ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Hemostemix Inc., 2017 ABASC 14 **Date: 20170202**

Hemostemix Inc.
Appeal of TSX Venture Exchange Decision

Panel:	Tom Cotter Stephen Murison
Representation:	Chris Simard Michael Mysak David McKinnon Michael Selnes Peter Inglis for Jed M. Wood et al. (Appellants)
	Linda Plumpton James Gotowiec for the TSX Venture Exchange
	Orestes Pasparakis Andrea Campbell Kathleen Cowick for Hemostemix Inc.
	Denise Weeres Tracy Clark for Commission Staff
Submissions Completed:	November 2, 2016
Oral Decision:	November 4, 2016
Written Decision:	February 2, 2017

5334064.1

TABLE OF CONTENTS

I. BACKGROUND

A. Introduction

[1] A group of shareholders (the **Appellants**) of Hemostemix Inc. (**Hemostemix**) appealed the decision by the TSX Venture Exchange (the **TSXV**) to approve a private placement of securities by Hemostemix (the **Placement**) without requiring the approval of Hemostemix shareholders. The appeal was commenced on September 30, 2016 under section 73 of the *Securities Act* (Alberta) (the **Act**).

[2] We heard the appeal on November 2 (unless expressly otherwise indicated, all dates cited herein were in 2016). We received the documentary record pertinent to the TSXV decision (the **Record**, which included correspondence between TSXV staff and Hemostemix's counsel, and between TSXV staff and Appellants' counsel, some Hemostemix public disclosure, and internal TSXV documents dealing generally with aspects of its processes and considerations when asked to approve a private placement). We also received submissions from the Appellants, the TSXV, Hemostemix and ASC staff (**Staff**).

[3] In view of the time-sensitive nature of the matters at issue, we delivered our decision on the appeal orally on November 4. Stated briefly, we concluded that none of the grounds upon which the ASC may disturb the decision of the TSXV had been established. We therefore dismissed the appeal, with written reasons to follow. Those reasons are set out below.

B. Parties

1. Hemostemix

[4] Hemostemix's common shares are listed for trading on the TSXV. The Record indicated that Hemostemix is a clinical-stage biotechnology company. Facing a serious liquidity challenge, it had sought to raise up to $5,000,000 through a private placement in or about April 2016. Although unsuccessful in that effort, Hemostemix later raised $1,610,000 by way of loans on unspecified terms (the **Loans**, which increased to $1,644,000 as discussed below). The Loans were to be "converted" into new securities issued in the Placement.

[5] Among Hemostemix's larger shareholders before the Placement were Victor Redekop (**Redekop**, a Hemostemix director holding approximately 12% of its common shares) and Charles Baker (**Baker**, a former director and chief executive officer of Hemostemix, holding approximately 14% of its common shares). Lyle Wunderlich (**Wunderlich**) held 3.85% of Hemostemix's common shares immediately before the Placement.

2. Appellants

[6] The notice of appeal described the Appellants as "a group of concerned shareholders" of Hemostemix, represented by one of them, Jed Wood (**Wood**). The Appellants' submissions indicated that the same individuals were also identified as concerned shareholders in a dissident proxy circular issued in connection with an annual and special meeting of Hemostemix shareholders held on September 8 (the **Shareholder Meeting**).

3. TSXV

[7] The TSXV is an exchange recognized by the ASC under section 62 of the Act. It regulates issuers whose securities are listed on the TSXV.

C. Terms of the Placement

[8] An August 11 Hemostemix news release (the **August Release**) set out the framework of what would become the Placement. Although presented as an amendment of the earlier (unsuccessful) private placement, the August Release appeared primarily to relate to the $1,610,000 already raised through the Loans, specifically to the terms of the securities to be issued to the lenders. The August Release stated that the $1,610,000 came "from several parties, including current and former insiders". Of that amount, $1,000,000 was attributed to what the August Release termed "an arm's length party" (not identified at that time), and was to be converted into a non-interest-bearing three-year debenture (the **Debenture**) secured by a general security agreement (a **GSA**) over all of Hemostemix's assets, and convertible at the holder's election into units each consisting of a common share and a share-purchase warrant. The remaining $610,000 in Loans ($430,000 of that amount was attributed to persons referred to in the August Release as "current insiders" of Hemostemix) was to be converted into unsecured promissory notes of Hemostemix (the **Notes**).

[9] On August 25 (two weeks after the August Release) Hemostemix applied to the TSXV for approval of the Placement (the **Application**). The Application included a TSXV Form 4B *Notice of Private Placement* (the **Form 4B**) setting out the terms of the Placement, a copy of the August Release, and the forms of Debenture and Notes. The Placement amount now totalled $1,644,000, with the Notes now totaling $644,000 ($464,000 of which was linked to "current insiders"). More specifically, the Form 4B identified Wunderlich as the "Placee" of the $1,000,000 Debenture and a $180,000 Note, and Baker and Redekop as placees of $114,000 and $350,000 Notes respectively. The Form 4B also disclosed that if Wunderlich converted the Debenture and exercised the warrants, he would hold 19.47% of Hemostemix's common shares. (This calculation was inaccurate; the correct percentage would be closer to 16%. Neither this inaccuracy, nor other inaccurate calculations presented to the TSXV or before us, affected our decision.)

[10] Certain terms of the Debenture, as set out in the Application, differed from what had been announced in the August Release. The Notes would now also be convertible into Hemostemix common shares, at a conversion price of $0.16. Each unit issuable upon conversion of the Debenture (at a conversion price of $0.16 per unit) would now consist of one common share and just half a warrant (each whole warrant entitling the holder to acquire a common share within 36 months at an exercise price of $0.30). What the August Release had described generically as "customary change of control provisions" for the Debenture were now articulated to include a provision that upon a change of control of Hemostemix the Debenture's maturity date would accelerate and it would then bear interest at the rate of 10%.

D. Complaints from the Appellants

[11] Beginning on August 25 (the Application date) the Appellants' counsel made numerous complaints about the conduct of Hemostemix and individuals connected with it, in a series of telephone and written communications to **AH**, the TSXV analyst assigned to the Application.

[12] The essence of the Appellants' complaints was that the Placement would create a "**new Control Person**" – namely, Wunderlich – and that the Placement was a defensive tactic in the proxy battle surrounding the upcoming Shareholder Meeting. The determination of a new Control Person (we adopt this TSXV term in our decision) for TSXV purposes is discussed

below. The Appellants noted that Wunderlich had "longstanding connections to Hemostemix", by virtue of his connections to two companies of which Hemostemix was the successor by amalgamation (Wunderlich had been a director of one and a shareholder of both).

[13] In a September 6 email, the Appellants' counsel asserted that the Appellants' "concerns have only been exacerbated and amplified":

> We can confirm unequivocally that Mr. Wunderlich is supported [by] the current entrenched board of directors and executive management, having been one of most of their (subject to the 2 recently appointed replacements for recent resignations) fellow directors . . .

[14] The Appellants' counsel urged the TSXV to require approval by Hemostemix shareholders before granting final TSXV approval of the Placement, asserting that such shareholder approval was required by what the Appellants contended was the proper application of the TSXV's own policies.

[15] A September 8 email from Appellants' counsel stated that the Appellants would that day apply for injunctive relief regarding the TSXV's proposed final approval of the Placement and would appeal that approval to the ASC.

E. Communications Between the TSXV and Hemostemix

[16] Learning of concerns relating to the Application, Hemostemix (through counsel) communicated with AH in support of the Application. One such communication, an August 31 email, stated that:

- the Placement securities could not affect the Shareholder Meeting outcome because the record date for the Shareholder Meeting was August 4;
- the Loans had been negotiated well before the dissident Shareholder Meeting proxy circular was filed;
- the Loans (to be converted in the Placement) were intended "not to entrench the board and management with more shares", but rather "to ensure the survival of the company";
- with respect to the aggregate shareholdings of Baker and Redekop (on the one hand) and Wunderlich (on the other), there would be "no absolute change of control";
- also with respect to those individuals, "the parties are not acting in concert but rather what they believe are in the best interests of the company and its continued existence", Wunderlich being "an avid supporter" of Hemostemix whose $1,000,000 investment was "critical to funding [Hemostemix's] ongoing phase 2 trial"; and
- Hemostemix's directors had earlier "rejected a very onerous . . . funding proposal from the dissidents (Jed Wood) that, if accepted, would have likely triggered a default and foreclosure on the company's stem cell intellectual property".

[17] That email was accompanied by two documents described by Hemostemix's counsel as "board minutes" (the **Minutes**). According to Hemostemix's counsel, the Minutes showed that the $1,000,000 "loan was being negotiated at the board level on July 18 and discussions were

well [under way] many weeks prior to that", and "that emergency funding discussions were [under way] several months before the dissidents filed their circular or the complainant contacted the TSXV". These statements were presumably made to dispel any concern that the Placement was a defensive tactic in the proxy contest.

