

**THE COMPETITION TRIBUNAL**

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

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

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

**BETWEEN:**

COMPETITION TRIBUNAL  
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

October 6, 2003

CT-2002-006

Jos LaRose for / pour  
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

# 0031

**COMMISSIONER OF COMPETITION**

**Applicant**

- AND -

**CANADA PIPE COMPANY LTD./TUYAUTERIES CANADA LTÉE**

**Respondent**

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**RESPONSE OF CANADA PIPE COMPANY LTD./  
TUYAUTERIES CANADA LTÉE**

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**PART I: OVERVIEW OF CANADA PIPE'S RESPONSE**

1. The Commissioner's Application is based on three fundamental misconceptions:

- (a) that drain, waste and vent pipe, fittings and MJ couplings (collectively "DWV Products") made from cast iron constitute distinct product markets;

- (b) that the stocking distributor program ("SDP") of the Respondent, Canada Pipe Company Ltd./Tuyauteries Canada Ltée ("Canada Pipe" or "Bibby "), or its acquisitions of other companies, constitute anti-competitive acts; and
- (c) that any acts or practices of Canada Pipe substantially lessened or prevented competition in the relevant and properly defined product and geographic markets.

2. The Commissioner's definition of the relevant product markets is artificially narrow and is incorrect. Substitution between DWV Products made from various materials confirms that there is no distinct cast iron DWV Products market(s). Given the functional interchangeability between DWV Products made from cast iron and DWV Products made from other materials, the relevant product market includes all DWV Products, of which Canada Pipe has a market share of approximately 10%. Since a significant market share is a necessary, but not sufficient, condition to the existence of market power, one of the essential elements of the establishment of an infringement of s. 79 of the *Competition Act* (the "Act"), Canada Pipe's lack of significant market share is dispositive of the Application, and it must be dismissed on this basis alone.

3. Even if one were to adopt the Commissioner's artificially narrow definition of the relevant product markets, Canada Pipe would be unable to exercise market power given the low barriers to entry, the existence of actual and potential competition, the countervailing power of large distributors and the competitive constraints from DWV Products made from other materials. For ease of reference, the Commissioner's

alleged product markets will be referred to collectively as the cast iron DWV Products market.

4. Finally, even if one were to assume that Canada Pipe could somehow exercise market power within this hypothetical cast iron DWV Products market, the SDP would not constitute an abuse of dominance under s. 79 of the *Act*. Contrary to the Commissioner's allegations, the SDP does not "foreclose the distribution network to potential entrants and current competitors", and does not enable Canada Pipe to "create, entrench and enhance its market power". The function of the SDP is to create incentives for distributors to promote Canada Pipe's products and to prevent buyer confusion. The SDP does not bind distributors to Canada Pipe. Rather, it permits distributors to exit and re-enter the program at any time. Furthermore, distributors are able to purchase DWV Products from Canada Pipe regardless of whether they participate in the SDP. For these reasons, the SDP is not anti-competitive in purpose or effect.

5. No market power can be exercised or entrenched when there are such low barriers to entry into distribution. Since Canada Pipe's competitors, including those that supply cast iron DWV Products, can access new avenues of distribution easily, the SDP cannot prevent competitors from reaching customers. The SDP cannot, therefore, be anti-competitive. Even if the SDP did bind individual distributors to Canada Pipe (which Canada Pipe vigorously denies), it does not follow that the SDP forecloses the distribution network to Canada Pipe's competitors. Given the short period within which rebates are determined, competitors remain free to compete for individual distributors.

Furthermore, competitors are free to use alternative means of accessing contractors/builders, in addition to distributing through the existing network of cast iron DWV Products distributors. These alternatives include the establishment of new distributors, dealing with plumbing distributors who do not currently stock cast iron DWV Products and selling directly to contractors/builders. The SDP in no way restricts competitors from using these alternatives.

6. Also, as discussed below, Canada Pipe's acquisitions of other companies do not constitute an abuse of dominance under s. 79 of the *Act*.

7. In summary, as discussed in more detail below, contrary to the Commissioner's allegations, Canada Pipe has not contravened s. 79 of the *Act* for a number of reasons, including the following:

- (a) Canada Pipe does not have market power in any relevant and properly defined market;
- (b) even within the Commissioner's overly narrow hypothetical product market, Canada Pipe would not be able to exercise market power for a number of reasons including the following:
  - (i) there are no significant barriers to entry in this market;
  - (ii) it is forced to compete against both domestically produced and imported cast iron DWV Products;
  - (iii) the price of cast iron DWV Products is, in any event, constrained by the price of DWV Products made from other materials;

- (c) even if one were to accept the Commissioner's erroneous contention that Canada Pipe has been able to exercise market power, the operation of the SDP would not constitute the practice of an anti-competitive act as:
  - (i) it has a legitimate and lawful business rationale; and
  - (ii) it has not had an anti-competitive effect; and
  
- (d) the SDP has not given rise to a substantial lessening or prevention of competition in any relevant and properly defined market. Since the SDP was introduced there has been:
  - (i) a decrease in the real price (the nominal price corrected for the general rate of inflation) of cast iron DWV Products;
  - (ii) the emergence of a domestic manufacturer of cast iron DWV Products that has competed aggressively and demonstrated sustained growth;
  - (iii) continued aggressive and successful competition from importers of foreign produced cast iron DWV Products; and
  - (iv) continued aggressive and successful competition from manufacturers and suppliers of DWV Products made from materials other than cast iron.

**PART II: RESPONSE TO PARTICULARS OF COMMISSIONER'S STATEMENT OF GROUNDS AND MATERIAL FACTS (THE "SGMF")**

8. Canada Pipe denies the allegations in the SGMF except as expressly admitted to below.

9. Among other things, Canada Pipe denies that the relevant product market is the cast iron DWV Products market or any subset of that market, that the SDP constitutes a practice of an anti-competitive act, or that it has had the effect of

substantially lessening or preventing competition in any relevant and properly defined product or geographic market in Canada.

10. Canada Pipe further denies that Canada Pipe has engaged in a practice of exclusive dealing as alleged in paragraphs 10 and 11 of the SGMF or that its acquisitions of other companies constitute further anti-competitive acts. Canada Pipe also denies that it has imposed unreasonable restrictive covenants as alleged in paragraph 8 of the SGMF.

