

# 2009 BCSECCOM 665

## Partners in Planning Financial Services Ltd. and Mutual Fund Dealers Association of Canada

### Sections 27 and 28 of the *Securities Act*, RSBC 1996, c. 418

<b>Panel</b>	Brent W. Aitken Bradley Doney David J. Smith	Vice Chair Commissioner Commissioner
<b>Date of hearing</b>	November 6, 2009	
<b>Date of ruling</b>	November 9, 2009	
<b>Date reasons issued</b>	November 25, 2009	
<b>Appearing</b>		
Shayne Strukoff	For Partners in Planning Financial Services Ltd.	
Gordon Johnson	For Mutual Fund Dealers Association of Canada	
Alan E. Keats Douglas B. Muir	For the Executive Director	

### Reasons for Ruling

#### The ruling

- ¶ 1 On October 9, 2009 Partners in Planning Financial Services Ltd. applied for a hearing and review, under section 28(1) of the *Securities Act*, RSBC 1996, c. 418, of a decision of the Mutual Fund Dealers Association of Canada to amend its By-law No. 1.
- ¶ 2 On November 6 we held a hearing to consider whether the MFDA's decision is a "decision" described in section 28(1) of the Act and, if so, whether Partners is directly affected by that decision. The parties also made submissions on whether the Commission ought to hear the application under section 27(1).
- ¶ 3 We ruled that the Commission will hear the application under section 27(1) (see 2009 BCSECCOM 627). These are our reasons.

#### Background

- ¶ 4 At the MFDA annual general meeting on December 4, 2008, its members voted on, among other things, amendments to MFDA by-laws that would have increased the term limits for MFDA directors and changed eligibility requirements for

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public directors. The amendments did not pass, and the election of the public directors nominated for election did not proceed.

- ¶ 5 Two MFDA directors who had reached their term limits at the time of the 2008 annual general meeting, and who were among those nominated for election as public directors, nevertheless continued in office. One, Robert J. Wright, continued to act as chair of the MFDA board and as a member of the board's governance committee.
- ¶ 6 In March 2009 the MFDA board established a task force to review governance issues at the MFDA. Wright was one of those appointed to the task force.
- ¶ 7 The task force prepared draft and final reports for the board's consideration. The board adopted the task force recommendations, which included the same proposals to increase the term limits for directors and to change eligibility requirements for public directors that had failed to pass at the December 2008 annual general meeting. The board called a special meeting for October 2, 2009 for the members to consider amendments to the MFDA by-laws that would effect those changes.
- ¶ 8 The MFDA sent materials to members in preparation for the meeting. The materials included a form of proxy in favour of George Aguiar, an MFDA director (there was space for members to name an alternate). The form of proxy authorized the proxy to vote only in favour of the resolution to amend the by-laws; it made no provision for voting against the resolution.
- ¶ 9 Partners alleges that MFDA management solicited proxies from MFDA members, and that MFDA compliance staff participated in the proxy solicitation process.
- ¶ 10 Of the MFDA's 145 members, 113 were present in person or by proxy at the October 2009 special meeting. The special resolution effecting the by-law amendments required a two-thirds majority to pass – 76 votes. The resolutions passed by a majority of 86 votes, including 57 represented by proxies held by Aguiar.
- ¶ 11 Partners says that the process for approving the amendments was flawed because
  - the board was unlawfully constituted after the December 2008 annual general meeting because the directors who had reached their term limits improperly continued to act as directors,
  - the governance committee and the task force were in a conflict of interest because the amendments they proposed directly affected directors' eligibility and term limits,

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- Wright in particular had a conflict of interest through his participation on the governance committee and the task force because only through the proposed amendments could he be eligible for re-election, and
- the MFDA improperly pressured members to provide proxies for the October 2009 special meeting through the participation of compliance staff in the proxy solicitation process.

### Analysis

¶ 12 Section 28(1) says

28(1) . . . a person directly affected by a direction, decision, order, or ruling made under a bylaw, rule or other regulatory instrument or policy of a self-regulatory body . . . may apply by notice to the commission for a hearing and review of the matter under Part 19, and section 165(3) to (8) applies.

¶ 13 Sections 165(3) and (4) say (with our editorial changes to reflect its application to these circumstances):

165(3) . . . any person directly affected by a decision of [a self regulatory body] may, by a notice in writing sent to the Commission within 30 days after the date on which the [self regulatory body] sent the notice of the decision to the person, request and be entitled to a hearing and a review of the decision of the [self regulatory body].

(4) On a hearing and review, the commission may confirm or vary the decision under review or make another decision it considers proper.

¶ 14 Section 27(1) says

27(1) If the commission considers it to be in the public interest, the commission may make any decision respecting the following:

- (a) a by-law, rule, or other regulatory instrument or policy, or a direction, decision order or ruling made under a bylaw, rule or other regulatory instrument or policy, or a self regulatory body . . . ;
- (b) the procedures or practices of a self regulatory body . . . .

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- ¶ 15 The effect of these sections is that, if section 28(1) applies, then Partners is entitled to a hearing and review and, whether or not section 28(1) applies, the commission may hear the matter on its own motion under section 27(1).
- ¶ 16 For section 28(1) to apply, Partners has to show that the amendment to the bylaws passed at the October special meeting was a “decision” as described in section 28(1), and that Partners was directly affected by that decision.
- ¶ 17 Both Partners and the MFDA made submissions on both these points. They also made submissions on whether we should exercise our discretion to hold a hearing under section 27(1).
- ¶ 18 In our opinion, it is not necessary to consider whether Partners is entitled to a hearing and review under section 28(1), because the application raises sufficient public interest concerns that the Commission ought to hear it under section 27(1).
- ¶ 19 We have formed no opinion on whether the public directors who had reached their term limits were nevertheless entitled to act as directors, whether any of the conflicts of interest alleged by Partners existed, or whether any aspects of the MFDA’s proxy solicitation process was improper. However, the answers to these issues may well bear on the integrity of the MFDA’s governance practices, and could ultimately affect the credibility of the MFDA as an institution.
- ¶ 20 The MFDA says that whatever concerns there may be about the process by which the by-law amendments were passed, or the content of the by-law itself, can be addressed during the Commission staff review of the by-law, which is required before the by-law can come into effect.
- ¶ 21 We disagree. The system of securities regulation we have in Canada depends on the roles played by regulatory organizations like the MFDA. It is essential that those organizations operate, and are seen to operate, in a manner that leaves no room to question the integrity of their governance, procedures and practices. It is equally essential that any allegations that could raise those questions be dealt with thoroughly and openly.
- ¶ 22 For these reasons we decided to hold a hearing under section 27(1) to consider Partners’ application.
- ¶ 23 November 25, 2009
- ¶ 24 **For the Commission**

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Brent W. Aitken  
Vice Chair

Bradley Doney  
Commissioner

David J. Smith  
Commissioner