

SHAREHOLDER ACTIVISM: THE CP PROXY BATTLE AND EMERGING TRENDS

Patricia L. Olasker
J. Alexander Moore
Jennifer F. Longhurst








September 10, 2012

DAVIES

Proxy Contests

- **Trendline shows significant increase in proxy contests**
- **Complaints:**
 - Share price performance
 - Management performance
 - Compensation
 - Corporate governance
- **Resource sector activism**

	Avion Gold Corp 	Maudore Minerals Ltd. 	Roxgold Inc. 	Baja Mining Corp 	Mosquito Consolidated Gold Mines 	Mundoro Capital Inc. 	Bison Gold Resources Inc. 	Argonaut Exploration Inc. 	MGold Resources Inc. 
Trading Symbol	AVR-T	MAO-V	ROG-V	BAJ-T	MSQ-V	MUN-T	BGE-V	AGA-V	MNI-V
Market Cap (in CDN)	\$305.38m	\$67.63m	\$56.12m	\$22.11m	\$21.80m	\$16.13m	\$10.28m	\$2.59m	\$1.45m
Meeting Date	June 26, 2012	July 19, 2012	Sept.25, 2012	April 3, 2012	Dec. 16, 2011	Aug. 27, 2012	June 26, 2012	Feb. 14, 2012	June 29, 2012
Size of Dissidents' Share	28%	18.4%	49.6%	20%	17.8%	8.39%	1.2%	18.52%	0.14%
Identity of Dissidents	2 institutional SHs	3 entities	1 retail SH + other retail SHs	1 Institutional SH	2 directors + 1 institutional SH	1 institutional SH + 1 retail SH	1 director + 1 officer + 1 former director	3 former directors	1 retail SH
Dissidents' Complaint	Did not disclose; Leadership and share price performance following coup in Mali	Technical leadership; Exploration costs; Company direction; Fitness of CEO	Technical concerns; Management & governance concerns; Share price	Nepotism; Cronyism; Compensation; Related party transactions; Board independence	Management concerns; Allocation of funds; Share price; Fitness of president	Share price; Allocation of resources	Share price; Management concerns; Compensation	Financing plan; Board expertise	Cancelled projects; Rising costs
Dissidents Announced Slate On	Did Not Disclose	June 29, 2012	July 9, 2012	Feb. 23, 2012	Dec. 7, 2011	June 18, 2012	June 18, 2012	Jan. 24, 2012	June 14, 2012
Did Company Postpone Meeting Date?	Yes (original date: May 17, 2012)	No	Yes (original date: July 12, 2012)	No	No	Yes (original date: June 26, 2012)	No	No	No
Full Board Replacement or Short Slate?	Did Not Disclose	Replace Full Board	Replace Full Board	Short Slate	Replace Full Board	Replace Full Board	Replace Full Board	Replace Full Board	Replace Full Board
Company's Desired Board Size	7	7	5	7	8	4	6	7	4
Dissidents' Desired Board Size	Did Not Disclose	7	5	9 (7 + 2 ind. directors)	5	5	6	5	4
ISS sided with	Company, with 1 withhold	Company	TBD	Dissidents	Company	TBD	N/A	N/A	N/A

	Avion Gold Corp 	Maudore Minerals Ltd. 	Roxgold Inc. 	Baja Mining Corp 	Mosquito Consolidated Gold Mines 	Mundoro Capital Inc. 	Bison Gold Resources Inc. 	Argonaut Exploration Inc. 	MGold Resources Inc. 
Glass Lewis sided with	N/A	Company	TBD	Company	Company	TBD	N/A	N/A	N/A
Winner of Contest	Company	Compromise (5 dissident nominees + 2 Company nominees)	TBD	Company (by 2%)	Company	TBD	Company	Dissidents (by 2 to 1 margin)	Dissidents
Litigation Before Meeting Date?	No	Yes; Company sued dissidents for breach of confidentiality agreement; Action dismissed by SCJ (ON)	TBD	Yes; Company filed complaint with BCSC, alleging that Dissident Shareholders failed to issue an early warning and insider trading report	No	Yes; Dissidents sued Company for advance notice policy and meeting postponement; Application dismissed by Supr Ct (BC)	No	No	No
Litigation After Meeting Date?	No	No	TBD	No; But dissidents planned to audit the vote	Yes; Supr Ct (BC) invalidated result. Dissidents successfully challenged the taking of voting instructions orally by telephone.	TBD	Yes; Dissidents appealed to SCJ (ON) to confirm dissident slate	No	No

Large Cap Activism

- **Pershing Square/CP**
 - Management Change
- **Mason Capital/Telus**
 - Event-driven
- **Jana Partners/Agrium**
 - Seeking spin-off

Key Issues

1. Share accumulation reporting and the exemption for passive investors
2. Constraints on "wolf pack" behaviour
3. Requisitioned meeting vs. shareholder proposal vs. ambush
4. Board change proposals – short slate vs. full slate, and the universal proxy
5. Proxy solicitation – How far can you go?