**A. The Parties**

11. Canada Pipe admits the allegations in paragraphs 12 to 15 of the SGMF.

**B. Background**

**(a) Drain, Waste and Vent (DWV) Applications**

12. Canada Pipe admits the allegations in paragraphs 16 to 18 of the SGMF. Contrary to paragraph 19, cast iron is not the only material used in certain applications as a result of its unique characteristics or applicable regulations. DWV Products made from other materials are functionally interchangeable with cast iron DWV Products (i.e. they may be used in any material application in which cast iron DWV Products can be installed). For example, a plastic coated DWV product manufactured by IPEX Inc. ("XFR") is approved for, and has been used in, non-combustible applications in which cast iron or copper were formerly the preferred choice of DWV material. While historical industry practice has led to cast iron DWV Products being the most common choice in a few limited applications, the last 30 years have also clearly shown that plastic DWV

Products have overtaken cast iron DWV Products once their use has been approved for a given application.

**(b) The Principal Participants in the Cast Iron DWV Pipe, Fittings and MJ Couplings Industry**

**(i) Manufacturers and Importers**

13. Canada Pipe admits the allegations in paragraphs 20 to 23 and 25 of the SGMF, save that imported products are primarily from China. In addition to the importers listed in paragraph 25 of the SGMF, Mission Couplings, William Kelly & Sons Limited, Hebei Metals and Kent Sharp Company Ltd. are also significant importers of cast iron DWV Products.

**(ii) Distributors**

14. Canada Pipe admits the allegations in paragraphs 27 to 30 of the SGMF. In addition, virtually all distributors of cast iron DWV Products sell DWV Products made from other materials, but not all distributors of DWV Products sell cast iron DWV Products. Sales of cast iron DWV Products generally represent only a small percentage of the total sales of distributors of DWV Products.

**(iii) Plumbing Contractors**

15. Canada Pipe admits the allegations in paragraphs 33 to 35 of the SGMF.

**(c) Canada Pipe's Stocking Distributor Program**

16. With respect to paragraph 39 of the SGMF, contrary to the implication that the SDP is unusual, the three largest domestic manufacturers of cast iron DWV

Products in the United States have loyalty programs that are substantially similar to the SDP.

17. The SDP is a partnering program for distributors that support Canada Pipe's cast iron DWV Products. The SDP only applies to cast iron DWV Products and does not apply to other cast iron products sold by Canada Pipe. The program provides participants with consistent and pre-arranged pricing discounts, rebates and priority access to customer service, technical/marketing support, and to Canada Pipe's extensive product inventory. In return, participating distributors commit to promote Canada Pipe products and to give Canada Pipe the opportunity to satisfy all of their cast iron DWV Product needs. The SDP is offered to all distributors and ensures that all participating distributors, regardless of size, have access to competitive pricing.

18. As described in paragraph 43 of the SGMF, two components of the SDP are the quarterly and annual rebates available to stocking distributors. The quarterly rebate is available to stocking distributors that participate in the SDP for each quarter they participate in the program. An annual rebate is also available to stocking distributors that participate in the SDP for the entire year.

19. The SDP does not require long-term buying commitments from distributors, who are free to enter and exit the program at any time. Canada Pipe's entire distribution network is effectively contestable at any time. Even a distributor that leaves the SDP for a given quarter and buys cast iron DWV Products from Canada Pipe's competitors can re-enter the program easily at any time having only given up the opportunity to earn quarterly rebates from Canada Pipe during the period that the



distributor was not participating and any annual rebate. As noted in paragraph 44 of the SGMF, the SDP is heavily weighted towards the quarterly rebate and the annual rebate was only 4% in 2002.

20. The purpose of the SDP is:

- (a) to ensure that Canada Pipe's distributors have a stake, and are able to fully participate, in the marketing of cast iron DWV Products, particularly in the face of the continuing erosion of cast iron DWV Products usage due primarily to competition from plastic DWV Products;
- (b) to have sufficient volumes of inventory located at the distributors' place of business so that customers may have immediate access to a full line of products;
- (c) to ensure that pricing is competitive across Canada Pipe's entire product line; and
- (d) to ensure that Canada Pipe's small and medium sized distributors are given full and fair opportunity to compete against larger distributors, including larger distributors of competitive cast iron DWV Products and of DWV Products made from other materials.

**(i) Treatment of Stocking Distributors under the SDP**

21. A distributor's decision to participate in the SDP distinguishes that distributor from non-stocking distributors. This decision reflects the choice by the distributor to provide Canada Pipe with the first opportunity to supply that distributor's cast iron DWV Products requirements. If Canada Pipe is unable to supply the

distributor with a given cast iron DWV Product, the distributor will remain on the SDP despite having bought products from another supplier without any impact on their participation in the SDP.

22. As Canada Pipe only manufactures, and the SDP applies only to, cast iron DWV Products, stocking distributors are also able to purchase DWV Products made from other materials from manufacturers other than Canada Pipe without any impact on their participation in the SDP.

23. Contrary to the allegations in paragraph 41 of the SGMF, stocking distributors are not required to buy one 40,000 pound shipment (or truckload) per quarter. Rather, this threshold represents a rough guide as to the purchase volume that a stocking distributor is meant to maintain. Smaller distributors, particularly in sparsely populated areas, where quarterly purchase of truckload quantities is not practical, also participate in the SDP.

24. Canada Pipe admits the allegations in paragraph 44 of the SGMF.

25. For the reasons explained above, Canada Pipe denies the allegation in paragraph 45 of the SGMF that the SDP precludes distributors from purchasing or carrying cast iron DWV pipe, fittings or MJ couplings from suppliers other than Canada Pipe.

**(ii) Mobility between Stocking and Non-Stocking Distributors**

26. The lack of contractual obligation to participate in the SDP permits mobility between classes of distributors. A distributor can exit and enter the SDP at any time in

response to the competitive supply options available to it. As noted in paragraph 46 of the SGMF, even distributors that have chosen to exit the SDP in a given quarter are able to participate again in the following quarter.

