



CANADA PROTECTS THE OLYMPIC MARKS IN EXPECTATION OF THE 2010 WINTER GAMES IN VANCOUVER

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"The most important thing in the Olympic Games is not winning but taking part; the essential thing in life is not conquering but fighting well."

Pierre de Coubertin

1. Introduction

What does everybody on earth think of when seeing a logo composed of five interlaced rings which are, from left to right, blue, yellow, black, green and red? The Olympic rings, of course. Although it might not be a known fact to everybody that this Olympic symbol represents the union of the five continents and the meeting of athletes from throughout the world at the Olympic Games, it is uncontested that this Olympic symbol is among the most widely recognised symbols in the world and is highly protected by its owner, the International Olympic Committee.

In the modern context of globalization where the Olympic Games are given a huge media coverage and extensive commercial power, the protection of the Olympic marks has become more and more important.

In this perspective, the Nairobi Treaty on the Protection of the Olympic Symbol was adopted on September 26, 1981. To this day, forty six countries are contracting parties of the Nairobi Treaty, although many others have not signed it (including Canada, the United States, France and Germany) and chose to enact their own laws to protect the Olympic symbol. In a nutshell, the Nairobi Treaty obliges the contracting parties to protect the Olympic symbol, namely the five interlaced rings, against use for commercial purposes without the authorization of the International Olympic Committee.

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2. The Canadian Approach

In expectation of the Winter Games to be held in Vancouver in 2010, Canada wished to provide a special protection to certain terms, expressions and symbols relating to the Olympic Games by adopting the *Olympic and Paralympic Marks Act*¹, and its corresponding Regulations², which came into force on December 17, 2007. The ambit of protection of the Act is however limited to an exhaustive list of Olympic and Paralympic marks³ provided in the Act.

The Act essentially has two purposes: it creates a list of prohibited marks and it provides protection against false and unauthorized commercial associations with the Olympic Games, also called “ambush marketing”.

2.1 Prohibited marks

The Act prohibits the adoption and use, in a commercial context, of an Olympic mark or a mark that so nearly resembles an Olympic mark as to be likely to be mistaken for it.⁴ Considering that the wording of section 3 of the Act is somewhat similar to the wording of section 9 of the *Trade-marks Act*⁵ pertaining to official marks, one could anticipate that Courts will rely on the test of confusion applicable to official marks when assessing whether a mark “so nearly resembles an Olympic mark as to be likely to be mistaken for it”. In such a context, the requesting party could be vested with a lighter burden of proof in the sense that critical circumstances of subsection 6(5) of the *Trade-marks Act* may not be taken into consideration, such as the nature of the products and services.

The prohibition is integrated in the *Trade-marks Act* by modification of its paragraph 12(1) which consequently provides that a trade-mark is not registrable if it is a mark the adoption of which is prohibited by the *Olympic and Paralympic Marks Act*.

Some examples of the Olympic marks covered by section 3 of the Act include the following terms or expressions: “Olympia”, “Olympic Games”, “Faster, Higher, Stronger”, “Canada 2010”, “Games City”, and the following logos:

¹ R.S.C. 2007, c. 25 (hereinafter also referred to as the « Act »)

² SOR/2007-294

³ The Olympic and Paralympic marks are set out in Schedules 1 and 2 of the Act; hereinafter collectively referred to as the “Olympic marks”.

⁴ Section 3 of the Act.

⁵ R.S.C. 1985, c. T-13.



For instance, a restaurant owner may not, in the course of its business, advertise its services in association with expressions such as “Come and join us to celebrate the Olympic Games” or simply “Canada 2010”. The potential effects of such a prohibition might seem draconian but, on the same occasion, it serves as an effective limitation to the persons and entities attempting to unduly benefit from a commercial association with the Olympic Games without paying any financial support.

