profit or "self-interest". Rather, maintaining a sufficient level of production throughput (and in particular a sufficient volume of production of cast iron DWV products) allows Bibby to realize significant production efficiencies which are

²¹¹ See Ross Report at para 86.

crucial for keeping the production costs of Bibby's DWV products and Bibby's foundry (including its non-DWV products) low and its products cost-competitive.

184. As Mr. Leonard explained in his testimony before the Tribunal, Bibby's foundry produces 220 to 240 tonnes of total cast iron castings which include various cast iron products (e.g., waterworks, stadium seating, etc).²¹² Of these total castings, approximately 50% consist of cast iron DWV products. Cast iron DWV pipe (or "soil pipe") has a very low production cost compared with Bibby's other cast iron DWV products and Bibby's other cast iron, non-DWV products. Mr. Leonard testified that the production cost of soil pipe is typically one-third of the cost of producing other cast iron products.²¹³ Thus, soil pipe is an important product for Bibby to produce because it absorbs a significant amount of Bibby's overhead at a very low cost.²¹⁴
185. The SDP encourages the sale of Bibby's full line of cast iron DWV products and ensures that Bibby's customers are not simply "cherry picking" and purchasing the low volume "specialty items" which only Bibby produces. By maintaining a sufficient level of production of cast iron DWV products, Bibby is able to lower its overall production costs and its overall prices for its products, by amortizing its total overhead costs over its total production (including soil pipe). The production efficiencies realized enable Bibby's foundry to remain cost-competitive on all of its cast iron products (including DWV products).

²¹² See Testimony of T. Leonard, Vol. 19, pp. 3868-69.

²¹³ See Testimony of T. Leonard, Vol. 19, pp. 3870-71 and pp. 3873-74.

²¹⁴ See *ibid.*

186. In addition, by encouraging an exclusive purchasing relationship with Bibby, the SDP allows Bibby to reduce the production cost of its low-volume "specialty" cast iron DWV products which are not produced or required as frequently, but are (as the Tribunal found) an essential part of any building.²¹⁵ As Mr. Leonard explained, Bibby manufactures over 80 different types of cast iron pipe, 650 to 700 different models of fittings and sells (but does not manufacture) between 70 to 80 types of couplings.²¹⁶ Canada Pipe is the only cast iron DWV supplier in Canada that manufactures and/or supplies a full line of cast iron DWV products. However, of these products, 20% typically represent 80% of the volume purchased such that other suppliers are able to focus on these high volume products and choose not to carry the lower volume and higher-cost specialty products. Mr. Leonard's evidence on this point was confirmed by Mr. Bouthillette of BMI.²¹⁷
187. Again, the SDP helps to ensure that Bibby's customers purchase a variety of DWV products from Bibby and thus ensures a sufficient volume of "bread and butter" items in order to keep Bibby's costs of producing the low-volume specialty product lower and more competitive. In contrast to its competitors, Bibby chooses to manufacture a full line of cast iron DWV products since a full line must be available to distributors and, ultimately, builders in order for cast iron to remain a viable alternative to, and effective competitor with, DWV products made from other materials.²¹⁸

²¹⁵ See Testimony of T. Leonard, Vol. 19, p. 3816, line 22 to p. 3818, line 23; p. 3877-3880; Original Tribunal Decision at para. 211; CPC Authorities, Tab 1.

²¹⁶ See Testimony of T. Leonard, Vol. 19, p. 3816, line 22 to p. 3819, line 2 and p. 3822, line 19 to 24.

²¹⁷ See Testimony of M. Bouthillette, Vol. 12, p. 2511, lines 15-22; Testimony of T. Leonard, p. 3825, line 17 to p. 3826, line 21.

²¹⁸ See Testimony of T. Leonard, Vol. 20, p. 3827, lines 1 to 15.

(B) *SDP Encourages the Promotion of Cast Iron DWV Products*

188. As Mr. Leonard explained before the Tribunal, one of the primary purposes of the SDP is to encourage distributors to inventory and handle a complete line of cast iron DWV products in order for cast iron to remain an accessible and viable alternative to other DWV products:

"Well, the Stocking Distributor Program, the number one purpose of it is to allow cast iron to compete against plastic and asbestos and copper. Wholesalers and distributors are very interested in profit margins, and they will promote inventory and handle the product line that treats them the best. Wherever they make the most money is where they are going to spend the most time. The idea of the Stocking Distributor Program is, one, to convince our customers that they should inventory and handle a complete line of DWV. It's very easy to handle a complete line of plastic and copper. Its not very heavy. It doesn't take up a lot of space. The cast iron is a different story. That's why half of the distributors in Canada don't handle cast iron, because its heavy. So the Stocking Distributor Program is to get the wholesalers to inventory our product completely, to buy it in truckloads, to inventory it in their yards so that, when a contractor comes to buy the product, they can be supplied completely, that they feel that cast iron is as accessible as plastic.

The other thing it's designed to do is to put profit in the product line. This whole industry operates on rebates. The plumbing industry, very simply, you can measure their profits by the size of the rebates. They don't sell above invoice very often. So the Rebate Program is basically to put profit in our customers' pockets so they will want to handle our product".²¹⁹

189. As illustrated by Mr. Leonard's evidence, given the difficulties associated with carrying and handling a full line of cast iron DWV products, distributors must be provided with an incentive to inventory a full line of cast iron DWV products. The SDP provides such an incentive.

190. Mr. Iaboni of Sherwood Plumbing (a distributor) confirmed that the SDP has had the effect of encouraging him to inventory and promote cast iron DWV products.²²⁰ Similarly, other evidence on the record confirmed Mr. Leonard's testimony that

²¹⁹ Testimony of T. Leonard, Vol. 19, p. 3877, line 23 to p. 3879, line 5.

²²⁰ See Testimony of G. Iaboni, Vol. 22, pp. 4538-39.

distributors will inventory and/or promote certain DWV products depending on the margins offered by the products.²²¹

191. This business justification does not represent a naked self-interest to sell more cast iron DWV products. Rather, it is important, from Bibby's perspective, to encourage distributors to inventory cast iron DWV products in order to ensure the long-term viability of cast iron DWV products. Furthermore, encouraging distributors to inventory cast iron DWV products has the positive effects of increasing consumer choice (by having another type of DWV product readily available), as well as increasing overall competition between DWV products made from different materials.
192. The SDP also encourages the promotion and sale of cast iron DWV products by smaller distributors by granting the small- and medium-sized distributors the same rebates (and thus the same prices) as larger distributors. As Mr. Leonard testified, from Canada Pipe's perspective it is important for smaller distributors to inventory cast iron DWV products because smaller distributors are more likely to promote cast iron DWV products as an alternative to other DWV products, thereby increasing consumer choice and overall competition amongst DWV products. Mr Leonard explained:

"In our industry, the big wholesalers, the Wolseleys and the Emcos, they are low margin, high volume. They don't promote my product. They don't promote anyone's product. You take the medium and small wholesalers, those are the people that build relationships with the contractors. Those are the people who will promote one product against another.

What the Stocking Distributor Program does is puts the small and medium wholesalers on the same playing field as the big wholesalers. Of course, the big wholesalers don't like that at all but what it does is, for me if you take a small wholesaler, you take like a Noble Trade which is in Ontario - - he's just a

²²¹ See JB 7-300, JB7-319 (Wolseley indicates that it will promote PVC products because they have better margins than cast iron).

regional wholesaler. He just sells in the Greater Toronto Area, but he sells more soil pipe in the Greater Toronto Area than the three or four nationals do. So its in my interest for him to have the same cost as an Emco.[...] So as far as a product line, as far as an industry goes, we want to promote the small and medium wholesaler because they promote us. It's a really good fit. And the reason Noble Trade doesn't just say: 'Well, I'll go to plastic. I'll promote plastic. So what I'll do is I'll go out and promote plastic', which he could do and probably be successful at it, but the plastic people have a volume rebate. He doesn't want to go promote plastic because my story is exactly what would happen. He would go out and convince somebody to sell plastic, and Emco will come in and just cut his price, because Emco buys their plastic pipe substantially less than Noble Trade".²²²

193. The SDP has the pro-competitive effect of increasing competition at the distributor level since smaller distributors are able to offer the same low price for Bibby's cast iron DWV products as larger competitors. This increases competition at the distributor level and leads to consumers receiving the benefit of this increased level of competition.
194. The Tribunal originally declined to accept this business justification on the ground that ensuring that "small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy" (as stated in section 1.1 of the Act) is "unrelated to the issue of abuse of dominance". The Tribunal went on to say that:

"[c]ompetition 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".²²³

195. With respect, the Tribunal's conclusion on this point should be revisited for at least three reasons. To begin with, from Bibby's perspective, the purpose of the SDP is not to increase competition at the distribution level; rather, the purpose of the SDP is to ensure that smaller distributors are provided with sufficient incentive to inventory and promote

²²² Testimony of T. Leonard, Vol. 19, pp. 3880, line 25 to 3883, line 11.

²²³ Original Tribunal Decision at para. 209; CPC Authorities, Tab 1.

cast iron DWV products. Again, because Bibby sells its product through distributors, it must ensure that distributors are provided with a sufficient incentive to promote cast iron DWV products as alternatives to DWV products made from other materials. This promotion ensures the long-term viability of cast iron DWV products in the cast iron DWV industry.

196. Secondly, the Tribunal should revisit its decision with respect to this proffered business justification in light of the Court of Appeal's additional guidance that the business justification doctrine requires the Tribunal to determine whether the justification in question provides an alternative pro-competitive or efficiency-enhancing explanation for the conduct. In light of this guidance, the Tribunal should determine whether its initial analysis and rejection of the justification still holds (which Bibby says it does not).

197. Finally, contrary to the Tribunal's conclusion in its Original Decision that the creation of equitable opportunities for small-and-medium-sized enterprises to participate in the Canadian economy is not a relevant consideration for the purposes of section 79, the Court of Appeal explicitly directed that the impact of the conduct upon consumers is indeed a relevant consideration for the purposes of determining the weight and credibility to be given to a particular business justification. As discussed above, increasing competition amongst distributors clearly has a pro-competitive impact (in the way of increased price competition) for consumers, which suggests that this business justification is indeed credible and should be afforded significant weight.

(C) ***SDP is Intended to and does Minimize Free Riding on Canada Pipe's Investments***

198. Another efficiency enhancing, pro-competitive rationale for the SDP is that it minimizes the extent to which importers and other manufacturers of cast iron DWV products can free-ride on Bibby's innovation efforts and its efforts to promote the use of cast iron DWV against other products. Canada Pipe submits that this business justification meets not only the Court of Appeal's criteria for a valid business justification, but the Commissioner's own criteria as well.

199. At paragraph 143 of her Memorandum of Argument, the Commissioner offers the following possible pro-competitive rationales for the SDP:

"Dr. Ross provided examples of possible pro-competitive rationales for exclusive dealing arrangements like the SDP. Specifically, Dr. Ross noted that exclusive dealing can be a pro-competitive or efficient arrangement if it protects certain types of investments that a firm makes, such as investing in the development of a new product".

200. Other possible efficiency-enhancing motivations for exclusive dealing were also described by the Commissioner's expert economist in his report:

"Exclusive dealing is one of those vertical restraints that can represent an efficient arrangement between sellers (often manufacturers) and buyers (typically distributors), or an attempt to restrict competition at some level of the distribution chain. For example, if a manufacturer invests a lot of resources into creating a certain type of product and marketing it extensively to bring it into retailers' stores, it might worry that the retailers would then switch customers over to a rival manufacturer's copy-cat product that was developed at lower cost (because it was a copy) and was not advertised. This free-riding on the first manufacturer's investments will destroy the incentive to invest and develop new products. By forcing the retailers to stock the first manufacturer's product exclusively, their ability to switch customers is removed...."²²⁴

"See Marvel [1982], for a nice discussion of the *Standard Fashions* case that emphasizes efficiencies. More recently, Masten and Snyder show that when it is desirable for sellers to invest in the training of buyers, exclusive contracts may be necessary to protect these investments. Otherwise, the buyers could apply their training to help them sell products provided by rival sellers".²²⁵

²²⁴ Ross Report at para. 86.

²²⁵ Ross Report at 26, footnote 49.

201. A review of the evidence confirms that Bibby has made significant investments of the very kind that Dr. Ross acknowledges that a manufacturer, like Bibby, may justifiably seek to protect through exclusive dealing. Bibby has made significant investments in the development of new cast iron DWV products, and to maintain a full line of cast iron DWV products. In addition, Bibby has made significant expenditures to promote cast iron DWV products to distributors and builders by visiting with builders, contractors and building inspectors, and providing technical support regarding the installation of cast iron DWV products.²²⁶
202. With respect to innovations in cast iron DWV products, Mr. Leonard gave the following evidence:

"T. LEONARD: About a year or two ago, the PVC people came up with a hanger that would hold both sides of a fitting, where we had a hanger that would -- if you had a fitting, you need two hangers, one on each side. So that's a good clever idea. So in fact, we developed our own hanger that would hold a joint on both sides with only one hanger, lowering the cost of the installation of our product. So that's a typical ---

K.E. THOMSON: You said 'PVC', what does that mean?

T. LEONARD: The plastic DWV.

K.E. THOMSON: Okay. And what about your one and a half inch cast iron DWV pipe?

T. LEONARD: Yeah, the one and a half -- well, the one and a half inch cast iron DWV isn't that old of a product. When I first arrived in Ste-Croix, the inch-and-a-half was being produced and I don't really know for sure how much before that. But, pretty much, we had not competed historically on the inch-and-a-half copper and we came out with the inch-and-a-half, you know, much later than the other sizes to compete against copper. It was the same situation on 12 and 15-inch. We never made 12-inch DWV or 15-inch DWV in the mechanical joint or the type that uses the coupling, we only made it in the hub and spigot. But because of asbestos cement was being so successful and they didn't have a hub and spigot joint, they had a coupling-type joint like in the back of the room

²²⁶ See JB 14-701; JB 15-704; JB 5-236; JB 7-319; JB 9-424; JB 10-449; JB 14-706, 713 and 727; JB 15-744, 769, 774 and 790; JB 16-833; JB 18-918; JB 19-941; JB 21-1041 and 1048; JB 22-1078; JB 24-1193; JB 28-1321.

there, so we actually developed plain-end by plain-end 12 and 15-inch pipe to, again, enhance our product line, to compete against asbestos cement".²²⁷

203. In addition, Bibby is the only supplier of cast iron DWV products that invests any time, effort or money into promoting the use of cast iron DWV products. One of the organizations funded entirely by Bibby is the Cast Iron Soil Pipe Association ("CISPA"). The Commissioner has previously acknowledged that CISPA promotes the use of cast iron DWV products over other materials.²²⁸ Among other things, CISPA commissions studies concerning the use of competing materials such as plastic. Vandem was invited to participate in CISPA, but declined, at least in part, because it did not want to contribute to funding the Association.²²⁹ As a result, Bibby is the only member of CISPA and bears all of its costs.²³⁰

204. The promotion of cast iron is not purely in Bibby's "self-interest", or purely in its financial interest, but, rather, is intended to maintain the viability of cast iron DWV products as an alternative to DWV products made from other materials (in particular, plastic). Indeed, other suppliers of cast iron DWV testified that they do very little to promote the overall use of cast iron since they rely upon Bibby to do so. For example, Mr. Kelm of Sierra testified that he, in fact, sometimes calls upon Bibby to contest the use of plastic DWV in a particular project.²³¹ Mr Demeny of Vandem testified that his

²²⁷ Testimony of T. Leonard, Vol. 19, p. 3889, line 7 to p. 3890, line 16; [CONFIDENTIAL].

²²⁸ See Final Written Submissions of Commissioner at para. 41.

²²⁹ See Testimony of R. Demeny, Vol. 6, p. 1293, line 24 to p. 1295, line 6; Testimony of J. Vanderwater, Vol. 8, p. 1578, lines 6 to 10.

²³⁰ See Testimony of T. Leonard, Vol. 19, p. 3864, line 20 to p. 3865, line 24.

²³¹ See Testimony of D. Kelm, Vol. 11, p. 2371, line 10 to p. 2372, line 12.

company makes no effort to promote the use of cast iron over plastic and benefits from the promotional efforts of CISPI.²³²

205. Mr. Leonard testified that he is aware that Canada Pipe's efforts to promote cast iron against DWV products made from other materials have, on occasion, benefited competitors such as Vandem and Sierra. However, in his view such promotion is necessary in order to stem the complete decline of cast iron DWV products:

"K.E. THOMSON: Okay. Now, you testified yesterday that, to your knowledge, Bibby is the company in Canada that actively promotes the use of cast iron DWV products. To what extent, if any, does Bibby promote the use of cast iron in a particular project even if another company, such as Vandem for instance, will supply materials for the project instead of Bibby if the owner decides to use cast iron?