27. In response to the allegations in paragraph 46 of the SGMF, it is inaccurate to characterize Canada Pipe as withholding a quarterly or annual rebate from a distributor that purchases cast iron DWV Products from another supplier. If a distributor unilaterally chooses to no longer participate in the SDP (which all distributors are free to do), that distributor does not earn any quarterly rebate for the quarter in which it exits. Nor does it earn an annual rebate. Canada Pipe does not withhold earned funds. Rather, Canada Pipe does not pay rebates that are not earned or owing under the well-known terms of the SDP. The SDP permits distributors to participate when it is most advantageous for them to do so and to exit when it is in their interest to deal with one of Canada Pipe's competitors. Canada Pipe supplies distributors that exit the SDP as non-stocking distributors.

28. Further, Canada Pipe does not automatically withhold the annual rebate as alleged in paragraph 46 of the SGMF.

**(iii) Leaving the SDP**

29. Canada Pipe reserves the right to remove a distributor from the SDP if it comes to Canada Pipe's attention that the distributor has purchased products which Canada Pipe carries from another supplier without first allowing Canada Pipe the opportunity to fulfill these requirements. Participation in the SDP is determined by the distributor and not by Canada Pipe.

30. Distributors that leave the SDP because they do not wish to comply with its terms are not "reprimanded" by Canada Pipe, as alleged in paragraph 48 of the SGMF. Rather, having voluntarily chosen to become non-stocking distributors, they are simply treated like any other non-stocking distributor. Further, as described above, a distributor that leaves the SDP retains the benefit of any stocking distributor multiplier or quarterly rebate component earned in any quarter before it decided to leave the SDP and can rejoin the SDP in any subsequent quarter by informing Canada Pipe that it will meet the stocking distributor requirements for that quarter.

**(iv) Other Sales Efforts by Canada Pipe**

31. Contrary to the allegation in paragraph 47 of the SGMF, Canada Pipe's sales representatives do not visit customers to enforce compliance with the SDP. Rather, like any other sales force, they visit distributors to develop personal relationships with Canada Pipe's customers and other distributors, provide support, introduce new products, discuss pricing and industry conditions and increase the sales of Canada Pipe products. In the course of fulfilling these duties, Canada Pipe's sales representatives may attempt to determine if a distributor has exited the SDP without formally notifying Canada Pipe.

32. Visits to construction sites allow Canada Pipe's sales representatives to interact with contractors in order to promote and support cast iron DWV Products (and Canada Pipe's products in particular), to discuss industry trends and to get ideas for new products. Additionally, given the potential risks involving safety and warranty claims, Canada Pipe's sales representatives also note when competitive DWV Products

are mixed with Canada Pipe's products or when materials or installations do not meet appropriate building code standards.

33. In response to the allegation in paragraph 49 of the SGMF, from time to time Canada Pipe offers rebates to contractors on specific jobs. These rebates are offered in order to meet lower prices offered on specific jobs by Canada Pipe's competitors, including competitors that supply DWV Products made from materials other than cast iron. Lowering prices to meet competition is neither anti-competitive nor a breach of the *Act*. Rather it is precisely the competitive conduct that the *Act* is meant to encourage.

### **C. The Relevant Product Market**

34. Canada Pipe denies the allegation in paragraph 50 of the SGMF that the "three relevant product markets are the supply of cast iron DWV pipe, fittings and MJ couplings". The Commissioner's proposed definition of the relevant product markets is untenable.

35. The relevant product market for the purposes of this Application is DWV Products, regardless of the material from which they are produced. DWV Products made from various materials are functionally substitutable, with few exceptions. The Commissioner's assertions regarding the definition of the relevant product market are clearly erroneous in view of this functional substitutability, the extent to which the prices of non-cast iron DWV Products affect the price of cast iron DWV Products, the fact that suppliers of DWV Products made from different materials promote and market their products as competing with DWV Products made from other materials, and in view of

the continuous erosion of sales of cast iron DWV Products in favour of plastic DWV Products.

**(a) The Individual Characteristics Identified in the SGMF Do Not Distinguish Product Markets for DWV Products Made from Each Individual Material**

36. Canada Pipe agrees with the statement in paragraph 51 of the SGMF that DWV Products can be made from a variety of materials, but denies the allegation in paragraph 52 of the SGMF that cast iron has unique characteristics and end-uses for which there are no practical substitutes. While DWV Products made from each individual material have relative advantages and disadvantages compared to DWV Products made from other individual materials, these are not sufficient to create a distinct product market. More importantly, contrary to paragraph 52 of the SGMF, other DWV materials are substitutable for cast iron in every material DWV application.

37. Canada Pipe denies that the isolated differences in characteristics of cast iron compared to other DWV Products that are described in paragraphs 52 to 64 of the SGMF can be used to define the relevant product markets. The Commissioner's approach is unsound and untenable. In attempting to tailor a relevant product market out of these various characteristics, the Commissioner ignores the fact that purchasers take these characteristics (product price, durability, combustibility, installation costs and others) into account when choosing which DWV material to install in their project. There is no economic or legal basis to assume that all products within a relevant product market must be fungible or indistinguishable from each other. Individual characteristics of DWV Products made from different materials are an important dimension of the

competition between these functional substitutes and drive producers of DWV Products to continually improve product quality, service and price.

38. Canada Pipe denies the allegation in paragraph 53 of the SGMF. While Canada Pipe believes that cast iron DWV Products are quieter than those made of plastic, DWV Products made from asbestos and copper are also as quiet or quieter than those made of plastic. Further, manufacturers of plastic DWV Products have asserted that their DWV Products are not noisier than cast iron DWV Products; thus confirming that they view cast iron DWV Products as competing with plastic DWV Products. Sound characteristics are only one of several factors considered by purchasers of DWV Products.

39. Canada Pipe denies the allegation in paragraph 54 of the SGMF that the durability of plastic is unproven. Plastic DWV Products have been used for over 30 years and the continuing increase in the use of plastic DWV Products at the expense of cast iron DWV Products, as well as copper and asbestos, demonstrates that the industry does not consider the durability of plastic to be a concern. Further, manufacturers of plastic DWV Products have stressed the reliability and durability of their DWV Products as a significant selling feature.

