BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Osadchuk, 2020 BCSECCOM 450 Date: 20201028

In the Matter of Darrell Donald Osadchuk, Citation Growth Corporation and the Canadian Securities Exchange

Panel	Gordon Johnson	Vice Chair
	Deborah Abbey	Commissioner
	Audrey T. Ho	Commissioner
Hearing dates	August 17, 2020	
Submissions Completed	August 17, 2020	
Decision date	October 28, 2020	

Appearing

Jennifer Whately Gordon Smith Nazma Lee	For the Executive Director
Frank Y. Sur Jason Mullins	For Darrell Donald Osadchuk
Jamie Anderson	For the Canadian Securities Exchange

Decision and Reasons

I. Introduction

[1] This is an application for a hearing and review under section 28 of the *Securities Act*, RSBC 1996, c. 418 (the Act) of a decision dated March 17, 2020 of the Canadian Stock Exchange (the CSE) determining that the applicant is not suitable to serve as a director or officer of a CSE listed company. The applicant, Darrell Donald Osadchuk (Osadchuk) seeks an order requiring the CSE to reconsider its prior determination.

II. Background Facts

A. Procedural History

[2] On March 13, 2019, the CSE received a personal information form and related documents in connection with a request that Osadchuk be assessed for suitability for a potential appointment of Osadchuk as director or officer of an issuer which was later

identified as Citation Growth Corporation (Citation Growth). On May 10, 2019, the listing committee of the CSE (the Listings Committee) made a unanimous determination that Osadchuk would not be suitable for the purpose of acting as a director or officer of a CSE listed issuer.

[3] On October 29, 2019, Osadchuk requested that the Listings Committee reconsider its determination. Osadchuk also provided a notice of intention to appeal if the Listings Committee did not reverse its earlier determination.

[4] On October 30, 2019, the Listings Committee reconsidered but did not overturn its earlier determination.

[5] Osadchuk proceeded with his appeal, which was heard by a hearing panel of the CSE board (the Hearing Panel) on November 14, 2019. The Hearing Panel denied Osadchuk's appeal on the date of the hearing and confirmed that outcome, with written reasons, on March 17, 2020.

[6] It is not clear when Osadchuk received the written reasons from the Hearing Panel. On April 27, 2020, counsel for Osadchuk applied in writing under section 28(1) of the Act requesting that the British Columbia Securities Commission (the Commission) review the decision of the Hearing Panel.

[7] The hearing before the Commission proceeded on August 17, 2020. By consent, the hearing was conducted by teleconference.

B. General Background Facts

[8] Osadchuk is currently a businessman who resides in Alberta.

[9] During an almost continuous period which began in July of 1999 and continued into August of 2002, Osadchuk was employed by various investment dealers which were members of the Investment Dealers Association (the IDA). In the course of his employment Osadchuk advised clients and accepted trading instructions from clients, initially under a restricted registration but later as a registered representative.

[10] In a settlement agreement which he agreed to on November 14, 2005, Osadchuk admitted various contraventions of IDA By-Laws, Regulations, Rulings or Policies (the Contraventions). In general the Contraventions consisted of unauthorized trading in client accounts over an 11-month period and efforts to conceal such trading.

[11] As a part of his settlement, Osadchuk agreed to pay a fine in the amount of $40,000 and to accept a permanent prohibition from approval to act in any registered capacity with a member of the IDA.

[12] The settlement agreement was subject to acceptance by a hearing panel of the IDA and it was brought before a hearing panel of the IDA on November 21, 2005. In written reasons dated November 27, 2005 that hearing panel accepted the settlement agreement and provided written reasons for doing so. One of the conclusions reached by the hearing panel in determining that a permanent ban was appropriate was that "there is reason to believe that the respondent could not be trusted to act in an honest and fair manner in all their dealings with the public, their clients, and the securities industry as a whole".

[13] Over 13 years passed between the time the IDA approved Osadchuk's settlement agreement and the time the CSE conducted its suitability review of Osadchuk. During that time there was no evidence to suggest any further misconduct by Osadchuk.

[14] In recent years Osadchuk developed a relationship with Citation Growth. In support of the suitability reconsideration request to the Hearing Panel, Osadchuk made the following unchallenged submissions (the Original Submissions):

(a) Osadchuk is a significant investor in Citation Growth, having invested approximately $1.4 million (now approximately $1.8 million) representing approximately 5% of the issued and outstanding common shares in the capital of Citation Growth;

(b) Osadchuk has been instrumental in supporting investor relations for Citation Growth;

(c) Osadchuk has coordinated investments in Citation Growth made by several of his family members and friends;

(d) Osadchuk has business development experience and operational experience of running other companies;

(e) the chief executive officer of Citation Growth at that time indicated that Osadchuk has been instrumental to Citation Growth and assisted with shareholders as the cannabis sector experienced reduced share prices; and

(f) Osadchuk noted that the IDA Ruling was issued over 18 years ago and suggested that his actions since then do not support a finding that he would not be suitable to act as a director or officer of a CSE listed issuer.

