

**IN THE MATTER OF AN OPPOSITION
by Calgary Cooperative Association
Limited to application No. 1,025,721 for the
trade-mark \$1.49 DAY filed by Cooper
Market Ltd.**

On August 13, 1999, the applicant, Cooper Market Ltd., filed an application to register the trade-mark \$1.49 DAY based upon proposed use of the trade-mark in Canada in association with grocery retail store services.

The application was advertised for opposition purposes in the Trade-marks Journal of November 6, 2002. On April 4, 2003, the opponent, Calgary Co-operative Association Limited, filed a statement of opposition against the application. The applicant filed and served a counter statement.

As rule 41 evidence, the opponent filed the affidavit of Barry Heinrich, the opponent's Vice President Finance and Administration. The applicant elected to not file rule 42 evidence and did not cross-examine Mr. Heinrich. Neither party filed a written argument. An oral hearing was not requested.

Although several grounds of opposition have been pleaded, I will focus my discussion on the ground that is based on s. 38(2)(d) of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the "Act"). This ground pleads that the applied for trade-mark is not distinctive of the applicant's services and has not been adapted by the applicant to make the mark distinctive of the applicant's services. In support of its position, the opponent states that it has used \$1.49 DAY since at least as early as 1982. The opponent also claims use of \$1.49 WEEK since April 1, 2001.

The material date with respect to a ground of opposition based on non-distinctiveness is the date of filing of the opposition. [*Metro-Goldwyn-Meyer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.T.D.) at 324] Although the applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act, there is an initial burden on the opponent to adduce sufficient admissible evidence from which it could

reasonably be concluded that the facts alleged to support each ground of opposition exist. [see *John Labatt Limited v. The Molson Companies Limited* (1990), 30 C.P.R. (3d) 293 (F.C.T.D.) at 298; *Dion Neckwear Ltd. v. Christian Dior, S.A. et al.* (2002), 20 C.P.R. (4th) 155 (F.C.A.)]

I find that the opponent has met its initial burden to show that it was using \$1.49 DAY and \$1.49 WEEK in association with its grocery store services well prior to the material date of April 4, 2003, based on the following statements and exhibits of Mr. Heinrich's affidavit:

[The opponent] developed a marketing concept which centered around the sale of select goods that are normally found in a grocery store and that on a specific day of a month, such goods were sold at the price of \$1.49. That sales event was marketed on the first Monday of every month from at least as early as 1982 through to March 5, 2001. A sample of the advertising that was used in association with this sales event is attached as Exhibit "A".

...

The \$1.49 Day sales event became so successful that on April 1, 2001, Calgary Coop expanded the promotion from a one day event to a one week event. In so doing, Calgary Coop adopted the \$1.49 Week trademark (a sample of which is shown in Exhibit "B" attached).

On the other hand, I note that the applicant's application is based on proposed use and the applicant has filed no evidence that would enable me to conclude that \$1.49 DAY is distinctive of its services. The applicant has therefore not satisfied its legal burden and the non-distinctiveness ground of opposition accordingly succeeds.

Having been delegated by the Registrar of Trade-marks by virtue of s. 63(3) of the Act, I refuse the application pursuant to s. 38(8).

DATED AT TORONTO, ONTARIO, THIS 10th DAY OF FEBRUARY 2006.

Jill W. Bradbury
Member
Trade-marks Opposition Board