Johnston Wassenaar
Intellectual Property Law

October 24, 2008

VIA E-MAIL

Ms. Darlene Carreau
Acting Chair
Trade-marks Opposition Board
Canadian Intellectual Property Office
50 Victoria Street
Place du Portage II
Gatineau, QC K1A 0C9

Dear Ms. Carreau:

Re: Proposed Changes to the Practice in Trade-mark Opposition Proceedings

On behalf of the law firm of Johnston Wassenaar LLP, we are writing to comment on the Proposed Changes to the Practice in Trade-mark Opposition Proceedings (the "Proposed Changes"), as modified on September 4, 2008 which are intended to supplement the provisions of the *Trade-marks Act*[1] (hereinafter the *Act*) and the *Trade-marks Regulations*[2] (hereinafter the *Regulations*) that provide for Opposition Proceedings.

It is the consensus of Johnston Wassenaar LLP that any proposed amendments to the Practice in Trade-mark Opposition Proceedings (the "Practice") which would enhance both settlement and clarity for users and trade-mark agents are beneficial and required, following the implementation of the current (2007) practice which predictably created confusion, has added costs and has created an administrative backlog at the Opposition Board with respect to the review of submissions for "exceptional circumstances".

It is the intent of Johnston Wassenaar LLP in providing these comments that the perspective of practicing members of the intellectual property law bar will be helpful to the Canadian Intellectual Property Office in examining whether some of the changes should be reconsidered, refined or are more properly the subject of legislative amendment.

Where appropriate, we have commented on each section of the Consultation Document as modified on September 4, 2008, in the order in which they appear in the document. We note that references to the "Opposition Board" have been replaced with "The Registrar" which

[1] *Trade-marks Act*, R.S.C. 1985, c. T-13
[2] *Trade-marks Regulations*, SOR/96-195

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appears to bring the practice notice in line with the wording in the *Act*, as it is the Registrar and not the Opposition Board who is enabled under the *Act* to carry out the *Regulations* of the *Act*.

Trade-mark Law Operates in an International Forum

It is to be highlighted that all aspects of trade-mark law operate in an international forum. Indeed, a review of the applicants and opponents of the trade-mark registration and opposition systems in Canada reveals a significant number of non-Canadian entities and individuals among them (55% of applications filed in Canada are filed on behalf of foreign applicants). Therefore, any contemplated changes to the Practice before the Registrar ought to take into account the reality and complexities of the international aspects of this area of law and the fact that Canadian trade-mark agents are often instructed by foreign counsel or entities, for whom a Canadian opposition may form only a part of a larger, complex international legal settlement negotiation arising in multiple jurisdictions across numerous borders, or worldwide. While administrative issues of the Registrar are relevant, they cannot be the driving force behind the manner in which the *Act* is regulated.

Privilege may attach to Settlement Negotiations between parties

It is also a reality for lawyers and/or agents acting before the Registrar that privilege attaches to many aspects of a settlement negotiation, and it is almost always inappropriate for counsel to divulge information to the Registrar in seeking extensions of time, beyond the mere fact of the consent of the other party, and the fact of the settlement discussions *per se*. It is to be noted that we can think of no Canadian court or tribunal that requires parties to make this information publicly available and believe that the Registrar should remain cognizant of this fact, particularly when all documents filed with the Registrar in an opposition are publicly available. That negative consequences should flow from a party's unwillingness to reveal privileged and confidential information is contrary to a lawyer's duty of confidentiality to their clients, their obligations to their respective law societies, and undermines the prevailing principle that the parties ought to be permitted to negotiate without prejudice to their rights. In granting extensions of time, the Registrar cannot require parties to waive privilege. Concurrently, Section 47(1) of the *Act* specifically acknowledges that extensions may be required. Perhaps what <u>is</u> expressly required in the *Act* is an amendment which acknowledges that settlement discussions by parties be permitted to proceed with the knowledge that both parties will receive extensions of time whenever such requests are made on consent.

