

IN THE MATTER OF AN OPPOSITION
by Canadian Olympic Association
to application serial No. 620,511
for the trade-mark THE TORCH BEARERS
filed by B.P.S. Consultants Inc.

On December 1, 1988, the applicant, B.P.S. Consultants Inc., filed an application to register the trade-mark THE TORCH BEARERS, based on proposed use in Canada, for the wares and services shown below (after amendments to the application as originally filed):

wares: audio and video recordings; books

services: organization and presentation of seminars and workshops designed to educate and motivate others into helping themselves attain the things they truly desire in life.

The subject application was advertised for opposition purposes on July 19, 1989. The opponent, Canadian Olympic Association, filed a statement of opposition on November 15, 1989, a copy of which was forwarded to the applicant on November 28, 1989. The grounds of opposition, as pleaded, are summarized below:

1(a) The application does not comply with Section 30(i) of the Trade-marks Act because at the time of filing the applicant was aware of the opponent's marks and could not have been satisfied as to its entitlement to use the applied for mark.

1(c) [sic] The applicant is not a proper applicant within the meaning of the Act.

2 to 7. The applicant is not entitled to obtain registration of the mark and the mark is not registrable in view of of Sections 9, 11, and 12(1)(e) having regard to the

various official marks, owned by the opponent, public notice of which had been given pursuant to Section 9(1)(n)(iii).

8. The applied for mark is not adapted to distinguish the applicant's wares from the "wares and services of the [opponent's official] marks".

The most pertinent of the official marks relied upon by the opponent are shown below:

The applicant filed and served a counter statement generally denying all of the grounds of opposition.

The opponent's evidence consists of the affidavit of John N. Allport, a lawyer in the firm representing the opponent. Mr. Allport's affidavit serves to introduce into evidence, inter alia,

copies of the Journal pages of the Trade-marks Journals where public notice of the opponent's various official marks relied upon in the statement of opposition were given. Exhibit D referenced by Mr. Allport is not attached to his affidavit; in any event, it appears that Exhibit D is not relevant as it alludes to official marks which are not relied upon in the statement of opposition.

The applicant did not file any evidence in support of its application. Neither party filed a written argument. Only the opponent was represented at an oral hearing.

The material time for considering the grounds of opposition denoted by 2-7 above, arising pursuant to Sections 9(1)(n)(iii) and 12(1)(e), is the date of my decision - see Olympus Optical Co. Ltd. v. Canadian Olympic Association (1991), 38 C.P.R.(3d) 1 at pp. 3-4 (F.C.A.). The opponent is not required to evidence use and adoption of the official marks relied on, at least not in the absence of evidence suggesting that the mark was not used - see Allied Corp. v. Canadian Olympic Association (1989), 28 C.P.R.(3d) 161 at 166 (F.C.A.). I would also mention that Section 11 pleaded by the opponent in the statement of opposition proscribes **use** of a prohibited mark and is not a proper ground of opposition either with respect to the registrability of the applied for mark, covered by Section 12, or with respect to the applicant's entitlement to registration, covered by Section 16.

The test in Section 9(1) 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? - see The Ontario Federation of Anglers and Hunters v. Murphy (1990), 34 C.P.R.(3d) 496 (TMOB). The test is one of straight comparison

between the applied for mark and the official mark apart from any marketplace considerations - see Allied, supra, at 166 and Canadian Olympic Assn. v. Konica Canada Inc. (1990), 30 C.P.R.(3d) 60 at 65 (F.C.T.D.), reversed on other grounds (1991), 39 C.P.R.(3d) 400 (F.C.A.).

In other words, the surrounding circumstances (set out in Section 6(5)) relevant to the test for confusion (set out in Section 6) have no application in determining the issue of the registrability of an applied for mark arising pursuant to Sections 9 and 12(1)(e) - see The Queen v. Kruger (1978), 44 C.P.R.(2d) 135 (TMOB); Canadian Olympic Assn. v. Holmont Industries Ltd. (1986), 13 C.P.R.(3d) 308 (TMOB).

Nevertheless, without the benefit of argument by the applicant and in the absence of authority on point, I accept the opponent's submission that all three aspects of resemblance referred to in Section 6(5)(e) should be considered to determine the issue of registrability arising pursuant to Sections 9 and 12(1)(e). In this regard, I have had recourse to standard reference dictionaries and I have noted that the meaning of "resemblance" is not restricted to merely visual likeness.

In the present case, it is only the second branch of the Section 9(1) test that needs to be considered since the applied for mark THE TORCH BEARERS is not identical to any of the official marks relied upon by the opponent.

I do not consider that the applied for mark THE TORCH BEARERS shows any substantial visual resemblance to any of the official marks relied upon by the opponent.

There may be some resemblance aurally between the applied for mark and the opponent's official design marks shown above to the extent that those official marks might be sounded as "torch bearer"

or "bear with a torch".

There may also be some resemblance in ideas suggested by the applied for mark and the opponent's official design marks shown above to the extent that (1) the opponent's official marks might suggest "torch bearer" rather than "runner with a torch" or "torch carrier" or "bear with a torch" or "Olympic mascot" and to the extent that (2) the applied for mark may suggest the literal idea of "a person holding a torch" rather than the abstract idea of "spreading enlightenment".

Considering all three aspects of the resemblance between the marks in issue, I do not find that the applied for mark THE TORCH BEARERS so nearly resembles as to be likely to be mistaken for any of the official marks relied upon by the opponent.

The grounds of opposition arising pursuant to Sections 9 and 12(1) (e) therefore fail.

The remaining grounds of opposition are not supported by evidence and therefore fail because the opponent has not met its evidential burden with respect to establishing the facts underlying those grounds - see John Labatt Ltd. v. Molson Companies Ltd. (1990), 30 C.P.R. (3d) 293 (F.C.T.D.).

In view of the above, the opponent's opposition is rejected.

DATED AT HULL, QUEBEC, THIS 29th DAY OF MAY, 1992.

Myer Herzig,
Member,
Trade-marks Opposition Board