[18] AH sent to Hemostemix's counsel on August 31 letters conditionally accepting the Placement of the Debenture and the Notes respectively (the **Conditional Acceptance**), subject to conditions including that "Shareholder approval will be required if the [Placement] results in a new Control Person being created."

[19] Communications continued between AH and Hemostemix. In part these provided information and representations concerning whether Wunderlich would become a new Control Person.

[20] In a September 2 email to AH, Hemostemix's counsel represented that, "[t]o the best of [counsel's] knowledge, Wunderlich is not acting in concert or jointly with management." Minutes later, AH asked Hemostemix's counsel to provide confirmation of that representation from Wunderlich and management. Before sending such written confirmation, Hemostemix's counsel also responded to a request from AH for confirmation that Wunderlich "doesn't have any superior rights". That response was:

> [Wunderlich] does not have any superior rights over any shareholders. His debenture will be secured with a GSA and he will receive common shares and warrants if the debenture is converted.

[21] On September 7 Hemostemix's counsel responded to AH's earlier request, attaching to an email a September 6 written acknowledgement (the **Acknowledgement**), signed by Wunderlich and stating that Wunderlich was not "acting in concert or jointly" with Hemostemix's management or board of directors, and that he had "no involvement in the running of the day to day operations" of Hemostemix. A director of Hemostemix also signed the Acknowledgement, confirming that "Wunderlich is not acting in concert or jointly with the board of directors or management" of Hemostemix. The Acknowledgement defined the phrase "Acting in Concert or Jointly", without any indication of the source of the definition.

[22] In this September 7 email Hemostemix's counsel asserted that "Wunderlich is not a director of the company, as alleged by the dissidents". The email explained that the current terms of the Debenture and the Notes were necessary to satisfy "the holders", who otherwise "would have demanded immediate repayment [of the Loans] and the company would be insolvent". Counsel further stated that the Hemostemix board had exercised its "reasonable business judgment . . . to secure short term funding to ensure the survival of the company".

[23] We note that some of the emails between AH and Hemostemix's counsel referenced telephone contact, such as "Got your message", "Further to our call", "Please call with any questions", and "In our conversation". Similar comments appeared in emails between AH and the Appellants' counsel (including "Further to our telephone conversation" and "I should generally be available for a call"). A TSXV document referred to three telephone discussions between Appellants' counsel and TSXV staff. All these references persuade us that some of the

discussions at the time between representatives of these three parties were not in writing and, therefore, not necessarily preserved in the Record. We found no indication that any non-preserved conversations would have been inconsistent with what appeared in the Record.

F. The TSXV Decision

1. Conditional Acceptance

[24] As noted, the TSXV granted the Conditional Acceptance on August 31.

[25] The TSXV Corporate Finance Manual (the **TSXV Manual**) includes Policy 4.1 *Private Placements* (**Policy 4.1**, discussed in greater detail below), which allows an issuer to close a private placement following receipt of conditional acceptance (if permitted by Policy 4.1) and before receipt of final acceptance. The Conditional Acceptance stipulated certain requirements that had to be satisfied before the TSXV would grant final acceptance. The closing date for the Placement was September 2.

[26] An undated and unattributed TSXV internal memorandum (the **Memorandum**) set out a chronology of the events surrounding the Placement application in some detail, including the terms of the Placement, and communications with counsel for Hemostemix and the Appellants. The conclusion reached prior to issuance of the Conditional Acceptance is found at paragraph 6 of the Memorandum:

> The [TSXV] reviewed the submission in light of the complaints from the Concerned Shareholders; the [TSXV] came to the conclusion that the 20% threshold for the change of control was not met, and upon confirmation from the company, since there [were] no superior rights for the investor nor any director/management position for the investor, the control person argument was not valid. Further, since the record date had passed and the votes for the shares in this financing could not be used to sway the vote on September 8th, this concern was also not a reason to hold the financing back. Further, the company demonstrated a need for the funds and the reasoning behind the GSA, which the [TSXV] deemed reasonable. Finally, the argument regarding the punitive change of control provision on the interest rate, from zero to ten percent, was not punitive in consideration of the overall loan arrangements within the venture marketplace. . . . .

2. Final Acceptance

[27] As noted, Appellants' counsel reiterated and elaborated on the Appellants' concerns in a September 6 email to AH, then advised on September 8 (the Shareholder Meeting date) of their intention to seek injunctive relief and appeal the TSXV's decision. The following day, September 9, the TSXV issued its final acceptance letters approving the Placement (the **Final Acceptance**).

[28] The Memorandum referred to the September 6 email and to further actions and deliberations of the TSXV prior to issuance of the Final Acceptance. According to the Memorandum, the TSXV told Hemostemix that the Final Acceptance could not be issued on September 8 "in light of the complaints having to be fully investigated before final acceptance could be provided".

[29] The Memorandum discussed the Appellants' principal arguments – specifically concerning the issues of change of control, the interest rate and the shareholder approval requirement – and then stated:

> The [TSXV] determined in conversations internally, including the team manager, that the 20% threshold [relevant to a determination of control] was not met when considered with the fact that the shareholder did not hold any superior rights and taken with a signed declaration from the Company and Mr. Wunderlich stating that they were not acting jointly or in concert (Appendix 5). This was deemed a relevant document to ask the company for in the situation given the allegations. Although the investor was a former director, since he was no longer a director and has no intention (as confirmed by company's counsel) of becoming a director again.
>
> The punitive interest rate argument, as considered earlier seemed entirely reasonable given market conditions. Although there was a penalty for a change of control, the fact that the interest rate became ten percent from the original zero percent, seemed entirely reasonable given the predatory nature of loans to struggling companies in the venture marketplace.

3. Reasons

[30] The Record included a two-page internal memorandum, written by TH (a senior manager at the TSXV) and AH and dated September 9 (the **Reasons**, adopting the definition used by the TSXV in submissions). The Reasons contained background information similar to that set out in the Memorandum, and indicated that the lengthy August 26 and September 6 emails from Appellants' counsel to AH were attached to the Reasons as appendices. The Reasons concluded that the Placement should be given final acceptance without shareholder approval based on "[r]eceipt of satisfactory filing documentation" and the determination (using internal guidance; apparently the "Guidance" document referred to below) that Wunderlich's involvement did not constitute the creation of a new Control Person.

[31] In arriving at this conclusion regarding Wunderlich's involvement, the Reasons articulated three points:

- Wunderlich would hold 19.46% of the Hemostemix common shares upon conversion and exercise of all his Hemostemix securities. However there were no facts present to suggest that Wunderlich was acting in concert with others (the Reasons referred to the Acknowledgement).

- Wunderlich did not have the right, pursuant to the Placement, to appoint or nominate for election Hemostemix directors or officers, or the right to prevent Hemostemix from carrying out certain corporate actions without his consent. It was noted that the Debenture is secured by a GSA over all of Hemostemix's assets, consideration for a 36-month maturity date (unlike the unsecured Notes with the shorter maturity date of 12 months).

- While acknowledging that Wunderlich was a director and shareholder of one of Hemostemix's predecessors, that relationship with management "will not affect materially the control of" Hemostemix (the Reasons again referred to the Acknowledgement).

II. TSXV POLICIES AND GUIDANCE

A. Applicable Policies

[32] It was common ground among the parties that the relevant provisions are found in Policy 4.1, which relates to private placements for TSXV issuers. Section 1.12 of Policy 4.1 describes

three circumstances in which the TSXV will or may require an issuer to obtain prior shareholder approval for a private placement. Only 1.12(a) is relevant here:

> If the issuance of the Private Placement Shares and the Listed Shares issued on conversion of a Warrant or Convertible Security will result in, or is part of a series of transactions that will result in, the creation of a new Control Person, the [TSXV] will require the Issuer to obtain prior Shareholder approval of the issuance of such securities.

[33] Policy 1.1 *Interpretation* (**Policy 1.1**) of the TSXV Manual defines "Control Person" (which term we use in this decision, along with the mentioned associated concept of "new Control Person"):

> **"Control Person"** means any Person that holds or is one of a combination of Persons that holds a sufficient number of any of the securities of an Issuer so as to affect materially the control of that Issuer, or that holds more than 20% of the outstanding Voting Shares of an Issuer except where there is evidence showing that the holder of those securities does not materially affect the control of the Issuer.

[34] Staff pointed to some differences between that TSXV definition and the definition of "control person" in section 1(l) of the Act. It is unnecessary to analyze here the precise differences in the respective definitions, but the fact they are different is noteworthy for two reasons.

[35] First, the Act and the TSXV Manual operate in different circumstances. In the Act, a "control person" may be subject to a prospectus requirement when distributing securities. In the TSXV Manual, the creation of a new Control Person in connection with a private placement triggers a requirement for prior shareholder approval.