I The word "must" in the Proposed Changes in Section I "Correspondence", Section II "Service on the other Party to the Opposition", and Section V "Extension of Time"

The proposed change is to substitute "should" with "must", however, the Proposed Changes are silent as to the repercussions of failing to act in accordance with the practice notice and the consequences of compliance and non-compliance continues to lack certainty and may therefore be contrary to the principles of Administrative law. This appears to require legislative amendment to the *Act* in order that the consequences of the failure be made specific to the parties. Such amendments will eliminate any possibility of ambiguity or vagueness and will put practitioners on notice that such steps are imperative and make clear to participants in the Opposition process the consequences of failing to meet the standard. This should serve the interests of the Registrar and ensure each party is aware that the other party has/or has not taken a step in the proceeding. An exceptional circumstance for clerical error could prevent mistakes from harming the substantive interests of parties who otherwise have an interest in seeing an opposition proceed. Such clarity is not achieved with the current Proposed Changes.

II Service on the other Party to the Opposition

This proposed change is supported in principle.

V Extensions of Time

The Proposed Change inserts the word "must" with respect to the two-part test enunciated under the Proposed Changes. However, the Proposed Changes are silent as to the repercussions of failing to act in accordance with the practice notice and the same comments as in Section I above apply.

It may be argued that the amendments proposed in Section V and the subsequent sub-sections of the Proposed Changes may raise issues under Administrative Law principles, and represent a substantive change in practice before the Registrar in that it makes irrelevant the consent of the other party when seeking an extension of time as a relevant consideration pursuant to s.47(1), unless it is a situation specifically contemplated by the Proposed Changes as being one in which consent of the other party will be considered. Section 47(1) of the *Act* provides:

> **47. Extensions of Time** – (1) If, in any case, the Registrar is satisfied that the circumstances justify an extension of the time fixed by this Act or

> prescribed by the *Regulations* for the doing of any act, he may, except as in this Act otherwise provided, extend the time after such notice to other persons and on such terms as he may direct. (emphasis added)

While this Section of the *Act* does give discretion to the Registrar, such discretion is not unfettered, and in using such discretion the Registrar is bound by the guiding principles of Administrative Law, particularly where the Registrar's proposed practice changes are directed to parties in such a way that requires parties to waive their rights; prejudices the rights of the parties; and/or appear unreasonable in that it effectively fails to take into account ongoing or intermittent settlement attempts. Such an approach may be seen as a misuse of the Registrar's discretion and subject the Registrar's interim and final decisions to appeal and judicial review.

V.1 Extensions of Time – General Benchmarks

The proposed change of sub-section V.I "Extensions of Time – General Benchmarks" in addition to changing "Standard Lengths of Extensions of Time (on or after October 1, 2007)" to "Benchmark for Maximum Extensions of Time" thereby changing the procedure and limiting the flexibility of the parties to the opposition, also adds a "preamble" as follows:

> "Registrar has discretion under s. 47 of the Act to grant extensions of time fixed by the Act or prescribed by the *Regulation*s if satisfied that the facts justify the need for an extension, **subject to benchmark limits**.
>
> The Registrar will not grant multiple requests for extensions of time, even where such multiple requests amount to an extension of time within or up to the respective benchmark." (emphasis added)

In failing to amend the legislation it is arguable that the Proposed Changes grant powers to the Registrar which exceed the jurisdiction granted to the Registrar under the *Act* and do not reflect the flexibility the *Act* intended the parties to have under Section 47 by providing for extensions of time.

From the *CIPO Annual Report, Supporting Canadian Innovation, Annual Report 2006-2007*, the statistics on oppositions available to the public suggest that 10% or less of oppositions filed reach the decision stage. As such, it is unclear whose purposes are best served by the proposed changes, nor why the Registrar would be anxious to allocate additional costs and resources to

the decision stage of opposition proceedings as opposed to incorporating settlement at all stages of the opposition process upon payment of a prescribed government fee.

V.1.1 Cooling-off Period

The law firm of Johnston Wassenaar LLP supports in principle the notion of a cooling-off period, but not to the exclusion of extensions of time on consent by the parties where settlement negotiations are ongoing. In addition, if a cooling-off period is adopted it is recommended that it be available to either party at any stage of the opposition proceeding on consent of both parties and not as currently proposed. This would in effect acknowledge the reality of ongoing settlement negotiations, whereas the Proposed Changes renders the fact of ongoing settlement negotiations irrelevant with the sole exception of finalizing the settlement documents under "special circumstances".

