Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor, 20 Queen Street West, Toronto ON M5H 3S8 | CP 55, 19e 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 THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA BY-LAW NO. 1**

**-AND-**

**INDEPENDENT FINANCIAL BROKERS OF CANADA**

**-AND-**

**STAFF OF THE ONTARIO SECURITIES COMMISSION AND STAFF OF THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

# REASONS AND DECISION

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| **Hearing:** | June 5, 2009 | |
| **Decision:** | October 27, 2009 | |
| **Panel:** | Mary G. Condon | - Commissioner (Chair of the Panel) |
| | David L. Knight, FCA | - Commissioner |
| | Paulette L. Kennedy | - Commissioner |
| **Counsel:** | Alistair Crawley<br>Jocelyn Loosemore<br>Clarke Tedesco | - for the Independent Financial Brokers of Canada |
| | James D. G. Douglas<br>Margot Finley | - for Staff of the Mutual Fund Dealers Association of Canada |
| | Anne C. Sonnen<br>Aislinn Reid | - for Staff of the Ontario Securities Commission |

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## REASONS AND DECISION

## I. BACKGROUND

[1] This was a hearing before the Ontario Securities Commission (the "Commission") on June 5, 2009, to consider an application (the "Application") made by the Independent Financial Brokers of Canada (the "IFBC") pursuant to sections 21.1(4), 21.7, and 144 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "Act"), for a review of the decision of the Commission approving the proposal of the Mutual Fund Dealers Association of Canada (the "MFDA") to amend section 24.3 of MFDA By-Law No. 1 (the "By-Law"), *Amendments to Section 24.3 of MFDA By-law No. 1, Regarding Suspensions in Certain Circumstances*, which was published on August 1, 2008 in the Commission Bulletin: (2008), 31 O.S.C.B. 7589.

[2] This matter arose out of a Notice of Hearing issued by the Commission on March 18, 2009, in relation to the Application by the IFBC.

[3] In the Application, the IFBC seeks an order quashing the decision of the Commission to approve proposed amendments to section 24.3 of the By-Law, as well as an order declaring the amendment to be contrary to Ontario securities law. The amendments at issue deal, in part, with the circumstances in which the MDFA can suspend its members/approved persons without notice in applications made under exceptional circumstances, and where a hearing panel determines that proceeding without notice is in the public interest.

[4] The IFBC was founded in 1985, and is a voluntary, not-for-profit association representing approximately 4,000 licensed financial advisors across Canada. It is an incorporated entity under Part II of the *Canada Corporations Act*, 1970, c. C-32. Between 60 and 70% of the IFBC's members are registered to sell mutual funds, and are subject to the By-Law as "Approved Persons".

[5] As a preliminary matter, the MFDA and Staff of the Commission ("Staff") take the position that there is no jurisdictional basis for the Commission to hear the Application, or to grant the relief sought by the IFBC. They also argue that the IFBC does not have standing under the Act to bring this Application.

[6] The IFBC takes the position that a hearing panel of the Commission has jurisdiction under the Act to hear this Application pursuant to sections 21.7, 21.1(4) and 144 of the Act. Further, the IFBC argues that, on behalf of its membership, it has standing to bring the Application as a person or company directly affected by the By-Law.

[7] Accordingly, at the commencement of the hearing, we requested that the parties make submissions as to whether the Application should be dismissed on the basis that a hearing panel of the Commission does not have jurisdiction to hear and determine the matter raised in the Application, and/or that the IFBC does not have standing to bring the Application.

[8] We are considering this preliminary matter below, in order to determine whether we should proceed with a full hearing and determination of the Application. We did not hear counsel's submissions with respect to the merits of the Application at the hearing.

## II. APPLICATION

[9] In the Application, the IFBC argues that the By-Law unduly compromises the right of a respondent to natural justice and procedural fairness, and is therefore contrary to the Act and the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 ("SPPA"). The IFBC argues that section 24.3.1 of the By-Law by-passes fundamental principles of natural justice by permitting hearings without notice for the stated purpose of protecting the public interest, and further that unlike the regime under the Act, there is "no appropriate balancing of the interests of a respondent to natural justice and procedural fairness with the need to obtain interim and temporary relief on an urgent basis to protect the public in the appropriate case".

