

# 2010 BCSECCOM 325

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

### Sections 27 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>	April 23, 2010	
<b>Date of ruling</b>	June 9, 2010	
<b>Appearing</b>		
Shayne Strukoff	For Partners in Planning Financial Services Ltd.	
Gordon Johnson	For Mutual Fund Dealers Association of Canada	
Alan E. Keats	For the Executive Director	

### Ruling

- ¶ 1 This is an application by Partners in Planning Financial Services Ltd., the Mutual Fund Dealers Association of Canada and the executive director to discontinue a hearing under section 27(1) of the *Securities Act*, RSBC 1996, c. 418.

#### History of proceedings

- ¶ 2 On October 9, 2009 Partners applied under section 28(1) of the Act for a hearing and review of the MFDA's decision to amend its By-law No. 1. The amendments were approved at a special meeting of MFDA members held in October 2009.
- ¶ 3 On November 9 we ruled that the Commission would hold a hearing under section 27(1) and issued our reasons for that decision on November 25 (see 2009 BCSECCOM 627 and 2009 BCSECCOM 665).
- ¶ 4 On April 23, 2010 Partners withdrew its application, and it, the MFDA, and the executive director made joint submissions asking us to discontinue the section 27(1) hearing on the basis that it is no longer in the public interest to hold the hearing.

## 2010 BCSECCOM 325

### **Background**

- ¶ 5 At its annual general meeting on December 4, 2008 the MFDA proposed amendments to its By-law No. 1 that would have increased the term limits for MFDA directors and changed eligibility requirements for public directors. The amendments did not pass.
- ¶ 6 Two MFDA public directors who had reached their term limits at the time of the December 2008 annual general meeting nevertheless continued in office.
- ¶ 7 In March 2009 the MFDA board established a task force to review governance issues at the MFDA. One of the public directors whose term limit had expired was one of those appointed to the task force. This director was also a member of the MFDA board governance committee.
- ¶ 8 The task force made recommendations that the board adopted to amend the MFDA by-laws, including the same amendments increasing the term limits for directors and changing the eligibility requirements for public directors that had failed to pass at the December 2008 annual general meeting.
- ¶ 9 The MFDA held a special meeting of its members in October 2009, at which the members, by a sufficient majority, approved the amendments increasing the term limits for MFDA directors and changing the eligibility requirements for public directors.
- ¶ 10 Partners alleged in its application that the process for approving the amendments was flawed because
- the board was unlawfully constituted after the December 2008 annual general meeting because the two public directors who had reached their term limits improperly continued to act as directors,
  - the participation by one of those directors on the governance committee and the task force was a conflict of interest because only through the proposed amendments could he be eligible for re-election, and
  - the MFDA improperly pressured members to provide proxies for the meeting through the participation of compliance staff in the proxy solicitation process.
- ¶ 11 In our reasons for deciding to hear the matter under section 27(1), we said:

“14 Section 27(1) says

## 2010 BCSECCOM 325

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 . . . .

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."

## 2010 BCSECCOM 325

### **The parties' joint submission**

- ¶ 12 The parties say that since Partners made its application, the circumstances have changed and it is now no longer in the public interest to hold the section 27(1) hearing, because:
- the MFDA has suspended the implementation of the by-law amendments pending a review by its governance committee, which will also review the MFDA's conflict of interest policy and its practices in soliciting proxies
  - whether the two public directors who continued to act as directors after their term limits expired were entitled to do so is not a matter of policy, but of legal interpretation, and in any event is moot because both of them are no longer MFDA directors
  - the board's process leading to the recommendation to amend the by-laws is no longer relevant because the board composition has significantly changed with the resignation of some directors and the election of new ones, because the director whose participation on the task force was impugned is no longer an MFDA director, and because the by-law amendments will be subject to the review process described above
  - it is not necessary to consider the practices employed by the MFDA in soliciting proxies for the October 2009 meeting because a survey of members suggest there was no improper pressure applied by the MFDA to its members and in any event its proxy-solicitation procedures are subject to the review described above

### **Analysis**

- ¶ 13 Partners says that it has achieved what it set out to achieve in bringing its application. The by-law amendments have been put on hold pending the MFDA review, which will cover the issues that concern Partners about the MFDA's governance. The directors who Partners say ought not to have continued as directors after the December 2008 annual general meeting are no longer MFDA directors.
- ¶ 14 That being so, and Partners' having withdrawn its application, it is no longer a party to this hearing.
- ¶ 15 However, that is not the end of the matter. This proceeding was initiated by Partners as a result of the issues raised in its application under section 28(1). Even though we need not resolve the dispute between Partners and the MFDA, there

## 2010 BCSECCOM 325

remain the public interest issues raised by Partners about the integrity of the MFDA's governance, procedures and practices.

