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Citation: Pro-Financial Asset Management Inc. (Re), 2017 ONSEC 39
Date: 2017-11-07

IN THE MATTER OF
PRO-FINANCIAL ASSET MANAGEMENT INC.,
STUART MCKINNON and JOHN FARRELL

REASONS AND DECISION ON A MOTION

Hearing: September 28, 2017

Decision: November 7, 2017

Panel:	AnneMarie Ryan	Commissioner and Chair of the Panel
	Janet Leiper	Commissioner
	Timothy Moseley	Commissioner
Appearances:	Derek J. Ferris Catherine Weiler	For Staff of the Commission
	Stuart McKinnon	On his own behalf and on behalf of Pro-Financial Asset Management Inc.

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REASONS AND DECISION

I. OVERVIEW

[1] In a merits decision issued on April 20, 2017 (the **Merits Decision**), the Ontario Securities Commission (the **Commission**) found that the respondents Pro-Financial Asset Management Inc. (**PFAM**) and Stuart McKinnon had committed numerous contraventions of Ontario securities law. A sanctions and costs hearing has not yet been held.

[2] Mr. McKinnon and PFAM have applied under section 144 of the *Securities Act*[1] (the **Act**) for an order varying the Merits Decision. Mr. McKinnon and PFAM (who were respondents in the merits hearing; together, the **Applicants**) contend that there are numerous errors in that decision, and that the Commission ought not to have made many of the findings that it did.

[3] Staff of the Commission (**Staff**) challenges the factual and legal basis advanced by the Applicants in support of their section 144 application, and have brought a motion to dismiss the application. Although Staff originally framed its argument as jurisdictional in nature, during oral submissions Staff agreed that its motion is analogous to the approach adopted by the courts for applications under the *Canadian Charter of Rights and Freedoms*; that is, applying discretion to consider, on a preliminary basis, whether the material filed by an applicant demonstrates a "tenable legal basis" for an application for relief.[2]

[4] In this case, Staff says that the basis of the application fails substantively to meet the applicable standard for a section 144 application and that the Applicants seek section 144 relief on the basis of evidence that is neither new nor compelling. Staff submits that the application is essentially an appeal of the Commission's decision and that such an appeal must be made to the Superior Court of Justice (Divisional Court), and not to the Commission. Staff asserts that the Commission should not revoke or vary its decisions in such circumstances.

[5] At the conclusion of the hearing of Staff's motion, we issued an order granting Staff's motion, and dismissing the section 144 application, with reasons to follow. These are our reasons.

II. BACKGROUND FACTS

A. The merits hearing

[6] Staff commenced a proceeding against Mr. McKinnon, John Farrell and PFAM by Notice of Hearing dated December 9, 2014, under sections 127 and 127.1 of the Act.

[7] Mr. Farrell, PFAM's former Vice President and Chief Compliance Officer, entered into a settlement agreement with Staff on June 24, 2015. The Commission approved that settlement on June 26, 2015.[3]

[8] Mr. McKinnon was the indirect owner, President and directing mind of PFAM from inception. As PFAM's Ultimate Designated Person (**UDP**), Mr. McKinnon was responsible for ensuring that PFAM was in compliance with Ontario securities law

[1] RSO 1990, c S.5.
[2] See, *e.g.*, *R v Garrick*, 2014 ONCA 752, referring to *R v Kutynec*, 1992 CanLII 7751 (Ont. C.A.)
[3] *Re Pro-Financial Asset Management Inc.* (2015), 38 OSCB 5994.

as well as promoting a culture of compliance and overseeing the effectiveness of PFAM's compliance system.

[9] The merits hearing against Mr. McKinnon and PFAM commenced on April 11, 2016, and was conducted over 17 days, ending with closing oral submissions on September 15, 2016. Mr. McKinnon was represented by counsel throughout the hearing; PFAM was not represented at the hearing and did not appear or participate.

