

Responding To An Activist Shareholder: The Playbook

The Canadian Investor Relations Institute
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FASKEN MARTINEAU CANADIAN PROXY CONTEST STUDY

For a copy of our study and updates, visit:

<http://www.fasken.com/canadian-proxy-contest-study-2015-update/>



PROXY CONTEST STUDY OVERVIEW

Focus of our study

- Focus on proxy contests over other forms of shareholder activism
- Focus on formal contests
- Focus on “board-related contests”

Topics addressed in our study

- Issuer profile
- Dissident profile
- Dissident allegations
- Tactical matters

PROXY CONTESTS ARE ON THE RISE

Proxy Contests Per Year, 2008-2012



The number of formal proxy contests (where the dissident issues a proxy circular) has increased by 84% over the previous five-year period.

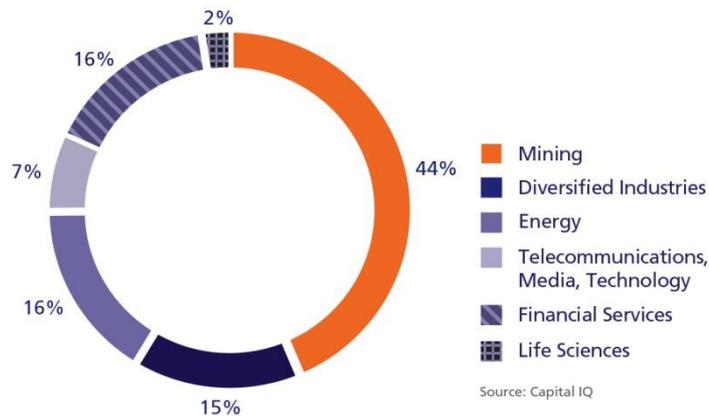
DISSIDENTS ACHIEVED SUCCESS WELL OVER HALF OF THE TIME



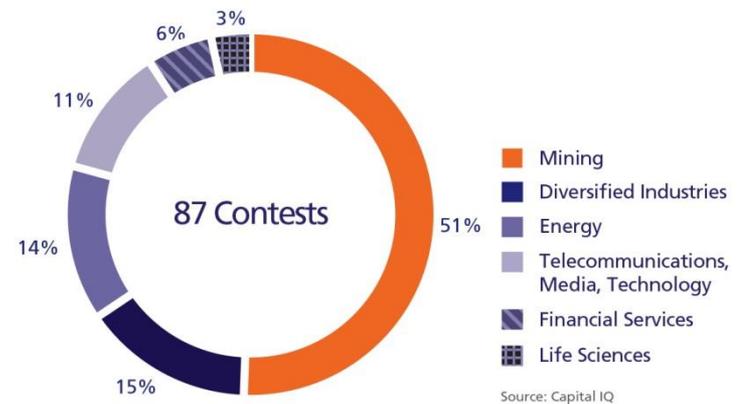
Dissidents achieved all or some of their objectives in 54% of contests and outright wins in 40% of contests.

NO ONE IS IMMUNE

Distribution of TSX and TSX-V Listed Issuers by Industry (Average for the Study Period)

