

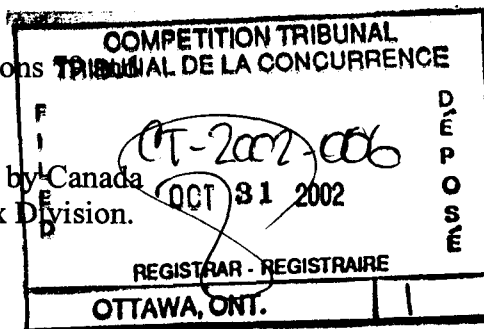
~~CT-011~~ CT-2002-006

THE COMPETITION TRIBUNAL

IN THE MATTER OF THE *COMPETITION ACT*,
R.S. 1985, c. C-34, as amended;

IN THE MATTER OF an application by the
Commissioner of Competition pursuant to sections
77 of the *Competition Act*;

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



BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

AND

CANADA PIPE COMPANY LTD./TUYAUTERIES CANADA LTÉE

Respondent

NOTICE OF APPLICATION

TAKE NOTICE that the Applicant will make an application to the Competition Tribunal (the "Tribunal") pursuant to sections 79 and 77 of the *Competition Act* (the "Act") for orders pursuant to subsections 79(1), 79(2) and 77(2) of the *Act*. The particulars of the orders sought by the Applicant are set out in paragraph 127 of this application.

AND TAKE NOTICE that the Applicant will rely on the following Statement of Grounds and Material Facts in support of this application.

STATEMENT OF GROUNDS AND MATERIAL FACTS

PART I: GROUNDS

1. All references in this Statement of Grounds and Material Facts to Bibby Ste-Croix (“Bibby”) are references to Canada Pipe Company Ltd./Tuyauteries Canada Ltée (“Canada Pipe”) carrying on business through its Bibby Ste-Croix Division.

A. Abuse of Dominant Position:

2. The Applicant states that Canada Pipe has engaged in or is engaging in a practice of anti-competitive acts. This practice has had, is having or is likely to have the effect of substantially lessening or preventing competition among manufacturers and importers of cast iron pipe, fittings and mechanical joint (“MJ”) couplings, for use in certain drain, waste and vent (“DWV”) applications, in six Canadian regions.
3. Bibby sells cast iron DWV pipe, fittings and MJ couplings (the “three relevant products”) in Canada.
4. The supply of the three relevant products constitutes the three relevant product markets.

5. Bibby substantially controls the supply of the three relevant products in British Columbia, Alberta, the Prairies (Saskatchewan and Manitoba), Ontario, Quebec and Atlantic Canada (New Brunswick, Nova Scotia, Newfoundland and Labrador and Prince Edward Island) (the “six relevant geographic markets”). In the alternative, Canada constitutes a single, national geographic market wherein Bibby substantially controls the supply of the three relevant products.
6. Bibby’s Stocking Distributor Program induces plumbing wholesalers and distributors to carry only Bibby’s line of cast iron DWV pipe, fittings and MJ couplings. The Stocking Distributor Program provides preferential discounts and rebates to customers who purchase their cast iron DWV pipe, fittings and MJ couplings exclusively from Bibby, thereby enforcing exclusive dealing and full-line forcing. This program in itself constitutes a practice of anti-competitive acts.
7. Bibby’s Stocking Distributor Program forecloses the distribution network to potential entrants and current competitors. As a result, Bibby has been able to create, entrench and enhance its market power.
8. The Applicant states that Canada Pipe’s acquisition of rivals and imposition of unreasonable restrictive covenants constitute further anti-competitive acts adding to the practice referred to above, and that the said practice has had, is having or is likely to have the effect of substantially lessening or preventing competition in the relevant product and geographic markets.

B. Exclusive Dealing:

9. The Applicant states that Bibby is a major supplier of cast iron DWV pipe, fittings and MJ couplings.

10. Through the Stocking Distributor Program, Bibby offers to supply the three relevant products to plumbing wholesalers and distributors (its “customers”) on more favourable terms and conditions, by providing preferential terms and rebates, if the customers purchase the three relevant products exclusively from Bibby. By so doing it induces its customers to deal only in the three relevant products supplied by Bibby and to refrain from dealing in the said products except as supplied by Bibby or its nominees. Bibby thereby engages in exclusive dealing and full-line forcing.