[10] The IFBC submits that it is in the public interest for the Commission to hear and determine this Application. The IFBC argues that the public interest in "effective and responsive regulation invokes the duty of the Commission to address a problem with an important rule of an SRO on a policy level" in the context of the Application, rather than "rely on the exigencies of a respondent subject to a hearing without notice under the By-Law Amendment potentially advancing the issue to the Commission level in the context of a contested enforcement hearing process".

[11] As noted above, we have determined that it would be most judicious and efficient to determine both the jurisdictional issue and the issue of the IFBC's standing under the Act as a preliminary matter, before proceeding with the balance of the hearing on the merits of the Application.

## III. SUBMISSIONS BY THE PARTIES ON JURISDICTION AND STANDING

### A. Submissions by the IFBC

[12] The IFBC takes the position that as a hearing panel of the Commission, we have jurisdiction to hear this Application under sections 21.7, subsection 21.1(4), and section 144 of the Act. Further the IFBC submits that it is authorized to bring the Application under the Act.

[13] The IFBC argues that the Commission has an overriding supervisory power with respect to SROs, and further that pursuant to subsection 21.1(4) the Commission may "make any decision with respect to any by-law" of an SRO. The IFBC also submits that subsection 21.1(4) should be interpreted broadly, that the subsection contains no restriction which prevents the Commission from relying on the subsection in the context of a hearing, and that the subsection does not restrict who may apply for a hearing.

[14] The IFBC does not suggest that it has an express right to a hearing under subsection 21.1(4) of the Act, but rather argues in its written submissions that a "broad interpretation of subsection 21.1(4) suggests that it is entirely within the discretion of the Commission to hear and decide this Application" and that "the determination of whether or not it is in the public interest that the Commission hears the Application rests on the merits of the Application itself and on the substance of the By-Law Amendment". The IFBC asserts that it is in the public interest that we hear this Application.

[15] In addition to subsection 21.1(4) of the Act, the IFBC contends in its written submissions that it enjoys a "statutory right of application" under section 144 of the Act. The IFBC submits that the wording of section 144 implies a less stringent standard as to standing than section 21.7, because the section allows an applicant to seek relief from the Commission where they are "affected" rather than "directly affected". In its written reply to the submissions by Staff and the MFDA, the IFBC asserts that the use of the term "affected" indicates that the "applicant need not be immediately or automatically affected".

[16] Also in its written reply, the IFBC states that section 144 provides a "method by which the Commission can adequately address the legitimate concerns of a party affected by a rule or by-law whose concerns were not addressed prior to approval". The IFBC submits that the wording of section 144 is broad enough to allow us to vary or revoke an administrative policy decision made by the Commission as a whole; though in the past section 144 has been used to vary or revoke decisions made by hearing panels. The IFBC further submits that section 144 "requires only that the order made under the section not be prejudicial to the public interest and does not place any further limits on the circumstances under which an order can be made". In addition, the IFBC asserts that section 144 can work in tandem with subsection 21.1(4), so that section 144 creates a procedure by which an Applicant can request that the Commission exercise its powers under subsection 21.1(4).

[17] In his oral submissions, counsel for the IFBC summarized the IFBC's position in regards to our jurisdiction and its standing to bring this Application:

> However, we would concede that the avenue pursuant to which a party, such as this, bring this issue forward is not clearly set out in the Act … the type of issue that's being raised today is essentially a policy issue in legality … [that] is not a process that's contemplated under the enforcement provisions under [section] 127 of the Act, and it's not a process that's specifically contemplated through the rule making and review provisions of the Act. However, in my submission, the overriding supervisory jurisdiction of this Commission over the self-regulated organizations does give you the jurisdiction to hear this application, and in my submission what this, the question of standing really boils down to is whether the Commission in its discretion concludes that this isn't an application that it should hear and I say that because there is, in my submission, clearly jurisdiction to hear it if you choose to do so.