40. Canada Pipe admits the allegations in paragraphs 55 to 57 of the SGMF.

41. Canada Pipe disputes the allegations in paragraph 59 of the SGMF. Building codes restrict the use of combustible DWV Products in residential buildings over approximately six stories, in commercial buildings over approximately eleven stories and in certain institutional buildings. However, XFR, a non-combustible plastic

DWV Product manufactured by IPEX, satisfies all relevant building codes relating to flame and smoke spread. As such, contrary to the allegations in paragraph 59 of the SGMF, XFR has been approved for use in all relevant non-combustible applications. Manufacturers of plastic DWV Products other than IPEX are developing similar technologies.

42. Further, while the allegations in paragraph 59 of the SGMF might suggest that plastic DWV Products are limited to only a small section of DWV applications, Canada Pipe estimates that even combustible plastic DWV Products (i.e. plastic DWV Products other than XFR) are acceptable for approximately 95-98% of residential construction and approximately 70% of commercial construction. When XFR is also considered, DWV Products made from plastic compete for use in all relevant DWV applications in which cast iron DWV Products can be used.

43. With respect to paragraph 60 of the SGMF, Canada Pipe acknowledges that cast iron is currently the material most commonly used in certain high-rise DWV applications. However, 30 years ago, cast iron was the material most commonly used in virtually all DWV applications. As plastic DWV Products have become more accepted and widely utilized, they have grown to represent over 90% of all DWV applications.

44. Canada Pipe estimates that the total amount of commerce involved in these limited building code restricted applications is approximately \$9 million of Canada Pipe's total annual sales of cast iron pipe, fittings and couplings of approximately \$27 million in 2002 or 33%. In other words, even excluding non-combustible plastic DWV



Products, with respect to 67% of Canada Pipe's cast iron DWV business, cast iron competes directly with combustible DWV Products. However, given the existence of non-combustible plastic DWV Products, Canada Pipe competes with plastic DWV Products for all of its sales.

45. With reference to paragraph 61 of the SGMF, historically, it has generally been simpler to install fire-stopping around DWV Products made from cast iron, as well as most other non-combustible DWV Products, than those made from plastic. The significance of that advantage, if at all, depends largely on whether the extra costs incurred to fire-stop plastic DWV Products will be offset by the substantially lower cost of installing plastic DWV Products, rather than DWV Products made from cast iron. In addition, ongoing developments in fire-stopping technologies and processes operate to reduce this cost differential.

46. Canada Pipe has no knowledge of the allegation in paragraph 62 of the SGMF concerning the perceived health risks associated with asbestos other than that the Federal Government has asserted that there is no such health risk when proper precautions are taken. However, even if a perceived health risk exists, it would not distinguish cast iron DWV Products from those made from plastic, stainless steel or copper.

47. Canada Pipe admits the allegation in paragraph 63 of the SGMF concerning the low thermal expansion rate of cast iron, but denies that this demonstrates that cast iron DWV Products are in a separate market distinct from DWV

Products made from other materials. Asbestos, for example, has an even lower thermal expansion rate than cast iron.

48. In summary, Canada Pipe acknowledges that DWV Products made from different materials may have some distinct characteristics. However, Canada Pipe denies that these distinctions are sufficient to create a distinct product market for cast iron DWV Products. Rather, these distinctions form an important dimension of the competition between products that are functional substitutes within a single product market.

49. Canada Pipe admits the allegations in paragraphs 66 to 68 of the SGMF.

#### **D. The Relevant Geographic Market**

50. While Canada Pipe previously had six geographic price zones, it currently has only two price zones (east and west Canada).

51. With respect to paragraph 73 of the SGMF, Canada Pipe admits that imports are currently higher in B.C. and Alberta than in other provinces, but denies that this is sufficient to distinguish distinct geographic markets particularly in light of the lack of structural or other barriers to trade into or between provinces.

52. Canada Pipe asserts that the relevant geographic market for the purposes of this Application is significantly broader than Canada and should include at least both Canada and the United States for a number of reasons, including the following:

- (a) domestic DWV manufacturers, including Canada Pipe, export products into the United States and overseas;

- (b) there are no significant barriers to entry for a foreign producer to commence selling in Canada. This is evidenced by the steady increase in the number of foreign manufacturers obtaining certification to applicable product standards and selling DWV Products in Canada over the past five years;
- (c) there are no regulatory barriers to inter-provincial trade that might indicate the need for markets delineated by region or province;
- (d) almost any foreign foundry can easily produce cast iron DWV Products suitable for sale in the Canadian market;
- (e) a significant proportion of Canadian sales of cast iron DWV Products are imported; and
- (f) freight costs do not serve as impediments to the importation of products into Canada as evidenced by the significant shipments into Canada of cast iron DWV Products from as far away as China. In addition, Canada Pipe ships its DWV Products both across Canada and the U.S. and is aware that certain of its customers have done the same.

53. In the alternative, the relevant geographic market should be no smaller than Canada as a whole. To Canada Pipe's knowledge, most suppliers of Canadian cast iron DWV Products ship throughout Canada from a single production facility or point of landing. Furthermore, similar products are sold throughout Canada and are produced to satisfy national standards. In addition, there are no meaningful barriers to movement of DWV Products between provinces.

**E. Canada Pipe Does Not Possess Market Power**

54. Canada Pipe denies the allegations in paragraph 75 of the SGMF that it controls a relevant product market such that it can set prices above competitive levels, dissuade new entrants, or induce compliance with the SDP. Canada Pipe also denies the allegation in paragraph 75 of the SGMF that its market share is protected by barriers to entry. To the contrary, in the relevant product market, Canada Pipe's market share is less than 10%. The existence of market power is one of the essential elements of the establishment of an infringement of s. 79 of the *Act*. Since a significant market share is a necessary, but not sufficient, condition to the existence of market power, Canada Pipe's lack of significant market share is dispositive of the Application.

55. Canada Pipe does not possess market power even within the hypothetical and overly narrow markets put forward by the Commissioner. Contrary to the allegations contained in the SGMF, even the markets defined by the Commissioner are subject to significant competition with low barriers to entry (as evidenced by significant and sustained recent entry by domestic and foreign competitors), pricing set by competitive forces (including prices of DWV Products made from other materials), and Canada Pipe's inability to price discriminate against applications that were traditionally satisfied by cast iron or copper DWV Products.