11. This exclusive dealing impedes or is likely to impede the entry of another firm or firms into the markets for cast iron DWV pipe, fittings and MJ couplings, with the result that competition is or is likely to be lessened substantially.

PART II: MATERIAL FACTS – ABUSE OF DOMINANT POSITION

A. The Parties:

12. The Applicant, the Commissioner of Competition, is appointed under section 7 of the *Act* and is charged with the administration and enforcement of the *Act*.
13. The Respondent, Canada Pipe, is a company incorporated pursuant to the laws of Ontario. Its head office is located in the city of Hamilton in the province of Ontario.
14. Canada Pipe is a subsidiary of McWane, Inc., an American corporation.
15. Canada Pipe sells ductile iron pipe through its Canada Pipe Division and sells valves and hydrants through its Clow Canada Division. The Bibby Ste-Croix Division sells cast iron DWV pipe, fittings and MJ couplings.

B. Background:

Drain, Waste and Vent (DWV) Applications:

16. Three systems make up a DWV application for the disposal of wastewater. Drainage systems are used primarily to drain rainwater from rooftops and decks. Waste systems drain wastewater from toilets, sinks, bathtubs and other fixtures and appliances. Venting systems provide air to the drainage and waste systems.

17. These systems are assembled using pipe, fittings and MJ couplings. Fittings join and re-direct pipes while MJ couplings bind and seal the fittings to the pipes or one pipe to another.
18. DWV pipe and fittings are generally made of cast iron, plastics, copper or asbestos cement. MJ couplings are made of rubber and stainless steel.
19. Cast iron is the only material used in certain DWV applications as a result of its unique characteristics, the applicable building regulations and industry practice. For example, in high-rise and other buildings where non-combustible DWV materials are required, cast iron DWV products are the dominant choice.

The Principal Participants in the Cast Iron DWV Pipe, Fittings and MJ Couplings Industry:

a) Manufacturers and Importers:

20. Cast iron DWV pipe, fittings and MJ couplings are either manufactured domestically or imported into Canada from the U.S. or other countries.
21. Bibby manufactures cast iron DWV pipe and fittings at its foundry in Ste-Croix, Quebec. It imports MJ couplings from related companies Tyler Pipe, a division of Ransom Industries LP, (“Tyler Pipe”) and Anaco Inc. (“Anaco”) in the U.S.

22. Vandem Industries Inc. (“Vandem”) is the only other Canadian manufacturer of cast iron pipe. Its pipe is produced at Crowe Foundry Limited (“Crowe Foundry”) in Cambridge, Ontario. Vandem sells Ideal MJ couplings and, until recently, imported fittings from Richmond Foundry Inc. (“Richmond Foundry”) in the U.S.
23. Rollee Industrial Products (1987) Ltd. (“Rollee”), located in British Columbia, is the only Canadian manufacturer of MJ couplings.
24. All other Canadian suppliers of cast iron DWV pipe, fittings and MJ couplings are importers. They obtain the products from the U.S. or from other countries and resell them in the relevant geographic markets.
25. The principal Canadian importers of cast iron DWV pipe, fittings and MJ couplings are: Sierra Distributors Ltd. (“Sierra”), in British Columbia; New Centurion Import & Export Ltd. (“New Centurion”), in British Columbia; Davcon Distributors Inc. (“Davcon”), in Alberta; John L. Schultz Ltd. (“Schultz”), in Quebec; Mediterranean Trading Co. Ltd. (“Mediterranean”) in Quebec; and Fernco Connectors Ltd. (“Fernco”), in Ontario.

