

**Date: 20080502**

**Docket: T-2217-07**

**Citation: 2008 FC 573**

**Vancouver, British Columbia, May 2, 2008**

**PRESENT: Roger R. Lafrenière, Esquire  
Prothonotary**

**BETWEEN:**

**THANE STENNER**

**Applicant**

**and**

**STENNER FINANCIAL SERVICES LTD.**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] The facts underlying the motion by the Applicant, Thane Stenner, for an extension of time to conduct cross-examinations of the Respondent's deponents are not in dispute.

[2] Thane Stenner brought an application to expunge the Respondent's trade-mark STENNER on December 19, 2007. CIBC World Markets Inc. (CIBC) commenced a similar proceeding against the Respondent on December 20, 2007 in Court File No. T-2216-07.

[3] The Respondent, Stenner Financial Services Ltd., filed a Notice of Appearance in opposition to both proceedings on January 2, 2008. On consent of the parties, Mr. Justice François Lemieux ordered that the two matters be heard together on common evidence on February 13, 2008. Around the same time, the Respondent consented to an extension of time for the two Applicants to serve and file their supporting affidavits in accordance with Rule 7 of the *Federal Courts Rules*. Rule 7 provides that most periods stipulated by the *Rules* may be extended once for up to half the time period in question simply by filing the written consent of the parties.

[4] After the Applicants served and filed their supporting affidavit evidence within the extended deadline, the Respondent obtained the Applicants' consent to an extension of time to comply with Rule 307. The Respondent accordingly served and filed its responding evidence, consisting of thirteen (13) affidavits, on April 2, 2008.

[5] Rule 308 provides that all parties must complete cross-examination on affidavits within 20 days after the filing of the respondent's affidavits. It is common ground that the deadline to complete cross-examinations would expire on April 22, 2008, unless otherwise extended either on consent or by court order.

[6] Within three (3) business days of service of the Respondent's affidavits, counsel for CIBC, Mr. Stephen Warnett, informed Respondent's counsel, Mr. Murray L. Smith, that the Applicants intended to cross-examine all but one of the thirteen (13) deponents. Mr. Warnett sent a confirmatory letter to Mr. Smith on April 8, 2008. He requested that Mr. Smith consent to a 10-day extension to conduct cross-examination, and also solicited his cooperation in coordinating convenient dates for cross-examination and service of Directions to Attend. Mr. Andrew Morrison, counsel for Thane Stenner, made a similar request that same day.

[7] On April 9, 2008, Mr. Smith forwarded a letter to Applicants' counsel to advise them that he could not agree to the 10-day extension as he was not available during that period and that "it will be necessary to seek an order from the Court". While stating that he is confident that reasonable arrangements could be made to accommodate the cross-examination of the deponents, Mr. Smith expresses concerns about what he views as the Applicants' "excessive" and "oppressive" demands to cross-examine. He requests that the Applicants agree to restrict the examination of George Stenner to one half day, and those of "minor deponents" to 30 minutes, and that only one cross-examination be conducted on behalf of both Applicants. Mr. Smith indicates that he will provide available dates "once the preliminary issues are resolved."

[8] Mr. Morrison replied by letter the following day. He advised Mr. Smith that he was not prepared to agree to the proposed time limits on examinations or to limit cross-examinations to only one counsel on behalf of both Applicants. Mr. Morrison indicated, however, that he expected that cross-examinations of each of the non-party deponents would take no longer than 30 minutes to

complete, and that counsel for the Applicants would work together to avoid covering the same ground. He concluded his letter as follows:

With respect to the timing of the cross-examinations, are you and the witnesses available prior to the deadline imposed by the Federal Courts Rules?

If not, please contact me so that we can discuss your availability and the availability of the witnesses, and whether you will consent to an extension of the deadline so that I can file a request for an order extending the deadline.

[9] By letter to Applicants' counsel dated April 11, 2008, Mr. Smith took exception to the tone of Mr. Morrison's letter, which he characterized as "unnecessarily hostile". He confirmed that his law firm had available dates for the examinations, but that he would not take on the task of coordinating dates convenient to the witnesses and counsel. He also gave notice that the Respondent would require strict compliance with the *Rules*.

