



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 EDWARD FURTAK, AXTON 2010 FINANCE CORP.,
STRICT TRADING LIMITED, RONALD OLSTHOORN,
TRAFALGAR ASSOCIATES LIMITED, LORNE ALLEN and
STRICTRADE MARKETING INC.**

**REASONS AND DECISION
(Motion)**

Hearing:	June 24, 2015	
Decision:	July 2, 2015	
Panel:	Christopher Portner	Commissioner and Chair of the Panel
	Janet Leiper	Commissioner
	Timothy Moseley	Commissioner
Appearances:	Julia Dublin	For Edward Furtak, Axton 2010 Finance Corp., Strict Trading Limited, Ronald Olsthoorn, Trafalgar Associates Limited, Lorne Allen and Strictrade Marketing Inc., moving parties
	Catherine Weiler	For Staff of the Commission

REASONS AND DECISION

I. INTRODUCTION

- [1] The moving parties, Edward Furtak, Axton 2010 Finance Corp., Strict Trading Limited, Ronald Olsthoorn, Trafalgar Associates Limited, Lorne Allen and Strictrade Marketing Inc. (collectively, the “**Moving Parties**”), are the subject of enforcement proceedings pursuant to a Notice of Hearing issued by the Ontario Securities Commission (the “**Commission**”) on March 30, 2015 and the Statement of Allegations filed by Staff of the Commission (“**Staff**”) dated March 30, 2015 (the “**Statement of Allegations**”).
- [2] Staff allege in the Statement of Allegations that a series of contractual arrangements involving licenses for trading software (the “**Strictrade Offering**”) constituted an “investment contract”, and therefore a security, as defined in clause (n) of the definition of “security” in subsection 1(1) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “**Act**”). Staff also allege that the Moving Parties breached various provisions of the Act in relation to the marketing and sales of the Strictrade Offering.
- [3] The Moving Parties claim that the Statement of Allegations is prejudicial given the history of their exchanges with Staff over the issue of whether the Strictrade Offering is a security. They say that this amounts to procedural and substantive unfairness. The Moving Parties seek a preliminary determination of the issue.
- [4] The relief requested by the Moving Parties evolved from that specified in the notice of motion through oral argument. In their notice of motion, the Moving Parties asked that:
- a. the Commission hold a hearing limited to the question of whether the Strictrade Offering was an “investment contract” under the Act;
 - b. the merits and sanctions hearings be conducted separately; and
 - c. the Statement of Allegations be amended to reflect the foregoing, consistent with the statement of allegations in another matter.

II. PRELIMINARY SUBMISSIONS

- [5] Before embarking on the cross-examination of the Staff affiant, the Commission sought and received preliminary submissions from counsel for the Moving Parties and from Staff on the legal and evidentiary foundations for the motion. During these submissions, counsel for the Moving Parties fairly conceded that there is no legal precedent or statutory authority to grant the type of relief sought. Counsel also fairly conceded that there is no claim being made of an abuse of process or of bad faith by Staff.
- [6] The essence of the proposed motion is a complaint that the Moving Parties have communicated with Staff openly and cooperatively about the nature of the Strictrade Offering over a lengthy period of time and that the ultimate decision of Staff to bring enforcement proceedings amounts to a “failure of fairness” because of the conduct alleged and the penalties being sought. In response to a question about how the

Commission could order an amendment to the Statement of Allegations, counsel for the Moving Parties submitted an alternative, namely, an order staying the proceedings with conditions requiring that the Moving Parties subject themselves to a separate process to inquire into the question of whether or not the Strictrade Offering constituted an investment contract.

- [7] The notice of motion also identified the possibility that the interests of the Moving Parties might diverge, with the result that counsel for the Moving Parties would find herself in a conflict which might make it necessary for some or all of her clients to have separate representation. Counsel submitted that, at a separate hearing into the question of whether the Strictrade Offering is an investment contract, a joint retainer would be possible as the interests of the respondents are aligned. On the question of duplication of evidence, Counsel submitted that the evidence heard at any preliminary hearing could apply at a subsequent hearing on the merits.
- [8] Staff expressed concerns about the evidentiary record before us, the scope of the proposed motion and whether there is a proper connection between the alleged unfairness and the relief sought. Staff submitted that there is no process for a separate hearing pursuant to a stay within enforcement proceedings. Staff pointed out that an application for exemptive relief pursuant to section 74 of the Act would have led to a determination of the preliminary issue. Finally, Staff submitted that there are concerns with bringing an application for a remedy to address counsel's potential conflict in representing all of the Moving Parties at the merits and sanctions hearings.

III. ANALYSIS

- [9] There is a foundation in law for relief, generally by way of a stay of proceedings, where an applicant establishes prejudice to a fair hearing as a result of delay or where the conduct of the prosecution violates fundamental principles of justice: *In the Matter of Mega-C Power Corp. et al* (2010), 33 OSCB 8290; *Blencoe v. British Columbia (Human Rights Commission)* [2000] 2 SCR 307.
- [10] The *Statutory Powers Procedure Act*, R.S.O. 1990, c.22, as amended, also permits a proceeding to be dismissed without a hearing if:
- a. the proceeding is frivolous, vexatious, or is commenced in bad faith;
 - b. the proceeding relates to matters outside the jurisdiction of the tribunal; or
 - c. some aspect of the statutory requirements for bringing the proceeding has not been met.
- [11] In this case, none of these impediments to embarking on a hearing on the merits has been claimed by the Moving Parties. Staff are not alleged to have acted in bad faith. Staff have filed a Statement of Allegations which sets out the particulars of what is alleged. Even if we found that Staff had not acted expeditiously or ought to have agreed with the Moving Parties' characterization of the Strictrade Offering, neither conclusion would be a ground for the type of relief sought, for which there is no precedent in cases relating to abuse of process.
- [12] Another complicating feature could foreseeably arise were there to be a preliminary hearing at which the Moving Parties would be represented by their current counsel of

choice. If the Strictrade Offering were to be found to be a security, the Moving Parties would face a second hearing, for which some of them might have to retain new counsel, given that their interests might diverge, dependent as those interests are upon the Moving Parties' varying degrees of involvement.

- [13] Essentially, the Moving Parties are asking for a conditional stay of the enforcement proceeding pending a separate proceeding on the question of whether or not the Strictrade Offering is an investment contract. They disagree with Staff's choice to proceed by way of an enforcement proceeding and with the characterization of the Strictrade Offering as a security by virtue of being an investment contract. That issue is dominant in the Statement of Allegations and would be central at a hearing on the merits. The Moving Parties would have an opportunity to test Staff's position, to cross-examine and to make submissions. This is the process which has been created and from which the Commission derives its jurisdiction to make findings and orders.
- [14] We are not persuaded that we have the jurisdiction to grant the relief sought on the motion as framed, even if we were to accept the characterization by counsel for the Moving Parties of Staff's conduct in their dealings with the Moving Parties. Accordingly, the motion is dismissed. We observe that counsel may also wish to consider the question of potential conflict relating to the joint retainer raised during the hearing.

Dated at Toronto this 2nd day of July, 2015.

"Christopher Portner"
Christopher Portner

"Janet Leiper"
Janet Leiper

"Timothy Moseley"
Timothy Moseley