

FILED / PRODUIT
November 1, 2007
CT- 2002-006

Chantal Fortin for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

0122

PUBLIC VERSION

CT -2002-006

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an Application by the Commissioner of Competition pursuant to sections 77 and 79 of the *Competition Act*;

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

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

AND

CANADA PIPE COMPANY LTD./TUYAUTERIES CANADA LTÉE

Respondent

**MEMORANDUM OF ARGUMENT
OF THE COMMISSIONER OF COMPETITION
(Redetermination Proceeding)**

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I. OVERVIEW

1. The Applicant, the Commissioner of Competition (the “Commissioner”), seeks a remedy under sections 77 and 79 of the *Competition Act* (the “*Act*”) with respect to the Stocking Distributor Program (“SDP”) implemented in Canada by the Respondent, Canada Pipe Company Ltd./Tuyauteries Canada Ltée, through its Bibby Ste-Croix Division (“Bibby”).
2. As described in greater detail below, the Commissioner states that the SDP constitutes “exclusive dealing” for the purpose of section 77 of the *Act* and “a practice of anti-competitive acts” for the purpose of section 79 of the *Act*. The Commissioner further states that the SDP has had, is having and is likely to have the effect of substantially lessening or preventing competition in the relevant markets described below.
3. In a decision dated February 3, 2005, the Competition Tribunal (the “Tribunal”) defined three relevant product markets for the cast iron DWV products supplied by Bibby: cast iron pipe, cast iron fittings and mechanical joint (“MJ”) couplings. Cast iron DWV products are used in buildings to carry waste and drain water from appliances and drains. These products are also used to provide ventilation for drainage and waste systems.
4. The Tribunal also identified six relevant geographic markets for the supply of cast iron DWV products: British Columbia, Alberta, the Prairies (Saskatchewan and Manitoba), Ontario, Quebec, and Atlantic Canada (New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador).
5. The Tribunal found that Bibby held market power in respect of the supply of each of the relevant cast iron DWV products in each of the relevant geographic markets. Among other things, the Tribunal found that Bibby had the ability to set prices for the relevant cast iron DWV products well above its marginal costs, resulting in “hefty” profit margins for certain products and “supra-competitive pricing”. The Tribunal also noted Bibby’s “overwhelming” share of the relevant markets of between 80 to 90%.

6. As such, the Tribunal found that the first elements of sections 77 and 79 of the *Act* - the issues of whether Bibby is a major supplier or substantially controls the supply of cast iron DWV products in each of the relevant markets - were satisfied in this case. This finding by the Tribunal was affirmed by the Federal Court of Appeal in a decision dated June 23, 2006.
7. The remaining elements required to be established to secure a remedy under sections 77 and 79 of the *Act* were returned to the Tribunal for redetermination in accordance with the principles outlined by the Federal Court of Appeal.
8. In respect of section 79 of the *Act*, the following two issues remain to be determined: (i) whether Bibby has engaged or is engaging in a practice of anti-competitive acts; and, (ii) whether this practice has had, is having or is likely to have the effect of substantially preventing or lessening competition in the relevant markets.
9. On the first issue, it is clear that the implementation and enforcement of the SDP constitutes a practice of anti-competitive acts. An “anti-competitive act” is an act that has as its purpose an intended negative effect on a competitor that is predatory, exclusionary or disciplinary. Proof of the overall character of the impugned conduct can be established directly through evidence of subjective intent, or indirectly through the reasonably foreseeable consequences of the conduct.
10. Bibby’s own internal documents and testimony from various witnesses demonstrate that the SDP was implemented by Bibby with the intent that it would result in a negative exclusionary effect on competitors by [CONFIDENTIAL], “blocking avenues” for entry, and “tying up” distributors “so that they would have to buy from Bibby” and “would not be able to consider alternatives”.
11. Given the clear evidence of subjective intent found in Bibby’s own internal documents and in the testimony of witnesses, it is evident that the SDP was undertaken by Bibby

with intended exclusionary effects on competitors. In addition, the actual and reasonably foreseeable consequences of the SDP were negative exclusionary effects on competitors.

12. The competitors to Bibby that appeared as witnesses at the initial hearing before the Tribunal testified that the SDP foreclosed competition in the relevant markets by “tying up” distributors or otherwise preventing distributors from switching to these competitors. This occurred notwithstanding the express preference of distributors to have an alternate choice for suppliers of cast iron DWV products.
13. Competitors of Bibby cited the SDP as the primary or sole reason that they were unable to compete in Canada. Indeed, the exclusionary effects of the SDP caused certain competitors of Bibby to exit from the relevant markets and impeded the entry and expansion of other competitors.
14. Given Bibby’s overwhelming share of the Relevant Markets and the obvious full-line forcing and exclusionary effects of the SDP, it was reasonably foreseeable that the SDP would result in negative exclusionary effects on competitors.
15. Further, it is clear from the evidence that the SDP was not undertaken for a valid business purpose. Rather, as described above, the evidence demonstrates that Bibby’s subjective intent in implementing the SDP and the reasonably foreseeable consequences of the SDP were negative exclusionary effects on competitors.
16. The evidence of Bibby’s subjective intent and the actual and foreseeable consequences of the SDP therefore unequivocally establish that the SDP is an act that has as its purpose an intended negative exclusionary effect on competitors. It follows that the SDP is an anti-competitive act within the meaning of paragraph 79(1)(b) of the *Act*.
17. The evidence also establishes that, but for the SDP, all of the relevant markets – in the past, present and future – would likely benefit from greater competition, including

substantially lower prices, increased switching between competing suppliers and substantially more entry and expansion by competitors.

18. The Tribunal has previously determined that Bibby holds an “overwhelming” share of the relevant markets. Given Bibby’s high degree of market power, even smaller impacts on the business of competitors resulting from a practice of anti-competitive acts will meet the test of being “substantial” for the purpose of paragraph 79(1)(c) of the *Act*.
19. In any event, the evidence shows that the SDP has a significant impact on competition in each of the relevant markets. Whereas distributors would otherwise elect to give a portion of their demand for cast iron DWV products to rival firms, the SDP effectively forecloses this possibility. In essence, the SDP creates an “all-or-nothing” choice for distributors – competitors must purchase all of their cast iron DWV products from Bibby or purchase all of these products from rival firms.
20. By requiring rivals to compete for all of the demands of a distributor, the SDP significantly raises the costs of a rival seeking to enter or expand in the relevant markets. The SDP enhances the “incumbent advantage” held by Bibby by forcing distributors to entrust all of their requirements for cast iron DWV products to competing firms.
21. The SDP impedes “toe-hold entry” and otherwise alters the conditions of entry and expansion in the relevant markets so as to make it very difficult for competitors to establish the reputation and credibility necessary to effectively compete. In the absence of the SDP, entry and expansion into the relevant markets would be substantially more frequent.
22. The evidence clearly demonstrates that the relevant markets would be more substantially competitive in the absence of the SDP. The SDP caused competitors to exit the relevant markets and prevented entry or expansion by rival firms. For example, prior to the introduction of the SDP, BMI was able to effectively compete in Ontario and Quebec and

- was considering expansion into another relevant market. Due to the exclusionary effects of the SDP, BMI exited from the relevant markets and abandoned its plans for expansion.
23. The evidence also shows that the SDP insulated Bibby from price competition, allowing it to price at “supra-competitive” levels. Indeed, the Tribunal has found that prices increased significantly in certain relevant markets following the introduction of the SDP. Furthermore, the evidence demonstrates that the removal of even one competitor for cast iron DWV products in the relevant markets has a substantial effect on prices. Clearly, there would be substantially greater price competition in each of the relevant markets in the absence of the SDP.
 24. The evidence therefore establishes that, but for the SDP, competition would be substantially greater in all of the relevant markets. It follows that the SDP has had, is having or is likely to have the effect of preventing or lessening competition substantially in each of the relevant markets for the purpose of section 79(1)(c) of the *Act*.
 25. In respect of exclusive dealing, the Tribunal has already determined that the SDP constitutes a “practice of exclusive dealing” for the purpose of section 77. Further, the evidence clearly demonstrates that the SDP has impeded entry or expansion of firms in each of the relevant markets with the result that competition is and is likely to be lessened substantially.
 26. Overall, the evidence before the Tribunal establishes that Bibby holds market power. Through the SDP, Bibby has engaged and is engaging in a practice of anti-competitive acts and exclusive dealing that is not in furtherance of any legitimate business justification. The evidence also clearly establishes that in the absence of the SDP, competition in each of the relevant markets would be substantially greater.
 27. Prior to implementation of the SDP by Bibby, the markets in Canada for cast iron pipe and fittings and MJ couplings were poised for vigorous competition. A domestic manufacturer of pipe and fittings, Vandem, had entered the marketplace for the first time

in years, and quality Asian pipe and fittings were becoming increasingly available for import into Canadian markets at competitive prices. In the absence of the SDP, competitive market forces – in the form of domestic and import competition – would have imposed significant price discipline on Bibby and eroded the significant market power that Bibby had accumulated through acquisition of other domestic producers of cast iron DWV products. Bibby’s expressed intent of the SDP was to substantially foreclose this potential competition. The SDP has clearly achieved its intended purpose. By implementing the SDP, Bibby has been able to stall emerging competition from Vandem and importers, and maintain and enhance its overwhelming market power, hefty profit margins and ability to maintain supra-competitive prices.

28. The Commissioner therefore seeks the relief requested in the Notice of Application and, in particular, an order prohibiting Bibby from engaging in the SDP or a similar program. Such a remedy is essential to restoring competition in the relevant markets.

II. THE CANADIAN CAST IRON DWV INDUSTRY

29. The Respondent, Canada Pipe Company Ltd./Tuyauteries Canada Ltée is a company that sells cast iron drain waste and vent pipe, fittings and mechanical joint (“MJ”) couplings (collectively, “cast iron DWV products”) in Canada through its Bibby Ste-Croix Division (“Bibby”).

Commissioner of Competition v. Canada Pipe Co., 2005 Comp. Trib. 3 at para. 4 [“Reasons”]; Brief of Authorities of the Commissioner of Competition (“Commissioner’s Brief of Authorities”), Tab 1.

30. DWV products are used in buildings to carry waste and drain water from appliances and drains, and to vent plumbing systems. DWV pipe is sometimes referred to as “soil pipe”. In the initial decision in this matter, the Tribunal described the following components of DWV products:

There are three components of a DWV system: pipe, fittings and mechanical joint (MJ) couplings. Pipe, essentially tubes, comes in various diameters and lengths. Fittings join and re-direct pipes. MJ couplings mechanically join and seal DWV pipes together; they are primarily designed to couple pipes of the same material.

Reasons, para. 21; Commissioner's Brief of Authorities, Tab 1.

31. Bibby manufactures cast iron DWV pipe and fittings in Canada. Bibby also imports MJ couplings into Canada that are manufactured by Bibby's affiliates or third party manufacturers.

Reasons, paras. 4, 33, 34 and 40; Commissioner's Brief of Authorities, Tab 1.

32. DWV products are typically sold to distributors of building supplies who, in turn, sell DWV products to building, mechanical and plumbing contractors. As stated by the Tribunal:

Distributors of DWV products buy from suppliers, either the manufacturer or an importer, and sell to the building, mechanical and plumbing contractors involved in construction or renovation projects. ...

Reasons, para. 37; Commissioner's Brief of Authorities, Tab 1.

33. There are three large national distributors of building supplies in Canada: Wolseley Canada Inc. ("Wolseley" and formerly, "Westburne"), EMCO Ltd. ("Emco") and Crane Supply Inc. ("Crane"). All three of these distributors purchased cast iron DWV products from Bibby for resale to contractors.

Reasons, para. 38; Commissioner's Brief of Authorities, Tab 1.

34. There are also smaller distributors of building supplies who purchase cast iron DWV products for resale. These distributors include: McKeough Supply Inc. ("McKeough"), Niagara Plumbing Supply Co. Ltd., Sherwood Plumbing Supplies ("Sherwood"), Noble Trade Inc. ("Noble") and Nuroc Plumbing & Heating Supplies Ltd. ("Nuroc").

Reasons, paras. 20 and 38; Commissioner's Brief of Authorities, Tab 1.

35. Some smaller distributors have joined buying groups, which pool the purchases of members to secure volume discounts and rebates. Two such buying groups are Octo Purchasing Group Ltd./Octo Groupe d'Achats Ltée. ("Octo") and 2258005 Canada Limited ("Canaplus").

Reasons, para. 38; Commissioner's Brief of Authorities, Tab 1.

A. Relevant Markets

36. The Tribunal has determined that there are three distinct relevant product markets for cast iron DWV products: (i) cast iron pipe, (ii) cast iron fittings, and (iii) MJ couplings.

Reasons, para. 112; Commissioner's Brief of Authorities, Tab 1.

37. The Tribunal also identified six relevant geographic markets: (i) British Columbia, (ii) Alberta, (iii) the Prairies (Saskatchewan and Manitoba), (iv) Ontario, (v) Quebec, and (vi) Atlantic Canada (New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador) (the three product markets and six geographic markets are collectively referred to as the "Relevant Markets"):

... [T]he Tribunal finds that the product market is the cast iron DWV product market, within which three distinct markets can be identified: cast iron pipe and fittings and MJ couplings. Because of the significant price variations in cast iron DWV products from region to region, we find that there are six distinct geographic markets: British Columbia, Alberta, the Prairies, Ontario, Quebec and the Maritimes.

Reasons, para. 112; Commissioner's Brief of Authorities, Tab 1.

B. Market Power

38. The Tribunal also found that Bibby has market power in each of the Relevant Markets. Specifically, the Tribunal stated that “the evidence indicates that Bibby has market power” and “Bibby can and does exercise market control in the three product markets and six geographic regions”. On the issue of market power, the Tribunal concluded as follows:

...Bibby’s large market share, its range of products and national presence, the limited penetration of competitors and the fact that this market offers only limited growth potential are sufficient to establish that Bibby does control a substantial part of the cast iron DWV products market.

Reasons, para. 161; Commissioner’s Brief of Authorities, Tab 1.

39. One indication of Bibby’s market power identified by the Tribunal was Bibby’s ability to set its prices for cast iron DWV pipe and fittings well above its marginal costs, resulting in “hefty” profit margins for these products.

Reasons, paras. 137 and 161; Commissioner’s Brief of Authorities, Tab 1.

40. A second indication of Bibby’s market power identified by the Tribunal was Bibby’s ability to charge prices for cast iron DWV products in certain regions that were substantially higher than the competitive price for these products. On this issue, the Tribunal stated that “[f]or all three products, Bibby’s ability to lower prices indicates supra-competitive pricing.”

Reasons, para. 161; Commissioner’s Brief of Authorities, Tab 1.

41. In fact, the Tribunal found that Bibby’s prices for cast iron DWV products were substantially lower in Western Canada than in Eastern Canada, even though Bibby produced its pipe and fittings in Quebec and is required to include the cost of transporting its products from Quebec in its Western Canadian prices:

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

It is somewhat puzzling that Bibby offers no evidence to rebut the Commissioner's assertions of high margins. ... We are left with Bibby's hefty margins and its significant ability to vary prices across regions.

Reasons, paras. 136 and 137; Commissioner's Brief of Authorities, Tab 1.

42. The Tribunal's finding of market power also rests, in part, on Bibby's "overwhelming" share of the relevant markets for cast iron DWV products that Bibby gained through various acquisitions and arrangements, which was between 80% to 90%. Specifically, in the period of October 2001 to August 2002, Bibby's share of sales of cast iron DWV products was [CONFIDENTIAL] in British Columbia/Alberta, [CONFIDENTIAL] in the Prairies, [CONFIDENTIAL] in Ontario, [CONFIDENTIAL] in Quebec and [CONFIDENTIAL] in the Maritimes.

Reasons, para. 140; Commissioner's Brief of Authorities, Tab 1.

Expert Report of Dr. Ross, Appendix 3, p. 70.

43. In contrast, the only other Canadian manufacturer of cast iron DWV pipe and fittings, Vandem Industries ("Vandem"), was not able to gain a material share of any Relevant Market. Specifically, Vandem's Canadian sales of cast iron DWV products were largely confined to Ontario and Quebec. In the period of October 2001 to August 2002, Vandem's share of the supply of cast iron DWV products in Ontario and Quebec was [CONFIDENTIAL].

Reasons, para. 150; Commissioner's Brief of Authorities, Tab 1.

Expert Report of Dr. Ross, Appendix 3, p. 70.

