See para. 90

Case Name:

Maudore Minerals Ltd. v. Harbour Foundation

Between
Maudore Minerals Ltd., Plaintiff, and
The Harbour Foundation, City Securites Ltd., Howard William Carr, Seager Rex Harbour and Daniel Harbour, Defendants
And between
The Harbour Foundation and City Securites Ltd., Plaintiffs,
and
Maudore Minerals Ltd., Defendant

[2012] O.J. No. 3548

2012 ONSC 4255

111 O.R. (3d) 660

5 B.L.R. (5th) 258

2012 CarswellOnt 9332

218 A.C.W.S. (3d) 546

Court File Nos. 12-CV-9874CL and 12-CV-9782CL

Ontario Superior Court of Justice

P.M. Perell J.

Heard: July 17, 2012.
Judgment: July 18, 2012.

(121 paras.)

Corporations, partnerships and associations law -- Corporations -- Meetings of shareholders -- Proxies and proxy solicitation -- Motion by Maudore Minerals for injunctive relief dismissed -- Motion by Harbour and City for directions for conduct of shareholder meeting dismissed -- Harbour and City intended to vote for new slate of directors due to allegation of prejudicial and

unfair conduct by current slate -- Maudore sought injunction based on misuse of confidential information to obtain proxies -- Maudore failed to establish strong prima facie case showing alleged misuse -- No evidence connected dissidents' proxy circular with confidential information -- In absence of demonstrated impropriety, there was no basis for interference with corporate electoral process.

Motion by Maudore Minerals for an injunction enjoining Harbour Foundation and City Securities from voting their shares and soliciting proxies at an annual and special shareholders meeting. Harbour and City owned 18.4 per cent of the shares of Maudore, and as such, were the company's single largest shareholder. With the support of the second larges shareholder, who held a further 8.8 per cent interest, Harbour and City nominated, and intended to vote for a new slate of directors. Maudore sought to prevent the vote on the basis that one of the nominees for the proposed board had breached a confidentiality agreement and misused confidential information to obtain proxies. Harbour and City contended that the current management of Maudore engaged in self-interested behaviour that was unfairly prejudicial and disregarded their interest as shareholders. They brought a motion for the conduct of the upcoming shareholders' meeting in the context of a broader application under ss. 107 and 248 of the Ontario Business Corporations Act.

HELD: Motions dismissed. Maudore failed to establish the existence of a strong prima facie case in respect of the alleged breach of confidence. In particular, they failed to establish a strong prima facie case that the defendants engaged in unauthorized use of confidential information they had received. In addition, the balance of convenience favoured refusal of the relief sought. There was no evidence connecting the dissidents' proxy circular with confidential information and no evidence that Maudore's lost its incumbent's advantage. The parties were left to win or lose the proxy fight on their merits. With respect to the motion for directions on the conduct of the meeting, in the absence of demonstrated impropriety, there was no basis for interference with operation of the shareholders' right to control their own corporate constitution and electoral process.

Statutes, Regulations and Rules Cited:

Ontario Business Corporations Act, R.S.O. 1990, B. 16, s. 107, s. 248

Counsel:

Robert B. Cohen and Lara M.B. Jackson for Maudore Minerals Ltd.

R. Seumas, M. Woods, Doug McLeod, and Max Shapiro for The Harbour Foundation, City Securities Ltd., Howard William Carr, Seager Rex Harbour, and Daniel Harbour.

Orestes Pasparakis, Teresa Walsh, and Nicholas Saint-Martin for the Maudore Special Committee of Independent Directors.

REASONS FOR DECISION

P.M. PERELL J.:--

A. INTRODUCTION

1 The Harbour Foundation and City Securities Limited together own 18.4% of the shares of Maudore Minerals Ltd., a Canadian mining corporation, and together are its single-largest shareholder. With the support of the second-largest shareholder, which holds an 8.8% interest, Harbour Foundation and City Securities have nominated and plan to vote for a new slate of directors at the annual and special meeting of the shareholders scheduled for tomorrow, July 19, 2012.

2 Maudore, however, brings a motion to enjoin Harbour Foundation and City Securities from voting their shares and from soliciting proxies on the grounds that Dr. Howard Carr, who is Harbour Foundation's and City Securities Limited's nominee as a director on the proposed board of directors, breached a confidentiality agreement signed by him while acting on behalf of Harbour Foundation and City Securities. Alternatively, Maudore seeks an injunction on the basis that the defendants perpetrated a breach of confidence by misusing confidential information.

3 On either theory of liability, the alleged breach is that Harbour Foundation and City Securities are using confidential information to obtain proxies with the aim of replacing the current board of directors with a new board. Maudore submits that through the inquires of Dr. Carr, Harbour Foundation, City Securities, Dr. Carr, Seager Rex Harbour, and Daniel Harbour received and then misused confidential information and, therefore, should be enjoined from voting at the shareholders' meeting.

4 In addition to resisting Maudore's motion, two of the defendants, Harbour Foundation and City Securities, have brought an application pursuant to s. 107 and, or s.248 of the Ontario *Business Corporations Act*, R.S.O. 1990, B. 16. In that application, they bring a motion about the conduct of the upcoming shareholders' meeting.

5 Harbour Foundation and City Securities submit that Maudore's current management has for months engaged in a pattern of self-interested behaviour designed to frustrate their ability to propose their alternate slate of directors. They submit that the corporation's conduct is oppressive, unfairly prejudicial to, and unfairly disregards their interests as shareholders, and breaches their reasonable expectation of fair and equal treatment.

