

Ottawa, Thursday, July 7, 1994

Appeal No. AP-92-350

IN THE MATTER OF an appeal heard on December 17, 1993, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue for Customs and Excise dated December 5, 1992, with respect to requests for re-determination under section 63 of the *Customs Act*.

BETWEEN

**RECKITT & COLMAN CANADA INC.
(FORMERLY KNOWN AS BOYLE-MIDWAY LTD.)**

Appellant

AND

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

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**RECKITT & COLMAN CANADA INC.
(FORMERLY KNOWN AS BOYLE-MIDWAY LTD.)**

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

This is an appeal under section 67 of the Customs Act from 136 decisions of the Deputy Minister of National Revenue for Customs and Excise dated December 5, 1992. The issue in this appeal is whether Sani-Flush is properly classified under tariff item No. 3402.20.90 as a toilet bowl cleaning preparation put up for retail sale, as determined by the respondent, or should be classified in subheading No. 3808.40 as a disinfectant, as claimed by the appellant.

HELD: *The appeal is dismissed. In the Tribunal's view, Sani-Flush has subsidiary disinfecting qualities and is, therefore, excluded from being classified in heading No. 38.08 by virtue of the Explanatory Notes to the Harmonized Commodity Description and Coding System. The Tribunal finds that Sani-Flush is properly classified under tariff item No. 3402.20.90 as a toilet bowl cleaning preparation put up for retail sale.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: December 17, 1993
Date of Decision: July 7, 1994*

*Tribunal Members: Arthur B. Trudeau, Presiding Member
Anthony T. Eyton, Member
Sidney A. Fraleigh, Member*

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Anne Jamieson

*Appearances: Michael Kaylor, for the appellant
Brian Tittmore, for the respondent*

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(FORMERLY KNOWN AS BOYLE-MIDWAY LTD.)**

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
ANTHONY T. EYTON, Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from 136 decisions of the Deputy Minister of National Revenue for Customs and Excise dated December 5, 1992. The issue in this appeal is whether Sani-Flush is properly classified under tariff item No. 3402.20.90 of Schedule I to the *Customs Tariff*² as a toilet bowl cleaning preparation put up for retail sale, as determined by the respondent, or should be classified in subheading No. 3808.40 as a disinfectant, as claimed by the appellant.

The following are the relevant provisions from Schedule I to the *Customs Tariff*:

- 34.02 *Organic surface-active agents (other than soap); surface-active preparations, washing preparations (including auxiliary washing preparations) and cleaning preparations, whether or not containing soap, other than those of heading No. 34.01.*
- 3402.20 *-Preparations put up for retail sale*
- 3402.20.90 *---Other*
- 38.08 *Insecticides, rodenticides, fungicides, herbicides, anti-sprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packings for retail sale or as preparations or articles (for example, sulphur-treated bands, wicks and candles, and fly-papers).*
- 3808.40 *-Disinfectants*

The appellant's witness, Mr. Robert T. Fellows, Product Development Co-ordinator for Reckitt & Colman Canada Inc., explained to the Tribunal the composition of Sani-Flush, which he described as a "disinfecting toilet bowl cleaner." He entered, as a confidential exhibit,

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. R.S.C. 1985, c. 41 (3rd Supp.).

a document entitled "Formulation of Sani-Flush Crystals" and identified all of the ingredients in the document, namely, "hanna," dyed sodium chloride, sodium bisulphate,³ soda ash dense, sodium chloride, dye acid blue 9, sodium lauryl sulphate powder and talc.

Mr. Fellows described the sodium bisulphate as both a disinfecting and a cleaning agent, but stated that, in his view, Sani-Flush primarily disinfects and secondarily cleans. He explained that, as a disinfectant, the sodium bisulphate, when diluted in water, is converted to sulphuric acid which kills micro-organisms. As a cleaning agent, the sulphuric acid binds with and has the potential to remove about 80 percent of hard water mineral deposits or inorganic deposits. He stated that, without an appreciable level of detergent, Sani-Flush would not be capable of removing other types of deposits. He was not aware of any other products containing only sodium bisulphate for use as a cleaning agent.