[10] On April 20, 2017, the Commission released the Merits Decision, in which it found that:

a. PFAM failed to deal fairly, honestly and in good faith with its clients, contrary to subsection 2.1(1) of OSC Rule 31-505 *Conditions of Registration* (**Rule 31-505**), resulting in a shortfall of $1.2 million and harm to investors;

b. PFAM failed to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances and, in doing so, breached the standard of care for investment fund managers, contrary to paragraph 116(b) of the Act;

c. PFAM failed to maintain the minimum working capital required of a registered firm and failed to report its capital deficiency, contrary to section 12.1 of NI 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**);

d. PFAM failed to keep satisfactory books, records or other documents, contrary to subsection 19(1) of the Act and sections 11.5 and 11.6 of NI 31-103;

e. PFAM failed to establish, maintain and apply policies and procedures that establish an adequate system of controls and supervision, contrary to subsection 32(2) of the Act and section 11.1 of NI 31-103;

f. Mr. McKinnon, as a director and officer of PFAM, authorized, permitted or acquiesced in PFAM's breaches as set out above in (a) through (e) and was therefore deemed not to have complied with Ontario securities law, pursuant to section 129.2 of the Act;

g. Mr. McKinnon breached his obligations as Ultimately Responsible Person (**URP**) and UDP of PFAM, contrary to section 5.2 of NI 31-103; and

h. PFAM and Mr. McKinnon's conduct was contrary to the public interest.

[11] In arriving at its findings, the Commission found portions of Mr. McKinnon's testimony not credible or congruent with other evidence.

B. The section 144 application

[12] On August 18, 2017, Mr. McKinnon filed a section 144 application on his own behalf and on behalf of PFAM. The Applicants state that the findings in the Merits Decision were "incorrect, unfair and unduly harsh", and argue that the Merits Decision effectively terminated Mr. McKinnon's ability to work in a registered capacity.

[13] The application cites the following grounds for the request:

a. conflicts of interest with Staff that were not disclosed;

b. denial of full disclosure;

c. conflicts of interest with PFAM's former legal counsel, to whom we shall refer as "R.S.";

d. the credibility of PFAM's former manager of operations, Ralph Bozzo;

e. factual errors;

f. the standard to which a UDP is held; and

g. evidence that was not considered.

[14] The Applicants request that the Commission issue an order revoking all of the findings of the Merits Decision set out in paragraph [10] above, except the findings related to the failure to maintain working capital and report a capital deficiency, and the failure to keep satisfactory books and records or other documents.

III. LEGAL FRAMEWORK

[15] Section 144 allows the Commission to revoke or vary a decision it has made if, in the Commission's opinion, doing so would not be prejudicial to the public interest.

[16] The Commission has consistently held that an order under section 144 ought to be made only in the rarest of circumstances.[4] Relief under the section may be available if:

a. an applicant at the original hearing misrepresented a fact to the Commission or failed to state a material fact;[5]

b. unbeknown to an applicant at the original hearing, there was a material fact not brought to the attention of the original panel;[6]

c. new facts come to light that were not discoverable at the time of the original hearing, or new law is enacted, that make it desirable to change the original decision;[7] or

d. a conclusive and binding decision was not brought to the attention of the original panel.[8]

[17] If any of those circumstances is raised, the Commission ought also to consider whether the new information would have been "compelling", *i.e.*, likely to have affected the original decision.[9]

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[4] See, *e.g.*, *Re Black* (2014), 37 OSCB 9697 at para 13; *Re Khan* (2014), 37 OSCB 1035 at para 21.
[5] *Re X Inc.* (2010), 33 OSCB 11380 at para 32 (***X Inc.***); *Re Ultramar plc* (1991), 14 OSCB 5221 (***Ultramar***) at 5222.
[6] *Ultramar* at 5222.
[7] *X Inc.* at para 32; *Re Universal Settlements International Inc.* (2003), 26 OSCB at para 22.
[8] *X Inc.* at para 32.
[9] *Re Northern Securities Inc.* (2014), 37 OSCB 161 at para 28; *X Inc.* at para 32; *Ultramar* at 5222.