44. The only manufacturer of MJ couplings in Canada is Rollee Industrial Products (1987) Ltd. ("Rollee"). Rollee was not able to secure a material share of any Relevant Market and never became a significant competitor in Canada.

Reasons, para. 33; Commissioner's Brief of Authorities, Tab 1.

45. Cast iron DWV products are manufactured in Asia for export to various countries, such as Canada and the United States, and distributed in Canada through various agents. However, foreign suppliers or importers of cast iron DWV products were unable to effectively compete in any of the Relevant Markets in Canada.

46. For example, New Centurion was an importer of cast iron DWV pipe and fittings from Asia for sale in Western Canada. Sierra Distributors ("Sierra") also imported cast iron DWV products for sale in British Columbia. BMI Canada ("BMI") formerly imported fittings for sale in Ontario and Quebec, but by the time of the initial hearing before the Tribunal, BMI had exited the Relevant Markets.

Reasons, paras. 20, 154, 155, 245; Commissioner's Brief of Authorities, Tab 1.

47. Sierra and New Centurion were not able to penetrate any Relevant Market in Canada other than British Columbia, Alberta and the Prairies. Further, even in these Relevant Markets, Sierra represented [CONFIDENTIAL] of sales of cast iron DWV products in the period October 2001 to August 2002. Similarly, in the same period, New Centurion [CONFIDENTIAL] of sales of cast iron DWV products in British Columbia, Alberta and the Prairies. These companies had no sales in other regions of Canada.

Expert Report of Dr. Ross, Appendix 3, p. 70.

48. In addition, the main manufacturers of MJ couplings for sale in Canada are Mission Rubber Company (“Mission”) and Ideal and Bibby’s affiliates, Tyler Couplings and Anaco Inc., which manufacture these products in the United States. Although Mission supplied limited quantities of MJ couplings into Canada, Mission was not able to effectively compete in any Relevant Market. In October 2001 to August 2002, Mission’s share of the sales of cast iron DWV products in each of the relevant geographic markets were as follows: [CONFIDENTIAL] in British Columbia/Alberta, [CONFIDENTIAL] in the Prairies, [CONFIDENTIAL] in Ontario, [CONFIDENTIAL] in Quebec and [CONFIDENTIAL] in the Maritimes.

Reasons, para. 33; Commissioner’s Brief of Authorities, Tab 1.

Expert Report of Dr. Ross, Appendix 3, p. 70.

49. Although distributors and other purchasers of cast iron DWV products were uniformly of the view that cast iron DWV products manufactured outside of Canada were priced competitively, the Tribunal found that imports of cast iron DWV products into Canada were not significant. Specifically, during 1998 to 2002, imports of cast iron DWV products (including those by Bibby) represented only 5% of total sales of these products in Canada.

Reasons, paras. 40 and 150; Commissioner’s Brief of Authorities, Tab 1.

50. With respect to barriers to entry, the Tribunal concluded that Bibby’s established reputation and ability to offer a full product line resulted in an “incumbent advantage” for Bibby:

Bibby is a well-known and well-established manufacturer. A new entrant would probably have difficulty competing with the quality and quantity of products Bibby is able to offer. The various distributors testified to the fact that Bibby offered a full product line and that the quality of its products was certain, definitely factors in choosing a supplier. No other supplier has a strong national presence.

Reasons, para. 144; Commissioner’s Brief of Authorities, Tab 1.

C. The Stocking Distributor Program

51. Since January 1998, Bibby has promoted its cast iron DWV products in each of the Relevant Markets through a loyalty rebate program known as the Stocking Distributor Program (“SDP”). Distributors that purchase cast iron DWV pipe and fittings and MJ couplings exclusively from Bibby are referred to as “stocking distributors” and are entitled to significant payments from Bibby under the SDP in the form of rebates and price reductions. Distributors that do not buy all three of these products exclusively from Bibby are referred to as “non-stocking distributors” and are not entitled to such payments.

Reasons, paras. 5 and 44-47; Commissioner’s Brief of Authorities, Tab 1.

JB-1-3; JB-1-11; JB-1-15; JB-3-68; JB-4-111; JB-6-256; JB-11-520; JB-15-803

52. There are thus two essential features to the SDP: full-line forcing and exclusivity. Full-line forcing refers to the fact that the SDP ties all purchases of the three cast iron DWV products; exclusivity refers to the fact stocking distributors must buy cast iron DWV products exclusively from Bibby.

Reasons, paras 201, 257 and 279; Commissioner’s Brief of Authorities, Tab 1.

53. In 1998 when the SDP was introduced, Bibby issued credit memos to stocking distributors for the amount of the quarterly rebates. The credit memos forced stocking distributors to continue to purchase cast iron DWV products from Bibby to secure the payments under the SDP.

JB-7-336; JB-11-542

Testimony of T. Leonard, Vol. 19, pp. 3922-3926; and, Vol. 21, p. 4367

Testimony of G. Tester, Vol. 9, pp. 1869-1870

54. As noted above, through the SDP, Bibby offers substantial price reductions and rebates to stocking distributors. The price reductions take the form of discounts off list prices for stocking distributors. For instance, for fittings in British Columbia, stocking distributors received a discount in 2003 of [CONFIDENTIAL] off Bibby's list price, compared to non-stocking distributors who received only a 4% discount from Bibby's list price. Also, for pipe in British Columbia and Alberta stocking distributors received a discount in 1998 of [CONFIDENTIAL] compared to non-stocking distributors who received only a 4% discount from Bibby's list prices. On this issue, the Tribunal stated:

... If the distributor buys all of its cast iron supplies and MJ couplings from Bibby, it is entitled to quarterly and annual rebates, as well as a significantly lower price for items purchased through application of the multiplier. The multiplier for pipe, for example, could be 0.55 for a stocking distributor, and 0.94 for a non-stocking distributor. Thus at the time of purchase, the stocking distributor would pay 55 percent of the list price for pipe, while the non-stocking distributor would pay 94 percent of the list price.

Reasons, para. 44; Commissioner's Brief of Authorities, Tab 1.

JB-08-346; JB-3-672; JB-4-149; JB-6-0272; JB-18-0884; JB-21-1060; JB-26-1266; JB-29-1342

55. In addition to the reductions to list prices, Bibby also made substantial payments to stocking distributors in the form of quarterly and annual rebates. For example, in 2002, the quarterly rebate paid by Bibby to stocking distributors was 7% on pipe, 15% on fittings and 9% on MJ couplings. The annual rebate was 4% on all three cast iron DWV products.

Reasons, para. 44; Commissioner's Brief of Authorities, Tab 1.

Testimony of T. Leonard, Vol. 19, pp. 3920-3921; Vol. 21, pp. 4359 and 4362.

JB-17-848-27; JB-19-925; JB-23-1152; JB-23-1154; JB-23-1156; JB-24-1178; JB-24-1179

56. As an example, due to the price reductions and rebates, stocking distributors in British Columbia in January 2003 paid [CONFIDENTIAL] less for Bibby's pipe, [CONFIDENTIAL] less for Bibby's fittings and [CONFIDENTIAL] less for Bibby's MJ couplings than non-stocking distributors.

JB-29-1342

Testimony of T. Leonard, Vol. 21, p. 4360.

57. The value of the payments made by Bibby under the SDP was significant and represents a substantial portion of distributors' profits on cast iron DWV products. For example, in January 2000, Bibby paid [CONFIDENTIAL] in quarterly and annual rebates to Emco for its purchases of cast iron DWV pipe and fittings and MJ couplings in 1999. At the same time, Bibby made rebate payments in the amount of [CONFIDENTIAL] to Crane, [CONFIDENTIAL] to Wolseley and [CONFIDENTIAL] to Noble.

Reasons, para. 45; Commissioner's Brief of Authorities, Tab 1.

JB-13-662; JB-13-663; JB-13-661; JB-13-665; JB-13-646

III. ABUSE OF DOMINANCE

58. Section 79(1) of the *Act* states:

Where, on application by the Commissioner, the Tribunal finds that:

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

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

Competition Act, Section 79(1)

59. In order to obtain a remedy under section 79 of the *Act*, the Commissioner must establish, on a balance of probabilities, that: (i) the party engaging in the impugned behaviour has market power in a relevant market; (ii) the impugned conduct qualifies as a practice of anti-competitive acts; and (iii) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.
60. In this case, the Tribunal has already determined that the first element of section 79 is satisfied; namely, that Bibby has market power in each of the Relevant Markets. The Federal Court of Appeal affirmed the Tribunal's decision that Bibby exercised market power.

Reasons, para. 161; Commissioner's Brief of Authorities, Tab 1.

Commissioner of Competition v. Canada Pipe Company Ltd./Tuyauteries Canada Ltée, 2006 FCA 236 (23 June 2006); Commissioner's Brief of Authorities, Tab 2.

61. The Tribunal has also determined that the SDP constitutes a practice within the meaning of section 79(1)(b) as it is "structured, organized and applied throughout Canada". This determination by the Tribunal was described by the Federal Court of Appeal as follows:

... The Tribunal had no difficulty recognizing the SDP as a "practice". It wrote, at para. 171, that the term entails more than an isolated act that may be one occurrence that is sustained and systemic, or that has had a lasting impact on competition. It explained at para. 200 of its reasons that the SDP is structured, organized and applied throughout Canada, albeit with some variations in the multiplier and rebates in the different regions and that the various components of the program add up to a practice. ...

Commissioner of Competition v. Canada Pipe Company Ltd./Tuyauteries Canada Ltée, 2006 FCA 233 (23 June 2006) (the "FCA Decision"), para. 60; Commissioner's Brief of Authorities, Tab 3.

Reasons, para. 200; Commissioner's Brief of Authorities, Tab 1.

62. The remaining issues under section 79 of the *Act* to be addressed in this redetermination proceeding are the following: (i) whether the SDP qualifies as an anti-competitive act; and, (ii) whether the SDP has, is or is likely to result in a substantial lessening or prevention of competition in any of the Relevant Markets.

IV. **ANTI-COMPETITIVE ACT (PARAGRAPH 79(1)(B))**

A. **Introduction**

63. The purpose of the abuse of dominance provisions was described by the Tribunal in *Canada (Director of Investigation and Research) v. D & B Companies Canada Ltd.* as follows:

It is important in interpreting legislation to keep in mind the purpose of the legislature. What then is the purpose of ss. 78 and 79 of the Act? It is not controversial, and it is not disputed before me, that the sections are intended to deal with abuses by dominant firms. The Government's explanatory guide summarizes the objectives of the provision:

Anti-competitive behaviour on the part of dominant firms imposes artificial restraints on the competitive process, impeding the market from efficiently allocating resources. In a healthy, dynamic economy, goods and service are supplied by the firms which can product them most efficiently and adapt to the ever-changing demands of the marketplace. The proposed abuse of dominance provision will ensure that dominant firms compete with other firms on merit, not through the abuse of their market power. The provision is of particular importance for the protection of consumers, new entrants and, in particular, the small business community. [emphasis added]

Canada (Director of Investigation and Research) v. D & B Companies Canada Ltd. (1995), 64 C.P.R. (3d) 216 at 222-23 (Comp. Trib.) ["Nielsen"]; Commissioner's Brief of Authorities, Tab 4.

64. Similarly, in its *Enforcement Guidelines on the Abuse of Dominance Provisions*, the Competition Bureau emphasized that the "objective of the abuse of dominance provisions

is to create a market framework within which all firms have the opportunity to either succeed or fail on the basis of their ability to compete”.

Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) (July 2001) (“*Abuse Guidelines*”) at 6; Commissioner’s Brief of Authorities, Tab 5.

Canada (Director of Investigation and Research) v. Tele-Direct Inc. (1997), 73 C.P.R. (3d) 1 (Comp. Trib.) at 179 [“*Tele-direct*”]; Commissioner’s Brief of Authorities, Tab 6.

65. In effect, section 79 establishes certain limitations on the conduct of dominant firms. Only dominant firms can be sanctioned under section 79 for engaging in a practice of anti-competitive acts. This is because dominant firms, by definition, are not effectively constrained by competitive market forces and therefore have the ability to engage in conduct that maintains, entrenches or enhances their market power, to the detriment of potential or existing competition.
66. Indeed, many of the acts described in section 78 of the *Act* could be pro-competitive when engaged in by a non-dominant firm. For example, the acquisition by a non-dominant supplier of a customer may enhance the ability of the non-dominant supplier to compete in downstream markets. However, these same acts, when engaged in by a dominant firm, may substantially lessen or prevent competition.
67. The requirement to restrain anti-competitive conduct by dominant firms which would otherwise be legitimate when engaged in by non-dominant firms has been endorsed in antitrust jurisprudence. For example, in *Lepage’s Inc. v. 3M*, the U.S. Court of Appeals found that 3M breached section 2 of the *Sherman Act* by offering bundled rebates conditioned on the purchase of diverse product lines, notwithstanding the absence of any legal impediments that would prevent customers from foregoing rebates and switching to competing suppliers. In that case, the U.S. Court of Appeals distinguished between conduct that is permissible for dominant and non-dominant firms:

... 3M is a monopolist; a monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on the monopolist's behaviour. See, e.g. *Aspen Skiing*, 472 U.S. at 601-04.

Lepage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) ("*LePage's*") (USSC cert. Denied, 2004 U.S. LEXIS 4768 (U.S., June 30, 2004)) at 151-152; Commissioner's Brief of Authorities, Tab 7.

68. The Court went on to consider the anti-competitive effects of bundled rebates and induced exclusivity by a dominant firm, stating:

The principle anticompetitive effect of bundled rebates as offered by 3M is that when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and therefore cannot make a comparable offer.

...

The foreclosure of markets through exclusive dealing contracts is of concern under the antitrust laws. As one of the leading treatises states:

unilaterally imposed quantity discounts can foreclose the opportunities of rivals when a dealer can obtain its best discount only by dealing exclusively with the dominant firm. For example, discounts might be accumulated over lengthy periods of time, such as a calendar year, when no obvious economies result. ...

LePage's at 155-158; Commissioner's Brief of Authorities, Tab 7.

69. More recently, in a case that dealt with a prohibition by the dominant supplier of artificial teeth in the U.S. which prevented dealers from stocking new products of competing suppliers, the U.S. Court of Appeals (Third Circuit) found a breach of section 2 of the *Sherman Act*, notwithstanding the absence of long-term contracts precluding dealers from switching suppliers. The Court of Appeals stated as follows:

A leading treatise explains:

A set of strategically planned exclusive dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its products or rely at least temporarily on inferior or more expensive outlets. Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth. Herbert Hovenkamp, *Antitrust Law*, 1802c, at 64 (2d ed. 2002)

By ensuring that the key dealers offer Dentsply teeth either as the only or dominant choice, Dealer Criterion 6 has a significant effect in preserving Dentsply's monopoly. It helps keep sales of competing teeth below the critical level necessary for any rival to pose a real competitive threat to Dentsply's market share. As such, Dealer Criterion 6 is a solid pillar of harm to competition. [emphasis added]

U.S.A. v. Dentsply International, Inc. 399 F.3d 181 (3d. Cir. 2005) (“*Denstply*”) at 191; Commissioner's Brief of Authorities, Tab 8.

See also A.D. Melamed (Principal Deputy Assistant A.G., Antitrust Div., U.S. Dept. of Justice), *American Bar Association* (April 2, 1998); Commissioner's Brief of Authorities, Tab 9.

70. Section 78 of the *Act* sets out a non-exhaustive list of acts that qualify as “anti-competitive acts” for the purposes of section 79. The common element to the acts enumerated in section 78 is an anti-competitive purpose; specifically, subsection 78(1) expressly references conduct that is undertaken, “for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market”, “with the object of preventing a competitor's entry into, or expansion in, a market”, and “for the purpose of disciplining or eliminating a competitor”.

Competition Act, section 78

71. The Tribunal has found in two prior cases that exclusive dealing arrangements engaged in by a dominant supplier constitute abuse of dominance within the meaning of section 79 of the *Act*; namely, *Canada (Director of Investigation and Research) v. NutraSweet Co.* and *Canada (Director of Investigation and Research) v. D & B Companies Canada*. In both of these decisions, the Tribunal found that exclusive dealing arrangements, engaged in by a dominant supplier, constituted a practice of anti-competitive acts that had the

effect of preventing or lessening competition substantially in relevant markets. For example, in *NutraSweet*, the Tribunal found as follows regarding the anti-competitive effect of exclusivity clauses in contracts between the dominant firm and customers:

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

Canada (Director of Investigation and Research) v. NutraSweet Co. (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) at 48 and 49 [*"NutraSweet"*]; Commissioner's Brief of Authorities, Tab 10.