6 Their motion is resisted by Maudore's Special Committee of Independent Directors.

7 Although their request for relief has narrowed considerably from the relief requested in their Notice of Application, Harbour Foundation and City Securities now seek: (a) a declaration that Maudore shareholders who acquired their shares by transfer after June 8, 2012 are not entitled to vote those shares at the shareholders' meeting; (b) an order that the Chair of the meeting be an independent third party appointed by the court; and (c) an order that at the shareholders' meeting, Maudore adopt the review of proxies procedure set out in paragraphs 20 to 24 of the Protocol attached as Schedule A to the Notice of Application.

8 For the reasons that follow, I dismiss both motions.

B. FACTUAL BACKGROUND

9 With a few editorial comments and some foreshadowing of the issues I must resolve later in these Reasons, the factual background to both motions is as follows.

10 Maudore is a Canadian mining public corporation with its shares listed on the TSX Venture Exchange. It has mining projects in the Abitibi region of Québec, near the town of Val-d'Or, including the Comtois gold project.

11 Ronald Shorr is Maudore Mineral's Chief Executive Officer and President. He has forty years experience in the mining industry and has a MBA in finance from Harvard Business School.

12 Robert Pevenstein recently replaced Mr. Shorr as the company's Chairman.

13 The Harbour Foundation, which is an English charity, and City Securities together own approximately 18.4% of the issued and outstanding common shares of Maudore, making them collectively the company's single-largest shareholder.

14 Seager Rex Harbour ("Mr. Harbour") and his son Daniel Harbour, Ph.D. ("Dr. Harbour") are trustees of Harbour Foundation. The senior Harbour is the founder and principal of City Securities and has a reputation as an activist shareholder having, for instance, initiated and won a contest for control of Mintails Ltd., an Australian mining company. Dr. Harper is an academic and scientist at Queen Mary College University of London in the area of cognitive science.

15 In 2011, Mr. Harbour began to have doubts about the competency of Maudore's management, which is led by the 75-year old Mr. Shorr, who is not a geologist. Mr. Harbour asked Howard Carr, PhD to investigate Maudore.

16 Dr. Carr, who lives in Perth Australia, is an economic geologist, who has held executive positions with both private and public mining and resource companies. Dr. Carr is married to the son of Mr. Harbour's best friend and had previously worked with Mr. Harbour, who nominated him for a directorship at Mintails Ltd.

17 Dr. Carr analyzed the publicly available documentation about Maudore, including its

statutorily required "43-101" technical report on its operations, its annual reports, investor presentations, and press releases since 2005. He also reviewed public documents on the geology of the Comtois gold project and about volcanogenic massive sulphide deposits in the area of the project. Dr. Carr reported to Mr. Harbour that there was a good prospect that Maudore Mineral's property did contain an economically-feasible gold deposit as had been reported, but that the company's management seemed to be functioning at a very low level technically.

18 Having received this information from Dr. Carr, Mr. Harbour contemplated asking Maudore to change its management to include Dr. Carr. Mr. Harbour decided to send his son Dr. Harbour along with Dr. Carr to visit the Comtois gold project site on behalf of the Harbour Foundation to verify the accuracy of the public disclosures and to assess the competence of the current management.

19 Mr. Harbour contacted Mr. Shorr and asked about the possibility of Dr. Harbour, who had academic matters to attend to in Canada, visiting the project. Mr. Harbour did not mention that Dr. Carr would accompany Dr. Harbour. There was no advance notice of plans to replace or displace Mr. Shorr and his management team. There was no disclosure that Dr. Daniel Harbour's agenda would be to assess management, Maudore's business plan, and general matters. None of these threatening prospects was ever communicated to Mr. Shorr or to Maudore. Apparently believing that curiosity was the only motivation for the visit, Mr. Shorr agreed that Dr. Harbour could visit the Comtois gold project site.

20 Dr. Harbour subsequently followed up with Mr. Shorr and did disclose that Dr. Carr would also be attending the site visit. On March 8, 2012, Dr. Harbour sent an email message to Mr. Shorr. In his email, Dr. Harbour stated that: "the family's holding with Maudore is substantial (from both our perspectives) and therefore my brothers and I are keen to have a more sound understanding of the investment". He then advised that he had been able to arrange for one of his family's financial advisors to join him on the site visit. Dr. Harbour wrote:

> ... [Dr. Carr is] an old family friend (officially, an advisor to the Harbour foundation, from memory) and his investment profile includes a number of mines ... as I digest new material slowly and deliberately, and as there'll be much that's novel, it'll be helpful for me to have someone with me who's more familiar with the relevant concepts and who won't be hesitant about correcting misunderstandings on my part, should any arise. So, personally, I will feel much more comfortable having him along. I trust that's ok. See you in about 36 hours. I'm really looking forward to this."

21 The information about Dr. Carr caused Mr. Shorr to find out about the background of Dr. Carr, and when he learned that Dr. Carr had a doctorate in economic geology and had been involved with Mintails Ltd., he asked Maudore's lawyers, Cassels Brock & Blackwell LLP to prepare a confidentiality agreement for Dr. Carr's visit to the site.

22 Harbour Foundation and City Securities deny that they did anything nefarious in arranging for Dr. Carr to visit the Comtois gold project site but concede that they were not forthcoming and candid for the reason that they felt that Mr. Shorr would have refused a visit if he thought that its purposes were other than benign.

23 I pause here to say that for the purposes of Maudore's injunction motion it is not necessary to draw any conclusion about the alleged duplicitousness because as the discussion below will reveal, Maudore protected itself with a confidentiality agreement that it seeks to enforce not set aside. The motivations of the parties good or bad that led to that confidentiality agreement or to whether there was a breach of confidence become simply part of the interpretative background.

24 Returning to the narrative, on March 8, 2012, Dr. Carr and Dr. Harbour met Mr. Shorr at the airport in Montreal, and they all travelled together to Val D'Or. The next day, on March 9, 2012, Mr. Shorr, Dr. Carr, and Dr. Harbour had breakfast together in Val-D'Or.

