**IN THE MATTER OF AN OPPOSITION by Superdollar Stores Ltd. to application No. 757,230 for the trade-mark DOLLAR GENERAL filed by Dollar General Corporation**

On June 14, 1994, the applicant, Dollar General Corporation, filed an application to register the trade-mark DOLLAR GENERAL based on proposed use of the trade-mark in Canada in association with "Retail store services". The statement of services was amended at the examination stage to cover "Retail store services in the field of general merchandise".

The present application was advertised for opposition purposes in the ***Trade-marks Journal*** of July 12, 1995 and the opponent, Superdollar Stores Ltd., filed a statement of opposition on December 12, 1995, a copy of which was forwarded to the applicant on January 11, 1996. The applicant filed and served a counter statement in which it generally denied the opponent's grounds of opposition. The opponent filed as its evidence the affidavit of Angela Kim while the applicant elected not to file any evidence. Both parties filed a written argument and neither party requested an oral hearing.

Considering initially the grounds of opposition based on Section 30 of the ***Act***, the opponent has alleged that the applicant could not have been satisfied that it was entitled to use its trade-mark DOLLAR GENERAL in Canada for the reasons set forth in the other grounds of opposition and, further, that the application does not contain a statement that the applicant, by itself or through a licensee, or by itself and through a licensee, intends to use its trade-mark DOLLAR GENERAL in Canada. The legal burden or onus is on the applicant to show that its application complies with Section 30. This includes both the question as to whether or not the applicant has filed an application which formally complies with the requirements of Section 30 and the question as to whether or not the statements contained in the application are correct. To the extent that the opponent relies on allegations of fact in support of its Section 30 grounds, there is an evidential burden on the opponent to prove those allegations [see ***Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate Ltd.***, 3 C.P.R. (3d) 325, at pp. 329-330]. To meet the evidential burden upon it in relation of a particular issue, the opponent must adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support that issue exist [see ***John***

***Labatt Limited v. The Molson Companies Limited***, 30 C.P.R. (3d) 293, at p. 298]. Further, the material time for considering the circumstances respecting the issue of non-compliance with Section 30 of the ***Act*** is the filing date of the application [see ***Georgia-Pacific Corp. v. Scott Paper Ltd.***, 3 C.P.R.(3d) 469, at p. 475].

With respect to the Subsection 30(i) ground, no evidence has been furnished by the opponent to show that the applicant could not have been satisfied that it was entitled to use its trade-mark DOLLAR GENERAL in Canada. Moreover, to the extent that this ground is founded upon allegations set forth in the remaining grounds of opposition, the success of this ground is contingent upon a finding that the trade-mark is not registrable or not distinctive, as alleged in those grounds [see ***Consumer Distributing Co. Ltd. v. Toy World Ltd.***, 30 C.P.R. (3d) 191, at p. 195; and ***Sapodilla Co. Ltd. v. Bristol-Myers Co.***, 15 C.P.R. (2d) 152, at p. 155]. I will therefore consider the remaining grounds which are based on Paragraphs 12(1)(b) and 12(1)(e) of the Act, as well as being based on allegations that the applicant's trade-mark DOLLAR GENERAL is not distinctive.

As its second Section 30 ground, the opponent alleged that the present application does not comply with Subsection 30(e) of the ***Trade-marks Act*** in that the applicant has merely claimed that it intends to use the trade-mark DOLLAR GENERAL in Canada. Subsection 30(e) of the ***Trade-marks Act*** provides as follows:

> **30.** An applicant for the registration of a trade-mark shall file with the Registrar an application containing
> (*e*) in the case of a proposed trade-mark, a statement that the applicant, by itself or through a licensee, or by itself and through a licensee, intends to use the trade-mark in Canada;

While the wording of paragraph 3 of the applicant's application does not conform to the specific wording of Subsection 30(e), the claim that the applicant itself intends to use its trade-mark in Canada meets the requirements of Subsection 30(e) if it is not the applicant's intention to license its trade-mark in Canada. In this regard, no evidence has been furnished by the opponent to show that the applicant intends to use its trade-mark DOLLAR GENERAL in Canada through a licensee. I have therefore dismissed the Subsection 30(e) ground.