Nielsen at 277; Commissioner's Brief of Authorities, Tab 4.

72. As discussed in greater detail below, the SDP is even more egregious than the clauses considered in previous cases by the Tribunal, because it involves both exclusivity and full-line forcing.

B. Test for an Anti-Competitive Act

73. In the present matter, the Federal Court of Appeal confirmed that an "anti-competitive act" is an act that has as its purpose an intended negative effect on a competitor that is predatory, exclusionary or disciplinary.

FCA Decision, para. 66; Commissioner's Brief of Authorities, Tab 3.

74. Proof of the overall character of the impugned conduct can be established directly through evidence of subjective intent, or indirectly through the reasonably foreseeable consequences of the conduct. Moreover, "a respondent cannot disavow responsibility for the reasonably foreseeable consequences of its actions".

FCA Decision, paras. 72 and 73; Commissioner's Brief of Authorities, Tab 3.

75. It is also sufficient, for the purposes of paragraph 79(1)(b), to demonstrate that the subjective intent of the conduct and/or the actual and foreseeable consequences of the conduct were a negative effect on a competitor or competitors that is predatory, exclusionary or disciplinary. It is not necessary to establish for the purpose of paragraph 79(1)(b) that the conduct had the effect of substantially lessening or preventing competition in a relevant market.

FCA Decision, para. 69; Commissioner's Brief of Authorities, Tab 3.

76. A business justification is an additional factor in the determination of whether the impugned conduct was undertaken with the requisite anti-competitive intent as it can provide an alternative pro-competitive explanation for the conduct at issue. The Federal Court of Appeal stated that a business justification may overcome deemed intention based on the actual or foreseeable effects of the impugned conduct if it is demonstrated that the anti-competitive effects are not the over-riding purpose of the act:

In appropriate circumstances, proof of a valid business justification can overcome the deemed intention arising from the actual and foreseeable effects of the conduct, by showing that ...[the] anti-competitive effects [of the conduct] are not in fact the over-riding purpose of the act in question.

FCA Decision, para. 73; Commissioner's Brief of Authorities, Tab 3.

77. The Federal Court of Appeal further stated that in order to overcome the deemed intention of the impugned conduct, the business justification must be more than mere self-interest. Rather it must:

... be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the act.

FCA Decision, para. 73; Commissioner's Brief of Authorities, Tab 3.

78. In addition, the pro-competitive effects of the conduct must counterbalance or neutralize the anti-competitive effects or subjective intent so as to establish that the conduct was undertaken for a valid business purpose.

FCA Decision, paras. 73 and 88; Commissioner's Brief of Authorities, Tab 3.

79. As discussed below, the evidence clearly demonstrates that Bibby's subjective intent in implementing the SDP was to create a negative exclusionary effect on competitors. Namely, the SDP was implemented to prevent or impede competitors from entering and effectively competing in the Relevant Markets and to eliminate existing competitors or significantly limit any attempt at expansion. This conclusion is corroborated by evidence of the actual negative effect of the SDP on entry and expansion by competitors. These effects were not only reasonably foreseeable, but Bibby did in fact foresee them.
80. Moreover, in all cases, the nature of the effect of the SDP on competitors has been exclusionary; the SDP has impeded entry and expansion by competitors and in some cases, forced competitors to exit from Relevant Markets. Finally, there is no evidence of a pro-competitive rationale or business justification for the SDP.

C. Bibby's Subjective Intent Underlying the SDP

81. Bibby's internal documents and the oral testimony of witnesses clearly establish that the SDP was implemented for the purpose of excluding competitors from the Relevant Markets. Specifically, this evidence demonstrates that the SDP was intended to have a negative effect on competitors by [CONFIDENTIAL], "blocked an avenue" for entry, and "tied up" distributors "so that they would have to buy from Bibby" and "would not be able to consider alternatives".

JB-9-435-10; JB-9-435-11.

Testimony of M. Corriveau, Vol. 10, pp. 2020 and 2034.

Testimony of G. Nagel, Vol. 2, p. 416.

Testimony of R. Demeny, Vol. 5, p. 959.

82. Indeed, this is one of those rare cases, referred to in *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems*, where there are a number of “smoking gun” documents. The Tribunal in *Laidlaw* defined a “smoking gun” document as a “document which makes it clear that the purpose of the conduct in question was to exclude competitors from the market”.

Canada (Director of Investigation & Research) v. Laidlaw Waste Systems, (1992), 40 C.P.R. (3d) 289 (Comp. Trib.) at 342 [“*Laidlaw*”].

83. For example, in an internal document prepared for the Board of Directors of its parent company, Ransom Industries LP, Bibby explicitly described the SDP as a [CONFIDENTIAL] and emphasized that [CONFIDENTIAL]. [CONFIDENTIAL]

[CONFIDENTIAL]

JB-9-435-11.

84. In addition, in an internal memo dated October 22, 1997 comparing Bibby and Mission prices for MJ couplings, Bibby states that it “could move the market in B.C., Alberta and Quebec” in response to Mission’s prices for MJ couplings that were 5-10% lower than Bibby’s prices, “or leave it and allow our loyalty program to address the problem.” The memo also suggests implementing price reductions in Montreal and Calgary “until December 15, 1997”, after which, the SDP would “address the problem”. The “problem” was competition from Mission; the SDP would address the “problem” be impeding entry and expansion by Mission:

Following is a comparison between Mission and ourselves. The Mission couplings have shown up in B.C., Alberta and Quebec:

<u>Bibby</u>		<u>Mission</u>	
Invoice	5% stocking net	invoice	5% H.O. net
2" 1.96	1.86	2" 1.87	1.77
3" 2.16	2.06	3" 1.96	1.86
4" 2.43	2.28	4" 2.19	2.08

Difference is 5% on 2" and 10% on 3" and 4". Couplings make up 20%-25% of the total dollar sales of pipe, fittings and couplings.

We can move the market in B.C., Alberta and Quebec 10% to make a statement or leave it and allow our loyalty program to address the problem. Thus far, three customers in four locations have bought Mission. ... We may want to make a statement in Montreal and Calgary only and move the coupling price until December 15, 1997 at all wholesalers. ... [emphasis added]

JB-4-115-1

Testimony of C. Vansell, Vol. 13, pp. 2628-2629.

85. Messrs. Nagel and Demeny, both former employees of Bibby, also provided testimony regarding Bibby's purpose in implementing the SDP, as expressed to them by Mr. Nolan, President of Ransom Industries LP. The purpose of the SDP described by Mr. Nolan was to "block" distribution avenues for competitors and "virtually tie [distributors] up so that they would have to buy from Bibby" and so that distributors "would not be able to consider alternative ... sources for their cast iron pipe and fittings and couplings". This would permit Bibby to "control" the market and allow Bibby "to drive up prices in the absence of a competitor". In this respect, Mr. Nagel testified regarding his dealings with Mr. Leonard, a senior officer at Bibby:

Mr. Nagel: Well, through meetings that I had with him with the joint sales calls at places like Emco, for instance, where statements were made that certain people would not be allowed to sell product into the Canadian marketplace.

Mr. Campion: What was his attitude through words and actions to competition, so far as you recollect it?

Mr. Nagel: That Chinese or foreign competition or domestic competition was not going to be accepted.

Mr. Champion: By whom?

Mr. Nagel: By Bibby Ste-Croix, by outlining the program.

Mr. Champion: How was he going to deal with it?

Mr. Nagel: Well, there was a – the number one was what was always in place, which is the loyalty program, which you know told the wholesalers or outlined for the wholesalers to buy 100 per cent and they were subsequently rewarded for doing that. That blocked an avenue that way.

Testimony of G. Nagel, Vol. 2, pp. 415-416.

86. Mr. Demeny, a former employee at Bibby and now President of Vandem also provided testimony regarding the intent of Bibby senior management in implementing the SDP:

Mr. Demeny: Mr. Nolan felt that we should – that I should bring forth the program to the wholesalers which would virtually tie them up so that they would have to buy from Bibby, that they would not be able to consider alternatives or alternative sources for their cast iron pipe and fittings and couplings.

...

Mr. Demeny: ... So he [Mr. Nolan] felt that we had to cut ties for the moment with the contractors and bring the program into place with the wholesalers so that it could be implemented and enforced and bring the market into some sort of order, order being one that they could – that Bibby could control.

Mr. Champion: Control the market?

Mr. Demeny: Yes.

Mr. Champion: What else did Mr. Nolan say before you responded?

Mr. Demeny: Well, this allowed us – this would allow us the opportunity to continue to drive prices up in the absence of a competitor.

Testimony of R. Demeny, Vol. 5, pp. 959, 960 and 961.

87. Mr. Demeny also testified that Bibby's strategy was to eliminate competitors so that it would be free to increase prices. Mr. Demeny was told by Bibby, his employer at the time, to assess competition in the marketplace and eliminate Cremco by dramatically

reducing the price in the trading area of Cremco and increasing the price in other regions where Cremco was not operating. Mr. Demeny testified that Bibby's view was that it had "bought" the Canadian market and that there was no room for competitors such as Cremco.

Testimony of R. Demeny, Vol. 5, pp. 943, 949-952, and 976-977.

88. Mr. Corriveau, a senior executive at Wolseley, provided testimony regarding his conversation with Mr. Leonard, the Vice President and General Manager of Bibby. During this conversation, Mr. Leonard stated that Bibby wanted to "eliminate importers" from Canadian cast iron DWV product markets. The SDP was the primary means chosen by Bibby to achieve this objective.

Mr. Campion: Before we actually deal with that document, sir, in the November 10, 1997 meeting was there a discussion about importers between you and Mr. Leonard?

Mr. Corriveau: Yes, there was.

Mr. Campion: And what – did Mr. Leonard say anything about importers?

Mr. Corriveau: Yes, he said he wanted to eliminate importers.

Testimony of M. Corriveau, Vol. 10, p. 2020.

89. Bibby's own internal documents and the testimony from witnesses demonstrate that Bibby implemented the SDP with an exclusionary purpose. Specifically, [CONFIDENTIAL], to "tie up" distributors so that they would not consider alternative suppliers and to prevent existing competitors from expanding in each of the Relevant Markets.
90. The evidence of Bibby's subjective intent unequivocally establishes that the SDP is an act that has as its purpose an intended negative exclusionary effect on competitors and therefore, is an anti-competitive act within the meaning of paragraph 79(1)(b) of the *Act*.

91. In light of the evidence regarding the subjective intent of Bibby, it is not necessary to consider the reasonably foreseeable consequences of the SDP. Nevertheless, as described in the section below, the evidence clearly demonstrates that the reasonably foreseeable consequences of the SDP were negative exclusionary effects on competitors of Bibby.

D. Actual Negative Exclusionary Effect of the SDP on Competitors

92. The SDP has had a negative exclusionary effect on competitors in the Relevant Markets. It did so by virtually eliminating switching by distributors to competing suppliers of cast iron DWV products and impeding entry and expansion by competitors in the Relevant Markets.
93. Virtually all of the distributors of cast iron DWV products purchase all cast iron DWV products exclusively from Bibby as a result of the SDP. All of the major distributors (with the exception of Wolseley in Western Canada for a limited time) have dealt exclusively with Bibby throughout the course of the SDP.

Testimony of T. Leonard, Vol. 20, p. 4172; and, Vol. 21, pp.4256-4258.

Expert Report of Dr. Ross, Appendix 3, p. 71.

94. As explained in greater detail in section “V” below discussing substantial lessening or prevention of competition under paragraph 79(1)(c), the SDP effectively impedes distributors from switching to competing suppliers for particular cast iron DWV products or from fulfilling a portion of their total demand with competing products.
95. Because of the SDP, competing suppliers of cast iron DWV products are not able to enter the market in a gradual manner and customers are unwilling to switch to a supplier that cannot supply a full product line, even if that supplier’s individual product is better priced, as they would lose the rebates and discounts they receive from Bibby on the remaining products.

96. In order to avoid these costs, distributors must purchase all of their cast iron DWV products from Bibby or purchase all of these products from rival firms. In other words, the SDP creates an “all-or-nothing” choice for distributors. The effect of this is that the SDP eliminates competition in the market, that is, competition for a small portion of a distributor’s demand for all three cast iron DWV products. The only type of competition that remains is competition for the market, that is, competition for each distributor’s total cast iron DWV requirements.
97. In the absence of the SDP, distributors would source their purchases from more than one supplier. The requirement to purchase all three cast iron products from either Bibby or a group of competitors that can supply a full line of products is driven solely by the SDP.
98. By requiring rivals to compete for all of the demands of a distributor, the SDP significantly raises the costs of rivals seeking to enter or expand in the Relevant Markets. Ultimately, the decreased competitive effectiveness of competitors caused by the SDP, maintains and enhances Bibby’s ability to charge supra-competitive prices for all of its cast iron DWV products.
99. Every competitor of Bibby that testified in the initial proceeding stated that the SDP had a negative exclusionary effect on its cast iron DWV products business. In each case, the nature of the negative effect has been exclusionary; namely, the SDP forced competitors to exit or impeded entry and expansion by these competitors in the Relevant Markets.
100. Competing suppliers of cast iron DWV products testified that the SDP foreclosed the Relevant Markets by preventing distributors from switching to these competitors. This occurred notwithstanding the express preference of distributors to have an alternate choice for suppliers of cast iron DWV products. **[CONFIDENTIAL]**

[CONFIDENTIAL]

101. Specific examples of the exclusionary effect of the SDP on competitors to Bibby are discussed below.

1. Mission

102. Mission is an established U.S. manufacturer of MJ couplings. Its sales of MJ couplings in Canada, which grew from \$1 million in 1996 to \$1.3 million in 1997, dropped to \$800,000 in 1998 following introduction of the SDP and to virtually nothing in 1999 to 2001 – within just one year after the introduction of the SDP. In 2002, Mission made some sales to Wolseley when it went off of the SDP in British Columbia, but was otherwise unable to expand beyond this market into the remaining markets for MJ couplings in Canada.

Testimony of C. Vansell, Vol. 13, pp. 2589-2590 and 2600-2602.

103. Mr. Vansell, a Vice President with Mission, testified that the SDP was the reason that Mission was not able to compete in Canada. Specifically, Mr. Vansell testified that Mission's ability to sell MJ couplings to distributors was "basically shut down" because of the SDP. Customers that purchased MJ couplings from Mission prior to implementation of the SDP refused to purchase product from Mission following the introduction of the SDP, notwithstanding that Mission's prices were 15% to 30% lower than Bibby's prices.

Testimony of C. Vansell, Vol. 13, pp. 2631-2633.

JB-22-1095; JB-24-1176

104. The SDP was the reason cited by Mission's customers for their refusal to continue to purchase from Mission. In particular, customers advised Mission that as a result of the SDP, they would not accept MJ couplings even if Mission supplied such products at no cost. As noted above, MJ couplings are only one of three cast iron DWV products purchased by distributors. By purchasing MJ couplings from a supplier other than Bibby,

a distributor will not qualify for any payments or discounts under the SDP program. Mr. Vansell confirmed this point in his testimony:

Mr. Champion: ... Now, what caused the decline from your high in '97 in the next subsequent years ... to ... Wolseley?

Mr. Vansell: We believe the Bibby Loyalty Rebate Program was detrimental to us.

Mr. Champion: Why?

Mr. Vansell: Because it ties together the sale of pipe, fittings and couplings and forces that distributor to buy all three product lines directly from Bibby and, that being said, our market opportunities with wholesalers were basically shut down.

Some customers that we had done business with told us that they can no longer do business with us because of that program and that they were not willing to buck that trend – that they weren't willing to go against Bibby and they said:

“You could give me your couplings for free and I wouldn't take them. You can't give them to me because of the competition's program to us”

and they're not willing to risk the rebates.

Testimony of C. Vansell, Vol. 13, pp. 2602-03.

105. Because the SDP required distributors to purchase MJ couplings exclusively from Bibby to qualify for discounts on cast iron DWV pipe and fittings, Bibby effectively foreclosed competition for MJ couplings. As Mr. Vansell noted in his testimony, the SDP allowed Bibby to significantly increase the price charged for MJ couplings without a risk of losing sales to competitors, such as Mission. Mr. Vansell's evidence and Bibby's own evidence is that the SDP addressed the “problem” of competition from Mission because it “locked up all their distributors” so that “[t]here was no longer any need to worry about price”.
106. During his testimony, Mr. Vansell discussed the internal Bibby memorandum dated October 22, 1997, which describes Bibby's use of the SDP:

Mr. Vansell: ... I can answer the second half of the question which is:

“ ... leave it and allow our loyalty program to address the problem.”