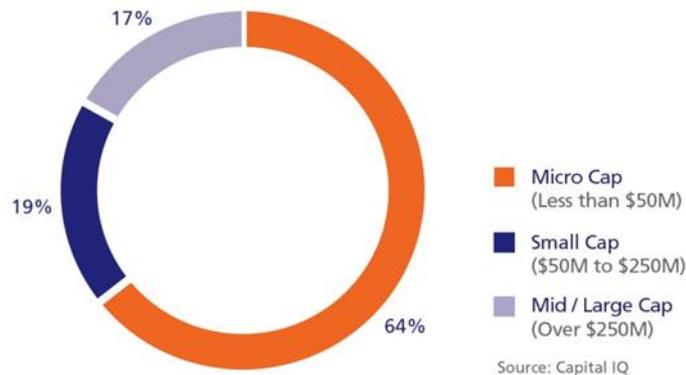


Distribution of Contests by Issuer Industry

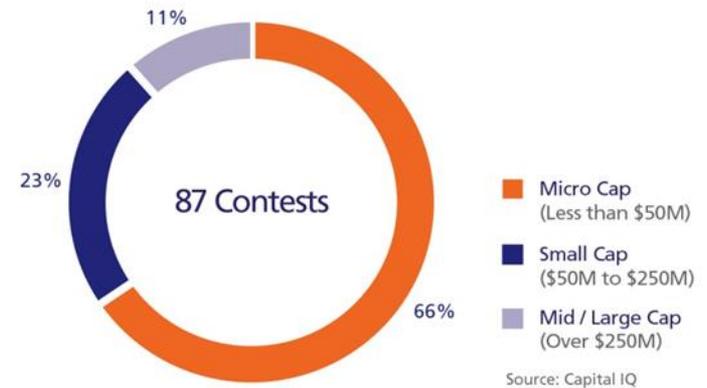


NO ONE IS IMMUNE

Distribution of TSX and TSX-V Listed Issuers by Market Capitalization, (Average for the Study Period)

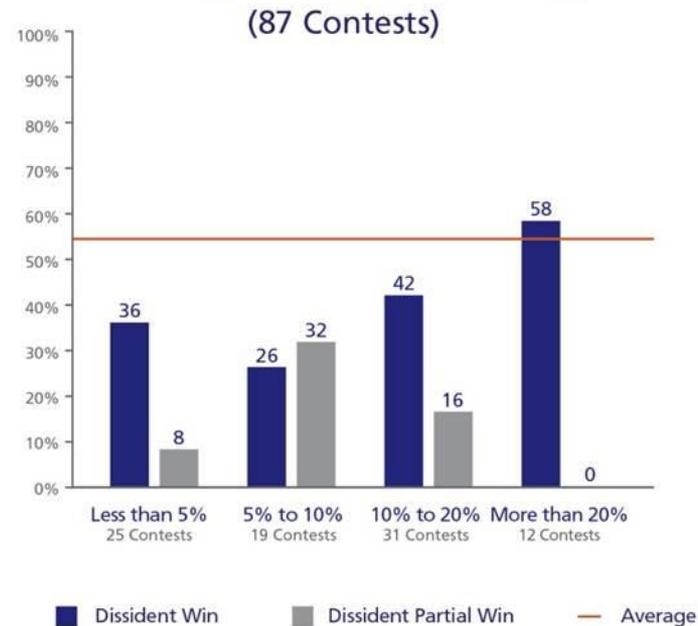


Distribution of Contests by Issuer Market Capitalization



GREATER SHARE OWNERSHIP IS ASSOCIATED WITH BETTER OUTCOMES FOR THE DISSIDENT

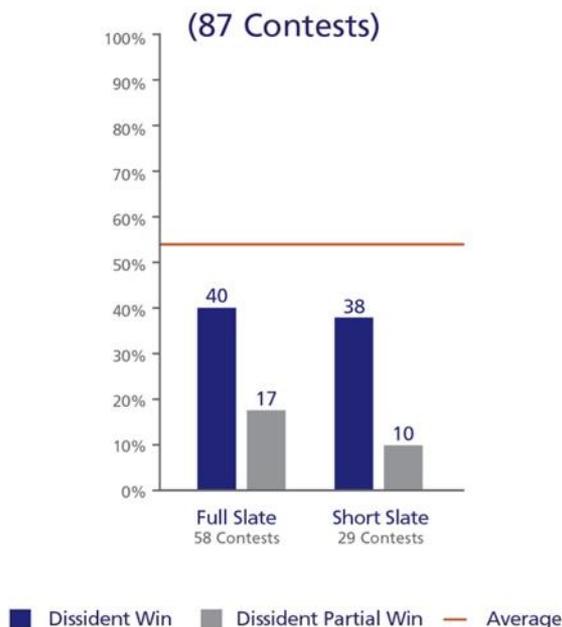
Dissident Win Rate by Dissident Voting Share Ownership



The percentage of full wins increased as share ownership levels increased, but overall success rates remained constant.