C. Exchange Policies, Regulatory Framework

[15] The CSE is an exchange which has been formally recognized as such by the Commission under section 24(b) of the Act. The Commission has made a recognition order with respect to the CSE and the Commission has a supervisory role with respect to the activities of the CSE.

[16] There is no automatic right for an issuer to be listed on the CSE. The CSE has a range of decisions which it is both able to make and expected to make when it accepts an application from an issuer for a CSE listing. These decisions include determinations about the suitability of those associated with CSE-listed issuers. Section 1.10 of Appendix A of CSE Policy 2 – Qualifications for Listing, states:

> The Exchange may deem any person to be **unacceptable to be associated in any manner** with a Listed Issuer if the Exchange **reasonably believes such association will give rise to investor protection concerns** or **could bring the Exchange into disrepute**.
>
> [emphasis added]

[17] The most relevant provisions in the current context are found in the following extracts from the CSE's listings policies and the listing agreement that Citation Growth had entered into with CSE:

> The authority for the CSE to make a determination regarding an individual's suitability to act as a director or officer of a listed issuer is found in s. 3.3 of Policy 4:
>
> > The Exchange may collect such personal information about the directors and officers of a Listed Issuer as the Exchange may require and, notwithstanding the qualification for listing of its securities, a Listed Issuer must remove, or cause the resignation of, any director or officer which **the Exchange determines is not suitable for the purpose of acting as a director or officer of a Listed Issuer**, failing which the Exchange may immediately disqualify for listing the Issuer's securities.
> >
> > [emphasis added]
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> Similar requirements are found in section 6 of the Citation Growth listing agreement:
>
> > … notwithstanding the qualification for listing of its securities, the Issuer agrees that either (i) it will remove, or cause the resignation of or termination of the contract of, any Related Person which the **Exchange determines is not suitable**; or (ii) the Exchange may immediately disqualify for quotation the Issuer's securities.
> >
> > [emphasis added]
>
> Also of relevance in the CSE listings policy is s. 1.9(a) of Appendix A of Policy 2:
>
> > The Exchange may not approve an Issuer for listing if any Related Persons, or investor relations person(s) associated with the Issuer:

> a) have **entered into a settlement agreement with a securities regulator or other authority**;
>
> unless the Issuer first **severs relations with such person(s) to the satisfaction of the Exchange**.
>
> [emphasis added]

[18] After the CSE has made a decision based upon the authority and discretion set out in its listings agreement or listings policies, a party directly affected can apply to the Commission for a review of that decision under section 28(1) of the Act, which reads as follows:

> **Review of action**
> **28**(1) The executive director or a person directly affected by a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy of a clearing agency, exchange, quotation and trade reporting system, self-regulatory body or trade repository may apply by notice to the commission for a hearing and review of the matter under Part 19, and section 165 (3) to (9) applies.

III. Law

[19] The most recent decision of the Commission of significant relevance is *Re Chilean Metals Inc*., 2019 BCSECCOM 24, a decision which raised an issue of how much deference should be shown to decisions of an exchange in the course of a section 28 hearing and review. A key passage from that decision is as follows:

> [119] The Exchange plays a significant role as a gatekeeper in our capital markets. Part of that role, as a gatekeeper (as set out in the Exchange's recognition order from the Commission), is the enforcement of its rules and policies in the public interest. With the authority to enforce its rules and policies, must come some latitude for the Exchange to reasonably use its discretion to apply, waive or modify (through the imposition of conditions) those rules and policies in a nuanced manner, applicable to the specific circumstances of each situation. …

[20] Similar to the TSX Venture Exchange in *Chilean Metals*, this gatekeeper function is set out in the CSE recognition order, requiring the CNSX to maintain its ability to perform its regulatory function, including setting standards for conduct, as well as methods for enforcing its rules and policies. As such, we find the reasons in *Chilean Metals* equally applicable here.

[21] The procedure for proceedings initiated under section 28 of the Act is governed by BC Policy 15-601 (the Hearing Policy).

[22] Paragraph 7.9(a) of the Hearing Policy provides that the Commission is generally reluctant to interfere in a decision under review simply because it might have made a different decision in the circumstances, provided the decision was reasonable and was made in accordance with the law, the evidence, and the public interest. Paragraph 7(a) further provides that the person seeking to have the recognized entity's decision revoked or varied has the burden to present a case demonstrating that one of five grounds are present. The five grounds are: (1) the recognized entity proceeded on an incorrect principle, (2) the recognized entity made an error in law, (3) the recognized entity overlooked material evidence, (4) new and compelling evidence is presented to the Commission, or (5) the Commission's view of the public interest is different from that of the recognized entity.