**(a) Lack of Significant Market Share**

56. Canada Pipe admits the allegations in paragraph 81 of the SGMF. As Canada Pipe has not been provided with relevant sales information by its competitors or the Commissioner, it is unable to confirm or deny the allegations in paragraph 77 of the SGMF.

57. Canada Pipe admits that Vandem is the only domestic cast iron DWV Products manufacturer to enter the market in the past four years. However, contrary to the Commissioner's allegations, other manufacturers have begun selling in Canada during the past four years through imports.

58. Canada Pipe denies the allegations in paragraph 80 of the SGMF that it has consistently been able to charge prices above competitive levels. In fact, the price of cast iron in Canada is significantly lower than in the United States (where there are a larger number of domestic manufacturers). Further, as the Commissioner has acknowledged in paragraphs 81, 82, 83 and 84 of the SGMF, Canada Pipe has been forced to actively price compete against domestic and foreign competitors (including those that supply DWV Products made from materials other than cast iron). Canada Pipe denies that a strategy of lowering prices to meet competition can be an anti-competitive act or that the price competition it has engaged in is a breach of the *Act*.

59. Canada Pipe denies that this price competition "penalizes" non-stocking distributors as alleged in paragraph 85 of the SGMF. Distributors are free to purchase product from whichever supplier they want. If a distributor chooses not to participate in the SDP, it is likely because it believes it can obtain lower prices, better service or quality than that it could if it remained on the SDP. The Commissioner's allegation in paragraph 85 of the SGMF that non-stocking distributors are penalized because the price difference between Canada Pipe and its competitors becomes narrower through competitive forces is specious. Canada Pipe denies that any narrowing of pricing between it and its competitors can constitute a penalty or an anti-competitive act.

60. Moreover, the allegations in paragraphs 80 and 82 of the SGMF misconstrue Canada Pipe's pricing as generating supra-competitive profits. The Commissioner further misconstrues Canada Pipe's profit margins in certain products as representing significant market power. It is typical for margins in a declining industry, such as cast iron DWV, to be higher than in some other industries. This reflects the necessity of covering fixed and sunk costs with ever-declining volumes of sales. Any margins that may have been earned by Canada Pipe reflect neither the presence of market power nor that of supra-competitive profits. Rather, they are required in a declining industry in order to survive.

**(b) This Industry Is Subject to Low Barriers to Entry**

61. Canada Pipe denies the allegation in paragraph 86 of the SGMF that manufacturers and importers face significant barriers to entry into the DWV Products market or with respect to the sale of cast iron DWV Products in Canada. In particular, barriers to entry in the manufacture and distribution of cast iron DWV Products are low for a variety of reasons, including the following:

- (a) there are no patents or intellectual property rights making entry difficult;
- (b) the only significant reputational/technical barrier is CSA registration;
- (c) the technology used to make cast iron DWV pipe is well known, readily available and has not been subject to significant recent innovation;
- (d) as discussed in more detail below, most foundries have at least some of the equipment required to produce cast iron DWV pipe and can easily and cheaply acquire the remaining equipment;

- (e) sunk costs of entry, even by a new domestic manufacturer, are low given that the most significant investment is melting capacity and this is readily available in underutilized foundries;
- (f) neither industry contracting practices nor the SDP prevents distributors from switching suppliers;
- (g) significant sources of foreign cast iron DWV pipe are available for import into Canada; and
- (h) sustained competitive domestic and foreign entry has occurred in the last five years.

62. Contrary to the Commissioner's allegations, these indicia demonstrate that the SDP has not foreclosed entry to the DWV Products market or even to the Commissioner's hypothetical cast iron DWV Products market.

**(i) The SDP Is Not a Barrier to Entry**

63. Canada Pipe denies that the SDP forecloses at least 80% of the distribution network. Indeed, Canada Pipe denies that any portion of the distribution network is foreclosed by the SDP. Canada Pipe also denies that stocking distributors face high switching costs or that that the SDP significantly raises the cost of entry. The success of competitors that have begun selling into Canada or expanded their Canadian sales since the SDP came into effect demonstrates that the Commissioner's allegations are without merit.

64. The SDP does not contractually obligate distributors to purchase from Canada Pipe for any set period of time. As stated above, Canada Pipe's entire

distributor network is effectively contestable at any time by Canada Pipe's competitors. Even if a stocking distributor chose to time its exit from the SDP so that it remained on the SDP for an entire period, that distributor's business would become contestable at least every year. Contrary to the allegations in paragraph 88 of the SGMF, stocking distributors face low switching costs to exit the SDP at any time given that they would only forfeit, at most, the annual rebate (which is only 4%) and any quarterly rebates that would otherwise be earned in the quarter in which they left the program. This also does not take into account any offsetting inducements that a competitor might offer one of Canada Pipe's stocking distributors in order to induce it to exit the SDP. A stocking distributor that leaves the program in favour of a new supplier at year end faces no switching costs whatever arising from exiting the SDP.

65. Canada Pipe denies the allegations in paragraph 89 of the SGMF. A decision by Canada Pipe's competitors to compensate distributors for forgone rebates in order to induce them to exit the SDP does not constitute a significant barrier to entry. Further, since stocking distributors are not contractually bound to deal exclusively with Canada Pipe, competitors can attempt to induce stocking distributors to leave the SDP at any time. Stocking distributors can and do leave the program when they feel that they can obtain more attractive supply arrangements elsewhere. Even if stocking distributors refused to forgo any rebates from Canada Pipe, their business would still be contestable to Canada Pipe's competitors on at least an annual basis.

66. Contrary to the allegation in paragraph 90 of the SGMF, the SDP does not act as a disincentive for most Canada Pipe customers to test new entrants. This is



demonstrated by the recent decision of Wolseley (one of the largest distributors in Canada) to leave the SDP in western Canada. Wolseley is now buying from other suppliers that do not offer a full line of all three products. Further, Vandem, a recent domestic manufacturing entrant, has been able to sell to distributors that previously had been part of the SDP.