T. LEONARD: We work very hard and fight for every project in Canada to go cast iron. We do not walk away from a project because it might use Vandem or it might use import products. We feel that you have to be careful not to win the battle and lose the war. So, you know, we believe that every time we can have a job go cast iron it's better for Bibby in the long run and if we can stem the tide of the PVC or slow down the continual growth of PVC, then that's the best thing for us to do in the long run".²³³

206. As Dr. Ware explained in his report and testimony, without the protection afforded by a preferential dealing program such as the SDP, the free riding by Bibby's competitors would only be exacerbated.²³⁴ Indeed, Dr. Ware relied upon the same work (Marvel) that Dr. Ross cites in his report in explaining this efficiency-enhancing rationale for exclusive dealing:

"E. BABIN: Okay. Now in conducting this analysis, you reviewed, as I understand it, the academic literature which sets out or deals with the economic theory relating to these programs?

²³² See Testimony of R. Demeny, Vol. 6, p. 1293, line 24 to p. 1296, line 15.

²³³ Testimony of T. Leonard, Vol. 20, p. 4043, lines 4 to 23; JB 19-941 and 942.

²³⁴ See Testimony of R. Ware, Vol. 25, p. 4964, line 22 to p. 4965, line 20; Ware Report at paras. 112 to 113.

R. WARE: Yes, I do.

E. BABIN: And what principles have you, if any, have you applied from that review to your analysis of the SDP?

R. WARE: Well, perhaps I could start with -- there was a work that I cite here by Marvel -- it's in paragraph 112 -- and Marvel was one of the earlier economist to address the economic analysis of exclusive -- he was talking about exclusive dealing arrangements but the features are similar enough to capture some of the essential properties. He pointed out the importance of manufacturers being able to protect investments that they make in the promotion of their product through these exclusive arrangements with distributors. That they would -- that unless a manufacturer is able to, let's say, require a distributor to carry a product exclusively, then it may be subject to free riding. It's the investment that it makes -- I'm sorry -- in Marketing and Distribution, possibly training the distributors in establishing a reputation for the quality of its product, in going to trade shows, and all of those things. It may be subject to free riding by other manufacturers who don't participate in that investment but nevertheless can benefit from it".²³⁵

207. Bibby has also made significant investments in order to maintain a full line of cast iron DWV products. Bibby is the only domestic manufacturer of cast iron DWV products with a full product line; that is, it also produces the 80% of the product line that generates only 20% of the revenues.²³⁶ Mr. Leonard explained that Bibby has chosen to invest in producing a full line of products because it is essential if cast iron DWV is to remain a viable alternative to other DWV materials.²³⁷

208. The fact that Bibby carries a full line of products benefits importers and other domestic manufacturers of cast iron DWV products who are able to carry fewer products, knowing that the full line is available from Bibby. Mr. Leonard testified:

"K.E. THOMSON: Okay.

And I think you've answered this, but just in case we don't have it, to your knowledge, are there any other suppliers of cast iron DWV products in Canada

²³⁵ Testimony of R.Ware, Vol. 25, p. 4964, line 22 to p. 4965, line 20, Ware Report, paras. 112 to 113.

²³⁶ See Testimony of T. Leonard, Vol. 19, p. 3825, line 16 to p. 3827, line 5.

²³⁷ See Testimony of T. Leonard, Vol. 19, p. 3827, lines 1 to 15.

that carry a line of products as extensive as yours in pipes and fittings and couplings?

T. LEONARD: No, sir.

K.E. THOMSON: All right. Mr. Leonard, from your perspective, to what extent, if any, do other suppliers of cast iron DWV products in Canada benefit from the fact that Bibby carries a full line of its products?

T. LEONARD: Well, immensely. I mean, you can't be in the business if we're not here.

You know, like I say, you take that building on the corner here, our competitors, whether they be the importers or Vandem, they can supply 80 per cent of what the needs are for that building, but there's going to be fittings and there's going to be sizes of pipe in a typical building that they're not going to have.

So what will happen is, if they sell the job, the contractor will go to a Bibby wholesaler and buy the missing parts so the job can be done completely. If Bibby wasn't here and the missing parts weren't available, well then they couldn't be successful on the project".²³⁸

(D) *SDP Encourages Sales of a Complete System of Cast Iron DWV Products*

209. Another purpose of the SDP is to encourage distributors to purchase a "complete system" from Canada Pipe. As Mr. Leonard testified:

"The other thing with the Rebate Program is to convince people to sell the package. You know, our competitors all sell systems. Bibby has a system. I mean, you can't use the pipe without the couplings. You can't use the fittings without the pipe. You can't use the couplings without the pipe and fittings. It's a system. Part of the Rebate Program is to sell our product as a system".²³⁹
[emphasis added]

210. Selling a complete "system" of products to Bibby's customers clearly lowers distribution costs for Bibby, as well as its customers.²⁴⁰ In addition, selling a complete system of products enables Bibby to lower the cost of offering a warranty for its products to its customers. The evidence on the record clearly establishes that Bibby warranties all of its cast iron DWV products (regardless of whether they are purchased separately or as a

²³⁸ Testimony of T. Leonard, Vol. 19, p. 3831, line 3 to p. 3832, line 5.

²³⁹ Testimony of T. Leonard, Vol. 19, p. 3879, line 6 to p. 3880, line 20.

²⁴⁰ *PeaceHealth* at 11208; CPC Authorities, Tab 5.

complete system).²⁴¹ However, when Bibby cast iron products are sold separately, if a customer calls Bibby when a problem arises, Bibby must first determine whether it is the Bibby product that is causing the problem or whether it is the other DWV products that are defective. Given that DWV products are hidden behind walls, making such a determination can be time-consuming and costly. In contrast, if Bibby is aware that it has sold the complete cast iron DWV system to a customer, such investigations are not necessary and this cost is avoided for Bibby as well as the customer. Again, the fact that such costs are minimized allows Bibby to remain cost competitive, not only with imported cast iron DWV products but also with DWV products made from other materials.

(iv) SDP Clearly has a Positive Effect on Consumers

211. Bibby submits that the evidence and prior findings of the Tribunal clearly establish the SDP has a positive effect on consumers in that the SDP permits Bibby ensure that its full line of products remain available as a competitive alternative to DWV products made from other materials.
212. The Tribunal explicitly found that the SDP allows Bibby to maintain sufficiently high volumes of production and these volumes, in turn:

"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".²⁴² [emphasis added]

²⁴¹ See Testimony of T. Leonard, Vol. 20, p. 4118, line 13 to p. 4120, line 5; Vol. 21, p. 4371, line 6 to p. 4373, line 1.

²⁴² Original Tribunal Decision at para. 212; CPC Authorities, Tab 1.

213. In addition, the fact that the SDP has led to increased competition between large and small distributors can only benefit consumers by way of lower prices. As Mr. Leonard and Mr. Iaboni testified, if the SDP was abolished and Bibby moved to a volume discount program, this would result in a significant loss of sales for small- and medium-sized distributors and thus, less price competition amongst distributors.²⁴³

214. The pro-competitive benefits of the SDP for consumers clearly confirms that the business justifications offered by Bibby are legitimate and should be given considerable weight as part of the Tribunal's consideration of the overall intent, purpose and character of the SDP.

4. *Conclusions Regarding Section 79(1)(b)*

215. In sum, Canada Pipe submits that the Commissioner has failed to establish that Bibby has engaged in a practice of anti-competitive acts within the meaning of section 79(1)(b) for at least the following reasons:

- (a) the SDP does not have an intended negative effect on a competitor that is predatory, exclusionary or disciplinary;
- (b) contrary to the Commissioner's allegations, the SDP cannot be linked to any exclusionary impact on any Bibby competitor;
- (c) the terms are clear, there is no minimum period of participation and no requirement of exclusivity as a condition of supply. This distinguishes the SDP

²⁴³ Testimony of G. Iaboni, Vol. 22, p. 4481, line 14 to 4483, line 15; Testimony of T. Leonard, Vol. 19, p. 3383, lines 12-19.

from every other preferential dealing or exclusive dealing arrangement the Tribunal has previously considered;

- (d) distributors are fully able and entitled to leave the SDP at any time to purchase from other suppliers. Bibby's customers are thus contestable at any time and Bibby's competitors are fully able to compete against Bibby by offering a better price or service; and
- (e) there is no evidence to support the Commissioner's allegations concerning Bibby's alleged subjective anti-competitive intent in introducing the SDP. Rather, the evidence shows that Bibby went to great lengths to make the Bureau aware of the terms and conditions of the SDP prior to its implementation, and that the SDP has several valid business justifications.

216. The Commissioner's failure to prove the second essential element in section 79 of the Act is fatal to her Application, and it should be dismissed for this reason alone.

B. THE SDP DOES NOT SUBSTANTIALLY LESSEN OR PREVENT COMPETITION

1. Test for Section 79(1)(c)

217. In its Decision, the Court of Appeal concluded that that section 79(1)(c) of the Act requires the Tribunal to: "consider whether the evidence on the 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".²⁴⁴ [emphasis in the original] On this point, the Court of Appeal quoted the

²⁴⁴ *Ibid.* at 55.

Tribunal's decision in *Laidlaw*, which established two potential points of comparison to address the "but for" question raised by section 79(1)(c):

"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".²⁴⁵

218. In other words, as the Court of Appeal stated, in order to determine whether a practice of anti-competitive acts has had, is having, or is likely to have the effect of preventing or lessening competition substantially within the meaning of section 79(1)(c) of the Act 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'".²⁴⁶

219. Put another way, the relevant question to be determined is: "would the relevant markets – in the past, present or future – be substantially more competitive but for the impugned practice of anti-competitive acts?"²⁴⁷

220. The Court of Appeal suggested what the "but for" test might involve, noting that:

"[It] 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

²⁴⁵ *Laidlaw* at 344-46, as quoted in FCA Decision at para. 42; CPC Authorities, Tab 2.

²⁴⁶ FCA Decision at para. 37; CPC Authorities, Tab 2.

²⁴⁷ *Ibid.* at para. 38.

treating the market conditions before and after the introduction of the impugned practice as proxies for the market with and without the practice".²⁴⁸

221. The Court of Appeal was careful not to suggest that any particular type of evidence was required under section 79(1)(c). Rather, it observed that the evidence required can only be determined by the Tribunal on a case-by-case basis.²⁴⁹ However, the Court did state that in answering whether, without the SDP, the relevant markets would be substantially more competitive, a proper examination 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".²⁵⁰
[emphasis added]

222. The Court of Appeal further noted that certain guidelines must be borne in mind when undertaking the "but for" assessment. Notably, the Court stated that in making a determination under section 79(1)(c) "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".²⁵¹ Those purposes include ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and providing customers with competitive prices and product choices. Both of these objectives are particularly relevant in the instant matter.

223. In sum, the Court of Appeal focussed the analysis under section 79(1)(c) on an assessment of the level of competitiveness which would be obtained in the absence of the

²⁴⁸ *Ibid.* at para. 46.

²⁴⁹ *Ibid.* at para. 46.

²⁵⁰ *Ibid.* at para. 58.

²⁵¹ *Ibid.* at para. 48.

anti-competitive practice in question. That is, the Commissioner bears the burden of proving that without the SDP, the Relevant Markets would be substantially more competitive in the past, present or future. As already noted, the precise methodology for conducting this assessment was left to be determined by the Tribunal on a case-by-case basis.

2. *Methodology for Section 79(1)(c) Test*

224. The central question under section 79(1)(c) in this redetermination is whether the "SDP was responsible for a *substantial increase* in the difficulty of gaining entry in the market[s], and hence a *substantial* lessening [or prevention] of competition".²⁵² [emphasis in the original]

225. As the Court of Appeal noted, this question may be answered through the creation of a hypothetical comparator model market, where the model includes all characteristics of the Relevant Markets, except the impugned practice. While the courts have acknowledged that the creation of such a model is difficult, it is not impossible, and has been achieved in prior antitrust cases.²⁵³ Canada Pipe submits that such a comparator model would allow the most accurate analysis of the impact (if any) of the SDP on competition in the Relevant Markets. However, the Commissioner has made no attempt to construct such a model to allow for this analysis. Instead, as set out more fully below, the Commissioner relies on faulty extrapolation and conjecture to support her claim that the Relevant Markets would be substantially more competitive "but for" the SDP.

²⁵² *Ibid.* at para 53.

²⁵³ See, e.g., *Concord Boat Corporation v. Brunswick Corporation*, 207 F.3d 1039 (8th Cir. 2000), rev'g 95-CV-781 (E.D. Ark. 1998); CPC Authorities, Tab 7.

226. In the absence of a hypothetical comparator model, the only alternative is to examine the evidence on the record to analyse the impact the SDP has had, is having and will have upon the Relevant Markets, and to derive a conclusion, based on such evidence, as to the competitiveness of the Relevant Markets but for the SDP.
227. Canada Pipe submits that the evidence on the record establishes that the SDP has not had, is not having and will not have any detrimental impact on competition in any of the Relevant Markets. Rather, any impact upon competitors attributable to the SDP is purely reflective of competition on the merits and does not evidence a substantial lessening or prevention of competition. The absence of any impact upon any of Bibby's competitors associated with the SDP is discussed above in connection with section 79(1)(b). The evidence on the record clearly shows there is no credible link between the SDP and any detrimental impact upon any competitor in any of the Relevant Markets. Canada Pipe submits that the absence of any such impact is by itself dispositive of the "but for" analysis required by section 79(1)(c).
228. Should the Tribunal decline to find that the Commissioner has failed to satisfy section 79(1)(c) on this basis, Canada Pipe submits that in carrying out the "but for" analysis mandated by the Court of Appeal, the Tribunal should have regard to the following factors or considerations:
- (a) the competitiveness of each of the Relevant Markets both prior to and after the introduction of the SDP in 1998;²⁵⁴

²⁵⁴ As the FCA noted, "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": FCA Decision at para. 46; CPC Authorities, Tab 2.

- (b) whether or not, without the SDP, entry or expansion might be substantially faster, more frequent or more significant in each of the Relevant Markets;
 - (c) whether or not, without the SDP, switching between products and suppliers might be substantially more frequent in each of the Relevant Markets;
 - (d) whether or not, without the SDP, prices might be substantially lower;
 - (e) the effect of the SDP in the Relevant Markets; and
 - (f) whether the practice is a result of the superior competitive performance of Bibby.
229. Bibby disagrees with the Commissioner that the "degree of market power held by Bibby during the currency of the SDP" is, can or should be a relevant factor in the Tribunal's assessment of the SDP's impact on competition.
230. The Commissioner contends that "[w]here a respondent has significant market power, even a small effect on competition qualifies as substantial",²⁵⁵ and asserts that because of Bibby's (alleged) "high degree of market power" and "overwhelming" market share, even a small impact on competition will meet the threshold of being "substantial" within the meaning of section 79(1)(c) of the Act".²⁵⁶ The Commissioner refers to and relies upon the Tribunal's decision in *Tele-Direct* as authority for her position in this regard.
231. The Tribunal's approach in *Tele-Direct* is not applicable and, in fact, is irrelevant to the "but for" analysis to be performed in this case for at least three reasons.
232. First, it is important to recognize that in *Tele-Direct*, the Tribunal had clearly found that Tele-Direct had a "high degree" of market power in the relevant market and not simply high market shares.

²⁵⁵ Commissioner's Memorandum of Argument at para. 167.

²⁵⁶ See Commissioner's Memorandum of Argument at paras. 167-70.

233. In her Memorandum of Argument, the Commissioner incorrectly attempts to equate the Tribunal's determination regarding Bibby's high *market shares* with a "high degree" of *market power*. It is clear, however, the Tribunal made no finding with respect to the degree of Bibby's market power in any of the Relevant Markets, let alone a finding that Bibby possesses a "high degree of market power" in all of the Relevant Markets.
234. A basic tenet of competition law is that without significant barriers to entry there cannot be significant market power. Again in direct contrast to *Tele-Direct*, the Tribunal did not find that there were significant barriers to entry in each of the Relevant Markets. In fact, the Tribunal concluded that "the evidence on barriers to entry is not conclusive", a finding which was not disturbed by the Court of Appeal.²⁵⁷ Indeed, the Tribunal also determined that 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".²⁵⁸ This finding that prices are competitive for most of Bibby's sales in Canada is inconsistent with any suggestion that the Tribunal concluded that Bibby has a high degree of market power.
235. Canada Pipe submits that in the absence of a "high degree" of market power, to suggest that a *de minimis* impact upon competitors would be sufficient to meet the "substantiality" threshold in section 79(1)(c) would be to read this threshold out in all cases where it has been established that a firm has market power. Given that market power is a precondition under section 79(1)(a), this would effectively mean the

²⁵⁷ Original Tribunal Decision at para. 161; CPC Authorities, Tab 1.