The Proposed Changes envision that settlement and opposition proceedings should be running in tandem between the parties, leading to additional costs to the parties, and the potential for settlement negotiations to be derailed by the need for contentious opposition steps to be taken. This is NOT a practice adopted in any court who will take the fact of ongoing settlement discussions into account in permitting parties to refrain from taking the next step in an inherently contentious process.

It is the experience of the members of the law firm of Johnston Wassenaar LLP who have participated in numerous opposition proceedings that this will undermine attempts at settlement. In addition, as can be concluded from the number of foreign applicants in Canada, it is the case that parties to opposition proceedings can and often are engaged in settlement discussions outside of Canada, effectively moving the settlement process beyond the control and expertise of the Canadian agent, but making the attempt no less "genuine". This may differ from the case in other foreign jurisdictions and the resulting length of opposition proceedings in those jurisdictions. However, the opposition procedures of other countries are not relevant to the Canadian system and should not impact the Canadian opposition system and the pursuit of running an efficient system that administers justice for its users, Canadian and otherwise.

Finally, we believe that if the wording of the Proposed Changes were adopted it would invariably result in the applicant seeking the maximum extension of 9 months for each request, as the proposed wording does not permit the parties to "bank" the unused cooling-off period for later in the proceedings at a time mutually agreed upon by the parties unless they are within the "exceptional circumstance" of having finalized the settlement negotiations.

Both proposed changes to the Practice Notice, V.1.1 "Cooling-off Period" and the subsequent sub-section V.1.2 "Termination of Cooling-off Period" appear to contemplate new steps not provided for in the current *Act* and/or *Regulations*, and may be *ultra vires* the Registrar and ought more properly be brought by way of legislative amendment as was the case in the U.K., where an amendment to add a cooling-off period was made to the Rules (Trade Marks Rules 2008, No. 1797).

V.1.2. Termination of Cooling-off Period

The provisions of this proposed change are linked to the proposed changes in V.1.1 and therefore the same general comments apply with respect to the timing of the cooling off period as currently proposed. Again, the notion of a party being able to opt out of a cooling-off period is accepted in principle, but not at the expense of parties having the right to attempt settlement discussions and obtain extensions of time on consent pursuant to Section 47 of the *Act*. In addition, the requirement to provide written notice that the cooling off period has ended, followed by a one-month reprieve prior to the next step being taken, ought to apply to both parties, regardless of who terminates the cooling-off period and appears to be a more "fair" approach to the termination of a cooling-off period. It is anticipated that this would be amended to permit either party to invoke this step in an opposition proceeding.

The Benchmarks as set out in the Proposed Changes

See comments above with respect to these proposals which, in addition to altering the current practice, appear to introduce a new step in the opposition process NOT contemplated by the *Act* and/or *Regulations*, namely a "cooling-off period" and the subsequent "Termination of Cooling-off Period", and which severely restricts the ability of parties to attempt settlement negotiations outside the proposed "cooling-off period" without concurrently proceeding with the opposition.

These changes do not appear to be directed at the users of the opposition proceedings. The inclusion of the word "genuine" in the provisions for the "cooling-off period" is superfluous and ought to be removed. In general, these "benchmarks" reiterate the position that consent with respect to extensions of time in opposition proceedings is no longer relevant, and represents a major shift in the practice before the Registrar with increased cost consequences to the parties and potentially to the Registrar administratively as a greater percentage of oppositions progress to the hearing and decision stages.

V.3 Extensions of Time beyond the Benchmark – "Exceptional Circumstances"

The "exceptional circumstances" as enunciated in the Proposed Changes mark a substantial departure from the "exceptional circumstances" test as understood by those practicing before the Registrar prior to the Practice being changed by the current Practice Notice dated September 26, 2007 (which took effect on October 1, 2007), which provided little or no guidance and appears to have resulted in a bottleneck at the Opposition Board; confusion amongst those agents involved in oppositions as to the test for exceptional circumstances; additional costs to parties; and the potential that the decisions of the Registrar may be subject to greater judicial review on appeal.

