

**IN THE MATTER OF AN OPPOSITION
by Canadian Olympic Association to applica-
tion No. 680,569 for the trade-mark FLAME
PIZZA & Design filed by Flame Pizza Ltd.**

On April 23, 1991, the applicant, Flame Pizza Ltd., filed an application to register the trade-mark FLAME PIZZA & Design (illustrated below) for “restaurant services, including takeout and delivery and catering services.” The application is based on use of the mark in Canada since December 9, 1977 by the applicant or its predecessors in title George Malahias and John Houliaras carrying on business as Flame Pizza, John Houliaras and John Lekkas carrying on business as Flame Pizza and Lekkas-Milionis Enterprises Ltd. The application was amended to include a disclaimer to the word PIZZA and was subsequently advertised for opposition purposes on February 5, 1992.



The opponent, Canadian Olympic Association, filed a statement of opposition on February 20, 1992, a copy of which was forwarded to the applicant on June 9, 1992. The first ground of opposition is that the application does not comply with Section 30(i) of the Trade-marks Act because the applicant was aware of the opponent's marks. The second ground is that the applicant is not the person entitled to registration because he is not a proper applicant. The third ground is that the application does not comply with Section 30(b) of the Act because the applicant did not use his mark since December 9, 1977 as claimed.

The fourth ground of opposition is that the applied for trade-mark is not registrable pursuant to Sections 9(1)(n)(iii), 11 and 12(1)(e) of the Act in view of a series of official marks

of the opponent comprising or including a torch design or including the word FLAME or LE FLAMBEAU. Those marks were published in the issues of the Trade-marks Journal dated April 11, 1984; May 9, 1984; June 13, 1984; April 10, 1985; September 24, 1986 and December 10, 1986. The fifth ground is that the applied for trade-mark is not distinctive in view of the use of the official marks relied on in respect of the fourth ground.

The applicant filed and served a counter statement. As its evidence, the opponent filed an affidavit of John N. Allport. As its evidence, the applicant filed the affidavits of John Lekkas and William Lekkas. Neither party filed a written argument but an oral hearing was conducted at which only the opponent was represented.

As for the opponent's first ground of opposition, the legal burden is on the applicant to show its compliance with Section 30(i) of the Act. However, there was an initial evidential burden on the opponent to prove the allegations of fact in support of that ground: see Joseph Seagram & Sons v. Seagram Real Estate (1984), 3 C.P.R.(3d) 325 at 329-330 (T.M.O.B.). Since the opponent has failed to file any evidence on point, the first ground is unsuccessful.

Likewise, the opponent has failed to file evidence directed to its second ground of opposition and it, too, is therefore unsuccessful. The opponent failed to evidence any use of the various marks relied on and thus failed to support its fifth ground of opposition. That ground is therefore also unsuccessful.

As for the opponent's third ground of opposition, the onus or legal burden is on the applicant to show its compliance with the provisions of Section 30(b) of the Act: see the opposition decision in Joseph Seagram & Sons v. Seagram Real Estate (1984), 3 C.P.R.(3d) 325 at 329-330 and the decision in John Labatt Ltd. v. Molson Companies Ltd. (1990), 30 C.P.R.(3d) 293 (F.C.T.D.). There is, however, an evidential burden on the opponent respecting its allegations of fact in support of that ground. That burden is lighter respecting the issue of non-compliance with Section 30(b) of the Act: see the opposition decision in Tune Masters v. Mr. P's Mastertune (1986), 10 C.P.R.(3d) 84 at 89. Furthermore, Section 30(b) requires that

there be continuous use of the applied for trade-mark in the normal course of trade since the date claimed: see Labatt Brewing Company Limited v. Benson & Hedges (Canada) Limited and Molson Breweries, a Partnership (1996), 67 C.P.R.(3d) 258 at 262 (F.C.T.D.). Finally, the opponent's evidential burden can be met by reference to the applicant's own evidence: see Labatt Brewing Company Limited v. Molson Breweries, a Partnership (1996), 68 C.P.R.(3d) 216 at 230 (F.C.T.D.).

In his affidavit, John Lekkas sets out the history of the use of the applicant's mark. Mr. Lekkas commenced employment with one of the applicant's predecessors in title on February 28, 1978. In support of his contention that use of the applied for mark commenced on December 9, 1977, Mr. Lekkas appended as Exhibit B to his affidavit a certified copy of a Manitoba business name registration filed by George Malahias and John Houliaras carrying on business as Flame Pizza. That document is slightly at odds with the present application since it states that Messrs. Malahias and Houliaras commenced business under the name Flame Pizza on December 10, 1977, one day after the claimed date of first use of December 9, 1977. However, that document also states that those two men "are carrying on business" under that name and it was signed on December 7, 1977. Given that the document was accepted for registration on December 9, 1977, I consider that the statement that use of the name had commenced on December 10, 1977 was clearly in error and that use of the name had commenced earlier. Thus, I consider that the applicant has satisfied the onus on it to show that its claimed date of first use is accurate. Furthermore, the applicant's evidence shows that use of the mark has been continuous since that date. The third ground is therefore also unsuccessful.

