

CANADA / JUDGMENT

Harbour v. Barkerville Gold Mines Ltd.

2013 BCSC 652

COURT

Supreme Court of British Columbia

DECIDED

12 April 2013

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2013 BCSC 652 Harbour v. Barkerville Gold Mines Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Harbour v. Barkerville Gold Mines Ltd., 2013 BCSC 652 Date: 20130412 Docket: S128520 Registry: Vancouver Between: Rex Harbour, City Securities Ltd. and The Harbour Foundation Petitioners And Barkerville Gold Mines Ltd. and J. Frank Callaghan Respondents Before: The Honourable Mr. Justice Steeves Reasons for Judgment Counsel for the Petitioners: S. A. Turner Counsel for the Respondent Barkerville Gold Mines Ltd.: K. L. M. Carteri M T. C. Shannon Counsel for the Respondent J. Frank Callaghan: K. Richard Place and Date of Hearing: Vancouver, B.C. April 11, 2013 Place and Date of Judgment: Vancouver, B.C. April 12, 2013

- [1] The petitioners are shareholders in the respondent Barkerville Gold Mines Ltd. (Barkerville). They represent about 6.5% of the total shares of Barkerville. Pursuant to section 186 of the Business Corporations Act, S.B.C. 2002, c. 57, they seek two orders with respect to an annual general meeting of Barkerville that is scheduled for April 16, 2013. The respondents oppose the petitioners' application.
- [2] The first order sought by the petitioners is that they be entitled to nominate Andrew Gustajtis for election to the position of director of the company at the annual meeting. The second order is that the usual notice periods for applications of this nature be abridged as necessary.
- [3] By way of background, the petition in this action relates to a dispute among shareholders about the proceedings of the annual general meeting of Barkerville and the prospect of a significant private placement. The initial dispute was the subject of mediation and ultimately an order of this court dated January 23, 2013 (the Order). The Order addressed a number of issues including how the private placement was to be considered by the shareholders.
- [4] The Order also set a date for the annual general meeting on April 16, 2013.
- [5] Paragraph 7 addresses the nomination for election of directors by the petitioners and is as follows,

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7. By no later than March 4, 2013, the Petitioners shall advise the Company whether they intend to support nominees for election as directors of the Company, who are not currently directors, and provide the Company with the names and biographical information for any such nominees (the "Shareholder Nominees").
- [6] The settlement and the March 4, 2013, date for nominations by the petitioners was the subject of a press release dated January 29, 2013.
- [7] On February 18, 2013, the directors of Barkerville adopted the "Advance Notice Policy" (the Policy). The introduction of the policy states, The Corporation is committed to: (i) facilitating an orderly and efficient annual general or, where the need arises, special meeting, process; (ii) ensuring that all shareholders receive adequate notice of the director nominations and sufficient information with respect to all nominees; and (iii) allowing shareholders to register an informed vote.
- [8] The Policy also states that only persons nominated in accordance with the procedure in the Policy shall be eligible for election as directors (section 1) at an annual general meeting (or special meeting). The notice required for nominations is not less than 30 days and not more than 65 days before the date of the general meeting (section 3). As can be seen, this is a different notice period than for the petitioners under the Order.
- [9] Section 4 of the Policy sets out the form of any nomination by a nominating shareholder as follows,
4. To be in proper written form, a Nominating Shareholder's notice to the Secretary of the Corporation must set forth:
- (a) as to each person whom the Nominating Shareholder proposes to nominate for election as a director:
- (i) the name, age, business address and residential address of the person; (ii) the principal occupation or employment of the person; (iii) the class or series and number of shares in the capital of the Corporation which are controlled or which are owned beneficially or of record by the person as of the record date for the meeting of shareholders (if such date shall then have been made publicly available and shall have occurred) and as of the date of such notice; and (iv) any other information relating to the person that would be required to be disclosed in a dissident's proxy circular in connection with solicitations of proxies for election of directors pursuant to the Act and Applicable Securities Laws (as defined below); and ...
5. ... The Chairman of the meeting shall have the power and duty to determine whether a nomination was made in accordance with the procedures set forth in the foregoing provisions and, if any proposed nomination is not in compliance with such foregoing provisions, to declare that such defective nomination shall be disregarded.