[10] Mr. Warnett responded by letter the same day and again requested that Mr. Smith consent an extension of time. On April 14, 2008, Mr. Smith wrote back to advise that it was not possible for him to agree to the Applicants' request for a ten day extension for the reasons given in his letter dated April 9, 2008.

[11] On April 14, 2008 both Applicants delivered letters to Mr. Smith enclosing Directions to Attend requiring Gordon Stenner to attend for cross-examination on his affidavit on April 22, 2008.

[12] On April 15, 2008, Mr. Smith wrote to advise that Gordon Stenner would not attend because he (Mr. Smith) was out of town on the appointed date, and the Direction to Attend was not

in compliance with the requirements of the *Rules*. Mr. Smith refers to the requirement in Rule 91(3)(b) that a Direction to Attend on a non-party must be served at least ten (10) days before the day of the proposed examination. Mr. Smith leaves open the possibility of cross-examinations taking place in the future, but only on the following conditions:

We are still prepared to reasonably accommodate cross-examination in this matter but we repeat that the Applicants who are joined in this proceeding at their own request may not tag-team their cross-examination. You may choose one lawyer to examine Mr. Stenner for one day. We will make Mr. Stenner available at our offices during the week of April 28th, 2008.

*Positions of the parties*

[13] The Applicants submit that they have a valid explanation for their delay in conducting cross-examinations. They notified the Respondent promptly of their intention to cross-examine the Respondent's deponents, and made reasonable attempts to coordinate and schedule cross-examinations. The Applicants also submit that they have maintained a continued intention to conduct cross-examinations, as evidenced by the exchange of correspondence between counsel for the parties. Further, they maintain that the Respondent would not be prejudiced if an extension of time is granted.

[14] The Respondent counters that the Applicants have failed to act with due diligence and have provided no explanation for their delay in conducting cross-examination within the time provided in Rule 306. It also contends that where a party is applying for the Court's permission to conduct cross-examinations, there must be evidence to show that cross-examination is necessary. The Respondent submits that the Applicants have failed to establish any ambiguity or confusion in the Respondent's affidavits that requires clarification.

*Analysis*

[15] The only issue to be determined on this motion is whether an extension of time should be granted to the Applicant to conduct cross-examination of the Respondent's deponents.

[16] As a general rule, the test for determining whether an extension of time should be granted is whether an applicant has demonstrated a continued intention to pursue the application, that the application has some merit, that no prejudice to the respondent arises from the delay, and that a reasonable explanation for the delay exists: *Canada (Attorney General) v. Hennelly*, [1999] F.C. J. No. 846 (C.A.). The emphasis to be given to the four factors will vary, however, with the circumstances in each case.

[17] With respect to the first factor, it is clear from the evidence before me that the Applicants maintained continued intention to cross-examine on the Respondent's affidavits. In their numerous letters to Mr. Smith, counsel for the Applicants consistently and firmly asserted their respective client's intention to cross-examine.

[18] As for the merits of the application, there is, at the very least, an arguable case that the STENNER trade-mark is not distinctive. In any event, there is no requirement on the Applicants to seek leave to cross-examine, or to demonstrate that cross-examination is necessary. The Applicants have an absolute right to cross-examine each of the Respondent's deponents, provided they do so with due diligence.

[19] Turning to the third factor, I am satisfied that the Respondent would not be prejudiced if the time for completion of the Applicants' cross-examination is granted. The extension of time requested by the Applicants is relatively short and will not significantly delay the proceeding.

[20] Finally, in terms of explanation for the delay, the Applicants have fully accounted for their failure to conduct cross-examinations by April 22, 2008. Faced with a dozen deponents to cross-examine and a tight timeframe within which to complete them, the Applicants promptly contacted the Respondent to request its consent to an extension of time and to schedule the cross-examinations in an efficient and expedient manner. When the Respondent refused to cooperate, the Applicants took steps to schedule the cross-examination of George Stenner, but to no avail, and then moved without delay for an extension of time. The Respondent's position that the Applicants failed to act with due diligence is wholly without merit.

[21] The Respondent unreasonably refused to consent to an extension of the deadline for completing cross-examinations or to facilitate cross-examinations. It also unfairly set up procedural obstacles, under the guise of "strict compliance with the Rules", in a clear attempt to extract concessions from the Applicants. Such tactics are inappropriate and should not be condoned.