26. Some U.S. manufacturers have a limited presence in one or more of the relevant geographic markets. Bibby sells a limited quantity of Tyler Pipe and Anaco products in Canada. Tyler Pipe manufactures cast iron DWV pipe and fittings. Anaco manufactures MJ couplings. Fernco Inc. and Mission Rubber Company, a division of MCP Industries, Inc. (“Mission Rubber”) also manufacture MJ couplings, and sell MJ couplings on a small scale in the relevant geographic markets.

b) Distributors:

27. Manufacturers and importers generally sell their cast iron DWV pipe, fittings and MJ couplings to wholesalers and distributors (“distributors”). Some manufacturers and importers sell directly to plumbing contractors. The vast majority of sales are through distributors.
28. Distributors supply the construction and renovation industry with a variety of plumbing products including DWV materials, waterworks products, heating, ventilation and air conditioning products and fire protection products.
29. Distributors usually carry pipe and fittings made of cast iron as well as plastic, copper or asbestos cement and MJ couplings for use in DWV applications.
30. The major distributors include: Emco Limited (“Emco”); Wolseley Canada Inc. (formerly Westburne Wolseley Canada) (“Westburne”); Crane Supply, a division

of Crane Canada Inc.; Noble Trade Inc., Bartle & Gibson Co. Ltd.; and Deschênes et Fils Ltée.

31. Some distributors operate nationally with branches in each of the relevant geographic markets; others operate regionally or are limited to one province.
32. A number of distributors are members of buying groups. The main purpose of buying groups is to pool members' purchases to attain higher volume rebates from manufacturers and importers. The principal buying groups in the relevant geographic markets are Octo Purchasing Group Ltd./Octo Groupe D'Achats Ltée ("Octo") and 2258005 Canada Limited ("Canaplus").

c) Plumbing Contractors

33. The principal customers of distributors are mechanical and plumbing contractors.
34. Once the plumbing systems for a construction project have been designed, the plumbing contractor solicits bids from distributors to supply the required products. Distributors bid on supplying all or a portion of the plumbing products for the building "rough-in", of which DWV applications are a part.
35. Carrying all three relevant products enables distributors to bid successfully on the whole plumbing component of a construction project.

36. In order to bid on projects, distributors must be able to determine what it will cost them to purchase required products from manufacturers or importers. Accordingly, most manufacturers and importers publish price lists for each of the three relevant products.
37. In addition to the published price list, manufacturers and importers offer discounts for each product. These discounts are published as multipliers.
38. The unit price of a product is determined by multiplying the list price by the applicable multiplier.
39. Most manufacturers and importers in the plumbing industry also offer rebates to their customers. Generally, these rebates are based upon the volume of purchases attained. As the purchase volume increases, so does the amount of the rebate.

Bibby's Stocking Distributor Program:

40. Bibby does not offer volume rebates on cast iron DWV pipe, fittings or MJ couplings purchases. Instead, since 1998, it has promoted the three relevant products through a marketing program known as the Stocking Distributor Program. The Program specifies one level of unit price and rebates to customers buying the three relevant products exclusively from Bibby, and a higher level of

unit price and no rebates to non-exclusive customers. This induces customers to buy their cast iron DWV pipe, fittings and MJ couplings exclusively from Bibby.

a. Two Classes of Distributors:

41. The Stocking Distributor Program establishes two classes of distributors – stocking distributors and non-stocking distributors. A stocking distributor is a distributor who purchases the three relevant products exclusively from Bibby. Moreover, a stocking distributor must buy at least one 40,000 pound shipment of the three relevant products in a given quarter.

b. Two Unit Prices:

42. Bibby publishes two sets of multipliers for its price lists. One set applies to non-stocking distributors. The second set of multipliers, applicable to purchases by stocking distributors, provides for significantly higher discounts and, accordingly, results in significantly lower unit prices for customers who buy the three relevant products exclusively from Bibby.

c. Rewards:

43. A further incentive of the Stocking Distributor Program is that customers who buy all of their cast iron DWV pipe, fittings and MJ couplings exclusively from Bibby are eligible for quarterly and annual rebates. The rebates are lump-sum payments given at the end of a specified period. The quarterly rebates are paid to distributors who purchase all of their requirements of cast iron DWV pipe, fittings

