

ALBERTA SECURITIES COMMISSION

DECISION

Citation: D'Addario, Re, 2009 ABASC 557

Date: 20091110

Frank D'Addario

Appellant

- and -

TSX Venture Exchange

Respondent

Panel: Glenda Campbell, QC
Stephen Murison

Appearing: Diane L. Evans
for the Appellant

Mark L. Skwarok and Lisa Ridgedale
for the Respondent

Submissions Completed: 23 October 2009

Date of Decision: 10 November 2009

I. INTRODUCTION

[1] Frank D'Addario ("D'Addario") appeals a determination by the TSX Venture Exchange (the "TSXV") that precludes him from acting as a director or officer of any TSXV-listed issuer (the "TSXV Determination"). In a 23 October 2006 letter (the "TSXV Decision Letter") the TSXV communicated the TSXV Determination to D'Addario, stating that it had "determined that, effective immediately and until further notice, [D'Addario] is currently unacceptable to occupy [such a] position" and required his "immediate resignation" as a director and officer of any TSXV-listed issuers with which he held such posts.

[2] D'Addario commenced his appeal by a 21 November 2006 letter to the Alberta Securities Commission (the "Commission"). After a lengthy interval attributable largely to what counsel for D'Addario referred to as her own "inadvertence" or misunderstanding of procedure, the appeal came before this panel in mid-2009. We first considered a preliminary matter raised by the TSXV, which sought to have the appeal dismissed outright on a number of grounds, including for delay. Having heard the parties' explanations and submissions on that application, we dismissed it on 10 July 2009. The parties then provided additional written and oral submissions on the substantive aspects of the appeal.

[3] For the reasons set out below, we dismiss the appeal.

II. FACTUAL BACKGROUND

[4] The TSXV compiled a "Record" of documents for consideration in this appeal. Many of the documents post-dated the TSXV Decision Letter; for that reason we considered them of little or no relevance. Our decision was based on those documents presented to us that pre-dated the TSXV Decision Letter, and the TSXV Determination itself as communicated in the TSXV Decision Letter.

A. History with the Toronto Stock Exchange

[5] The events leading to the TSXV Determination originated in D'Addario's dealings with the Toronto Stock Exchange (the "TSE"), an exchange affiliated with – but distinct from – the TSXV.

[6] D'Addario had apparently been the president, chief executive officer and chairman of the board of a TSE-listed company, Environmental Management Solutions Inc. ("EMS"). In approximately 2004 D'Addario's employment with EMS was terminated. Litigation ensued, in the course of which independent directors of EMS apparently retained lawyers who in turn commissioned the KPMG firm to conduct an investigation. (Some of the litigation was apparently later resolved, with D'Addario receiving a payment in settlement.) KPMG seemingly provided EMS's lawyers with interim reporting memoranda on KPMG's investigation, including one memorandum dated 29 March 2005 (for simplicity, we refer to the memoranda collectively as the "KPMG Material"). The KPMG Material apparently suggested that some questionable transactions or conduct had occurred while D'Addario was with EMS. According to D'Addario, KPMG included cautionary statements in the KPMG Material such as:

Our interim reporting memo was prepared for your information in considering next steps and distribution should be restricted. Our investigation continues and our findings may change as new information is uncovered. This interim reporting memo is not intended for general use, circulation or publication. For the avoidance of doubt our interim

reporting memo may not be disclosed, copied, quoted or referred to in whole or in part, whether for the purposes of litigation, disciplinary proceedings or otherwise, without our prior written consent in each specific instance. . . .

[7] Notwithstanding these cautionary statements, the KPMG Material came to the TSE's attention. This led the TSE itself to look into EMS's and D'Addario's conduct, focusing ultimately on certain stock option grants and exercises, share issuances, payments by EMS and some related disclosure, trading activity in EMS shares, and conduct and disclosure relating to shareholder meetings.