IV. Positions of the parties

[23] Osadchuk continues to rely upon the Original Submissions, described above, which were made to the Hearing Panel. In addition, Osadchuk has added a number of new submissions as follows:

(a) Citation Growth has relied on Osadchuk to lead the search for its new President, Chief Executive Officer and Chief Financial Officer following the resignation in November 2019 of its Chief Financial Officer and the resignation in February 2020 of its President, Interim Chief Executive Officer and Interim Chief Financial Officer;

(b) the friends and family of Osadchuk that have invested in Citation Growth represent greater than 25% of the issued and outstanding common shares in the capital of Citation Growth;

(c) Osadchuk, through his common shareholdings and incentive stock options in Citation Growth has a very strong alignment with Citation Growth investor interests;

(d) Osadchuk was the Chief Executive Officer and a director of Zipcash Financial Trust ("Zipcash") and certain affiliated entities, that collectively raised over USD$50 million through private placements and exempt market dealers registered under National Instrument 31- 103 – Registration Requirements, Exemptions and Ongoing Registrant Obligations, and filings for such financings were properly made to the Commission and other security regulatory authorities in Canada, as applicable, between 2012 and 2016;

(e) Osadchuk has the requisite experience in restructuring companies that Citation Growth needs at this time to successfully emerge from the current difficult time it is experiencing; and

(f) Osadchuk has deep institutional knowledge of Citation Growth that is invaluable to management and the board of directors of Citation Growth following the departures of key executive officers.

[24] The main thrust of both Osadchuk's Original Submissions and his additional submissions is that he has expertise which is of value to Citation Growth, he has a relationship of trust with representatives of Citation Growth and he has direct and family financial interests which align with the interests of Citation Growth and its shareholders.

[25] Osadchuk argues that the Listings Committee placed sole reliance on the IDA Ruling for its suitability determination and that the Hearing Committee placed undue reliance on the IDA Ruling when the Hearing Committee found that the Listings Committee's determination was reasonable. Osadchuk says these were errors of fact and there was no reasonable basis for the Listings Committee or the Hearing Committee to make their determinations. Osadchuk notes that he accepted his punishment from the IDA (which was directed at Osadchuk's future as a Registered Representative) and he has since carried on with his life and business affairs without becoming the subject of allegations of further misconduct. Osadchuk argues that it is not in the public interest that he be denied an opportunity to serve as a director or officer of Citation Growth in the circumstances which exist here.

[26] The CSE argues that it made no error of law. The CSE asserts that it properly considered the material evidence regarding Osadchuk's suitability to be a director or officer.

[27] The CSE places considerable reliance on the provisions of its listings policies and listing agreement which demonstrate the wide scope of its discretion in assessing the suitability of potential directors and officers of issuers listed on the CSE. The CSE characterizes itself as a gatekeeper, charged with the responsibility of setting standards for who will run listed companies. The CSE notes that it is expressly obligated to consider whether potential directors have entered into settlements with securities regulators and whether there is a reasonable basis for it to believe that an association between a listed issuer and a potential director will give rise to investor protection concerns or could bring the CSE into disrepute.

[28] The CSE submits that in accordance with the Commission's Hearing Policy, the Commission should be reluctant to interfere in a decision of the CSE. The CSE argues that none of the usual grounds for such interference are present here.

[29] The CSE references Osadchuk's new submissions and suggests that those submissions do not establish any materially different consideration beyond what was before the CSE decision makers. The CSE implies without expressly stating that there is no basis for us to take Osadchuk's submissions into account given that Osadchuk has not established that there is new and compelling evidence in support of the submissions. However, after referencing a part of Osadchuk's new submissions regarding a company called Zipcash, the CSE notes that there are civil proceedings that have been filed in connection to

Zipcash in which fraud or similar conduct is alleged (but not proven) against Osadchuk and others.

[30] The CSE asserts that without an "outright reversal or pardon of the IDA Ruling, there would be no reasonable basis upon which to justify a decision that Osadchuk is suitable to act as a director or officer of a listed issuer."

[31] The Executive Director has taken a position in this proceeding. The Executive Director submits that no proper basis has been established for the Commission to substitute its discretion for the discretion of the CSE. The Executive Director asserts that it is within the mandate and discretion of the CSE to find that the conduct addressed by the IDA Ruling raises concerns about Osadchuk's ability to conduct business with integrity, and could bring the reputation of the CSE into disrepute.

V. Analysis

[32] We begin by noting three issues which we will not address. First, we are not addressing the possibility that Osadchuk's application was not brought within all applicable time limits. We take that approach because we do not have all of the relevant facts before us about the timing issue and because no party suggested there is a concern about this.