- [10] Later in February 2013, that is after the adoption of the Policy, the proposed private placement was withdrawn.
- [11] On March 13, 2013, the Harbour Foundation, a shareholder of Barkerville and petitioner in this case, sent a nomination form to Barkerville to nominate two people as directors: Michael Steele and Mr. Gustajtis. They were identified and described as follows, Michael Steele Age 54 Business and Residential Address: 15466 The Gore Road, Caledon East, Ontario. L7C 3B5 Principal Occupation: President, Avonlea Ventures Ltd. Number of shares of the Corporation controlled and owned beneficially: 1.000.000 common shares K. Andrew Gustajtis Age 65 Business Address: 150 York St. Suite 1714, Toronto, Ontario. M5H 3S5 Residential Address: 938 Whittier Crescent, Mississauga, Ontario. L5H 2X3 Principal Occupation: Managing Director and Vice-President, D&D Securities Inc. Number of Shares of the Corporation controlled and owned beneficially: 545.030 common shares
- [12] On March 18, 2013, Barkerville sent a letter to its shareholders. It referred to the history between the parties and the nomination sent by Harbour Foundation and said, "Arguably the notice is in violation of the settlement agreement" (i.e. the Order).
- [13] Also on March 18, 2013, Barkerville sent to its shareholders a Form of Proxy notice of the meeting on April 16, 2013, and notice that proxies were to be received on April 12, 2013. Among other things, the form identified a vote to increase the number of directors from six to eight. It also presented eight named individuals for election as directors. Mr. Steele was included in this list, Mr. Gustajtis was not.
- [14] The petitioners now seek the right, by means of the subject application, to have a shareholder at the April 16, 2013 annual general meeting nominate Mr. Gustajtis as a director. In the event that such a nomination is made, then a vote will be required, assuming that there are more nominations than there are positions open. This is opposed by the respondents.
- [15] In my view the resolution of this dispute lies primarily with a consideration of the Order of January 23, 2013. The petitioners were a party to that order and it was under the same cause of action as the current application.
- [16] As above, the Order sets out a number of matters including how the petitioners were to nominate directors they supported. This was to be done no later than March 4, 2013. More precisely, the petitioners were to advise Barkerville if they supported the nominees up for election who were not currently directors and provide Barkerville with the names and biographical information for any nominees.

- [17] The petitioners place considerable reliance on the fact that the context for the Order was the prospect of a significant private placement (subsequently withdrawn). According to the petitioners, they agreed to provide advance notice of a slate of directors but they did not forgo their ordinary rights as shareholders to nominate and elect directors. They further submit that the Policy, including the nomination procedures, applies to the petitioners just as it applies to all other shareholders.
- [18] I accept that the provisions of the Order that specifically relate to the private placement are no longer applicable because there is no longer a private placement. For example, section 3 permits the petitioners to submit a proposal to Barkerville about the structure of the private placement. There now is nothing to propose.
- [19] I note that the Order arose from a mediation process but in the end it became an order of this court. By definition that means its terms are legally enforceable except where subsequent events render those terms inapplicable. Again, the withdrawal of the private placement was such an event. I am not persuaded, however, that subsequent events operate, as the petitioners would have it, to make the Order void in all respects. It is not a contract with one term conditional on another. It does not end for all purposes because the private placement was withdrawn.
- [20] Overall, I agree with the petitioners that they are subject to different rules with respect to the nomination of directors at the April 16, 2013 meeting than other shareholders who are not parties to the Order. That is, the petitioners are subject to the rules in the Order and shareholders who are not petitioners in this action are subject to the rules in the Policy. I also accept that the right to nominate and vote for directors at an annual general meeting is an important right for shareholders generally. Further, the petitioners did not give up those rights under the Order.
- [21] However, I am not persuaded that there is a conflict between the Order and the Policy with respect to the petitioners and the facts in this application.
- [22] It is not the case that the rights of the petitioners to nominate and vote for directors have been removed or even significantly changed under the Order. Instead, the Order places certain rules about the exercise of their rights. Those rules are different than the ones in the Policy but the underlying right remains. This is the application of an order of this court to one group of shareholders for the one annual meeting; in contrast the policy and rules adopted by the directors relate to the orderly conduct of all meetings. The directors are entitled to make rules and policy for this purpose and there is no evidence to suggest bad faith or impropriety on the part of the directors. The Order governed the situation at the time it was made and it prescribed the petitioners' rights to nominate directors for the April 2013 meeting. The Policy governs other meetings and shareholders who are not the petitioners. This is not an illegal or otherwise improper discrimination between different groups of shareholders.

[23] The result is that the petitioners, pursuant to the Order of which they were a party to, were required to file their nomination for directors no later than March 4, 2013. Their nominations were made on March 13, 2013, and were, therefore, in violation of the provisions of the Order. This violation of the time limits in the Order provided a reasonable basis for the directors to decline to accept the petitioners' nominations. For the above reasons the petitioners' application is dismissed. "Steeves J."

Steeves, J.

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