[8] A letter from the TSE to D'Addario on 11 July 2005 (the "TSE Decision Letter") set out the TSE's interim determination on the matter (the "TSE Interim Determination"). D'Addario was apparently not, at that time, an officer or director of a TSE-listed issuer. After referring to earlier correspondence and to certain of the KPMG Material (and acknowledging that the latter did not involve input from D'Addario), the TSE Decision Letter stated:

. . . given the seriousness of the issues identified [by KPMG, the TSE] will not consent to your appointment as an officer *or director* of a [TSE-] listed issuer until these matters are resolved to the satisfaction of [the TSE]. [original emphasis]

Prior to [the TSE] making any final determination of your suitability, [the TSE] extends the opportunity for you to respond regarding your knowledge of and involvement in the following issues. Your response must address each of [several enumerated issues] . . . and the issues outlined in [certain of] the KPMG [Material]. . . .

[9] The TSE Decision Letter concluded:

. . . The issues identified in the KPMG [Material], if true, do not demonstrate the standard expected of management of a [TSE-] listed issuer. Given these concerns, [the TSE] is not in a position to accept you as an officer or a director of any [TSE-] listed issuer until the issues identified are resolved to the satisfaction of [the TSE].

As previously noted, prior to [the TSE] making any final determination of your suitability, [the TSE] extends the opportunity for you to respond regarding your knowledge of and involvement in the following [sic] issues. . . . Upon receipt of your response, if any, [the TSE] may request additional or supplemental information.

[10] Apparently D'Addario never did respond to the TSE's satisfaction. Documents before us disclosed subsequent correspondence between them, but it seems that the TSE interim refusal to consent continues. That, however, is not the subject of this appeal.

B. History with the TSXV

[11] Before the TSXV Determination, D'Addario was involved with at least one TSXV-listed company – Epicore BioNetworks Inc. ("Epicore"), of which he was a director.

[12] In a 29 August 2006 letter to D'Addario (the "TSXV August 2006 Letter") the TSXV advised D'Addario that the TSXV had received a copy of the TSE Decision Letter and had a "significant concern" with the issues raised in that document. The TSXV referred to paragraph

2.4(d) ("Paragraph (d)") of Policy 3.1 of the TSXV *Corporate Finance Manual – Directors, Officers and Corporate Governance*, as it then read ("TSXV Policy 3.1"), stating:

. . . We refer you to [Paragraph (d),] which provides that the following Persons cannot serve as directors or officers of [TSXV-] listed issuers . . . :

- (d) [unless otherwise consented to in writing by the TSXV,] a Person who is subject to a consent order or decrees [sic], agreed statement of facts or similar documentation, entered into or issued by a stock exchange . . . which currently places restrictions on that Person's ability to be a director, senior officer or Insider of a public company.

In the [TSE Decision Letter], the [TSE] advised you that, ". . . [the TSE] is not in a position to accept you as an officer or a director of any [TSE-] listed issuer until the issues identified are resolved to the satisfaction of [the TSE]." Accordingly, [Paragraph (d)] is applicable to you. As a result, we advise you that your suitability to be a director or officer of [a TSXV-] listed issuer, or perform functions for any [TSXV-] listed issuer which are similar to those performed by an individual occupying the position of director or officer, is under review by the [TSXV]. The [TSXV] invites you to provide compelling reasons as to why the [TSXV] should waive the automatic prohibition of this [TSXV] Policy.

The [TSXV] requires a complete satisfactory response to the above by **Wednesday, September 13, 2006**. Please be advised that should you fail to respond by the noted deadline, the [TSXV] will proceed with its review and determination of your suitability after September 13, 2006 based on all information available to the [TSXV] at that date, without any further input from you and without any further notice. . . . [original emphasis]

[13] The TSXV August 2006 Letter also referred to a 9 December 2005 news release (the "2005 OSC Statement") issued by the Ontario Securities Commission (the "OSC") in response to a news release issued earlier that day, apparently by D'Addario. In his news release, D'Addario advised:

. . . that he has been notified by the [OSC] that the review of his conduct while president, chief executive officer and a director of [EMS] has been completed. Any issues raised by EMS subsequent to his termination have been addressed to the satisfaction of the OSC and the file has been closed.