That is certainly what they did in 1998. The loyalty program addressed the problem.

Mr. Champion: And how did it address the problem, sir?

Mr. Vansell: There was no longer any need to worry about price because they locked up all their distributors with the loyalty program, which from that day forward Bibby was able to sell in the market MJ couplings from 15 to 30 per cent more expensive than Mission.

Because, as mentioned earlier, none of the wholesalers would – would – you know, take a chance on Mission. They were tied-in with the loyalty program on the pipe fittings and couplings.

So the loyalty program definitely addressed that problem in 1998 for – for – for Bibby.

Testimony of C. Vansell, Vol. 13, pp. 2631-2633 and 2643-44.

JB-4-1176

107. Through the SDP, Bibby effectively excluded Mission from all Canadian markets for the supply of MJ couplings. The negative effect of the SDP on Mission is evidenced by the fact that as noted above, Mission’s sales of MJ couplings in Canada declined from the level of \$1.3 million in 1997 to virtually nothing in the period between 1999 and 2001. By August 2002, Mission’s market shares in all relevant geographic markets were [CONFIDENTIAL].

Expert Report of Dr. Ross, Appendix 3, pp. 69-70.

2. Gates

108. Gates Canada (“Gates”) attempted to sell MJ couplings in Canada that were manufactured by Ideal in the United States. Ideal, like Mission, is an established U.S. manufacturer of MJ couplings.

Reasons, para. 253; Commissioner's Brief of Authorities, Tab 1.

Testimony of M. O'Brien, Vol. 11, pp. 2198-2199.

109. Gates was also wholly unsuccessful at expanding sales of MJ couplings in Canadian markets because of the SDP. Mr. O'Brien of Gates testified that despite marketing Ideal MJ couplings to plumbing distributors across the country, Gates was unable to develop any significant sales of MJ couplings in Canadian markets:

Ms. Lawrence: And what was the response of these target customers?

Mr. O'Brien: "Lukewarm" would be my description to you.

We had a number of presentations to some of the key plumbing distributors across the county and most of those presentations resulted in absolutely no orders, no business but, over and above that, resulted 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. Lawrence: Did he elaborate further as to why that was?

Mr. O'Brien: He did not.

Ms. Lawrence: Was any mention of Bibby Ste-Croix made during the course of this conversation?

Mr. O'Brien: Only -- my recollection, only that they were currently sourcing from Bibby Ste-Croix.

...

Mr. O'Brien: Again, my sales people would have met with every key plumbing distributor in the country because we were selling Tridon clamps and insert fittings to most of those distributors across the country.

An example – or some examples would be the Mutual Group, Canaplus Group, Western Supplies, Emco, people like that.

Ms. Lawrence: And ultimately, how many orders did you get from these groups or companies?

Mr. O'Brien: No orders at all from any of those major plumbing distributors.

Testimony of M. O'Brien, Vol. 11, pp. 2208-2211.

110. Gates conducted a survey of potential customers which revealed that it was necessary “to be in all three parts of the business”, namely: cast iron DWV pipe and fittings and MJ couplings, in order to sell any one of these products in Canada. As Mr. O'Brien testified, this was because customers could not “break away” any segment of their demand for these products from Bibby due to the SDP:

Mr. O'Brien: ... after I came back from the meeting in the United States and the Ideal people had requested that we launch this program [selling Ideal MJ couplings in Canada], I felt it necessary to talk to somebody in Canada who had access to the three components of the – of the sale, and that's cast iron soil pipe, fittings and mechanical joint couplings.

Ms. Lawrence: Why did you feel that was important?

Mr. O'Brien: It was – from the – I had mentioned earlier about surveying customers?

Ms. Lawrence: Uh-hum.

Mr. 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. Lawrence: Do you know why that was? Did your survey tell you that?

Mr. O'Brien: I don't know exactly why. I had my own ideas why.

Ms. Lawrence: Can you share those ideas, please, for the Tribunal?

Mr. O'Brien: I believe that the customers we'd approach had been led to believe that if they broke away any segment of their business, that monies owing to them would be withheld.

So, therefore, our business was not very attractive to them.

Ms. Lawrence: Now, “broke away” from who?

Mr. O'Brien: Bibby Ste-Croix.

Testimony of M. O'Brien, Vol. 11, pp. 2214-2215.

111. As a result of the SDP, Gates was unable to effectively compete in the Relevant Markets for MJ Couplings. In a total market that Gates valued at between \$4 to \$5.5 million, Gates sold less than \$250,000 worth of product in 2001 and 2002. Further, such sales were solely to small importers and directly to contractors. As of August 2002, Gates exited the Canadian market for the sale of MJ couplings in Canada.

Testimony of M. O'Brien, Vol. 11, pp. 2212-2213 and 2218.

3. Fernco

112. Fernco Connectors Ltd. manufactures couplings in Canada but does not manufacture MJ couplings. It imports for sale in Canada MJ couplings that are manufactured by Ideal.

Reasons, paras. 250 and 253; Commissioner's Brief of Authorities, Tab 1.

113. Despite its established brand name, sales force and customer service, Fernco has also been unsuccessful at increasing sales of Ideal MJ couplings in Canada because of the SDP. Mr. Peter Kirkpatrick, the National Sales Manager of Fernco, testified on this issue as follows:

Mr. Law: ... Now, having this, as you called it, "brand name", excuse me, and Fernco sales force and its customer services features, have any of these assisted Fernco in selling its MJ couplings to large distributors who buy from Bibby?

Mr. Kirkpatrick: No.

Mr. Law: And why not?

Mr. Kirkpatrick: Primarily because of the Bibby Loyalty Program.

Testimony of P. Kirkpatrick, Vol. 11, p. 2170.

114. In the absence of the SDP, Fernco, with its “brand name” and sales force, would likely have attracted substantial sales of its MJ couplings to distributors who were otherwise captive to the SDP.

4. BMI

115. In 1997, BMI operated as an importer of cast iron DWV fittings, which it sold to customers in Ontario and Quebec. In addition, BMI was considering expanding its operations into cast iron DWV pipe. In 1997, prior to the introduction of the SDP, BMI’s business was growing with margins in the order of 30-50%. BMI’s prices for cast iron DWV fittings were as much as 67% lower than Bibby’s at that time.

JB-1-20; JB-4-123; JB-4-124; JB-4-158; JB-4-163; JB-4-166; JB-4-169;
JB-6-245

Testimony of M. Bouthillette, Vol. 12, pp. 2414-2522 and 2525.

Testimony of R. Byrne, Vol. 4, pp. 745-746.

Testimony of J. Keon, Vol. 14, p. 2800.

116. After Bibby implemented the SDP in 1998, BMI was told by its customers that they would no longer be able to buy cast iron DWV products from BMI. As a result of these discussions with customers, BMI determined that because of the SDP, it would not be possible to convince customers to purchase cast iron DWV products from BMI.

Me. Lawrence: Pouvez-vous décrire les démarches qui ont été prises vers la fin de '98 pour convaincre vos grossistes de rester chez vous?

Mr. Bouthillette: Michel a communiqué avec la moyenne des gens et avec les gens à qui on discutait et les contrats qu'on avait.

On réalisait qu'il y avait pas de possibilité de convaincre les gens de rester chez nous. C'était – c'était réglé là. On nous disait carrément: L'an prochain, on peut vous encourager dans telle commodité, telle commodité, mais on doit absolument rayer ce genre de commodités de notre entente parce qu'on ne pourra pas vous encourager et on aime autant vous le dire de tout de suite pour pas que vous ayez à partir dans une situation difficile.

Testimony of Bouthillette, Vol. 12, pp. 2527-2529.

117. Accordingly, instead of expanding sales of fittings and entering the cast iron DWV pipe market, BMI sold its inventory of fittings to Bibby and permanently exited the Ontario and Quebec market for cast iron DWV fittings. It did so solely because of the SDP. Bibby subsequently sold the newly purchased BMI inventory to BMI's former customers at Bibby's substantially higher prices. As M. Bouthillette explained:

Me Lawrence: Par la suite, d'après ce que vous connaissez, qu'est-ce que Bibby Ste-Croix a fait avec les raccords qu'ils ont achetés chez vous?

M. Bouthillette: Nos clients nous ont dit, sans qu'on puisse le vérifier physiquement, que la moyenne des raccords qu'on avait vendus chez Ste-Croix avait été surtout expédiée à des clients qui faisaient déjà affaires avec BMI dans le passé.

Me Lawrence: Et leur réaction à cette situation était quoi.

M. Bouthillette: C'est sûr que le client lui a la réaction qui se dit: "Pourquoi je paye le nouveau prix quand je reçois le même produit?", mais je pense que c'était de bonne guerre.

Testimony of Bouthillette, Vol. 12, pp. 2545.

118. In the absence of the SDP, BMI would have continued serving the Quebec and Ontario markets with cast iron DWV fittings and may have also expanded their operations to include the supply of cast iron DWV pipe products. The SDP clearly had an exclusionary effect on BMI.

5. Vandem

119. Vandem was founded in 1997 by two former employees of Bibby, Messrs. Vanderwater and Demeny. Vandem produced pipe and fittings at Crowe Foundry in Ontario and imports MJ couplings for sale in Canada from manufacturing operations in the United States.

120. Messrs. Vanderwater, Demeny and Promoli (of Crowe Foundry) testified that anticipated support for Vandem's product dissipated after the introduction of the SDP.

Testimony of J. Vanderwater, Vol.7, pp. 1456-1457.

Testimony of R. Demeny, Vol. 5, pp. 991-993, 1010-1014 and 1031-1032.

Testimony M. Promoli, Vol. 3, pp. 561.

121. [CONFIDENTIAL]

122. [CONFIDENTIAL]

123. It was clear that the SDP precluded Vandem from obtaining sufficient sales volume or market penetration so as to become an effective competitor. Mr. Vanderwater testified as follows regarding the exclusionary effects of the SDP:

Mr. Vanderwater: Well, we have had a difficult time in the Canadian market, that's for sure.

Mr. Champion: All right. You are going to have to explain that, sir, and I would like you to start from the beginning and go to the end and do it slowly. Why have you had a difficult time in the Canadian market?

Mr. Vanderwater: Well, when we first entered into the market and into the business, we found that there was a number of wholesalers that were unable to support us in regards to buying pipe fittings and couplings from us due to the fact that they were under certain programs, referring to a Loyalty Program that had been instituted by my competitor.

Mr. Champion: Namely?

Mr. Vanderwater: Bibby Ste-Croix. Basically, the three items were tied together and a lot of the larger accounts told me that it wasn't possible to buy from us since they had to buy 100 per cent of all three items from my competitor.

Mr. Champion: Name the name, sir.

Mr. Vanderwater: My competitor at that time was Bibby Ste-Croix and it still is.

Testimony of J. Vanderwater, Vol. 7, pp. 1449-1451.

124. Mr. Vanderwater further testified on how the SDP foreclosed competition and the exclusionary effects of the SDP as follows:

Mr. Champion: Has the McWane/Bibby Ste-Croix Loyalty Program impacted you, Vandem, in Canada?

Mr. Vanderwater: For sure.

Mr. Champion: How?

Mr. Vanderwater: Well, it's basically closed doors with many of the wholesalers, where they are not allowed to buy. They have to buy 100 per cent from Bibby Ste-Croix in order to participate in the rebate structures.

Testimony of J. Vanderwater, Vol. 7, p. 1454.

125. Finally, Mr. Demeny also testified that the exclusivity and full-line forcing effects of the SDP precluded Vandem from making sufficient sales to distributors. On the issue of why distributors would not purchase from Vandem, Mr. Demeny testified as follows:

Mr. Demeny: We were told that they could not support us because the majority of them were now on a Loyalty Program from Bibby and that, if they were to purchase any portion of either pipe fittings or couplings from an outside source, they would lose their status as a Stocking Distributor which meant that they would lose their ability to purchase all of those products from Bibby at a competitive price in the market.

Testimony of R. Demeny, Vol. 5, p. 1011.

126. The exclusionary and full-line forcing effects of the SDP negatively affected Vandem's sales and market share.

6. Sierra

127. Sierra Distributors is an importer of cast iron DWV products for sale in British Columbia. The business is owned and operated by Mr. Kelm along with two other employees.

Reasons, paras. 20 and 154; Commissioner's Brief of Authorities, Tab 1.

Testimony of D. Kelm , Vol. 11, p. 2247.

128. Sierra initially tried to sell cast iron DWV products directly to distributors, but was unable to find any distributors willing to buy its products because of the SDP. Mr. Kelm testified that although plumbing distributors liked the prices offered by Sierra which were “quite a bit cheaper” than Bibby’s prices, they refused to buy any product from Sierra because they were “tied in” to the SDP.

Mr. Champion: All right.

And you went to plumbing wholesalers in British Columbia; is that right?

Mr. Kelm: Yes.

Mr. Champion: And what was your reception?

Mr. Kelm: Short.

Basically, I was told by all of them that I approached that they could not buy from me, even though my pricing was quite a bit cheaper than they were paying for.

And they like the pricing but they said they were tied in on the Bibby Loyalty Rebate Program and if they bought one item from me they would lose their rebate.

So at this point in time, none of them were interested in dealing with me.

Testimony of D. Kelm, Vol. 11, p. 2245.

129. Because distributors were locked into the SDP and would not buy from Sierra, it was forced to operate as a niche player confining its operations to direct sales to contractors. This is a more costly and limited business than selling to distributors.

Mr. Champion: And what did you find out about it [the SDP]?

Mr. Kelm: I’m sorry, when or what?

Mr. Champion: What did you find out about it?

Mr. Kelm: Well, it didn't take me long to realize that I wasn't going to be doing it selling product the easy way, going through plumbing wholesalers, that if I was going to have to move my product, I'd have to deal directly with the end user which was the plumbing contractor.

Mr. Champion: And is that an easy thing to do to deal with plumbing contractors?

Mr. Kelm: No.

Mr. Champion: Why not?

Mr. Kelm: You are dealing with a lot more accounts for one thing.

Mr. Champion: Yes.

Mr. Kelm: Probably a lot more smaller deliveries and just trying to get their worth.

Instead of dealing with four to five customers, you are now trying to deal with, you know, several hundred out there.

Mr. Champion: And you are restricted to acting locally?

Mr. Kelm: Yes.

Testimony of D. Kelm, Vol. 11, pp. 2246-2247.

130. Sierra's business has remained sufficiently small such that Bibby has been prepared to allow Sierra to remain in the market, provided that Sierra's business does not expand to become a competitive threat to Bibby. Mr. Kelm, the principal of Sierra, testified as follows regarding his conversation with Mr. Leonard and Mr. Albert, two senior executives of Bibby:

Mr. Champion: Would you explain what and why you have concluded that there would be retaliation including any conversations that you had in full detail with Mr. Leonard and Mr. Albert, or both of them?

Mr. Kelm: I had a meeting with both of them, Mr. Leonard and Mr. Arnold (sic), in the Bibby office in Surrey and various things were discussed at that time.

Mr. Campion: You should just try and develop them as best you can, sir. Nice and easily and go slowly.

Mr. Kelm: Sure.

If anything, I probably made the suggestion to them that I wouldn't mind being – my business part of it being bought out. That's probably how the meeting started in the first place.

During the course of the meeting, it was explained to me that – and the exact phrase was that – and I remember this:

“Don't let success be your demise”.

I asked for a clarification about that and, basically, it was put to me that, basically, we'll let you become successful but do not become successful to the point where you have a number of employees, you have a number of containers in your yard and, basically, you'll think you're rolling along making money because you'll reach a point where we'll drop the prices 30 per cent.

It was made quite clear to me that I'd be allowed to be in the marketplace and being successful, but I'd have to know my place in the marketplace.

Testimony of D. Kelm, Vol. 11, pp. 2263-2264.

131. The SDP had a negative exclusionary effect on competitors. In the absence of the SDP, Sierra would have likely been able to sell cast iron DWV products to distributors and become a more effective competitor in British Columbia.

7. New Centurion

132. New Centurion is an importer of cast iron DWV pipe and fittings for sale in British Columbia. New Centurion has been importing cast iron DWV pipe since 1982.

Reasons, para. 20; Commissioner's Brief of Authorities, Tab 1.

Testimony of J. Lim, Vol. 12, pp. 2406-2407.

133. Wolseley purchased cast iron DWV pipe and fittings from New Centurion until June 1999. In early 1999, Bibby discovered imported cast iron DWV products at Wolseley locations in Alberta. In order to be able to retain its annual rebate under the SDP for Alberta, Wolseley agreed with Bibby to become a stocking distributor under the SDP in British Columbia.