[33] Secondly, we are not addressing the technical issue of whether our review should be solely limited to the decision of the Hearing Panel. All parties argued the issues as if the original determination of the Listings Committee is subject to review as well as the decision of the Hearing Panel. No party argued otherwise. Since we are able to fully resolve this application without considering this point, and since the point would be better addressed only after detailed argument we see no reason to explore the issue.

[34] Finally, we are not addressing the admissibility of new evidence. Osadchuk made further submissions to us which he did not make to the Hearing Panel. We have no concerns about Osadchuk revising his submissions over time. However, Osadchuk has based some of his new submissions on facts which are not in the record. In response, the CSE has referenced allegations made in some civil litigation which is not in the record before us. This new information in essence consists of more examples of the types of matters that were provided in support of the Original Submissions. None of the new information is compelling. We find nothing in the new submissions of Osadchuk, to the extent they rely on new facts, to be different in character or significant enough to lead us to conclude that the CSE would have come to a different conclusion had they been before them, or persuade us not to give deference to the CSE decision. Similarly the new information mentioned by the CSE does not lead us to a conclusion that Osadchuk has conducted himself unethically in the years since his settlement agreement.

[35] Our analysis begins with an acceptance that the CSE has a broad discretion in making its assessments of who is suitable to act as a director or officer of an issuer listing on the CSE. We agree with the view taken in *Re Chilean Metals Inc.*, quoted above, that the CSE plays a significant role as gatekeeper in our capital markets. The CSE must be allowed some latitude in setting its own standards.

[36] We have carefully reviewed the decision of the Hearing Panel. It is clear that the Hearing Panel placed significant emphasis on the IDA Ruling, but that Hearing Panel also considered other factors. It is worth quoting all of paragraphs 11 through 13 of the decision:

> **[11]** In its reconsideration of the suitability of Osadchuk, the Listings Committee determined it did not have any new information that would overturn its prior determination. Furthermore, it noted that Osadchuk's activities with the Appellant were related to financing and dealing with investors and his role would permit oversight of his own interests.
> **[12]** The Appellant advised it is aware of the CSE Policies and aware of the discretionary authority of the CSE. The Appellant submitted that Osadchuk made significant contributions to the company, that if appointed as a director he would be only one of five directors, and he would hold no unilateral power. Furthermore, in terms of the IDA Ruling, the conduct ruled upon at that time occurred 18 years ago. The Appellant submitted that the CSE Board should give appropriate weight to such - Osadchuk was young and inexperienced when the misconduct occurred.
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> **[13]** The Hearing Panel concludes that the Listings Committee properly acted within its authority, reasonably applied the Policy requirements, and appropriately applied its discretion in making a determination of "not suitable". It is not the Hearing Panel's place to second guess the IDA Ruling. A permanent prohibition was imposed by the IDA Hearing Panel which concluded that Osadchuk's conduct was similar to the most serious forms of misconduct. This is sufficient grounds for the Listings Committee on which to base its not suitable determination.

[37] The CSE clearly listened to Osadchuk's submissions regarding his value to Citation Growth, his youth and inexperience at the time of the conduct as a Registered Representative, his clean record of conduct in the many years since and the need of the CSE to set a standard for its listed companies. We find that the CSE did not overlook any material evidence. The CSE decided that the conduct which was the subject of the IDA Ruling was very significant and the determination of unsuitability made by the Listings Committee was a reasonable one. We find that the decision of the Hearing Committee was itself reasonable.

[38] It is important to note that the Contraventions which were the subject matter of the Settlement Agreement were not limited to unauthorized trading. Osadchuk's contraventions went further and included the delivery of explanations and documents designed to conceal improper activity. We consider Contraventions of that nature to be very serious.

[39] There is one submission made by the CSE which we do not accept. We do not agree that the only way there could be a reasonable basis to support Osadchuk's candidacy as a director or officer of a listed issuer would be if Osadchuk first obtains a reversal of or pardon of the IDA Ruling. It may be that the day will arrive when, on application, Osadchuk presents evidence that, among other things, sufficiently addresses concerns

about his integrity and proposed role with a particular listed issuer such that the CSE considers he is suitable to serve as an officer or director of that issuer. Such a finding would be within the discretion of the CSE to make, subject always to the Commission's review power. However, that is not the case before us, and is a question for a future date.

[40] At present, it is our obligation to rule on the present application. We find that the CSE decision was reasonable, and made in accordance with the CSE's policies and the regulatory framework. As Osadchuk has not met the burden required for us to set aside or substitute a different decision than that of the CSE, we dismiss Osadchuk's application.

October 28, 2020

For the Commission:

Gordon Johnson
Vice Chair

Deborah Abbey
Commissioner

Audrey T. Ho
Commissioner