²⁵⁸ *Ibid.* at para. 265.

elimination of the substantiality component under section 79(1)(c) in all abuse of dominance cases.

236. Secondly, Tele-Direct's high degree of market power was confirmed by the evidence that the relevant market (for advertising sold through consultants) was already uncompetitive to begin with (even in the absence of the anti-competitive acts). In other words, in that case, the starting point for the Tribunal's "but for" analysis of the impact of the anti-competitive acts upon competition in the relevant markets was an already uncompetitive market. In contrast to *Tele-Direct*, there is no evidence on the record before the Tribunal in the instant case establishing that the Relevant Markets are uncompetitive even in the absence of the SDP.

237. Indeed, the only evidence on the record with respect to the state of competitiveness of the Relevant Markets points to the presence of significant and effective competition. As discussed above, the Tribunal made the factual determination that prices were competitive in the markets which accounted for 75% of Bibby's sales.²⁵⁹ The presence of such effective competition and competitive prices is inconsistent with any suggestion that the Relevant Markets are uncompetitive.

238. Lastly, in *Tele-Direct*, the Tribunal had clearly determined that the anti-competitive acts engaged in with respect to consultants had reduced the "competitive effectiveness of consultants".²⁶⁰ In contrast, as discussed in greater detail above, the Commissioner has failed to establish the requisite link between the SDP and any impact on the competitive

²⁵⁹ Ibid. at para. 265.

²⁶⁰ *Tele-Direct* at 246; CPC Authorities, Tab 6.

effectiveness of Bibby's competitors. Indeed, the evidence on the record establishes that Bibby's competitors remain effective in spite of the SDP's presence and numerous additional competitors have entered and/or expanded while the SDP has been in effect.

239. Consequently, Canada Pipe submits that the approach expressed by the Tribunal in *Tele-Direct* is not relevant to the Tribunal's analysis in this case. In any event, as discussed in greater detail below, the Commissioner has failed to demonstrate that the SDP has lessened competition whatsoever in any of the Relevant Markets.

240. Applying the factors and considerations referred to above to the evidence on the record, Bibby submits, for the reasons set out below, that there is no basis upon which the Tribunal can properly conclude that the SDP has had, is having or will likely have the effect of lessening or preventing competition substantially in any Relevant Market. Indeed, all of the relevant evidence before the Tribunal establishes that the Relevant Markets have seen increased price competition and entry since the SDP was introduced. Further, the Commissioner has failed to prove that there would be even more entry or competition absent the SDP.

3. *Application of Relevant Factors and Considerations to SDP*

a. *Competitiveness of the Relevant Markets Prior to and After Implementation of SDP*

241. Notwithstanding the assertions of the Commissioner that the SDP has precluded entry or restricted expansion in all 18 Relevant Markets, she has failed to lead any reliable evidence to demonstrate that the SDP has had, is having or will likely have a negative effect on competition. In fact, the Commissioner's own witnesses have given evidence of increased, rather than diminished, competition in the presence of the SDP.

242. For example, Mr. Kelm of Sierra (who is also a former employee of Bibby when it was owned by David Gooding prior to 1997) testified that since Canada Pipe acquired Bibby in 1997, the cast iron DWV industry has become more competitive while the price of cast iron DWV products has decreased:

"K.E. THOMSON: When you were employed by Mr. Gooding –

D. KELM: Yes.

K.E. THOMSON: --- is it fair to say that Mr. Gooding had almost 100 per cent of the cast iron DWV business in Canada?

D. KELM: Yes, by the time he acquired Bibby, yes, other than Cremco and maybe some stuff that came up from the States.

K.E. THOMSON: He almost had a monopoly on it?

D. KELM: Yes.

K.E. THOMSON: And then Canada Pipe buys Bibby, and we've established that was in April of 1997.

D. KELM: Okay.

K.E. THOMSON: And they basically step into the shoes of Mr. Gooding?

D. KELM: Yes.

K.E. THOMSON: And since that time, a company called Vandem has entered the Canadian market ---

D. KELM: Okay, yes.

K.E. THOMSON: --- as a manufacturer of cast iron DWV products. You are familiar with Vandem?

D. KELM: Yes, I spoke to him a few times. I didn't know what -- when he entered into it.

K.E. THOMSON: All right. You would agree with me that Vandem is the first new manufacturer in this industry in any number of years?

D. KELM: Yes.

K.E. THOMSON: And also since that time a number of new importers have also entered the market, including Sierra?

D. KELM: Yes.

K.E. THOMSON: And Davcon; right?

D. KELM: Yes.

K.E. THOMSON: And Westburne is now importing product?

D. KELM: Yes.

K.E. THOMSON: William Kelly was importing product directly as a contractor?

D. KELM: Yes.

K.E. THOMSON: And since 1998, you would agree with me that there is more imported cast iron DWV product in the area that you serve?

D. KELM: Yes.

K.E. THOMSON: Is it a fair statement that the industry is now more competitive than it has been in years?

D. KELM: Yes.

K.E. THOMSON: Prices are lower?

D. KELM: Unfortunately.

K.E. THOMSON: And contractors, whether you like it or not, contractors have better prices and more products to choose from; correct?

D. KELM: Yes".²⁶¹

243. Indeed, by allowing small- and-medium sized distributors to better compete with large national and regional distributors, the SDP is directly responsible for increased competition at the distributor level.²⁶² Mr. Iaboni of Sherwood testified that if Canada Pipe were to replace the SDP with a volume rebate program, it would have a "tremendous impact" on his business as it would "cut him out of the marketplace" and "he would have to find a different avenue, perhaps, to compete".²⁶³ Many of the representatives of the

²⁶¹ Testimony of D. Kelm, Vol. 11, p. 2382, line 12 to p. 2384, line 20.

²⁶² Testimony of G. Iaboni, Vol. 22, p. 4481, line 17 to p. 4482, line 8; Testimony of M. Corriveau, Vol. 10, p. 2009, lines 11 to 19 and p. 2053, line 19 to p. 2056, line 1.

²⁶³ Testimony of G. Iaboni, Vol. 22, p. 4483, lines 5 to 23.

distributors who testified at the Original Hearing said that competition amongst distributors is fierce.²⁶⁴

244. In the face of increased, and not diminished, competition while the SDP has been present, the Commissioner must demonstrate that, without the SDP, the Relevant Markets would be substantially more competitive. The Commissioner has failed to do so and, accordingly, her application under section 79 must fail.

b. Entry and Expansion Would Not be Substantially Faster, More Frequent or More Significant

(i) Tribunal's Relevant Findings

245. The Tribunal has asked the parties to address whether "but for" the SDP, entry or expansion might be *substantially* faster, more frequent or more significant. Canada Pipe submits that in order for this to be the case, it must be that the SDP acts to substantially increase barriers to entry or expansion in the Relevant Markets.

246. In its Original Decision, the Tribunal concluded that the Commissioner has failed to establish that the SDP acts as a barrier to entry or expansion in any market. Specifically, the Tribunal found that: "[f]rom the evidence, the Tribunal is satisfied that the SDP has had had an impact in the marketplace, but there is no direct evidence that would support

²⁶⁴ Testimony of R. Byrne, Vol. 4, p. 845, lines 5 to 14; Testimony of R. Johnston, Vol. 7, p. 1366, line 25 to p. 1367, line 4; Testimony of G. Tester, Vol. 10, p. 1935, lines 11 to 24; Testimony of J. Keon, Vol. 14, p. 2825, line 25 to p. 2826, line 4; Testimony of G. Iaboni, Vol. 22, p. 4478, lines 11 to 15.

the conclusion that it is a barrier to entry".²⁶⁵ [emphasis added] The Tribunal also found that while "entry may be difficult [...] this appears unrelated to the SDP".²⁶⁶

247. While Canada Pipe acknowledges that the Court of Appeal determined that Tribunal's analysis of the evidence of entry or effects of the SDP upon entry appears to have been "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", it is submitted that, even applying a relative standard, there is simply no evidence to suggest that the SDP acted as a substantial impediment to entry or expansion or indeed as any impediment to entry or expansion in any of the Relevant Markets.
248. Should the Tribunal disagree that its prior findings are dispositive of the question of whether "but for" the SDP entry or expansion might be substantially faster, more frequent or more significant, the Commissioner's arguments on this issue are addressed below.

(ii) Commissioner's Arguments Regarding the Effect of the SDP on Entry and Expansion are Without Merit

249. The Commissioner asserts at paragraph 194 of her Memorandum of Argument that the SDP was "clearly intended to, and did in fact, make it substantially more difficult for small and medium-sized and domestic and foreign competitors to enter and expand in the Relevant Markets". Once again, this statement is baseless, and stands in complete contradiction to the evidence. The Commissioner is unable to point to even one would-be entrant who would have entered the Relevant Markets but for the presence of the SDP. In fact, as discussed in greater detail below, the record is replete with evidence of entry,

²⁶⁵ Original Tribunal Decision at para. 149; CPC Authorities, Tab 1.

²⁶⁶ *Ibid.* at para. 261.

and, in fact, increased entry since the SDP was implemented. For a detailed discussion of the impact of the SDP in each of the Relevant Markets, please see section 3(e) below.

250. As it did at the Original Hearing, the Commissioner's position with respect to the impact of the SDP upon entry and expansion has three interrelated elements: (i) the alleged (but illusory and unsubstantiated) similarity between the SDP and the exclusive dealing arrangements at issue in *NutraSweet* and *Nielsen*; (ii) Dr. Ross' "mixing costs" theory; and (iii) the testimony of Bibby's competitors regarding their alleged difficulty entering and expanding in the Relevant Markets. Each of these elements is discussed in turn below.

(A) *NutraSweet*

251. The Commissioner's *NutraSweet*-related arguments have already been considered and were rejected by the Tribunal in its Original Decision, albeit in the context of the Tribunal's analysis of the question of whether the SDP is a practice of anti-competitive acts:

"The evidence in this case falls short of establishing the anti-competitive nature of the SDP. Although the terms of the program, as noted earlier, could be seen as binding on its participants, the SDP bears none of the characteristics that were found offensive in Nielsen, NutraSweet or Laidlaw. The terms are clear. The full commitment is for only a year. Non-performance by the distributor (buying outside) leads to non-performance by Bibby (rebates are not paid). However, this is not comparable to penalty clauses or liquidated damages that would be additional to non-performance of a contract. Moreover, the main advantage of the program, the multiplier effect, is provided as soon as the distributor enters the program, and is only taken away from the moment the distributor chooses to leave the program. The distributor does not have to reimburse the discount applied at time of purchase through the multiplier. This distinguishes the program significantly from the contracts in other abuse of dominance cases, where non-performance would lead to heavy penalties.

Although the rebate structure in the SDP is an inducement to exclusive dealing (see further the analysis under section 77), the Tribunal does not find in this case that the program has an exclusionary effect. In *NutraSweet*, buyers were tied to *NutraSweet* not only by the rebate inducement, but by the whole structure of the

contract, including the exclusivity requirements (using only NutraSweet aspartame in a given line of products) and the meet-and-release clause, which effectively precluded competitors from ever offering a better bargain to the customers of NutraSweet. The same exclusionary purpose and effect cannot be attributed to the SDP.

In the instant case, rebates and the multiplier discount are premised on buying cast iron products exclusively from Bibby, but these represent only a financial incentive to adopt the SDP program. In NutraSweet, the logo allowance for label display and advertisement, which was worth some 40 percent of the purchase price, added significant complications to switching aspartame brands. Customers could not simply end the contract with NutraSweet. Changes had to be made to labels and promotional campaigns, and manufacturers were reluctant to lose the goodwill that might be associated with the NutraSweet brand. In the present case, there are no similar costs, nor is there an arrangement comparable to the meet-and-release clause. Competitors can offer, and have successfully offered, better bargains to sway buyers away from Bibby".²⁶⁷ [emphasis added]

252. As will be seen shortly, there is also an absence of any (credible or reliable) evidence supporting the Commissioner's contention that consequences of the SDP for entry and expansion in the Relevant Markets can be likened in any way to the impact of the impugned arrangement in *NutraSweet*.

(B) Dr. Ross' "Mixing Costs" Theory

253. As already discussed, in his evidence before the Tribunal, the Commissioner's economic expert, Dr. Ross, advanced a theory that the SDP imposes significant "mixing costs" and thus impedes entry. That theory was expressly rejected by the Tribunal in its Original Decision:

"Dr. Ross's argument is that mixing costs prevent 'toe-hold entry'. Small scale entry is impossible, according to Dr. Ross, since new entrants cannot hope to gain part of the distributors' business. The Tribunal rejects this argument. Nothing prevents the distributors from seeking out *several other* suppliers, as is the case for Wolseley. Nor does the SDP prevent the new entrant from making arrangements with another supplier to offer a complete line in order to compete with Bibby's program, as Vandem has done with Mission Rubber and Ideal".²⁶⁸ [underlying added; italics in the original]

²⁶⁷ Original Tribunal Decision at paras. 256-58; CPC Authorities, Tab 1.

²⁶⁸ *Ibid.* at para. 226. See also para. 260.

254. Similarly, the Tribunal found that there "was no economic evidence that mixing costs *per se* will prevent small-scale entry; in fact, they have not".²⁶⁹ [emphasis added]
255. In her submissions in respect of the impact of the SDP upon the entry or expansion of competitors, the Commissioner also repeats her argument at the Original Hearing that the SDP "forces" competing suppliers to "supply a full line of cast iron DWV products", thus raising the costs of rivals and impeding the ability of competitors to establish a reputation in the marketplace.²⁷⁰ This argument is inconsistent with both the evidence before the Tribunal and the Tribunal's findings that entrants can and have entered without a full line of cast iron DWV:

"[t]he Commissioner has not explained why only larger full line suppliers could compete with Bibby, when the evidence clearly shows that successful entry was achieved by suppliers who did not carry full lines of products (New Centurion, Sierra, Ideal, Vandem).

...

... Nor does the SDP prevent the new entrant from making arrangements with another supplier to offer a complete line in order to compete with Bibby's program, as Vandem has done with Mission Rubber and Ideal".²⁷¹

256. At paragraphs 200 to 209 of her Memorandum of Argument, the Commissioner relies (as she did in her Closing Submissions filed in connection with the Original Hearing) on the evidence of certain Bibby competitors as (purported) concrete examples of Dr. Ross' theory and the SDP's alleged impact on entry and expansion. However, the evidence of these witnesses has not been described accurately by the Commissioner. As discussed in

²⁶⁹ *Ibid.* at para. 241.

²⁷⁰ Commissioner's Memorandum of Argument at para. 196.

²⁷¹ *Ibid.* at paras. 141 and 226.

greater detail above (see section IV(c)(i)), contrary to what the Commissioner says, the evidence on the record establishes that:

- (a) Mission's sales did not "decline precipitously in 1998,"²⁷² nor were Mission's sales ever virtually eliminated;²⁷³
- (b) there are numerous other reasons which could explain Mission's decline in sales including Vandem's poor marketing efforts on its behalf;
- (c) Ideal's decision to begin selling directly into Canada (and to stop selling via Gates) was the reason that Gates stopped selling couplings in Canada, and not the SDP;²⁷⁴
- (d) any difficulties experienced by Fernco selling in Canada are more likely related to its pricing strategy and the fact that it competes against the very supplier who provides its couplings, rather than the SDP;²⁷⁵
- (e) BMI's decision not to expand into the cast iron DWV pipe market had nothing to do with the SDP but rather was a result of, among other things, BMI's quality concerns.²⁷⁶ Furthermore, any limits on BMI's ability to expand into the Quebec Market are more likely related to the reluctance of customers in Quebec to purchase products which are not manufactured in Quebec, rather than the SDP;²⁷⁷
- (f) Vandem's testimony was generally considered not to be credible by the Tribunal and the Tribunal concluded in its Original Decision that there were numerous other reasons which could explain Vandem's apparent financial difficulties.²⁷⁸

257. Even if evidence of Bibby's competitors had been accurately described by the Commissioner (which it clearly was not), it is also to be noted that the Commissioner did not adduce any documentary evidence to corroborate their testimony. Dr. Ross, the Commissioner's own expert, acknowledged in his testimony before the Tribunal the

²⁷² Commissioner's Memorandum of Argument at para. 202.

²⁷³ See *ibid.* at para. 205

²⁷⁴ See Testimony of M. O'Brien, Vol. 11, p. 2229, line 3 to 23.

²⁷⁵ See Testimony of P. Kirkpatrick, Vol. 11, p. 2159, line 24 to p. 2160, line 3; p. 2191, line 14 to p. 2192, line 12.

²⁷⁶ Testimony of M. Bouthillette, Vol. 12, p. 2519, line 19 to 2521, line 2.

²⁷⁷ Testimony of M. Bouthillette, Vol. 12, p. 2513, lines 1-23.