67. With respect to the second and third sentences of paragraph 90 of the SGMF, any distributor's concerns with dealing with suppliers without a full line of products has nothing to do with the SDP. Furthermore, in view of the success of recent entrants, as described above, it is clear that these allegations, even if true, do not constitute a significant barrier to entry.

68. Contrary to the allegations in the last sentence of paragraph 90 of the SGMF, nothing prevents a stocking distributor that leaves the SDP from returning to Canada Pipe as a stocking distributor at any time. Canada Pipe denies the allegation that the potential loss of the annual rebate "limits the distributor's ability to compete" particularly as sales of cast iron DWV Products constitute for most distributors only a very small percentage of their business and, as mentioned above, the annual rebate is relatively small.

69. With respect to the allegations in paragraph 91 of the SGMF concerning warranties, Canada Pipe sells pipe, fittings and MJ couplings as a system (as do competitors such as IPEX) and provides a warranty for its products as an integrated system. If a customer mixes a pipe sold by Canada Pipe with a non-Canada Pipe fitting, the system warranty provided by Canada Pipe may not be available since

Canada Pipe cannot be held responsible for claims or damages caused by products it did not manufacture. Canada Pipe denies that this constitutes a significant barrier to entry. Warranties are also just one aspect of the factors (such as price, service, etc.) that a purchaser will consider in making a purchase decision.

**(ii) Other Canada Pipe Actions Also Do Not Raise Barriers to Entry**

70. Canada Pipe admits that it has made lump-sum payments directly to contractors as alleged in paragraph 92 of the SGMF. It has made these payments, in a limited number of cases, to effectively lower its prices in response to competition from other suppliers of DWV Products. Contrary to the allegations in paragraph 93 of the SGMF, this does not represent an additional barrier to entry. Rather, this is simply a competitive response to aggressive pricing by Canada Pipe's competitors. By making payments directly to contractors in certain cases, Canada Pipe permits those contractors to deal with the stocking distributors of their choice.

71. With respect to the allegation in paragraph 94 of the SGMF concerning Canada Pipe's "large sales force", Canada Pipe has a sales force of seven people to service all of Canada. Like the sales force of any other company, their job is to increase sales of Canada Pipe's products vis à vis all of its competitors, including manufacturers of DWV Products made from materials other than cast iron. Canada Pipe vigorously denies the allegation that its sales force's attempt to service and develop relations with its customers and contractors and promote the use of cast iron DWV Products, and Canada Pipe's products in particular, is in any way improper or unlawful and constitutes a barrier to entry.

**(iii) The Nature of the Industry Creates No Significant Additional Barriers to Entry**

72. Canada Pipe admits that the cast iron DWV industry is mature, and that growth is limited as alleged in paragraph 95 of the SGMF. Indeed, the limited growth opportunities are primarily due to successful competition from DWV Products made from other materials, principally plastic.

73. Contrary to the allegations in paragraphs 96 to 98 of the SGMF, access to distribution channels is not a barrier to entry for a new entrant. Neither Canada Pipe, nor, to Canada Pipe's knowledge, any other incumbent supplier, has entered into long-term supply arrangements with distributors. Distributors are not "locked in" with any given supplier in any manner whatsoever and are free at any time to change their source of supply. Therefore, the allegations contained in paragraphs 96 to 98 of the SGMF are irrelevant to the determination of whether barriers to entry exist in any relevant market.

74. Given the commodity nature of cast iron DWV Products, existing distributors have no reason to remain with a particular supplier if another supplier is able to provide competitive quality, price and service. Any new entrant (importer or domestic manufacturer) would have access to the same channels of distribution as incumbent suppliers, provided they are able to offer competitive quality, prices and service.

75. In addition, there are a number of distributors of DWV Products that either do not currently distribute cast iron DWV Products or are not enrolled in the SDP. In addition to competing with Canada Pipe for non-stocking distributors, a new entrant could, in establishing its distribution network, approach distributors with no significant

cast iron DWV Products sales. New domestic manufacturers are also able to compete for export business in addition to any domestic sales.

76. Contrary to the allegations in paragraph 98 of the SGMF, at least three significant importers in Alberta and British Columbia (Sierra, Kelly and Davcon) deal directly with contractors. Canada Pipe has no knowledge, regardless of the implication of paragraph 98 of the SGMF, of whether the operations of competitors are economical.

77. Canada Pipe has no knowledge of the allegations in paragraph 99 of the SGMF but, given the substantial existing foundry capacity in Canada, Canada Pipe denies that these allegations are relevant to the determination of barriers to entry in the relevant market for a potential domestic manufacturer.

78. Contrary to the allegation in paragraph 100 of the SGMF, converting an existing foundry to produce cast iron DWV pipe is relatively inexpensive and can be accomplished quickly. Raw materials are readily available, and a new entrant would not be at any competitive disadvantage to incumbent domestic manufacturers in this regard. The conversion to cast iron DWV pipe production from other cast iron foundry operations (e.g., automotive casting, or other cast iron castings) is relatively simple and would only require the acquisition or fabrication of a pipe spinning machine and molds at an aggregate initial capital investment in the range of \$350,000–\$750,000, depending upon the size of the machine and the range of pipe sizes to be manufactured. A single spinning machine would be able to produce pipe suitable for approximately 90% of all pipe sold in Canada.

79. Melting operations (including cost of raw materials) account for the greatest proportion of total cost (approximately 58% in the case of Canada Pipe). Thus, a new entrant could easily combine a single spinning machine with the melting capacity of an existing foundry that has operations on a scale similar to those of Canada Pipe (of which there are several in Canada) and attain economies of scale comparable to Canada Pipe's with respect to the types of cast iron DWV pipe that account for almost 90% of Canada Pipe's sales. Given the low reputational barriers to entry and lack of long-term contracts, this strategy would effectively eliminate any potential incumbent manufacturing advantage that Canada Pipe might possess.

80. Similarly, if an entrant desired to manufacture fittings, it could do so by partnering with an existing foundry that has existing sand molding operations (which are used by Canada Pipe, as well as by other North American manufacturers, to manufacture fittings). All that would be required would be the acquisition of new patterns to make the desired range of fittings. These patterns can be purchased for approximately \$15,000 each. At that cost, Canada Pipe estimates that a supply of patterns sufficient to manufacture fittings accounting for approximately 80% of Canadian sales could be obtained for approximately \$700,000 - \$750,000.