Key Issues

6. Impact of ISS and other proxy advisory firms
7. Flaws in the proxy system
8. Shareholder meeting protocol agreements
9. Role and cost of Broadridge and other gatekeepers
10. Empty voting

Share Accumulation Reporting

- **Goal of acquiring a position quietly without tipping the market**
- **Important differences between the Canadian and U.S. disclosure regimes**
- **United States**
 - Schedule 13D filing obligation triggered at 5%
 - Alternative Schedule 13G report not available to activist shareholders
 - Schedule 13D is due within 10 days of crossing 5% – no prohibition on further purchases

Share Accumulation Reporting

- **Canada**

- Higher threshold – 10%
- Early Warning Report (EWR) and announcement required immediately
- Alternative Monthly Reporting System (AMRS) allows eligible institutional investors (includes hedge funds) to avoid immediate announcement
- Unless eligible for AMRS, shareholder must stop buying after crossing 10% for one full business day
- A shareholder with activist intent may still file under AMRS

Wolf Pack Behaviour

- **Importance of shareholder support**
- **Insider trading and tipping**
- **Joint actor characterization**
- **Implications for:**
 - Early warning and 13D disclosure
 - Take-over bid compliance
 - Poison pill trigger

Initiating the Proxy Contest

- **Formally launching the contest:**
 - The "Ambush";
 - Shareholder proposal;
 - Requisitioning a meeting; and/or
 - Proxy fight by way of proxy circular
- **Weighing the Pros and Cons**
 - Tactical considerations and objectives
 - Timing constraints or concerns
 - Pershing adopted a combination of strategies

Initiating the Proxy Contest

- **The Ambush**

- Nominations from the floor without notice
- Emerging trend of "advance notice by-laws"
- Recent case law – *Northern Minerals v. Mundoro*

- **Shareholder Proposal**

- 1% of voting shares for 6 months with \$2,000 FMV
- No credible precedents for nominating directors
- Deadline for submission – 90 days before anniversary date of prior year's notice of meeting

Initiating the Proxy Contest

- **Requisitioning a Meeting**

- "Holder" of 5% of voting shares – no holding period
- Must "call" within 21 days, unless already called AGM
- State the business to be transacted – *Ursa Major* and *Reichert v. Richtree*

- **Proxy Fight**

- Delivery of dissident proxy materials
- Used alone or in combination with above

Board Changes: Proposing the Slate



- **CP's board was comprised of "Blue Chip" directors**
- **Pershing Square initially asked to have two nominees**
- **When friendly talks broke down, Pershing sought a larger slate, though less than a majority**

Board Changes: Proposing the Slate



- **On January 23, 2012, Pershing announced that it would nominate five nominees**
 - Subsequently, number of nominees was increased to six with the addition of Paul Haggis and then to seven with the addition of former Norfolk Southern CEO Steve Tobias

Board Changes: Universal Proxy



- **Use of the universal proxy**

- Allows the shareholder to pick and choose between the management and dissident nominees on a single form
- In the United States, a dissident cannot unilaterally use a universal proxy without the consent of the nominees
- Without a universal ballot, the shareholder is presented with a stark choice:
 - vote on the dissident's proxy form and vote "for" or "withhold" against the dissident nominees; or
 - vote on management's proxy and vote "for" or "withhold" against the management nominees
- wasted votes

Board Changes: Universal Proxy



- Pershing Square had pushed unsuccessfully for a universal ballot proxy in its proxy fight with Target
- In Canada, there is no restriction on a dissident including management's nominees in its proxy
- Acting pre-emptively, CP adopted a universal proxy that included Pershing Square's nominees
- Pershing Square also used a universal proxy

Proxy Solicitation

- **Shareholder One-on-Ones**
 - Dissidents can rely on ≤ 15 -shareholder exemption
- **Town Hall Meeting and Dissident Circulars**
 - "Pre-emptive" dissident proxy circular
- **"Public Broadcast" Exemption**
 - Eligibility and criteria for reliance
 - Types of solicitation and practical aspects of compliance
 - *e.g.*, public meetings, press releases, one-on-one meetings, customized website, media, speeches and interviews

Proxy Solicitation

- **Proxy Solicitation Conduct**

- What is "solicitation"? – ambiguities and risks
- CP's solicitation practices
 - e.g., letters to employees and shareholders, press releases, customized website, "Google Ads", etc.