Testimony of M. Corriveau, Vol. 10, pp. 1997-2009.

134. When Wolseley became a stocking distributor in 1999, New Centurion lost 75% of its business. In effect, New Centurion was excluded from the B.C. markets for pipe and fittings. Mr. Lim testified that the SDP had a significant negative effect on New Centurion's business:

Mr. Lim: ... They told us that they can no longer buy our pipe because of the rebate program they have with Bibby and that it would affect their program if they continued to buy our cast iron products.

...

Mr. Rennie: And what impact did this decision have on your business operations?

Mr. Lim: Well, it was huge. It was 75 percent of our business was with Wolseley, so when that ended very abruptly it had a big impact.

Testimony of J. Lim, Vol. 12, pp. 2411-12.

135. In the initial decision, the Tribunal recognized that the SDP had a negative impact on New Centurion:

In the West, the SDP had a clear impact on New Centurion, an importing company that sourced its products in China. Mr. Lim testified for New Centurion that Westburne, its main client, ceased ordering from New Centurion because it had agreed to be part of the SDP program throughout the Western region (B.C., Alberta, the Prairies). In 2002, however, Wolseley (which had acquired Westburne) renewed its supply contract with New Centurion. [emphasis added]

Reasons, para. 247; Commissioner's Brief of Authorities, Tab 1.

136. In the absence of the SDP, New Centurion would not have lost the Wolseley account for pipe and fittings in B.C. Moreover, there is no apparent reason, other than the SDP, that New Centurion was unable to expand its pipe and fittings sales in the B.C. markets.
137. In total, seven competitors to Bibby testified at the initial hearing before the Tribunal: Mission, Gates, Fernco, BMI, Vandem, Sierra and New Centurion. Each of these competing suppliers of cast iron DWV products testified that the SDP had a negative exclusionary effect on their business. The SDP was expressly identified as the primary or sole reason that these competitors were unable to effectively compete in Canada. Some competitors, such as BMI and Gates, exited the Relevant Markets as a result of the exclusionary effects of the SDP.
138. The SDP clearly had a negative exclusionary effect on competition. Given Bibby's overwhelming share of the Relevant Markets and the obvious full-line forcing and exclusionary effects of the SDP, it was reasonably foreseeable that the SDP would result in such a negative exclusionary effect on competitors.

E. Business Justification

139. It is clear from the discussion above that the SDP was not undertaken for a valid business purpose. Rather, as described above, the evidence demonstrates that Bibby's subjective intent in implementing the SDP and the reasonably foreseeable consequences of the SDP were negative exclusionary effects on competitors.
140. By alleging that there is a valid business justification underlying the SDP, Bibby is attempting to disavow responsibility for the reasonably foreseeable exclusionary effects of its acts. Further, an allegation that a valid business justification exists cannot be sustained in the face of the explicit evidence indicating that Bibby's subjective intent in implementing the SDP was to exclude competitors and foreclose competition in the Relevant Markets.

141. As noted above, a business justification is an additional factor in the determination of whether the impugned conduct was undertaken with the requisite anti-competitive intent as it can provide an alternative pro-competitive explanation for the conduct in issue.

FCA Decision, para. 73; Commissioner's Brief of Authorities, Tab 3.

142. The Federal Court of Appeal stated in this case that a valid business justification must be more than mere self-interest. The Court of Appeal further stated that a respondent cannot disavow the reasonably foreseeable consequences of its actions.

FCA Decision, paras. 73, 86 and 91; Commissioner's Brief of Authorities, Tab 3.

143. In his evidence, 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. However, there is no evidence of any pro-competitive or efficiency rationale for the SDP that is attributable to Bibby. Rather, it is clear from the evidence that the SDP was implemented by Bibby for an anti-competitive purpose.

Expert Report of Dr. Ross at paras. 86, 110-111; Ross Reply Report, paras. 6-9.

144. In the initial hearing before the Tribunal, Bibby argued that there are two business justifications for its conduct. The first is that the SDP creates equitable opportunities for small and medium-sized distributors. This alleged justification is not supported by the evidence described above. In any event, the Tribunal correctly rejected this argument on the basis that it did not provide a justification for the SDP that was attributable to Bibby, but relates to alleged benefits of the SDP for other industry participants:

One of the Respondent's main arguments in defence of the SDP is that it in fact encourages competition, by creating a level playing field for small and large distributors. ...

In support of its argument, the Respondent cites the Act, and especially section 1.1, which in describing the purpose of the Act includes the statement that the purpose is in part "...to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy ...". 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. [emphasis added]

Reasons, paras. 208 and 209; Commissioner's Brief of Authorities, Tab 1.

145. The Federal Court of Appeal confirmed that any valid business justification must be attributable to the respondent. On this issue, the Court of Appeal stated, in part:

... A valid business justification must provide a credible efficiency or pro-competitive explanation, unrelated to an anti-competitive purpose, for why the dominant firm engaged in the conduct alleged to be anti-competitive. The business justification must therefore be attributable to the respondent, for it is the latter's allegedly anti-competitive conduct which is sought to be explained. [emphasis added]

FCA Decision, para. 90; Commissioner's Brief of Authorities, Tab 3.

146. The second business justification alleged by Bibby is that the SDP allows Bibby to sell more products which, in turn, permits Bibby to maintain a full-line of cast iron DWV products. Again, the evidence does not support that this justification is the underlying purpose of the SDP.

Reasons, paras. 212; Commissioner's Brief of Authorities, Tab 1.

147. Bibby has provided no evidence that there are economies of scale in the production of cast iron DWV products, or that so-called "exotic" items required to supply a full-line of cast iron DWV products cannot be sold profitably at competitive prices. Indeed, there is no evidence that Bibby's prices for these items did not exceed Bibby's costs of

production. To the contrary, the evidence that does exist shows that Bibby earned hefty profit margins on its cast iron DWV products.

148. In any event, the Federal Court of Appeal rejected Bibby's second business justification holding that improved consumer welfare alone, is not sufficient to establish a valid business justification as it does not establish an efficiency-related explanation of the conduct attributable to a respondent. In the absence of such a link, the Court found that "self-interest remains the only justification for the SDP which is attributable to the respondent". A self-interested desire to sell more product at higher prices is not a valid business justification.

FCA Decision, paras. 84-91; Commissioner's Brief of Authorities, Tab 3.

Nielsen at 261; Commissioner's Brief of Authorities, Tab 4.

149. Accordingly, there is no evidence of a valid business justification for the SDP. Rather, the evidence clearly demonstrates that the purpose and reasonably foreseeable effects of the SDP were negative exclusionary effects on competitors to Bibby.

F. Conclusion on Anti-Competitive Act

150. The evidence of Bibby's subjective intent and the actual and foreseeable consequences of the SDP therefore unequivocally establishes that the SDP is an act that has as its purpose an intended negative exclusionary effect on competitors. It follows that the SDP is an anti-competitive act within the meaning of paragraph 79(1)(b) of the *Act*.

V. **SUBSTANTIAL LESSENING OR PREVENTION OF COMPETITION (PARAGRAPH 79(1)(C))**

A. **Test for Substantial Lessening or Prevention of Competition**

151. To satisfy paragraph 79(1)(c) of the *Act*, the Commissioner must establish, on the balance of probabilities, that the practice of anti-competitive acts has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

Competition Act, paragraph 79(1)(c)

152. The test established by paragraph 79(1)(c) of the *Act* is a relative or comparative analysis. As the Federal Court of Appeal stated, “it is not the absolute level of competition in a market which must be substantial, but rather the preventing or lessening of competition that results from the impugned practice must be substantial”. The Federal Court of Appeal further described the appropriate test under paragraph 79(1)(c) as follows:

The test mandated by paragraph 79(1)(c) is not whether the relevant markets would or did not attain a certain level of competitiveness in the absence of the impugned practice, or whether the level of competitiveness observed in the presence of the impugned practice is “high enough” or otherwise acceptable. These are absolute evaluations, while the statutory language of “effect of preventing or lessening ... substantially” clearly demands a relative and comparative assessment.

FCA Decision, paras. 36 and 37; Commissioner’s Brief of Authorities, Tab 3.

153. The Federal Court of Appeal also stated that, in assessing whether an anti-competitive act has, is or is likely to result in a substantial lessening or prevention of competition, the Tribunal must:

... compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is “substantial”. This comparison must be done with reference to actual effects in the past and present, as well as likely future effects. Only

through such a comparative approach can the Tribunal determine, as the statutory provision requires, whether the impugned practice “has had, is having or is likely to have the effect of preventing or lessening competitive substantially”.

FCA Decision, para. 37; Commissioner’s Brief of Authorities, Tab 3.

154. The Federal Court of Appeal described the appropriate test as a “but for” analysis; namely, “would the relevant markets – in the past, present or future – be substantially more competitive but for the impugned practice of anti-competitive acts?”

FCA Decision, para. 38; Commissioner’s Brief of Authorities, Tab 3.

B. Methodology for the Section 79(1)(c) Test

155. The Federal Court of Appeal did not prescribe a specific methodology for applying the test established by paragraph 79(1)(c), on the basis that the appropriate methodology was an issue for the Tribunal to determine in each case. However, the Court of Appeal did state that any methodology adopted by the Tribunal “must be sufficiently flexible to allow a full assessment of all factors relevant in a particular fact situation at issue, and must be reflective of the different objectives of the *Act*”, including the objectives set out in section 1.1 of the *Act*:

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.

FCA Decision, paras. 46 and 47; Commissioner’s Brief of Authorities, Tab 3.

156. Many of the objectives listed in section 1.1 of the *Act* are particularly relevant to this case, including maintaining and encouraging competition in Canada, promoting

competitive prices and product choices for consumers, recognizing the role of foreign competition in Canada and ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy.

157. The Federal Court of Appeal also stated that the “but for” test was not new and that “although the Competition Tribunal had not used the ‘but for’ wording in its previous cases”, “the substance of this legal test has been articulated and applied by the Tribunal in prior decisions”. As such, earlier decisions of the Tribunal provide significant guidance on the appropriate methodology to be applied in the present matter. In fact, prior decisions of the Tribunal have employed a number of different methodologies in examining the issue of whether a practice of anti-competitive acts is likely to substantially lessen or prevent competition.

FCA Decision, paras. 42 and 43; Commissioner’s Brief of Authorities, Tab 3.

158. For example, in determining whether the anti-competitive conduct in *Nielsen* resulted in a substantial lessening or prevention of competition, the Tribunal examined whether the impugned conduct was likely to “preserve or add to Nielsen’s market power”. To determine this issue, the Tribunal examined the conditions of entry into the relevant market in the presence and absence of the anti-competitive conduct:

The final element that must be proven for the tribunal to make an order under s. 79 of the Act is that the practice of anti-competitive acts described in the preceding pages has had, is having or is likely to have the effect of preventing or lessening competition substantially in the market for scanner-based market tracking services. We have found that Nielsen intended by its actions to exclude potential competitors, specifically IRI. We must now consider the degree of success it achieved or is likely to achieve, if any. The central issue to be decided in determining whether the Director has satisfied this third element is the effect of the exclusives with retailers and the long-term contracts with customers on the conditions of entry into the market. Or, to paraphrase the words of the Tribunal in *NutraSweet* (supra, at p. 47), in essence, the question to be decided is whether the anti-competitive acts engaged in by Nielsen preserve or add to Nielsen’s market power.

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

Nielsen at 266; Commissioner's Brief of Authorities, Tab 4.

159. In *Laidlaw*, the Tribunal considered whether certain acquisition and contractual practices were likely to lessen competition substantially. Although evidence relating to the state of competition prior to the introduction of the anti-competitive conduct may be relevant to the determination, the Tribunal found that such evidence was not necessary to establish a substantial lessening of competition.

Laidlaw at 344-45; Commissioner's Brief of Authorities, Tab 11.

160. The Tribunal's decision in *Laidlaw* also clarifies that evidence required to establish a substantial lessening of competition is not confined to "statistical information concerning the state of competition in the markets", but includes qualitative evidence, such as the effect of anti-competitive conduct on the conditions of entry and expansion for competitors. In particular, the Tribunal examined the state of competition in the relevant market and how the anti-competitive acts altered conditions of entry and expansion for potential competitors of the dominant firm:

There is no reason to doubt that based solely on the economics of lift-on-board service there should be highly competitive markets. The evidence shows, however, that the effect of the contracts is to make entry sufficiently difficult so that it no longer effectively polices the market. The evidence demonstrates that a new firm can acquire a certain number of customers but that it cannot establish a customer base with sufficient rapidity to make entry attractive. In the markets in question there is no doubt that acquisition practices of *Laidlaw* buttressed by the creation of artificial barriers to entry through the contracts have resulted in a substantial lessening of competition.

Laidlaw at 347-48; Commissioner's Brief of Authorities, Tab 11.

161. In *Tele-Direct*, the Tribunal considered the degree of market power held by the dominant firm in examining whether anti-competitive conduct resulted in a substantial lessening of

competition. The Tribunal recognized that where the firm engaging in the anti-competitive conduct has a high degree of market power, “smaller impacts on competition resulting from the conduct will meet the test for being substantial”.

Tele-Direct at 247-48; Commissioner’s Brief of Authorities, Tab 6.

162. The Tribunal in *NutraSweet* stated that the factors to be considered in a determination of whether anti-competitive acts are likely to substantially lessen competition are similar to those examined in determining whether the allegedly dominant firm has market power:

The factors to be considered in deciding whether competition has been or is likely to be substantially lessened are similar to those that were discussed in concluding that NSC has market power. In essence the question to be decided is whether the anti-competitive acts engaged in by NSC preserve or add to NSC’s market power.

NutraSweet at 47-48; Commissioner’s Brief of Authorities, Tab 10.

163. In *NutraSweet*, the Tribunal considered whether the anti-competitive acts preserved or added to the market power of the dominant firm and in particular, “the degree to which these anti-competitive acts add to the entry barriers into the Canadian market”. In determining this issue, the Tribunal considered, among other things, whether the anti-competitive conduct “impedes toe-hold entry into the market and inhibits the expansion of other firms in the market” and the proportion of the relevant Canadian market that was “tied up” by the dominant firm.

NutraSweet at 84 and 85; Commissioner’s Brief of Authorities, Tab 10.

164. Consistent with prior decisions of the Tribunal, the Commissioner submits that there are a number of different methodologies which the Tribunal should employ to determine whether the SDP has or is likely to result in a substantial lessening or prevention of competition, not all of which will be appropriate in respect of each relevant market; namely, the Tribunal should consider the following:

- (1) the degree of market power held by the Respondent during the currency of the SDP;
- (2) the effect of the SDP on customer switching between competing suppliers;
- (3) the effect of the SDP on the conditions of entry and expansion in the Relevant Markets;
- (4) the proportion of the Relevant Markets that is foreclosed to competitors or “tied up” as a result of the SDP;
- (5) the competitiveness of the Relevant Markets prior to and after the introduction of the SDP in 1998; and
- (6) the effect of the SDP on prices in the Relevant Markets.

165. As described in greater detail below, the evidence in relation to the factors listed above, individually and collectively, establishes that the SDP has, is or is likely to have the effect of a substantial lessening or prevention of competition in each of the Relevant Markets.

166. In accordance with the Framework Document dated October 25, 2007 issued by the Tribunal, the sections below discuss the evidence on the record and factual findings of the Tribunal relevant to each of the factors listed above. This is followed by a discussion of the evidence and factual findings which demonstrate that the SDP has had, is having, and is likely to have the effect of substantially lessening or preventing competition in each of the Relevant Markets.

C. Application of the Relevant Factors to the SDP

1. Degree of market power held by Bibby during the currency of the SDP

167. Where a respondent has significant market power, even a small effect on competition qualifies as substantial. For example, in *Tele-Direct*, the Tribunal considered whether certain discriminatory acts by the dominant firm directed at consultants were likely to substantially lessen or prevent competition:

It is difficult to arrive at a numerical determination of the effect on consultants of the practice of discriminatory acts we have found to be anti-competitive because the acts are intermingled with other forces that hamper consultants. What we know, however, is that the consultants' ability to compete is limited and fragile as compared to Tele-Direct's virtual monopoly through its control of publishing. Consultants, by the nature of their services, have little ongoing business and must convince advertisers to pay for their services when these advertisers could place advertising in directories without incurring such expense, i.e., the market for their services is necessarily a "thin" one.