- ¶ 16 We also stated the importance of ensuring that any allegations questioning those matters are dealt with thoroughly and openly. Vice Chair Aitken reinforced that message in hearing management conferences with the parties. He said, "the public interest issues raised by Partners' application require a full examination of all of the circumstances relating to the by-law amendments passed at the October 2009 special meeting," and told the parties that "however they chose to divide the investigative work among themselves, it was imperative that every effort is made to ensure that whatever relevant evidence exists be put before the panel."
- ¶ 17 At the hearing management conference on March 31, 2010 the parties informed the Vice Chair of their intent to seek a discontinuance. He said, "whatever is put before the panel, it must deal with the issues with sufficient transparency and credibility that an objective observer would conclude that the public interest issues had been properly addressed."
- ¶ 18 In our opinion, the parties' joint submissions fail to meet that test. They ask us, in essence, to ignore what actually happened and rely on the MFDA's forthcoming review of its governance, conflict of interest, and proxy-solicitation policies and practices.
- ¶ 19 A credible inquiry into the issues that led us to decide to hold a hearing requires, first, an assessment of the MFDA's conduct related to the passing of the by-law amendments. An objective observer could not conclude that the public interest issues have been properly addressed if there is no finding as to what actually happened.
- ¶ 20 The joint submissions do not do that. They do not speak to the appropriateness of the MFDA's conduct (other than to note that it would be disputed in a hearing).
- ¶ 21 We still have formed no opinion on the issues, but the outcome of this proceeding, whether through a hearing or otherwise, must include our findings as to whether the MFDA's conduct was appropriate.
- ¶ 22 If we find that the MFDA did not act inappropriately, then that will be the end of the matter. If we find otherwise, then we will have to assess the adequacy of the steps the MFDA has taken, and plans to take, to address whatever failings we have found in its past conduct.
- ¶ 23 More specifically, on the issue of whether the two public directors whose terms had expired at the December 2008 annual general meeting ought to have

## 2010 BCSECCOM 325

continued as directors, the record contains conflicting legal opinions on the subject. We have not heard the basis on which the MFDA concluded it was appropriate to extend the terms of the directors. That is relevant to assessing the MFDA's conduct relating to the passing of the by-law amendments.

- ¶ 24 On the issue of the conflicts of interest, we have not heard the extent to which the MFDA considered the issue, nor the basis on which the MFDA concluded it was appropriate to constitute the task force as it did. That is relevant to assessing the MFDA's conduct relating to the passing of the by-law amendments.
- ¶ 25 On the issue of proxy solicitation, we have seen the form of proxy, an internal MFDA memo about the process, and surveys about the process completed by some MFDA members.
- ¶ 26 The form of proxy sent by the MFDA to its members for voting at the October special meeting provided no means of voting for any of the resolutions before the meeting. Instead, it authorized an MFDA director as the proxy to vote on the member's behalf and provided spaces to appoint a different proxy.
- ¶ 27 An MFDA memorandum about how members were to be contacted in connection with the October 2009 special meeting identifies compliance staff among those who would be contacting members. The guidelines for those contacting members suggested, among other things, that MFDA representatives inquire as to whether the member was in support of the amendments and whether the member would be attending in person or by proxy.
- ¶ 28 After Partners' application, Commission staff sent a survey to MFDA members asking them if they were contacted by the MFDA before the October 2009 special meeting. The survey also asked:

“If you were contacted, please provide the following details:

Who contacted you?

When?

How were you contacted?

Describe any discussions about the October Meeting.

Was your firm's decision to participate or vote (or not) at the October Meeting affected by contact with the MFDA?

## 2010 BCSECCOM 325

If yes, describe how your participation was affected.”

- ¶ 29 Commission staff sent the survey to 142 firms, of which 106 responded. Fifty-eight members reported that the MFDA had contacted them, 23 said the contact affected them and caused them to participate by voting or sending in a proxy. Six members said the contact by the MFDA influenced them in deciding how to vote.
- ¶ 30 We are not aware of any other investigative steps taken by Commission staff or any other party. This is unfortunate, because some comments from the survey appear to show that at least some members were uneasy with the process. Some expressed discomfort that MFDA staff would be aware of how they voted. These and other comments are also consistent with statements by Partners that fear of reprisal was on the mind of some members. With no investigative activity beyond the relatively passive exercise of administering a survey, it is difficult to determine to what extent that fear may have influenced the outcome of the vote.
- ¶ 31 With no evidence of any investigation (other than the sending of the survey) of the contact the MFDA made with its members in connection with their voting or submitting proxies for the meeting, and how that contact was perceived by its members, we are not confident we have all of the evidence necessary to assess the MFDA’s conduct relating to the passing of the by-law amendments.

### **Conclusion and next steps**

- ¶ 32 We decided to hold a hearing under section 27(1) because of the public interest concerns raised by Partners’ application. The credibility of the MFDA has been impugned by those allegations: they must be dealt with. Leaving unanswered significant questions about whether the MFDA’s conduct was appropriate would potentially undermine not just the MFDA’s credibility, but that of the regulatory system itself.
- ¶ 33 We direct the MFDA and the executive director to make comprehensive submissions addressing these issues:
1. The MFDA’s decision-making process and reasoning that led to its conclusion that it was appropriate for the two public directors whose terms had expired at the December 2008 annual general meeting to continue as directors.
  2. The MFDA’s decision-making process and reasoning that led to its conclusion that it was appropriate for one of the public directors whose term had expired at the December 2008 annual general meeting, and who continued as a director, to continue as a member of the governance committee and become a member of the task force.

## 2010 BCSECCOM 325

3. The details of contacts made by the MFDA with its members in connection with the October 2009 special meeting, including which MFDA representatives contacted which members, and sufficient other information about the proxy solicitation process that will enable us to assess whether the MFDA's conduct was appropriate.

¶ 34 We recognize that comprehensive submissions on the issues may require further investigation by Commission staff. We have therefore not set a date for filing submissions.

¶ 35 We direct the MFDA and the executive director to contact the Secretary to the Commission forthwith to arrange a hearing management conference at their earliest convenience. The agenda for the conference will include setting a date for filing submissions and discussion of other matters relevant to this ruling and the hearing.

¶ 36 June 9, 2010

¶ 37 **For the Commission**

Brent W. Aitken  
Vice Chair

Bradley Doney  
Commissioner

David J. Smith  
Commissioner