- and MJ couplings from Bibby throughout a quarter. The yearly rebates are paid to distributors who buy exclusively from Bibby throughout a year.
44. In 2002, Bibby has offered its stocking distributors the following quarterly rebates: pipe six per cent; fittings fifteen per cent; and, MJ couplings eight per cent. The annual rebate on all three products is four per cent. Bibby also offers a marketing allowance of one per cent on pipe and MJ coupling purchases, earned and paid annually.
 45. In order to qualify for all of the discounts and rebates offered by Bibby, the distributors are precluded from purchasing or carrying any cast iron DWV pipe, fittings or MJ couplings from suppliers other than Bibby.
 46. If a stocking distributor purchases cast iron DWV pipe, fittings or MJ couplings from a competitor, Bibby withholds the rebate for that quarter as well as the annual rebate. Although the distributor can join the Stocking Distributor Program again in the next quarter and earn quarterly rebates, the annual rebate is lost.

d. Monitoring and Enforcement:

47. Bibby enforces and monitors its customers' compliance with the exclusivity requirement of the Stocking Distributor Program. Bibby regularly visits distributors' warehouses and construction sites to ensure that its customers are buying only Bibby product. Further, Bibby analyzes customers' purchases for

indications that any of the three relevant products is being obtained from a competitor.

48. If Bibby determines that a customer has purchased any cast iron DWV product from a competitor, that customer will generally be reprimanded. Bibby can and will demote a so-called “cheating”, or non-compliant, customer to non-stocking distributor status and deny it access to lower unit prices and rebates.

e. Direct-to-Contractor Marketing:

49. The Stocking Distributor Program is further enhanced by Bibby’s direct-to-contractor marketing activities. Bibby has made lump-sum payments directly to plumbing contractors who purchase cast iron DWV products from stocking distributors.

C. The Product Markets:

50. The three relevant product markets are the supply of cast iron DWV pipe, fittings and MJ couplings.

Cast Iron’s Distinct Market:

51. DWV applications can be assembled using a variety of piping materials including cast iron, plastic (e.g. polyvinyl chloride (“PVC”) and acrylonitrile-butadiene-styrene (“ABS”)), copper and asbestos cement.

52. Cast iron has unique characteristics and end-uses for which there are no practical substitutes.

a. Quiet and Durable:

53. The flow of wastewater through DWV applications using plastic piping is audible. Cast iron's ability to reduce plumbing related noises is unique.
54. Cast iron is resistant to impact and has proven durability. The durability of plastic is unproven.

b. Will not Burn or Smoke:

55. Cast iron is non-combustible. Cast iron pipe will neither ignite nor burn when exposed to a specified degree of temperature for a specified length of time.
56. Cast iron meets all of the Underwriters' Laboratories of Canada ("ULC") criteria for non-combustible materials. The ULC performs standardized tests on all building materials to determine their non-combustibility.
57. The National and Provincial Building Codes, Plumbing Code or municipal regulations ("Codes") limit the use of combustible pipe in buildings over a certain height and occupancy.

58. There are no restrictions in the Codes on the use of non-combustible materials such as cast iron.
59. Plastic pipe is combustible and develops smoke when exposed to flame. Accordingly, plastic pipe is prohibited in certain types and areas of buildings. As a result of these limitations, the use of plastic pipe is restricted primarily to low-rise construction where the Codes permit combustible DWV materials.
60. The combination of the applicable Codes and industry practice has made cast iron the material most often installed in DWV applications in buildings such as high-rises and in institutions (e.g. hospitals, schools and long-term care facilities).

c. Simpler Fire-stopping Procedure:

61. The Codes also provide that wherever a DWV pipe passes through a fire separation (e.g. a wall or a floor) the penetration space must be sealed with a fire-stopping product. Fire-stopping of cast iron pipe simply requires the application of fire-resistant caulking. To firestop plastic pipe penetrations, special fire-stopping devices known as “donuts” must be installed.

d. No Health Risks:

62. The use of asbestos cement in DWV applications is limited in large part because of the perceived health risk in working with asbestos.

e. Low Thermal Expansion Rates:

63. Cast iron pipe expands and contracts at a low rate, similar to those of building materials such as steel, concrete and masonry, eliminating the need for costly expansion joints.

f. Economical:

64. Copper is non-combustible and can be used in all DWV applications. However, the high material cost of copper limits the use of copper pipe larger than three inches in diameter.