[36] Second, the difference is relevant to the Appellants' contention that the TSXV erred in law by failing to consider and apply the correct test for a new Control Person. In so arguing, they asserted that the definition under the Act is "consistent with the test for a control person in TSXV Policy 1.1".

B. Internal Guidance

[37] The Record included a 10-page internal memorandum dated October 29, 2013 titled "Assessing Change of Control and Creation of a New Control Person Situations" (the **Guidance**).

[38] The Guidance includes the following caution:

> NOTE: The guidance provided in the memo is intended to serve as a **<u>framework</u>** for [TSXV staff] to follow in assessing whether or not a transaction involves either a Change of Control or the creation of a new Control Person. **Although certain very specific guidance is provided in this memo, <u>it is not all encompassing</u> and assessments shall ultimately be made on a case by case basis taking into account the facts specific to a particular transaction**. As such, elements of independent judgement and discretion on the part of [TSXV staff] will be a part of the process. [emphasis in original]

[39] The Guidance addresses four questions relevant to assessing whether a transaction will create a "new Control Person" or effect a "Change of Control" (the Guidance defines these two outcomes collectively as a **New Control Transaction**, a term we also adopt in this decision although only the "new Control Person" element is relevant here):

- "Who Comprises the Acquiring Party?" – are there persons acting in concert?
- "How Many Voting Securities Will the Acquiring Party Hold?" – convertible securities may be relevant.
- "Does the Acquiring Party Hold any Superior Rights?" – discussed in these reasons.
- "What is the Acquiring Party's Relationship with Management?" – a non-arm's length relationship may affect the acquiring party's ability to affect control.

[40] The Guidance then sets out the review procedures to be followed by the TSXV where the acquiring party will own 20% or less of the issuer's securities post-transaction, or where the acquiring party will own more than 20% of the issuer's securities post-transaction. This is why the determination of "acting in concert" was crucial in the circumstances – if Wunderlich were not acting in concert with any others, he would own less than 20% post-transaction; if he were acting in concert with Baker and Redekop (or one of them), he would own more than 20% post-transaction.

[41] If the acquiring party will own more than 20% after the transaction, the TSXV will deem the transaction to be a New Control Transaction unless evidence "reasonably shows that the shareholder in question does not affect materially control of the Issuer". However, if the acquiring party will own 20% or less after the transaction, the TSXV will not deem the transaction to be a New Control Transaction, but will make a determination "after taking into account all factors relevant to the [TSXV]". The Guidance further states that if the acquiring party will hold 20% or less, "does not hold a Superior Right" and "is independent of the Issuer's management", then the TSXV "<u>will not</u> consider the transaction to be a New Control Transaction" (emphasis in original). Independence in that context is described in the Guidance as "none of the directors or officers of the Issuer is a Non-Arm's Length Party of the Acquiring Party".

[42] If an acquiring party will own 20% or less after a transaction and the TSXV makes an initial determination that that transaction is a New Control Transaction, the issuer and the acquiring party are given an opportunity "to present evidence that the Acquiring Party does not affect materially control of the Issuer" or that the transaction is not otherwise a New Control Transaction.

[43] As there was considerable argument on appeal on the issue of whether Wunderlich received a "**Superior Right**" (we also adopt this TSXV term in our decision) as a result of the Placement, it is useful to reproduce the Guidance definition (and its associated footnote) in its entirety:

> "**Superior Right**" means any right or benefit granted by an Issuer, whether contractual or pursuant to some other arrangement or understanding, whether written or unwritten, that is above and beyond the rights held by a typical shareholder of the Issuer <u>and</u> which directly or indirectly

> allows the holder of the right to exert influence over the management or conduct of the Issuer's business and affairs including its ability to complete other transactions or corporate actions. Superior Rights include, without limitation:
>
> (i) director nomination or appointment rights;
>
> (ii) management appointment rights; and
>
> (iii) rights that prevent or restrict the Issuer from carrying out certain actions without the consent of the Acquiring Party (these may include, for example, quasi-veto rights (e.g. the Issuer cannot complete a material corporate action, such as the sale of a principal property, without the consent of the Acquiring Party[2]) to material procedural input (e.g. the Issuer's work program or business plan must be consented to by the Acquiring Party)). [emphasis in original]
>
> [2] [TSXV staff] should note that the [TSXV] may have concerns with an Issuer granting these types of Superior Rights to persons other than secured creditors. If [TSXV staff] is aware that this type of Superior Right is proposed, [TSXV staff] should consult with their Team Manager and Director/VP regarding their acceptability.

[44] The review procedures section of the Guidance stipulates that the granting of any of the following three Superior Rights to an acquiring party will result in an initial determination that the subject transaction is a New Control Transaction:

> (a) The right to appoint or nominate for election <u>more than</u> 1/3 of the Issuer's directors upon completion of the transaction.
>
> (b) The right to appoint the Issuer's CEO upon completion of the transaction.
>
> (c) The right to prevent the Issuer from completing any future financing, material acquisition, material disposition or merger without the Acquiring Party's consent. [emphasis in original]

III. ISSUES

A. Appellants' Statement of Issues

[45] The Appellants argued that the TSXV erred:

- "by failing to exercise its discretion to determine that the" Placement would create a new Control Person, thus causing a change of control and requiring a shareholder vote;
- "in its interpretation and application of the public interest to" its decision;
- "by disregarding material information and by failing to make all necessary inquiries as to whether" the Placement would materially affect control of Hemostemix; and
- "in failing to seek relevant evidence to supplement" the Record (the Appellants contended that there were gaps in the Record).

[46] In arguing these issues, the Appellants focused on two principal grounds. First, that the TSXV should have concluded that Wunderlich was acting jointly or in concert with Redekop or Baker (or both), thus leading to a deemed New Control Transaction. Second (apparently in the alternative), the Appellants argued that Wunderlich had Superior Rights, which should have led

to the TSXV concluding that Wunderlich was a new Control Person. In either scenario, a shareholder vote would be required. The Appellants also argued that the TSXV erred by failing to consider the perception of the public interest in its decision.

[47] In consequence of the alleged TSXV errors, the Appellants sought the following ASC orders:

- staying the TSXV decision until the disposition of the appeal (this was not pursued);
- requiring Hemostemix to obtain prior shareholder approval as a condition of TSXV approval of the Placement; and
- prohibiting Hemostemix from issuing certain securities or implementing financing proposals connected with the Placement without first obtaining prior shareholder approval of the Placement.

B. TSXV's Statement of Issues

[48] The TSXV submitted that there were two issues: (a) the appropriate standard of review of the TSXV decision, including the issue of adequate reasons; and (b) whether the ASC should defer to the TSXV decision (given the standard of review, the Reasons and the contents of the Record). The TSXV stated that the TSXV neither erred in law nor overlooked material evidence. The TSXV also argued that the public interest in an efficient capital market is served by consistent application of TSXV principles and policies to private placements.

C. Hemostemix's Statement of Issues

[49] Hemostemix did not separately articulate the issues but contended this was not one of the rare situations in which the ASC would intervene in a TSXV decision. Similar to the TSXV, Hemostemix argued there was neither an error in law nor a failure to consider material evidence. Hemostemix made a similar public interest argument to that advanced by the TSXV, adding that it would be contrary to the public interest in market certainty to allow the appeal when the Placement had already closed. A prominent contention from Hemostemix was that the appeal had ulterior motives insofar as Hemostemix had rejected a financing proposal from Drive Capital Corporation (**Drive Capital**, which according to Hemostemix had been co-founded by the Appellants' representative, Wood). The rejected financing proposal would apparently have given Drive Capital "effective control over" Hemostemix. Hemostemix also pointed to the Appellants' proxy contest loss at the Shareholder Meeting. Hemostemix's submissions thus characterized the Appellants as a "bitter bidder", attempting to use the appeal process to force Hemostemix "back to the negotiating table".

D. Staff's Statement of Issues

[50] Staff provided submissions outlining the legislative and policy-making history of the definitions of "control person" found in the Act and the TSXV Manual. Staff also discussed the issues of control and Superior Rights, as well as what they termed "special access" to management. In the end, Staff suggested that we could substitute our own decision for that of the TSXV on the basis that the TSXV either did not have all of the material facts before it with which to make a decision, or that it was unclear whether the TSXV considered certain evidence in making its decision. Staff refrained from making a recommendation as to what such a substituted decision should be, because "certain information is not on the Record".

Alternatively, Staff suggested that, were we to conclude that the TSXV erred or failed to consider material evidence, we could refer the matter back to the TSXV for reconsideration, given their expertise and the need for market certainty.

E. Non-contentious Issues

1. Appeal Filed in Time

[51] Although we note Hemostemix's complaint that the appeal was filed on the last day of the 30-day appeal period provided for in section 73 of the Act, the appeal was filed in time.