Practitioners were not provided with an enunciated list of those facts which would meet the "exceptional circumstances" test going forward, contrary to principles of fairness and administrative law. The Proposed Changes are of assistance to the profession in this regard. However, the ground of ongoing settlement discussions between the parties previously relied upon by those practicing before the Opposition Board has effectively been eliminated, to the detriment of all and the interests of none that have been articulated to date. In addition, the use of the word "may" with respect to the enunciated "exceptional circumstances" might be interpreted as vague.

V.3.1 Co-pending Opposition Proceedings

This "exceptional circumstance" relates to the overall tone of the Proposed Changes in as much as the Proposed Changes seek to limit the ability of parties to conduct settlement negotiations outside the timelines imposed by the Proposed Changes. It effectively eliminates ongoing settlement discussions and the consent of the other party as a test of "exceptional circumstances". It essentially mirrors Section "V.3.7 Finalizing Settlement" of the Proposed Changes in that it limits EITHER party to, ONE extension of time, to FULLY FINALIZE and COMPLETE settlement negotiations, up to a MAXIMUM of THREE months, on CONSENT. In so doing the party making the request must divulge facts which "clearly demonstrate" the stage that the parties have reached. Objections to this "exceptional circumstance" are discussed in greater depth in V.3.7 below.

V.3.2 Recent Change in a Party's Instructing Principal or Trade-mark Agent

While supported in principle by Johnston Wassenaar LLP as a ground that ought to fall within "exceptional circumstances", the wording of the proposed sub-section is vague, and therefore

does not provide sufficient guidance to those practicing before the Registrar to determine the standard required to meet the test. Specifically, the following phrases have not been defined with sufficient clarity; "very recent change"; "a reasonable period of time"; "depend on the stage of the opposition". Greater clarity is required to guide the users of the Opposition process and a provision that if the test has not been met a safeguard is in place to protect the parties' substantive rights.

V.3.3 Circumstances Beyond the Control of the Person Concerned

While supported in principle by Johnston Wassenaar LLP as a ground that ought to fall within "exceptional circumstances", the wording of the proposed sub-section is vague, and therefore does not provide sufficient guidance to those practicing before the Registrar to determine the standard required to meet the test. Specifically, the following basket phrase has not been defined with sufficient clarity "other serious and unforeseen circumstances". In leaving such phrases vague, the Registrar will have a duty to advise practitioners as the test becomes refined as greater clarity is required to guide the users of the Opposition process to maintain fairness before the Registrar. In addition, a provision that if the test has not been met a safeguard is in place to protect the parties' substantive rights.

V.3.4 Assignment

This proposed change is supported in principle.

V.3.5 Revised Application

This proposed change is supported in principle.

V.3.6 Cross-examination

This "exceptional circumstance" sets out the limited grounds available to parties seeking an extension of time to cross-examine to one four-month extension on consent under Section IX.I of the Proposed Changes. This may be too narrow in scope to meet the "exceptional circumstances" that may arise provided the Registrar is taking the position that the grounds given in this Section (and other enunciated grounds) are exhaustive. For example, no provision has been given with regards to requirements for translators, illness of an affiant scheduled for cross-examination, etc.

V.3.7 Finalizing Settlement

This "exceptional circumstance" relates to the overall tone of the Proposed Changes in as much as the Proposed Changes seek to limit the ability of parties to conduct settlement negotiations outside the timelines imposed by the Proposed Changes. It effectively eliminates ongoing settlement discussions and the consent of the other party as a test of "exceptional circumstances". It limits EITHER party to, ONE extension of time, to FULLY FINALIZE and COMPLETE settlement negotiations, up to a MAXIMUM of THREE months, on CONSENT. In addition, the Proposed Changes include the following wording: "The provision of a summary of the steps taken by the parties as well as a firm timetable with an estimate of completion dates for finalizing the settlement would generally be of assistance to the Registrar". There is no basis for the requested information relating to a summary of the steps which have been taken (or will be taken) in determining whether the extension should be granted beyond the fact that the Registrar has been advised in writing that settlement is ongoing and the parties consent. Johnston Wassenaar LLP's submissions with respect to the limits of the Registrar's discretion, and in particular with respect to requiring parties to waive privilege, apply here. This "exceptional circumstance" should be headed "SETTLEMENT" and <u>not limit</u> the parties to the final stage of such a negotiation.

VI Evidence

This proposed change is supported in principle.