The material time for considering the circumstances respecting the fourth ground of opposition would appear to be the date of my decision: see the decisions in Allied Corporation v. Canadian Olympic Association (1989), 28 C.P.R.(3d) 161 (F.C.A.) and Olympus Optical Company Limited v. Canadian Olympic Association (1991), 38 C.P.R.(3d) 1 (F.C.A.). The opponent is not required to evidence use and adoption of each official mark relied on: see page 166 of the Allied decision and pages 7-9 of the unreported opposition decision in The Canadian

Council of Professional Engineers v. Parametric Technology Corporation (S.N. 602,455; January 31, 1995).

As stated in Section 9(1)(n)(iii) of the Act, the test to be applied is whether or not the applicant's mark consists of, or so nearly resembles as to be likely to be mistaken for, the official mark. In other words, is the applicant's mark identical to, or almost the same as, any of the opponent's official marks?: see page 47 of the unreported decision of the Federal Court, Trial Division in Big Sisters Association of Ontario v. Big Brothers of Canada (Court No. T-29-94; May 20, 1997). At page 49 of that decision, Mr. Justice Gibson confirmed that in assessing the resemblance between the marks at issue, regard may be had to the factors set out in Section 6(5)(e) of the Act. Further, at page 48, Mr. Justice Gibson indicated that the test was to be applied as a matter of first impression and imperfect recollection and he concurred with the following test set out by Mr. Justice Rothstein at page 19 of the decision in Canadian Olympic Association v. Health Care Employees Union of Alberta (1992), 46 C.P.R.(3d) 12 (F.C.T.D.):

The question must be determined in the context of whether a person who, on a first impression, knowing one mark only and having an imperfect recollection of it, would likely be deceived or confused.

This would appear to be a broader test than the test of straight comparison previously applied in numerous opposition decisions although the result in the Big Sisters case might suggest otherwise.

The most relevant of the opponent's official marks is the mark OLYMPIC FLAME. The applicant's mark is not the same as that mark. Furthermore, it is not almost the same as the opponent's official mark primarily in view of the differences between the marks. Nevertheless, there is some resemblance between the marks in view of the common use of the word FLAME.

The opponent contended that it is the owner of a family or series of official marks and relied on Mr. Justice Rothstein's decision in the Health Care Employees case. In his decision, Mr. Justice Rothstein apparently held that the concept of a family or series of trade-marks applicable in assessing the issue of confusion between trade-marks is also applicable when

considering the issue of resemblance arising pursuant to Section 9 of the Act. He also apparently held that, unlike the case with a family or series of trade-marks, the owner of a family or series of official marks need not evidence use of those marks in order to rely on them.

In my view, it is not clear that the concept of a family or series of marks can be imported into the resemblance test for Section 9. Even if it can, it is even less clear that there should be no requirement for an official mark owner to evidence use of the various official marks comprising the alleged family. However, the Chairman of the Opposition Board found in his decision in Canadian Olympic Association v. Express Services, Inc. (1993), 51 C.P.R.(3d) 102 (T.M.O.B.) that although he, too, disagreed with Mr. Justice Rothstein's decision, he could not unequivocally state that it was clearly wrong. I find myself in the same position.

The net result of the foregoing is that I am obliged to consider the opponent's official marks which include the word TORCH or LE FLAMBEAU and those which consist of or include the design of a torch (including the two shown below) as comprising a family or series of marks. This finding effectively further broadens the test for resemblance in the present case since a dominant element of the applicant's trade-mark is the design of a flaming torch.

Given that there is at least some resemblance between the applicant's trade-mark and the official mark OLYMPIC FLAME, given that the opponent owns a family or series of related marks and given that the test to be applied is one of first impression and imperfect recollection, I am left in a state of doubt regarding the issue of resemblance. Since the onus

is on the applicant to show that its trade-mark is registrable, I must resolve that doubt against it. Thus, the fourth ground is successful.

In view of the above, and pursuant to the authority delegated to me under Section 63(3) of the Act, I refuse the applicant's application.

DATED AT HULL, QUEBEC, THIS 20th DAY OF JUNE, 1997.

**David J. Martin,
Member,
Trade Marks Opposition Board.**