2. Standing

[52] There was no dispute that the Appellants are "directly affected by a . . . decision . . . of a recognized exchange", and thus have standing to bring this appeal under section 73 of the Act.

[53] In considering the scope of "directly affected" in section 73 of the Act, the Court of Appeal in *Bahcheli v. Alberta Securities Commission*, 2007 ABCA 166 at para. 51, stated that proposed appellants "must demonstrate a direct effect of a decision and not mere dissatisfaction with the decision and the reasons for arriving at that decision". The Record was clear that there was an active proxy contest between the Appellants and the Hemostemix board and management at the relevant time. Even apart from the Appellants' dissatisfaction with Hemostemix's direction, we note that the Appellants were Hemostemix shareholders, and we agree with the conclusion of the Ontario Securities Commission (the **OSC**) on the question of standing made in *Re HudBay Minerals Inc.* (2009), 32 O.S.C.B. 3733 at para. 74:

> . . . In our view, a shareholder of a listed issuer is directly affected by a decision of the TSX not to require a shareholder vote in connection with a proposed transaction that has direct consequences to that shareholder. . . .

[54] We are of the view that a TSXV decision not to require a shareholder vote in connection with a proposed private placement that could affect voting control of a public issuer which is the subject of a proxy contest, would have direct consequences to dissenting shareholders, thus making them "directly affected".

IV. STANDARD OF REVIEW

A. The Test

[55] Section 36(3) of the Act states:

> (3) On conducting an appeal, the [ASC] may, by order,
>
> (a) make any decision that the person who heard the matter in the first instance could have made and substitute the [ASC'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.

B. Reasonableness and Deference

[56] The above-quoted provision gives the ASC broad discretion when reviewing a decision of the TSXV. There are two important concepts within this framework: reasonableness and deference. *Dunsmuir v. New Brunswick,* 2008 SCC 9 is instructive on both concepts.

[57] Regarding "reasonableness", the majority of the court in *Dunsmuir* stated (at para. 47):

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[58] The majority then turned to "deference" (at para. 49):

> Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D.J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[59] For "jurisdictional and some other questions of law", correctness is the standard, and deference is not shown in that process: "This promotes just decisions and avoids inconsistent and unauthorized application of law" (*Dunsmuir* at para. 50).

[60] In other words, "many legal issues attract a standard of correctness"; and "questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness" (*Dunsmuir* at para. 51).

[61] There was some inconsistency in the parties' presentations of the standard of review, although they generally agreed that "reasonableness" was the appropriate standard. It is well accepted that the ASC "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" (*Re D'Addario*, 2009 ABASC 557 at para. 27). Each party referred to and accepted the principle that the ASC should defer to a decision of the TSXV unless at least one of five grounds (set out below) applies. According to the Appellants, three of those grounds warranted our interference with the TSXV's decision. We address these arguments below.

C. General Approach

[62] In considering an appeal of a TSXV decision, the ASC assesses whether the TSXV is entitled to deference. Such deference amounts to recognition that the TSXV has expertise in supervising the listing and trading of securities on the exchange it operates, and in administering the rules and policies it develops for that purpose. However, should any of five grounds be present, the ASC will conclude that deference is not warranted. In cases where deference is warranted, the ASC will interfere with the impugned TSXV decision only if it falls outside a range of reasonableness (per *Dunsmuir*, discussed above).

D. Grounds Warranting Intervention

[63] The five grounds that could lead to a determination that a TSXV decision does not warrant deference are derived from decisions including *D'Addario* at para. 27 and *TSX Venture Exchange Inc. v. McLeod*, 2005 ABASC 607 at paras. 161-62; the same principles were recently examined by the OSC in *HudBay* at para. 105, referring to *Re Canada Malting Co.* (1986), 9 O.S.C.B. 3566 at 3587:

- the TSXV proceeded on an incorrect principle;
- the TSXV erred in law;
- the TSXV overlooked material evidence;
- new and compelling evidence is presented to the commission that was not presented to the TSXV; and
- the commission's perception of the public interest conflicts with that of the TSXV.

[64] The Appellants argued that three of these factors applied here: the TSXV erred in law; the TSXV overlooked material evidence; and "the TSXV erred by failing to consider the perception of the public interest in its final decision".

E. On the Record or De Novo?

[65] In *HudBay*, the OSC concluded that it had "original jurisdiction" and could conduct its hearing and review "as a trial *de novo*". The OSC clarified (at para. 111) that doing so was subject to the OSC "concluding that it has grounds to intervene based on one of the five grounds for intervention", as set out above. According to the OSC, the grounds referring to "new and compelling evidence" and to a differing "perception of the public interest" gave additional support to the conclusion that it could consider information in addition to that which was before the original decision-maker there (at paras. 112-13).

[66] The panel in *TSX Venture Exchange Inc. v. McLeod* (at para. 6) noted that a preliminary decision in the same matter had concluded that the appeal there should proceed on the record, not as an appeal de novo – although the record could be supplemented by oral testimony and related documents. That preliminary decision had stated that "an appeal under section 36 of the Act is generally on the record, but can be an appeal de novo in appropriate circumstances" (*Re McLeod*, 2005 ABASC 191 at para. 59).

[67] We are satisfied that we have the authority to receive new evidence in this appeal (see also *Re Ironside*, [2002] A.S.C.D. No. 158 at para. 31, as cited in *Re McLeod* at para. 48). Indeed, some parties referred in their submissions to documentation not comprising part of the

Record, and we accepted into evidence an undertaking dated contemporaneously with this hearing. However, we did not ultimately give any weight to this new evidence.

V. ANALYSIS OF TSXV DECISION PROCESS

A. Did the TSXV Err in Law?

[68] The Appellants' contended that the TSXV erred in law by failing "to consider and apply the correct test for a Control Person under the Act and the common law". They cited the definition of "control person" in the Act and a decision of the British Columbia Securities Commission (the **BCSC**) in *Mercury Partners & Co. v. Canadian Venture Exchange Inc.,* 2002 BCSECCOM 173. The BCSC concluded in *Mercury* (at para. 61) that the exchange "would have had to examine the entire circumstances of the private placement to determine whether it would result in a Change of Control" at the company in question.

[69] Although acknowledging the differences (mentioned earlier) between the definitions of "control person" in the Act and in the TSXV Manual, the Appellants argued that such differences were not material because the definitions share "fundamental components": the same "ultimate standard" of affecting control post-transaction; and the consideration of the acquiring party as "a group if there is an element of acting in concert".

[70] We do not view the definition of "control person" in the Act (and the surrounding jurisprudence) as determinative of the test the TSXV ought to have applied in interpreting its policies. As mentioned, the definitions in the Act and in Policy 1.1 cover different circumstances and serve different regulatory purposes. The resale of securities held by control persons – which the Act's definition addresses – engages certain market fairness considerations because of the informational advantage which may be held by a control person (for example a control person may have information about the issuer that other market participants do not, and thus the Act requires that such a control person file a prospectus providing full, true and plain disclosure about the issuer before the securities are sold, subject to limited exceptions). On the other hand, Policy 4.1 (using the definition from Policy 1.1) gives an issuer's shareholders a vote on a private placement that would result in the creation of a new Control Person – one who would "affect materially the control of that Issuer".

[71] Notwithstanding the different definitions and regulatory purposes, the approach under the Guidance is not dissimilar to the approach taken under the Act. The Guidance itself notes that the key component in assessing the "creation of new Control Person" is "affect[ing] materially the control of an Issuer", which component "is derived from the definition of 'control person'" in provincial securities laws (Guidance, section I).

[72] We are of the view that the TSXV applied the correct test, having regard to the Guidance, in deciding to approve the Placement.

[73] The evidence did not support the Appellants' contention that the TSXV confined the analysis solely to a 20% "bright line" test in identifying whether the Placement would result in a new Control Person. It is evident from the Record that the TSXV considered both heads of the definition of "Control Person" found in TSXV Policy 1.1 and forming the basis of the review procedures in the Guidance. That is, the TSXV addressed both the 20%-or-less scenario and the more-than-20% scenario.

[74] Specifically, we are satisfied that the TSXV assessed whether Wunderlich was a joint actor with other Hemostemix shareholders. Had the TSXV concluded that Wunderlich was so acting, those joint players would hold, in the aggregate, more than 20% of the common shares, which would result in a new Control Person being deemed. Having addressed its mind to this possibility, the TSXV concluded that Wunderlich was acting on his own, meaning that the relevant share percentage would not exceed 20%; the Reasons clearly stated the TSXV's conclusion that "No facts are present to suggest that Lyle Wunderlich [was] acting in concert with another Person." The Reasons indicated that the TSXV then considered Superior Rights and independence, which would be "factors relevant to the [TSXV]" as contemplated in the Guidance. (The Appellants' contention that the TSXV erred in concluding that Wunderlich did not have Superior Rights is inextricably linked with their contention that the TSXV overlooked material evidence; we discuss both issues below.)

