

# Ambush Marketing – The Canadian Perspective

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## Summary

Options available for seeking recourse and remedies for ambush marketing in Canada are very limited in both the common law and legislation primarily because such activities fall outside of the traditional concepts and remedies available for infringement and/or the tort of passing-off. As a result, there are very few cases in Canada that address or even touch on the concept of ambush marketing. Nonetheless, the jurisprudence suggests that a remedy for ambush marketing may be available under the tort of passing-off where consumers would mistakenly believe that activities, services or products were authorized, endorsed by or otherwise connected to a party and no adequate disclaimer is provided to dispel this mistaken belief.

The only notable action taken in Canada on a legislative scale to address ambush marketing activities occurred as a result of the Vancouver 2010 Olympic Games where the *Olympic and Paralympic Marks Act* was enacted in advance of the games and remains in force today. This act provides a broad scope of protection to a specific list of Olympic and Paralympic trade-marks, prohibiting use of a list of specified marks or any mark that “so nearly resembles as to likely be mistaken for” the specified marks, as trade-marks or otherwise, in association with any business. This act also lowers the standard typically required to obtain interlocutory or interim injunctions as it specifically eliminates the need of the plaintiff (i.e. the Olympic organization) to prove irreparable harm. Some of the broader sections of this act remained in force only during the 2010 Olympic year

## Statutory Framework

With the exception of the *Olympic and Paralympic Marks Act*<sup>1</sup> there is no specific legislation in Canada to address and/or provide remedies for ambush marketing.

While the *Trade-marks Act*<sup>2</sup> does contain some general causes of action including a prohibition on

- (a) making false or misleading statements tending to discredit the business, wares or services of a competitor;
- (b) directing public attention to wares, services or business in such a way as to cause or be likely to cause confusion with the wares, services or business of another;
- (c) passing off other wares or services as and for those ordered or requested; and
- (d) doing any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada<sup>3</sup>

None of these options truly cover ambush marketing activities *per se*, particularly since when engaged in

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<sup>1</sup> S. C. 2007, c.25

<sup>2</sup> R.S.C. 1985, c.T-13, section 7

<sup>3</sup> Note that the constitutionality of this subsection of the *Trade-marks Act* is suspect and is generally considered unconstitutional and unenforceable. See *MacDonald et al. v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134 where the Supreme Court held that this section was not supportable under the powers of granted to the federal government (the Trade-marks Act being a federal statute).


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ambush marketing the offending party typically does not refer to the business or marks of the competitor, i.e. the party who has secured the rights to be identified with the particular event.

## *Olympic and Paralympic Marks Act*

Enacted in 2007, the *Olympic and Paralympic Marks Act* (“OPMA”) was enacted to address Canada’s commitment to the International Olympic Committee made when the bid for the 2010 Olympics was launched.

The OPMA provides a sweeping prohibition on the adoption or use of a list of specific “Olympic” trademarks including Olympic, Paralympic, Canadian Olympic Committee, , and slogans such as FASTER, HIGHER, STRONGER, as well as any marks “so nearly resembling as to likely be mistaken for” any of these marks.<sup>4</sup> The prohibition applies not only to unauthorized use of such marks as trade-marks, but rather in any manner associated with a business whether as a trade-mark or otherwise.<sup>5</sup> The prohibition also applies to translations of these marks in any language.<sup>6</sup>

The OPMA also sets a much lower standard for securing an interim or interlocutory injunction for authorized and prohibited uses of the specific marks. Obtaining such injunctions is typically an uphill battle in Canada, particularly in cases involving intellectual property, as a complainant must establish irreparable harm, with pure monetary losses generally considered insufficient to qualify as irreparable harm. Under the OPMA, complainants are specifically not required to prove that they will suffer irreparable harm in order to obtain the injunctions.

The OPMA contained several provisions that remained in force only until December 31, 2010. These provisions were ones that addressed activities that were presumably considered particularly harmful to the reputation of the Olympic marks during the year of the Vancouver Olympics, or which were most likely to occur during the Olympics and in the months immediately preceding and following the events. These now-expired provisions were clearly directed to address activities such as ambush marketing and prohibited the promotion or directing of public attention to one’s business, wares or services in a manner that misleads or is likely to mislead the public into believing that

- (a) the person’s business, wares or services are approved, authorized or endorsed by an organizing committee, the Canadian Olympic Committee (“COC”) or the Canadian Paralympic Committee (“CPC”); or
- (b) a business association exists between the person’s business and the Olympic Games, the Paralympic Games, an organizing committee, the COC or the CPC.