25 After breakfast, Mr. Shorr met Dr. Carr privately and told him that he would not be permitted to visit the site unless he signed the Confidentiality Agreement. Dr. Carr signed the agreement. The agreement states:

> Confidentiality Agreement
>
> Maudore Minerals Ltd. (the "Corporation") is prepared to make available to Dr. Howard William Carr (the "Recipient") certain Information (as hereinafter defined) to assist the recipient in connection with the review of the Corporation's properties and projects on behalf of Mr. Rex Harbour, City Securities Ltd. and The Harbour Foundation (collectively, the "Harbour Entities")." ...
>
> 2. *Non-Disclosure and Restricted Use* - The Information will be kept confidential and will not, without the Corporation's prior written consent, or as expressly provided in this Agreement, be disclosed by the Recipient in any manner whatsoever, in whole or in part, and will not be used by the Recipient, directly or indirectly, for any purpose other than evaluating the Corporations' properties and projects on behalf of the Harbour Entities. The Recipient will not use the Information so as to obtain any commercial advantage over the Corporation or its Affiliates or in any way which is, directly or indirectly, detrimental to the Corporation or its Affiliates.
> 3. *Access Limited to Representatives*- The Recipient may reveal or permit access to the information only to the Harbour entities.
> 7. *Injunctive Relief* ... disclosure of the Information or other breach of this Agreement would cause serious and irreparable damage and harm to the Corporation and that remedies at law would be inadequate to protect against breach of this Agreement, and agree in advance to the granting of injunctive

> relief in the Corporation's favour for any breach of the provisions of this Agreement and to the specific enforcement of the terms of this Agreement, without proof of actual damages, and without the requirement to post a bond or other security, in addition to any other remedy to which the Corporation would be entitled.

26 The next event was that Mr. Shorr, Dr. Carr, and Dr. Harbour visited the offices of Maudore's geological consultants, InnovExplo, where they met Alain Carrier, the team leader. With one possible exception, nothing of significance appears to have happened at this meeting. The exception is that Dr. Carr's evidence was that he told Mr. Shorr that he did not want to receive any confidential or sensitive information during the visit and that Mr. Shorr agreed. This part of the conversation is denied by Mr. Shorr. In my opinion, the conflict between the parties need not be resolved.

27 Whether or not Dr. Carr did not want to receive confidential information is irrelevant and insignificant. The relevant matter is whether or not he received and misused confidential information.

28 Mr. Shorr, Dr. Carr, and Dr. Harbour then went and toured the Comtois site but interrupted their tour at the core shed, where they met Dr. Vincent Jourdain, another InnovExplo geologist. Dr. Jourdain was the Technical Director of Geology with InnovExplo, where he supervised approximately 30 geologists. Dr. Jourdain received his PhD in mineral resources from the University of Quebec in Montreal. He had worked on the Maudore project since July 2011.

29 There is some divergence in the evidence about what was said and what occurred at the core shed. There, however, is no dispute that there was a great deal of technical information discussed by Doctors Jourdan and Carr. Mr. Shorr and Dr. Harbour mainly observed the discussions between Dr. Jourdain and Dr. Carr.

30 Dr. Carr appeared to be extraordinarily well prepared for the meeting, and his questioning was substantive, detailed, and not superficial. Dr. Jourdan provided detailed and elaborate answers. Mr. Shorr says that would not have allowed Dr. Jourdain to respond with the level of detail without Dr. Carr having first signed the Confidentiality Agreement.

31 Dr. Carr's evidence is that he told Dr. Jourdain that he wanted to see drill core and core sections to confirm that the deposit checked out against what Maudore had reported in its 43-101 and subsequent press releases, but he did not want to see any new unreleased drill results or inside information that would impede his capacity to report his findings. This account is denied by Maudore.

32 Dr. Carr was provided with drill core sections and associated sections as requested. Dr. Carr's evidence was that the tour resumed and the group went to one of Maudore's drill sites. Shortly thereafter, they returned to the core shed and viewed more sections, which are physical samples and

also cross-sections, which are data sheets or charts of information derived from physical sources. Dr. Carr saw between 20 and 50 of the approximately 100 cross-sections. He did take hand-written notes, but they do not refer to any of the sections. The cross-sections would have included data that had been assembled from information learned after the 43-101 Report.

33 Some or all of the information from cross-sections may been disclosed in press releases or public disclosure documents after the 43-101 Report or be information that would be disclosed in future press releases.

34 It is Dr. Carr's evidence that during the course of the Site Visit, he asked Dr. Jourdain about whether Maudore was doing any "oriented core" drilling, which is a critical tool in exploration for structurally controlled gold deposits. However, after viewing the drilling rig and seeing no evidence of orientation of core, Dr. Carr concluded that Dr. Jourdain was not being completely frank with him.

35 Dr. Jourdain says that because of Dr. Carr's level of preparation, he provided much more information than he would otherwise have. It was in Dr. Jourdain's experience unusual for investors to see the geological cross-sections of the drilling, which is not publicly available information. Typically only core sections are disclosed. Cross-sections are compilations of information from other sources of data.

36 My assessment is that Dr. Carr was at least provided with information that had been confidential information at one time and may have been confidential information at the time when Dr. Carr saw it. Dr. Jourdain's evidence was that he did provide Dr. Carr with confidential information. For the purposes of this interlocutory injunction motion, my conclusion is that Maudore has shown a strong *prima facie* that Dr. Carr received confidential information at the time of his visit to the Comtois site.

37 The next day, March 10, 2012, before departing from Val D'Or, Dr. Carr and Dr. Harbour visited InnovExplo again, where they met with Mr. Carrier. Dr. Carr gave Mr. Carrier a presentation on what he had learned about the Comtois property before the site visit.