[75] We are satisfied that the TSXV did not err in its approach – considering whether Wunderlich was acting jointly or in concert, then considering the issue of Superior Rights – which was consistent with its Guidance.

[76] In so doing, the TSXV considered the Acknowledgement, as well as other information and submissions from Hemostemix and from the Appellants. The TSXV also received the representation from Hemostemix's counsel that "Wunderlich is not acting in concert or jointly with management". The TSXV relied on the Acknowledgement and the quoted representation. We consider that it was entitled to do so in the circumstances, and did not need to enquire further or otherwise look behind them. Read in context, these elements of the evidence could only be construed as referring to Wunderlich's relationship with Hemostemix management and with the two significant shareholders, Baker and Redekop. The evidence disclosed nothing that in our view ought to have caused the TSXV to doubt the veracity or pertinence of the representation from Hemostemix's counsel or the Acknowledgement.

[77] As discussed below, we also conclude (given the evidence, and the wording of its own Guidance) that the TSXV was entitled to reach the conclusion it did regarding Superior Rights.

[78] In sum, the evidence satisfied us that the TSXV did not err in law in reaching the conclusions it did.

B. Did the TSXV Overlook Material Evidence?

[79] The Appellants contended that the TSXV overlooked material evidence by failing to consider evidence from the Minutes as to Wunderlich's position, and by failing to consider the provisions in the Debenture (and provisions possibly in the GSA) pertaining to what the Appellants cast as Wunderlich's Superior Rights. Staff submitted that nothing in the Record indicated "that the TSXV considered Mr. Wunderlich's special access to" the management and board of Hemostemix or "considered the Negative Covenants" in the Debenture.

1. The Minutes

(a) Pertinent Evidence

[80] The Record included copies of Minutes for two July 18 meetings involving (but not restricted to) Hemostemix directors: the **3:00 Meeting** and the **4:10 Meeting**. We here summarize pertinent portions of those Minutes.

(i) 3:00 Meeting

[81] The Minutes described the 3:00 Meeting as a "Conference Call". Listed attendees included Wunderlich (identified as "Insider") and **AJ** (not a director, he presented a report on financing options and was identified as "Guest"). The sole agenda topic was the **AJ Report**.

[82] The 3:00 Meeting Minutes recorded discussion of three "Options for raising money":

> 1. $1 million loan from Lyle Wunderlich is to be converted and secured.
> 2. Drive Capital Debenture contemplates the same $1 million and another $3 million to be secured.
> 3. Dilute with shares and raise equity.
>
> Items 1 and 2 will have a tough time coexisting. If we go with [Drive Capital] option, then would have to repay what Lyle put in.

[83] According to the 3:00 Meeting Minutes, Wunderlich explained that "funds would be convertible, note to convert to equity and secured against the assets of the corporation. Secured until converted".

[84] AJ stated "We should concentrate on Options 1 or 3 as leaves in control of the Board."

[85] Wunderlich asked whether "we [have] heard anything" about the Drive Capital financing; DW (apparently a director) answered that he told Drive Capital there was a board "meeting today and would get back to them later".

[86] There were other references to Wunderlich's $1,000,000, including a mention by DW that "when we go to Board portion of this meeting", there should be a discussion of Wunderlich's "loan being fully secured against assets of the company. . . . Will have resolution at our [board meeting] which will follow this meeting."

(ii) 4:10 Meeting

[87] Although the 4:10 Meeting was also described in the Minutes as a "Conference Call", this appeared to be an official meeting of the board of directors. Wunderlich was again present, this time identified as "Nominated Director". The sole agenda topic was "Loans and Financing". The 4:10 Meeting opened with a call for "thoughts on presentation", presumably a reference to the discussion of the AJ Report at the 3:00 Meeting. Wunderlich stated: "[the presentation] was a preliminary analysis, funding is the biggest part of it. Which direction to go." He also referred to other individuals who were apparently possible sources of funds, but would "know more at 11:00 am tomorrow". Redekop stated there was "no point in pursuing Drive Capital any further", at which point Wunderlich queried what "the backup plan" would be if the additional funds did not "come through": "Renegotiate with [Drive Capital]? [If Drive Capital] comes in [Wunderlich] would want his $1 million back and they could go ahead." Elmar Burchardt

(**Burchardt**, President and Chief Executive Officer of Hemostemix) stated he did "not like everything in the [Drive Capital] proposal", but "keep [Drive Capital] open and talk about it more". When asked to discuss "other [Drive Capital] obstacles he sees", Burchardt stated: "[Drive Capital] to take management over", then referred to what appeared to be the possible effect on clinical trials and the possibility of future operations in Asia. After further discussions, two resolutions were passed: "prepare GSA for [Wunderlich]"; and "craft email to [Drive Capital] advising them not interested in LOI, conditions have changed but would like to talk with them then we will release [certain] materials". For the first resolution, the Minutes reported "All in favour", which indicated that Wunderlich voted. For the second resolution, the Minutes reported four as voting in favour, including Wunderlich.

(b) TSXV Access to the Minutes

[88] In a September 6 email, AH asked Hemostemix's counsel for a copy of the Minutes, stating: "In our conversation, you mentioned that you had the minutes from a meeting in July where these loans were originally discussed."

[89] The Appellants pointed to that email as casting doubt on whether the TSXV had reviewed the Minutes before September 6, although the Record indicated they had been provided to the TSXV by Hemostemix's counsel on August 31.

(c) Parties' Positions on the Minutes

[90] The Appellants referred to various portions of the Minutes as raising "red flags", including Wunderlich's identification as an "Insider" and as a "Nominated Director", his participation in the meetings, and his voting at the 4:10 Meeting. The Appellants read the Minutes as suggestive of Wunderlich having "special access" or acting jointly or in concert with others (including some or all of those in Hemostemix's management or on its board), thus requiring the TSXV to ask further questions and engage in critical thinking. The Appellants did not consider the Acknowledgement determinative of these questions, essentially contending that the TSXV could not take that document at face value. (We concluded to the contrary, above.) The Appellants also criticized the wording of the Acknowledgement as too limited, addressing neither whether Wunderlich acted jointly or in concert with the individuals Baker or Redekop (or both), nor whether Wunderlich had special access to management or to the board.

[91] Staff characterized the Minutes as showing that "Wunderlich was not treated as an ordinary shareholder [but] had special access to management and the board of directors, being permitted to attend and possibly vote at such meetings". Staff stated there was nothing in the Record indicating that the TSXV had considered this "special access to management and the Board in assessing whether he had the ability to 'affect materially the control of'" Hemostemix. Staff contended that the TSXV could reasonably rely on representations (such as in the Acknowledgement) as long as they "address the issue at hand" and are "made by a party who has the authority to make them". Here, Staff considered the Acknowledgement to be "limited" in two respects: not addressing Wunderlich's connections with any individuals; and the "seemingly narrow definition of acting in concert or jointly".

[92] The TSXV submitted that it was entitled to rely on the Acknowledgement "that [Wunderlich] is not 'acting in concert or jointly' [as defined in the Acknowledgement] with management or the board of directors of [Hemostemix] and . . . has no involvement in the

running of the day to day operations of [Hemostemix]". The TSXV also noted that the Acknowledgement was given as part of a response by Hemostemix to further questions asked by the TSXV, after the TSXV received additional communication from counsel for the Appellants, still suggesting a close relationship. The TSXV criticized the Appellants' and Staff's arguments as to Wunderlich's purported "special access" as not a standard part of the analysis regarding control persons, asserting that adopting such a standard where the decision-making process "is already carefully thought through in the [G]uidance" would be a "real mischief". The TSXV stated:

> Special access is not a term as used by both Staff and my friends that appears anywhere in the [Guidance]. It's not defined anywhere, has no particular meaning, even in the submissions being suggested, other than it may involve conversations or communications that occur between management and the board and an individual. . . .

[93] The TSXV argued that it "did identify a red flag, and the response to the red flag was to get the [Acknowledgement], and in the context of this administrative process, that's entirely appropriate". There was no need, according to the TSXV, to ask whether Wunderlich "was acting in concert with an associate".

[94] According to Hemostemix, the TSXV made its decision respecting Wunderlich's independence based on the evidence, and there was "no misapprehension of the evidence". Hemostemix suggested that the Minutes were not "fairly portrayed by the Appellants". In Hemostemix's interpretation of the Minutes, Wunderlich was being considered for a board position. However, Hemostemix stated that "the nomination was abandoned", thus meaning that Wunderlich was an investor and was not connected to the board – he "took steps that ensured his independence prior to his investment in the" Placement. Hemostemix contended that the 3:00 Meeting ended with the mention of securing Wunderlich's loan because those were "emergency funds" he had put in: "This isn't the convertible loan transaction. This is just security given to Mr. Wunderlich while the board is still considering which path it wants to go down."