Where a firm with a high degree of market power is found to have engaged in anticompetitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being "substantial" than where the market situation was less uncompetitive to begin with. In these circumstances, particularly Tele-Direct's overwhelming market power, even a small impact on the volume of consultants' business, of which there is some evidence, by the anti-competitive acts must be considered substantial. Of course, in the future, in the absence of any order by the Tribunal, there would be no constraint on Tele-Direct intensifying discriminatory acts against consultants and exacerbating an already substantial effect on them. We have no difficulty concluding that Tele-Direct's proven practice of anti-competitive acts has had, is having or is likely to have the effect of lessening competition substantially in the market. [emphasis added]

Tele-Direct at 247-48; Commissioner's Brief of Authorities, Tab 6.

168. As in *Tele-Direct*, the Tribunal has determined that Bibby holds an "overwhelming" share of the Relevant Markets of between 80 to 90%. Further, on appeal, the Federal

Court of Appeal affirmed the Tribunal's decision that Bibby exercised market power in each of the Relevant Markets.

Reasons, para. 140; Commissioner's Brief of Authorities, Tab 1.

Expert Report of Dr. Ross, Appendix 3, pp. 69 and 70.

Commissioner of Competition v. Canada Pipe Company Ltd./Tuyauteries Canada Ltée, 2006 FCA 236 (23 June 2006) at paras. 51 and 53; Commissioner's Brief of Authorities, Tab 3.

169. The Tribunal found that Bibby was able to set its prices for cast iron DWV pipe and fittings well above its marginal costs, resulting in "hefty" profit margins for these products and that "[f]or all three products, Bibby's ability to lower prices indicates supra-competitive pricing".

Reasons, paras. 137 and 161; Commissioner's Brief of Authorities, Tab 1.

170. In accordance with the principles applied by the Tribunal in *Tele-Direct*, given Bibby's high degree of market power and "overwhelming" market share, even smaller impacts on the business of competitors resulting from a practice of anti-competitive acts will meet the test of being "substantial" for the purpose of paragraph 79(1)(c) of the *Act*.
171. Although the Commissioner is only required to establish that the SDP had "a small impact" on the business of competitors to Bibby, it is evident from the discussion below that the SDP had a very substantial impact on competition in each of the Relevant Markets.

2. The effect of the SDP on customer switching between competing suppliers

172. The SDP significantly decreases the likelihood that customers would switch between competing suppliers of cast iron DWV products. It does so by making it prohibitively costly for a distributor to switch a portion of its demand to competing suppliers. To offset these "mixing costs", competing suppliers would have to sell their products for a price

significantly lower than that of Bibby's (in some cases, as shown below, a price that is less than zero). The SDP therefore impedes distributors from switching to competing suppliers for particular cast iron DWV products or from fulfilling a portion of their total demand with competing products.

173. While "mixing costs" are not incurred if a distributor switches all of its demand for cast iron DWV products, switching by a distributor of all of its demand is unlikely for two reasons; namely, competing suppliers cannot offer a full line of all three products and do not have an established reputation in the marketplace. This makes switching by a distributor of all of its demand very risky.
174. For example, because of the SDP, competing suppliers of cast iron DWV products are not able to enter the market in a gradual manner and customers are unwilling to switch to a supplier that cannot supply a full product line, even if that supplier's individual product is better priced, as they would lose the rebates and discounts they receive from Bibby on the remaining products. But for the SDP, competing suppliers would be able to enter the Relevant Markets in a gradual manner, and build their reputation and product line over a period of time.
175. In the absence of the SDP, distributors would prefer to source their purchases from more than one supplier. The requirement to purchase all three cast iron products from either Bibby or a group of competitors that can supply a full line of products is driven solely by the SDP.
176. Distributors of cast iron DWV products consistently expressed a preference for alternative suppliers of cast iron DWV products. [CONFIDENTIAL] Mr. Tester, of Nuroc, found the program "disturbing" as it removed his ability to choose suppliers. Mr. Byrne, of Crane, stated that he did not like the SDP because it eliminated his ability to use cheaper sources of supply. [CONFIDENTIAL]

Testimony of P. Lachance, Vol. 9, pp.1784 and 1787.

Testimony of G. Tester, Vol. 9, pp. 1865, 1866 and 1880.

Testimony of R. Byrne, Vol. 4, p. 779.

[CONFIDENTIAL]

177. Whereas distributors would otherwise elect to try new suppliers or use single product suppliers to fulfill a portion of their total demand for cast iron DWV products, the SDP effectively forecloses this possibility. Rather, as a result of the SDP, distributors must elect between Bibby and rival firms for their entire demand of cast iron DWV products. As Dr. Ross stated:

As a result, entry by an alternative supplier trying to build itself gradually would be very costly – it would have to compensate its customers for all those lost rebates. Even promising compensation for lost rebates may not be enough for customers who worry about upsetting a key supplier such as Bibby. After all, if the entrant fails, they will be back with Bibby for all their needs.

Expert Report of Dr. Ross at para. 104.

178. Indeed, as a result of the SDP, an entrant or existing competitor seeking to compete with Bibby in respect of one of the three cast iron DWV products would have to supply this product at no cost to distributors in order to compensate the distributor for the rebates and discounts lost on other cast iron DWV products. As Dr. Ross explained in his report:

The effect of the 100% loyalty requirement is to make the price of the last unit of purchase from Bibby very low (in an important sense, actually very negative) and the price of moving that last purchase to a competitor very high, as the buyer surrenders a significant rebate on all of its previous purchases. This makes it very difficult for a distributor to justify giving only part of its business to someone else – the incentive is either give all your business to Bibby or none.

Expert Report of Dr. Ross at para. 100.

179. Dr. Ross' evidence in this regard is corroborated by the testimony of competitors and distributors in this proceeding. For example, Mr. Vansell of Mission testified that

customers stated that Mission could give away MJ couplings for free and customers would still not accept these products as a result of the SDP.

Testimony of C. Vansell, Vol. 13, p. 2603.

Testimony of M. O'Brien, Vol. 11, pp. 2208 – 2209.

180. As a result of the SDP, distributors must purchase all of their cast iron DWV products from Bibby or purchase all of these products from rival firms. In other words, the SDP creates an “all-or-nothing” choice for distributors. The effect of this is that the SDP eliminates competition in the market, that is, competition for a small portion of a distributor’s demand for all three cast iron DWV products. The only type of competition that remains is competition for the market, that is, competition for each distributor’s total cast iron DWV requirements. As discussed in *Nielsen*:

Dr. Winter describes what occurred in 1986 with respect to the retailers’ scanner data as “competition for the market”, in contrast to competition *within* the market, the market in question being the supply of a national scanner-based market tracking service. The winner becomes the sole supplier of the service for the duration of the exclusives. As noted by Dr. Winter, the most likely effect of this type of competition for exclusives is higher prices to retailers for their data which would be incorporated into the price charged for the market tracking service based on the data. ... [emphasis in original]

Nielsen at 268; Commissioner’s Brief of Authorities, Tab 4.

Expert Report of Dr. Ross at paras. 75-77 and 105-107.

Testimony of T. Ross, Vol. 17, pp. 3442-3444.

181. The Tribunal has already concluded that Bibby’s status as a well-known and well-established manufacturer gave Bibby an “incumbent advantage” such that a “new entrant would probably have difficulty competing with the quality and quantity of products Bibby is able to offer”.

Reasons, para. 144; Commissioner’s Brief of Authorities, Tab 1.

182. The SDP enhances the “incumbent advantage” held by Bibby by requiring distributors to entrust all of their requirements for cast iron DWV pipe or fittings or MJ couplings to a new entrant, as opposed to allowing a new entrant to enter gradually and gain significantly larger portions of a distributor’s business.

Reasons, para. 144; Commissioner’s Brief of Authorities, Tab 1.

Expert Report of Dr. Ross at para. 105.

NutraSweet at 41; Commissioner’s Brief of Authorities, Tab 10.

Nielsen at 283; Commissioner’s Brief of Authorities, Tab 4.

183. Distributors testified that they would not buy a portion of their product requirements from suppliers other than Bibby as this would jeopardize the rebates payable under the SDP. **[CONFIDENTIAL]**

Testimony of P. Lachance, Vol. 9, pp.1784 and 1787.

Testimony of G. Tester, Vol. 9, pp. 1866 and 1880.

Testimony of R. Byrne, Vol. 4, p. 779.

[CONFIDENTIAL]

184. Further, the SDP enhances the barriers to entry into the Relevant Markets created by Bibby’s ability to offer a full line of cast iron DWV products. Distributors are not able to switch all of their business from Bibby to a rival firm as Bibby is the only supplier of cast iron DWV products that carries a full product line and as such, is the only supplier that can satisfy all of a distributor’s requirements.

Expert Report of Dr. Ross at paras. 75-77 and pp. 30-31.

Reasons, paras. 210-211; Commissioner’s Brief of Authorities, Tab 1.

185. The Tribunal has previously held that exclusivity requirements which create an all-or-nothing choice for purchasers undermine the ability of new entrants to obtain the reputation or credibility necessary to compete. For example, in *NutraSweet*, the Tribunal

found that exclusive dealing arrangements negatively affected the ability of competitors to establish credibility or reputation in a market:

... Even upon the expiry of those contracts, the customer/supplier relationship entrenched by the contract terms (discussed further below) dictated that a new supplier would have to be able to meet all of a customer's requirements or at least those for a product line; the customers did not have the option of placing small orders with suppliers as a way of trying them and contributing to their survival. Thus, to the extent that HSC may have had a credibility problem at the end of 1988, it cannot be separated from the effect of NSC's practices.

NutraSweet at 47-48; Commissioner's Brief of Authorities, Tab 10.

186. In *NutraSweet*, the Tribunal also found that by impeding "toe-hold entry" by competing suppliers, exclusive dealing arrangements limit entry and expansion due to the significant differences in the circumstances facing an incumbent supplier and a new entrant:

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

It is true that these contracts are generally only one year in duration. Theoretically, therefore, the bulk of the market is only tied up for a year at the most and then a new supplier would have the same chance as NSC of bidding for and winning the supply contracts that have expired. There are, however, significant differences in such circumstances in the position of a new supplier and that of NSC.

NutraSweet at 48-49; Commissioner's Brief of Authorities, Tab 10.

187. The Tribunal has already found in this case that Bibby has an "incumbent advantage" as an established, credible and national supplier of a full-line of all three cast iron DWV products. The SDP preserves and adds to these advantages, by forcing competitors to compete solely for each distributor's entire cast iron DWV product requirements and

precluding competitors from building the reputation necessary by supplying increasingly larger amounts of product to distributors.

Reasons, para. 144; Commissioner's Brief of Authorities, Tab 1.

188. In the absence of the SDP, the evidence is that distributors would have sourced a portion of the cast iron DWV requirements from competing suppliers offering competitive prices. As noted above, distributors consistently expressed their preference for sourcing cast iron DWV products from alternate suppliers.

Expert Report of Dr. Ross at paras. 99-100.

Testimony of T. Leonard, Vol. 19, p. 4256.

Testimony of R. Byrne, Vol. 4, pp. 779-780.

Testimony of P. Lachance, Vol. 9, pp. 1784-1787.

Testimony of C. Vansell, Vol. 13, pp. 2602-2603 and 2644.

Testimony of T. Ross, Vol. 17, pp. 3449-3451 and 3476.

JB-1-16

189. The evidence also shows that competitors did offer cast iron DWV products at prices substantially below Bibby. Mission and BMI for example, offered MJ couplings and fittings respectively at prices up to 25% below Bibby's prices. Given the significant difference between Bibby's prices and competing prices, in the absence of the SDP, switching would likely be substantial.

Testimony of C. Vansell, Vol. 13, pp. 2603 and 2644.

Testimony of M. Bouthillette, Vol. 12, pp. 2414-2522 and 2525.

Testimony of R. Byrne, Vol. 4, pp. 745-746.

Testimony of J. Keon, Vol. 14, p. 2800.

JB-1-20; JB-4-123; JB-4-124; JB-4-158; JB-4-163; JB-4-166; JB-4-169;
JB-6-245.

190. This evidence further demonstrates that in the absence of the SDP, distributors would have switched a portion of their demand for cast iron DWV products to competing suppliers.

Expert Report of Dr. Ross at paras. 99 and 100.

Testimony of T. Leonard, Vol. 19, p. 4256.

Testimony of R. Byrne, Vol. 4, pp. 779 and 780.

Testimony of P. Lachance, Vol. 9, pp. 1784-1787.

Testimony of C. Vansell, Vol. 13, pp. 2602, 2603 and 2644.

Testimony of T. Ross, Vol. 17, pp. 3449-3451 and 3476.

JB-1-16

191. The significance of the impact of the SDP on switching is further evidenced by the impact of the SDP on Mission's sales. Prior to the SDP, Mission's sales in Canada were expanding, as customers switched their purchases of MJ couplings between Bibby and Mission in at least the British Columbia, Alberta, and Quebec markets. Following implementation of the SDP, switching to Mission products declined substantially such that Mission's sales fell from \$1.3 million to virtually nothing. Moreover, there is no apparent reason, other than the SDP, that would explain the decline in switching between Mission and Bibby.

Testimony of C. Vansell, Vol. 13, pp. 2600-2602.

192. Similarly, prior to the SDP, purchasers of cast iron DWV fittings in the Quebec market switched between BMI and Bibby and indicated an interest in purchasing pipe from BMI. As a result of the SDP, BMI's former customers would not switch any of their purchases of these products from Bibby to BMI, forcing BMI to exit the markets for fittings in Ontario and Quebec and to forego its planned expansion into pipe.

Testimony of R. Byrne, Vol. 4, pp. 745-746.

Testimony of M. Bouthillette, Vol. 12, pp. 2528-2531.

193. This evidence clearly demonstrates that in the absence of the SDP, switching by distributors between suppliers of cast iron DWV products would have been, would be, and would likely be, substantially more frequent.

3. The effect of the SDP on conditions of entry and expansion in the Relevant Markets

194. 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.
195. In order for a competing supplier to sell cast iron DWV products to a distributor during a rebate period, that is a period at the end of which a distributor is expecting to receive a rebate payment from Bibby, the supplier will have to compensate the distributor for any rebates it would have otherwise earned from Bibby. Thus the competing supplier would have to sell its product for a price significantly lower than that of Bibby's (in some cases, as shown below, a price that is less than zero), raising the supplier's costs, and thus decreasing the competitive effectiveness of an otherwise efficient competitor.
196. Even at the end of a rebate period a supplier's costs of entry are increased by the SDP, because the SDP forces that supplier to supply a full line of cast iron DWV products. This too significantly raises the costs of rivals seeking to enter or expand in the Relevant Markets. Ultimately, the decreased competitive effectiveness of competitors caused by the SDP maintains and enhances Bibby's ability to charge supra-competitive prices for all of its cast iron DWV products.
197. The SDP preserves and adds to the barriers to entry created by Bibby's "incumbent advantage" as an established, credible and national supplier of a full-line of all three cast iron DWV products. By enhancing these barriers and impeding entry, the SDP has preserved and enhanced Bibby's market power in the Relevant Markets.

NutraSweet at 46-47; Commissioner's Brief of Authorities, Tab 10.

Nielsen at 266-277; Commissioner's Brief of Authorities, Tab 4.

198. As discussed above, the SDP impedes “toe-hold” entry by competitors in the Relevant Markets, making it very difficult for entrants to establish the reputation necessary to compete with Bibby. Entrants are required to compete for a distributor’s entire cast iron DWV product requirements and are precluded from building the necessary reputation through gradual growth in the Relevant Markets.

NutraSweet at 48 and 49; Commissioner's Brief of Authorities, Tab 10.

Expert Report of Dr. Ross at paras. 104-108.

199. Also, because of the SDP, any competitor or group of competitors that seeks to enter or expand in any of the six geographic markets in Canada for cast iron DWV products must be able to supply all of the cast iron needs of distributors in that geographic market. This means that entry or expansion in a single cast iron DWV product market is contingent on effective entry and expansion in both of the other cast iron DWV product markets, solely because of the SDP.

200. To give a concrete example, because of the SDP, Mission cannot expand its sales of MJ couplings to distributors in any of the six geographic markets, regardless of the quality or price competitiveness of its couplings, or its efficiency relative to Bibby, unless distributors in these markets consider that there are other competing suppliers of cast iron DWV pipe and fittings capable of supplying all of their cast iron DWV pipe and fittings needs. However, there are no suppliers, other than Bibby, or combination of suppliers in Canada that offer a full line of all three cast iron DWV products.