However, the Act provides for an exhaustive list of persons or entities to whom such a prohibition does not apply, including persons having obtained the written consent of an organizing committee (namely the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (also referred to as the VANOC)), public authorities having requested that the Registrar of trade-marks give public notice of a mark under paragraph 9(1)(n) of the *Trade-marks Act* (provided that the notice is given prior to March 2, 2007), and individuals who have been selected to compete, or have competed, in an Olympic or Paralympic Games (for certain protected expressions and in reference to the individuals’ participation in, or selection for, those Games only).

It is also worth mentioning that the Act makes an incursion into copyright law by allowing use of an Olympic mark in the publication or broadcasting of a news report relating to Olympic Games or for the purposes of criticism or parody relating to Olympic Games.⁶ It is interesting to note that the *Copyright Act* comprises the exception of fair dealing for criticism or review purposes, but such an exception does not specifically cover parody. The Act also provides that the inclusion of an Olympic mark in an artistic work is not in itself a use in connection with a business if the work is not reproduced on a commercial scale.⁷

2.2 Protection against ambush marketing

⁶ Paragraph 3(5) of the Act.

⁷ Paragraph 3(6) of the Act.

The Act also provides that no person shall, in association with a trade-mark or other mark, promote or otherwise direct public attention to their business, wares or services in a manner that misleads or is likely to mislead the public into believing that the person's business, wares or services are approved, authorized or endorsed by the VANOC, the Canadian Olympic Committee or the Canadian Paralympic Committee, or that there exists some sort of business association between them.⁸ Again, the rationale behind these prohibited acts is to assure a certain exclusivity to sponsors who spend important amounts of money to be associated with the Olympic Games. According to the VANOC:

Ambush marketing is a real threat to VANOC's sponsorship and licensing programs as it undermines the value of official sponsorship and licensing rights and impairs VANOC's ability to attract future sponsorship and licensees. It also threatens the financial viability of future Olympic/Paralympic Games by impairing the ability of 2010 Winter Games' organizers to raise necessary sponsorship and licensing funding. VANOC must protect the Olympic Brand against unauthorized use and ambush marketing as part of its efforts to stage a well-organized and financially successful 2010 Winter Games.⁹

In order to determine whether there is a false commercial association, Courts will have to evaluate, amongst others, to what extent the alleged offending party has used a combination of expressions listed in Schedule 3 of the Act, such as "Games", "2010", "Medals", "Winter", "Gold" and "Vancouver". For instance, an unauthorized contest relating to the 2010 Winter Games in Vancouver might well be considered as ambush marketing contrary to the Act.

2.3 Other key provisions of the Act

It is interesting to note that the Act provides a lightened burden of proof for any plaintiff, namely the VANOC (or the Canadian Olympic Committee or the Canadian Paralympic Committee with the VANOC's written consent during the period prescribed by regulation ending on December 31, 2010) seeking an interlocutory or interim injunction against any party allegedly in contravention of the above prohibitions (sections 3 and 4 of the Act), as it will not have to show irreparable harm, i.e. a criteria often difficult to meet in interlocutory injunction matters.

Certain provisions of the Act are only applicable during the period prescribed by regulation, such period ending on December 31, 2010, a few months after the closing of the Vancouver Winter Games. Thus, all the marks and expressions contained in Schedules 2 and 3 of the Act will be repealed on that date. In the same manner, the application of section 4 of the Act pertaining to ambush marketing is also limited to the same prescribed period. Such a prescription gives an evolutionary character to the Act;

⁸ Section 4 of the Act.

⁹ Available on VANOC's official web site www.vancouver2010.com

once the regulatory period is expired, the provisions and schedules covered by said prescription will be repealed but could be reactivated or modified for other Olympic Games in the future.

3. Conclusion

The *Olympic and Paralympic Marks Act* somewhat reflects the Olympic Games' motto « Faster, Higher, Stronger » which represents the basic principles of the Olympic spirit. Indeed, through the Act, the Olympic marks will benefit from additional protection and the VANOC will have profitable and effective means to cure non authorized use of Olympic marks and reprimand businesses conducting unfair practices with a view to unjustly benefiting from some sort of commercial association with the 2010 Olympic Games without paying the price.

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