38 Dr. Carr reported on the visit to Mr. Harbour. Dr. Carr's conclusions were that: the deposit drill core and associated sections were comparable to those presented in the 43-101 technical report and the Resource statement in 43-101 was likely to be accurate; the prospectivity of the near Comtois area for more similar mineralisation was fair; the prospectivity of the regional tenements appeared very good at a high level, but was almost completely unexplored; Mr. Shorr possessed no useful technical knowledge; InnovExplo was competent, but was not being guided and supervised closely enough to maximise the value of its output.

39 By this time, Dr. Carr had provided notice to his then-current employer, Macquarie Group, that he would be leaving effective April 17, 2012. Dr. Carr did this in order to pursue a full-time position with Maudore. He knew by then that Mr. Harbour would be putting him forward for the

board of Maudore as its chief executive officer, but that it was not guaranteed because there would potentially be a proxy fight. It was a risk he was willing to take.

40 For his part, Dr. Harbour made an unfavourable report to his father about the competence of Maudore's management.

41 On March 29, 2012, Maudore's Board of Directors called the company's annual general meeting for June 8, 2012. At that time, there was no indication that any of the issues for the meeting would be contentious.

42 On April 11, 2012, Maudore gave notice that it would hold its annual and special meeting of shareholders on June 8, 2012, with a record date of May 4, 2012. Among the items for consideration at the meeting would be the election of the board of directors.

43 After hearing Drs. Carr and Harbour's unfavourable impressions of Maudore's management, on April 18, 2012, Mr. Harbour met with Mr. Shorr about making changes including replacing Mr. Shorr with Dr. Carr as CEO and making Kevin Tomlinson as Chair of Maudore's board. Mr. Shorr proposed instead providing Mr. Harbour with board representation.

44 On April 20, 2012, the Maudore Board of Directors learned that Mr. Harbour, was unhappy with the direction of Maudore and that he might initiate a proxy contest unless the Company implemented certain changes. To consider Mr. Harbour's concerns, a special committee of independent directors of the Board was established. Mr. Pevenstein was asked to be the Chair of the Special Committee.

45 In an email on April 23, 2012, Mr. Harbour confirmed to Mr. Shorr his desire to replace him as CEO and nominate a new Chair, but stated that he did not want to replace the entire board. Mr. Shorr and the Board declined Mr. Harbour's proposals. Mr. Harbour therefore decided to propose his own slate of directors for the Board. To assist them, in late April 2012, Harbour Foundation and City Securities retained a proxy solicitation agent, Phoenix Advisory Partners.

46 On April 26, 2012, Harbour Foundation's and City Securities's counsel, Blake Cassels & Graydon LLP ("Blakes"), wrote Maudore and asked for the list of the company's registered and beneficial shareholders Maudore did not respond to this request.

47 On May 7, 2012, Blakes again requested lists of registered and beneficial shareholders. It specifically requested a list of the beneficial shareholders located in the United States (the "US NOBO List"), which was important because about 50% of Maudore's shareholders are located outside of Canada. Later that day, Maudore's counsel, Norton Rose Canada LLP, responded and refused to provide the lists because the request was "deficient."

48 Blakes responded by letters dated May 8, 2012 and May 11, 2012, denying that the requests were deficient, and indicating that failing a response the Harbour Foundation and City Securities

would move for an order compelling production of the lists.

49 On May 11, 2012, Maudore provided Blakes with some, but not all, of the requested shareholder lists. It did not provide the US NOBO List.

50 On May 15, 2012, Maudore changed the date for the shareholder's meeting to June 29, 2012, with a Record Date of May 4, 2012. The same day Mr. Pevenstein advised Mr. Harbour that the Nominating Committee of the Maudore Board would be setting up interviews for the purpose of completing the Company's slate of directors and that Mr. Harbour's two candidates would be considered.

51 In the following two weeks, the Nominating Committee interviewed Messrs. Tomlinson and Carr.

52 Meanwill Blakes wrote Norton Rose on May 14, 2012 and again on May 16, 2012. Blakes stated that failing receipt of the requested US NOBO list by the end of the week, Harbour Foundation and City Securities would bring the matter to the attention of Maudore's principal regulator, the Autorité des marches financiers.

53 On May 17, 2012, Norton Rose responded that it did not have the list and suggested that the US NOBO List be obtained from Broadridge US., an American corporation that had the list. Blakes followed up, but when Broadridge US refused to provide the list on the grounds of it not being permissible to do so under U.S. law, on May 25, 2012, Norton Rose confirmed that Maudore had requested a copy of the US NOBO List from Broadridge US, and would provide it to The Harbour Foundation and City Securities on receipt.

54 Also on May 25, Maudore announced that it had changed its by-laws to require shareholders who wanted to propose an alternate slate of directors to comply with new rules. The Advance Notice By-Law included a deadline to submit information on any alternative slate of directors.

55 On May 28, 2012, Blakes asked Maudore by May 29, 2012 to clarify certain ambiguities in the Advance Notice By-Law so that the Applicants could ensure that they complied with it. Maudore refused to clarify many of the identified ambiguities and refused to confirm the number of directors that the Board planned to put forth at the shareholders' meeting.

56 On May 30, 2012, Mr. Pevenstein telephoned Mr. Harbour to advise him that while the company preferred a single nominee, it was prepared to accept both of Mr. Harbour's nominees for the board. Mr. Harbour rejected the proposal.

57 On June 1, 2012, Blakes emailed Norton Rose and indicated that the Applicants had learned that Broadridge US had provided Maudore with the US NOBO List. Blakes asked Norton Rose to provide the list, as it had previously agreed to do.