- **Regulatory Involvement and Legal Options**

- Regulatory reluctance to monitor and enforce compliance in the face of a proxy contest
- Potential legal alternatives?

Impact of Proxy Advisory Firms

- **Proxy advisory firms are in the business of providing voting recommendations to client institutional investors and also providing back office voting functions**
- **Often play a key role in close proxy contests**
- **Canadian Securities Administrators are currently seeking comment on potential regulation**

Impact of Proxy Advisory Firms

- **High level of institutional ownership of CP shares suggested that the recommendations of proxy advisory firms (particularly ISS) would be crucial to success**
- **Both Pershing Square and CP made presentations to ISS**
- **ISS also received input from other shareholders**

Impact of Proxy Advisory Firms

- **Both ISS and Glass Lewis recommended that shareholders vote on Pershing Square's proxy for all Pershing Square's nominees and also specified an additional nine incumbents**
- **ISS report was highly critical of CP management and the incumbent board:**
 - Unconvinced of CP's explanations for operating ratio deficit compared to peers
 - Critical of high turnover in executive ranks
 - Saw problems with corporate culture and lack of accountability for poor performance

Impact of Proxy Advisory Firms

- **Following the issuance of the ISS recommendation, Pershing Square saw a spike in the proxies being submitted in line with the ISS recommendation**
- **ISS and Glass Lewis recommendations were very influential in determining which of the incumbents would be re-elected**

Flaws in the Proxy System

- *Issuers and investors have lost confidence in the accuracy of the results of shareholder voting – not just a problem in proxy contests*
- **To be effective, what should the system do?**
 - Allow investors to make informed decisions;
 - Allow votes to be cast according to clear, impartial and practical rules;
 - Votes properly cast are given full weight;
 - Votes are cast by those with the economic interest; and
 - Transparency in the system to foster confidence

Flaws in the Proxy System

- **So what are the problems, and why do they persist? Among other things, they include:**
 - Lack of information about how the system works
 - No direct relationship between issuers and investors
 - Large category of unknown investors – OBOs
 - Susceptibility to administrative and technological errors
 - Absence of regulation and monitoring compliance
 - Third party service providers and gatekeepers
 - Role and influence of proxy advisory firms *e.g.*, ISS, Glass Lewis and Egan-Jones
 - Reliance on Broadridge Canada and Broadridge U.S.

Meeting Protocol Agreement

- Purpose of the agreement
- Independent Chair
- Independent scrutineer
- Court reporter
- Review of Chair's agenda
- Right to attend
- Right to speak

Meeting Protocol Agreement

- Restrictions on substantive business and motions
- Advance disclosure of proxies
- Application of STAC protocol
- Over-voting
- Right to be present in scrutineer's room
- Retention of proxies and ballots

Legal Remedies

- Public interest application under s.127 OSA
- s.145 CBCA determination of controversies
- s.247 CBCA compliance or restraining orders
- *Mosquito Consolidated Gold Mines* (August 2012)
 - Oppression case challenging use of Georgeson's tele-voting system
 - Importance of level playing field

Role and Cost of Gatekeepers

- **Requesting and obtaining shareholder information**
 - Canadian shareholder, optionholder and NOBO lists
 - U.S. NOBO and DTC lists
 - Employee share purchase program administrators
- **The Role and Costs of Broadridge**
 - Logistics of ensuring timely and effective communication with investors
 - The price of admission to compete

Role and Cost of Gatekeepers

- **Other Players and Costs:**
 - Transfer agents
 - Proxy solicitors
 - PR firms and consultants
 - Legal and financial advisors
 - Commercial printers
 - Internal resources
 - Indemnities/cost reimbursement
 - Other costs of the campaign

Potential for Empty Voting

- **Empty voting occurs where a shareholder acquires the right to vote shares in which it does not have an economic interest**
- **Can be achieved through various methods:**
 - Borrowing shares
 - Using derivatives to reduce economic exposure while retaining voting rights
- **Recent example in Mason Capital's opposition to Telus's attempt to eliminate its dual class share structure**

Potential for Empty Voting

- **Empty voting did not become an issue in CP proxy battle:**
 - Pershing Square acquired straightforward share ownership
- **Extent of empty voting is unknown, but several high profile examples are troubling**
- **Regulators have noted the issue, but no action has been taken to date**