Testimony of C. Vansell, Vol. 13, pp. 2600-2603 and 2631-2633.

Reasons, paras. 144 and 266; Commissioner's Brief of Authorities, Tab 1.

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201. Despite the fact that suppliers of MJ couplings offer a well-established product and complete line of MJ couplings at lower prices than Bibby, they have not been able to achieve any significant sales in the relevant markets in Canada for MJ couplings.

Testimony of C. Vansell, Vol. 13, pp. 2600-2603.

Testimony of P. Kirkpatrick, Vol. 11, p. 2167-2170.

Testimony of M. O'Brien, Vol. 11, pp. 2212-2218.

202. Mission's sales in Canada, which grew almost 30% in 1997, declined precipitously following the introduction of the SDP in 1998 and remained almost insignificant, despite prices that were significantly lower than Bibby's. The only significant sales that Mission has made following introduction of the SDP occurred in B.C., when Wolseley went off the SDP. The sole explanation for Mission's inability to expand its sales is the SDP; there are no other apparent impediments to entry or expansion by Mission in the Relevant Markets.

Testimony of C. Vansell, Vol. 13, pp. 2600-2603.

203. Similarly, despite a significant marketing effort and an established product, Gates was unable to sell more than \$250,000 worth of MJ couplings in Canada in 2001 and 2002. In comparison, Bibby had \$8 million of annual sales of MJ couplings in the period 1998 to 2000 and \$10.5 million in annual sales of this product in 2001. As a result, Gates stopped selling MJ couplings in Canada in 2002.

Testimony of M. O'Brien, Vol. 11, pp. 2198-2199.

204. Fernco has likewise been unable to capitalize on its distribution network, reputation and established product to gain a significant share of any MJ coupling market in Canada.

Testimony of P. Kirkpatrick, Vol. 11, p. 2166-2168.

Expert Report of Dr. Ross, Appendix 3, p. 2.

205. The sole reason for the virtual elimination of Mission's sales of MJ couplings in Canada and the inability of Gates and Fernco to expand sales of this product, is the SDP.

206. But for the SDP, MJ coupling manufacturers and importers would have been able to effectively compete with Bibby on the merits. However, the effect of the SDP on entry and expansion is not limited to the markets for MJ couplings. As described above, BMI exited the Quebec market for cast iron fittings and abandoned its planned expansion in the market for cast iron pipe as a result of the SDP.

Testimony of M. Bouthillette, Vol. 12, pp. 2528-2531.

207. Similarly, as described above, Sierra was unable to sell cast iron DWV products to plumbing distributors in British Columbia and was forced, by the SDP, to operate as a niche player, selling directly to contractors.

Testimony of D. Kelm, Vol. 11, p. 2246-2247.

208. New Centurion was limited to selling pipe and fittings to Wolseley in British Columbia and its business collapsed when Wolseley went back on the SDP in 2002.

Testimony of M. Corriveau, Vol. 10, pp. 1997-2009.

Testimony of J. Lim, Vol. 12, pp. 2411-2412.

209. Finally, Vandem's ability to expand in the Ontario and Quebec markets for cast iron DWV products, and enter into other Relevant Markets was largely foreclosed as a result of the SDP.

Testimony of J. Vanderwater, Vol. 7, pp. 1449-1451.

210. The evidence therefore clearly establishes that, but for the SDP, entry and expansion in the Relevant Markets would have been substantially more significant.

4. Proportion of the Relevant Markets Foreclosed as a Result of the SDP

211. Where the anti-competitive conduct of a dominant firm forecloses a substantial portion of a relevant market from competition, it is likely that the conduct has, is and is likely to result in substantial lessening of competition. For example, the Tribunal in *NutraSweet* found that because exclusive use and supply contracts covered “over 90 percent of the Canadian market for aspartame”, there was “little room for entry by a new supplier”.

NutraSweet at 48-49; Commissioner’s Brief of Authorities, Tab 10.

Tele-Direct at 247-248; Commissioner’s Brief of Authorities, Tab 6.

212. The Tribunal has previously determined that Bibby controls 80% to 90% of the market for cast iron DWV products and that [CONFIDENTIAL] of Bibby’s sales of cast iron DWV products are sold under the SDP. [CONFIDENTIAL]

Reasons, paras. 140; Commissioner’s Brief of Authorities, Tab 1.

Expert Report of Dr. Ross, Appendix 3, p. 71.

213. As the proportion of the Relevant Markets that is foreclosed to competitors by the SDP is substantial, the SDP has, is and is likely to have the effect of substantially lessening or preventing competition in each of these the Relevant Markets.

5. The competitiveness of Relevant Markets prior to and after introduction of the SDP

214. A comparison of the state of competition in certain of the Relevant Markets both prior to and following the introduction of the SDP in 1998 demonstrates that there was greater competition in the Relevant Markets prior to the implementation of the SDP.
215. Prior to the SDP, BMI was able to compete effectively in the Quebec and Ontario markets for cast iron DWV fittings and was considering expanding into the market for cast-iron pipe.

Testimony of M. Bouthillette, Vol. 12, pp. 2514-2533.

216. At that time, BMI's prices were up to 67% below Bibby's prices for cast iron DWV fittings.

Testimony of R. Byrne, Vol. 4, pp. 745-746.

Testimony of J. Keon, Vol. 14, p. 2800.

JB-1-20; JB-4-123; JB-4-124; JB-4-158; JB-4-163; JB-4-166; JB-4-169;
JB-6-245.

217. Due to the implementation of the SDP by Bibby, BMI was not able to sell cast iron DWV pipe and fittings in the Ontario and Quebec markets:

On réalisait qu'il y avait pas de possibilité de convaincre les gens de rester chez nous. C'était – c'était réglé là. On nous disait carrément: L'an prochain, on peut vous encourager dans telle commodité, telle commodité, mais on doit absolument rayer ce genre de commodités de notre entente parce qu'on ne pourra pas vous encourager et on aime autant vous le dire de tout de suite pour pas que vous ayez à partir dans une situation difficile.

Testimony of M. Bouthillette, Vol. 12, p. 2529.

218. As a result of the SDP, BMI sold its inventory to Bibby and exited the Ontario and Quebec fittings markets, thereby depriving consumers in these markets of the benefit of competition. As a result of the removal of an effective competitor, Bibby was able to sell the inventory that it had purchased from BMI at prices that were higher than BMI's price for the same products.

Testimony of M. Bouthillette, Vol. 12, pp. 2531-2541.

Testimony of G. Tester, Vol. 9, p. 1868.

Testimony of G. Iaboni, Vol. 22, pp. 4499 - 4501

219. Indeed, the Tribunal has found that prices for cast iron DWV products rose in Quebec and the Maritimes following implementation of the SDP by Bibby.

Reasons, para. 97; Commissioner's Brief of Authorities, Tab 1.

220. The evidence also shows that prior to implementation of the SDP, Mission's prices for MJ couplings were 5% to 10% lower than the prices charged by Bibby, placing pressure on Bibby to reduce its prices for MJ couplings in the Relevant Markets and, in particular, in British Columbia, Alberta and Quebec. Following implementation and because of the SDP, it was no longer necessary for Bibby to reduce its prices in response to competition from Mission in these or other markets. As Mr. Vansell testified:

Mr. Vansell: There was no longer any need to worry about price because they locked up all their distributors with the loyalty program, which from that day forward Bibby was able to sell in the market MJ couplings from 15 to 30 per cent more expensive than Mission.

Testimony of C. Vansell, Vol. 13, pp. 2600-2603 and 2631.

JB-24-1176; JB-24-1177; JB-24-1181.

221. Therefore, the evidence demonstrates that there was greater competition in certain of the Relevant Markets prior to the introduction of SDP.

6. Effect of the SDP on prices in the Relevant Markets

222. The Tribunal found that for all three relevant products, "Bibby's ability to lower prices indicates supra-competitive pricing". As described below, 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.

Reasons, para. 161; Commissioner's Brief of Authorities, Tab 1.

223. Bibby's own evidence is that the SDP shields Bibby from the requirement to respond to competitive prices, thereby permitting Bibby to maintain supra-competitive prices for its cast iron DWV products in the Relevant Markets. As noted above, in an internal memo dated October 22, 1997 comparing Bibby and Mission prices for MJ couplings, Bibby

states that it “could move the market in B.C., Alberta and Quebec” in response to Mission prices for MJ couplings that were 5-10% lower than Bibby’s prices, “or leave it and allow our loyalty program to address the problem”.

Reasons, para. 161; Commissioner’s Brief of Authorities, Tab 1.

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224. Prior to the SDP, lower prices by competitors like Mission imposed pressure on Bibby to reduce its prices. After the implementation of the SDP, Bibby was no longer required to respond to Mission’s prices, despite the fact that Mission consistently offered MJ couplings for sale at prices that were 15% to 30% lower than Bibby’s. But for the SDP, Bibby would have had to reduce its prices to match those of Mission. Given the differential between Bibby and Mission’s prices, the reductions would be significant.

Testimony of C. Vansell, Vol. 13, pp. 2602-2603, 2631-2632 and 2643-2644.

JB-24-1176; JB-4-115.

225. BMI also offered fittings for sale in the Quebec market at prices that were up to 25% below Bibby’s prices prior to implementation of the SDP. Following implementation and because of the SDP, BMI exited the market and Bibby no longer faced any competitive pressure from BMI to reduce its prices. As a result, Bibby sold fittings at prices that were significantly above BMI’s prices.

Testimony of M. Bouthillette, Vol. 12, pp. 2514-2533.

Testimony of R. Byrne, Vol. 4, pp. 745-746.

Testimony of J. Keon, Vol. 14, p. 2800.

JB-1-2; JB-4-123; JB-4-124; JB-4-158; JB-4-163; JB-4-166; JB-4-169;
JB-6-245.

226. The evidence, more generally, is that import prices were significantly below Bibby's prices. For instance, Mr. Promoli of Crowe Foundry testified that imports are sold at prices which were significantly lower than North American prices:

Mr. Thomson: Okay.

And of course, the Chinese foundries are able to produce cast iron products in many cases more cheaply than Canadian foundries can?

Mr. Promoli: I can't comment on their costs. I can comment on the way they are selling.

Mr. Thomson: All right.

Why don't you? Can you please assist the Tribunal?

Mr. Promoli: They are selling significantly below North American pricing.

Testimony M. Promoli, Vol. 3, pp. 628.

Testimony of J. Keon, Vol. 14, p. 2800.

Testimony of M. Corriveau, Vol. 10, p. 2022.

227. The evidence also demonstrates that Bibby had the ability to significantly reduce its prices in response to entry given Bibby's hefty profit margins and supra-competitive pricing on its cast iron DWV products.

Reasons, para. 137; Commissioner's Brief of Authorities, Tab 1.

Expert Report of Dr. Ross at paras 21 and 31.

228. Given these substantial margins, Bibby clearly had the ability to reduce its prices significantly in response to entry and expansion of competitors that would have occurred in the absence of the SDP.

Expert Report of Dr. Ross, Appendix 3, pp. 28-36.

Reasons, para. 97; Commissioner's Brief of Authorities, Tab 1.

229. Furthermore, the evidence shows that the removal of even one existing competitor or prevention of a single entrant into the Relevant Markets has a substantial effect upon prices of the relevant products. For example, Bibby announced price increases of 27% in B.C. in 1999 after Wolseley became a stocking distributor.

Testimony of J. Lim, Vol. 12, pp. 2413 and 2416.

Testimony of M. Corriveau, Vol. 10, pp. 2009-2010.

JB-10-459-1; JB-1-469-1.

230. **[CONFIDENTIAL]**

231. This evidence indicates the magnitude of price reductions that can be expected to occur, but for the SDP. It is likely that prices in the Relevant Markets would have been, would be, and would likely be, substantially lower in the absence of the SDP.

D. Effect of the SDP in specific geographic markets

1. Quebec

232. Bibby's market share in the Quebec markets for cast iron DWV products was approximately **[CONFIDENTIAL]** in 2002. Thus, the SDP foreclosed competition for a substantial part of the demand in this relevant market. This alone signifies that the SDP has, is and is likely to have the effect of preventing or lessening competition substantially in these markets.

Expert Report of Dr. Ross, Appendix 3, pp. 69-70

233. In the Quebec market for pipe, the SDP forced the exit of BMI, substantially impeded expansion by Vandem and shielded Bibby from the requirement to reduce its prices to compete with lower priced imported pipe.

Testimony of J. Vanderwater, Vol. 7, pp. 1449-1451.

Testimony of M. Bouthillette, Vol. 12, pp. 2528-2541.

234. In the Quebec market for fittings, the SDP has forced BMI to exit the market, substantially impeded expansion by Vandem and shielded Bibby from the requirement to reduce its prices to compete with substantially cheaper imported fittings.

Testimony of M. Bouthillette, Vol. 12, pp. 2528-2541.

Testimony of R. Byrne, Vol. 4, pp. 745-746.

Testimony of J. Keon, Vol. 14, p. 2800.

JB-1-20; JB-4-123; JB-4-124; JB-4-158; JB-4-163; JB-4-166; JB-4-169;
JB-6-245.

235. In the Quebec market for MJ couplings, the SDP impeded expansion and entry by each of Mission, Gates, Ideal and Fernco, and shielded Bibby from the requirement to reduce its prices to compete with Mission, who offered MJ couplings at prices that were up to 30% lower than Bibby's prices.

Testimony of C. Vansell, Vol. 13, pp. 2600-2602 and 2631-2633.

Testimony of M. O'Brien, Vol. 11, pp. 2208-2215 and 2218.

Testimony of P. Kirkpatrick, Vol. 11, p. 2170.

JB-4-115

236. The evidence is also that Bibby's prices for cast iron products in Quebec have risen since the implementation of the SDP in 1998, and that Bibby has been able to maintain hefty profit margins on cast iron DWV pipe and fittings in this market.

Expert Report of Dr. Ross, Appendix 3, pp. 6-17.

Reasons, para. 97; Commissioner's Brief of Authorities, Tab 1.

237. In the circumstances, it is clear that the SDP has substantially lessened or prevented competition from domestic and foreign producers of cast iron DWV products in Quebec,

and resulted in prices that are significantly higher than the competitive levels that would prevail in these markets, in the absence of the SDP.

2. Maritimes

238. Bibby's market share in the Maritime markets for cast iron DWV products was approximately [CONFIDENTIAL] in 2002. Thus, the SDP foreclosed competition for a substantial part of the demand in this relevant market. This alone signifies that the SDP has, is and is likely to have the effect of preventing or lessening competition substantially in these markets.

Expert Report of Dr. Ross, Appendix 3, pp. 69-70.

239. As in Quebec, the evidence shows that prices for cast iron DWV products have risen in the Maritimes since implementation of the SDP by Bibby.

Expert Report of Dr. Ross, Appendix 3, pp.28-36.

240. The evidence is also that Bibby has been able to maintain hefty profit margins on its cast iron DWV products in this market.

Expert Report of Dr. Ross, Appendix 3, pp. 6-17.

241. Moreover, the evidence demonstrates that, but for the SDP, Vandem and importers, including Mission and Fernco would have been able to enter and expand in the Maritimes.

Testimony of J. Vanderwater, Vol. 7, pp. 1449-1451.

Testimony of C. Vansell, Vol. 13, pp. 2600-2602 and 2631-2633.

Testimony of M. O'Brien, Vol. 11, pp. 2208-2215 and 2218.

Testimony of P. Kirkpatrick, Vol. 11, pp 2159 and 2170.

Expert Report of Dr. Ross, Appendix 3, pp.69-70.

JB-4-115

242. Had such entry and expansion occurred, even on a limited basis, the evidence is that it would have had a significant impact on prices. As discussed above, Mission and importers offered their products at a significant discount relative to Bibby – a discount that, by Bibby’s own evidence, it would have had to respond to by lowering its prices but for the SDP.

JB-4-115-1

243. In the circumstances, it is clear that the SDP has substantially lessened or prevented competition from domestic and foreign producers of cast iron DWV products in the Maritimes, thereby resulting in prices that are significantly higher than the competitive levels that would prevail in the absence of the SDP.

3. Ontario

244. Bibby’s market share in the Ontario markets for cast iron DWV products was approximately [CONFIDENTIAL] in 2002. Thus, the SDP foreclosed competition for a substantial part of the demand in this relevant market. This alone signifies that the SDP has, is and is likely to have the effect of preventing or lessening competition substantially in these markets.

Expert Report of Dr. Ross, Appendix 3, pp. 69-70.