58 On June 4, 2012, The Harbour Foundation and City Securities attempted to comply with the provisions of the new Advance Notice By-Law.

59 On June 5, 2012, Maudore again postponed the Meeting date, moving it from June 29, 2012 to July 19, 2012, and moving the Record Date from May 4, 2012 to June 8, 2012.

60 On June 6, 2012 Maudore's counsel advised The Harbour Foundation and City Securities that it had reviewed Maudore's obligations under Canadian securities laws and was of the view that Maudore had complied with the law by providing the lists of registered shareholders and Canadian NOBOs, and that it would not provide any additional lists.

61 The Harbour Foundation and City Securities submit that Norton Rose was reneging on a promise. On June 7, 2012, Blakes responded to Norton Rose and objected, among other things, that: (a) by changing the Record Date of the meeting, Maudore would allow individuals who were not Maudore shareholders at the time of either the notice, or the original Record Date, to influence the shareholders' meeting; (b) Maudore was contravening statutory provisions requiring the Meeting be held no later than June 30, 2012; and (c) Maudore's conduct could only be seen as an ongoing attempt to deny Harbour Foundation and City Securities their right to an equal and fair opportunity to present their alternative slate of directors to Maudore's shareholders

62 On June 8, 2012, Norton Rose again refused to provide the US NOBO List.

63 On June 11, 2012, Harbour Foundation and City Securities complained to the the Autorité des marches financiers, and on June 22, 2012 they also applied to the Quebec Bureau de decision et de revision for various orders, including an order requiring Maudore to provide the US NOBO List.

64 On June 21, 2012, the Harbour Foundation and City Securities issued a formal press release stating that they would propose an alternate slate of directors.

65 On June 22, 2012, Maudore issued a responding press release on June 22, 2012.

66 On June 22, 2012, Blakes sent to Maudore's counsel a copy of a proposed Protocol for the conduct of the shareholder's meeting.

67 Throughout May and June, 2012, Mr. Harbour continued discussions with Mr. Shorr and with Mr. Pevenstein, who had been appointed as the chair of a special committee of Maudore's board established in response to Mr. Harbour's desire to see a change in Maudore's management. Dr. Carr was not invited to join the board.

68 Meanwhile, Dr. Carr prepared an outline of the steps he would take if he became Maudore's CEO, which he called the "100 Day Action Plan." He presented the plan to a committee of Maudore's board, formed to consider new nominees to Maudore's board and management. Maudore submits that Dr. Carr prepared his action plan using confidential information acquired by his visit to

the Comtois site.

69 On June 27, 2012, Maudore issued its Notice and Management Proxy Circular. It also issued a press release in which Mr. Shorr is quoted as saying "The dissidents have little first-hand knowledge of our [i.e. Maudore's] programs, making them ill-equipped to lead the company through the critical next stage of its development.

70 On June 29, 2012, the application to the Bureau came on for a hearing. After hearing argument, the Bureau advised counsel that it was reserving its decision on jurisdiction and would hear argument on the merits. At that point, Maudore's counsel asked for a recess to obtain instructions. The hearing recessed and when she returned, she indicated that Maudore would provide the US NOBO List that day.

71 Still on June 29, 2012, the list was delivered and the Harbour Foundation and City Securities issued their Dissident Proxy Circular, which included as an appendix the "100-day plan" that had been prepared by Dr. Carr.

72 Anglo Pacific Group plc., the second largest shareholder, holding 8.8% of Maudore Mineral's shares, has agreed to support the slate of directors proposed by The Harbour Foundation and City Securities Ltd.

73 Maudore has provided an undertaking with respect to damages if the interlocutory injunction is granted.

C. DISCUSSION

1. The Test for an Interlocutory Injunction

74 In the main, both motions before the court are requests for interlocutory injunctive relief. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the Supreme Court set out the test used for granting or refusing to grant an interlocutory injunction. Under the *RJR-MacDonald* test for an interlocutory injunction, the court considers three factors: (1) whether the plaintiff has presented a serious issue to be tried or, in a narrow band of cases, a strong *prima facie* case; (2) whether the plaintiff would suffer irreparable harm if the remedy for the defendant's misconduct were left to be granted at trial; and (3) where does the balance of convenience or inconvenience lie in the granting or the refusing to grant an interlocutory injunction.

75 Under the *RJR-MacDonald* test, the court considers whether the plaintiff or applicant has shown that there is a serious issue to be tried in the sense that the plaintiff or applicant has a viable claim. For most cases, this factor sets a low threshold, and this approach negates the need of any intensive review of the merits at the preliminary phase of the proceedings. However, if its consideration of the other elements of the test is inconclusive, the court may revisit the question of the strength or merits of the plaintiff's case as an aspect of the balance of convenience factor:

American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396 (H.L.); *Omega Digital Data Inc. v. Airos Technology Inc.* (1996), 32 O.R. (3d) 21 (Gen. Div.); *Empire Stevedores (1973) Ltd. v. Sparringa* (1978), 19 O.R. (2d) 610 (H.C.J.).

76 The higher threshold of showing a strong *prima facie* case is required where the outcome of the interlocutory injunction, practically speaking, will make proceeding to trial pointless for one party or when the plaintiff's right can be exercised only immediately or not at all: *RJR-MacDonald Inc. v. Canada (Attorney General), supra*; *Ontario (Attorney General) v. Ontario Teachers' Federation* (1997), 36 O.R. (3d) 367 (Gen. Div.). Courts typically also require a moving party to adhere to the higher standard where the moving party seeks a mandatory order as opposed to just a restraint on action: *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*, [2009] O.J. No. 1743 (S.C.J.) at paras. 37-39.

