



McMillan National Seminar

Shareholder Activism is on the Rise —
What you need to know

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Overview

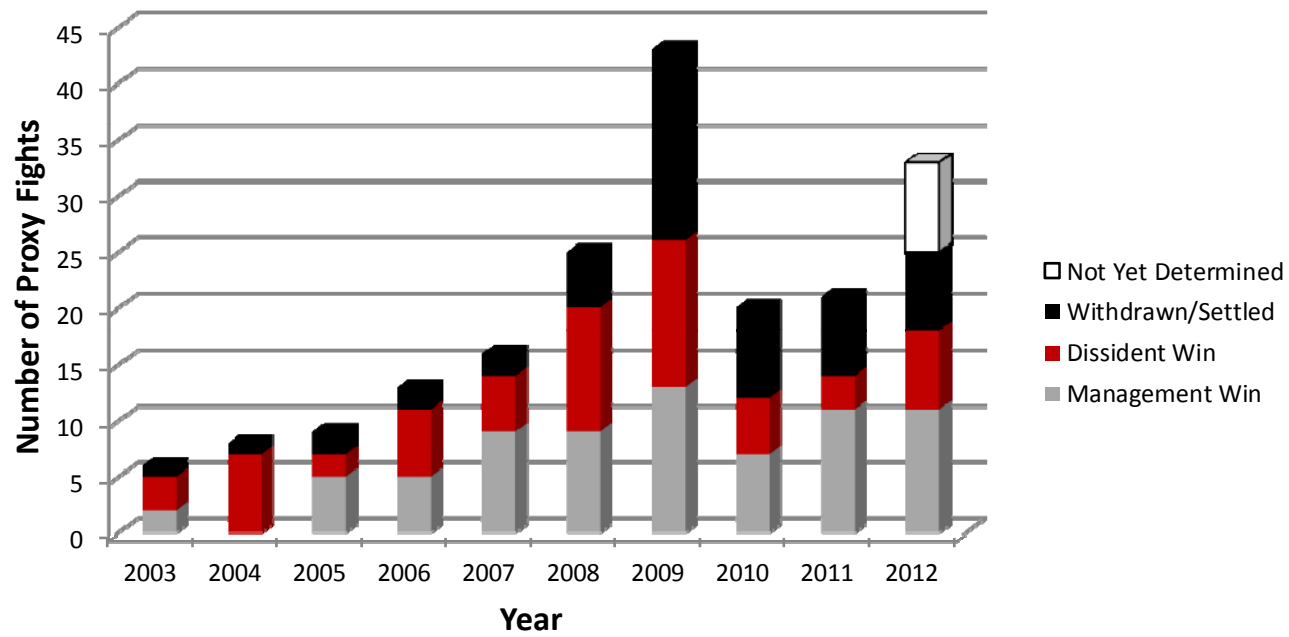
- Forms of Activism
- Trends
- Objectives of Activists and Responses
- Advance Notice By-laws
- Key Takeaways
 - Be Prepared
 - Communication with Shareholders is critical
 - Protect your assets
 - Litigation is a strong possibility and must be taken into account

Forms of Activism

- Private pressure for change
- Public pressure, including shareholder proposals
- Litigation
- Proxy fights

Trends

Proxy Fights in Canada – 2003-2012



Information provided by Kingsdale Shareholder Services Inc.

Trends (cont'd)

Changing Face of Dissidents

- Until 2009, with a few exceptions, dissident actions tended to be associated with smaller companies, and dissidents were aggrieved former officers, founders or directors.
- The face of dissident shareholder actions has changed over the past three years with the emergence of professional activist or catalyst investors.
- One dramatic change: traditional fund and pension managers are now willing to support and even lead dissident shareholder action.

Information provided by Kingsdale Shareholder Services Inc.

Trends (cont'd)

Regulatory Initiatives

- Majority voting policies
- Notice and access
- Regulation of proxy advisory firms
- New regulations on shareholder rights plan
- Lowering threshold to 5% for early warning reports

Recent Jurisprudence

- Advance notice by-laws/policies: *Mundoro Capital* and *Maudore Minerals* decisions
- Telephone voting: *Mosquito* decision
- Empty voting: *Telus* decisions

Objectives of Activists & Responses

Objectives

- Change: corporate strategy or management
- It's about money

Responses

- **Yes**
 - Accept dissident proposal in some form
- **No**
 - Seek to defeat dissident — includes pre-emptive steps
- **Maybe**
 - Negotiate; bide time; fight now and prepare for settlement

Advance Notice By-laws

- Purpose of an advance notice by-law, as prepared by McMillan, is to provide advance notice to issuers and their shareholders in circumstances where nominations of persons for election to the board of directors of the issuer are made by shareholders (usually at the meeting called to elect directors), other than pursuant to a requisition of a meeting or a shareholder proposal



Advance Notice By-laws (cont'd)

- Applies to only 2 of the 4 methods available to shareholders to nominate directors at a meeting of shareholders:
 - shareholders' requisition
 - shareholder proposal
 - proxy fight
 - nominations at a meeting



Advance Notice By-laws (cont'd)

- Not intended to discourage nominations:
 - ensures that all shareholders – including those participating in a meeting by proxy rather than in person – receive adequate notice of nominations
 - allows shareholders to register an informed vote
 - facilitates an orderly and efficient process
 - prevents an “ambush”



Advance Notice By-laws (cont'd)

- “Commonplace” in the United States
- Endorsed by ISS and Glass Lewis
- We have been genuinely surprised by the rapid rate of adoption of advance notice by-laws over the past year and humbled by the fact that the form of advance notice provisions adopted by Canadian public companies have been based on the form adopted by our clients commencing in October 2011



Advance Notice By-laws (cont'd)

- Consistent with ISS guidelines, which “support additional efforts by companies to ensure full disclosure of a dissident shareholder’s economic and voting position in the company so long as the informational requirements are reasonable and aimed at providing shareholders with the necessary information to review any proposed director nominees”, we have introduced an enhanced by-law for the 2013 proxy season.



Advance Notice By-laws (cont'd)

- Our enhanced by-law:
 - provides that all nominees (including management solicited nominees) are required to deliver to the issuer an agreement to abide by all applicable policies of the issuer.
 - requires disclosure of all shares indirectly owned by each nominee and the shareholder making the nomination, including convertible securities and shares owned through derivatives.
 - requires the nominating shareholder to include a statement as to whether each nominee would be “independent” of the issuer (within the meaning of applicable securities laws).



Key Takeaways

Be prepared

- First rule — it is never a total surprise
- Communicate with shareholders
- Follow best practices in corporate governance
- Be alert to signs of problems
- Establish a proxy fight team
- Implement an advance notice by-law



Key Takeaways (cont'd)

Communication with shareholders is critical

- Important that management monitors shareholders' concerns and activities
- Ongoing and proactive communications with shareholders – particularly institutional shareholders – is critical; investor relations function is important
- In the context of a proxy fight: need a consistent and easily understood story – this is a campaign for votes



Key Takeaways (cont'd)

Protect your assets

- In the course of a protracted, personal and hostile fight management may lose sight of the fact that if they win it is important to have something left that was worth fighting over
- Secure key employees
- Pay attention to other key stakeholders



Key Takeaways (cont'd)

Litigation is a strong possibility and must be taken into account

- Sword or shield
- The facts are critical in any litigation and therefore it is important to appear to be reasonable
- Act as if everything done will be publicly disclosed
- Many legal decisions in this field are not widely reported