²⁷⁸ Original Tribunal Decision at paras. 148, 243, 244; CPC Authorities, Tab 1.

inherent frailties and limits of uncorroborated evidence from complainants and/or competitors concerning issues like barriers to entry.²⁷⁹

258. On cross-examination, Dr. Ross was asked about his article entitled "*Annex 1: Barriers to Entry*".²⁸⁰ That publication concerned, among other things, the dangers associated with evidence from market participants, like Messrs. Vansell, Kelm, Kirkpatrick, O'Brien, Demeny and Vanderwater, who have a direct interest in the outcome of the proceeding, and the resulting importance of corroborating "hard data". In relevant part, that article includes the following statement by Dr. Ross:

"The principal participants in the market are frequently the most important source about barriers to entry. No one understands the market better than those in it – the sellers, buyers and input suppliers. The danger, however, is that most will have some interest in how a competition case turns out, so their information must be filtered. Since their opinions might be influenced by self-interest, they should be encouraged to provide as much hard data as possible on market shares, the most likely entrants, general demand conditions, entry and exit history of the market, profitability of the incumbents over the past several years, start up costs and the fraction that is sunk, economies of scale, capital costs of entry and sources of financing, time needed to build an efficient facility and acquire equipment, importance of product differentiation and advertising, the depth of the incumbents' pockets and vertical restraints".²⁸¹ [emphasis added]

259. Dr. Ross confirmed before the Tribunal that his views on this issue are unchanged.²⁸²
260. For all of these reasons, Canada Pipe submits that there is no merit to the Commissioner's claim but for the SDP entry and expansion in the Relevant Markets would have been substantially more significant.

c. Switching Between Suppliers Would Not be Substantially More Frequent

²⁷⁹ See Testimony of T. Ross, Vol. 18, p. 3679, line 20 to p. 3683, line 13.

²⁸⁰ See Exhibit R-16.

²⁸¹ *Ibid.* at p. 114.

²⁸² See Testimony of Dr. T. Ross, Vol. 18, p. 3679, line 24 to p. 3682, line 10.

261. The Commissioner's arguments with respect to the likelihood of distributors leaving the SDP (in paragraphs 172 to 193 of her Memorandum of Argument) rest solely on Dr. Ross's argument that the SDP imposes significant "mixing costs". While he acknowledged that the switching costs involved in leaving the SDP at the end of the year are zero,²⁸³ he postulated that the SDP makes it expensive for distributors to leave the SDP because Bibby is the only supplier of a full line of cast iron DWV products.²⁸⁴
262. As already discussed, the Tribunal gave Dr. Ross' theory extensive consideration and rejected it:

"The mixing cost hypothesis proposed by Dr. Ross is not convincing. Distributors say they will choose other suppliers if they are offered a better bargain, the benefits of which outweigh the mixing costs. It is true that Bibby's products are much more expensive if the distributor is not on the SDP (or does not have access to an alternative source of Bibby products such as Wolseley in the Western region buying from its eastern counterpart or Octo members buying from SDP participants). Because of this, it is probable that distributors will move the majority or all of their purchases away from Bibby if they choose to rely on other suppliers. Indeed, this is confirmed by Mr. Lachance and Mr. Mark Thomas Corriveau from Wolseley. As seen earlier, the evidence establishes that there exist other sources of supply for the most commonly used products. In other words, the Tribunal is of the view that the mixing costs will not have the deterrent effect suggested by Dr. Ross. Practically, these mixing costs will be marginal and limited to the acquisition of 'exotic' items available through Bibby".²⁸⁵ [emphasis added]

263. With specific reference to the impact of the SDP upon customers' ability to switch suppliers, the Tribunal concluded:

"[a]lthough the SDP is an attractive program for a distributor, it does not prevent the distributor from considering other options, or even from purchasing elsewhere if it is more advantageous to do so. Distributors remain with Bibby for a variety of reasons, and notably because it is a reliable supplier and, in the

²⁸³ See Testimony of Dr. T. Ross, Vol. 17, p. 3529, lines 13 to 23.

²⁸⁴ See Testimony of Dr. T. Ross, Vol. 17, p. 3475, lines 3-24.

²⁸⁵ Original Tribunal Decision at para. 225; CPC Authorities, Tab 1.

case of large distributors, because the size of the market does not warrant searching for another supplier".²⁸⁶

264. Again, Bibby acknowledges that the Court of Appeal determined that the Tribunal's findings and conclusions with respect to the impact of the SDP were considered against the absolute standard of prevention, rather than a more relative standard implied by the words "impeding" or "lessening". However, the Respondent respectfully submits that the Tribunal's previous determination that "mixing costs" are unlikely to arise has not been affected by the FCA Decision and is alone fatal to the Commissioner's arguments on this point.
265. Although it is therefore strictly unnecessary, in view of the foregoing, to revisit the evidence underlying the Tribunal's findings and conclusions on the issue of switching or "mixing" costs, for the sake of completeness that evidence is summarized below.

(i) Distributors are Not "Locked In"

266. Numerous distributors testified that far from being involuntarily "locked in" (to use the Commissioner's terminology), as Dr. Ross and the Commissioner allege, their decision to stay on the SDP is a purely voluntary and economic one. They also testified that the SDP does not prevent or impede distributors from seeking out alternative suppliers. For example, Mr. Johnston of Emco testified about the choices available to distributors as follows:

"J. DORIS: And sir, you will agree that 1998 -- the program came into -- the Stocking Distributor Program came into effect in 1998?

R. JOHNSTON: If that's what the program says, yes.

²⁸⁶ *Ibid.* at para. 237.

J. DORIS: And you will agree that the sales in 1998 decreased rather than increased from the previous year?

R. JOHNSTON: These would directly show, yes.

J. DORIS: And sir, you would agree that there are distributors in Canada that choose not to participate in Bibby's program?

R. JOHNSTON: Yes.

J. DORIS: And Emco is not forced to participate?

R. JOHNSTON: Not forced by who?

J. DORIS: By anybody. It can choose not to participate?

R. JOHNSTON: Yes, that's correct.

J. DORIS: And should Emco see an opportunity to go off the program?

R. JOHNSTON: Meaning?

J. DORIS: Well, if it was in Emco's economic interests, it could go off the program?

R. JOHNSTON: Sure.

J. DORIS: And Emco has no concern that Bibby would stiff it on rebates that had already been earned?

R. JOHNSTON: We are clear on the rules if we go off the program as to the cutoff points and what the -- for lack of a better word -- the penalties would be in rebates, and also in terms of a higher invoice cost for the material, from memory.

J. DORIS: And Emco doesn't stay on the program because it's concerned that Bibby will renege on its agreements to pay rebates that are earned?

R. JOHNSTON: Not sure I understand the question. If we don't stay on a program because we are concerned about the rebates?

J. DORIS: You are concerned about not getting paid rebates that you already earned?

R. JOHNSTON: No.

J. DORIS: And the choices that Emco has are to, for example, buy from Vandem? That's a choice available to Emco?

R. JOHNSTON: It could be an option.

J. DORIS: You can buy from importers?

R. JOHNSTON: Yes.

THE CHAIRPERSON: I'm sorry, I didn't get the response.

R. JOHNSTON: That could be an option.

THE CHAIRPERSON: Very good.

J. DORIS: You can buy from importers?

R. JOHNSTON: Correct.

J. DORIS: You can also import product itself?

R. JOHNSTON: Yes.

J. DORIS: And it can also buy from Bibby while not on the program?

R. JOHNSTON: Correct.

J. DORIS: And it can do some combination of all those?

R. JOHNSTON: It could, yes".²⁸⁷ [emphasis added]

267. Representatives of distributors, including Crane and Wolseley, gave substantially similar evidence before the Tribunal.²⁸⁸

(ii) SDP Does Not Force Entrants to Compete for All of a Distributor's Cast Iron DWV Requirements

268. The evidence on the record also contradicts the Commissioner's (and Dr. Ross') assertions that Bibby's full line of products means that distributors must do business with Bibby and because competing suppliers cannot offer a full line of all three products and do not have an established reputation in the marketplace switching is unlikely and risky.²⁸⁹

269. As to the first assertion, the evidence before the Tribunal shows that numerous distributors have chosen to either leave the SDP at various times (*e.g.*, Wolseley) or

²⁸⁷ Testimony of R. Johnston, Vol. 7, p. 1377, line 10 to p. 1380, line 3.

²⁸⁸ See Testimony of R. Byrne, Vol. 4, p. 848, line 22 to p. 850, line 16 and p. 851, line 22 to p. 852, line 11; Testimony of P. LaChance, Vol. 9, p. 1773, line 2 to p. 1774, line 5; Testimony of G. Tester, Vol. 10, p. 1921, line 17 to p. 1922, line 21; Testimony of G. Iaboni, Vol. 22, p. 4509, lines 12 to 24.

²⁸⁹ See Commissioner's Memorandum of Argument at paras. 173-93 and 198-99.

simply not to purchase from Bibby (*e.g.*, McKeough, Nuroc, Niagara). Furthermore, there was no evidence before the Tribunal that entrants such as New Centurion or Vandem have been unable – or, as discussed immediately below, required, in order to secure business, to – meet all of the cast iron DWV product needs of their distributors or customers.

270. With respect to the second assertion, the evidence on the record establishes that competitors can enter (and have, in fact, repeatedly entered) the cast iron DWV business without supplying a full and complete range of every product that Bibby produces or sells. Indeed, the Tribunal made the factual finding that "the evidence clearly shows that successful entry was achieved by suppliers who did not carry full lines of products (New Centurion, Sierra, Ideal, Vandem)".²⁹⁰

271. As discussed above, given that a very limited range of the most popular cast iron DWV products account for a substantial proportion of a cast iron supplier's sales, it is not necessary to carry a full line of cast iron DWV products in order to have a successful business. This point is confirmed by the evidence given on behalf of Vandem, Sierra and BMI, as well as by the evidence of Mr. Leonard.²⁹¹

272. As Mr. Leonard testified, the demand for cast iron DWV products is such that 80% of Bibby's sales are attributed to roughly 20% of its products.²⁹² As such, importers are able to focus on selling only those high-volume and high margin products, without investing

²⁹⁰ Original Tribunal Decision at para. 141.

²⁹¹ See Testimony of T. Leonard, Vol. 19, p. 3825, line 16 to p. 3826, line 25; Testimony of M. Bouthillette, Vol. 12, p. 2511, line 19, to p. 2512, line 3 and Vol. 13, p. 2570, line 22 to p. 2572, line 12; Testimony of D. Kelm, Vol. 11, p. 2378, line 3 to p. 2379, line 8.

²⁹² See Testimony of T. Leonard, Vol. 19, p. 3825, line 16 to p. 3826, line 25.

in a full line. This approach to entry was confirmed by Mr. Bouthillette of BMI who testified that it was his strategy to enter the cast iron industry in Canada by carrying only the high volume products.²⁹³

(iii) SDP does Not Impose Restrictions on Resale

273. Yet another evidentiary shortcoming of Dr. Ross' "mixing costs" analysis is his assumption that distributors that are "mixing" must purchase from Bibby at its non-stocking distributor prices. There is, in fact, no evidence that distributors who have either left the SDP or who have chosen to purchase from Bibby's competitors are required to purchase cast iron DWV products from Bibby at its non-stocking distributor prices. Rather, the evidence shows that because Bibby does not impose any restrictions on resale, those distributors are able to and do purchase Bibby's products from distributors which participate in the SDP at SDP prices.²⁹⁴

274. For example, when Wolseley was not participating in the SDP in Western Canada, but was participating in the SDP in Eastern Canada, it was able to purchase at SDP prices in the East for resale in the West.²⁹⁵ Similarly, Mr. Beaulac of Octo testified that one of the benefits of being in a buying group is that distributors can and do purchase from one another, and are able to share the lower SDP pricing with one another.²⁹⁶

275. For the reasons outlined above, there is simply to basis in fact for the Commissioner's theory that the SDP imposes significant "mixing costs" and thus, substantially impedes or

²⁹³ See Testimony of M. Bouthillette, Vol. 13, p. 2570, line 22 to p. 2573, line 7.

²⁹⁴ See Testimony of T. Leonard, Vol. 20, p. 4058, line 14 to p. 4059, line 4; JB 11-512; JB -14-696-2.

²⁹⁵ See Testimony of M. Corriveau, Vol. 10, p. 2058, line 20 to p. 2064, line 6; JB5-173.

²⁹⁶ See Testimony of C. Beaulac, Vol. 8, p. 1665, line 14 to p. 1667, line 6.

lessens switching between suppliers in any of the Relevant Markets. Similarly, there is simply no evidence to support the Commissioner's contention that in the absence of the SDP, there would be substantially more switching between suppliers.

d. Prices Would Not be Substantially Lower

(i) SDP does Not Insulate Bibby from Price Competition

276. At paragraph 222 of her Memorandum of Argument, the Commissioner claims that the "SDP insulates Bibby from price competition by rivals and in the absence of the SDP, distributors would benefit from more competitive prices for the relevant products". This allegation is flatly inconsistent with the evidence on the record.

277. Indeed, the evidence conclusively establishes, to the contrary, that notwithstanding the presence of the SDP, Bibby has faced significant price competition from smaller competitors such as Vandem, Sierra and New Centurion (among others). As the Tribunal noted, the evidence also demonstrates that this competition has had the impact of forcing Bibby to reduce its prices. As discussed below, there is simply no evidence to support the Commissioner's contention that in the absence of the SDP, prices in the Relevant Markets would be even lower.

278. There are numerous documents on the record that evidence the impact that Sierra and other importers have had on Bibby's prices for cast iron DWV products.²⁹⁷ The

²⁹⁷ See, e.g., documents: JB:13-677; JB 18-886; JB 5-191; JB 7-315; JB 9-409; JB 14-711; JB 15-752; JB 19-932; JB 21-1015 and 1028; JB 22-1075, 1079, 1082 and 1084; JB 23-1100; and 1142; JB 24-1191; JB 27-1305, 1306, 1307, 1310 and 1313; JB 28-1320.

information in these documents corroborates the testimony given on behalf of entrants such as Sierra, New Centurion and Vandem.²⁹⁸

279. For example, Mr. Kelm of Sierra acknowledged before the Tribunal that his prices have had and are having an impact far beyond the customers to which he sells.²⁹⁹ He also testified that he was aware that distributors and contractors (that Sierra does not sell to) are using Sierra's prices to obtain lower prices from Bibby:

"K.E. THOMSON: And are you aware of this phenomenon that is referred to in this paragraph where what contractors were doing was then bidding on projects using your prices in order to win the projects?

D. KELM: Sure.

K.E. THOMSON: And then what would happen in some cases is distributors would come back to Bibby and complain that Bibby's prices were too high to them so they couldn't compete with you?

D. KELM: Okay, yes.

K.E. THOMSON: You're aware of that happening?

D. KELM: Sure".³⁰⁰

280. Entry even on a small scale has had a significant impact on prices in the Relevant Markets and has constrained any ability Canada Pipe might otherwise have had to exercise market power. This was expressly acknowledged by Dr. Ross in his report where he noted that Canada Pipe has had to lower its prices in response to the prices of imported cast iron DWV products.³⁰¹

²⁹⁸ See Testimony of J. Vanderwater, Vol. 8, p. 1562, line 5 to p. 1563, line 8; Testimony of D. Kelm, Vol. 11, p. 2327, lines 7-23; p. 2347, line 7 to p. 2350, line 6; JB13-677; Testimony of J. Lim, Vol. 12, p. 2416, lines 1-13.

²⁹⁹ See Testimony of D. Kelm, Vol. 11, p. 2358, line 20 to p. 2362, line 21.

³⁰⁰ Testimony of D. Kelm, Vol. 11, p. 2359, lines 6 to 19.

³⁰¹ See Ross Report at paras. 21-28.

281. The evidence on the record also shows that even the dissemination of an importer's price sheet can have a significant impact on Bibby's prices.³⁰² Mr. Lim from New Centurion described Bibby's response to his company's entry into the market as follows:

D.J. RENNIE: How has Bibby responded to the pricing of your new product:

J.H. LIM: Since we entered the market, the pricing of MJ has dropped considerably.

D.J. RENNIE: Can you give me an idea, a rough percentage, as to what it might be?

J.H. LIM: A four-inch (4") pipe, for example, before we entered the market was just slightly over \$4 in some regions. Now it is as low as \$2.49".³⁰³ [emphasis added]

282. The Commissioner makes the unsubstantiated (and unproven) claim that after the SDP, Bibby no longer felt competitive pressures from Mission and that "but for the SDP, Bibby would have had to reduce its prices to match those of Mission".³⁰⁴ Once again, that claim is, in fact, contrary to the evidence before the Tribunal. A number of documents on the record demonstrate that Bibby responded to competition from Mission by offering the same (if not better pricing) to its distributors after the SDP was implemented.³⁰⁵ One such document showing the price competition between Mission and Bibby after the SDP was implemented was put to Mr. Vansell of Mission by Commissioner's counsel in the following exchange:

"J.A. CAMPION: I would then like you to go forward to Tab 1181 in the same volume. It says that this is a memorandum from Mr. Albert to Mr. Leonard on May 8, 2002, and it says: 'Re: Mission Coupling Prices out West.' It says:

³⁰² See Testimony of J. Vanderwater, Vol. 8, p. 1570, line 11 to p. 1571, line 15; Testimony of D. Kelm, Vol. 11, p. 2348-61; see also: JB 11-517; JB 13-674; JB 14-713; JB 15-758, 760 and 779; JB 19-938.