[14] In the 2005 OSC Statement the OSC responded as follows:

After reviewing the issues regarding [D'Addario's] conduct while he was a director and officer of [EMS], staff of the [OSC] sent [D'Addario] a warning letter on Nov. 15, 2005, which stated: "It appears from our review that you did not act in good faith and with the best interests of the corporation in mind. Rather, you used your position as an officer and director of EMS to obtain benefits for yourself."

The letter concluded by cautioning [D'Addario] in respect of his conduct.

[15] D'Addario and the TSXV exchanged correspondence in September and October 2006. In support of his contentions that the KPMG Material should not be relied on and that the various

allegations against him were "unfounded and could not be proved", D'Addario pointed to the qualifications – and restrictions on use – contained in the KPMG Material and to his favourable settlement of the EMS-related litigation. The TSXV reiterated its call for D'Addario to address its concern about his "suitability"; declined to "speculate" on the reasons for the EMS settlement; and suggested that D'Addario's concerns about the TSE and its use of the KPMG Material were better raised with the TSE. In response, D'Addario claimed to have "an unblemished record" with the two exchanges and "an excellent record with the OSC". He also contested the applicability of Paragraph (d):

. . . D'Addario is not subject to a consent order or decree, an agreed statement of fact or similar documentation, entered into or issued by a stock exchange which places restrictions on his ability to be a director, senior officer or insider.

Rather, the [TSE] has made inquiries of [D'Addario] (in its letter of July 11, 2005) premised upon a confidential, incomplete and inaccurate set of 'reports' prepared by KPMG. In that inquiry letter, the [TSE] states that *it will not make any final determination of [D'Addario's] suitability until [D'Addario] responds*. This clearly indicates that no final determination has been made. The fact that [the TSE] has initiated this inquiry should not affect the [TSXV's] position. [original emphasis]

[16] The TSXV's response was the TSXV Determination, communicated in the TSXV Decision Letter, from which we quote:

The [TSXV] has determined that, effective immediately and until further notice, [D'Addario] is currently unacceptable to occupy the position of Director or Officer of [a TSXV-] listed issuer or perform functions for any [TSXV-] listed issuer which are similar to those performed by an individual occupying the position of Director or Officer. . . .

Our determination is based upon concerns surrounding [D'Addario] while he was a Director and Officer of [EMS]. This conduct resulted in the [TSE] issuing [the TSE Decision Letter] advising him that [the TSE] would not consent to his appointment as an Officer or Director of a [TSE-] listed issuer until certain matters had been resolved to the satisfaction of [the TSE]. We are advised by [TSE] staff that, notwithstanding that [D'Addario] advised that he would not stop any [TSE] investigation into his conduct, no response was ever forthcoming which would enable [the TSE] to continue its investigation. As a result, [D'Addario] remains subject to the restrictions imposed by [the TSE] in the [TSE Decision] Letter. Contrary, therefore, to the assertions contained in your October 6, 2006 letter, [Paragraph (d)] clearly applies to [D'Addario].

Having determined that this policy applies to prohibit [D'Addario's] involvement with [TSXV-listed] issuers, we then considered your submissions regarding his regulatory track record with a view to determining whether we would waive the application of this policy to [D'Addario]. . . .