[95] Hemostemix emphasized that the suggestion at the 3:00 Meeting that the board retain control came from AJ (a guest), and that in the 4:10 Meeting Burchardt (the CEO) wanted to keep talking about the Drive Capital proposal, and there was mention of the need to discuss what a transition plan to Drive Capital would look like. Hemostemix argued that indications in the 4:10 Meeting that the Drive Capital proposal was still being considered showed that Wunderlich was not "running this process".

[96] Hemostemix agreed with the TSXV that the latter was entitled to rely on the Acknowledgement. Hemostemix also asserted that the Acknowledgement was "very broad" and went "far beyond the test" of whether Wunderlich was exerting control over Hemostemix. In addition, Hemostemix pointed to an August 31 email from Hemostemix's counsel to AH, stating Hemostemix's view that there was no "acting in concert" and that there was "no absolute change of control", specifically referring in both instances to Baker's and Redekop's holdings. Hemostemix argued that this showed the TSXV had asked questions on this point and had received answers.

[97] Hemostemix reiterated that the Record did not contain all of the information before the TSXV, because the numerous telephone conversations were not included.

(d) Analysis Concerning the Minutes

(i) TSXV Review of the Minutes

[98] We address first the Appellants' claim that the TSXV had not reviewed the Minutes before September 6.

[99] The significance seemingly ascribed to that date was in our view unwarranted. The TSXV decision under appeal – final approval of the Placement – was given on September 9. It was not essential for the TSXV to have received the Minutes three days earlier in order to have reviewed them before making its final decision.

[100] The Record indicated that the TSXV received the Minutes on August 31 as an attachment to an email from Hemostemix's counsel. The Record did not reveal when the TSXV looked at the Minutes. It is not impossible that they were initially misplaced, or that having been reviewed they were then forgotten. Even if there were such a lapse, the evidence indicated that it was corrected. The TSXV expressly requested the Minutes, in AH's September 6 email. We will not assume that a document specifically requested was then ignored, and nothing before us established that the TSXV overlooked the Minutes or their potential significance.

[101] As noted, the Record clearly showed the TSXV's receipt of the Minutes and the Acknowledgement, and the Reasons set out the TSXV's conclusion that "No facts are present to suggest that Lyle Wunderlich [was] acting in concert with another Person." We are satisfied that the TSXV did ask further questions and engage in critical thinking on that point, and reached its determination after doing so.

[102] In any event, as discussed below, we were not persuaded by the Appellants' arguments regarding the significance of the content of the Minutes to the TSXV's determination.

(ii) Potential Significance of the Minutes

[103] We agree with the Appellants' contention that various aspects in the Record raised "red flags", and that these should have prompted the TSXV to examine more thoroughly the two applicable issues set out in the Guidance:

- whether Wunderlich was "acting in concert" for the purpose of determining whether the transaction was a New Control Transaction (involving here the creation of a new Control Person); and

- whether Wunderlich had "any existing relationship with management of [Hemostemix]. Specifically, are any of the directors or officers of [Hemostemix] a Non-Arm's Length Party of [Wunderlich]".

[104] As discussed above, we are satisfied from the Record as a whole that the TSXV did examine these issues. It was in the context of that examination that the TSXV received the September 2 representation from Hemostemix's counsel that "[t]o the best of my knowledge, Wunderlich is not acting in concert or jointly with management". Minutes later, AH requested

from Hemostemix's counsel "confirmation from [Wunderlich] and management" on that point, and on September 7 AH was given the Acknowledgement in response.

[105] As noted, the Appellants and Staff argued that the Minutes may have indicated that Wunderlich enjoyed "special access" at Hemostemix, which also should have led the TSXV to ask further questions. Although the Guidance does not refer to the concept of "special access", the Guidance does require the TSXV to examine the circumstances to determine whether persons are acting in concert, including a determination as to whether any relevant non-arm's length relationships exist. Again, we are satisfied that the TSXV reviewed the material in the Record – including the Minutes – and concluded from that material that Wunderlich was not acting in concert or in a non-arm's length relationship.

[106] In the result, we are satisfied that the TSXV addressed its mind to the relevant issues concerning Wunderlich's status or relationships, and reached a conclusion on the basis of the pertinent evidence including the Minutes. The Appellants having drawn a different inference from the Minutes does not show that the TSXV overlooked or failed to consider material evidence, and we are not persuaded that the TSXV did so.

2. Debenture – Superior Rights?

(a) Wording of the Debenture

[107] The Debenture wording was significant to the issue of whether Wunderlich had Superior Rights.

[108] The TSXV concluded in the Reasons that Wunderlich had no Superior Rights, specifying that he did not have the right as a result of the Placement:

> . . . to appoint or nominate for election [Hemostemix's] directors or officers or the right to prevent [Hemostemix] from carrying out certain actions (e.g. completing any future financing, acquisition, disposition or merger) without his consent. The Debenture held by Lyle Wunderlich is secured by a GSA over all of [Hemostemix's] assets as consideration for acceptance of a 36-month maturity date whereas the Notes are unsecured as the Notes mature in 12 months.

[109] Section 6.3 of the Debenture provided that until the earlier of the $1,000,000 being repaid or Wunderlich exercising his conversion "as to the entire convertible amount", Hemostemix covenanted not to do the following without Wunderlich's "prior written consent":

> (a) incur or become liable for any indebtedness when it is in default under this Debenture, except short term indebtedness incurred in the ordinary course of business of [Hemostemix];
>
> (b) guarantee the debts, liabilities or obligations of any person or become the endorser on any note or other obligation when it is in default under the terms of this Debenture;
>
> (c) enter into any merger, amalgamation, arrangement or other corporate combination of [Hemostemix] with one or more other persons;
>
> (d) enter into any transaction (including by way of reconstruction, re-organization, consolidation, amalgamation, merger, liquidation, transfer, sale or otherwise) whereby all or any portion of its undertaking, property and assets would become the property of any

other person, or, in the case of any such amalgamation, of the continuing corporation resulting there from;

(e) incur any indebtedness after the date hereof that would rank *pari passu* with, senior to or in priority to the Secured Obligation (or any portion thereof); and

(f) dispose of, damage, or otherwise compromise any of the Collateral (other than inventory in the ordinary course of business or the replacement of obsolete or damaged Collateral).

(b) Parties' Positions

[110] The Appellants contended that there was "a demonstrable error" by the TSXV, as it was clear on the face of the Debenture that its "negative covenants give Mr. Wunderlich veto rights over a wide range of corporate transactions and other transactions the company would, otherwise, be able to enter into". The Appellants characterized the TSXV's conclusion and rationale in the Reasons (stated above) as "just wrong; it's directly contrary to the rights granted to him" by the Debenture. The Appellants referred to the following comment in the Guidance on Superior Rights:

> . . . a principal factor relevant to the [TSXV's] assessment of whether the transaction is a New Control Transaction is whether the Acquiring Party will hold a Superior Right on completion of the transaction. The reason being is that the existence and nature of a Superior Right can have a direct impact on the Acquiring Party's ability to "affect materially the control of an issuer".

[111] The Appellants submitted that, given the importance of this factor, the TSXV should at least have obtained a copy of the GSA, because its terms might have differed from those of the Debenture. They stated that "it was unreasonable and in violation of the [TSXV's] own policy not to require that information".

[112] Further, the Appellants argued that had the TSXV "reasonably considered" the Debenture's contents, it would have been "compelled to come to the conclusion that this was a [New Control Transaction], and it clearly did not do so". Instead, according to the Appellants, the TSXV wrongly relied on the representation by counsel for Hemostemix that "[Wunderlich] does not have any superior rights over any shareholders" because that representation "was simply dead wrong on the facts".

[113] Hemostemix noted that its Form 4B referred to attached "copies of the Debenture and Notes, [containing] a full summary of the terms and conditions". The Form 4B also stated that "The Debenture contains customary defaults [sic] provisions and the Notes have no default provisions." Hemostemix contended that the TSXV thus had sufficient information about the Debenture terms, and did not need a copy of the GSA itself.

[114] The TSXV noted that Wunderlich's rights under the Debenture were granted to him as a secured creditor, not as a shareholder. The TSXV pointed to the Guidance (which it described as "intended to promote consistency in decision-making from case to case"), stating that the Guidance footnote quoted above highlighted the concern the TSXV may have "with an [i]ssuer granting these types of Superior Rights to persons other than secured creditors". The TSXV submitted that the Guidance wording recognized that secured party arrangements would typically involve provisions comparable to the negative covenants in favour of Wunderlich, such that Wunderlich was not granted special rights in the sense contemplated by the Guidance.

[115] The Appellants responded to the effect that the quoted Guidance footnote spoke of a secured creditor alone, not of someone who is both a secured creditor and a shareholder, and that the TSXV failed, when making its decision, to recognize the effect of those dual capacities of Wunderlich.