81. Thus, with a relatively modest capital investment of approximately \$1 million to \$1.5 million, together with a joint venture or other arrangement with an existing foundry having excess melting capacity (of which there are several), a new entrant could operate at an efficient scale with capacity to service approximately 80-90% of Canadian demand for cast iron DWV Products.

82. In addition, both fittings and couplings are readily available from other domestic or foreign sources. Canada Pipe currently sources its couplings in this fashion.

83. Vandem began competing in exactly this fashion. Further, Vandem began operation during the period that the SDP was in force and, according to paragraph 77 of the SGMF, while the SDP was operating, Vandem has become the second largest seller of cast iron DWV Products in Canada. Vandem installed equipment in the existing Crowe Foundry in Cambridge, Ontario. Vandem acquired only one significant new piece of equipment in order to commence production - a double centrifugal spinner. Vandem has described its facility as "very automated and up to date" which suggests that entry as an efficient manufacturer is relatively easy. While Vandem presently competes primarily in Ontario, it has also competed aggressively in Quebec, Alberta, Manitoba and Atlantic Canada. In addition, paragraph 119 of the SGMF alleges that Vandem exports into the United States.

84. Contrary to the allegation in paragraph 101 of the SGMF, the costs incurred by competitors that choose to import cast iron DWV Products into Canada do not constitute a significant barrier to entry. Foreign produced cast iron DWV Products are available at prices that are considerably lower than prevailing wholesale prices in Canada and significant foreign capacity exists to serve Canadian importers. As a result, a new entrant could easily acquire sufficient inventory and begin supplying a significant part of Canadian demand in a relatively short amount of time.

85. Contrary to the allegation in paragraph 101 of the SGMF, with such readily available product, start-up costs for a new entrant are relatively modest, amounting to sufficient working capital to sustain approximately 90 days worth of inventory, the rental of a storage facility, salary for sales and office staff and minimal overhead. The absolute dollar value of the investment required would depend on the scale and scope of operations contemplated by the new entrant. For example, the cost of 90 days worth of inventory sufficient to supply 10% of Ontario sales is only approximately \$300,000. Like Canada Pipe, a new entrant could deliver its product using third-party carriers, with no competitive disadvantage.

86. Likely sources of potential entrants include firms that presently distribute other building and plumbing supplies as these firms would have the necessary administrative infrastructure, customer contacts and warehousing to enter the cast iron DWV Products industry quickly and inexpensively. Alternatively, distributors that currently sell cast iron DWV Products, even stocking distributors, could easily begin importing and compete directly against Canada Pipe. Indeed, Central Plumbing Supply imports fittings directly, and Wolseley has done this in the past and currently sells imported cast iron DWV Products in western Canada. Due to the commodity nature of the product, sunk costs of importing would be virtually negligible, as there would always be a buyer for imported inventory, including other wholesalers.

87. An entrant selling imported products would have access to distribution on the same basis as manufacturing entrants and incumbents. Existing distributors could readily switch suppliers to a new entrant that offers competitive quality, price and

service levels. Moreover, an importer could obtain its supplies of the entire range of cast iron DWV Products from offshore foundries. Finally, the significant relative growth of imported cast iron DWV Products suggests that the industry generally accepts that the quality of imported DWV Products is now competitive with the quality of domestically produced products.

88. Canada Pipe believes that there has been significant new entry by imported product in the last few years. Since 1998, at least three new importers of cast iron DWV Products have commenced selling in Canada. Further, a number of foreign producers have obtained CSA registration for cast iron DWV Products, including three Canadian companies that Canada Pipe believes are importing product: Taurus Industries Ltd., John L. Schultz Ltd., Kent Sharp Company Ltd., Sierra Distributors and Sino-Canwest Trading Inc.

89. Contrary to the allegation in paragraph 102 of the SGMF, standard certification is not a barrier to entry. Canada Pipe's products must also meet all relevant standards.

90. Canada Pipe denies the allegation in paragraph 104 of the SGMF that its past acquisitions of other companies have discouraged Canada Pipe's customers from testing new entrants.

## **F. Practice of Anti-Competitive Acts**

### **(a) The SDP Is Not an Anti-Competitive Act**

91. Canada Pipe denies the allegations in paragraphs 105 to 109 of the SGMF. As stated earlier, the SDP does not foreclose competition. In fact, Canada Pipe



faces greater levels of competition today, even within the Commissioner's hypothetical relevant market, than at the time the SDP was introduced. Since its introduction, among other things, there has been significant entry (including the first domestic manufacturer in over 30 years and increased level of imports), introduction of more competitive plastic DWV Products and the price of cast iron DWV Products has decreased significantly in real terms.

92. With respect to the allegations contained in paragraph 106 of the SGMF, non-stocking distributors may pay higher prices than stocking distributors if they purchase their cast iron DWV requirements from Canada Pipe. However, Canada Pipe denies that this makes the SDP an anti-competitive act as non-stocking distributors can purchase from Canada Pipe's competitors or choose to participate in the SDP at any time and exit again at any time if purchasing from one or more of Canada Pipe's competitors' prices is more advantageous.

93. Contrary to the allegation in paragraph 107 of the SGMF, distributors are not penalized for non-compliance; rather, they simply do not continue to enjoy the benefits of the SDP if they choose not to comply with its terms. The choice is left to the distributor. Further, provided credit requirements are met, Canada Pipe will sell to any customer regardless of whether the customer is participating in the SDP.

94. Canada Pipe denies the allegation in paragraph 109 of the SGMF that the SDP has been used to "create, preserve and entrench its market power", or to discourage and eliminate competition.

**(b) Canada Pipe's Acquisitions Do Not Constitute an Anti-Competitive Act**

95. Canada Pipe denies that its acquisitions of other companies were part of a practice of eliminating its competitors as suggested in paragraph 110 of the SGMF. All of Canada Pipe's acquisitions were the result of solicitations made by the prospective sellers. Canada Pipe did not approach those companies seeking to buy them or their inventories. Rather, Canada Pipe was approached and was advised that those companies or their inventories were for sale.

