



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADE-MARKS

**Citation: 2015 TMOB 146**  
**Date of Decision: 2015-08-28**

**IN THE MATTER OF SECTION 45 PROCEEDINGS**

**Jeffrey Kaplan**

**Requesting Party**

**and**

**Reckitt Benckiser (Canada) Inc.**

**Registered Owner**

**TMA342,361 for SANI-FLUSH PUCK**  
**TMDA17,356 for SANI-FLUSH**

**Registrations**

[1] This is a decision involving a summary expungement proceeding with respect to registration Nos. TMA342,361 and TMDA17,356 for the trade-marks SANI-FLUSH PUCK and SANI-FLUSH respectively (sometimes hereafter referred to as the Marks).

[2] Registration No. TMA342,361 (SANI-FLUSH PUCK) is registered for use in association with “solids to clean, disinfect and deodorize bathroom or toilet bowls, and tanks”.

[3] Registration No. TMDA17,356 (SANI-FLUSH) is registered for use in association with “powders and liquids to clean, disinfect and deodorize bathroom bowls. Solid concentrate for suspension in bathroom or toilet bowls to clean, disinfect and deodorize the same”.

[4] On June 28, 2013 (with respect to registration No. TMA342,361) and on June 27, 2013 (with respect to registration No. TMDA17,356), at the request of Jeffrey Kaplan (the Requesting Party), the Registrar of Trade-marks issued notices under section 45 of the *Trade-marks Act* RSC 1985, c T-13 to Reckitt Benckiser (Canada) Inc. (the Owner). The notices required the Owner to

provide evidence showing that it had used the Marks in Canada at any time in the three years preceding the dates of the respective notices, in association with each of the registered goods. If the Marks had not been so used, the Owner was required to furnish evidence providing the date when the Marks were last in use and the reasons for the absence of use since that date.

[5] The relevant definition of use is set out in section 4(1) of the Act as follows:

4(1) A trade-mark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

[6] It has been well established that the purpose and scope of section 45 of the Act is to provide a simple, summary, and expeditious procedure for clearing the register of “deadwood”. The criteria for establishing use are not demanding and an overabundance of evidence is not necessary. However, sufficient evidence must nevertheless be provided to allow the Registrar to conclude that the trade-mark was used in association with each of the registered goods during the relevant period [see *Uvex Toko Canada Ltd v Performance Apparel Corp* (2004), 31 CPR (4th) 270 (FC)]. Furthermore, mere statements of use are insufficient to prove use [see *Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)].

[7] In response to the Registrar’s notices, the Owner furnished affidavits of David Najgoldberg, both sworn September 25, 2013. Only the Owner filed written representations; an oral hearing was not held.

[8] For the reasons that follow, I conclude that both registrations ought to be maintained.

[9] Before discussing the reasons for my decision, I will begin with a brief summary of the evidence.

The Evidence – TMA342,361 (SANI-FLUSH PUCK)

[10] Mr. Najgoldberg attests that he is the Category Manager, Surface and Personal Care for the Owner, and has held this position since late 2011. He explains that the Owner is a manufacturer and distributor of a wide variety of household products. He further explains that the Owner manufactures its SANI-FLUSH PUCK brand product and sells it to retailers and distributors in Canada, including national grocery chains and distribution brokers who sell the product to smaller retailers.

[11] Mr. Najgoldberg states that the SANI-FLUSH PUCK trade-mark has been used in Canada for decades and continues to be used today. More specifically, he attests that, during the relevant period, the Owner sold products in Canada using the Mark as described in his affidavit, one such product being a “solid in-tank toilet bowl cleaner”.

[12] In support, Mr. Najgoldberg provides the following:

- A photograph of the solid in-tank toilet bowl cleaner “as it has been sold in Canada since at least 2010” (Exhibit A); and
- A representative invoice showing sales in Canada of the product shown in Exhibit A dated during the relevant period (Exhibit B).

[13] Additionally, Mr. Najgoldberg explains that while the Owner’s internal sales figures are confidential, he conducted a search for sales data using the Owner’s paid subscription to a retail measurement database operated by Nielsen, a company that measures what consumers buy, among other services. He provides as Exhibit C, a printout from Nielsen’s website describing its retail measurement services, which Mr. Najgoldberg states he believes to be accurate based on his experience. He attests that the results of a search of the database for sales of SANI-FLUSH PUCK brand products in Canada during the three-year relevant period, tracked using POS (point-of-sale) scanning technology, were as follows: “SANI-FLUSH PUCK SOLID 48 GM - \$843,140”.

The Evidence – TMDA17,356 (SANI-FLUSH)

[14] With respect to registration No. TMDA17,356, Mr. Najgoldberg provides similar attestations as with regard to his position within the Owner and the Owner’s line of business and channels of trade.

[15] Mr. Najgoldberg then attests that the trade-mark SANI-FLUSH has been used in Canada for decades and continues to be used today. He further attests that specifically during the relevant period, the Owner has sold at least two products in Canada using the trade-mark SANI-FLUSH, which he describes as a “liquid toilet bowl cleaner” and a “solid in-tank toilet bowl cleaner”.

[16] In support, Mr. Najgoldberg provides the following:

- Photographs of the liquid and solid in-tank toilet bowl cleaners as they have “been sold in Canada since at least 2010” (Exhibits A and B); and
- Representative invoices showing sales in Canada of the products shown in Exhibits A and B, dated during the relevant period (Exhibit C).

