



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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**IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, c. S.5, AS AMENDED**

- and -

**IN THE MATTER OF
NEW FUTURES TRADING INTERNATIONAL CORPORATION
and FERNANDO HONORATE FAGUNDES also known as HENRY ROCHE**

**REASONS AND DECISION
ON MOTION TO WAIVE SERVICE
(Rule 1.5.3 of the Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071)**

PART 1 - BACKGROUND

1. On March 18, 2013, the Ontario Securities Commission (the "**Commission**") issued a Notice of Hearing pursuant to subsections 127(1) and 127(10) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended in respect of New Futures Trading International Corporation ("**New Futures**") and Fernando Honorate Fagundes also known as Henry Roche ("**Fagundes**") (collectively, the "**Respondents**");

PART 2 - THE MOTION

2. On April 3, 2013, the Commission heard an application by Enforcement Staff of the Commission ("**Staff**") for an order to waive service of the Notice of Hearing and Statement of Allegations and all future process upon the Respondents.

3. Rule 1.5.3 of the Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071 (the "**Rules of Procedure**"), provides:

1.5.3. Inability to Effect Service – (1) If a person required to serve a document is unable to serve it by one of the methods described in Rule 1.5.1., the person may apply to a Panel for an order for substituted, validated or waived service. [...]

(3) Substituted, Validated or Waived Service – A Panel may give directions for substituted service or, where necessary, may validate or waive service if it considers it appropriate.

4. For the Reasons that follow, the panel shall issue an order waiving service of the Notice of Hearing, Statement of Allegations and all future process on Fagundes.

PART 3 - REASONS

5. Rule 1.5.1 of the *Rules of Procedure* mandates that all documents required to be served shall be served in one of seven specified ways or by any other means authorized by the panel.

6. In support of its motion, Staff filed the Affidavit of Raymond Daubney, sworn March 22, 2013, outlining the steps that he took, as lead investigator, to contact Fagundes in order to serve him with this Notice of Hearing and Statement of Allegations.

7. I have the affidavit and note that Mr. Daubney attempted to contact Fagundes: (i) by telephone at Fagundes' last known telephone number and contacting Bell Mobility, Corporate Security Services who confirmed the number had been reissued; and (ii) by sending a letter to Fagundes' last known address, which letter was returned unopened and attending at that address and speaking to the new owner and neighbours, all of whom indicated that the residence had been sold and that no one knew of the whereabouts of Fagundes. In addition, Mr. Daubney was in touch with Fagundes' lawyer who acted for Fagundes on the sale of the residence. The lawyer had no information regarding the current whereabouts of Fagundes. As a consequence, he would not accept service of documents on behalf of Fagundes.

8. Mr. Daubney spoke with an officer of the Canada Border Services Agency ("CBSA") assigned to locate Fagundes, who is wanted on an outstanding warrant issued in Regina, Saskatoon. On March 20, 2013, Mr. Daubney confirmed that the CBSA has been unable to locate Fagundes.

9. Finally, on March 20, 2013, Mr. Daubney also spoke with Manny Silva of Dracut, Massachusetts, Fagundes' brother. Mr. Silva advised that he did not know of the whereabouts of his brother and that his contact with his brother occurred only when Fagundes telephoned him.

Mr. Silva does not have any forwarding address or contact information for Fagundes and will not accept service of documents on behalf of Fagundes.

10. Mr. Silva did, however, indicate to Mr. Daubney that he had spoken to Fagundes and had told him that the Commission was urgently trying to contact him.

11. Based upon the foregoing service attempts, I am satisfied that all reasonable steps have been taken to contact Fagundes and to serve documents upon him. I am also satisfied that Fagundes has knowledge of the fact that the Commission is seeking to contact him and is actively avoiding service. In these circumstances, it is appropriate for the Commission to exercise its discretion and waive service of the Notice of Hearing, Statement of Allegations and all future process on Fagundes.

12. I am not making a similar order for the respondent, New Futures, a New Hampshire corporation which Staff alleges has a principal place of business in Bedford, New Hampshire. It appears, from the Statement of Allegations, that the shareholder and officer of New Futures is Fagundes' wife, Emilia Elnasin (also known as Emilia Elnasin Roche or Lian Roche).

13. There are no submissions on service of New Futures and no evidence before me of any attempts to serve New Futures or its shareholder or officer.

14. The merits hearing may thus proceed as against Fagundes. If Staff wish to proceed against New Futures, it will have to either serve New Futures or demonstrate by cogent evidence that attempts to serve New Futures have been unsuccessful.

PART 4 - CONCLUSION

15. For the Reasons given, an order will be issued stating that the motion to waive service of process on Fagundes is granted, pursuant to Rule 1.5.3 of the *Rules of Procedure*.

Dated at Toronto this 9th day of April, 2013.

“Alan J. Lenczner”

Alan J. Lenczner, Q.C.