VI.1 Consequences for Failure to File Evidence

This proposed change is supported in principle.

VIII Amended Applications

This proposed change is supported in principle.

IX Cross-examination

This proposed change is supported in principle.

IX.I Extension of Time to Conduct Cross-Examination

The proposed change severely limits the ability of a party to seek an extension of time to conduct cross-examination beyond four months with consent, unless a party can meet the "exceptional circumstances" proposed under Section V.3.6 "Cross-examination" of the Proposed Changes and is dealt with above.

X Hearings

Johnston Wassenaar LLP supports in principle greater advanced scheduling of hearings with the participation of those representatives and/or parties that wish to be heard by the Registrar but is of the opinion that clarification and reconsideration of timelines is required, particularly when the proposals are considered together. For example, it is unclear if parties agree to be heard on short notice if their names are maintained on the regular hearing list in the interim.

Secondly, with respect to the scheduling of hearings, presuming it is in the Registrar's interest to have counsel provide their availability for a hearing 4 or 5 months in advance of the hearing. The Proposed Changes include that the Registrar will generally not grant a postponement of the scheduled hearing date, then the "not less than 30 days notice" of the scheduling of the hearing is unworkable in that counsel and agents often have schedules determined months in advance. It then becomes reasonable for parties to seek postponement of hearing dates to ensure that the applicant or opponent is represented by their chosen representative. However, the Proposed Changes have eliminated postponement. If the Proposed Changes eliminate the ability of parties to postpone hearings, then the parties ought to be notified 90 to 120 days in advance of the hearing date, and as such the proposed changes need to be amended.

X.1 Request to be Heard – Rule 46 of the *Regulations*

This proposed change is supported in principle.

X.2 Hearings on Short Notice

This proposed change is supported in principle, however the 24 hours notice proposed arguably offers an advantage to those parties (who wish to be heard in person) to those residing in close approximation to Gatineau and perhaps Montreal and Toronto (it is unclear if short notice hearings would be available in all three locations). In reality, this proposal may be impractical in most cases should parties need to seek client instructions etc., particularly when the majority of

Canadian applicants are foreign. The impracticality of the proposal may be reduced if the notice period could be extended to 5 business days, increasing the likelihood of greater participation by all parties. It is equally unclear what will happen to parties on the Short Notice Hearing list if they are unable to utilize the opportunity to attend (where does the case move to on the hearings list, etc.).

X.3 Scheduling of Hearings

This proposed change is supported in principle as the Registrar does not currently have a practice of consulting the parties in advance about their schedules and availability to attend a hearing unless parties need to reschedule.

However, the current proposal theoretically requires parties to hold all dates given to the Registrar, for an unspecified length of time from the date the availability is sent to the Registrar for the scheduling of the hearing up to "no less than 30 days prior to the date" because the Registrar is concurrently proposing that no postponement to the actual hearing date will be permitted (Section X.6 "Postponement of Hearing"). In light of the concurrent proposals, it is submitted that the Registrar amend the Proposed Changes under Section X.3 "Scheduling of Hearings" so that the Registrar will advise the parties of the scheduled hearing date and time no less than a minimum of 120 or 90 days prior to the date (with the exception of those hearings on short notice, as previously discussed).

X.4 Changes to the Scheduled Hearing Date

Should parties be notified no less than 120 or 90 days prior to the scheduled hearing date as set out above, the limited changes to the hearing date set out in this section of the Proposed Changes (which do not contemplate rescheduling but other changes) would be agreeable in principle but for "exceptional circumstances" as amended per these and other submissions. However, if the Registrar proposes that they retain the "not less than 30 days" included in the Proposed Changes then this proposed change becomes unworkable in practice.

X.5 Simultaneous Translation

This proposed change is supported in principle, although the requirement that the Registrar have at least three weeks notice in advance of the scheduled hearing date appears to eliminate the possibility of bilingual Hearings on Short Notice under section X.2 as currently drafted. A

possible modification should include the requirement to notify the Registrar three weeks in advance of the Hearing if simultaneous translation is required, in writing.