[116] The TSXV argued that it had considered the Debenture, including whether it was a defensive tactic (a prospect that it implicitly rejected, having noted in the Reasons that the Appellants had raised the concern). Further, the TSXV stated that there was no suggestion that the GSA contained any terms that would have altered its decision concerning the Placement.

[117] Hemostemix stated that "[t]he rights given to a secured creditor are not the rights of a shareholder" and alluded to adverse ramifications were we to regard a secured creditor as having Superior Rights: "every secured convertible debenture would involve a new [C]ontrol [P]erson potentially, and every loan that is secured by a shareholder will also give rise to this concern". Hemostemix asserted that the TSXV was "not blind to the [D]ebenture in considering the issue of [S]uperior [R]ights", but made "a reasoned decision: It considers the test; it considers the facts; it considers its guidelines". Hemostemix also emphasized that the TSXV practice was "long-standing", should not be "throw[n] up in the air", and that this raised "an issue of deference where the TSXV ought to be able to explain to you how it interprets its own guidelines".

[118] Regarding the purported danger that Wunderlich could convert all but a small portion of his secured debt, thus making him a significant shareholder who would retain the benefit of negative covenants under the Debenture (and thus potentially have Superior Rights while being a significant shareholder), Hemostemix submitted that "it can't be for the TSXV or the [ASC] to game out every possible eventuality under a transaction document", nor to assess a transaction based on "speculation of what somebody might do". Hemostemix also contended that Wunderlich had an "overriding legal obligation to deal fairly under the contract". Finally, Hemostemix tendered into evidence a November 1 undertaking (the **Undertaking**) from Wunderlich, stating that from the date he converts any portion of the Debenture principal to equity "he will forever waive and forego his rights as set forth in section 6.3 of the Debenture in respect of certain negative covenants made by" Hemostemix. We conclude that the Undertaking was relevant (in that it clearly touched on aspects of the Placement or the securities issued thereunder), but that its execution date meant that it did not assist us in shedding light on circumstances at the time relevant to this appeal. We therefore gave the Undertaking no weight, and we do not consider it to be the sort of new and compelling evidence relevant to the assessment of whether deference is warranted to the TSXV.

[119] Staff discussed the representation from Hemostemix's counsel that Wunderlich did not have Superior Rights. Staff noted that, when asking Hemostemix's counsel on September 6 whether Wunderlich had "any superior rights", the TSXV provided "no clarity or guidance" to Hemostemix's counsel "about what would be considered to be a [S]uperior [R]ight". This, along with what they termed "clear evidence" in the Debenture of Superior Rights, led Staff to conclude that the TSXV "mistakenly" relied on the representation from Hemostemix's counsel. Staff further noted that Hemostemix's Form 4B referred to change of control and default provisions, but not to Superior Rights. Staff would also interpret the mentioned Guidance

footnote as suggesting that if a secured creditor had the types of Superior Rights set out, then "that would go into the mix in assessing whether or not that person was a control person".

(c) Analysis

[120] We are satisfied that the negative covenants gave Wunderlich certain rights that could be considered Superior Rights in the appropriate context. The question remaining is whether the TSXV overlooked material evidence that would indicate that the rights given to Wunderlich as a secured creditor were Superior Rights in the context of the Guidance. In examining this issue we must determine whether the TSXV overlooked material evidence by not obtaining and reviewing the GSA or by not properly assessing the Debenture (or evidence in the Record related to the Debenture).

[121] We note the TSXV's explicit acknowledgement in the Reasons of the existence of the GSA. There was no indication at the time it was making its decision that anything in the GSA would confer on Wunderlich rights different from those indicated by the Debenture or the other material in the TSXV's possession. As mentioned, Hemostemix represented in its Form 4B that the Debenture and Notes "contain[ed] a full summary of the terms and conditions". Nothing in the Record established this statement to have been inaccurate. In our view, the TSXV's awareness of the GSA and of its apparent consistency with the Debenture's terms supports a conclusion that the TSXV had the necessary information when making its determination. We are satisfied that it was not necessary for the TSXV to obtain a copy of the GSA in these circumstances, and that the TSXV therefore did not overlook material evidence in this regard.

[122] Turning to the Debenture, there was no suggestion that its negative covenants were unusual in the circumstances.

[123] The TSXV was aware that Wunderlich was a shareholder before the Placement, and thus that he held the rights under the Debenture as a secured creditor while concurrently being a shareholder. The TSXV was also aware that Wunderlich could convert some of the amount outstanding under the Debenture to increase his shareholdings in Hemostemix. The TSXV clearly did not consider either aspect to be of concern. The Appellants' argument that the TSXV did not consider Wunderlich's dual status is therefore untenable.

[124] Given those points, we cannot reasonably infer a lack of attention by the TSXV to the negative covenants when applying the Guidance. Accordingly, we are not persuaded that the TSXV overlooked any material evidence relating to the Debenture. The TSXV was aware of the Debenture's terms and interpreted their significance, in line with the Guidance.

C. Public Interest Considerations

1. The Record

[125] The Record did not explicitly refer to public interest considerations that may have been taken into account in making the decision to approve the Placement. We note that section 4.1 of Policy 1.1 discusses "Exchange Discretion":

> The policies of the [TSXV] have been put in place to serve as guidelines to Issuers seeking a listing on the [TSXV] and their professional advisers. However, the [TSXV] reserves the right to exercise its discretion in its application of these policies. The [TSXV] may waive or modify an

> existing requirement or impose additional requirements in applying its discretion. It may also take into consideration the public interest and any facts or situations unique to a particular party. Issuers are reminded that listing on the [TSXV] is a privilege and not a right. The [TSXV] may grant or deny an application, . . . notwithstanding the published policies of the [TSXV].

[126] There is a reference in the Memorandum to Appellants' counsel citing an instance from 2006 when the TSXV required shareholder approval for a financing "below [the 20%] threshold". The Memorandum noted "this is an old practice that is no longer used as it does not provide certainty to the market."

2. Parties' Positions

[127] The Appellants relied on certain statements made in *HudBay* in urging us to conclude that the need for fair treatment of Hemostemix shareholders outweighed any prejudice that might be caused to Hemostemix by requiring shareholder approval of the Placement. The Appellants stated that the ASC should intervene to prevent erosion of capital market integrity "and the public's perception of that integrity". Intervention was, in their submission, necessary because errors in the Record were apparent, and not correcting them "would create more uncertainty".

[128] The Appellants also argued that shareholder approval of the Placement was required to protect "the quality and integrity of the market and investor confidence." In *HudBay* the question of "quality of the marketplace" was squarely in issue because the relevant provisions of the Toronto Stock Exchange *Company Manual* required that exchange to consider the effect that the subject transaction would have on the quality of the marketplace. While the OSC panel acknowledged that the concept of quality of the marketplace is not necessarily the same as the public interest, it noted that both raise similar issues and involve similar considerations (at para. 229). The Appellants relied on the OSC's statement as to the exercise of its jurisdiction regarding both concepts (at para. 232):

> In exercising our public interest discretion and the discretion under section 603 [the quality of the marketplace provision], we must carefully consider all of the policy issues raised by this matter and the potential impact of our decision on the interests of market participants and on market practice. We must weigh and balance factors such as (i) deal and regulatory certainty, (ii) the ability of the TSX to act quickly and efficiently in interpreting and applying its rules, (iii) the fair treatment of HudBay and Lundin and the other persons directly affected by our decision, and (iv) the fair treatment of the HudBay shareholders.

[129] The Appellants directed us to the public-interest findings in *Mercury*, where the BCSC concluded that a shareholder vote should have been required for a private placement. The BCSC stated (at paras. 92-94) that the Canadian Venture Exchange Inc.'s decision had "clearly failed to protect the public interest" by failing to "apply its policies in a consistent and fair manner after considering all of the relevant circumstances" and by failing "to consider the fair treatment of [the issuer's] shareholders when it made its decision".

[130] The Appellants rejected the idea that market certainty would be eroded if the completed Placement were to be subject to a shareholder vote. Here, they contended, the Loans were funded long before the TSXV ruled on the issue of shareholder approval. This was apparently an argument that the making of the Loans (and the advance of money thereunder) already having occurred, shareholder approval would relate only to the issuance of the associated securities under the Placement.

[131] The TSXV referred to the importance of "consistent application of the principles and policies of the TSXV to private placements". The TSXV also emphasized that it is "entitled to rely on representations made to it by parties absent clear evidence to the contrary". To conclude that it could not rely on such materials would not be in the public interest because the consequent increased workload at the TSXV in performing additional diligence would "likely lead to longer timelines for granting approvals [which] would not be in the public interest". The TSXV contended that its process is neither judicial nor quasi-judicial, but that it is "entitled to make its decisions on the basis of a reasonable amount of information in an efficient way". Thus, there is no need for it to consider "every potential tactical scenario, whether flagged by a complainant shareholder or not [and] every issue, whether the subject of a complaint or not".