Pipes, Fittings and MJ Couplings -- Three Markets:

65. The three cast iron DWV products are in separate product markets. They have different physical characteristics and different end-uses. Cast iron DWV pipe, fittings and MJ couplings are complementary products; they are not substitutes for one another.
66. Cast iron pipe is manufactured in a foundry using scrap iron in spinning machines. Cast iron pipes are hollow cylinders or tubes, of varying length and diameter, made out of cast iron. Cast iron pipes can be used to conduct liquid, gas or finely divided solids.
67. Fittings are also manufactured in a foundry with scrap iron using moulds of the various fittings shapes. Moulding machines are required. Fittings come in a

variety of shapes (e.g. elbow, ell, tee, cross, hex) and diameters. Fittings are moulded hollow cast iron shapes used to connect one or more pipes and to change their direction.

68. MJ couplings are not usually manufactured in a foundry, as the basic materials are rubber and stainless steel. MJ couplings consist of multiple stainless steel bands attached to a corrugated stainless steel shield over a moulded one-piece rubber-sealing sleeve. MJ couplings, which come in a variety of dimensions, are used to bind and seal fittings to pipes or one pipe to another.

D. The Relevant Geographic Markets:

69. There are six relevant geographic markets for the supply of cast iron DWV pipe, fittings and MJ couplings in Canada:
- Atlantic Canada (New Brunswick, Nova Scotia, Newfoundland and Labrador and Prince Edward Island);
 - Quebec;
 - Ontario;
 - The Prairies (Saskatchewan and Manitoba);
 - Alberta; and,
 - British Columbia.
70. The six relevant geographic markets reflect the six pricing zones that Bibby has established. Bibby's prices for cast iron DWV pipe, fittings and MJ couplings

vary across these six regions. Distributors in each of these six regions may be required to purchase the three relevant products from Bibby at different prices.

71. Prices for the three relevant products in one geographic region are not strongly correlated to prices in the other regions and are affected by different factors.
72. Further, although some distributors operate nationally with branches in all six geographic regions, other distributors operate in only one of the geographic regions.
73. British Columbia and Alberta are also characterized by the presence of higher volumes of imported products.
74. In the alternative, Canada can be considered a single national relevant geographic market, in which Bibby is the dominant firm and major supplier of the three relevant products in all zones.

E. Bibby's Control of the Markets:

75. Bibby controls the supply of cast iron DWV pipe, fittings and MJ couplings in all six relevant geographic markets. Bibby has the ability to set the prices of the three relevant products in those geographic markets, to keep prices above competitive levels and to adjust prices in order to dissuade new entrants and induce compliance among stocking distributors with the Stocking Distributor

Program. Further, Bibby's market share is protected by significant barriers to entry.

Market Share:

76. From 1998 to August 2002, Bibby's sales of cast iron DWV pipe, fittings and MJ couplings accounted for more than 85 per cent of total sales in Canada. During the same period, Bibby controlled more than 80 per cent of the total sales of the three relevant products in each of the six relevant geographic markets.
77. The second largest supplier of cast iron DWV pipe and fittings in Canada is Vandem. Its sales from 1999 to August 2002 accounted for less than six per cent of the total sales of cast iron DWV pipe and fittings in the six relevant geographic markets combined. Vandem's largest market share is in Ontario where it accounts for less than ten per cent of the total sales of cast iron DWV pipe and fittings. Since its inception, Vandem's MJ couplings sales have been minimal.
78. Vandem began selling cast iron DWV products in 1999. It is the only manufacturer that has attempted to enter the relevant markets in the past four years.
79. The sales of the other participants in the supply of cast iron DWV pipe, fittings and MJ couplings in the six relevant geographic markets are negligible.