³⁰³ Testimony of J. Lim, Vol. 12, p. 2416, lines 5 to 13.

³⁰⁴ Commissioner's Memorandum of Argument at para. 224.

³⁰⁵ See, e.g., documents: JB 24-1181, JB 24-1172.

'Attached are there list prices, multiplier showing them 24% below us.' Is the attachment here, which is the same letter we've just looked at, is that an accurate reflection?

C. VANSELL: Yes.

J.A. CAMPION: It says: 'I would like to offer a buy to all distributors at .48 multiplier. in 10,000 units and Max 50,000 units. The .48 puts us 14% below Mission on invoice cost to the Jobbers. Do you want to publish with a new multiplier sheet or do it verbally as a special. By going to a new sheet it puts it in place for a longer period of time and we can send the sheet to W/burne'.³⁰⁶

(ii) Prices have Fallen Since the SDP was Implemented

283. The evidence before the Tribunal conclusively establishes that prices have fallen as a result of increased competition in the cast iron DWV industry since the SDP was introduced.

284. Mr. Leonard testified that Bibby's overall prices are lower today than they were in 1997.³⁰⁷ The data confirming Mr. Leonard's evidence was set out in Dr. Ware's report.³⁰⁸ Specifically, Dr. Ware's report shows that Bibby's average price per ton of pipe and fittings has fallen since the introduction of the SDP in January 1998.³⁰⁹ The average price per ton of pipe in 1997 was \$849, and by 2003, the price had fallen by more than 12%, to \$744. The decline in the price of fittings has been even more dramatic: in 1997, the price per ton of fittings was \$3,046, and by 2003 the price was \$2,019, a decrease of

³⁰⁶ Testimony of C. Vansell, Vol. 13, p. 2644, line 22 to p. 2645, line 25 and JB 24-1181. See also JB 24-1172.

³⁰⁷ See Testimony of T. Leonard, Vol. 20, p. 4073, line 23 to p. 4074, line 3; and p. 4108, lines 24 to 25.

³⁰⁸ See Ware Report at paras. 143-46.

³⁰⁹ See Dr. Ware measured average price as the total revenue (net of rebates and the portion of freight costs that is paid by Bibby) generated by sales of each product in all regions, divided by the total number of tons sold. All prices are in current dollars.

more than 33%. The price of couplings increased by a modest 5.5% between 1998 and 2003.³¹⁰

285. In his report, Dr. Ware calculated Bibby's prices and volumes for pipe and fittings for each of five regions (Alberta and B.C. were grouped together). In almost every region, the prices of pipe and fittings have fallen since 1997. The only exceptions are the price of pipe in Ontario, which increased by 2.2% between 1997 and 2003, and the price of pipe in Quebec, which increased by 14.3%. Virtually all of that increase occurred between 1997 and 1998 (*i.e.*, before the SDP was introduced), when the price for pipe in Quebec increased by approximately 13%. In all other regions, prices fell, in many cases significantly: in the West, for example, the price of pipe fell by 40% and the price of fittings fell by more than 48%.
286. The data in Dr. Ware's report regarding the overall decrease in Bibby's prices for cast iron DWV products were corroborated by many witnesses. Mr. Byrne from Crane testified that Bibby's prices had declined to such a point that distributors began to complain that their inventories were being devalued:

"J. DORIS: Now, sir, would you agree that, since the program was introduced in 1998, the price of cast iron DWV products has declined?"

R. BYRNE: Yes.

J. DORIS: And the reasons for that decline include increased competition from Vandem?"

R. BYRNE: I didn't view them as a factor. No, sir.

J. DORIS: Let me do it this way then: The reason for that decline includes increased competition from Vandem and imports?"

³¹⁰ See Ware Report at para. 143.

R. BYRNE: Yes.

J. DORIS: Sir, you would agree that the threat of going to imports disciplines price?

R. BYRNE: The threat of going to?

J. DORIS: Well, the possibility that a distributor can go and buy import product ---

R. BYRNE: Yes.

J. DORIS: --- has the effect of reducing price?

R. BYRNE: Yes.

J. DORIS: Sir, you would agree that prices have now got to the point that distributors are complaining about their inventory being devalued?

R. BYRNE: Up until, I would say, the beginning of this month, yes.

J. DORIS: Okay. And prior to that ---

R. BYRNE: Yes.

J. DORIS: --- prices were getting too low?

R. BYRNE: Prices were declining, yes.

J. DORIS: As a result of that your inventory was being devalued?

R. BYRNE: Yes".³¹¹

287. Similarly, Mr. Demeny of Vandem conceded on cross-examination that prices in the cast iron DWV industry are lower today than they were in 1998 when the SDP was introduced:

"K.E. THOMSON: I'm going to suggest to you that many of the imports that have landed in Canada from offshore, particularly from the Far East, have been imported at lower prices than were prevailing in the Canadian market before the imports began to arrive, and do you accept that?

R.R. DEMENY: Sorry, would you repeat that?

K.E. THOMSON: A lot of the imports that have been imported into Canada, particularly from the Far East, are low-priced imports?

³¹¹ Testimony of R. Byrne, Vol. 4, p. 870, line 7 to p. 871, line 17.

R.R. DEMENY: Lower priced, yes.

K.E. THOMSON: And that the effect of increased competition from low-priced imported products has been to put downward pressure on pricing in the DWV business in Canada; do you accept that?

R.R. DEMENY: I'm not sure that I do.

K.E. THOMSON: You haven't had a price increase, you said to Mr. Campion, since you entered the business in 1998?

R.R. DEMENY: Yes.

K.E. THOMSON: And I'm going to suggest that the impact of adding low-priced imported products to the market has been to force domestic users, such as Bibby and even Vandem, to lower your prices to compete effectively with the imports?

R.R. DEMENY: We don't see any, if at all, imported pipe in eastern Canada.

K.E. THOMSON: You are aware, of course, that Bibby competes throughout Canada including western Canada?

R.R. DEMENY: Yes.

K.E. THOMSON: Schultz, of course -- just to be clear, Schultz is an eastern-based importer; correct?

R.R. DEMENY: Yes.

K.E. THOMSON: Based in Montreal?

R.R. DEMENY: Yes.

K.E. THOMSON: And imports low-priced imported products into Canada?

R.R. DEMENY: Yes.

K.E. THOMSON: Into eastern Canada; correct?

R.R. DEMENY: Yes.

K.E. THOMSON: And you compete with Schultz?

R.R. DEMENY: Fittings, yes.

K.E. THOMSON: Am I right that one of the reasons that Vandem has chosen not to aggressively market its product in western Canada is because of the imports?

R.R. DEMENY: It's because of the pricing in the west.

K.E. THOMSON: Because the price is so low you can't effectively compete there; correct?

R.R. DEMENY: Correct.

K.E. THOMSON: One of the reasons the price is so low is because of an influx of imports; correct?

R.R. DEMENY: I don't know that --who started it.

K.E. THOMSON: But it is the way it is?

R.R. DEMENY: It is the way it is.

K.E. THOMSON: All right.³¹²

...

K.E. THOMSON: If I were to suggest to you that in constant dollars, prices are lower today in the DWV industry than they were at the beginning of 1998, would you accept that?

R.R. DEMENY: In the beginning of 1998, yes".³¹³

(iii) No Evidence to Suggest Prices Would be Even Lower

288. In her Memorandum of Argument, the Commissioner repeatedly makes the claim that Bibby has been shown to have "hefty margins" and "supra-competitive prices", and that these margins and prices indicate that "but for" the SDP, Bibby would be forced to meet the prices of its competitors (most notably its import competitors) by reducing its prices. There are three significant assumptions that are built into that claim, not one of which is supported – in fact, they are each contradicted – by the evidence on the record.
289. Firstly, the Commissioner incorrectly assumes that the prices of Bibby's competitors and, in particular, the prices of imported DWV products are significantly below Bibby's prices. Secondly, the Commissioner wrongly assumes that Dr. Ross' calculations of Bibby's gross profit margins are somehow indicative of Bibby's ability to substantially lower its prices in each of the Relevant Markets even further, and still remain viable.

³¹² Testimony of R. Demeny, Vol. 6, p. 1260, line 17 to p. 1263, line 7.

³¹³ Testimony of R. Demeny, Vol. 6, p. 1284, lines 5 to 10.

Thirdly, the Commissioner mistakenly assumes that the prices of imports are indeed the competitive "but for" benchmark for prices in the Relevant Markets in the absence of the SDP.

290. With respect to the first assumption, the Commissioner relies upon a single statement from Mr. Promoli of Crowe Foundry that imports are selling "significantly below North American pricing".³¹⁴ However, the evidence on the record shows that the price gap between domestic and imported cast iron DWV products has decreased significantly in recent years. William Kelly a contractor who imports cast iron DWV products for his company's use – and one of the Commissioner's witnesses – testified that the price of imported cast iron DWV products has increased in recent years.³¹⁵ Mr. Lim of New Centurion, who sells exclusively imported DWV products, testified that his prices to Westburne are the same as Bibby's.³¹⁶ Mr. Kelm of Sierra – who also sells only imported DWV products – also testified that his costs have recently increased due to the shortage of scrap and pig iron from offshore.³¹⁷

291. The evidence of the decrease in the price gap between domestic and imported cast iron DWV products is also evident from the testimony of numerous witnesses (including Vandem) that the price of domestic (including Bibby's) cast iron DWV products in Canada had fallen substantially since the SDP was implemented in 1998. Indeed, the

³¹⁴ Commissioner's Memorandum of Argument at para. 226.

³¹⁵ See Original Tribunal Decision at para. 131; CPC Authorities, Tab 1; Testimony of W. Kelly, Vol. 14, p. 2839, line 13 to p. 2840, line 5.

³¹⁶ See Testimony of J. Lim, Vol. 12, p. 2410, lines 3-16.

³¹⁷ See Testimony of D. Kelm, Vol. 11, p. 2256, line 14 to p. 2257, line 1.

evidence is replete with instances where Bibby has reduced its prices to meet or even beat the prices of imported products.³¹⁸

292. Given that the evidence clearly establishes that Bibby has already reduced its prices significantly in response to price competition from imported cast iron DWV products, and that the price of imported cast iron DWV products has risen in recent years, the very foundation for the Commissioner's theory is disproven.
293. With respect to the second assumption, it is to be noted that the scope of Dr. Ross' gross margin analysis was extremely narrow, covering only the three top selling pipes and fittings sold by Bibby.³¹⁹ As Dr. Ross acknowledged before the Tribunal, he did no gross profit margin analysis in respect of Bibby's more than 800 other cast iron DWV products.³²⁰ In addition, Dr. Ross conceded that the top three fittings products account for only 10% of Bibby's sales of DWV cast iron fittings,³²¹ leaving the Tribunal to conclude that Dr. Ross's margin data for fittings was incomplete.³²²
294. As part of her argument on the alleged price effects of the SDP, the Commissioner also repeatedly asserts that the evidence demonstrates that Bibby has been pricing "above its marginal costs".³²³ Contrary to the Commissioner's assertion, however, there is simply no evidence that Bibby has been or is pricing in the manner alleged. It appears that the

³¹⁸ See Original Tribunal Decision at paras. 97 and 136; CPC Authorities, Tab 1.

³¹⁹ See Ross Report at paras. 15, 17 and 18; Testimony of Dr. T. Ross, Vol. 17, pp. 3565-71.

³²⁰ See Testimony of Dr. T. Ross, Vol. 17, p. 3570, lines 7-12.

³²¹ See Ross Report at Appendix 3; Testimony of Dr. T. Ross, Vol. 17 at p. 3466, lines 5-9.

³²² See Original Tribunal Decision at para. 128; CPC Authorities, Tab 1.

³²³ Commissioner's Memorandum of Argument at paras. 5, 39 and 169.

Commissioner has confused Dr. Ross' evidence with respect to Bibby's gross margins with an analysis of Bibby's marginal costs.

295. Indeed, Dr. Ross performed no analysis of Bibby's marginal costs and acknowledged the lack of data to perform such an analysis in his report.³²⁴ The Tribunal also noted that there is no evidence regarding the ratio of Bibby's fixed to variable costs. As a result, both the Tribunal and Dr. Ross acknowledged the limitations in using his calculations of gross margins given his lack of understanding of how Bibby's costs were calculated and what these "costs" represent. In this regard, Dr. Ross testified that:

"[w]ithout a detailed understanding of how the costs were calculated in the Bibby data it is hard to determine the extent to which these margins represent the exercise of market power. If the unit costs approximate marginal costs these data constitute evidence that the markets are not perfectly competitive. However, even that would not allow us to conclude that Bibby was making positive economic profits because the extra revenues (beyond marginal costs) might be necessary to cover fixed costs".³²⁵ [emphasis added.]

296. The Commissioner's final assumption that imports prices should be the standard against which the competitiveness of pricing in the Relevant Markets is measured is also faulty and was implicitly rejected by the Tribunal in its Original Decision:

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

Second, the calculation is based on the assumption of full opportunity costs and similar quality. Although some witnesses testified to the quality of Chinese products being similar to that of Canadian products, we have no evidence as to the pricing policy of Chinese sellers, who may be intent on penetrating the Canadian market and pricing at below full opportunity cost. The fact is, the

³²⁴ Ross Report at para. 19.

³²⁵ Ross Report at para. 19; Original Tribunal Decision at para. 129; CPC Authorities, Tab 1.

Tribunal has insufficient evidence to decide whether the assumptions are valid and applicable.

Third, the conclusion that import prices can serve as a benchmark for Bibby's costs cannot be drawn from the evidence that we have before us. [...] Therefore, in the Tribunal's view, the price of imports cannot serve as a benchmark of Bibby's costs. Moreover, as stated earlier, there are no hard data provided as to the price of imports. In consequence, based on the evidence, the import prices cannot help confirm that Bibby's margins show supra-competitive prices".³²⁶ [citations omitted]

297. Canada Pipe submits that import prices cannot serve as the competitive price benchmark for domestic product in Canada "but for" the presence of the SDP for the same reasons they do not provide the appropriate standard for assessing Bibby's costs.
298. Lastly, the Commissioner alleges (at paragraph 29 of her Memorandum of Argument) that "the removal of even one existing competitor" has a "substantial effect upon the prices of the relevant products". The Commissioner provides as an example, Bibby's announcement of price increases in 1999 after Wolseley became a stocking distributor. It must be noted that Mr. Leonard testified before the Tribunal that these price increases were never successfully implemented by Bibby.³²⁷
299. For all of these reasons, Bibby submits that prices in the Relevant Markets would not have been, would not be, and would not likely be substantially lower in the absence of the SDP.

e. (Non-)Effect of the SDP in Relevant Markets

³²⁶ Original Tribunal Decision at paras. 131-33; CPC Authorities, Tab 1.

³²⁷ Testimony of T. Leonard, Vol. 21, p. 4267, line 15 to p. 4268, line 11.

300. The absence of any anti-competitive impact attributable to the SDP, as revealed by the foregoing analysis, is buttressed and confirmed by a review of the effects (or lack thereof) of the SDP upon competition in each of the Relevant Markets.

301. Contrary to the Commissioner's position, there is no evidence whatsoever that the SDP has impeded competition substantially in any of the Relevant Markets, let alone in all of the Relevant Markets, as the Commissioner contends.

(i) Quebec

302. There is no evidence on the record to support the Commissioner's argument that the SDP has substantially prevented or lessened, is substantially preventing or lessening, or is likely to substantially prevent or lessen, expansion or entry by any entrant in Quebec. Indeed, that argument is contrary to the evidence on the record before the Tribunal.

303. The Commissioner suggests that because Bibby had a market share "in the Quebec markets" for cast iron DWV products of approximately 93% in 2002 "the SDP has foreclosed competition for a substantial part of the demand in this relevant market".³²⁸ To begin with, however, this composite/aggregate market share figure – which tells the Tribunal nothing about Bibby's market share in each of the three relevant product markets – is virtually (if not entirely) meaningless. Further, and in any event, regardless of Bibby's actual market share, the Commissioner has, as discussed herein, failed to establish the requisite link between the SDP and an adverse impact on competition or entry in the Relevant Quebec Markets.

³²⁸ Commissioner's Memorandum of Argument at para. 232.