[132] Hemostemix submitted that the TSXV decision "was made carefully and diligently". It also stated that it would not "be in the public interest for the [ASC] to abandon well-trodden principles in favour of the *ad hoc* approach advocated by the Appellant[s]". Hemostemix further noted that, the transaction here having closed, market certainty would not be "promoted by unwinding historic transactions".

[133] Staff did not take a position on the public interest issue.

3. Analysis

[134] We do not consider it essential that public interest considerations be explicitly articulated in such decisions of the TSXV. The issue is whether the TSXV's perception of the public interest – as reflected in, not necessarily as articulated in, the impugned decision – conflicts with the ASC's perception of the public interest.

[135] We agree that all of the foregoing factors are relevant in determining whether our view of the public interest conflicts with that of the TSXV. However, the facts in each case dictate the relative significance of each factor. Here, the facts are clearly distinguishable from those in both *HudBay* and *Mercury*.

[136] *HudBay* involved an acquisition by one company of another. Under that transaction the acquirer (**HudBay**) would issue to the shareholders of the company being acquired (**Lundin**) approximately the same number of HudBay common shares as the number already outstanding (thus giving shareholders of each of HudBay and Lundin approximately 50% of the continuing company and significantly diluting the holdings of existing HudBay shareholders). Concerns were also raised regarding the composition of the HudBay board following the transaction, including that five of the nine directors after the transaction would be from the Lundin board. The HudBay share price declined by approximately 40% following announcement of the transaction.

[137] The OSC concluded in *HudBay* (at paras. 251, 253) that the transaction there would "have a transformational effect on HudBay and its business" and would "lead to a significant increase in HudBay's risk profile". In the result, according to the OSC, "the fair treatment of HudBay shareholders is fundamentally more important than considerations such as deal or regulatory certainty in assessing the impact of [that transaction] on the quality of the

marketplace" (at para. 255). The OSC set aside the decision not to require a shareholder vote and substituted its own decision requiring shareholder approval.

[138] *Mercury* involved a private placement of shares, but to a single subscriber (**Quest**) described as a merchant bank. Even though Quest would have 19% of the issuer's common shares post-transaction, the terms of the private placement and connected circumstances evinced several indicia that Quest would be able to affect materially the control of the issuer. Those included: a likely cancellation of shares held by the past president of the issuer which would move Quest to a 30% shareholding position; the fact that the issuer had no business and would soon have no employees; the amount of the investment made it likely that Quest anticipated being able to control the issuer; and Quest acting as though it had control of the issuer by proposing the composition of the issuer's board of directors (including several of Quest's nominees) and proposing a change of direction for the issuer's business. On the basis of Quest holding sufficient shares to affect materially control of the issuer, and the private placement transaction being a reverse take-over, the BCSC concluded (at paras. 70, 90) that shareholder approval should have been required.

[139] The present case involved a relatively modest financing. The Record was clear that the TSXV examined the terms of the Debenture in the context of market conditions and Hemostemix's financial circumstances – for example, the Memorandum noted that Hemostemix "demonstrated a need for the funds and the reasoning behind the GSA, which the [TSXV] deemed reasonable".

[140] We also note that the TSXV received a statement from Hemostemix's counsel that "Without these funds [Hemostemix] would be in grave financial distress. The [Loans] were made in the ordinary course of business and will ensure the survival of the company." Hemostemix's counsel also referred the TSXV to the Minutes concerning earlier "emergency funding discussions". We find corroboration for this depiction of dire financial circumstances in the fact that the individuals concerned advanced their Loans to the company even before the ultimate terms of the Placement were determined. Later, when providing the TSXV with the Acknowledgement, Hemostemix's counsel stated that if the lenders had not received the terms and conditions set forth in the Debenture and Notes, "they would have demanded immediate repayment and the company would be insolvent".

[141] The TSXV was therefore aware of Hemostemix's tenuous financial circumstances and the risk that the Loans could be withdrawn. In the face of that important practical consideration, the Appellants' argument that any required shareholder approval would relate only to the issuance of securities rather than to the funding already advanced under the Loans, although technically correct, would have been less than compelling, if indeed relevant at all, to the TSXV's analysis and ultimate decision. Given our conclusion on this appeal, we need not address Hemostemix's contention that "unwinding" the completed transaction here would not promote market certainty.

[142] In order to fulfil its responsibilities with requisite timeliness, the TSXV must in the ordinary course be able to rely on representations given to it by persons with relevant knowledge, not least from a lawyer who has an ethical obligation not to mislead others. Imposing on the TSXV an obligation to scrutinize such representations, as advocated by the Appellants – in the

context of a private placement application and without cause for it to doubt the veracity of what was represented – would slow the application process to an intolerable crawl.

[143] Turning to the process followed by the TSXV, it is evident that the Guidance was prepared to promote consistent application of TSXV policies to determine whether a transaction potentially involves the creation of a new Control Person or a change of control, while still allowing for "independent judgement and discretion on the part of [TSXV staff]". We view that objective as serving the public interest in fostering a fair and efficient capital market. Market participants expect – indeed require – the TSXV to make timely decisions on listed issuer financings, as changing market conditions can quickly "close the window" on the availability of capital. The Guidance is obviously intended to facilitate an efficient administrative decision-making process, so that the TSXV does not get mired in an extensive and time-consuming investigation process when faced with contentious financing applications.

[144] The Appellants' submission that the TSXV should have made several further enquiries to look behind the representations made by Hemostemix's counsel, and those made in the Acknowledgement, seemed to be taken by the TSXV as suggesting the need to engage in "a judicial or quasi-judicial process". Even had such a suggestion been made, that approach in these circumstances would have been both impractical and antithetical to the public interest in market efficiency. We agree with the OSC's comments in *HudBay* at para. 139:

> In our view, the TSX was entitled in this matter to make its decision based on the documents, information and representations that were before it. While the TSX must be careful to ascertain that it has all the relevant facts, it does not generally have an obligation to conduct an investigation or carry out due diligence when it is considering the exercise of its discretion under a provision of the TSX Manual.

[145] Far from ignoring the interests of Hemostemix's shareholders, the TSXV was clearly cognizant of the precarious financial position of this company, and by obvious implication the dangers that posed for its shareholders and the value of their shares. Moreover, a shareholders' right to vote is not always an unalloyed advantage. In the circumstances here, conferring on them a right to vote on the Placement could have delivered a pyrrhic victory for the dissident shareholders and worthless shares for all holders.

[146] We are satisfied that, in making its decision to approve the Placement, the TSXV had proper regard for and appropriately balanced the relevant public interest considerations presented by the facts of this case – most importantly, fairness to shareholders and market certainty.

D. Deference Is Warranted

[147] For the reasons given, the Appellants have not established that the TSXV erred in law or overlooked material evidence, or that its perception of the public interest was in conflict with that of the ASC.

[148] It follows, and we find, that deference is owed to the TSXV in its decision to approve the Placement without requiring approval by Hemostemix's shareholders.

[149] That does not dispose of the appeal. Despite its entitlement to deference, the TSXV's decision remains subject to review on the standard of reasonableness.

E. Reasonableness

[150] In assessing the reasonableness of the TSXV's decision we are mindful of the Supreme Court of Canada's admonition in *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65 at para. 3 that reasons given for a decision need not "consider and comment upon every issue raised by the parties"; "the issue remains whether the [impugned] decision, viewed as a whole in the context of the record, is reasonable".

[151] The TSXV concluded that Wunderlich's post-transaction shareholding would be less than 20%, as he was not acting jointly or in concert with others. Given the evidence and as discussed above, we find that this conclusion was reasonable. The TSXV then concluded that Wunderlich did not have Superior Rights. Based on the evidence and consistent with the Guidance's reference to concerns related to "persons other than secured creditors", we find that this conclusion too was reasonable. These conclusions led in turn to the TSXV's conclusion that there was no New Control Transaction and, consequently, no need for a shareholder vote. We find that this also was a reasonable conclusion.

[152] We are satisfied that the level of enquiry undertaken by the TSXV was reasonable throughout. We reiterate our view that the TSXV was entitled to rely on the representations made to it by and through Hemostemix's counsel. There was also no evidence that the further enquiries suggested by the Appellants would or should have led to a different decision.

[153] In the result, we are satisfied that the TSXV decision was reasonable in all the circumstances, when considered as a whole in the context of the Record.

VI. COSTS

[154] We declined Hemostemix's request for costs on the basis that the Act does not give us the authority to order costs on an appeal brought under section 73.

VII. CONCLUSION

[155] The appeal is dismissed.

February 2, 2017

For the Commission:

"original signed by"

Tom Cotter

"original signed by"

Stephen Murison