



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

22nd Floor
20 Queen Street West
Toronto ON M5H 3S8

22e étage
20, rue queen ouest
Toronto ON M5H 3S8

**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
(Rule 4.5 of the *Ontario Securities
Commission Rules of Procedure*)**

Hearing: April 14, 2016

Decision: April 20, 2016

Panel: Janet Leiper - Chair of the Panel
D. Grant Vingoe - Vice Chair
AnneMarie Ryan - Commissioner

Appearances: Yvonne B. Chisholm - For Staff of the Commission

Catherine Weiler

Julia Dublin - For the Respondents

TABLE OF CONTENTS

I. Introduction.....	1
II. The SPPA and the Rules: Application to the Process	1
III. Position of the Parties.....	2
IV. Analysis	3

REASONS AND DECISION

I. INTRODUCTION

- [1] On March 30, 2015 the Ontario Securities Commission (the "Commission") issued a Notice of Hearing in relation to a Statement of Allegations filed by Staff of the Commission ("Staff") seeking an order pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O 1990, c. S.5, as amended, regarding Edward Furtak, Axton 2010 Finance Corp., Strict Trading Limited, Ronald Olsthoorn, Trafalgar Associates Limited, Lorne Allen and Strictrade Marketing Inc. (collectively, the "Respondents"). A merits hearing is scheduled to proceed on May 9, 2016.
- [2] On September 28, 2015 the Commission made an order requiring the Respondents to provide a list of witnesses and summaries by Monday, October 26, 2015 pursuant to Rule 4.5 of the *Ontario Securities Commission Rules of Procedure* (2014), 47 OSCB 4168 (the "Rules"). The Respondents provided a witness list that included three of the named Respondents and a person who is not a party to the proceedings.
- [3] At the final interlocutory appearance on April 14, 2016, Staff filed written argument and correspondence alleging a refusal by the Respondents to provide witness summaries as required by the Rules and the Order of the Commission of September 28, 2015.
- [4] Counsel for the Respondents argued that the Respondents are parties but not witnesses as described in the Rules or in the *Statutory Powers Procedure Act*, R.S.O. c. S.22, as amended (the "SPPA"), and thus ought not to be required to disclose witness summary information as described in the Rules.
- [5] On April 14, 2015, after hearing argument and considering the submissions of counsel, the Commission made an order requiring the Respondents to comply with Rule 4.5. These are our reasons for that decision.

II. THE SPPA AND THE RULES: APPLICATION TO THE PROCESS

- [6] Counsel for the Respondents referred us to a number of provisions in the SPPA, including the authority granted to tribunals by section 25.1 of the SPPA to make rules.
- [7] Section 2 of the SPPA provides:
2. This Act, and any rule made by a tribunal under subsection 17.1 (4) or section 25.1, shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits.
- [8] Rule 4.5 of the Rules provides:
- 4.5 Witness Lists and Summaries – (1) Provision of a Witness List** – A party to a proceeding shall serve every other party and file with the Secretary a list of the witnesses the party intends to call to testify on the party's behalf at the hearing, at least 10 days before the commencement of the hearing.

(2) Provision of Witness Summaries – If material matters to which a witness is to testify have not otherwise been disclosed, a party to a proceeding shall provide to every other party a summary of the evidence that the witness is expected to give at the hearing, at least 10 days before the commencement of the hearing.

(3) Content of the Witness Summary – A witness summary shall contain:

- (a) the substance of the evidence of the witness;
- (b) reference to any documents that the witness will refer to; and
- (c) the witness's name and address or, if the witness's address is not provided, the name and address of a person through whom the witness can be contacted.

(4) Failure to Provide a Witness List or a Summary – A party who does not include a witness in the witness list or provide a summary of the evidence a witness is expected to give in accordance with subrules 4.5(1), 4.5(2) and 4.5(3), may not call that person as a witness without leave of the Panel, which may be on any conditions as the Panel considers just.

(5) Incomplete Witness Summary – A witness may not testify to material matters that were not previously disclosed without leave of the Panel, which may be on any conditions that the Panel considers just.

[9] The Rules do not define witness, but define "party" to include:

- (a) a person recognized as a party by the Act;
- (b) a person entitled by law to be a party to the proceeding;
- (c) a person granted party status by order of a Panel; and
- (d) Staff;

III. POSITION OF THE PARTIES

[10] There was no serious dispute that the Respondents have not fully complied with Rule 4.5. Although some of the Respondent's documents have been marked with the initials of some of the Respondents which purport to link those documents to the proposed evidence of the Respondents, this was not communicated to Staff until oral argument. In addition, during submissions, counsel for the Respondents stated that the Respondents may also refer to additional documents that have been the subject of disclosure. In contrast, Staff have provided a complete list of documents that each of their witnesses will be discussing in their evidence. The submission of Staff is that "full and fair compliance" by the Respondents with the Rule is needed to meet the objective of a well-prepared, and thus expeditious, hearing.

- [11] Counsel for the Respondents argued that witnesses who are not parties are different from parties who choose to testify. Counsel pointed to the different rights of representation for parties and witnesses provided for in the SPPA. In essence, counsel argued for two categories, one for parties and one for witnesses, that are separate from one another. Thus, where the Rules or the SPPA use the word "witness" this would always exclude parties to the proceeding.
- [12] Counsel for the Respondents argued it would be "absurd" to describe a party as a witness once the party chooses to testify, because this could lead to unfairness, for example by reducing a party's rights to representation, or their right to be heard. Counsel noted that the Respondents have already provided extensive document disclosure and have been interviewed at length under oath.
- [13] Staff submitted that the Rules apply to all witnesses whether or not they are parties in the proceedings. Any additional rights to procedural fairness engaged by party witnesses can be applied when and if a remedy is sought under the Rules for non-compliance. Further Staff submits that the prior disclosure and interviews that the Respondents provided means that compliance with Rule 4.5 need not be onerous, in that reference to prior interviews is one method by which Respondents may comply with the summary requirement.

IV. ANALYSIS

- [14] The Rules and the SPPA emphasize the importance of doing justice in hearings, in an expeditious and efficient manner. The requirements in the Rules for exchanging documents, witness lists and summaries are there to promote efficient hearings and enable both parties to prepare in advance for matters that often involve multiple transactions and many documents. There is no indication that Respondents who are also witnesses should be excluded from this requirement.
- [15] In considering the SPPA provisions that allow different rights to representation for witnesses than for parties, we do not accept the position that this settles the question that parties cannot also be described as witnesses. It will depend on the context and the nature of the provisions. There is more than one type of witness and different rights and obligations will apply depending on whether or not a witness is also a party. This will include considerations relating to the right to be heard and any remedies for non-compliance or partial compliance with the Rules. However, this reality does not exclude a party from also being a witness for the purpose of the Rules.

[16] We conclude that Rule 4.5 applies to all of the Respondents' witnesses, including those Respondents who intend to testify at these proceedings. Accordingly, we ordered that by 4:00 p.m. on April 22, 2016, the Respondents shall provide a written witness summary to Staff for each party and non-party witness that the Respondents intend to call to testify that contains:

- a. The substance of the evidence each party and non-party witness intends to give; and
- b. Reference to any documents that each party and non-party witness will refer to their evidence.

Dated at Toronto this 20th day of April, 2016.

"Janet Leiper"

Janet Leiper

"D. Grant Vingoe"

D. Grant Vingoe

"AnneMarie Ryan"

AnneMarie Ryan