(A) *Quebec Pipe*

304. The Commissioner incorrectly alleges that "the SDP forced the exit of BMI" in the sale of pipe in Quebec.³²⁹ However, the evidence on the record clearly establishes that BMI never sold pipe in Quebec at any time. Mr. Bouthillette of BMI testified that BMI chose not to expand into pipe in Quebec (or elsewhere) due to quality concerns, and not because of the SDP.³³⁰ Furthermore, it should also be noted that any decision not to expand into imported cast iron DWV pipe in Quebec may have been linked to the reluctance that Quebec customers expressed about purchasing any products that were not manufactured in Quebec.³³¹
305. Similarly, there is no evidence to support the Commissioner's assertion that the SDP "substantially impeded expansion" by Vandem in Quebec.³³² The only evidence on the record shows that Vandem was able to enter and expand in the Quebec market for cast iron DWV pipe well after the SDP was introduced.³³³ Vandem was able to secure a relationship with Main Supply, a Montreal-based distributor doing business with the largest contractor in the area. Main Supply is one of Vandem's largest customers.³³⁴ It should also be noted that this expansion was achieved notwithstanding that, as Mr.

³²⁹ See Commissioner's Memorandum of Argument at para. 233.

³³⁰ See Testimony of M. Bouthillette, Vol. 12, pp. 2519-20.

³³¹ Testimony of M. Bouthillette, Vol. 12, p. 2514

³³² See Commissioner's Memorandum of Argument at para. 233.

³³³ See JB 14-711.

³³⁴ See JB 14-711; Evidence of R. Demeny, Vol. 5, p. 1026, lines 15-25; Vol. 6, p. 1271, line 15 to p. 1273, line 16.

Vanderwater conceded, Vandem has expended very little effort in trying to penetrate the Quebec market.³³⁵

306. The only relevant evidence on the record points to increased entry into the Quebec market by pipe importers since the introduction of the SDP.³³⁶ For example, Schultz (a Montreal-based importer) began importing cast iron DWV pipe in 1999 and LGC Plomberie (another Quebec based importer) began selling cast iron DWV pipe just prior to the Tribunal hearing.³³⁷
307. The Commissioner's assertions regarding the SDP's alleged impact on prices in Quebec³³⁸ are addressed (and refuted) above, and will not be repeated here.
308. Lastly, there is no evidence on the record to suggest that but for the SDP there would have been even more entry or expansion the market for pipe in Quebec.

³³⁵ See Testimony of J. Vanderwater, Vol. 8, p. 1523, line 25 to p. 1524, line 3.

³³⁶ See documents: JB 17-861; 10-496; 19-971; 24-1183.

³³⁷ See documents: JB 9-412; Testimony of R. Demeny, Vol. 6, p. 1233, line 18 to p. 1234, line 12; Testimony of T. Leonard, Vol. 19, p. 3880, lines 1-11.

³³⁸ See Commissioner's Memorandum of Argument at paras. 236-37.

(B) *Quebec Fittings*

309. The Commissioner also contends that the SDP forced the exit of BMI from the market for fittings in Quebec.³³⁹ Again, the evidence on the record shows that BMI chose to "get out of the cast iron market and concentrate on its other strengths, if that was best for its clientele".³⁴⁰
310. The Commissioner's allegations with respect to the impact of the SDP upon Vandem's sales of imported cast iron fittings in Quebec are rejected and refuted on the same basis identified in respect of pipe above and will not be repeated here.
311. Similarly, the Commissioner's contention that the SDP "shielded Bibby from the requirement to reduce its prices to compete with substantially cheaper imported fittings" is also without merit. As already noted, the evidence on the record simply does not support the Commissioner's characterization of imported fittings as "substantially cheaper". Moreover, the evidence discloses numerous instances where Bibby has reduced its prices to meet or even beat the prices of imported fittings from Vandem, Sierra and others.³⁴¹
312. There are also numerous documents on the record which show that the volume of fittings imported in Quebec increased after the SDP was introduced.³⁴² In addition, importers such as LGC Plomberie were able to enter the Quebec market for pipe and fittings and

³³⁹ See Commissioner's Memorandum at para. 234.

³⁴⁰ Original Tribunal Decision at para. 246; CPC Authorities, Tab 1.

³⁴¹ See JB 11-517; JB 14-699; JB 15-754; JB 15-778; JB 15-779; JB 24-1172; JB 24-1173; JB 24-1181; JB 24-1182; JB 24-1191; JB 24-1194; JB 24-1196.

³⁴² See JB 17-861; JB19-936; JB21-1042; JB 24-1183.

Schultz (a Montreal-based importer) was able to continue importing fittings and competed against Vandem in Eastern Canada.³⁴³ In the face of such sustained entry and expansion while the SDP was in place, the Commissioner must, in order to satisfy section 79(1)(c), prove that there would have been even more entry or expansion but for the SDP. There simply is no evidence on the record capable of proving this.

(C) *Quebec Couplings*

313. There is no evidence to support the Commissioner's claims that the SDP impeded expansion and entry by any of Mission, Gates, Ideal or Fernco in Quebec, or that it shielded Bibby from having to compete on price against Mission.³⁴⁴
314. The only evidence with respect to Mission's presence in Quebec in relation to couplings shows that its inability to expand was likely unrelated to the SDP and was instead the result of Vandem's poor marketing efforts on its behalf in that province, and elsewhere in Canada.³⁴⁵
315. Similarly, the evidence before the Tribunal is that Fernco has not been successful in expanding its business for couplings in Canada generally because of its pricing structure and because its supplier of couplings (the manufacturer) competes directly against Fernco in respect of the very same products.³⁴⁶ Surprisingly, given the Commissioner's unqualified assertion regarding the negative impact of the SDP on Fernco in Quebec,

³⁴³ See Testimony of R. Demeny, Vol. 6, pp. 1234 and 1261-62; Testimony of T. Leonard, Vol. 19, p. 3880; Testimony of R. Byrne, Vol. 4, p. 857, lines 6-22.

³⁴⁴ See Commissioner's Memorandum of Argument at para. 235.

³⁴⁵ See Testimony of J. Vanderwater, Vol. 8, pp. 1526-30; See also Testimony of M. Promoli, Vol. 3, p. 653, line 24 to p. 654, line 13.

³⁴⁶ See Testimony of P. Kirkpatrick, Vol. 11, pp. 2163-64.

there is actually no evidence on the record before the Tribunal relating specifically to Fernco's efforts to enter and/or expand in the Quebec market for couplings.

316. There is a similar absence of direct and/or relevant evidence on the record with respect to Gates. What little evidence there is shows that Ideal (the company for which Gates was a distributor) decided to enter the Canadian marketplace through Vandem in late 2000/early 2001. Mr. O'Brien, who was called by the Commissioner to give evidence concerning Gates, was unable to provide the Tribunal with any sense of the SDP's impact on Ideal (if any at all) or with respect to Ideal's direct sales of couplings in Quebec (or Canada).³⁴⁷
317. Finally, with respect to Ideal, it is to be noted that no representative of that company testified at the Original Hearing. Also, no documents were produced with respect to Ideal's sales efforts or actual sales in any Relevant Market in Quebec, or in any other part of Canada. The only evidence on the record shows that Ideal began selling into Canada directly in 2002 (while the SDP was in effect) and abandoned its relationship with Gates as a result.

(ii) Maritimes

318. There is similarly no evidence to support the Commissioner's claims that the SDP has had, is having or is likely to have the effect of impeding competition in the Maritimes, or

³⁴⁷ See Testimony of M. O'Brien, Vol. 11, p. 2230, lines 23-25.

that the SDP has (or will) substantially lessened or prevented competition in that region.³⁴⁸

319. For the reasons given above at paragraph 303, the market share figure given by the Commissioner is meaningless. Further, and in any event, regardless of Bibby's actual market share, the Commissioner has failed to establish the requisite link between the SDP and an adverse impact on competition or entry in the Relevant Maritimes Markets.

(A) *Maritimes Pipe/Maritimes Fittings*

320. There is simply no evidence to support the Commissioner's claims that "but for" the SDP, Vandem and importers would have been able to enter and expand in the Maritimes.³⁴⁹ The evidence referred to and relied upon by Commissioner in relation to Vandem says nothing about either that company's efforts or its (alleged) difficulties in entering into any of the Relevant Markets in Canada, including the Maritimes. Mr. Vanderwater of Vandem conceded that his company had expended very little effort in making any sales in the Maritimes.³⁵⁰ He also conceded that the third party sales agents working on behalf of Vandem in that region had not been very active, and he told the Tribunal that Vandem was contemplating making changes to its sales arrangements as a result.³⁵¹ Despite its lack of effort in the Maritimes, Vandem was nevertheless able to win a contract to supply the Burnside Prison project in Atlantic Canada.³⁵² Furthermore, the evidence on the record establishes that Vandem was able to expand and capture approximately

³⁴⁸ See Commissioner's Memorandum of Argument at paras. 238, 241 and 243.

³⁴⁹ See Commissioner's Memorandum of Argument at para. 241.

³⁵⁰ See Testimony of J. Vanderwater, Vol. 8, pp. 1523, line 2 to p. 1524, line 17.

³⁵¹ See Testimony of J. Vanderwater, Vol. 8, pp. 1538, line 3 to p. 1539, line 5.

³⁵² See [CONFIDENTIAL]; JB 14-731; JB 15-749.

[CONFIDENTIAL]% of total cast iron DWV sales in the Maritimes between 1999 and 2001.³⁵³

321. In light of the foregoing, in order to satisfy section 79(1)(c) the Commissioner must establish that "but for" the SDP there would have been even more entry or expansion in pipe and fittings in the Maritimes. There is simply no evidence before the Tribunal that proves this.

(B) *Maritimes Couplings*

322. There is likewise no evidence to support the Commissioner's contention that "but for" the SDP, Vandem, Mission, Fernco and Gates would have been able to enter and expand in the Maritimes.³⁵⁴

323. There are no documents on the record to suggest that any of these competitors were not able to enter in Maritimes. There is testimony (contrary to the Commissioner's position) from Mr. Vansell, however, that Mission has had and continues to have customers in the "Eastern provinces".³⁵⁵

324. None of Messrs. O'Brien, Kirkpatrick or Vansell gave any evidence whatsoever with respect to their respective sales or sales efforts with respect to any of the three Relevant Markets in the Maritimes.

325. With respect to the SDP's alleged impact on prices in the Maritimes, Canada Pipe relies on its analysis of the relevant evidence, set out at paragraphs 285 to 299, above, which is

³⁵³ See [CONFIDENTIAL].

³⁵⁴ See Commissioner's Memorandum of Argument at para. 241.

³⁵⁵ Testimony of C. Vansell, Vol. 13, p. 2601, lines 17-18.

at odds with the Commissioner's assertion that the SDP has "resulted in prices that are significantly higher than the competitive levels that would prevail" in its absence.³⁵⁶ Canada Pipe's submissions regarding the irrelevance of its allegedly "hefty profit margins" in the Maritimes are found at paragraphs 288 to 299, above.

(iii) Ontario

326. There is no evidence on the record supporting the Commissioner's assertion that the SDP has had, is having or is likely to have the effect of impeding entry substantially or lessening competition substantially in any of the Relevant Markets in Ontario.³⁵⁷
327. There are numerous documents in the record before the Tribunal evidencing price competition between Bibby and Vandem since the introduction of the SDP in each of the Relevant Markets in Ontario.³⁵⁸ Indeed, those documents show that Bibby competed aggressively with Vandem and often lowered its prices to meet or beat Vandem's pricing.³⁵⁹ In the result, the Tribunal concluded that "competitive prices in Ontario ... followed Vandem's entry".³⁶⁰ The evidence referred to above and the Tribunal's finding clearly contradict the Commissioner's assertion in paragraph 246 of her Memorandum of Argument that the SDP "has shielded Bibby from the requirement to reduce its prices to compete with substantially cheaper imported fittings".

³⁵⁶ See Commissioner's Memorandum of Argument at para. 243.

³⁵⁷ See Commissioner's Memorandum of Argument at paras. 244-45, 247 and 249.

³⁵⁸ See JB 11-517; JB 12-579; JB 14-704; JB 14-721; JB 15-779; JB 15-781; JB 15-782; JB 22-1061.

³⁵⁹ See *ibid.*

³⁶⁰ Original Tribunal Decision at para. 148; CPC Authorities, Tab 1.

(A) Ontario Pipe

328. The evidence does not support the Commissioner's claim that the SDP foreclosed entry by BMI.³⁶¹ BMI's choice not to expand into pipe was based on its concerns about quality rather than the SDP.³⁶²
329. Similarly, the evidence fails to establish that the SDP was responsible for "substantially imped[ing]" Vandem's expansion in Ontario.³⁶³ The evidence shows that Vandem was able to expand and gain business from new distributors such as Nuroc and Central while the SDP was in place.³⁶⁴ Ultimately, it captured 10% of the national market for cast iron DWV products in a relatively short period of time. With no sales plans or strategy or dedicated sales force, there is no indication (nor, more importantly, any evidence) that Vandem would have been able to further increase its presence in the Ontario pipe market had it not been for the SDP.

(B) Ontario Fittings

330. The Commissioner asserts that the SDP "forced BMI to exit the market" for fittings in Ontario.³⁶⁵ Based on Mr. Bouthillette's evidence, it is clear that this assertion is simply not accurate.

³⁶¹ See Commissioner's Memorandum of Argument at para. 245.

³⁶² See Testimony of M. Bouthillette, Vol. 12, p. 2519, line 21 to p. 2521, line 2.

³⁶³ See Commissioner's Memorandum of Argument at para. 245.

³⁶⁴ See *e.g.*, JB 15-806; JB14-706; JB14-725; JB14-738; JB15-756; JB15-757; JB16-823; JB21-1026. Testimony of G. Tester, Vol. 9, p. 1870, lines 1-10.

³⁶⁵ See Commissioner's Memorandum of Argument at para. 246.

331. As for Vandem, as discussed above, there is no evidence for the Commissioner's contention that the SDP impeded Vandem's expansion in the Ontario fittings market in any fashion.
332. With respect to imported fittings (whose entry was allegedly "substantially impeded" by the SDP), the evidence on the record clearly establishes that fittings imports into Ontario increased while the SDP was in effect.
333. Indeed, as discussed above, the only evidence on the record with respect to BMI's sales of fittings during the SDP establishes that BMI experienced continued growth in 1998 and that BMI did not lose any customers in 1998.³⁶⁶ Furthermore, there is no evidence to suggest that competition in fittings in Ontario would have been substantially greater but for the presence of the SDP.

(C) *Ontario Couplings*

334. Again, the Commissioner advances the meritless argument that the SDP has "shielded Bibby from the requirement to reduce its prices to compete with Mission's prices".³⁶⁷ This argument is clearly contradicted by the evidence on the record which shows vigorous and continued price competition between Mission and Bibby in Ontario since the introduction of the SDP.³⁶⁸

³⁶⁶ See Testimony of M. Bouthillette; Vol. 12, p. 2525, lines 12-21, p. 2526, lines 10-12.

³⁶⁷ Commissioner's Memorandum of Argument at para. 233.

³⁶⁸ See JB 12-581; JB 20-989; JB 22-1085.

335. With respect to Fernco and Gates, for the reasons discussed above (see section IV(c)(i)), any alleged difficulties that these companies may have experienced in expanding in Ontario cannot be attributed to the SDP.
336. More generally, the Commissioner's allegation with respect to the adverse impact of the SDP on entry is belied by evidence of new entry into the Ontario couplings market since the SDP was put in place. The evidence establishes that Hi Lite, a new entrant, came into the couplings market in 2002 in Ontario,³⁶⁹ and that Ideal began to sell through Vandem in late 2000/early 2001.³⁷⁰

(iv) Prairies

337. The Commissioner puts forward (and has) no evidence bearing on the issue of whether the SDP has impeded entry or affected competition in each of the Relevant Markets in the Prairies. The evidence referred to and relied upon at paragraphs 250 to 253 of the Commissioner's Memorandum of Argument is virtually the same (generic and general) evidence that the Commissioner refers to and relies upon in support of her allegations concerning the purported impact of the SDP in the Maritimes.
338. Canada Pipe repeats and relies on its submissions at paragraphs 303 and 288 to 299, above, in response to the Commissioner's allegations concerning its market share³⁷¹ and profit margins³⁷² in the Prairie markets.

³⁶⁹ See JB 23-1131; Testimony of R. Demeny, Vol. 5, pp. 1250-51.

³⁷⁰ See Testimony of R. Demeny, Vol. 6, p. 1245, lines 1-12.

³⁷¹ See Commissioner's Memorandum of Argument at para. 250.

³⁷² See Commissioner's Memorandum of Argument at para. 251.