[18] Counsel states that in deciding whether or not to exercise our discretion to hear this Application, we should consider whether or not "the issue that's being raised is a sufficiently important issue to warrant a hearing" and that we may conduct a "preliminary assessment as to whether there appears to be merit" to the Application.

## B. Submissions by the MFDA and Staff

[19] The MFDA and Staff submit that, as hearing panel of the Commission, we do not have jurisdiction to review a decision by the Commission to approve a by-law of a self-regulatory organization ("SRO").

[20] Counsel for the MFDA argues that the IFBC is seeking to challenge "a purely administrative act" and that "there is a bias in administrative law in general against the challenge of purely administrative acts" absent clear jurisdiction under the authorizing legislation. Counsel for the MFDA states that because we are a statutory body, we do not have a general equitable or inherent jurisdiction similar to that of courts, and that our public interest jurisdiction is "simply a guide to the exercise of jurisdiction that is otherwise conferred … by the legislature under the Act".

[21] Counsel for the MFDA characterizes the Application as akin to a reference question as found under section 53 in the *Supreme Court Act*, R.S.C. 1985, c. S-26 and reminds us that the Act does not contemplate such a procedure. The MFDA also submits that subsection 21.1(4) does not provide us with "clear jurisdiction" to hear the Application, and that the powers contemplated under the subsection can only be exercised by us if there was a clear grant under the Act authorizing a hearing panel to do so.

[22] The MFDA contends that section 144 does not provide us with an avenue by which we may exercise the powers contemplated by subsection 21.1(4) of the Act. In its written submissions, the MFDA states that section 144 "operates in very limited circumstances", that the section has been "employed for discrete transactions, for example to revoke or vary cease trade orders or to allow rent to be paid after a freezing order". The MFDA argues that the IFBC is not "affected" by the Commission's decision to approve the By-Law in any event. The MFDA further argues that while the IFBC may be interested in the By-Law amendment, it is not an affected party because the By-Law has no direct impact on it.

[23] Staff takes a position similar to that taken by the MFDA with regards to subsection 21.1(4) of the Act. Staff submits that unlike section 21.7 of the Act, the subsection does not contemplate a process by which a hearing panel might exercise the powers under the subsection, and that it would be inappropriate for us to read in such a function.

[24] Staff also submits that the IFBC does not have standing to bring the Application under section 144 of the Act. In its written submission, Staff states that the use of section 144 for applications such as the one before us, will "lead to uncertainty in the by-law and rulemaking between [self-regulatory organizations] and securities regulators across the country".

[25] Similar to the MFDA, Staff also takes the position that the IFBC is not "affected" as contemplated by section 144 of the Act. In its written submissions, Staff contends that in order to be affected there must be a "certain degree of nexus between the By-Law approved by this Commission beyond an indirect, contingent and speculative interest", and that the term should provide a gatekeeper function so as to ensure that "anyone who articulates an interest in any Commission decision" does not automatically gain full standing to seek a variance or revocation of a past decision by the Commission.

## IV. ANALYSIS

[26] We consider our jurisdiction to hear this Application, as well as whether or not the IFBC has standing to bring this Application, under section 21.7, subsection 21.1(4), and section 144 of the Act, below.

### A. Section 21.7 of the Act

[27] In its written submissions, the IFBC asserts that we have the discretion to quash the decision of the Commission approving the amendment of MFDA By-law No. 1, pursuant to section 21.7 of the Act.

[28] In order to determine whether the Commission has jurisdiction to proceed with this hearing pursuant to section 21.7 of the Act, the Commission must determine: 1) whether the decision of the Commission approving the By-Law is a decision "made under" a by-law of an SRO and, if so, 2) whether the Applicant is "directly affected" by the decision.

[29] Section 21. 7 reads as follows:

> **Review of decisions**
>
> **21.7** (1) The Executive Director or a person or company *directly affected by,* or by the administration of, a direction, decision, order or ruling *made under a by-law*, rule, regulation, policy, procedure, interpretation or practice of a recognized stock exchange, recognized self-regulatory organization, recognized quotation and trade reporting system or recognized clearing agency may apply to the Commission for a hearing and review of the direction, decision, order or ruling. 1997, c. 19, s. 23 (5).
>
> [Emphasis added]

[30] The MFDA and Staff contend that section 21.7 cannot be relied upon by the IFBC. They contend that the IFBC is not a "directly affected" person or company, and that the IFBC is not seeking a hearing to a review a decision made by the MFDA under a by-law as is contemplated by the section.