X.6 Postponement of Hearing

This Proposed Change is dealt with in part in sections X.3 and X.4 above and the same factors apply here. Specifically, the current proposal (when sections X.3, X.4 and X.6 are read together) requires parties to hold all dates given to the Registrar, for an unspecified length of time from the date the availability is sent to the Registrar for the scheduling of the hearing up to "no less than 30 days prior to the date" while limiting the right of parties to seek postponements under section X.6. In light of the concurrent proposals, it is submitted that the Registrar amend the Proposed Changes under Section X.3 "Scheduling of Hearings" so that the Registrar will advise the parties of the scheduled hearing date and time no less than a minimum of 120 or 90 days prior to the date (with the exception of those hearings on short notice).

The Registrar's Proposed Changes make the postponement of hearings an exceptional circumstance, not generally available to parties. Once again, it eliminates consent between the parties and/or settlement negotiations as valid grounds for postponement, a practice contrary to that found in the courts.

Furthermore the Proposed Changes contemplate the issuance by the Registrar of a final decision even where parties did not proceed to the oral hearing state and who have sought the right to be heard at an hearing pursuant to Rule 46(4) of the *Regulation*s.

The Proposed Changes state:

> ... If the parties agree that they no longer wish to be heard, after the opposition has already been scheduled to be heard, the Registrar will proceed, in due course, to issue the final decision under s. 38 of the Act. In general, the Registrar will NOT hold decisions in abeyance or agree not to issue a decision based on consent of the parties and/or pending settlement negotiations. (emphasis added)

Yet Section 38(8) of the *Act* states:

> (8) *Decision* – After considering the evidence and representations of the opponent and the applicant, the Registrar shall refuse the application or reject the opposition and notify the parties of the decision and the reasons for the decision.

It may be argued that the amendments proposed in section X.6 of the Proposed Changes may go beyond the scope of the discretion granted to the Registrar.

More importantly, it is unclear on what rationale the Registrar would insist in going forward with a final decision, when the parties have sought on consent to withdraw the opposition prior to making oral representations at a hearing pursuant to section 46(4) of the *Regulations*. It is submitted that there would be no reason at law for the Registrar to proceed to issuing a decision in these circumstances, contrary to the Proposed Changes. It is also difficult to understand an unarticulated rationale for putting resources towards an opposition that has been settled between the parties, and on that basis, these proposed changes seem counter-productive and increase the likelihood of appeals and judicial review in the Federal Court and costs to every party concerned including the Registrar and the Federal Court.

X.7 Cancellation of Hearing

This proposed change is supported in principle.

X.8 Jurisprudence

This proposed change is supported in principle.

XI Appeals

This proposed change is supported in principle.

Conclusions

The law firm of Johnston Wassenaar LLP is of the view that certain issues have not been adequately addressed to date in discussions regarding the amendments, and the Proposed Changes may have unintended consequences that will undermine settlement negotiations between parties and increased costs to all, including the Registrar, and require that parties waive privilege in order that the *Registrar* grant extensions of times to permit those settlement negotiations to proceed free of concurrent opposition proceedings. There has been widespread confusion with respect to the practice before the Board since the Practice Notice dated September 26, 2007 took effect on October 1, 2007. Concerns of the profession went unaddressed, costs to parties have increased, as has uncertainty about the process. The Proposed Changes appear to cement "win/lose" solutions, whereas prior to October 2007, and as

permitted under Section 47 of the *Act*, the Registrar exercised their discretion in favour of parties attempting settlement at any and all times in the process. Consequently, decisions were required in 10% or less of the cases.

The rigidity of the Proposed Changes and the existing opposition practice since October 2007 do not appear to serve the interests of the parties or the administration of justice. Encouraging settlement is the goal of most disputed proceedings; a goal the Registrar had encouraged and achieved with great success. It is unclear how stepping away from the flexibility inherent in Section 47 of the *Act* serves any interests beyond a rigid understanding of the process and fails to consider other relevant and proper purposes.

It is encouraging that the input of members of the profession may have their views heard and considered. However, certain Proposed Changes appear to have the effect of granting powers to the Registrar that may overreach those granted by Parliament and may more properly be the subject of legislative amendments as previously discussed.

We appreciate the opportunity to provide input on the Proposed Changes, and trust that these together with the other submissions of the profession will be considered.

Yours very truly,
Johnston Wassenaar LLP

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