(A) *Prairies Pipe and Fittings*

339. With respect to cast iron pipe and fittings, the evidence on the record shows that New Centurion was able to recapture the significant sales to Wolseley in Saskatchewan and Manitoba (as well as in British Columbia and Alberta) in January 2002, despite the SDP.³⁷³
340. In contrast, there is no evidence to suggest that but for the SDP even more entry or expansion would have taken place in the Prairies. On the contrary, with respect to Vandem, for example, Mr. Promoli, of Crowe Foundry (Vandem's principal business partner) testified that Vandem never contemplated expanding its business west of Manitoba.³⁷⁴ Mr. Vanderwater attributed the geographic limitation on Vandem's abilities to compete to the lower cost of imports as well as the cost of freight, and not the SDP.³⁷⁵

(B) *Prairies Couplings*

341. With respect to couplings, there is simply no evidence from Mission, Fernco or Gates to suggest that they encountered any difficulties in this market which can be attributed to the SDP.

(v) *Alberta*

342. The Commissioner's submissions with respect to the impact of the SDP on the Alberta markets are identical (in all materials respects) to her arguments in relation to the Maritimes and the Prairies. Similarly, the Commissioner has, for at least the third time, recycled the same (generic and general) evidence.

³⁷³ See Testimony of J. Lim, Vol. 12, p. 2414, line 22 to p. 2415, line 25.

³⁷⁴ See Testimony of M. Promoli, Vol. 3, p. 613, lines 16-22.

³⁷⁵ See Testimony of J. Vanderwater, Vol. 8, p. 1524, line 21 to p. 1525, line 9.

(A) *Alberta Pipe and Fittings*

343. There is simply no evidence supporting the Commissioner's assertion that the SDP impeded Vandem's expansion into Alberta.³⁷⁶ In fact, the evidence on the record from Vandem itself establishes that it did not focus its sales efforts in Western Canada due to extremely low import prices and the cost of freight, and not because of the SDP.³⁷⁷
344. There is also no evidence that the SDP impeded entry or expansion by importers. Indeed, the only evidence on the record shows that Davcon (an importer based in Red Deer, Alberta) was able to enter and continue its business, after and despite the SDP.³⁷⁸

(B) *Alberta Couplings*

345. There is simply no evidence on the record to support the Commissioner's argument that the SDP impeded Mission's expansion in the Alberta market.³⁷⁹ The only explanation offered by the evidence for Mission's difficulties is Vandem's poor marketing efforts on Mission's behalf during the relevant time period.³⁸⁰
346. With respect to prices in Alberta, there are a number of documents on the record which show ongoing price competition between Mission and Bibby in Alberta, despite the SDP.³⁸¹ These documents show Bibby reacting to competitive prices from Mission, and

³⁷⁶ See Commissioner's Memorandum of Argument at para. 256.

³⁷⁷ Testimony of J. Vanderwater, Vol. 18, p. 1524-1525; Testimony of R. Demeny, Vol. 6, p. 1281, lines 19-22.

³⁷⁸ See documents JB 2-47; JB 15-783; JB 18-908; JB 18-910; JB 21-1016; JB 21-1029; JB 22-1075; JB 27-1310; Testimony of R. Demeny, Vol. 6, pp. 1243-44; Testimony of D. Kelm, Vol. 11, p. 2323, line 21 to 2324, line 9.

³⁷⁹ See Commissioner's Memorandum of Argument at para. 256.

³⁸⁰ See Testimony of J. Vanderwater, Vol. 7, p. 1457, lines 15-23; Vol. 18, p. 1532.

³⁸¹ See JB 24-1172; JB 24-1181; JB 25-1212.

lowering its prices to match or even beat Mission's prices in Alberta.³⁸² They are clearly at odds with the Commissioner's contention that the SDP relieved Bibby of the need to respond to Mission's pricing.³⁸³

347. On the issue of expansion, the evidence establishes that Mission was able to capture the Wolseley account in Western Canada (which includes Alberta) for the supply of couplings while the SDP was in place. Given the absence of documents from Mission with respect to its sales efforts in Alberta (or anywhere else in Canada, for that matter), there is simply no basis for concluding that "but for" the SDP Mission would have been able to expand even more than it ultimately did in Alberta.
348. Similarly, there is absolutely no evidence on the record with respect to Gates' or Ideal's marketing efforts or sales in Alberta. As such, there is simply no basis for concluding that "but for" the SDP, Gates and Ideal would have been able expand even more.
349. Canada Pipe repeats and relies on its submissions at paragraphs 303 and 288 to 299, above, in response to the Commissioner's allegations concerning its market share³⁸⁴ and profits margins³⁸⁵ in Alberta.

³⁸² See documents JB 24-1172; JB 24-1177; JB 24-1181.

³⁸³ See Commissioner's Memorandum of Argument at para. 257.

³⁸⁴ See Commissioner's Memorandum of Argument at para. 254.

³⁸⁵ See Commissioner's Memorandum of Argument at para. 255.

(vi) British Columbia

350. There is simply no evidence on the record in support of the Commissioner's argument that the SDP has impeded entry or expansion (is doing so or is likely to do so) in any of the three product markets in British Columbia.³⁸⁶
351. The Commissioner acknowledges that "B.C. prices have responded to competitive entry" in these markets.³⁸⁷ In other words, not only has entry occurred in British Columbia but Bibby has been forced to respond to such entry by reducing its prices. However, the Commissioner goes on to say that "given Bibby's significant market share, even a small amount of entry and expansion in the absence of the SDP is likely to have a further substantial effect on prices in this market".³⁸⁸ For this statement to be true (which Bibby denies it is), the Commissioner would have to show that (i) further entry would have occurred but for the SDP, (ii) such entry would be at a lower price than the current price of imports (which the evidence shows Bibby has met on numerous occasions³⁸⁹), and (iii) Bibby could lower its prices further and remain viable. There is no evidence establishing any of these three conditions precedent.
352. Canada Pipe also repeats and relies on its submissions at paragraph 303, above, in response to the Commissioner's allegations concerning its market share³⁹⁰ in British Columbia.

³⁸⁶ See Commissioner's Memorandum of Argument at paras. 258-62.

³⁸⁷ See Commissioner's Memorandum of Argument at para. 263.

³⁸⁸ Commissioner's Memorandum of Argument at para. 263.

³⁸⁹ See JB 21-1015; JB 24-1172; JB 24-1177; JB 24-1181; JB 24-1196; JB 24-1199; JB 24-1201.

³⁹⁰ See Commissioner's Memorandum of Argument at para. 258.

(A) *British Columbia Pipe and Fittings*

353. Just as with the Commissioner's allegations in the other Relevant Markets, there is no evidence on the record to corroborate the Commissioner's argument that the "entry and expansion by Sierra" in all three products was impeded by the SDP.³⁹¹ In order for the SDP to have impeded further expansion from Sierra, Sierra must have sought (but failed) expand further or made an effort to expand further (but failed to do so) due to the SDP. There is no evidence of attempted but failed expansion by Sierra. Instead, Mr. Kelm's evidence was that he voluntarily chose not to expand his business beyond the geographic area, or much beyond its current bounds, due to the increased amount of work such expansion would require.³⁹²

354. Similarly, little (if any) credence should be given to the Commissioner's contention that "[e]ntry and expansion by New Centurion in the pipe and fittings markets in B.C. has also been significantly impeded by the SDP".³⁹³ The Commissioner's description of the evidence is inaccurate and misleading. There is no evidence on the record that New Centurion actively tried to market its product within British Columbia after the SDP was introduced. The evidence also establishes that when Wolseley returned to New Centurion (after the SDP was introduced), New Centurion was content to do business with Wolseley exclusively in Western Canada.³⁹⁴ Given these facts, it would not be surprising (assuming for the sake of argument only that it is true) "that ... New Centurion was effectively forced to exit ... when Wolseley became a participant in the SDP" or that

³⁹¹ See Commissioner's Memorandum of Argument at para. 259.

³⁹² Original Tribunal Decision at paras. 154 and 248; CPC Authorities, Tab 1.

³⁹³ Commissioner's Memorandum of Argument at para. 260.

³⁹⁴ See Testimony of J. Lim, Vol. 12, pp. 2414-15.

"New Centurion's only significant customer of cast iron DWV products is Wolseley".³⁹⁵ Viewed in full context, the "evidence" referred to and relied on by the Commissioner (at paragraph 260 of her Memorandum of Argument) does not in any way support the contention that the SDP impeded New Centurion's expansion or entry.

(B) *British Columbia Couplings*

355. The Commissioner's characterization of Mission's presence in British Columbia is inconsistent with the evidence.³⁹⁶ Mr. Vansell testified that Mission maintained some business with Wolseley until the first few months of 1999 – well after the SDP was implemented in January 1998.³⁹⁷ Further, Wolseley chose to purchase from Mission when it left the SDP in 2002. If Mission chose to do business exclusively with Wolseley in British Columbia, this has nothing to do with the SDP. Again, it is difficult to gauge the true impact, if any, of the SDP upon Mission's alleged efforts to expand in British Columbia since Mr. Vansell gave no evidence with respect to this B.C. market and, indeed, gave no specific evidence with respect to Mission's efforts to expand or increase its sales anywhere in Canada. It is also to be noted there are no documents available to corroborate Mr. Vansell's recollections with respect to Mission's sales figures for Canada.
356. At paragraph 261 of her Memorandum of Argument, the Commissioner claims that Gates and Fernco were unable to make any significant sales in the B.C. market for MJ couplings because of the SDP. As discussed above, the Commissioner has failed to demonstrate any causal link to the SDP, and there is simply no evidence on the record to

³⁹⁵ Commissioner's Memorandum of Argument at para. 260.

³⁹⁶ See Commissioner's Memorandum of Argument at para. 261.

³⁹⁷ See Testimony of C. Vansell, Vol. 13, p. 2601, lines 5-9.

support this claim. Furthermore, no documents from Fernco or Gates were produced by the Commissioner. Indeed, the only evidence on the record shows that Gates had been selling to William Kelly and Sierra for a number of years.

f. Quality of Products Would Not be Substantially Greater

357. There is simply no evidence on the record to suggest that without the SDP the quality of products might be substantially greater. In order for this to be the case, it would have to be that the SDP is somehow allowing Bibby to sell sub-standard or subquality product. This is simply not the case as confirmed by the numerous witnesses who testified as to the quality of Bibby's product offerings.

g. Positive Effect of the SDP Upon Consumers

358. Bibby submits that the evidence on the record clearly shows that, absent SDP, consumers would be negatively impacted due to: (i) decreased competition amongst distributors and (ii) decreased product choice.

359. As discussed in greater detail above, the SDP has the pro-competitive effect of levelling the playing field amongst smaller distributors and large, national distributors in Canada. The positive impact of the SDP is passed on to consumers by way of increased competition between distributors on price and other factors, and greater competition between DWV product materials. As Mr. Kelm of Sierra testified:

"K.E. THOMSON: And are most of the contractors, to use a phrase the Tribunal has heard before, small or medium-sized businesses?"

D. KELM: Yes.

K.E. THOMSON: So that the contractors benefit from price competition between you and Bibby's distributors?"

D. KELM: Yes.

K.E. THOMSON: Because they get lower prices?

D. KELM: Yes.

K.E. THOMSON: They get, presumably, better service?

D. KELM: Yes.

K.E. THOMSON: They get a broader variety of product offerings; correct?

D. KELM: Yes.

K.E. THOMSON: So even though price competition might hurt your business, it could help theirs; is that a fair statement?

D. KELM: Oh yes, sure".³⁹⁸

360. Mr. Kelm's evidence was corroborated by the testimony of Mr. Iaboni, the proprietor of a smaller-sized distributor in Canada who testified that without the SDP, he would not be able to compete as effectively in cast iron DWV products against the larger national distributors.³⁹⁹

361. Secondly, as also discussed in section IV(A)(3) above, the SDP plays a key role in keeping Bibby's product readily available as a competitive alternative to DWV products made from other materials. As numerous distributors testified, the SDP provides an incentive for them to carry and sell cast iron DWV products.⁴⁰⁰ Removal of the SDP would necessarily impact their decisions to continue carrying cast iron DWV products as an alternative DWV product.

362. The SDP also plays a fundamental role in keeping Bibby's production costs low and, thus, in enabling Bibby to manufacture and sell a full line of cast iron DWV products that can compete with DWV products made from other materials. In its Original Decision,

³⁹⁸ Testimony of D. Kelm, Vol. 11, p. 2327, lines 3-23.

³⁹⁹ See Testimony of G. Iaboni, Vol. 22, p. 4481, line 14 to p. 4482, line 8; p. 4532, lines 10-17.

⁴⁰⁰ See, *e.g.*, Testimony of G. Iaboni, Vol. 22, p. 4483, lines 13-22.

the Tribunal repeatedly recognized that there are clear benefits to consumers which arise from Bibby's full product line.⁴⁰¹

363. Based on the evidence on the record, there can be no questions that the SDP has a positive impact upon consumer choice and prices in the cast iron DWV industry and that absent the SDP consumers in the Relevant Markets would be detrimentally affected.

h. Practice is a Result of Bibby's Superior Competitive Performance

364. Section 79(4) of the Act mandates that in determining 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 must consider whether the practice (in this case the SDP) is a result of a firm's superior competitive performance.

365. The Commissioner's Abuse Guidelines say the following with respect to the application of section 79(4):

"Having lower costs, better distribution or production techniques, or a broader array of product offerings can put a firm at a competitive advantage, that when exploited, will lessen competition by leading to the elimination or restriction of inferior competitors. This is the sort of competitive dynamic that the Act is designed to preserve and, where possible, enhance, as it ultimately leads to a more efficient allocation of resources".⁴⁰²

366. In its Original Decision the Tribunal commented as follows in relation to section 79(4):

"In the present case, there is no question that Bibby's Canada-wide distribution network and certainly its 'broader array of product offerings' give it an advantage over its competitors. The Tribunal has already recognized Bibby's ability to maintain a full line of products as a positive factor, which is consistent with 'the sort of competitive dynamic' discussed in the [Abuse] Guidelines".⁴⁰³

⁴⁰¹ See Original Tribunal Decision at paras. 144 and 212; CPC Authorities, Tab 1.

⁴⁰² Abuse Guidelines at Section 5.3.2; CPC Authorities, Tab 13.

⁴⁰³ Original Tribunal Decision at para. 269; CPC Authorities, Tab 1.

367. Bibby submits that to the extent there is any lessening of competition whatsoever arising from the SDP (which is expressly denied), it is properly attributed to Bibby's competitive advantage arising from its superior competitive performance, rather than to any anti-competitive acts. As the Tribunal has found repeatedly, there are numerous reasons given by distributors as to why they have chosen to deal with Bibby (including its full product line and reliable service). These reasons are consistent with the competitive dynamic that the Act is designed to preserve and foster, not prevent.

C. SDP DOES NOT HAVE EXCLUSIONARY EFFECTS WITHIN THE MEANING OF SECTION 77(2)(A)

1. *Test for Exclusive Dealing*

368. Section 77(2) of the Act requires the Commissioner to establish that an exclusive dealing practice, 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 have an exclusionary effect in a market with the result that competition is, or is likely to be, lessened substantially.

369. Subsection 77(2) of the Act provides as follows:

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

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

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

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

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

370. For the purposes of subsection 77(2), "exclusive dealing" has the meaning ascribed to it in subsection 77(1):

"exclusive dealing' means

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

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

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

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".

371. As evidenced by the Commissioner's brief reference to section 77, both in her Notice of Application and in her Memorandum of Argument, the allegations against Bibby under section 77(2) are little more than "add-on" or "piggyback" allegations to the Commissioner's primary allegations of abuse of dominance under section 79.

372. With respect to section 77(2), the Court of Appeal observed that there is a "parallel structure and logic between the statutory elements for exclusive dealing under subsection 77(2) and abuse of dominant position under subsection 79(1)".⁴⁰⁴

373. However, the Court of Appeal noted that some differences between the tests for section 77(2) and section 79 remain. For example, the Court noted that while both provisions employ the "key concepts of substantial lessening and competition, the two provisions also contain some differences in wording".⁴⁰⁵ In particular, the Court of Appeal observed

⁴⁰⁴ FCA Decision at para. 93; CPC Authorities, Tab 2.

⁴⁰⁵ *Ibid.* at para. 94.

that "the scope of section 79 appears to include events in the past, which are not expressly included for the purpose 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')".⁴⁰⁶

374. With respect to the requirement to show the exclusionary effects of the exclusive dealing, the Court of Appeal stated that it was not necessary to determine the "precise scope or nature of the similarity between the statutory element of subsection 77(2) concerning exclusionary effects, and paragraph 79(1)(b)".⁴⁰⁷ Instead, the Court noted that the "exclusionary effects required under subsection 77(2) are clearly of a relative nature, as indicated by the use of the word 'impede' in paragraph 77(2)(a) and (b), rather than a more categorical verb, such as 'prevent'".⁴⁰⁸

375. The Court of Appeal also noted that:

"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".⁴⁰⁹

376. In view of the foregoing, in order to succeed in her claim under section 77(2), the Commissioner must prove that the SDP is having or is likely to have the requisite exclusionary effect under subsection 77(2)(a), (b) or (c) of the Act. Thus, the SDP must be found to be likely to impede entry into or expansion of a firm in a Relevant Market,

⁴⁰⁶ *Ibid.* at para. 94.