In response to questions from counsel for the respondent, Mr. Fellows stated that an increase in the concentration of sodium bisulphate increases the concentration of acid and improves the ability of Sani-Flush to both disinfect and clean.

Mr. Fellows noted that the Sani-Flush label identifies it as a "disinfectant" which "kills household germs including staphylococcus aureus," and that it can only be called a disinfectant because it has met certain required standards in the United States and Canada. According to Mr. Fellows, Sani-Flush was tested in the United States by the Environmental Protection Agency and met the requirements to be called a disinfectant. In Canada, Sani-Flush satisfies the requirements of a disinfectant as set out in section 7 of the *Pest Control Products Regulations, amendment*⁴ (the Regulations). Section 7 of the Regulations requires that the concentration of sodium bisulphate be at least 10 percent. Mr. Fellows stated that the manufacturer put more than the required amount of sodium bisulphate in Sani-Flush in order to emphasize the product's disinfecting properties.

Mr. Fellows distinguished Sani-Flush from two other products. He described the other products as surface-active toilet bowl cleaners and stated that they do not contain any sodium bisulphate and contain more sodium lauryl sulphate or detergent than does Sani-Flush.

Mr. Wendell Ward, Acting Head, Analytical Section, Organics/Food Laboratory, Customs Laboratory Division, Laboratory and Scientific Services Directorate, Department of National Revenue, was accepted by the Tribunal as an expert witness in the area of chemical analysis of organic and inorganic products, including substances with cleaning and disinfecting qualities. In the respondent's expert report, Mr. Ward stated that, in his view, Sani-Flush is a toilet bowl cleaning preparation with subsidiary disinfecting qualities. He stated that, like most cleaners, Sani-Flush "creates an environment in which germs cannot survive, and therefore has subsidiary disinfecting qualities similar to disinfecting soaps."

At the hearing, Mr. Ward stated that, in the chemical industry, a disinfectant is described as a "material that kills germs and bacteria which would be harmful mainly to people or animals."⁵ He referred to the chapter entitled "Disinfectants" in Ullmann's Encyclopedia of

3. It was confirmed at the hearing that sodium hydrogen sulphate is the same as or equivalent to sodium bisulphate. See transcript of argument, Canadian International Trade Tribunal, December 17, 1993, at 32-33.

4. SOR/88-89, January 14, 1988, Canada Gazette Part II, Vol. 122, No. 3 at 909.

5. Transcript of public hearing, Canadian International Trade Tribunal, December 17, 1993, at 40.

Industrial Chemistry⁶ which states that "[t]he goal of disinfection procedures is to prevent transmission or spread of organisms that cause disease or spoilage. ... Disinfection is the specific elimination of undesirable microorganisms for the purpose of preventing their transmission by interfering with their structure or metabolism irrespective of their functional state."⁷ Mr. Ward also referred to the following examples of disinfectants: chlorine-producing materials, alcohols, peroxides and aldehydes.

Mr. Ward stated that the only instance with which he was familiar in which sodium hydrogen sulphate was used as a cleaner was in toilet bowl cleaners.

In response to questions from counsel for the appellant, Mr. Ward agreed that an agent or chemical can have different uses. As an example, he referred to the use of chlorine in Clorox bleach and to the way in which micro-organisms are killed when the bleaching action occurs.

Counsel for the appellant submitted that the appeal could be decided on the basis of Rule 1 of the General Rules for the Interpretation of the Harmonized System⁸ (the General Rules), which directs the Tribunal to look to the terms of the headings and any relative Section or Chapter Notes. He referred specifically to Note 2 to Section VI of Schedule I to the *Customs Tariff* which provides as follows:

goods classifiable in heading No. 30.04, 30.05, 30.06, 32.12, 33.03, 33.04, 33.05, 33.06, 33.07, 35.06, 37.07 or 38.08 by reason of being put up in measured doses or for retail sale are to be classified in those headings and in no other heading of the Nomenclature.

He pointed out that heading No. 34.02 was not included in that list and stated that Note 2 mandates that goods which are classifiable in heading No. 38.08, notwithstanding that the goods could also fall in some other heading, must be classified in heading No. 38.08.