77 A plaintiff may seek an injunction to prevent harm that has not yet occurred but that is threatened or apprehended as imminent. Such a motion is described as an injunction *quia timet* ("because he fears"). For this kind of injunction, the general principle is that there must be a high degree of probability that the substantial harm would occur if not restrained: *Connaught Laboratories Ltd. v. Smithkline Beecham Pharma Inc.*, [1998] F.C.J. No. 1851 (F.C.T.D.); *Canada (Attorney General) v. Hendy*, [1996] O.J. No. 5446 (Gen. Div.); *Vanswan Properties Inc. v. Peckham*, [1999] O.J. No. 3300 (S.C.J.); *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441; *Dowell v. Mengen Institute*, [1983] O.J. No. 1090 (H.C.J.); *Boehmer Box L.P. v. Ellis Packaging Ltd.*, [2007] O.J. No. 1694 (S.C.J.).

78 The irreparable harm analysis means the court will consider whether damages awarded after a trial will provide the plaintiff or applicant with an adequate remedy without the need for an interlocutory remedy: *Traynor v. Unum Life Insurance Co. of America* (2003), 65 O.R. (3d) 7 (Div. Ct.); *Paddington Press Ltd. v. Champ* (1979), 43 C.P.R. (2d) 175 (H.C.J.); *Evans Marshall & Co. Ltd. v. Bertola S.A.*, [1973] 1 All E.R. 992 (C.A.).The onus is on the plaintiff or applicant to show that if made to wait for a hearing where damages are awarded, then he or she will suffer irreparable harm.

79 The balance of convenience analysis considers what is the effect on the parties and sometimes on third parties of the court granting or not granting the interlocutory injunction: *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.); *Synergism Arithmetically Compounded Inc. v. 1130163 Ontario Inc.*, [1997] O.J. No. 4271 (Gen. Div.).

80 This analysis involves a determination of which of the two parties will suffer the greater harm from the granting or the refusal to grant an interlocutory injunction pending a decision on the merits. In this context, the court will need to compare and contrast the harm that the plaintiff may suffer if the interlocutory injunction is refused with the harm that the defendant would suffer that would not be reparable by the plaintiff's undertaking as to damages if the interlocutory injunction is granted. The factors that the court may consider in assessing the balance of convenience and the

weight to be given to them are indeterminate and will vary from case to case: *RJR-MacDonald Inc. v. Canada (Attorney General), supra.*

2. Harbour Foundation's and City Securities' Arguments Against Interlocutory Relief for Maudore

81 In the case at bar, Harbour Foundation and City Securities submits three main arguments that Maudore's motion for an interlocutory injunction should be dismissed. I foreshadow to say that I disagree with the second argument. I agree with the third argument, and I agree with the thrust of the first argument, but I would articulate that argument differently to remove several elements that I do not agree with.

82 Their first argument is that in the circumstances of this case, in order to obtain an interlocutory injunction, Maudore must show a strong *prima facie* case involving four elements; i.e. that (1) all the defendants are parties to the Confidentiality Agreement; (2) all the defendants received confidential information pursuant to the Confidentiality Agreement; (3) the defendants used the confidential information for the purposes of nominating a slate of directors in opposition to the one presented by Maudore's management, and soliciting proxies from other shareholders to support that slate; and (4) the use of the confidential information for that purpose is contrary to the Confidentiality Agreement. Maudore, however, it is submitted, cannot show a strong *prima case* satisfying these four elements, and, therefore, its motion should be dismissed.

83 Harbour Foundation's and City Securities' second argument is that Maudore cannot show irreparable harm.

84 Harbour Foundation's third argument is that the balance of convenience favours refusing the injunction.

85 In my opinion, Harbour Foundation and City Securities are correct in their submission that Maudore must show a strong *prima facie* case because granting or refusing the injunction will be determinative of the underlying dispute that concerns the election of competing slates of directors. In the circumstances of this case, it is not sufficient to simply show that there is a serious issue to be tried. I need not decide whether the higher standard is also required because of the mandatory aspects of the relief sought or for any other reason.

86 I, however, disagree with Harbour Foundation and City Securities about the constituent elements of that strong *prima facie* case. In my opinion, Harbour Foundation and City Securities fail to appreciate that Maudore's claim is not confined or limited to a breach of contract claim and includes a theory of liability based upon breach of confidence principles. In my opinion, Harbour Foundation and City Securities also undervalue the strength of the breach of contract claim against Harbour Foundation and City Securities on the theory that Dr. Carr was their agent.

87 The elements of a claim of breach of confidence are: (1) the plaintiff imparts information

having a quality of confidence (confidential information); (2) the information was imparted in circumstances in which an obligation of confidentiality arises (communication in confidence); and (3) the defendant makes an unauthorized use of the information (misuse of information): *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142; *Coco v. A. N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.).

88 With a possibly viable claim for breach of confidence in play, in my opinion, Harbour Foundation and City Securities are incorrect in asserting that in order for Maudore to be granted an interlocutory injunction, it must show a strong *prima facie* case that: (1) all the defendants were signatories of the Confidentiality Agreement; (2) all the defendants received confidential information pursuant to the Confidentiality Agreement; and (3) the use of confidential information was contrary to the Confidentiality Agreement. Rather, in my opinion, for success Maudore must simply show a strong *prima facie* case that (1) the defendants received confidential information (pursuant to the Confidentiality Agreement or in circumstances governed by the law of breach of confidence); and (2) they made an unauthorized use of the confidential information (be that unauthorized use a breach of contract or be it a breach of confidence).

89 In my opinion, the evidentiary record establishes that Maudore has shown a strong *prima facie* case that the defendants received confidential information from Maudore. However, I conclude that Maudore has shown only a weak case that there was a misuse of the confidential information. It follows that Maudore's request for an interlocutory injunction should be dismissed for its failure to satisfy one of the elements of the *RJR-MacDonald* test.