[17] The TSXV Decision Letter continued with a refutation of D'Addario's claim that he had "an unblemished record with the [TSE] and an excellent record with the [OSC]". The TSXV also stated that D'Addario had neither responded to the TSE concerning the TSE Interim Determination as set out in the TSE Decision Letter – which the TSXV contended was not based only on the KPMG Material – nor appealed that determination. The TSXV also noted that the OSC had issued a warning letter to D'Addario and that D'Addario "does not appear to have

availed himself of his right of appeal of the OSC's decision". The TSXV continued: "While we do not interpret the OSC's warning letter as a conclusive finding of wrong-doing, it is clear to us that it demonstrates that [D'Addario's] record with the OSC cannot fairly be portrayed as being 'excellent'".

[18] The TSXV Decision Letter concluded:

Our review of the [2005] OSC Statement and the [TSE Decision Letter] leads us to conclude that [D'Addario] does not have either an unblemished or excellent record with the [TSE] or the OSC. The evidence, rather, is to the contrary. In any event, we do not find that any of the information you provided us warrants the [TSXV] varying its policies and, as a result, we will not waive the prohibition imposed by [Paragraph (d)] on [D'Addario].

[19] The TSXV Determination forced D'Addario to resign his director position with Epicore, and he has been barred from acting as a director or officer of any TSXV-listed issuer since.

III. PARTIES' POSITIONS

A. D'Addario's Position

[20] D'Addario (through counsel) maintained before us many of the same positions (summarized above) he argued before the TSXV, including his criticism of the use of the KPMG Material, as well as his own supposedly untarnished regulatory record. He also disputed the TSXV's more procedural challenges to his appeal – notably, characterization of the appeal as merely an improper "collateral attack" on the TSE Interim Determination. He characterized the TSXV Determination as a "rubber stamp" of the TSE Interim Determination reflecting TSXV reliance on "second hand hearsay". D'Addario stated that the TSXV "must do more [than] simply blindly adopt the conduct of the [TSE]" and argued that the issuance of the TSXV Determination (and what he suggested was the TSXV's failure to exercise properly its discretion under Paragraph (d) not to reciprocate the TSE Interim Determination) therefore did not accord with the principles of natural justice. D'Addario placed emphasis on the TSE having, as he put it, "expressly stated that it did not make any finding as to his suitability or make any order as to his suitability to so act". He did not formally challenge the TSE's action, he explained, because it was "not an order capable of appeal" and because he was no longer, and did not seek to become, an officer or director of a TSE-listed issuer. Late in the course of the appeal hearing D'Addario returned to Paragraph (d) and argued that it could not properly be invoked by the TSXV to ground the TSXV Determination.

B. The TSXV's Position

[21] The TSXV reiterated its position that, apart from the substantive merits, the appeal should be dismissed, or at least stayed or adjourned, pending final resolution of the issues between the TSE and D'Addario.

[22] The TSXV's primary position was that it had properly exercised its authority in making the TSXV Determination based on the facts, including on D'Addario's failure to address to its satisfaction why it should not find him unacceptable as a director or officer of a TSXV-listed issuer. The TSXV contended that it and the TSE were both entitled to consider whatever information came before them – here, including asking questions based on the KPMG Material and on D'Addario's claimed "unblemished" and "excellent" histories with the TSE and the OSC.

The TSXV contended that it had no obligation to duplicate independently the TSE's review and assessment – it sufficed that the TSE had restricted D'Addario's ability to serve as a public company director or officer. There were no allegations relating to D'Addario's conduct at EMS; however, the TSXV suggested, D'Addario had been unresponsive to the concerns expressed first by the TSE and then by the TSXV. Further, the TSXV contended that this panel should not lightly interfere with an exercise of discretion by the TSXV (this argument apparently presupposed that the TSXV had relied properly on Paragraph (d) but, in so doing, declined – again properly – to exercise the discretion available to it to decline to apply the provision).

