

Date: 20080408

Docket: A-246-07

Citation: 2008 FCA 124

**CORAM: LÉTOURNEAU J.A.
EVANS J.A.
PELLETIER J.A.**

BETWEEN:

SEE YOU IN - CANADIAN ATHLETES FUND CORPORATION

Appellant

and

CANADIAN OLYMPIC COMMITTEE

Respondent

Heard at Ottawa, Ontario, on April 8, 2008.

Judgment delivered from the Bench at Ottawa, Ontario, on April 8, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

EVANS J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Ottawa, Ontario, on April 8, 2008)

EVANS J.A.

[1] This is an appeal by the See You In – Canadian Athletes Fund Corporation (“the SYI Fund”) from a decision by Justice Phelan of the Federal Court (2007 FC 406) granting an application for judicial review brought by the SYI Fund to set aside a decision by the Registrar of Trade-marks to publish as official marks of the respondent, the Canadian Olympic Committee, (“COC”) the words “See You In Torino”, “See You In Beijing”, and “See You In Vancouver”. The Registrar’s publication was dated October 13, 2004, and effectively terminated the SYI Fund’s application to register these words as its trade-marks.

[2] A peculiarity of this proceeding is that the appellant, the SYI Fund, is appealing against an order made in its favour. The respondent and cross-appellant, the COC, on the other hand, challenges the correctness of the Judge's decision. Accordingly, we heard the cross-appeal first.

[3] Counsel for the COC argued that the Applications Judge had committed a reviewable error in finding that the COC had not "adopted and used" the marks prior to the decision of the Registrar to publish them as official marks, as required by section 9 of the *Trade-marks Act*, RSC 1985, c. T-13. No evidence of "use" was put before the Registrar, other than the bare assertion contained in the request for publication. Since the Applications Judge was thus in the position of a trier of facts *de novo*, we will review his conclusion, absent any question of law, on a standard of palpable and overriding error.

[4] On the basis of the evidence adduced before the Applications Judge of the COC's "use" of the marks prior to the Registrar's publication, we are not persuaded that the Judge made such an error when he concluded that the COC had not proved prior "use".

[5] The Judge found, and counsel for the COC agreed, that, for the purpose of section 9 of the *Trade-marks Act*, "use" must involve a public display of the marks in question. Counsel for the appellant conceded that the only relevant evidence of "use" in this case concerned the pen and flashlight sets with the COC logo and the marks in question, which the COC had ordered. However, even if the COC had received the pen and flashlight sets before the publication date, the evidence regarding their distribution to the public by the COC was, in our opinion, so equivocal that the

Judge's conclusion that the COC had not established that it had "used" the marks does not constitute palpable and overriding error.

[6] For these reasons the cross-appeal will be dismissed with costs.

[7] We turn now to the appeal. The appellant, the SYI Fund, was successful below and had obtained the relief which it had sought, namely that its application for judicial review be granted and the Registrar's decision set aside. The Applications Judge based his decision on his finding that the COC had not established its adoption and use of the marks. However, he rejected another argument advanced by the SYI Fund in support of the application for judicial review, namely that the COC was a licensee of the mark from the International Olympic Committee. Counsel for the SYI Fund argued before us that the Judge had erred in this latter conclusion and urged this Court to make findings in favour of the appellant on the issue.

[8] We decline to do so. A party who has obtained the relief it sought is not normally entitled to appeal against the judge's reasons. We see no basis for making an exception in this case, however useful to the appellant a ruling in its favour may possibly be in the future.

[9] For these reasons, the appeal will be dismissed with costs.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-246-07

**(APPEAL FROM A JUDGMENT OF JUSTICE PHELAN DATED APRIL 18, 2007,
DOCKET NO. T-2016-04)**

STYLE OF CAUSE: SEE YOU IN – CANADIAN ATHLETES FUND CORPORATION
Appellant

and

CANADIAN OLYMPIC COMMITTEE

Respondent

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: April 8, 2008

REASONS FOR JUDGMENT OF THE COURT BY: Evans J.A.

DELIVERED FROM THE BENCH BY: Létourneau J.A.

APPEARANCES:

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APPLICANT

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