[31] We agree that section 21.7 is not applicable to this Application. The IFBC is asking us to review a decision by this Commission to approve amendments to the MFDA's By-Law, not to review a decision of the MFDA made under the By-Law. The Commission's approval of the By-Law is not a decision made under a by-law of an SRO. Rather, it is a decision of the Commission. Until each of the seven commissions of the seven recognizing regulators approved the By-Law, it was not operative. The Commission's approval of the By-Law cannot be reasonably interpreted as a reviewable decision made under the very By-Law it was approving.

[32] Furthermore, in its written reply submissions to the MFDA and Staff's written submissions, the IFBC conceded that "the relevant case-law indicates that [the IFBC] is likely not 'directly affected' by the Commission's approval of the By-Law Amendment". During this hearing counsel for the IFBC was even more explicit, stating the following: "we would acknowledge that this section is not the right section to bring this type of issue forward".

[33] In order to rely on section 21.7 of the Act, a person or company must demonstrate that it is "directly affected", that is, it must establish a direct nexus and causal connection between the conduct or act and the harm or wrongdoing.

[34] In *Instinet*, a group of SROs sought to oppose the Director's decision to grant registration status to Instinet as an international dealer. The Commission refused to grant standing to the group. In considering the SROs' right to participate in the hearing, the Commission considered the nexus required by the term "directly affected" and held:

> The words "directly affected" in subsection 8(2) of the Act should be interpreted in light of all of the relevant circumstances. The interpretation to be given to the words in the context of a decision relating to a take-over bid may well be different than in the context of a registration decision. In each case under subsection 8(2), in determining standing, the Commission must look at the nature of the power that was exercised, the decision that was made, the nature of the complaint being made by the person requesting the hearing and review and the nature of that person's interest in the matter.
>
> (*Instinet Corp., Re*, (1995) 18 O.S.C.B. 5439 at p. 5446)

[35] In denying standing to the SROs the Commission stated:

> In the *Finlay* case there is a discussion at p. 622 of the concepts of directness and causal relationship.
>
> > The term "nexus" is used in a more general sense in other cases, such as *Linda R.S. v. Richard D.*, 410 U.S. 6'4 (1973), to refer to the causative relationship that most exist between the injury or prejudice complained of and the action attacked. The action attacked must have been a cause of the injury or prejudice

> complained of, and the plaintiff must have a personal stake in the outcome of the litigation - that is, stand to benefit in his personal interests from the relief sought.
>
> If the Canadian exchanges are affected by the Director's decision to register lnstinet U.S. in our view they are only indirectly affected. In order to be "directly affected" in the registration context, the Director's decision to register Instinet U.S. would have to be the cause of fragmentation. The main concern of the Canadian exchanges appeared to be that if institutional investors see a better price on the instinet screen for securities that are listed on one of those exchanges, they may take steps to trade them through the Instinet system outside of Canada. In the event that any fragmentation occurs, which is at this stage speculative, it would require a number of intervening steps, including actions outside the control of instinet U.S. by investors. While it is possible that some fragmentation may be a consequential result, it is not a direct effect of the registration.
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> (*Instinet Corp., Re, supra* at pp. 5446 and 5447)

[36] In *Reuters Information Services Canada (Ltd.),* the Commission denied standing on the basis that the applicant was not directly affected as there must be an immediate or automatic effect on the applicant which is not speculative and contingent on future actions (*Reuters Information Services (Canada) Ltd., Re*; (1997) 20 O.S.C.B. 2277 at para. 29).

[37] The IFBC is an industry lobby group that is not directly affected by the By-Law. Its interest is general, not individual or specific (See *Canadian Civil Liberties Assn. v. Ontario Civilian Commission on Police Services* (2006) 275 D.L.R. (4th) 744 (Ont. C.A.) at para. 8; leave to appeal denied [2007] S.C.C.A. No. 4). Further, its interest at this stage is speculative and contingent upon a possible future application of the By-Law to one of its individual members/approved persons.

