Ms. Carreau
Chair, Opposition Board
CIPO

This is in response to the proposed amendments to the Trade-mark Regulations as opened June 28, 2010.

1. With regard to service of documents we believe, there should be a comma up to the word "transmission" in paragraph 2(1)(d) such that it reads:

"in any other manner, including by electronic transmission, with consent of the party or their agent."

Obviously, if the comma is not added, the rule would indicate that the service can be affected "in any other manner" without requiring the consent.

2. Your statistics may be true that reply evidence under Section 43 is rarely filed but we find it hard to believe that there is any "unnecessary delay" given that the current deadline to file reply evidence is merely one month, and an extension cannot be obtained without consent. Meanwhile the proposed deletion of Section 43 ignores the fact that the onus of succeeding on an opposition is actually upon the Applicant rather than the Opponent and thus Opponent's opportunity to file reply evidence can be critical. Having to request leave to file such reply evidence under Rule 44 would actually result in further delays as the request would not even be processed within the current automatic one month time period. It may true that Rules 33 and following, of the Federal Court Rules, do not provide for any automatic right to file reply evidence, but this is because Rule 300 deals with appeals from tribunal decisions where the evidence has usually been finalized at the tribunal level, with the opportunity to file reply having been offered at the tribunal level. The right to file reply evidence should be maintained, and the deadline extended.

3. With regard to cross-examinations, the right to do so (at the tribunal level) should be as of right, albeit after the filing of the opponent's reply as mentioned above.

4. With regard to undertakings, we do not agree that the party who was cross-examined should be responsible for filing undertakings. The fact is that the party conducting the cross-examination might elect not to file such undertakings for any one of many reasons, such as that the answers are not proper, or constitute an attempt to expand their original evidence. We do however agree that the obligation to fulfill the undertakings should still rest upon the party that gave the undertakings, although we assume this requires no amendment; we have the long standing principle that failure to answer a question can give rise to a negative implication etc.

5. With regard to written arguments, we agree that it would save administrative effort if the regulations were to set prescribed deadlines for filing written arguments. However, we do not understand the suggestion that the written argument be filed sequentially. If one party is to file their written argument first and they were to obtain an extension of time, and then the other party does so as well, the written argument stage could easily prolong the proceedings by 12 months. If both parties face the same deadline, then the delay would obviously be cut in half. We also suggest maintaining the current idea that both parties have the same deadline given that the opponent has a preliminary burden of proof while the applicant has the ultimate burden of proof. In other words, it could just as easily be argued that the applicant should be the party to file the written argument first, rather than the opponent.

6. We also question proposed Rule 46(3) in that there is little injustice if one party or the other wishes to file a supplementary written argument provided it is filed well in advance of the hearing. Perhaps more to the point is whether either party should be entitled to make oral submissions which were not fairly disclosed in their written argument; this is basically the unwritten rule in Court. (Oral submissions can also be made in response to the other party's submissions.)

Respectfully,

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