245. In the Ontario market for pipe, the SDP has foreclosed entry by BMI and substantially impeded expansion by Vandem and shielded Bibby from the requirement to reduce its prices to compete with lower-priced imported pipe.

Testimony of J. Vanderwater, Vol. 7, pp. 1449-1451.

Testimony of M. Bouthillette, Vol. 12, pp. 2528-2541.

246. In the Ontario market for fittings, the SDP has forced BMI to exit the market and substantially impeded expansion by Vandem, and shielded Bibby from the requirement to reduce its prices to compete with substantially cheaper imported fittings.

Testimony of M. Bouthillette, Vol. 12, pp. 2528-2541.

Testimony of R. Byrne, Vol. 4, pp. 745-746.

Testimony of J. Keon, Vol. 14, p. 2800.

JB-1-20; JB-4-123; JB-4-124; JB-4-158; JB-4-163; JB-4-166; JB-4-169;
JB-6-245.

247. In the Ontario market for MJ couplings, the SDP has impeded expansion and entry by Mission, Gates, Ideal and Fernco and has shielded Bibby from the requirement to reduce its prices to compete with Mission's prices, which are up to 24% lower than Bibby's.

Testimony of C. Vansell, Vol. 13, pp. 2600-2602 and 2631-2633.

Testimony of M. O'Brien, Vol. 11, pp. 2208-2215 and 2218.

Testimony of P. Kirkpatrick, Vol. 11, p. 2170.

JB-4-115

248. The evidence is also that although Bibby has reduced its prices somewhat in Ontario in response to competition from Vandem, Bibby's prices in Ontario remain significantly higher than in B.C. and Bibby has generally been able to maintain its prices above its costs.

Expert Report of Dr. Ross, Appendix 3, pp. 6-17 and 28-36.

Reasons, para. 109; Commissioner's Brief of Authorities, Tab 1.

249. In the circumstances, it is clear that the SDP has substantially lessened or prevented competition from domestic and foreign producers of cast iron DWV products in Ontario, and resulted in prices that are significantly higher than the competitive levels that would prevail in the absence of the SDP.

4. Prairies

250. Bibby's market share in the Prairies markets for cast iron DWV products was approximately [CONFIDENTIAL] in 2002. Thus, the SDP foreclosed competition for a substantial part of the demand in this relevant market. This alone signifies that the SDP has, is and is likely to have the effect of preventing or lessening competition substantially in these markets.

Expert Report of Dr. Ross, Appendix 3, pp. 69-70.

251. Again, the evidence is that Bibby has been able to maintain hefty profit margins on its cast iron DWV products in the Prairies.

Expert Report of Dr. Ross, Appendix 3, pp. 6-17.

Reasons, para. 109; Commissioner's Brief of Authorities, Tab 1.

252. The evidence demonstrates that, but for the SDP, Vandem and importers, including Mission, Fernco, Gates and Ideal, would have been able to enter and expand in the Prairies.

Testimony of J. Vanderwater, Vol. 7, pp. 1449-1451.

Testimony of C. Vansell, Vol. 13, pp. 2600-2602 and 2631-2633.

Testimony of M. O'Brien, Vol. 11, pp. 2208-2215 and 2218.

Testimony of P. Kirkpatrick, Vol. 11, p. 2170.

JB-4-115

253. Moreover, had such entry and expansion occurred, even on a limited basis, the evidence is that it would have had a significant impact on prices. As discussed above, Mission and importers offered their products at a significant discount relative to Bibby – a discount that, by Bibby's own evidence, it would have had to respond to by lowering its prices but for the SDP.

JB-4-115

5. Alberta

254. Bibby's share of sales of cast iron DWV products in BC/Alberta was approximately [CONFIDENTIAL] in 2002. Thus, the SDP foreclosed competition for a substantial part of the demand in this relevant market. This alone signifies that the SDP has, is and is likely to have the effect of preventing or lessening competition substantially in these markets.

Expert Report of Dr. Ross, Appendix 3, pp. 69-70.

255. Although prices in Alberta have on occasion fallen during the currency of the SDP in response to competitive entry of imports, prices in this market have generally remained above prices in British Columbia and Bibby has been able to maintain significant margins on its cast iron DWV products in this market.

Expert Report of Dr. Ross, Appendix 3, pp. 6-17 and 28-36.

256. As in other geographic markets, the evidence demonstrates that, but for the SDP, Vandem and importers, including Mission, Gates and Ideal, would have been able to enter and expand in Alberta.

Testimony of J. Vanderwater, Vol. 7, pp. 1449-1451.

Testimony of C. Vansell, Vol. 13, pp. 2600-2602 and 2631-2633.

Testimony of M. O'Brien, Vol. 11, pp. 2208-2215 and 2218.

Testimony of P. Kirkpatrick, Vol. 11, p. 2170.

JB-4-115

257. Moreover, had such entry and expansion occurred, even on a limited basis, the evidence is that it would have had a significant impact on prices. As discussed above, Mission and

importers offered their products at a significant discount relative to Bibby – a discount that in the absence of the SDP, by Bibby’s own evidence, it would have had to respond to by lowering its prices.

JB-4-115

6. British Columbia

258. As noted above, Bibby’s share of sales of cast iron DWV products in BC/Alberta was approximately [CONFIDENTIAL] in 2002. Thus, the SDP foreclosed competition for a substantial part of the demand in this relevant market. This alone signifies that the SDP has, is and is likely to have the effect of preventing or lessening competition substantially in these markets.

259. In British Columbia, entry and expansion by Sierra in all three product markets has been impeded by the SDP and, as result, Sierra remains only a niche player in these markets.

Testimony of D. Kelm , Vol. 11, pp.2245-2247.

260. Entry and expansion by New Centurion in the pipe and fittings markets in B.C. has also been significantly impeded by the SDP. The evidence is that New Centurion’s only significant customer of cast iron DWV products is Wolseley, and that New Centurion was effectively forced to exit the B.C. pipe and fittings markets when Wolseley became a participant in the SDP.

Testimony of M. Corriveau, Vol. 10, pp. 1997-2009.

Testimony of J. Lim, Vol. 12, pp. 2411-12.

261. Entry and expansion by Mission, as well as Gates and Fernco, in the market for MJ couplings has also been significantly impeded by the SDP. As in the case of New Centurion, Mission’s sales have been limited almost exclusively to sales to Wolseley and these sales were terminated when Wolseley became a participant in the SDP.

Testimony of C. Vansell, Vol. 13, pp. 2600-2602 and 2631-2633.

Testimony of M. O'Brien, Vol. 11, pp. 2208-2215 and 2218.

Testimony of P. Kirkpatrick, Vol. 11, p. 2170.

JB-4-115

262. In addition, Gates and Fernco were unable to make any significant sales of MJ Couplings in this market because of the SDP.
263. Furthermore, although B.C. prices have responded to competitive entry in these markets, 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 these markets.

Expert Report of Dr. Ross, Appendix 3, pp. 28-36.

E. Conclusion

264. The Commissioner submits, therefore, that the evidence establishes that, but for the SDP, all of the Relevant Markets – in the past, present and future – would likely benefit from greater competition, including substantially lower prices, increased switching between competing suppliers and Bibby, and substantially more entry and expansion by competitors.

VI. **EXCLUSIVE DEALING (SECTION 77(2))**

265. Section 77(2) of the *Act* states:

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

- (a) impede entry 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 exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof or to restore or stimulate competition in the market.

Competition Act, section 77(2)

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

“exclusive dealing” means

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

267. In order to obtain a remedy under section 77(2), the Commissioner must establish that Bibby has engaged in a practice of exclusive dealing, and that the practice, because it is engaged in by a major supplier or is widespread in a market, has had an exclusionary effect in a market such that competition is or is likely to be lessened substantially.
268. The Tribunal has found that the SDP is a practice of exclusive dealing and that Bibby is a major supplier. On this issue, the Tribunal stated:

The Tribunal is of the view that under the definition given at 77(1)(b), the evidence is sufficient to conclude that the SDP is indeed a practice of exclusive dealing. Through the SDP, Bibby induces its customers to refrain from dealing in a specified kind of product except as supplied by Bibby. Distributors on the SDP program are precluded from stocking other cast iron DWV products if they want to obtain their rebates and be entitled to an advantageous multiplier. In addition, there is no difficulty in finding that Bibby is a major supplier, given its large market share.

Reasons, para. 279; Commissioner's Brief of Authorities, Tab 1.

269. The remaining issues to be considered under section 77 are as follows: (i) whether the SDP has impeded entry or expansion of a firm in the Relevant Markets or had any other exclusionary effect; and, (ii) whether, as a result, competition in the Relevant Markets is or is likely to be lessened substantially.

A. Exclusionary Effects

270. The effect on entry that must be proven to satisfy paragraph 77(2)(a) is relative, not absolute. The test that must be met is that the practice of exclusive dealing "impedes" entry or expansion. It is not necessary to establish that the practice has prevented entry and expansion.

FCA Decision, para. 98; Commissioner's Brief of Authorities, Tab 3.

271. As discussed in section “V” above discussing substantial lessening or prevention of competition under paragraph 79(1)(c), the evidence demonstrates that the SDP has impeded entry and expansion of competing firms in the Relevant Markets. This evidence satisfies the test established by paragraph 77(2)(a).

B. Substantial Lessening of Competition

272. As noted by the Federal Court of Appeal, both section 77(2) and paragraph 79(1)(c) “employ the key concepts of substantial lessening of competition”. Accordingly, the same relative and comparative analysis used for paragraph 79(1)(c) is to be applied in respect of the test established by section 77(2), namely, whether, but for the practice of exclusive dealing, relevant markets are or are likely to be substantially more competitive.

273. For all the reasons discussed above in section “V”, the evidence establishes that the SDP is and is likely to result in a substantial lessening of competition in the Relevant Markets. As noted above, but for the SDP, all of the Relevant Markets – in the present and future – would likely benefit from substantially greater competition, including lower prices, increased switching between competing suppliers and substantially more entry and expansion by competitors.

C. Conclusion

274. The Commissioner submits therefore that the evidence establishes that the SDP is a practice of exclusive dealing that is likely to impede entry and expansion of competitors, as well as have other exclusionary effects with the result that competition is likely to be lessened substantially for the purpose of section 77 of the *Act*.

275. In conclusion, prior to implementation of the SDP by Bibby, the markets in Canada for cast iron pipe and fittings and MJ couplings were poised for vigorous competition. A domestic manufacturer of pipe and fittings Vandem had entered the marketplace for the

first time in years, and quality Asian pipe and fittings were becoming increasingly available for import into Canadian markets at competitive prices. In the absence of the SDP, competitive market forces – in the form of domestic and import competition – would have imposed significant price discipline on Bibby and eroded the significant market power that Bibby had accumulated through acquisition of other domestic producers of cast iron DWV products. Bibby's expressed intent of the SDP was to substantially foreclose this potential competition. The SDP has clearly achieved its intended purpose. By implementing the SDP, Bibby has been able to stall emerging competition from Vandem and importers, and maintain and enhance its overwhelming market power, hefty profit margins and ability to maintain supra-competitive prices.

VII. REMEDY AND COSTS

276. Section 79(1) of the *Act* provides that where the elements of the provision are established, the Tribunal may make an order prohibiting the impugned conduct. Section 79(2) further provides that where an order prohibiting the impugned conduct

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 such 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.

Competition Act, section 79(2)

277. Similarly, section 77(2) of the *Act* states that where all of the elements of the provision have been satisfied:

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 ... 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.

Competition Act, section 77(2)

278. The question of the appropriate remedy was examined in detail by the Supreme Court of Canada in *Director of Investigation and Research v. Southam Inc.*:

The evil to which the drafters of the Competition Act address themselves is substantial lessening of competition. See Competition Act section 92(1). It hardly needs arguing that the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger.

Director of Investigation and Research v. Southam Inc., [1997] 1 S.C.R. 748 at 788, [“*Southam*”]; Commissioner’s Brief of Authorities, Tab 12.

279. The Supreme Court of Canada went further to state:

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

Southam at 791; Commissioner’s Brief of Authorities, Tab 12.

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

- (a) an order pursuant to s. 79(1) and (2) of the *Act* prohibiting the Respondent from engaging in the practice of anti-competitive acts specified herein and directing the Respondent to take such actions as are reasonable and necessary to overcome the effects of the said practice, including:

- (i) that the Respondent be prohibited from adopting a rebate or loyalty program that provides a rebate structure based on exclusive purchases of any of the three relevant products from Bibby or any other entity controlled by, or agent or affiliate of, the Respondent;

- (ii) that the Respondent be prohibited from entering into, or enforcing, any contracts with distributors or end-users that provide a rebate structure based on exclusive purchases of any of the three relevant products from Bibby or any other entity controlled by, or agent or affiliate of, the Respondent in any of the six relevant geographic markets;
- (iii) that the Respondent be prohibited from offering any discounts or rebates based on purchases of previous years;
- (iv) that the Respondent be prohibited from offering any inducement to distributors or end-users to buy exclusively any of the three relevant products from Bibby or any other entity controlled by, or agent or affiliate of, the Respondent in any of the six relevant geographic markets;
- (v) that the Respondent be prohibited from continuing to engage in exclusive dealing and full-line forcing with its customers in respect of the three relevant products;
- (vi) declaring null and void all provisions, terms and conditions in Bibby's contracts with its customers providing for a rebate structure based on exclusive purchases of the three relevant products from Bibby or any other entity controlled by, or agent or affiliate of, the Respondent in the six relevant geographic markets;
- (vii) that the Respondent, its affiliates, officers or agents be prohibited from any acquisition or establishment, direct or indirect, of any interest or control in or over the whole or a part of the business

of any manufacturer, supplier or distributor of cast iron DWV pipe, fittings and MJ couplings in Canada for the three years following the date of the order; and,

- (viii) requiring the Respondent and its affiliates, officers or agents to notify the Merger Notification Unit of the Competition Bureau of any such acquisition or establishment in Canada for the three years following the initial three-year period in subparagraph (vii), even if the party-size and transaction-size thresholds found in sections 109 and 110 of the *Act* are not exceeded;
- (b) an order pursuant to s. 77(2) of the *Act* prohibiting the Respondent from continuing to engage in the practice of exclusive dealing and to take such further steps as are necessary to restore or stimulate competition in the market, including:
- (i) that the Respondent be prohibited from adopting a loyalty program based on exclusive purchases of any of the three relevant products from Bibby or any other entity controlled by, or agent or affiliate of, the Respondent;
 - (ii) that the Respondent be prohibited from entering into or enforcing any contracts with distributors or end-users that provide a rebate structure based on exclusive purchases of any of the three relevant products from Bibby or any other entity controlled, by, or agent or affiliate of, the Respondent in any of the six relevant geographic markets;
 - (iii) that the Respondent be prohibited from offering any discounts or rebates based on purchases of previous years from Bibby or any other entity controlled by, or agent or affiliate of, the

Respondent;

- (iv) that the Respondent be prohibited from offering any inducement to distributors or end-users to buy exclusively any of the three relevant products from Bibby or any other entity controlled by, or agent or affiliate of, the Respondent in any of the six relevant geographic markets;
- (v) that the Respondent be prohibited from continuing to engage in exclusive dealing and full-line forcing with its customers in respect of the three relevant products; and,
- (vi) declaring null and void all provisions, terms and conditions in contracts between Bibby and its customers that provide for a rebate structure based on exclusive purchases of the three relevant products from Bibby or any other entity controlled by, or agent or affiliate of, the Respondent in any of the six relevant geographic markets.

281. The primary relief requested by the Commissioner is a prohibition restraining Bibby from engaging in the SDP or any similar conduct. This is clearly appropriate in light of Bibby's conduct, including in particular, its subjective intent and market power in each of the Relevant Markets, and falls squarely within the remedies envisioned by sections 77(2) and 79 of the *Act*. This relief is also essential to restoring competition in the relevant markets.

282. The Commissioner also seeks a prohibition on any acquisition or establishment of a business in Canada by Bibby or its affiliates, officers or agents. This relief is also necessary to permit competition in the relevant markets to the level that it might have been, but for Bibby's practice of anti-competitive acts.

283. The Commissioner also seeks her costs in this matter, including costs for the initial hearing and for this redetermination hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: November 1, 2007

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THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an Application by the Commissioner of Competition pursuant to sections 77 and 79 of the *Competition Act*;

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

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

AND

CANADA PIPE COMPANY LTD./
TUYAUTERIES CANADA LTÉE

Respondent

MEMORANDUM OF ARGUMENT
OF THE COMMISSIONER OF COMPETITION

(Redetermination Proceeding)

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