⁴⁰⁷ *Ibid.* at para. 98.

⁴⁰⁸ *Ibid.* at para. 98.

⁴⁰⁹ *Ibid.* at para. 99.

impede the introduction of a product into or expansion of sales of a product in a Relevant Market or have any other exclusionary effect in a Relevant Market.

2. *SDP Does Not Have the Requisite Exclusionary Effects*

377. As set out in considerable detail in section IV(A), above, the SDP bears none of the hallmarks of anti-competitive exclusionary conduct. This is so even if one applies a "relative" standard of impeding, in place of an absolute standard of "prevention". The purposes and effects of the SDP are consistent with the objectives of the Act, and are pro-competitive in nature.

378. The evidence establishes that the SDP has not impeded entry or expansion of any firm or product in any of the Relevant Markets, much less in all of the Relevant Markets as alleged by the Commissioner. Quite the contrary, the SDP promotes the expansion of cast iron DWV sales in the Relevant Markets, including sales by suppliers of cast iron DWV products other than Bibby. Indeed, the only sustained entry by a domestic manufacturer of cast iron DWV products in Canada in the last thirty years occurred after the SDP has introduced. The Commissioner has failed to prove on the evidence that the SDP has the requisite exclusionary effect under subsection 77(2). On this basis alone, her section 77 claim must also fail.

3. *SDP Does Not Result in a Substantial Lessening of Competition*

379. There are significant (and fatal) shortcomings in the Commissioner's arguments regarding the SDP's effects on Competition.

380. In prior cases, the Tribunal has adopted the same approach to the substantial lessening of competition analysis under sections 77 and 79.⁴¹⁰ Thus, the Commissioner must prove under section 77 that the SDP preserves or adds to Bibby's alleged market power.

381. For the reasons set out in section IV(B) above, the Commissioner has failed to do so. Accordingly, her claim under section 77 must similarly fail.

D. REMEDIES

1. *The Tribunal's Discretion Not to Make an Order*

382. Even if the Tribunal somehow finds that the Commissioner has proven the required elements under sections 79 or 77, the Tribunal still maintains a discretion to grant or not grant a remedy, and to determine the scope and nature of any remedy that should be granted. This discretion is plain from the wording of those provisions, which states that the "Tribunal may make an order" if the Commissioner satisfies all of the specified conditions.

383. In the *Nielsen* case, the Tribunal noted that:

"Both subsections (1) and (2) [of section 79] provide that the Tribunal 'may' make an order. The word 'may' allows the Tribunal some residual discretion to refuse to issue an order despite its findings..."⁴¹¹

384. While the Tribunal's discretion not to make an order is plain on the face of sections 79 and 77, the Tribunal also confirmed in *Canada (Director of Investigation & Research) v. Southam Inc.*⁴¹² that the word "may" clearly affords the Tribunal the option to order no

⁴¹⁰ See *NutraSweet* at 56c; CPC Authorities, Tab 3.

⁴¹¹ *Nielsen* at 278d; CPC Authorities, Tab 4.

⁴¹² (1992), 47 C.P.R. (3d) 240 (Comp. Trib.); CPC Authorities, Tab 8.

remedy even where it finds a substantial lessening of competition. In *Southam*, the Tribunal considered the its discretion to grant a remedy under the merger provisions in section 92 of the Act:

"The Director also argues that the tribunal does not have the discretion to leave the situation as it found it, once a substantial lessening of competition has been identified. That is, he submits that the 'may' in s. 92 which precedes the list of remedial options is not permissive but rather should be read as 'shall'. The tribunal does not accept this submission.

...

In appropriate circumstances, the tribunal may, of course, be persuaded to choose to do nothing".⁴¹³

385. The Tribunal's discretion to grant or not grant an order under sections 79 and 77 must be exercised within certain parameters. The exercise of a tribunal's discretion is subject to the fundamental rule that it ought to promote the policies and objects of the governing statute. Discretionary decisions must therefore be made primarily on the basis of a weighing of factors relevant to the policy and purposes of the statute in question. This approach requires that the exercise of discretion be based on evidence before the decision-maker.⁴¹⁴

386. Moreover, the burden of adducing evidence to support a proposed remedy falls squarely on the party requesting the remedy. This was established in the *Southam* case discussed above. In affirming the Tribunal's remedy decision in that case, the Federal Court of Appeal stated that:

"Having proposed the remedy, Southam certainly had an obligation to satisfy the Tribunal that it was effective. It is trite that one who asserts must prove. Unless

⁴¹³ *Ibid.* at 246.

⁴¹⁴ S. Blake, *Administrative Law in Canada*, 3rd ed. (Markham, Ont.: Butterworths, 2001) at 89-90; CPC Authorities, Tab 14.

and until that obligation was discharged, the Tribunal had no alternative but to accept or reject the Director's proposal, the effectiveness of which was not in issue".⁴¹⁵

387. The Court of Appeal's conclusion was specifically endorsed by the Supreme Court of Canada on appeal:

"As for the claim that the Tribunal wrongly required the appellants to demonstrate the effectiveness of their proposed remedy, no more need be said than that he who asserts should prove, as Robertson J.A. so aptly put it".

⁴¹⁶

388. Applying this general approach to the Tribunal's discretionary decision whether to issue the Commissioner's requested remedies in this case, it is important to keep in mind the purposes of the Act as set out in section 1.1:

"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".

389. Further guidance on how the Tribunal should exercise its discretion in this case is available from the text of section 79. That section provides that once all the essential elements of section 79 are established by the Commissioner, the Tribunal may prohibit the practice of anti-competitive acts and may also, or in the alternative, make an order directing the respondent to take certain actions. Section 79 establishes clear parameters for the Tribunal's exercise of discretion in that regard:

⁴¹⁵ *Canada (Director of Investigation and Research) v. Southam Inc.* (1995), 63 C.P.R. (3d) 67 at 75f (F.C.A.); CPC Authorities, Tab 9.

⁴¹⁶ *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at 791-92; CPC Authorities, Tab 10.

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

Limitation

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order". [emphasis added]

390. The directions contained in section 79 clearly set out the types of considerations the Tribunal must take into account in exercising its discretion to grant or not grant an order as requested by the Commissioner. In addition to bearing in mind the overall purposes of the Act, the Tribunal must exercise its discretion based on the evidence relating to the necessity, effectiveness and reasonableness of the requested remedies in eliminating the substantial lessening of competition.
391. The Bureau's Abuse Guidelines also recognize the need for proportionality and reasonableness with respect to remedies sought in abuse of dominance cases. Section 5.3.1 notes that section 79(3) of the Act is an "additional safeguard that protects the rights of persons against whom an order is directed. The intent here is to have an order that is aimed at restoring competition, and not one that goes beyond achieving this objective. In other words, the order should be remedial and not punitive."
392. In past abuse of dominance cases, and in other competition cases, the Tribunal has taken its discretion to grant or not grant a requested remedy very seriously. For example, the Tribunal in *Laidlaw* emphasized the importance of carefully reviewing remedies proposed by the Commissioner in order to ensure that they are warranted on the evidence,

address only what is necessary to remedy the substantial lessening of competition and interfere as little as possible with the smooth functioning of competition markets:

"The Tribunal is aware that its orders pursuant to subsections 79(1) and 79(2) must only go as far as it considers necessary in order to restore competition in the relevant markets. It agrees with counsel for Laidlaw's argument that it is not part of the Tribunal's function to impose penalties or punitive measures. What is necessary to restore competition is a judgment which must be made by reference to the evidence which has been put before the Tribunal as to how the markets in question operate and have operated and the effects the anti-competitive acts are having thereon. The Tribunal has taken these considerations into account in deciding which of the orders requested by the Director it is prepared to grant".⁴¹⁷ [emphasis added]

393. In exercising its remedial discretion under section 79, the Tribunal has refused to issue orders requested by the Commissioner. For instance, in refusing to issue the pricing remedies requested by the Commissioner against *Laidlaw*, the Tribunal explained that it would not issue remedies without proper justification:

"The Tribunal has difficulty accepting that orders of this nature should be issued. The Tribunal's difficulty arises because no argument has been articulated as to why these remedies are sought and what will potentially be achieved through them. In addition, these remedies, on their face, raise serious questions for the Tribunal.

...

The Tribunal is willing to reconsider its refusal to include in the order what is referred to as the pricing remedies. It takes this stand because it wishes to ensure that all valid reasons for seeking such remedies have been brought to its attention. Accordingly, the Director, if he so wishes, may file written argument setting out the rationale on which the request for those remedies is based, within ten days of the date of these reasons. This should include, for example, an explanation as to what the remedies are intended to accomplish, why they are justified on the evidence and why they are necessary in the light of the other remedies which the Tribunal has agreed to grant".⁴¹⁸ [emphasis added]

⁴¹⁷ *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems* (1992), 40 C.P.R. (3d) 289 at 356d and 357b-d (Comp. Trib.); Commissioner's Brief of Authorities, Tab 11.

⁴¹⁸ *Ibid.* at 353d-f. In the circumstances, the Final Order in *Laidlaw* did not include pricing remedies.

394. It is also notable that the Tribunal in *Laidlaw* applied the principle that remedies ought to be justified when it refused to void restrictive covenants contained in Laidlaw's acquisition agreements, as requested by the Commissioner:

"While it may be clear that an application of the common law principles respecting restrictive covenants would lead to the conclusion that all of the unexpired covenants would be unenforceable as being overly broad, the Tribunal has not been convinced that declaring the unexpired restrictive covenants void is necessary to restore competition in the markets. There is merit in the argument that their effect on the markets and on competition therein is marginal".⁴¹⁹

395. As discussed below, the Commissioner has failed to even attempt to discharge her burden of justifying the remedies she requests in this case. In the circumstances, the highly interventionist remedies requested by the Commissioner are in themselves anti-competitive and ought not to be granted by this Tribunal.

2. *No Remedy Should be Granted in this Case*

396. In her Application, the Commissioner has requested that the Tribunal make a number of orders should it find that Bibby's allegedly anti-competitive acts lead to a substantial lessening of competition. The remedies sought by the Commissioner in this case are significant and in the Respondent's submission, entirely unnecessary and unreasonable. Having proposed these remedies, the Commissioner clearly has the burden of justifying them. However, other than a cursory re-statement of her theory of the case under section 79, the Commissioner makes no attempt whatsoever in her Memorandum of Argument to explain the necessity and reasonableness of her requested remedies. She has therefore failed to discharge her burden, and the Tribunal ought not to grant the requested orders.

⁴¹⁹ *Ibid.* at 353d-f.

397. Rather, the Commissioner merely states at paragraph 280 of her Memorandum of Argument that "[i]n the circumstances of this case, and having regard to the long-standing conduct of Bibby in exercising market power through the SDP, the following orders are appropriate". Surely, this blanket statement cannot discharge the Commissioner's burden of justifying the requested remedies.
398. The Commissioner seeks an order essentially restraining Bibby from using a rebate program similar to the SDP that is based on loyalty rather than volume of sales. If such an order were granted, however, it would have a dramatic and negative impact on Bibby, as well as on small and medium sized distributors that sell cast iron DWV products.
399. As explained by Dr. Ware in his report, partnership programs similar to Bibby's SDP are common throughout the plumbing and construction supplies industry, and are a normal and efficient element of a competitive market structure. To prohibit one firm, Bibby, from using such programs, would handicap Bibby's ability to compete, particularly against manufacturers of other types of competing DWV products. These include products made of plastic. The likely effects of handicapping Bibby in this manner will not only be a further erosion of Bibby's market share, but also the weakened ability of all cast iron DWV suppliers to compete against other DWV products made of other materials.
400. This will occur for a number of reasons. First, it is clear from the evidence that other cast iron suppliers, such as Vandem and Sierra, depend heavily upon Bibby to fight the

increased use of plastic.⁴²⁰ To the extent that Bibby is handicapped in that fight, other cast iron suppliers will suffer the inevitable result. Making Bibby less competitive does not necessarily make the market more competitive. As Dr. Ware testified, having two or three smaller suppliers in Canada may be far less efficient and pro-competitive in a global economy than having one strong competitor.

401. Second, as described earlier, the SDP encourages distributors, especially small and medium sized distributors, to carry and promote cast iron over plastic. If Bibby is forced to adopt a volume rebate scheme, distributors will be less inclined to promote cast iron over plastic and small-and medium-sized distributors will be placed at a significant (and potentially devastating) competitive disadvantage against substantially larger regional and national distributors. Mr. Iaboni described what would happen to his small distributorship if Bibby replaced the SDP with a volume rebate program:

"J. DORIS: And if, sir, Bibby was to use a pure Volume Rebate Program, what impact would that have on you?

G. IABONI: Tremendous impact. Obviously, that the business would -- I am assuming that the volume rebates meaning the Emcos, the Wolseleys and the Cranes would buy better than Sherwood -- my customers would be very -- I mean, it would be a no-brainer, they'd just ship the business there because they would have a better price. It would cut me out of the marketplace and I would have to find a different avenue, perhaps, to compete.

J. DORIS: And what impact would it have on your use of cast iron?

G. IABONI: It would drop dramatically, of course.

J. DORIS: And where would you turn instead?

G. IABONI: Plastics, imports. I have choices".⁴²¹

⁴²⁰ See Testimony of R. Demeny, Vol. 6, p. 1294, line 2 to p. 1296, line 4; Testimony of D. Kelm, Vol. 11, p. 2371, line 10 to p. 2374, line 23.

⁴²¹ Testimony of G. Iaboni, Vol. 22, p. 4483, lines 5 to 23.

402. In short, the primary beneficiaries of granting the relief requested in this case would be plastic manufacturers and large regional and national distributors of DWV products. Such an outcome would flatly be inconsistent with one of the central purposes underlying the Act, namely "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy". The Commissioner's request for relief should, therefore, be rejected.
403. The Commissioner also requests that the Tribunal issue orders limiting Bibby's ability to acquire participants at any level of the cast iron DWV industry. These orders, requested in subparagraphs 280(a)(vii) and (viii) of the Commissioner's Memorandum of Argument,, would essentially prohibit Bibby or any of its affiliates, officers or agents from acquiring any interest in a cast iron DWV manufacturer, supplier or distributor in Canada for three years and would require notification to the Bureau of any such acquisition in the three years after the initial prohibition period, regardless of the merger notification provisions in the Act.
404. Again, the Commissioner has made no argument and has adduced no evidence to assist the Tribunal in the exercise of its discretion to order a remedy regarding Bibby's acquisitions. The Commissioner simply states that this relief is "also necessary to permit competition in the Relevant Markets to the level it might have been but for Bibby's practice of anti-competitive acts".⁴²² This request is particularly troublesome in light of the Tribunal's explicit determination that Bibby's acquisitions did not constitute a practice

⁴²² Commissioner's Memorandum of Argument at para 282.

of anti-competitive acts. Thus, the Commissioner's suggestion that a prohibition on acquisitions by Bibby is somehow warranted is entirely without merit or justification.

405. The Commissioner completely fails to justify these orders despite their exceptional and highly intrusive nature. How, for example, will these requested orders be effective in overcoming any alleged substantial lessening of competition in the relevant market? In order for the Tribunal to exercise its discretion to issue the requested orders, the Commissioner must address such fundamental issues and, as the Tribunal has noted, provide "an explanation as to what the remedies are intended to accomplish [and] why they are justified on the evidence".⁴²³ There is no evidence to even suggest that an order eliminating Bibby's autonomy to make fundamental business decisions is necessary in the circumstances and will be effective and reasonable in its application.

406. For the foregoing reasons, it is submitted that even if the Tribunal somehow finds that the Commissioner has satisfied each and every essential element of proof under section 79, it ought to exercise its discretion not to issue a remedy in this case. The Commissioner has failed to explain or justify any of its requested orders. Far from remedying any alleged substantial lessening of competition, the orders requested by the Commissioner would subvert the purposes of section 79, and of the Act in general, by skewing the competitive playing field in favour of less efficient competitors, thereby distorting free competition in the DWV products industry.

⁴²³ *Laidlaw* at 357cd; Commissioner's Brief of Authorities, Tab 11.

PART V ~CONCLUSION

407. For all of these reasons, Canada Pipe respectfully submits that the Commissioner has failed to satisfy the tests for sections 79(1)(b), 79(1)(c) and 77(2) of the Act and, accordingly, requests that the Commissioner's Application be dismissed with costs in an amount and on a scale to be determined by the Tribunal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

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