# Activism on the Agenda

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by Andrew MacDougall, Donald Gilchrist and Donald Ross

2012 was a watershed for shareholder activism in Canada. While the number of proxy contests has increased over the last decade, rarely have Canada's largest companies been the target of activist activity, let alone the target of a successful activist campaign. This changed dramatically in 2012.


## A Watershed Year

2012 saw the successful campaign by Pershing Square Capital Management LP (Pershing Square) to effect change at Canadian Pacific Railway Limited (CP Rail), a strategic empty voting campaign by Mason Capital Management LLC (Mason) against TELUS Corporation's (TELUS) proposal to eliminate its dual class share structure and, at the end of 2012, the launch of a proposal by JANA Partners LLC (JANA Partners) to replace a minority of the board of directors of Agrium Inc. (Agrium) in support of a proposal by JANA Partners that Agrium spin off its retail business to its shareholders.

As the CP Rail contest aptly demonstrated, even the most iconic and blue chip companies in Canada are not immune to the pressure of a well-funded shareholder activist.

## The New Wave of Shareholder Activist

The current wave of shareholder activism is notable by the presence of tactical players with substantial financial backing who are in the business of seeking change to generate economic profits for their investors over the short term and, sometimes, the medium term. CP Rail, TELUS and Agrium are all widely-held companies with market capitalizations exceeding $16 billion, $11 billion and $15 billion, respectively. It takes confidence to acquire a sufficiently large percentage of shares to demand the focused attention of such companies. Yet, several large U.S.-based hedge funds have done just that. Pershing Square, for example, acquired its position in CP Rail at a cost of over $1.2 billion and JANA Partners acquired its position in Agrium at a cost of almost $800 million.

## Institutional Shareholders Demanding Increased Accountability

U.S. hedge funds cannot succeed in instigating change at large Canadian issuers without support from major Canadian institutional shareholders. Historically, Canadian institutional shareholders have, for the most part, preferred to engage in dialogue with companies rather than engage in costly, public proxy battles or litigation. As a result of a long period of relatively low share returns and high volatility, however, Canadian institutional shareholders have been demanding greater accountability from corporate managers. The CP Rail battle demonstrated that, in the right circumstances, and with a sufficiently compelling argument, Canadian institutional shareholders are willing to support change spearheaded by someone else.

**OSLER REPRESENTED THE FOLLOWING CLIENTS IN 2012:**

**TELUS Corporation** in its proposed arrangement to collapse its dual class share structure in the face of challenges by Mason Capital, a U.S. hedge fund.

**Concerned Shareholders of Helix BioPharma Corp.** to obtain majority representation on Helix BioPharma Corp.'s board.

**Mining Investors for Shareholder Value** in achieving representation on the board of MAG Silver Corp.

**Miranda Technologies Inc.** in responding to efforts on the part of JEC Capital to replace a majority of Miranda's board.



## Canada a Favourable Jurisdiction for Activists

Canada lacks structural defences to shareholder activists which exist in the United States. A key difference from U.S. corporations is that staggered boards do not protect the board of a Canadian corporation from removal at a single meeting called to elect directors. Further, registered shareholders holding 5% or more of shares that carry the right to vote may requisition a meeting to remove and replace the directors of a corporation, or a subset of them. On receipt of a requisition, the directors have 21 days to call a meeting, although the directors usually delay the meeting date for a few months. A shareholder activist can also time its purchases to be in a position to contest the election of directors at the target's next annual meeting if the directors do not accede to the activist's demands.

Another difference is that while a shareholder rights plan can be implemented in Canada, as in the United States, to prevent the acquisition of a shareholding above a limit such as 20%, in Canada the shareholder rights plan will eventually be rendered ineffective by a cease trading order from a securities commission if the plan is challenged by an activist who wishes to purchase a shareholding above the limit in the plan. In the United States, the courts will allow a shareholder rights plan to remain in place if the board of directors has a good faith reasonable basis to believe that the offer price for the additional shares is inadequate as compared to the company maintaining its long term corporate strategy.

Canadian share ownership reporting requirements are also favourable to shareholder activists. An early warning report (the Canadian equivalent to the U.S. Schedule 13D report) is required promptly upon obtaining beneficial ownership or control or direction over 10% or more of a class of voting or equity securities (versus 5% in the U.S.). However, eligible institutional investors, which would include most hedge funds, do not need to stop purchases and disclose their interest promptly upon reaching 10% ownership. So long as the eligible institutional investor does not intend to make a formal bid or propose a transaction involving the company that if completed would reasonably be expected to result in the eligible institutional investor (together with any joint actors) possessing effective control over the company or a successor, the eligible institutional investor may keep purchasing until the deadline for disclosing their interest, which is the 10th day after the end of the month in which they acquired a 10% holding. Mason Capital, for example, amassed an 18.7% position in TELUS's common shares before filing its first alternative monthly report in Canada on April 10, 2012.

An additional vulnerability for a Canadian board is the general absence of company by-law provisions requiring advance notice to the company of an intent to propose nominees for director in Canada. Exemptions under securities and corporate laws in Canada permit shareholders to engage in certain communications in preparation for a proxy contest and solicit up to 15 holders without a proxy circular. While it is unlikely in a major widely-held corporation that even with such favourable rules an activist can succeed without a proxy circular and a full scale proxy fight, some companies are considering whether to adopt advance notice by-laws to prevent a dissident from launching a surprise attack at or shortly before a shareholders' meeting or to gain information about the dissident and its proposed nominees for director.

Shareholders of companies incorporated in most Canadian jurisdictions have other favourable rights. With few limitations, shareholders generally may submit proposals to be included in the company's proxy circular, and, if the submitter holds more than 5% of the voting shares, those proposals may include nominees for director. Shareholders who requisition a shareholder meeting are entitled to have their reasonable costs reimbursed unless the shareholders vote otherwise at the meeting called in response to the requisition.

## The Year Ahead

The factors underlying the current wave of shareholder activism are unlikely to change for some time and we expect shareholder activism in Canada to continue in 2013. In fact, recent securities law changes which permit shareholders, not just companies, to post an electronic copy of a circular and send notice of its posting rather than printing and mailing thousands of paper copies of the circular, will reduce the cost of conducting a dissident solicitation.

With so many vulnerabilities for incumbent boards in Canada, it is important that directors and management of Canadian corporations prepare for the potential arrival of an activist shareholder. Companies should review their vulnerabilities to a potential activist, including recent declines in share price or relative operating performance or the existence of excess cash reserves or easily divisible businesses, and engage in appropriate defence planning and more meaningful and frequent shareholder engagement.

**CONTRIBUTORS**

**Andrew MacDougall**
Partner, Corporate
amacdougall@osler.com
416.862.4732

**Donald Gilchrist**
Partner, Corporate
dgilchrist@osler.com
416.862.6534

**Donald Ross**
Partner, Corporate
dross@osler.com
416.862.4288