[23] Once D'Addario emphasized Paragraph (d) as an issue, the TSXV responded with two arguments. The first turned on interpretation: the TSXV argued that the word "consent" as used in the provision modified only "order", not "decree", and that "similar documentation" meant that "any type of order from any other exchange that impedes an ability to be a director" – imposed with or without consent – could serve as a basis for the TSXV to impose a reciprocal restriction under the provision. The second argument was a broader invocation of the public interest: that the TSXV has an inherent power – and an express power, under paragraph 2.4(m) of TSXV Policy 3.1 ("Paragraph (m)") – to act as it did. To conclude otherwise, and constrain the TSXV's authority through "artificiality of semantics" applied to the interpretation of Paragraph (d), would produce "a ridiculous result" depriving the TSXV of the ability to "impose requirements and restrictions on listed issuers and persons associated with them" (citing *Re McLeod*, 2005 ABASC 607 at para. 76; appeal dismissed *McLeod v. Alberta Securities Commission*, 2006 ABCA 231).

IV. ANALYSIS

A. Appeal Provisions

[24] Section 73 of the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act"), which governs appeals from a recognized exchange, such as the TSXV, provides that:

(1) A person or company directly affected by, or by the administration of, a direction, decision, order or ruling made under a bylaw, rule, regulation, policy, procedure, interpretation or practice of a recognized exchange, . . . may appeal that direction, decision, order or ruling to the Commission.

(2) Section 36 applies to an appeal made under this section.

[25] Section 36(1) requires that such an appeal be made within 30 days of service of notice of the decision being appealed. This was done here.

[26] Section 36(3) sets out our powers in conducting the appeal:

(3) On conducting an appeal, the Commission may, by order,

- (a) make any decision that the person who heard the matter in the first instance could have made and substitute the Commission's decision for the decision of that person;
- (b) confirm, vary or reject the decision;
- (c) direct the person whose decision is being appealed to re-hear the matter.

[27] The Commission thus has a broad discretion to act in what it considers to be the public interest. That said, the Commission does not lightly interfere with an exchange decision – not, for example, simply because we might have made a different decision had the matter been before us in the first instance. Instead, the Commission will generally defer to the decision of an exchange (or other relevant body) unless there was an error in law, material evidence was overlooked, an incorrect principle was applied, there is new and compelling evidence, or some countervailing public interest consideration exists.

B. Discussion

[28] Although much of the documentation before us revealed differing views – as between D'Addario and the TSE, in particular – as to how D'Addario had conducted himself when associated with EMS, that conduct was not the subject of this appeal and we make no finding thereon. The only issue before us, and the only issue which we decide, concerns the TSXV Determination that D'Addario is "currently unacceptable to occupy the position of Director or Officer of [a TSXV-] listed issuer".

1. TSXV's Reliance on Paragraph (d)

[29] We turn now to the TSXV's authority to make the TSXV Determination.

[30] The TSXV Decision Letter (and the earlier TSXV August 2006 Letter) expressly referred to Paragraph (d) and to no other provision of TSXV Policy 3.1. The earlier letter stated, as noted, that the TSXV considered Paragraph (d) to apply in this case and invited D'Addario "to provide compelling reasons as to why [the TSXV] should waive the automatic prohibition of this [TSXV] Policy".

[31] The TSXV Decision Letter stated the following (for ease of reference, we reproduce here a portion already quoted above):

Our determination is based upon concerns surrounding [D'Addario] while he was a Director and Officer of [EMS]. *This conduct resulted in the [TSE] issuing [the TSE Decision Letter] advising him that [the TSE] would not consent to his appointment as an Officer or Director of a [TSE-] listed issuer until certain matters had been resolved to the satisfaction of [the TSE]. We are advised by [TSE] staff that, notwithstanding that [D'Addario] advised that he would not stop any [TSE] investigation into his conduct, no response was ever forthcoming which would enable [the TSE] to continue its investigation. As a result, [D'Addario] remains subject to the restrictions imposed by [the TSE] in the [TSE Decision] Letter. Contrary, therefore, to the assertions contained in your October 6, 2006 letter, [Paragraph (d)] clearly applies to [D'Addario].* [emphasis added; we refer below to the emphasized passage]

Having determined that this policy applies to prohibit [D'Addario's] involvement with [TSXV-listed] issuers, we then considered your submissions regarding his regulatory track record with a view to determining whether we would waive the application of this policy to [D'Addario]. . . .