[38] Although not binding on this Commission, we take note of the comments made by the Alberta Court of Appeal in *C.U.P.E. Local 30 v. Alberta (Public Health Advisory and Appeal Board),* where it stated:

> In our view, the Chamber Judge was correct in upholding the decision of PHAAB to give the words "directly affected" the common law interpretation enunciated by Lord Hobhouse in *Re Endowed Schools Act,* [1898] A.C. 477 (P.C.) at 483 where he stated:
>
> > That term points to a personal and individual interest as distinct from the general interest which appertains to the whole community ...
>
> This court has previously held that it is necessary to interpret reasonably the term

> "affected" to make an Act having a right of appeal workable: *Pension Fund Properties Ltd. v. Calgary (City)* (1981), 127 D.L.R. (3d) 477. The phrase "directly affected" must mean something more than "affected". However, it cannot be given an expanded meaning simply by virtue of expanding social consciousness: *Canada (Attorney General) v. Mossop* (1993), 100 D.L.R. (4th) 658(S.C.C.).
>
> In our view, the inclusion of the word "directly" signals a legislative intent to further circumscribe a right of appeal. When considered in the context of the regulatory scheme, it is apparent that the right of appeal is confined to persons having a personal rather than a community interest in the matter.
>
> (*C.U.P.E. Local 30 v. Alberta (Public Health Advisory and Appeal Board)* 34 Admin. L.R. (2d) 172 (Alta. C.A.) at paras. 18 and 19)

[39] Finally, the IFBC seeks a formal hearing and review of the decision of the Commission approving the MFDA By-Law. As a result, the Application cannot be brought under section 21.7 as that section concerns a decision by an SRO and not a decision by the Commission.

[40] Accordingly, we are satisfied that the IFBC is unable to satisfy the above requirements in relation to the Commission's approval of the By-Law which is the foundation for the Application brought pursuant to section 21.7 of the Act.

**B. Subsection 21.1(4) of the Act**

[41] The IFBC also asserts that we have jurisdiction to hear the Application pursuant to the Commission's supervisory powers with respect to SROs. The Commission's supervisory powers are set out under section 21.1 of the Act:

> **Self-regulatory organizations**
>
> **21.1** (1) The Commission may, on the application of a self-regulatory organization, recognize the self-regulatory organization if the Commission is satisfied that to do so would be in the public interest. 1994, c. 11, s. 358.
>
> **Same**
>
> (2) A recognition under this section shall be made in writing and shall be subject to such terms and conditions as the Commission may impose. 1994, c. 11, s. 358.

**Standards and conduct**

(3) A recognized self-regulatory organization shall regulate the operations and the standards of practice and business conduct of its members and their representatives in accordance with its by-laws, rules, regulations, policies, procedures, interpretations and practices. 1994, c. 11, s. 358.

**Commission's powers**

(4) The Commission may, if it is satisfied that to do so would be in the public interest, make any decision with respect to any by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized self-regulatory organization. 1994, c. 11, s. 358.

[42] As stated above, the IFBC submits that subsection 21.1(4) should be interpreted broadly, and that the subsection "places no restriction on the Commission as to when or how it can make a decision with respect to a by-law … of a recognized self-regulatory organization". The IFBC suggests that given the merits of the Application, it is in the public interest that we hear the Application.

[43] We do not agree with the position advocated by the IFBC. The IFBC is seeking to quash an administrative act of the Commission and not an adjudicative decision, and accordingly, there must be clear jurisdiction under the Act to permit such a challenge. While subsection 21.1(4) grants the Commission the jurisdiction to make a decision with respect to a by-law of an SRO such as the MFDA, we find that the subsection does not contemplate a procedure by which a hearing panel of the Commission can exercise such powers as in section 21.7 and 144 of the Act. Subsection 21.1(4) does not provide an automatic right to a hearing.