[22] The most important aspect to consider when determining whether to grant an extension of time is the interests of justice. On the evidence before me, the Respondent ought properly have acceded to the Applicants' reasonable requests. In the exercise of my discretion, I am satisfied that the motion for extension of time should be granted, with costs to the Applicants in any event of the cause.

**ORDER**

**THIS COURT ORDERS that**

1. The time provided under Rule 308 of the *Federal Courts Rules* within which the Applicant shall complete his cross-examinations of deponents of affidavits served and filed by the Respondent is extended to June 30, 2008, or the date of completion of those cross-examinations, whichever is earlier.
2. The application shall continue as a specially managed proceeding.
3. The Applicant is granted leave to serve a Direction to Attend on Gordon Stenner that requires Gordon Stenner to attend for cross-examination on his affidavit on Wednesday, May 28, 2008 at 9:30 a.m. at the offices of Borden Ladner Gervais LLP at 1200 - 200 Burrard Street, Vancouver, British Columbia.
4. The Applicant may serve the Direction to Attend on Gordon Stenner by delivering the document to the Respondent's address for service.
5. No witness fees need be paid or tendered to Gordon Stenner in connection with the cross-examinations on his affidavit to be conducted by the Applicant in this proceeding and by the Applicant in Federal Court No. T-2217-07.

6. The Applicant is granted leave to serve a Direction to Attend on Tore Jorgensen that requires Tore Jorgensen to attend for cross-examination on his affidavit on Thursday, May 29, 2008 at 9:00 a.m. at the offices of Borden Ladner Gervais LLP at 1200 - 200 Burrard Street, Vancouver, British Columbia. Tore Jorgensen is entitled to only one set of witness fees in the amount of \$60.00 for his attendance for the cross-examinations on his affidavit to be conducted by the Applicant in this proceeding and by the Applicant in Federal Court No. T-2217-07.
  
7. The Applicant is granted leave to serve a Direction to Attend on Mary Wareham that requires Mary Wareham to attend for cross-examination on her affidavit on Thursday, May 29, 2008 at 10:00 a.m. at the offices of Borden Ladner Gervais LLP at 1200 - 200 Burrard Street, Vancouver, British Columbia. Mary Wareham is entitled to only one set of witness fees in the amount of \$60.00 for her attendance for the cross-examinations on her affidavit to be conducted by the Applicant in this proceeding and by the Applicant in Federal Court No. T-2217-07.
  
8. The Applicant is granted leave to serve a Direction to Attend on Frank Stuber that requires him to attend for cross-examination on his affidavit on Thursday, May 29, 2008 at 11:00 a.m. at the offices of Borden Ladner Gervais LLP at 1200 - 200 Burrard Street, Vancouver, British Columbia. Frank Stuber is entitled to only one set of witness fees in the amount of \$70.00 for his attendance for the cross-examinations on his affidavit to be conducted by the Applicant in this proceeding and by the Applicant in Federal Court No. T-2217-07.

9. The Applicant is granted leave to serve a Direction to Attend on Kim Sigurdson that requires him to attend for cross-examination on his affidavit on Thursday, May 29, 2008 at 12:00 p.m. (noon) at the offices of Borden Ladner Gervais LLP at 1200 - 200 Burrard Street, Vancouver, British Columbia. Kim Sigurdson is entitled to only one set of witness fees in the amount of \$30.00 for his attendance for the cross-examinations on his affidavit to be conducted by the Applicant in this proceeding and by the Applicant in Federal Court No. T-2217-07.
  
10. The Applicant is granted leave to serve a Direction to Attend on Manley H. Gerow that requires him to attend for cross-examination on his affidavit on Thursday, May 29, 2008 at 2:00 p.m. at the offices of Borden Ladner Gervais LLP at 1200 - 200 Burrard Street, Vancouver, British Columbia. Manley H. Gerow is entitled to only one set of witness fees in the amount of \$50.00 for his attendance for the cross-examinations on his affidavit to be conducted by the Applicant in this proceeding and by the Applicant in Federal Court No. T-2217-07.
  