80. Additionally, Bibby has consistently been able to charge prices for the three relevant products in the six relevant geographic markets above competitive levels.
81. Whenever Bibby has faced competition in one or more of the relevant geographic markets, the discounts and rebates offered for the three relevant products have increased.
82. In 1998 and 1999, Bibby lowered its unit prices, through higher discounts, when imports from Asia entered British Columbia. However, in 1999, after the number of imports into British Columbia dropped significantly, Bibby returned prices to supra-competitive levels.
83. When Vandem entered the Ontario market in 1999, Bibby followed a strategy similar to that in British Columbia. In 1999, it increased its rebates. In 2000 it increased its discounts, and the unit prices for the three relevant products were lowered.
84. In British Columbia in 2002, Bibby lowered its unit prices after Westburne left the Stocking Distributor Program. For several months prior to doing so, Bibby had made direct payments to contractors to induce them to buy from its stocking distributors.

85. This strategy of lowering prices, through an increase in discounts, penalizes non-stocking distributors. Non-stocking distributors lose any potential cost advantage from dealing with suppliers other than Bibby and also lose the reductions equivalent to their former rebates. As a result, they are induced to return to Bibby as stocking distributors.

Barriers to Entry:

86. Manufacturers and importers face significant barriers to entry into and expansion within the relevant markets.

a. The Principal Barrier to Entry is Bibby's Stocking Distributor Program:

87. Bibby's Stocking Distributor Program forecloses at least 80 per cent of the distribution network to new entrants and current competitors.
88. Stocking distributors face high switching costs, in the form of higher unit prices and lost rebates, if they stop being exclusive to Bibby. As a result, new entrants cannot hope to obtain a portion of a Bibby customer's business. A new entrant is faced with having to win all of a customer's business or none at all.
89. The Stocking Distributor Program significantly raises the costs of entry into the relevant markets. In order to capture any business from Bibby's current stocking distributor customers, a successful entrant would have to compensate those

customers for the lost rebates. This significantly hinders the ability of entrants to enter the relevant markets.

90. The Stocking Distributor Program acts as a disincentive for most Bibby customers to test new entrants. Stocking distributors are hesitant to purchase products from new entrants, especially if they do not offer a full line of the three relevant products. Moreover, distributors must consider the ramifications that the failure of the new entrant would have on the supply of the products as well as the unit price. Returning to Bibby as a non-stocking distributor would limit the distributor's ability to compete.
91. Entry is also restricted by a perception among distributors that Bibby will not extend the warranties on its three cast iron DWV products unless they are used in conjunction with one another.

b. Other Bibby Actions Also Raise the Barriers to Entry:

92. As stated in paragraphs 49 and 84, Bibby has made lump-sum payments directly to plumbing contractors who purchase cast iron DWV products from stocking distributors.
93. This constitutes an additional inducement to the Stocking Distributor Program which new entrants must overcome in order to attract business from distributors.

94. In addition, Bibby maintains a network of sales representatives strategically located across Canada. Bibby's large sales force enables it to enforce the stocking distributor program, monitor its customers' compliance with the program, and deal directly with contractors.

c. The Nature of the Industry Creates Additional Barriers to Entry:

95. The Canadian cast iron DWV industry is mature. Growth of the demand for cast iron DWV pipe, fittings and MJ couplings is limited and Bibby is able to supply and meet the demand in the relevant markets.
96. The existence of national distributors like Westburne and Emco as well as the two buying groups, Octo and Canaplus, inhibits the creation of an alternative national or regional distribution network.
97. Given that the three relevant products represent only a small share of distributors' sales, it would not be profitable to set up an alternative distribution network for the three relevant products only, as contractors value distributors selling a wide variety of building materials.
98. It is similarly impractical for entrants to by-pass the distributors' network by selling directly to contractors. Not only would a substantial sales force be required but also servicing contractors' individual projects on a large scale would not be economical.