[44] Hearing panels of the Commission act on the behalf of the Commission, and hence generally can exercise certain powers which are granted to the Commission under the Act. However, it is within the discretion of hearing panels to decide whether or not it is appropriate to exercise any of those powers, where the Act does not stipulate the context in which the powers are to be exercised.

[45] Although the Commission has held in *Re TSX Inc.* that it has an overriding supervisory power with respect to SROs, this is not a case where the Commission should exercise its overriding authority under subsection 21.1(4) of the Act (see *TSX Inc., Re*; (2007) 30 O.S.C.B. 8917). The supervisory powers granted to the Commission under this subsection should not be exercised in an adjudicative context on an issue such as the one in this case, in the absence of appropriate standing to bring the matter forward.

[46] The Commission's responsibility to supervise SROs such as the MFDA is an important element of the regulatory structure created by the Act, and aside from the review of specific

decisions made by SROs as provided for by section 21.7, this supervisory role is best carried out by the Commission as a whole.

## C. Section 144 of the Act

[47] The IFBC contends that section 144 of the Act provides it with a "statutory right of application". Section 144 of the Act reads as follows:

> **Revocation or variation of decision**
>
> **144.** (1) The Commission may make an order revoking or varying a decision of the Commission, on the application of the Executive Director or a person or company affected by the decision, if in the Commission's opinion the order would not be prejudicial to the public interest. 1994, c. 11, s. 380.

[48] The IFBC submits that the use of the term "affected" rather than "directly affected" as in section 21.7, implies a less stringent standard such that the applicant need not be immediately affected. The IFBC states that its members are affected for the purposes of section 144 because they are subject to the amended MFDA By-Law. However, the IFBC was unable to refer us to a case in which the MFDA relied upon section 24.3 of the By-Law as amended and in so doing breached an affected party's rights to procedural fairness.

[49] The IFBC also submits that section 144 provides a procedural avenue by which we may exercise the Commission's supervisory jurisdiction set out in subsection 21.1(4).

[50] It is our view that section 144 of the Act operates in limited circumstances and should not be used for the purpose proposed by the IFBC. Section 144 of the Act is mostly relied upon to make changes to existing Commission Orders, most often in the context of temporary orders or exemptions in take-over bid applications, where new facts come to light or a new law is enacted which would change the effect of the initial order.

[51] Further, we note that in *Re Universal Settlements International Inc.*, (2003) 26 O.S.C.B. 2345 at para. 20, when considering a section 144 application the Commission stated the following:

> The decision to issue staff Notice 44 was not a decision of the Commission. We do not believe that section 144 gives us the authority to purport to revoke or vary that notice. But if it did, we would not do so because we believe that staff notices, which have no legal standing and are issued by staff, should be decided by staff. *Even Commission policy statements, which have no legal binding nature, are only issued after debate and consideration by the Commission as a whole, and should not be changed by a panel on a section 144 application.*
>
> [Emphasis added]

[52] Without coming to a conclusion on the general scope of section 144, we find that it is not available to the IFBC in this proceeding. As noted in our discussion of subsection 21.1(4) above, we do not believe that it is in the public interest for a hearing panel to review a policy decision made by the Commission as a whole.

[53] Furthermore, we are not convinced that the IFBC is "affected" for the purposes of section 144, and consequently that it has standing to bring an application under the section. While we agree that the threshold of "affected" is lower than the "directly affected" threshold found in section 21.7, there must still be some nexus between the Commission's decision and the applicant. While there is a possibility that members of the IFBC could become subject to proceedings by the MFDA under section 24.3 of MFDA By-Law No. 1 and thus be affected, the potential alone is not sufficient to bring an application.

## V. CONCLUSION

[54] For the above reasons we find that we cannot hear and determine the Application brought by the IFBC. That is not to say however, that a hearing panel of the Commission could not hear an application under section 21.7, in which an applicant in the context of specific facts challenges the legality of the By-Law.

[55] Consequently, it is not necessary to consider the merits of the Application. The Application is hereby dismissed.

Dated at Toronto this 27th day of October, 2009.

"Mary G. Condon" "David L. Knight"

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Mary G. Condon David L. Knight, F.C.A.

"Paulette L. Kennedy"

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Paulette L. Kennedy