[18] As the Commission stated in *X Inc.*, "if a section 144 application is, in effect, simply an appeal, it should be rejected as contrary to the intention of the *Act* and contrary to the public interest."[10]

IV. ANALYSIS

A. Introduction

[19] With that framework in mind, we review in turn the sufficiency of each of the section 144 arguments raised by the Applicants.

B. Disclosure of notes and audio tape

[20] The Applicants argue that Staff failed to make timely disclosure of notes and an audio recording of a meeting that took place at the Commission's offices on September 28, 2011. The meeting came about because of a pre-existing connection between Marrianne Bridge, then a Deputy Director at the Commission, and Anthony Cox, PFAM's Chief Financial Officer and Chief Operating Officer from November 2010 until he resigned in April 2011. Ms. Bridge and Mr. Cox had previously worked at Deloitte at the same time, before Mr. Cox began working for PFAM in 2010.

[21] In September 2011, five months after Mr. Cox had resigned from PFAM, Mr. Cox saw Ms. Bridge at a function. Mr. Cox mentioned to Ms. Bridge that he and Michael Butler, PFAM's President from November 2010 until his employment was terminated by Mr. McKinnon in April 2011, had sued PFAM, Mr. McKinnon, and others. At Ms. Bridge's request, Mr. Cox sent her a copy of the claim. Messrs. Cox and Butler requested a meeting with Staff to discuss the claim.

[22] Messrs. Cox and Butler attended the meeting, along with six members of Staff, including Michael Denyszyn, counsel in the Commission's Compliance and Registrant Regulation branch. The disclosure provided to the Applicants shortly before the hearing included Mr. Denyszyn's handwritten notes of the meeting.

[23] On the fourth day of the merits hearing, Staff advised the panel that on the previous evening, it had become aware, for the first time, that an audio recording had been made of the meeting. Prior to the start of the hearing that day, Staff began to listen to the recording along with counsel for Mr. McKinnon, but there was insufficient time to listen to the entire recording.

[24] At counsel's request, the hearing was recessed for two hours to allow counsel to complete their review of the recording. Staff noted that Mr. Denyszyn had begun to testify at the hearing but had not yet finished, and that Mr. Butler was to be called as a witness. Accordingly, both individuals could be cross-examined about the contents of the recording.

[25] When the hearing resumed, Staff confirmed that the review had been completed. Counsel for Mr. McKinnon raised no issues about the timing of the disclosure, or about any prejudice that might accrue to Mr. McKinnon as a result of the late discovery of the recording.

[26] The recording was referred to numerous times in subsequent examination and cross-examination of witnesses. On the eleventh day of the merits hearing, Mr. McKinnon's counsel asked that three portions of the recording be played for

[10] *X Inc.* at para 35. See also *Re Rankin* (2011), 34 OSCB 11797 at para 56.

the panel, and initially suggested that the entire recording be made an exhibit. Following a discussion among the chair of the panel, Staff counsel, and Mr. McKinnon's counsel, the chair advised that only those portions that had been played for the panel would be included in the exhibit.

[27] At no time during the merits hearing did Mr. McKinnon's counsel express concern about the timing of the disclosure. Had he done so, the panel would have had an opportunity to hear submissions and to determine whether, under the circumstances, there was any prejudice that warranted relief.

[28] There is nothing in the Applicants' complaint about this issue that is new or that could not have been raised with the panel at the merits hearing. The Applicants' material does not establish a basis for a section 144 application relating to disclosure of either the notes or the audio recording.

C. Alleged conflict of interest involving Staff

[29] The Applicants also expressed concern about the pre-existing connection between Ms. Bridge and Mr. Cox, referred to above. The Applicants assert that Ms. Bridge was influenced by that connection, and that members of Staff working on the matter were biased against PFAM and Mr. McKinnon.