DISSIDENTS SEEKING A CLEAN SWEEP OF THE BOARDROOM HAD A HIGHER SUCCESS RATE

Dissident Win Rate Full vs. Short Slate

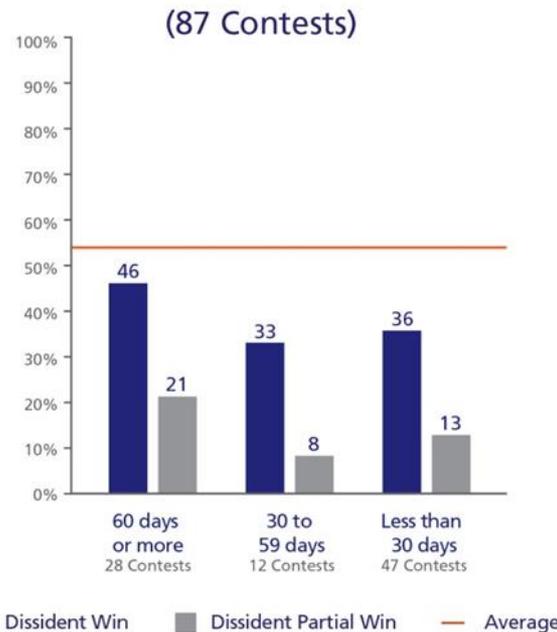


Opting for a full slate may be putting pressure on management to settle, resulting in a greater percentage of dissident partial wins.



SUCCESSFUL DISSIDENTS MAY FAVOUR A LONGER PUBLIC CAMPAIGN

Dissident Win Rate by Days Between Initiation and Issuer's Original Meeting Date

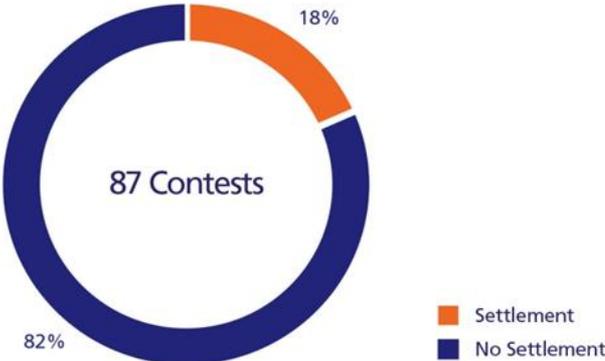


Longer public campaigns resulted in a greater percentage of dissident full and partial wins.



TRUE SETTLEMENT IS ELUSIVE AND OCCURS LATE IN THE GAME

Percentage of Contests that Settled



Win Rate in Contests that Settled



True settlement, involving substantive concessions on both sides, occurred in just over 10% of all contests. Where settlement did occur, it often occurred after the proxy cut-off time.

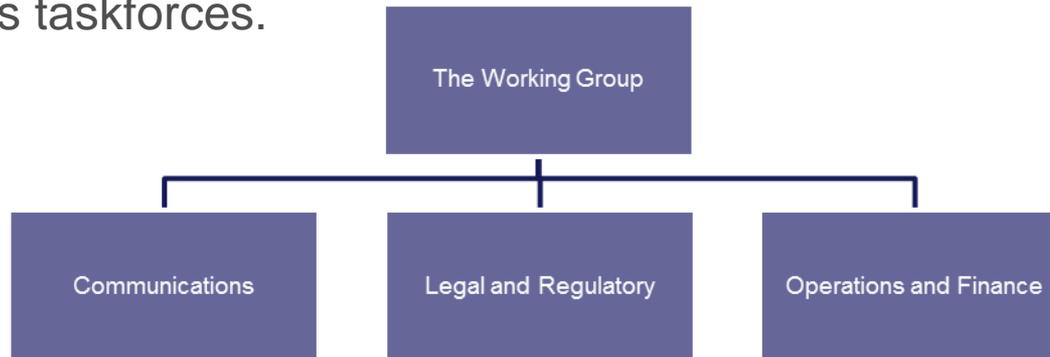


THE PLAYBOOK



THE WORKING GROUP

- Establish a working group to coordinate response and strategic/communications plans.
- A working group is typically comprised of leaders of a number of separate groups to lead various elements of strategic planning and communications. The working group's role is to coordinate, integrate and oversee the efforts of these various taskforces.