11. The Applicant is granted leave to serve a Direction to Attend on Graham E. Hanson that requires him to attend for cross-examination on his affidavit on Thursday, May 29, 2008 at 3:00 p.m. at the offices of Borden Ladner Gervais LLP at 1200 - 200 Burrard Street, Vancouver, British Columbia. Graham E. Hanson is entitled to only one set of witness fees in the amount of \$60.00 for his attendance for the cross-examinations on his affidavit to be conducted by the Applicant in this proceeding and by the Applicant in Federal Court No. T-2217-07.

12. The Applicant is granted leave to serve a Direction to Attend on Robert Vance that requires him to attend for cross-examination on his affidavit on Friday, May 30, 2008 at 9:00 a.m. at the offices of Borden Ladner Gervais LLP at 1200 - 200 Burrard Street, Vancouver, British Columbia. Robert Vance is entitled to only one set of witness fees in the amount of \$60.00 for his attendance for the cross-examinations on his affidavit to be conducted by the Applicant in this proceeding and by the Applicant in Federal Court No. T-2217-07.
13. The Applicant is granted leave to serve a Direction to Attend on Brenda Lynn Lloyd that requires her to attend for cross-examination on her affidavit on Friday, May 30, 2008 at 10:00 a.m. at the offices of Borden Ladner Gervais LLP at 1200 - 200 Burrard Street, Vancouver, British Columbia. Brenda Lynn Lloyd is entitled to only one set of witness fees in the amount of \$80.00 for her attendance for the cross-examinations on her affidavit to be conducted by the Applicant in this proceeding and by the Applicant in Federal Court No. T-2217-07.
14. The Applicant is granted leave to serve a Direction to Attend on Raj S. Cheema that requires him to attend for cross-examination on his affidavit on Friday, May 30, 2008 at 11:00 a.m. at the offices of Borden Ladner Gervais LLP at 1200 - 200 Burrard Street, Vancouver, British Columbia. Raj S. Cheema is entitled to only one set of witness fees in the amount of \$30.00 for his attendance for the cross-examinations on his affidavit to be conducted by the Applicant in this proceeding and by the Applicant in Federal Court No. T-2217-07.
15. The Applicant is granted leave to serve a Direction to Attend on Robert Schmunk that requires him to attend for cross-examination on his affidavit on Friday, May 30, 2008 at

- 12:00 p.m. (noon) at the offices of Borden Ladner Gervais LLP at 1200 - 200 Burrard Street, Vancouver, British Columbia. Robert Schmunk is entitled to only one set of witness fees in the amount of \$60.00 for his attendance for the cross-examinations on his affidavit to be conducted by the Applicant in this proceeding and by the Applicant in Federal Court No. T-2217-07.
16. The Applicant is granted leave to serve a Direction to Attend on James L. Hamilton that requires him to attend for cross-examination on his affidavit on Friday, May 30, 2008 at 2:00 p.m. at the offices of Borden Ladner Gervais LLP at 1200 - 200 Burrard Street, Vancouver, British Columbia. James L. Hamilton is entitled to only one set of witness fees in the amount of \$720.00 for his attendance for the cross-examinations on his affidavit to be conducted by the Applicant in this proceeding and by the Applicant in Federal Court No. T-2217-07.
17. Without further order of this court, the parties may consent to the Applicant in this proceeding and the Applicant in Federal Court No. T-2217-07 serving Directions to Attend on deponents of affidavits served by the Respondent that require a deponent to attend for cross-examination on his or her affidavit on a date or time that is different than that set out in this order.
18. Costs of the motion in the amount of \$1,000.00 are payable by the Respondent in any event of the cause.

“Roger R. Lafrenière”  
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Prothonotary

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2217-07

**STYLE OF CAUSE:** THANE STENNER v. STENNER FINANCIAL SERVICES LTD.

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** April 28, 2008

**REASONS FOR ORDER:** LAFRENIÈRE P.

**DATED:** May 2, 2008

**APPEARANCES:**

Andrew Morrison FOR THE APPLICANT

Murray L. Smith FOR THE RESPONDENT

Bradley J. Freedman FOR THE APPLICANT in T-2216-07  
Stephen T.C. Warnett

**SOLICITORS OF RECORD:**

Shields Harney FOR THE APPLICANT  
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Smith Barristers, FOR THE RESPONDENT  
Vancouver, B.C.

Borden Ladner Gervais LLP FOR THE APPLICANT in T-2216-07  
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