[30] The Applicants have not established any basis for relief under section 144 in relation to this alleged conflict. We reach that conclusion for three reasons:

a. There is no evidence that any member of Staff acted improperly during the investigation of this matter, or in the conduct of the merits hearing, nor was there any evidence of bias on the part of Staff.

b. There is no evidence that the connection between Ms. Bridge and Mr. Cox was anything more than their having worked at the same firm at the same time. Most importantly, there was no evidence of anything that might possibly motivate Ms. Bridge to act improperly, whether consciously or otherwise.

c. The Applicants' complaint contains nothing new. All of the information that they now rely on with respect to this issue was within their knowledge at the time of the merits hearing. The Applicants raised no concern at the hearing, and therefore lost any opportunity for them or for Staff to elicit evidence that might bear upon this question.

[31] In addition, the Applicants refer to a formal application they made under the *Freedom of Information and Protection of Privacy Act*,[11] for information that might assist them in "uncovering the extent of the conflict as well as the extent of the personal agenda with respect to [Messrs.] Butler, Cox and Staff towards PFAM and Mr. McKinnon." The Applicants contend that the application was denied, although Staff advises that its information is that the application was not pursued because of the cost. We saw no documents related to the application, and we are left with conflicting unsworn assertions about its status. In any event, the Applicants have not indicated any reason why a denial, if there was one, would assist them in establishing a basis for their section 144 application.

[11] RSO 1990, c F.31.

D. Alleged conflict of interest involving PFAM's former counsel

[32] The Applicants submit that PFAM was at a disadvantage because its former lawyer R.S. provided advice to PFAM during regulatory discussions with Staff in 2012, at a time when that same lawyer was acting for the banks who were the issuers of the principal protected notes (**PPNs**). The Applicants say that although R.S. disclosed the conflict in March of 2013, the impact of that conflict was "downplayed". The Applicants allege that, but for this conflict, PFAM would have brought the responsibilities of the banks to Staff's attention before the commencement of enforcement proceedings against them. The Applicants argue that PFAM received conflicted and prejudicial advice from R.S. that it should not "point fingers" at other players, that is the banks, who were involved with the issuance of the PPNs.

[33] Staff argues that R.S.'s retainer and any potential related issues were known and available to the Applicants prior to and during the merits hearing. During the cross-examination of Staff investigator Michael Ho by Mr. McKinnon's hearing counsel (not R.S., who was no longer counsel to PFAM as of May 2014), Mr. Ho was asked if he was aware that R.S.'s firm acted for the banks in relation to the issuing of the PPNs. Mr. Ho testified that he recalled that there had been a conflict at the time of the investigation and that the firm had represented at least one of the banks. In addition, offering documents filed at the merits hearing revealed that R.S.'s firm had been acting for one of the banks.

[34] On this preliminary motion, Staff filed copies of the written submissions from the merits hearing. Mr. McKinnon's merits hearing submissions did not raise the issue of a conflict on the part of R.S.

[35] We agree with Staff's position. Any conflict or constraint arising from the retainer of R.S. by PFAM and one or both of the banks was known to the Applicants and to Mr. McKinnon's counsel prior to the hearing. The fact of the potential conflict arose during evidence at the merits hearing, but was not argued as having any part in the determinations made by the merits panel. It is not new evidence, nor does it compel a different finding on the merits, by virtue of its existence. We conclude that there is no foundation for any section 144 relief in relation to this alleged conflict.

E. Credibility of witnesses

[36] The Applicants claim that the evidence provided at the merits hearing by Mr. Bozzo, PFAM's former manager of operations, was not credible and kept changing. In the Merits Decision, the panel commented on the issue of credibility and recognized the obvious animosity between Messrs. McKinnon and Bozzo. The panel specifically noted that it relied upon Mr. Bozzo's evidence only when it was supported by other factual evidence.