90 It seems trite to say it but a misuse of confidential information requires a use of confidential information. During the cross-examinations for the motion and during the argument of the motion, Maudore was invited to identify what use was made of the confidential information. Two uses were identified. First, the confidential information was used to motivate or to give Harbour Foundation and City Securities the comfort it needed to undertake a proxy fight, which it did not need permission to do but apparently required some measure of self-confidence to undertake. Second, the confidential information was used to prepare the proxy fight material. Thus, Maudore stated the following in paragraph 97 of its factum.

> 97 Maudore asserts in this proceeding that, in fact, the defendants used the Confidential Information in making the decision to solicit proxies in favour of a new slate of directors, in drafting the Dissident Proxy Circular for this purpose, and in particular, in formulating the "100-day plan" that forms Appendix A to the Dissident Proxy Circular. Maudore submits that this is an improper use of the Confidential Information.

91 Despite Maudore's arguments to the contrary, I do not regard these two uses of the information obtained by Dr. Carr as showing a strong *prima facie* case of misuse of confidential

information. The first alleged misuse of the information lacks substance because the information obtained from the site visit was no more than a motivational catalyst and it is difficult to say whether the motivation came from confidential information or from the fact that the confidential information was consistent with the extensive public information that Dr. Carr had ascertained. The second alleged misuse of the information to prepare the dissident proxy circular lacks substance because Maudore could not actually identify confidential information in the dissent proxy circular. Both alleged misuses arguably fall within the expressly permitted uses of assisting Dr. Carr in his review of Maudore's properties and projects for Harbour Foundation and evaluating Maudore's properties and projects on behalf of Harbour Foundation. In other words, it is arguable that using the information for the purpose of deciding to exercise shareholder's rights is not a misuse of confidential information.

92 I, therefore, conclude that Harbour Foundation's and City Securities' first argument, as I have reconfigured it, succeeds and that is a reason for dismissing Maudore's motion.

93 Harbour Foundation's and City Securities' second argument is that Maudore cannot show irreparable harm. I disagree with that argument. I rather agree with Maudore's argument that it could and would be irreparably harmed if its board of directors was elected in a tainted election. I think that the analogy it draws to cases in which a corporation was regarded as harmed by a tainted take-over bid are apt. See: *Certicom Corp. v. Research In Motion Limited*, 2009 CanLII 1651 (Ont. S.C.J.); *Gold Reserve Inc. v. Rusoro Mining Ltd. and Endeavour Financial International Corporation*, [2009] O.J. No. 533, 2009 CanLII 4855 (Ont. S.C.J.), leave denied to appeal [2009] O.J. No. 1442, 2009 CanLII 16291 (Ont. S.C.J.). I do not agree with Harbour Foundation's and City Securities' categorical argument that irreparable harm was impossible in the circumstances of this case.

94 I agree with Harbour Foundation's and City Securities' third argument which that the balance of convenience favours refusing to grant an injunction.

95 Assuming that confidential information was misused, it was misused for the purpose of Harbour Foundation and City Securities exercising a right that they had to engage in a proxy fight. In Harbour Foundation and City Securities now engaging in that proxy fight, there is no evidence connecting their dissent proxy circular with the confidential information. There is also no evidence that Maudore's management lost their incumbent's advantage.

96 Mr. Shorr testified that the dissidents had little first-hand knowledge. He said: "They have a little, but not much, but the little they have, they misused." If Mr. Shorr is correct that Harbour Foundation and City Securities achieved little from their alleged breach of confidence, than it seems draconian to disenfranchise Harbour Foundation and City Securities from the exercise of their normal electoral rights.

97 Based on Mr. Shorr's assessment and based on my own, the balance of convenience favours not granting the injunction. Assuming a breach of confidence, it seems not to have genuinely

perturbed Maudore's management and there is something to be said for Harbour Foundation's and City Securities' suggestion made during argument that the discomfort or inconvenience is not genuine but rather a cover for a tactical device in the proxy fight. The parties are left to win or lose the proxy fight on the merits.

98 In any event, in my opinion, the balance of convenience element does not favour Maudore and this provides another mutually independent reason for dismissing its injunction motion.

3. Special Committee of Independent Directors' Arguments against Interlocutory Relief

99 I can now turn to the other motion for interlocutory relief.

100 As noted at the outset, Harbour Foundation and City Securities submit that they are entitled to a declaration and interlocutory relief because they submit that Maudore's current management has for months engaged in a pattern of self-interested behaviour designed to frustrate their ability to propose their alternate slate of directors. They submit that the corporation's conduct is oppressive, unfairly prejudicial to, and unfairly disregards their interests as shareholders, and breaches their reasonable expectation of fair and equal treatment.

101 The particulars of the pattern of bad behaviour are fourfold: (1) Maudore changed the Meeting date and the record date for the shareholder's meeting; (2) Maudore delayed, and at times refused, to provide the Applicants with lists of Maudore's shareholders; (3) Maudore changed its changed its corporate by-laws to require Harbour Foundation and City Securities to follow an advance notice by-law process to make it as difficult as possible for them to put their slate of directors before Maudore's shareholders; and (4) Maudore refused to implement, or even discuss the implementation of, a meeting protocol for the fair conduct of the meeting.

102 In these alleged circumstances, Harbour Foundation and City Securities seek: (a) a declaration that Maudore shareholders who acquired their shares by transfer after June 8, 2012 are not entitled to vote those shares at the shareholders' meeting; (b) an order that the Chair of the meeting be an independent third party appointed by the court; and (c) an order that at the shareholders' meeting, Maudore adopt the review of proxies procedure set out in paragraphs 20 to 24 of the Protocol attached as Schedule A to the Notice of Application.

103 The Special Committee of Independent Directors argue that Harbour Foundation and City Securities ought not to be granted any declaratory or injunctive relief.