[17] Again, Mr. Najgoldberg explains that while the Owner’s internal sales figures are confidential, he conducted a search for sales data using the Owner’s paid subscription to Nielsen’s retail measurement database. He provides, as Exhibit D to his affidavit, a printout from Nielsen’s website describing its retail measurement services, which Mr. Najgoldberg states he believes to be accurate based on his experience. He attests that the results of a search of the database for sales of SANI-FLUSH brand products in Canada during the three-year relevant period, tracked using POS (point-of-sale) scanning technology, were as follows:

- SANI-FLUSH AUTO LIQ REGULAR 341 ML - \$550,278 (indicated to be the liquid toilet bowl cleaner product as shown in Exhibit A to his affidavit)
- SANI-FLUSH PUCK SOLID 48 GM - \$843,140 (indicated to be the solid in-tank toilet bowl cleaner product as shown in Exhibit B to his affidavit)

### Analysis and Reasons for Decision

[18] Having regard to the evidence as a whole, I am satisfied that the Owner has demonstrated use of the Marks in accordance with sections 4 and 45 of the Act in association with each of the respective registered goods.

[19] In particular, I am satisfied that there were transfers in the normal course of trade of each of the registered goods. In this regard, Mr. Najgoldberg has provided representative invoices for the goods clearly dated during the relevant period. The goods have been clearly identified on the invoices, whose product descriptions correspond to the product descriptions on the labels shown in the photographs of the respective associated products. In addition, such descriptions are consistent with Mr. Najgoldberg's descriptions of the products which I accept correspond to each of the registered goods.

[20] While only a single invoice has been furnished with respect to each of the registered goods, Mr. Najgoldberg attests that the invoices are representative. Furthermore, the sales demonstrated through the invoices are consistent with Mr. Najgoldberg's attestations regarding the Owner's normal course of trade. It is well established that evidence of a single sale may be sufficient to establish use of a trade-mark in the normal course of trade, depending on the circumstances surrounding the transaction [see *Ontario Inc v Eva Gabor International, Ltd et al* (2011), 90 CPR (4th) 277 (FC) and *Philip Morris Inc v Imperial Tobacco Ltd* (1987), 13 CPR (3d) 289 (FCTD)]. In the present case, I see nothing in the evidence that leads me to believe that such sales lacked bona fides in the sense of being deliberately manufactured or contrived in an attempt to protect the registrations.

[21] As I accept that the invoices are sufficient to demonstrate sales in the normal course of trade of the registered goods, I need not consider the issue of hearsay evidence; namely, the sales figure data derived from Nielsen's retail measurement database. In any event, I note that it has been held that the summary nature of cancellation proceedings are such that concerns regarding hearsay should generally only go to the weight given to evidence rather than admissibility [see *Derby Cycle Werk GmbH v Infinité Cycle Works Ltd*, 2013 TMOB 134, 113 CPR (4th) 412; *1459243 Ontario Inc v Eva Gabor International, Ltd et al*, 2011 FC 18, 90 CPR (4th) 277; and *Wishbuds Inc v Sandoz GmbH*, 2013 TMOB 208, 2013 CarswellNat 4700].

[22] With respect to notice of association of the Marks with the registered goods, the evidence clearly shows the Marks on the labels/packaging of the respective products in the exhibited photographs of the registered goods. Specifically, SANI-FLUSH clearly appears on the label of the liquid toilet bowl cleaner (Exhibit A of TMDA17,356); thus, I accept that notice of association of the mark SANI-FLUSH (TMDA17,356) was given at the time of transfer of the registered goods “powders and liquids to clean, disinfect and deodorize bathroom bowls”.

[23] Additionally, SANI-FLUSH PUCK appears on packaging of the “solid, in-bowl toilet cleaner” (Exhibit A of TMA342,361 and Exhibit B of TMDA17,356). In this instance, SANI-FLUSH appears in a significantly larger and different colour of font than the word PUCK, and both the words SANI-FLUSH and PUCK are followed by trade-mark indicia. Consequently, it is my view that the public would perceive the trade-mark SANI-FLUSH, as well as the composite mark SANI-FLUSH PUCK as the trade-marks being used, with the term PUCK being used as a sub-mark/product line identifier [see *Canadian Council of Professional Engineers v Ardex Inc* (2001), 13 CPR (4th) 554 (TMOB); and *Aramark Canada Ltd v 637870 Ontario Ltd* (2002), 22 CPR (4th) 409 (TMOB)]. Thus, I accept that the evidence supports that notice of association of SANI-FLUSH (TMDA17,356) was given at the time of transfer of the registered goods “solid concentrate for suspension in bathroom or toilet bowls to clean, disinfect and deodorize the same”, as was SANI-FLUSH PUCK (TMA342,361) with respect to “solids to clean, disinfect and deodorize bathroom or toilet bowls, and tanks”.

Disposition

[24] In view of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, the registrations will be maintained in compliance with the provisions of section 45 of the Act.

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Kathryn Barnett  
Hearing Officer  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

No Hearing Held

Agents of Record

Smart & Biggar

For the Registered Owner

Miltons IP/P.I.

For the Requesting Party