- The working group should be supported by experienced external advisors where necessary.

PREPARING AND POSITIONING FOR A PROXY CONTEST



- A sound, compelling narrative is at the core of any successful public campaign. A well-developed narrative should be shaped by information gathered, or remedial action implemented, in the course of taking a number of related, interconnected preparatory steps identified in the graphic above.

DEVELOPING YOUR NARRATIVE

- Far too many targets of activist conduct rely on the notion that the merits of their strategic vision are sufficiently self-evident to stand on their own.
- Even the most sound strategic plan requires explanation, simplification and even promotion. A carefully developed and articulated narrative fulfills these requirements and provides perspective and context for the target board's position.
- The narrative provides a consistent touchstone or guide throughout the life of an activist campaign and, more generally, throughout the process of developing and executing the target board's strategic plan.
- Shareholder buy-in for the chosen narrative is obviously crucial; however, shareholders are but one constituent in the target audience: the press, employees, customers, suppliers, regulators, research analysts and proxy advisory firms are among the other constituents that have a stake in the target and should therefore be among those with whom the narrative is intended to resonate.

CONDUCT AN HONEST SELF-ASSESSMENT

- Too often activist campaigns end unhappily for the target's management and board of directors owing to an entirely avoidable circumstance: failure by the target to conduct an honest self-assessment of its strengths and weaknesses. This can leave the target ill-prepared, both to evaluate the risk of activist conduct in the first place and to develop an effective response should that risk materialize.
- In order to properly evaluate the merits and drawbacks of the activist's proposal and begin developing a response, consider conducting an honest self-assessment from the following perspectives:



IDENTIFY AND EVALUATE STRATEGIC ALTERNATIVES

- An activist campaign often pushes the target's board of directors and management back on its heels. To get back on its front foot a target should have a set of well-defined and quantitatively evaluated strategic options to hold up against the activist's recommended course of action.
- All options should be expressed objectively in terms of:
 - expected impact on value delivery; and
 - anticipated costs and risks associated with generating such value.
- Options can be compared side-by-side, both according to the above criteria and according to their consistency with the “reasonable expectations” of impacted stakeholders, with the most attractive one selected by the target board.
- The set of options evaluated should be expanded to include the activist's proposal. Doing so will provide a transparent justification for the target board's rejection or acceptance of the activist's recommended course of action.

ENGAGE WITH YOUR STAKEHOLDERS

- Proxy contests are largely determined by who does the better job of communicating with affected stakeholders, not only once the proxy contest has begun but also in advance of any such contest.
- Effective stakeholder engagement:
 - is integral to developing and continuously refining one’s strategic vision; and
 - is of course crucial in responding to, and obtaining shareholder support against, any activist campaign that is initiated.
- Meetings should be scheduled with shareholders and efforts should be made to:
 - elicit their front-of-mind concerns;
 - communicate the target’s strategic vision and articulate how it addresses shareholder interests and concerns; and
 - demonstrate the manner in which the target has historically and recently delivered value to shareholders.
- In addition to shareholders, other stakeholders that should be engaged with include the press, employees, customers, suppliers, regulators, research analysts and proxy advisory firms.

KNOW YOUR ACTIVIST

- Intelligence on an activist's history and modus operandi is crucial in preparing an effective response to an activist campaign.
- The assessment of the target's shareholder base undertaken in connection with conducting a self-assessment should be of considerable assistance in identifying other potential activists among the shareholders.
- The following investigations should be undertaken:
 - What is the activist's history? Has it engaged in activist conduct in the past?
 - What tactics has the activist historically employed? Has it been aggressive in nature (e.g. hostile public statements, litigation, "fight letters")?
 - What is the activist's financial condition? Is it sufficiently sound to sustain a strong and prolonged campaign?
 - What are the activist's particular strengths or weaknesses? For example, does the activist have strong credibility among the shareholders or within the financial community more generally?