104 As I understand it, the Special Committee's argument is as follows.

105 The Special Committee submits that Harbour Foundation and City Securities have no current complaint and rather are seeking declaratory and interlocutory relief *qui timet* because of an apprehension that because of the past alleged misconduct of Maudore's management, Mr.

Pevenstein, who recently replaced Mr. Shorr as the company's Chairman and who will chair the shareholders' meeting may unfairly and unlawfully conduct that meeting.

106 However, the Special Committee submits that Harbour Foundation and City Securities should not be granted a *quia timet* injunction or a declaration when as a matter of the law of injunctions and as a matter of corporate law there is no justification for interlocutory relief and where as a matter of legal policy it would be unwise and inappropriate to grant any relief.

107 In support of its argument, the Special Committee makes the following points, which I agree with.

108 First, in the absence of demonstrated impropriety, court ought not to interfere in advance with the operation of the exercise of the shareholders' right to design their own corporate constitution and electoral process. In *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 at para. 49, the Supreme Court of Canada emphasized that "the detailed organization of a corporation is essentially a private contractual matter." As noted by the British Columbia Supreme Court in the context of a proxy battle: "The court should not enter into the fray and take sides in such a battle in the absence of any evidence of impropriety:" *Re MTC Electronic Technologies Co.*, [1994] B.C.J. No. 3223 (S.C.) at para. 29.

109 Here, I would add that, generally speaking, courts do and should respect contractual autonomy. In the case at bar, in seeking to have the court impose a voting protocol or now a portion of it, Harbour Foundation and City Securities are asking the court to re-write the by-laws of the corporation as Harbour Foundation and City Securities think would be reasonable and fair. In the circumstances of this case, I see no reason or basis for the court to interfere with the contractual and corporate autonomy of the board of directors. At this time, it is most likely that Mr. Pevenstein will attempt to be conscientious and meticulous in carrying out his responsibilities at the shareholders' meeting.

110 I adopt what Justice Campbell said at paras. 7 and 8 in *Environmental Management Solutions Inc. v. D'Arrario* (unreported, April 28, 2005, Toronto O5-CL-5772), a case in which a shareholder sought to have the court appoint an independent chair to preside at a corporation's annual general meeting:

> 7. I can understand the concern and perhaps apprehension that the respondents may have for the fair resolution of proxy and other issues at the meeting but on the material before me, I am not satisfied that Mr. Harris will not act fairly and reasonably in his duties as Chair notwithstanding the stated concerns by the Company about Mr. D'Arrrio's conduct.
> 8. The company and Mr. Harris are on notice that their actions may well be criticized before this Court after the fact ...

111 In the case at bar, the appropriate course of action is for Harbour Foundation and City

Securities to await the results of the annual general meeting and if there is some impropriety or illegality, then apply to the court under the Ontario *Business Corporations Act* for declaratory or injunctive relief.

112 Second, in the case at bar, there is no evidence or allegation that the current chairperson, director Robert L. Pevenstein, has threatened to or will not act fairly and reasonably in his duties as chair, or that he has committed any act or omission that has created a reasonable apprehension that the shareholders' meeting and Maudore has expressly confirmed that the meeting will be conducted in accordance with all legal requirements, applicable jurisprudence, recognized industry practices and with a view to the best interests of all shareholders.

113 Third, it is understandable and reasonable that the date of the shareholders' meeting was changed. The changes came about largely because of the unsuccessful efforts to appease Mr. Harbour. Harbour Foundation and City Securities are just wrong in asserting that the July 19, 2012 date is non-complaint with statutory requirements.

114 Fourth, there was nothing unfair or inappropriate in introducing the Advance Notice By-law to ensure that all shareholders would have sufficient notice of a contested election of directors.

115 Fifth, it is not true that Maudore refused to implement or even discuss the implementation of a meeting protocol for the fair conduct of the meeting. There were ongoing discussion to accommodate Mr. Harbour and in any event there was nothing inappropriate about the board of directors making decisions in accordance with their corporate law authority taken in the best interests of all shareholders.

116 To these points by the Special Committee, a sixth, seventh, and eighth point may be added.

117 Sixth, while the Board's and the company's lawyers handling of the request for the US NOBO list was far from exemplary, the failures are more accurately attributed to mistakes then to mischief, and, in any event, Harbour Foundation and City Securities ultimately got what they wanted albeit late and with somewhat less utility. Moreover, at the hearing of the motion brought by Maudore for an injunction, Harbour Foundation and City Securities exuded confidence that they would win the proxy fight if not enjoined from voting their own shares and the proxies. That remains to be seen, but their confidence belied any argument that they had been prejudiced or much discomforted by the late arrival of the US NOBO list.

118 Seventh, at this juncture it is premature for the court to declare anything about the request for a declaration that Maudore shareholders who acquired their shares by transfer after June 8, 2012 are not entitled to vote those shares at the shareholders' meeting. At this juncture, it is not known whether any shareholders acquired shares by transfer after June 8, 2012 and it is not known whether such shareholders, if any, will attempt to vote shares improperly.

119 Eighth, approached as a matter of injunctive relief, in my opinion, Harbour Foundation and

City Securities have not shown a strong *prima facie* case for a mandatory injunction. They will not suffer any irreparable harm if the injunction is not granted; if the shareholders' meeting is not properly conducted, the harm done is not irreparable. Finally, the balance of convenience does not favour granting the injunction given what would be a *qui timet* interference with the contractual and corporate autonomy of Maudore and its shareholders.

D. CONCLUSION

120 For the above reasons, both motions are dismissed.

121 If the parties cannot agree about costs they may make costs submissions in writing within 20 days of the release of these Reasons for Decision.

P.M. PERELL J.