[37] The Applicants also state that they were unaware that an affidavit suggesting that Mr. Bozzo had tampered with two email documents was not submitted. The affidavit was sworn by Mr. McKinnon's counsel's law clerk on April 28, 2016, after 12 hearing days had completed. It referred to and attached the two emails, which had already been marked as Exhibits 186 and 187 earlier in the merits hearing. The affidavit adds no further information about the emails other than the opinion of Mr. McKinnon's counsel's law clerk as to why the time-stamps on the two emails might be different. This affidavit was available to Mr. McKinnon

and his counsel during the hearing. The fact that they chose not to use it is not a basis for a section 144 application. Further, there is nothing compelling about the law clerk's opinion.

F. Alleged factual errors

[38] The Applicants assert that a number of statements and findings in the Merits Decision were incorrect. The arguments put forth regarding these alleged errors, for the most part, repeat the arguments made in Mr. McKinnon's submissions at the merits hearing. Each of the findings in the Merits Decision was based on extensive evidence presented and submissions by both Staff and Mr. McKinnon.

[39] Many of the alleged errors cited deal with the processing of PPNs. The Applicants repeat the arguments made in Mr. McKinnon's closing submissions that none of the PPN problems were PFAM's responsibility. As in previous submissions, the Applicants assert that Mr. Bozzo alone was responsible for the estimation process, that Mr. Bozzo is not credible, and that other parties such as IAS (the record keeper for the PPNs), Concentra (the custodian trustee for the PPNs) and the banks were responsible for ensuring that the processing was reconciled and that payments to or from the banks were handled efficiently.

[40] However, the panel in the Merits Decision was clear that it did not accept Mr. McKinnon's view and that his arguments were not congruent with the evidence provided by the representatives of the banks, Concentra, IAS, PFAM staff and investigative Staff. Further, the panel rejected Mr. McKinnon's claim that PFAM's role was similar to that of a "back-office" entity and found that PFAM's lack of reconciliation processes and lack of controls and documentation of the trust account did not meet the standards expected of a registrant acting as a market intermediary. The panel found that PFAM neglected the duty of care applicable to it in the PPN transactions.

[41] The Applicants also raise a concern relating to the settlement agreement between Staff and Mr. Farrell. The merits panel noted in paragraph 3 of the Merits Decision that the agreement was not relied upon in the merits hearing (although it was admitted as an exhibit). Mr. McKinnon himself confirms that the agreement was not used in the merits hearing. However, he contends that Mr. Farrell's admitted breaches should mitigate Mr. McKinnon's own liability. Mr. McKinnon asserts that he is being held responsible for failures that Mr. Farrell admitted to in his settlement, and that Mr. Farrell was more directly responsible for day-to-day compliance. However, the fact that Mr. Farrell may not have fulfilled his responsibilities as Chief Compliance Officer did not preclude the merits panel from making findings with respect to Mr. McKinnon's responsibilities as UDP/URP. The Merits Decision articulated Mr. McKinnon's responsibilities as UDP and the areas in which he did not fulfill his obligations under the Act. Further, this argument was available to the Applicants to make at the merits hearing, and they did not raise it.

[42] The Applicants further claim that the following findings in the Merits Decision were erroneous:

a. PFAM and Mr. McKinnon's conduct was contrary to the public interest.

b. Rule 31-505 only applies to transactional activities requiring registration.

c. Mr. McKinnon did not personally perform operational tasks, but he was an engaged and involved senior officer.

d. The late filings and late delivery of T3 slips are supportive of a willful disregard for the best interests of the investment fund.

e. PFAM did not report its working capital deficiency as required.

f. Mr. McKinnon was responsible for ensuring that PFAM maintained adequate working capital and it is not credible that Mr. McKinnon was unaware of the working capital problems.