96. Canada Pipe denies the allegations in paragraphs 111 to 115 of the SGMF that the restrictive covenants agreed to by the sellers were unreasonable. Contractual terms such as those described in paragraph 111 (non-compete, non-solicitation, non-disclosure and limited ownership) are common terms found in many business acquisitions. The reasonableness of the specific terms in these acquisitions is evidenced by the fact that Vandem was started by the former President and Sales Manager of Bibby, notwithstanding the restrictive covenants in the relevant agreement of purchase and sale.

97. With respect to the allegation in paragraph 112 of the SGMF concerning the acquisition of Bibby by Canada Pipe, Tyler Pipe was not acquired as part of the Bibby acquisition. Canada Pipe had, in fact, acquired Tyler Pipe two years prior to its acquisition of Bibby.

98. Contrary to the allegations in paragraph 115 of the SGMF, the acquisitions described have not raised barriers to entry in any relevant market. Further, Canada Pipe denies that any or all of the individual transactions described in paragraphs 112 to

114 of the SGMF constitute a practice for purposes of section 79 of the *Act*. As described above, each of these business opportunities came about at the initiative of the vendor and were not part of a pre-determined program of acquisitions. Even if these acquisitions did constitute a practice (which Canada Pipe denies) and even if this practice somehow constituted an anti-competitive act (which Canada Pipe also denies), the last acquisition occurred more than three years before the filing of the Commissioner's Application. Therefore, this alleged practice must reasonably be deemed to have ceased at that time and the limitation period within which the Commissioner could have filed an application under s. 79 with respect to these acquisitions has expired.

99. Finally, these acquisitions were each subject to the merger provisions of the *Act*. The Commissioner was aware of each of these transactions within his three year jurisdiction under the merger review provisions of the *Act* and took no steps to prevent or challenge them pre- or post-closing. Canada Pipe submits that the Commissioner is barred from alleging that these individual acquisitions constitute part of an abuse of a dominant position given his decision at the time of each of these transactions to not exercise his powers under the merger provisions of the *Act*. Had the Commissioner believed that any or all of these transactions resulted in a substantial lessening of competition in any relevant market, he could have challenged them under s. 92 of the *Act* during the three years following any of these individual transactions.

**G. There Has Been No Substantial Lessening or Prevention of Competition**

100. For the reasons stated earlier, Canada Pipe denies the allegations in paragraphs 116 to 118 and 120 to 122 of the SGMF, and denies that the operation of

the SDP has resulted in a substantial lessening or prevention of competition even in the hypothetical cast iron DWV Products market. The Commissioner's allegations are contradicted by the entry of Vandem, the expansion of import sales, the recent decision by one of the largest distributors in Canada to leave the SDP and purchase imported cast iron DWV Products, the development and certification of non-combustible plastic DWV Products and by the declining real price of cast iron DWV Products during the time the SDP has been in operation.

### **PART III: EXCLUSIVE DEALING**

101. Canada Pipe denies that it has engaged in a practice of "exclusive dealing" as alleged in paragraph 123 of the SGMF and, in response to that allegation, relies upon paragraphs 1 to 100 of this Response. Those facts may be summarized briefly as follows:

- (a) the SDP does not create a contractual relationship between the distributors and Canada Pipe and distributors are not forced to deal exclusively with Canada Pipe;
- (b) since distributors are not locked in to Canada Pipe, competitors can access those distributors and compete against Canada Pipe on the basis of price and service for their business;
- (c) the SDP permits distributors to exit the program at any time and re-enter in any subsequent quarter with low switching costs, if any;
- (d) the SDP does not preclude distributors that are not participating in the SDP from acquiring Canada Pipe products;

- (e) the SDP does not prevent distributors from accessing lower prices if available from other suppliers if they choose to do so;
- (f) the SDP has not prevented the entry and expansion of both domestic manufacturers and importers of foreign produced products;
- (g) the SDP has not permitted Canada Pipe to exercise market power to prevent a significant decline in price;
- (h) Canada Pipe's competitors are fully able to implement a program similar to the SDP if they wish to do so; and
- (i) the SDP has not permitted Canada Pipe to exercise market power by ignoring the interests of its customers in designing and revising the SDP.

#### **PART IV: CONCLUSION**

102. As stated above, Canada Pipe denies that the relevant product market for the purposes of this Application can be defined as narrowly as the Commissioner proposes. Rather, the relevant product market is the entire DWV Products market. Even if one considered only Canadian sales of DWV Products, Canada Pipe would have a market share of less than 10%. Canada Pipe's low market share is dispositive of the entire Application.

103. Even in the hypothetical cast iron DWV Products market defined by the Commissioner, Canada Pipe denies that it has market power, has engaged in a practice of anti-competitive acts or has engaged in exclusive dealing, either through the SDP or through its acquisitions of other companies. Canada Pipe also denies that these

alleged practices have had the effect of substantially lessening or preventing competition.

104. For the reasons provided above, Canada Pipe's continued operation of the SDP does not constitute an abuse of a dominant position under s. 79 of the *Act*.

105. Further, future acquisitions by Canada Pipe should be reviewed by the Commissioner as part of his merger review responsibilities under the *Act*. The Commissioner should not be able to abrogate his responsibility to review specific mergers by having Canada Pipe pre-emptively barred from acquisitions. Nor should Canada Pipe be forced to submit to notification requirements beyond those provided for in the *Act*.

#### **PART V: RELIEF SOUGHT**

106. Canada Pipe requests that an Order be granted dismissing the Application with costs payable to Canada Pipe on a basis to be determined by the Tribunal after entertaining submissions from the parties in respect of that issue.

**PART VI: PROCEDURAL MATTERS**

107. Canada Pipe requests that the Application be heard in Toronto, Ontario.

DATED: October 6, 2003

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**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 under sections 79 and 77 of the *Competition Act*;

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

BETWEEN:

**COMMISSIONER OF COMPETITION**

Applicant

- and -

**CANADA PIPE COMPANY LTD./ TUYAUTERIES  
CANADA LTÉE**

Respondent

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**RESPONSE OF CANADA PIPE COMPANY  
LTD./TUYAUTERIES CANADA LTÉE**

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