The opponent also alleged that the applicant's trade-mark DOLLAR GENERAL is not registrable in view of Paragraph 12(1)(b) of the ***Trade-marks Act*** since the trade-mark DOLLAR GENERAL is clearly descriptive or deceptively misdescriptive of the character or quality of the applicant's services. Paragraph 12(1)(b) of the ***Act*** provides as follows:

> **12.** (1) Subject to section 13, a trade-mark is registrable if it is not
> (b) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the wares or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin;

The issue as to whether the trade-mark DOLLAR GENERAL is clearly descriptive of the character or quality of the applicant's services must be considered from the point of view of the average user of those services. Further, in determining whether the trade-mark DOLLAR GENERAL is clearly descriptive, the trade-mark must not be dissected into its component elements and carefully analyzed, but rather must be considered in its entirety as a matter of immediate impression [see ***Wool Bureau of Canada Ltd. v. Registrar of Trade Marks***, 40 C.P.R. (2d) 25, at pp. 27-28 and ***Atlantic Promotions Inc. v. Registrar of Trade Marks***, 2 C.P.R. (3d) 183, at p. 186]. Additionally, the material date for considering a ground of opposition based on Paragraph 12(1)(b) of the ***Trade-marks Act*** is the date of decision [see ***Lubrication Engineers, Inc. v. The Canadian Council of Professional Engineers***, 41 C.P.R. (3d) 243 (F.C.A.)].

While the legal burden is upon the applicant to show that its trade-mark is registrable, there is an initial evidential burden upon the opponent in respect of this ground to adduce sufficient evidence which, if believed, would support the truth of the allegations that the trade-mark DOLLAR GENERAL is clearly descriptive or deceptively of the character or quality of the applicant's services. In the present case, no evidence has been furnished by the opponent in support of this ground. Moreover, while the opponent sought to argue that the components of the applicant's mark are descriptive, it failed to support its submissions by way of evidence and, in any event, the opponent's arguments do not address the applicant's trade-mark DOLLAR GENERAL when considered in its entirety. This ground of opposition is therefore unsuccessful.

The opponent's next ground is based on paragraph 12(1)(e) and Section 10 of the ***Trade-***

***marks Act***. As in the case of the Paragraph 12(1)(b) ground, no evidence has been furnished by the opponent in support of its allegations that the trade-mark DOLLAR GENERAL has by ordinary and *bona fide* commercial usage become recognized in Canada as designating the kind and quality of the applicant's services. The opponent has therefore failed to meet the evidential burden upon it in respect of this ground. Thus, the Section 10 ground is also unsuccessful.

The final ground relates to the alleged non-distinctiveness of the applicant's trade-mark in that the opponent and others have used the words "dollar" and "general" separately or together in association with retail store services offered in Canada, including a business operating in Canada under the name GENERAL DOLLAR. The material time for considering the circumstances regarding the issue of distinctiveness is the date of the opposition, that is, December 12, 1995 [see ***Re Andres Wines Ltd. and E. & J. Gallo Winery***, 25 C.P.R. (2d) 126 (F.C.A.), at p.130; ***Park Avenue Furniture Corp. v. Wickes/ Simmons Bedding Ltd.***, 37 C.P.R.(3d) 412 (F.C.A.), at p. 424; and ***Molson Breweries, a Partnership v. Labatt Brewing Company Limited***, (Court No. T-162-96, dated June 25, 1998, yet unreported, at p. 25)]. Furthermore, the onus or legal burden is on the applicant to show that its mark is adapted to distinguish or actually distinguishes its services from those of others throughout Canada [see ***Muffin Houses, Inc. v. Muffin House Bakery Ltd.***, 4 C.P.R.(3d) 272 (T.M.O.B.)]. There is, however, an evidential burden on the opponent to prove the allegations of fact in support of its non-distinctiveness ground [see ***Clarco Communications Ltd. v. Sassy Publishers Inc.***, 54 C.P.R.(3d) 418, at p. 431 (F.C.T.D.)].

The Kim affidavit refers to an entry appearing in a 1996-1997 telephone directory and to a telephone call made on December 10, 1996. As both of these are dated subsequent to the date of opposition [December 12, 1995], I have not accorded this evidence any weight in determining whether the opponent has met its evidential burden. Ms. Kim also annexed to her affidavit a photocopy of page 52 from the 1994-1995 "Brockville, Smiths Falls, Perth, Kemptville, Prescott, Morrisburg" telephone directory which includes a listing for "General Dollar", as well as a photocopy of a business name registration for General Dollar located at 744 Dundas Street in Cardinal, Ontario. However, no evidence has been furnished by the opponent as to whether the business name General Dollar has been used as a trade-mark or trade-name or the manner of that use.

Furthermore, no admissible evidence has been adduced by the opponent relating to the nature of the wares or services associated with the business name, if indeed it were being used as either a trade-mark or trade-name. In the absence of such evidence, I cannot conclude that the activities involving the entity identified as General Dollar are of any relevance to the distinctiveness of the applicant's trade-mark. Consequently, the opponent has failed to meet its evidential burden in respect of this ground. I have therefore rejected the final ground of opposition.

Having been delegated by the Registrar of Trade-marks pursuant to Subsection 63(3) of the ***Trade-marks Act***, I reject the opponent's opposition pursuant to Subsection 38(8) of the ***Trade-marks Act***.

DATED AT HULL, QUEBEC, THIS 30th DAY OF SEPTEMBER, 1998.

G.W. Partington
Chairperson
Trade Marks Opposition Board