[32] The TSXV Decision Letter also stated that the TSXV "will not waive the prohibition imposed by" Paragraph (d).

[33] As mentioned, the parties differed as to the correct interpretation of Paragraph (d) and, therefore, as to whether it could properly ground the TSXV Determination. At the time, Paragraph (d) read:

2.4 Prohibitions on Directors and Officers

The following Persons cannot serve as directors or officers of an Issuer:

...

(d) unless otherwise consented to in writing by the [TSXV], a Person who is subject to a consent order or decree, agreed statement of facts or similar documentation, entered into or issued by a stock exchange . . . which currently places restrictions on that Person's ability to be a director, senior officer or Insider of a public company;

...

[34] The TSXV argued that the word "consent" in this provision modified only the word "order" and not the word "decree" – or, presumably, the phrase "order or decree". D'Addario acknowledged an ambiguity. However, in our view, a careful reading of Paragraph (d) largely removes any such ambiguity. The alternative preconditions set out in the provision clearly imply an element of agreement or consent on the part of the "Person" on whom a restriction has been placed by another body, such as an exchange. Had the drafters intended the word "decree" to be somehow isolated and stripped of that notion of consent, the drafters would, at least, have inserted a comma between "order" and "decree" instead of the conjunction "and", such that the phrase would be "consent order, decree, agreed statement of facts . . .". Moreover, because both "consent order" and "agreed statement of facts" reflect consent or agreement, the phrase "similar documentation" requires that "decree" be construed as "consent decree" so that the concepts are sufficiently consistent to support the notion of similarity.

[35] Finally, had the drafters of the provision intended it to encompass documentation that did not reflect a degree of consent or agreement, those drafters could have merely said "orders, decrees or similar documentation", thus obviating the need for the word "consent" and the phrase "agreed statement of facts". It is a principle of legislative interpretation that each word in a provision is presumed to be there for a purpose and to have a meaning. It is inappropriate and incorrect to construe a provision so as to give some of the words no purpose or meaning.

[36] We conclude, therefore, that Paragraph (d) is predicated on a restriction having been consented to by the affected party before it is reciprocated by the TSXV. In this case, that means that the TSXV could only invoke Paragraph (d) if D'Addario (the "Person" here) had consented to the TSE Interim Determination.

[37] D'Addario did not consent to the TSE Interim Determination. In this regard, we do not overlook the portions of the TSXV Decision Letter quoted above, with the panel's emphasis added. Were those statements meant to suggest that D'Addario's failure to respond to the TSE's concerns itself constituted, or amounted to, consent to the resulting TSE Interim Determination, we do not agree. D'Addario's conduct, in the circumstances, fell short of "consent" as the term is used in Paragraph (d).

[38] For the reasons given, we conclude that the TSXV Determination could not properly be grounded in Paragraph (d). In this, we agree with D'Addario. This does not, however, dispose of the appeal.

2. TSXV Authority

[39] The TSXV's power to make a determination of an individual's acceptability as a director or officer of a TSXV-listed issuer is set out in section 2.4 of TSXV Policy 3.1. The provision sets out a number of grounds on which "Persons" are barred from serving as directors or officers of TSXV-listed issuers. Paragraph (d) sets out but one basis for such a determination. If its preconditions apply that provision undoubtedly provides the TSXV with a useful tool – a simple, efficient, and essentially immediate and automatic process (unless the TSXV exercises its discretion not to otherwise consent). That said, the existence of Paragraph (d) in no way precludes a similar outcome from alternative routes, including other elements of section 2.4 of TSXV Policy 3.1.

[40] Here, the TSXV Determination could be grounded in Paragraph (m):

2.4 Prohibitions on Directors and Officers

The following Persons cannot serve as directors or officers of an Issuer:

...