ENGAGE WITH YOUR ACTIVIST

- Nothing riles and motivates an activist more than being “stiff-armed”. Likewise, few things threaten to damage the credibility of the target board among shareholders more than a perception that it has been dismissive of what might be viewed by them as an attractive strategic alternative, raising the spectre of management entrenchment, among other things. Engaging with the activist early and, if necessary, often in order to understand their position is vital to avoiding these undesirable consequences.
- The likelihood of settlement significantly decreases if private negotiations fail and the activist goes public with its campaign. In light of the expense, risk of reputational harm, management distraction and potential impact on business and operations involved in engaging in a lengthy public campaign, every reasonable opportunity for reaching a negotiated solution before things go public should be pursued.
- An open and frank discussion regarding the activist’s motivations and strategic vision may help uncover its true interests, as distinct from its stated position, thereby creating room for compromise.
- Regardless, the understanding gained from engaging the activist and soliciting its views and ideas is likely to be of great benefit to mounting an effective defence against the activist. Likewise, making the effort is likely to be appreciated by shareholders and contribute to a perception of reasonableness, good governance and enlightened stewardship among stakeholders and the public at large.

THE LEGAL REGIME



OVERVIEW OF CANADIAN PROXY SOLICITATION RULES

- A person shall not solicit proxies unless a management proxy circular or dissident information circular, as applicable, is sent to each shareholder whose proxy is solicited.
- Soliciting is a very broad concept.
- There are limited exceptions to the proxy solicitation rules available for dissidents:
 - Solicitation to fifteen or fewer shareholders
 - Solicitation by public broadcast
- Under certain circumstances, a dissident shareholder may submit a shareholder proposal or requisition a meeting.

RESPONDING TO A REQUISITION FOR A SHAREHOLDERS MEETING

- The holders of not less than 5% of the company's common shares may requisition the directors to call a meeting of shareholders for the purposes stated in the requisition.
- Upon receiving a requisition, the directors shall call a meeting of shareholders to transact the business stated in the requisition unless:
 - the requisition received was not valid (including, if the requisition is not in proper form or where it is not properly delivered);
 - a record date has been fixed and notice thereof has been given or the directors have called a meeting of shareholders and have given notice thereof for a meeting at which there is some reasonable chance that the business stated in the requisition will be considered; or
 - the business of the meeting as stated in the requisition includes certain excluded matters (as identified in the following slide).

RESPONDING TO A REQUISITION FOR A SHAREHOLDERS MEETING

- The directors have discretion as to the scheduling of the meeting, provided that they act in good faith, with a view to the best interests of the corporation. Absent unusual circumstances, a court would be unlikely to interfere with the timing of a meeting to be held 2-4 months from the date of the requisition.
- Unless the directors have valid grounds for refusing to call a meeting, if the directors do not within 21 days after receiving the requisition call a meeting, any shareholder who signed the requisition may call the meeting.

GROUNDS FOR REFUSAL TO CALL A MEETING - EXCLUDED MATTERS

- The company is not required to requisition a meeting of shareholders where:
 - it clearly appears that the primary purpose of requisition or the business proposed to be transacted at the meeting is to enforce a personal claim or redress a personal grievance against the company or its directors, officers or security holders;
 - it clearly appears that the business proposed to be transacted at the meeting does not relate in a significant way to the business or affairs of the company;
 - not more than two years before the receipt of the requisition, a person failed to present, in person or by proxy, at a meeting of shareholders, a proposal that, at the person's request, had been included in a management information circular relating to the meeting; or
 - substantially the same proposal was submitted to shareholders in a management information circular or a dissident's information circular relating to a meeting of shareholders held within two years preceding the receipt of the shareholder's request and the proposal was defeated.

REMOVAL OF DIRECTORS

- The shareholders may by ordinary resolution (more than 50% the shares voted in person or by proxy at the meeting) at an annual or special meeting remove any director or directors from office.
- A vacancy created by the removal of a director may be filled at the meeting of shareholders at which the director is removed.
- If a requisition is received to remove one or more directors, the requisition must identify the individuals that are being proposed to replace such directors.
- A target company may have adopted a by-law or policy requiring advance notice to be provided to the company for nominations of directors by shareholders.
 - The advance notice requirement does not apply to a requisitioned meeting or nominations made by way of a shareholder proposal pursuant to applicable corporate laws.

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