In the view of counsel for the appellant, when Sani-Flush is put up for retail sale, if it is permitted to be identified as a disinfectant in accordance with the various government standards, then the thrust of the product is as a disinfectant. He stated that consumers are buying Sani-Flush for its disinfecting qualities and pointed out that consumers have the option of purchasing other products that are detergent-based toilet bowl cleaners that have no disinfecting qualities.

Counsel for the appellant also referred to the Explanatory Notes to the Harmonized Commodity Description and Coding System⁹ (the Explanatory Notes) to heading No. 38.08 which define disinfectants as "agents which destroy or irreversibly inactivate undesirable bacteria, viruses or other micro-organisms, generally on inanimate objects." The Explanatory Notes further provide that disinfectants "are used, for example, in hospitals for cleaning walls, etc., or sterilising instruments" and "in agriculture for disinfecting seeds." Counsel argued that Sani-Flush meets this definition since it is an agent which destroys undesirable bacteria, viruses or other micro-organisms in toilet bowls. In counsel's view, the presence of sodium bisulphate clearly confirms that disinfecting is the principal purpose of Sani-Flush.

6. Vol. A8, 5th ed. (Weinheim, Federal Republic of Germany: VCH, 1985) at 551.

7. *Ibid.*

8. *Supra*, note 2, Schedule I.

9. Customs Co-operation Council, 1st ed., Brussels, 1986.

With respect to the cleaning attributes of Sani-Flush, counsel for the appellant submitted that Sani-Flush is only capable of cleaning inorganic mineral deposits and does not work on organic deposits. Counsel also submitted that the reference to the use of disinfectants to clean walls in hospitals in the Explanatory Notes to heading No. 38.08 supports the view that a disinfectant may be used for cleaning purposes.

Finally, counsel for the appellant submitted that the following exclusion in the Explanatory Notes to heading No. 38.08 does not prevent the Tribunal from classifying Sani-Flush in heading No. 38.08, contrary to the position of the respondent:

Preparations covered by more specific headings of the Nomenclature, or having subsidiary disinfecting, insecticidal, etc., properties, for example:

...

(ii) *Disinfectant soaps (heading 34.01).*

He submitted that the disinfecting qualities of Sani-Flush are not subsidiary to the cleaning qualities and, therefore, Sani-Flush is not excluded from being classified in heading No. 38.08.

As a further argument, counsel for the appellant submitted that the Tribunal should apply Rule 3 (b) of the General Rules, as it did in *Weil Company Limited v. The Deputy Minister of National Revenue for Customs and Excise*,¹⁰ and classify Sani-Flush in terms of the properties or qualities which give it its essential character. He submitted that, since the quality or characteristic differentiating Sani-Flush from other products is the disinfecting quality, Sani-Flush should be classified as a disinfectant.

Counsel for the respondent submitted that, in interpreting the provisions of the *Customs Tariff*, the Tribunal must refer to the Explanatory Notes as required by section 11 of the *Customs Tariff* and should interpret the words in the context in which they appear.¹¹

Counsel for the respondent submitted that Sani-Flush is properly classified in heading No. 34.02, as a cleaning preparation put up for retail sale, for the following reasons: (1) the sodium bisulphate or sodium hydrogen sulphate in Sani-Flush acts as a cleaning ingredient; (2) Sani-Flush falls within the general context of the items that are included in that heading; (3) Sani-Flush fits the description of the types of items that would be included in heading No. 34.02, since it is an acid or alkaline cleaner which is not based in soap, it is a non-organic surface-active agent specially formulated for cleaning sanitary ware, and it contains sodium hydrogen sulphate; and (4) Sani-Flush falls within the exclusions in the Explanatory Notes to heading No. 38.08, as it has "subsidiary disinfecting, insecticidal, etc., properties."

Counsel for the respondent submitted that, in looking at whether a product is put up for retail sale as a disinfectant, the Tribunal should look at: (1) how the product is described; (2) how the product is used; and (3) how the marketer intends the product to be used. Counsel submitted that the evidence demonstrates that Sani-Flush is used and marketed primarily as a cleaner, as indicated by the instructions on the label to "[u]se twice weekly for real cleanliness."