(m) any Person that the [TSXV] advises is unacceptable to serve as a director or senior officer of an Issuer.

[41] In our view, although section 2.4 of TSXV Policy 3.1 does not so state, we consider that as a matter of good practice – as well as fairness – the section (including Paragraph (m)) would generally be applied only when the TSXV has reason to believe that some conduct or circumstance would render an individual's service as a director or senior officer of a TSXV-listed issuer incompatible with the public interest. In this regard it is worth noting that access to investors and the capital market through senior office with a listed public issuer is, ultimately, a privilege, not an entitlement. Those who hold such positions have significant responsibilities. They are expected to operate to a high standard consonant with the public interest. Inherent in this is a duty to interact responsibly with and responsively to regulators and other gatekeepers – such as, in this case, the TSE and the TSXV.

[42] Thus, the fact that another exchange or regulatory body had acted to remove the privilege from an individual might be highly relevant, and even sufficient reason under Paragraph (m), for the TSXV to reach (and act on) a conclusion such as the TSXV Determination. Equally, indications simply that an individual had been unresponsive or uncooperative in dealings with another exchange – or with the TSXV itself – could also suffice for that purpose. In this case, the TSXV had both sorts of concern (indications of unresponsiveness, and action having been taken by the TSE) and communicated such concerns to D'Addario in a string of correspondence culminating in the TSXV Decision Letter.

[43] In the circumstances, we do not consider that the absence of express reference to Paragraph (m) in the TSXV's communications with D'Addario prejudiced him or was, therefore, necessarily fatal to the TSXV Determination. D'Addario, reading the communications from the TSXV, could not but have known what was of concern to the TSXV, and (given the TSXV's role and powers) the potential consequences of a failure to respond to its satisfaction.

[44] Moreover, the Record demonstrates that the TSXV did not merely "rubber stamp" or blindly follow the TSE's actions. The TSXV gave serious consideration to D'Addario's suitability to act as an officer or director of a TSXV-listed issuer and gave D'Addario ample opportunity to address the concerns it raised (an opportunity not strictly necessary had the TSXV indeed been relying solely on the largely automatic reciprocation power under Paragraph (d)).

[45] Accordingly, we find, first, that the TSXV had the requisite authority to make the TSXV Determination. Second, we find that it had valid reason to make the TSXV Determination, and did so reasonably. In our view, D'Addario's failure to make satisfactory response to the TSE was, in and of itself, a sufficient ground, even absent any final suitability determination by the TSE. D'Addario's further failure to respond properly to the TSXV itself inevitably reinforced the TSXV's concerns and provided an additional, substantial basis for its determination of his unacceptability.

[46] We therefore conclude that the TSXV did not act improperly or unreasonably in making the TSXV Determination – D'Addario was not denied procedural fairness or otherwise prejudiced – and that the determination was correct.

C. Disposition

[47] In the result, we confirm the TSXV Determination.

[48] Had we instead found the TSXV to have erred, other possible courses of action would have been open to us under the Act. We could have exercised our power to direct the TSXV to rehear the matter, but we have no reason to believe that D'Addario could or would in that event offer any new or different information or argument that would lead to a different result. Alternatively, we could have substituted our own decision for that of the TSXV; however, based on the information before us, our decision would have been the same.

[49] We note in conclusion that nothing in the Record, nor in our decision on the appeal, precludes D'Addario from belatedly responding to the outstanding questions of the TSE and the TSXV and, in so doing, possibly addressing their concerns so as to pave the way for a reassessment of his acceptability as a director or officer.

[50] In the circumstances it is unnecessary for us to address the TSXV's "collateral attack" and other arguments.

V. DECISION

[51] The TSXV Determination is confirmed. The appeal is dismissed.

10 November 2009

For the Commission:

"original signed by"
Glenda Campbell, QC

"original signed by"
Stephen Murison