This now-repealed provision only covered activities where a person was using a “trade-mark or other mark”, presumably one with an Olympic connection but not necessarily one of the 39 specifically enumerated marks in Schedule 1 of the OPMA. There is however no definition to clarify what “other

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<sup>4</sup> OPMA, s.3(1) and Schedule 1

<sup>5</sup> OPMA, s.3(1)

<sup>6</sup> OPMA, s. 3(2)

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mark” was intended to cover. If necessary, presumably the CPC, COC and/or Vancouver Organizing Committee would have pushed for a broad interpretation of “other mark” had the need arisen to cover ambush marketing activities.

Another time-limited element of the OPMA was the inclusion of additional “prohibited” specified marks that included such general terms such as MEDAL, GOLD, SILVER and BRONZE as well as VANCOUVER 2010. These additional marks were listed in Schedules 2 and 3 of the OPMA but were repealed after on December 31, 2010.

### Common Law Regime

Very few cases in Canada have involved or dealt with the issue of ambush marketing.

One notable case from the early 1990’s dealt with a dispute between the National Hockey League (“NHL”) and Pepsi-Cola Canada (“Pepsi”) over a contest run by Pepsi which the NHL felt mislead consumers into thinking that the contest was authorized, endorsed or associated with the NHL when it was not<sup>7</sup>. Coke-a-Cola had the exclusive advertising contract with the NHL at the time and had the right to describe itself as the official Soft Drink of the NHL”. Coke also had the right to use NHL team logos for promotional purposes, but its agreement did not include the right to advertised during NHL game broadcasts (which had been granted to Molson brewery).

Pepsi had launched a promotional contest entitled “Diet Pepsi \$4,000,000 Pro Hockey Playoff Pool”. The contest was based on participants scratching bottle cap liners of Pepsi products where the messages would read:

"If [followed by the name of a city or state that was "home" to one of the NHL teams]  
wins in [followed by one of the numbers 4,5,6, or 7] games you win."

The contest was widely publicized on Pepsi products and materials contained the disclaimer “Diet Pepsi's \$4,000,000 Pro Hockey Playoff Pool is neither associated with nor sponsored by the National Hockey League or any of its member teams or other affiliates." In addition to print and point of purchase advertising, television commercials for the contest aired during NHL games and featured Don Cherry, a well-known commentator of NHL games. The disclaimer was displayed for the first 7 seconds of each commercial spot at the bottom of the screen.

In the action, the NHL asserted that Pepsi was guilty of trade-mark infringement, passing off and interference with contractual relations. The basis of their assertion was that the contest and particularly the television commercials that aired during NHL games and featured a well-known NHL commentator, were likely to convey to the public a false impression that the NHL or its member teams had approved, authorized or endorsed Pepsi’s contest.

In assessing the passing off allegation, the court noted that although passing off is typically premised on creating a false association or connection between one party’s business, wares or services and those

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<sup>7</sup> 1992 CanLII 2324 (BC SC)

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of another, not every connection amounts to passing off- there must be a representation that the defendant's goods are connected with the plaintiff such that people would accept them on the faith of the plaintiff's reputation.

The court was critical of the evidence relied upon by the NHL to prove its case, which primarily consisted of statements from NHL employees, employees of NHL teams and a public survey intended to gather public impressions. The survey was conducted on one day in only one geographic location in Canada. The survey was considered inadequate by the court given its geographic limitation and the basis that the survey participants were limited to "consumers of soft drinks who had seen the ad on television" rather than all persons exposed to the contest.

Based on the evidence presented, the court was not convinced that the contest suggested that the plaintiff approved, authorized or endorsed the contest or that there was any connection between the plaintiff and the defendant.

With respect to the effectiveness of disclaimers, the court noted that the required prominence of a disclaimer must to some extent depend on the likelihood of false impression being conveyed to the public and commented that the defendant's television commercial disclaimer "left something to be desired" given the short 7 seconds of display on a background that made the wording difficult to read. The deficiencies of the defendant's disclaimer were, however, not relevant given the finding that the public would not have made the mistaken connection between the plaintiff and the defendant in the first place.

Overall, the jurisprudence suggests that a remedy for ambush marketing may be available in Canada under the tort of passing-off in cases where the defendant's activities were such that the average consumer would mistakenly believe that the defendant's activities were authorized, endorsed by or otherwise connected to the plaintiff and the defendant fails to provide an adequate disclaimer to dispel this mistaken belief.