99. The establishment of a new Canadian foundry capable of producing cast iron pipe, fittings or MJ couplings for DWV applications is difficult. Setting up a foundry involves significant sunk costs. Additionally, numerous regulatory approvals are required and stringent environmental standards must be met.
100. The possibility of converting an existing foundry in order to enter the relevant markets is limited.
101. New importers of offshore products face the expense of setting up or securing docks, depots and storage facilities and making advance payments to foreign manufacturers.
102. Certification requirements pose an additional barrier to entry. The Canadian Standards Association must certify each of the three relevant products before it can be sold in Canada.
103. Large-scale entry by manufacturers and importers in the DWV cast iron industry is also limited by distributors' lack of confidence in unestablished entrants and products.
104. The Respondent's past acquisitions of its rivals or their inventories also discourage Bibby's customers from testing new entrants.

F. Practice of Anti-Competitive Acts:**Bibby's Stocking Distributor Program:**

105. Bibby's Stocking Distributor Program is designed to induce wholesale plumbing distributors to carry the Bibby line of cast iron DWV products exclusively. This exclusionary practice forecloses competition in the relevant markets.
106. As noted above, in paragraphs 40-46, non-stocking distributors face higher unit prices than those available to Bibby Stocking Distributors when purchasing cast iron DWV pipe, fittings and MJ couplings. Additionally, Bibby provides rebates only to those customers who purchase all of their cast iron DWV products exclusively from Bibby. Bibby also reserves the right to refuse to sell or deal with any non-stocking customer for any reason at any time.
107. As noted above in paragraph 47, Bibby polices its customers' adherence to the loyalty requirement of the Stocking Distributor Program and penalizes those who are non-compliant.
108. Bibby's Stocking Distributor Program ensures that it is not economically feasible for a stocking distributor to give part of its business to a competitor. It enforces exclusive dealing and full-line forcing.

109. Bibby has used its Stocking Distributor Program to create, preserve and entrench its market power and to discourage and eliminate competition in the relevant markets.

Acquisition of Rivals and Unreasonable Restrictive Covenants:

110. Canada Pipe, acting on its own behalf or through Bibby, has acquired the business, operations, assets, shares or corporate personality of other participants in the relevant markets for the purpose of eliminating Bibby's competitors from the relevant markets.
111. In the course of the said acquisitions, Canada Pipe has entered into agreements with the sellers imposing unreasonable restrictive covenants such as non-compete, non-solicitation, non-disclosure and limited ownership clauses.
112. In 1997, Canada Pipe purchased Bibby Ste-Croix Foundries Inc. and related entities, including Tyler Pipe. As part of the sale and purchase agreement, the sellers and shareholders of Bibby Ste-Croix Foundries Inc. and related entities were enjoined, for a period of seven years, from engaging in the manufacture, sale or distribution of the three relevant products or any similar business. Following the acquisition, Canada Pipe caused Tyler Pipe to exit the Canadian market.

113. In 1998, Canada Pipe acquired Cremco Supply Ltd. (“Cremco”), a Canadian manufacturer of couplings and an importer of Chinese cast iron DWV fittings and of American cast iron DWV pipe. As part of the sale and purchase agreement, the sellers and shareholders of Cremco were enjoined, for a period of seven years, from engaging in the manufacture, sale or distribution of the three relevant products or in any similar business.
114. In 1998, Bibby purchased BMI Canada Inc.’s imported cast iron DWV fittings inventory. BMI Canada Inc. then withdrew from the relevant markets.
115. Canada Pipe’s acquisitions of rivals and imposition of unreasonable restrictive covenant agreements have elevated market concentration, raised barriers to entry and consolidated Bibby’s significant control of the relevant markets.

G. Substantial Lessening or Prevention of Competition:

116. Bibby’s Stocking Distributor Program and Canada Pipe’s acquisition of rivals and imposition of unreasonable restrictive covenants create, preserve and add to Bibby’s market power.
117. The exclusivity requirements of the Stocking Distributor Program foreclose a substantial portion of the distribution network to new and potential entrants or current competitors.