[43] Of the Applicants' evidence in support of their submission that there were errors in the Merits Decision, only the affidavit of Samantha Pinto sworn August 18, 2017, could be described as new, although little of its content is new. Ms. Pinto was PFAM's Chief Financial Officer for approximately two years beginning in late 2012. She was a witness at the merits hearing.

[44] The exhibits attached to Ms. Pinto's affidavit are not new, in that they were all contained in exhibits filed at the merits hearing. The only exception is a two-line email dated January 21, 2013, from Mr. McKinnon to another PFAM employee, with a copy to Ms. Pinto, inquiring about a variance revealed by a PPN reconciliation. That email is inconsequential for the purposes of this application.

[45] The only content of Ms. Pinto's affidavit that is new is her statement that in early 2013 she spoke to R.S., PFAM's counsel at the time, to discuss a remedy for the variance referred to above. She asserts, without substantiating or corroborative evidence, that R.S. advised that PFAM should use some excess proceeds from another PPN series to cover the shortfall. She further states that Mr. McKinnon was not involved with that recommendation. Her affidavit evidence refers to events that preceded the merits hearing, but contradicts evidence presented at that hearing. We heard no explanation as to why she did not testify to this effect at the merits hearing. In light of those circumstances, we have real doubts about the reliability of the new evidence. The Applicants have failed to demonstrate that the new contradictory evidence should supplant the evidence that was tendered at the merits hearing, and that was relied on by the merits panel.

[46] Most importantly, however, Ms. Pinto's new evidence is not compelling, in that even if we accepted it, it relates to a redemption that is only one of many examples of unsupported redemptions. Her evidence, even if true, would have had no appreciable effect on findings contained in the Merits Decision, and we therefore find that it does not support section 144 relief.

[47] We conclude that none of the above alleged errors is a basis for a section 144 application. The Applicants' disagreements with the panel's findings are essentially an appeal, as evidenced by the Applicants' request in their application that the Merits Decision be "reviewed and reconsidered".

G. Standard applicable to an Ultimate Designated Person

[48] The merits panel explicitly found that:

a. as PFAM's UDP since October 26, 2009, Mr. McKinnon was obligated to comply with the responsibilities of a UDP as set out in section 5.1 of NI 31-103;

b. at the merits hearing, Mr. McKinnon attempted to absolve himself of responsibility to ensure that PFAM was being appropriately managed to ensure compliance;

c. Mr. McKinnon was wilfully blind to the seriousness of the PPN discrepancies, and he failed to discharge his obligations to ensure that the PPNs were processed properly, that the firm kept adequate records, and that the working capital calculations were being done correctly;

d. Mr. McKinnon failed to promote a culture of compliance and oversee the effectiveness of PFAM's compliance system; and

e. Mr. McKinnon's failures as UDP "were extensive and significant".

[49] In their section 144 application, the Applicants challenge the merits panel's conclusions. Mr. McKinnon submits that the evidence does not support those conclusions and that the panel has held him to a higher standard than that imposed by NI 31-103. However, Mr. McKinnon does not point to any new evidence or change in law that might form the basis for section 144 relief. Mr. McKinnon's concerns are in the nature of alleged grounds for appeal.

V. CONCLUSION

[50] In response to Staff's objection to the section 144 application, the Applicants were provided with an opportunity to demonstrate a tenable legal basis for their application. The affidavit evidence, and submissions made in support of the application, were neither new nor compelling and do not meet that standard. Staff's objection to proceeding further has merit and we decline to hold a further hearing with respect to the section 144 application, on the basis proposed by the Applicants.

[51] The section 144 application is dismissed. The sanctions and costs hearing in this matter will proceed on November 16, 2017, as scheduled, absent further order of the Commission.

Dated at Toronto this 7th day of November, 2017.

"AnneMarie Ryan"
AnneMarie Ryan

"Janet Leiper"
Janet Leiper

"Timothy Moseley"
Timothy Moseley