

IN THE MATTER OF AN OPPOSITION
by Canadian Olympic Association
to application No. 619,711 for the
trade-mark HEALTH CARE EMPLOYEES
UNION OF ALBERTA & Design filed by
Health Care Employees Union of Alberta

On November 18, 1988, the applicant, Health Care Employees Union of Alberta, filed an application to register the trade-mark HEALTH CARE EMPLOYEES UNION OF ALBERTA & Design (illustrated below) based on use in Canada since August 1, 1988 for the following services:

operation of a collective bargaining unit
for the benefit of its membership.

The application as filed contained a disclaimer to all of the reading matter included in the trade-mark. The application was advertised for opposition purposes on July 12, 1989.

The opponent, Canadian Olympic Association, filed a statement of opposition on November 8, 1989, a copy of which was forwarded to the applicant on November 22, 1989. The first ground of opposition is that the application does not comply with the provisions of Section 30(i) of the Trade-marks Act because the applicant could not be satisfied that it was entitled to use the applied for trade-mark because it was aware of the opponent's marks. The second ground is that the application does not comply with the provisions of Section 30(b) of the Act because the applied for trade-mark had not been used in Canada with the applied for services since August 1, 1988, as claimed.

The third ground of opposition is that the applicant is not the person entitled to registration because it is not a proper applicant. The fourth ground is that the applied for trade-mark is not registrable pursuant to Sections 9(1)(n)(iii) and 12(1)(e) of the Act in view of a number of official marks of the opponent for which public notice had been given in the Trade-marks Journal. The fifth ground of opposition is that the applied for trade-mark is not distinctive in view of the opponent's various official marks.

The applicant filed and served a counter statement. As its evidence, the opponent filed the affidavit of John N. Allport. The applicant filed the affidavits of Henry Jans and Joanne Michaud. Only the applicant filed a written argument and an oral hearing was conducted at which both parties were represented.

As for the opponent's first three grounds of opposition, there was an evidential burden on the opponent to prove the allegations of fact underlying those grounds. Since the opponent did not file any evidence directed to proving those allegations, the first three grounds are unsuccessful.

As for the fifth ground of opposition, the opponent has failed to file any evidence of use of its various official marks. Thus, there is no evidential basis for the fifth ground and it, too, is unsuccessful.

As for the fourth ground, the most pertinent of the opponent's marks are the two illustrated below:

January 29, 1975

April 29, 1987

Thus, a consideration of the issue arising pursuant to Sections 9(1)(n)(iii) and 12(1)(e) of the Act respecting each of these two marks will effectively decide the result of the fourth ground and the outcome of the opposition.

The material time for considering the circumstances respecting the fourth ground of opposition is as of the filing of the opposition, if not later: see the decision in Allied Corporation v. Canadian Olympic Association (1989), 28 C.P.R.(3d) 161 (F.C.A.). Furthermore, the opponent is not required to evidence use and adoption of its official marks: see page 166 of the Allied decision noted above. Finally, the test to be applied is one of straight comparison of the marks in question apart from any marketplace considerations such as the wares, services or trades involved: see page 166 of the Allied decision and page 65 of the decision in Canadian Olympic Association v. Konica Canada Inc. (1990), 30 C.P.R.(3d) 60 (F.C.T.D.). As stated in Section 9(1)(n)(iii) of the Act, that test 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, the official mark? In this regard, see the unreported opposition decision in The Ontario Federation of Anglers and Hunters v. Kevin Murphy (S.N. 604,436; December 31, 1990).

The applicant's mark does not consist of either of the opponent's official marks since the applicant's mark is not identical to either of them. I also find that the applicant's mark is not almost the same as either official mark. There is a degree of resemblance between the marks at issue but that is not determinative since there are also significant differences. I therefore find that the applicant has satisfied the onus on it to show that its trade-mark does not offend Section 12(1)(e) of the Act and is

registrable. The fourth ground of opposition is therefore also unsuccessful.

It would appear that a further ground of opposition was available to the opponent, namely, that use of the applicant's trade-mark in association with the applied for services does not constitute use of the trade-mark. In other words, since the services are performed by the applicant for itself, there are no services being performed for others with a view to earning a profit. However, the opponent failed to raise a ground based on the foregoing and I am therefore precluded from considering such a ground.

In view of the above, I reject the opponent's opposition.

DATED AT HULL, QUEBEC, THIS 30th DAY OF APRIL 1991.

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