10. Appeal No. AP-92-096, May 10, 1993.

11. See *Deputy Minister of National Revenue for Customs and Excise v. GTE Sylvania Canada Limited*, 10 C.E.R. 200, Federal Court of Appeal, File No. A-539-83, December 11, 1985.

After having examined the evidence and the applicable law, the Tribunal finds that Sani-Flush is properly classified under tariff item No. 3402.20.90 as a toilet bowl cleaning preparation put up for retail sale.

The Tribunal is directed by section 11 of the *Customs Tariff* to consider the Explanatory Notes as a guide to the interpretation of the headings and subheadings in Schedule I to the *Customs Tariff*. The Tribunal observes that the Explanatory Notes to heading No. 38.08 provide that the heading excludes "[p]reparations covered by more specific headings of the Nomenclature, or having subsidiary disinfecting, insecticidal, etc., properties." Thus, if the Tribunal determines that Sani-Flush is covered more specifically by heading No. 34.02 or that it has subsidiary disinfecting qualities, then the Tribunal is precluded from classifying Sani-Flush in heading No. 38.08.

In the Tribunal's view, Sani-Flush has subsidiary disinfecting qualities and is, therefore, excluded from being classified in heading No. 38.08. For the purposes of this appeal, the Tribunal adopts the plain and ordinary meaning of subsidiary as "auxiliary, supplementary"¹² and "subordinate; secondary."¹³ Based on the physical exhibits of Sani-Flush, the expert evidence of Mr. Ward in the respondent's expert report and at the hearing and the evidence of Mr. Fellows, the Tribunal finds that the disinfecting qualities of Sani-Flush are subsidiary to its primary qualities as a toilet bowl cleaner.

The description and directions for use on the label of Exhibit B-1, which is a sample of the Sani-Flush in issue, indicate that the cleaning qualities are of primary importance. The label reads: "Disinfectant Sani-Flush Toilet Bowl Cleaner." There is emphasis on the words "Toilet Bowl Cleaner" as they are in larger typeface than the word "Disinfectant." The directions for use refer to cleaning the toilet bowl as follows: "Swab solution over inside of bowl and UNDER RIM. For badly discoloured bowl, repeat. Use twice weekly for real cleanliness." When questioned about the effectiveness of Sani-Flush in disinfecting the toilet bowl, Mr. Fellows stated that, as a disinfectant, the use of Sani-Flush twice weekly would not ensure that the toilet bowl is free of micro-organisms. However, he stated that, for most toilets with a "minimal to medium level of soiling," the use of Sani-Flush twice weekly would ensure that the toilet bowl remains clean for the week.

The Tribunal observes that "Disinfectant soaps" are listed as one of the examples of goods which are "[p]reparations covered by more specific headings of the Nomenclature, or having subsidiary disinfecting, insecticidal, etc., properties." The words "heading 34.01" appear after "Disinfectant soaps," indicating that they are to be classified in heading No. 34.01. Heading No. 34.01 refers to soaps, but does not refer specifically to disinfectant soaps.

In the Tribunal's view, the "Disinfectant Sani-Flush Toilet Bowl Cleaner" should be treated similarly to the example of the disinfectant soap for classification purposes. Although Sani-Flush has disinfecting qualities, as does the disinfectant soap, the Tribunal is of the view that it should be classified in heading No. 34.02 on the basis of its primary description and use as a toilet bowl

12. The Concise Oxford Dictionary of Current English, 7th ed. (Oxford: Clarendon Press, 1988) at 1063.

13. Gage Canadian Dictionary, (Toronto: Gage Publishing, 1983) at 1120.

cleaner. The classification of Sani-Flush in heading No. 34.02 is supported by the Explanatory Notes to heading No. 34.02, which provide that the heading includes "Acid or alkaline cleaners specially formulated for cleaning sanitary ware ... e.g., those containing sodium hydrogen sulphate." Mr. Ward stated that Sani-Flush meets this description.

Accordingly, the appeal is dismissed. Sani-Flush is properly classified under tariff item No. 3402.20.90 as a toilet bowl cleaning preparation put up for retail sale.

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