118. Vandem is the only manufacturer that has attempted to enter the relevant markets in the last four years.
119. Vandem's customers are generally small distributors. As well, a portion of Vandem's sales of cast iron DWV pipe, fittings and MJ couplings are to customers in the northeastern U.S.
120. As a result, Vandem has not been able to become an effective and viable competitor in the relevant markets.
121. Similarly, importers' ability to compete with Bibby and expand in the six relevant geographic markets is restricted by their limited customer base of principally small distributors.
122. Finally, Canada Pipe's acquisitions of rivals and the unreasonable restrictive covenants that have been imposed have eliminated competitors from the relevant markets.

PART III: MATERIAL FACTS—EXCLUSIVE DEALING

123. The facts material to Bibby's practice of exclusive dealing are included in the recitation of facts material to abuse of dominant position, in Part II, Sections A-E, above. In summary, they are as follows:

- (a) Bibby is a major supplier of cast iron DWV products, accounting for more than 80 per cent of the total sales of each of the three relevant products in the six relevant geographic markets;
- (b) Through its Stocking Distributor Program, Bibby offers higher discounts resulting in lower unit prices to customers that purchase the three relevant products exclusively from Bibby;
- (c) Through its Stocking Distributor Program, Bibby offers quarterly and annual rebates to customers that purchase the three relevant products exclusively from Bibby;
- (d) Bibby's Stocking Distributor Program induces Bibby's customers to deal only in the three relevant products supplied by Bibby or to refrain from dealing in the three relevant products except as supplied by Bibby;
- (e) By offering to supply the three relevant products to its customers on more favourable terms if they deal only in the three relevant products supplied by Bibby or refrain from dealing in the three relevant products except as supplied by Bibby, Bibby is engaging in a practice of exclusive dealing; and,

- (f) Bibby's practice impedes or is likely to impede entry into or expansion of a firm attempting to sell the three relevant products, or all of them, in the six geographic markets, or in the Canadian national market, with the result that competition is or is likely to be lessened substantially.

PART IV: CONCLUSION

124. Bibby substantially controls the supply of cast iron DWV pipe, fittings and MJ couplings in the six relevant geographic markets.

125. The Respondent has engaged or is engaging in a practice of anti-competitive acts through Bibby's Stocking Distributor Program, and further through the acquisition of rivals and the imposition of unreasonable restrictive covenants for the purpose of excluding actual and potential competitors from the relevant markets. This has had, is having and is likely to have the effect of substantially preventing or lessening competition in the relevant markets.

126. Further, Bibby has engaged in exclusive dealing which has impeded the entry of another firm or firms into the relevant markets with the result that competition is or is likely to be substantially lessened.

PART V: RELIEF SOUGHT

127. The Applicant requests that the Tribunal make the following orders:

- a) an order pursuant to s. 79 (1) and (2) of the *Competition 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 *Competition 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.

(c) such further and other orders the Tribunal may consider appropriate.

PART VI: PROCEDURAL MATTERS

128. The Applicant requests that this application be heard in English.
129. The Applicant requests that this application be heard in the City of Ottawa.
130. The Applicant proposes that documents be filed electronically.
131. For the purposes of this application, service of all documents on the Applicant can be effected on:

Morris Rosenberg
Deputy Attorney General of Canada
Per: Linda J. Wall
Department of Justice
Room 2203, East Memorial Bldg.
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Tel:(613) 9957-4830
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E-mail: linda.wall@justice.gc.ca

Counsel for the Applicant

DATED AT Ottawa, Ontario, this 31st day of October, 2002



for Konrad von Finkenstein, Q.C.
Commissioner of Competition

Morris Rosenberg
Deputy Attorney General of Canada
Per: Linda J. Wall
Department of Justice
Room 2203, East Memorial Bldg.
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Counsel for the Applicant

TO: **Canada Pipe Company Ltd.**
c/o Mr. Milos Barutciski
Davies Ward Phillips & Vineberg
Barristers and Solicitors
44th Floor
1 First Canadian Place
P.O. Box 63, Stn. First Canadian Place
Toronto, Ontario
M5X 1B1

AND TO: **The Registrar**
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario
K1P 5B4