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Debunking the Myth: Why Activism Is Tough in Canada

Auteurs : Patricia L. Olasker et J. Alexander Moore

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Much has been written and said about how hospitable to shareholder activism Canada is compared to the United States. Commentators point to Pershing Square's stunning victory over Canadian Pacific Railway in 2012 and its even more stunning gains on the investment since then in support of their thesis. Indeed, there are aspects of Canadian law that, at least superficially, are very shareholder-friendly. For example:

- All TSX companies are required to provide for majority voting for directors at uncontested meetings, and boards must accept the resignation of a director who fails to get the requisite percentage of votes barring undefined "exceptional circumstances".
- Staggered boards are ineffective in Canada because most Canadian corporations statutes give shareholders the immutable right to remove directors by majority vote without regard to term and without cause.
- Shareholders holding 5% of a company's shares can force management to call a shareholders meeting.
- Dissident shareholders can wage a proxy contest without mailing a proxy circular by relying on the "broadcast exemption" which entitles shareholders (but not the company) to communicate by press release, public broadcast, website or public speech.
- Canadian shareholders are protected under Canadian corporations statutes by the "oppression remedy" which enables shareholders to complain to the court of conduct by the board of directors that is "unfairly prejudicial" to or which "unfairly disregards" the shareholders' interests.
- Finally, "voting pills" – a shareholder rights plan that is triggered not only by share accumulations above a specified threshold but also by proxy solicitation activity or agreements among shareholders to vote together – are rare in Canada and generally out of favour with securities regulators and proxy advisory firms.

Some suggest these factors have created an "activist's paradise" in Canada. But JANA Partners' defeat at the hands of Canadian fertilizer company Agrium tells a different story: an unsettled and undeveloped law governing solicitation activity and the conduct of boards in conflict with their shareholders coupled with an uncertain regulatory and judicial response to such conflicts. Moreover, despite the acknowledged plethora of undervalued companies in Canada and persistent complacency about the quality of corporate management there has been no real increase in U.S. activist led campaigns against Canadian companies.

In this article we will explain why, despite the numerous apparent structural and procedural advantages in Canada, U.S. activists continue to face a challenging and even hostile climate in Canada.

The Canadian "Yes" and Other Cultural Challenges to Activism

The numerous apparent similarities between Canadian and U.S. legal regimes – and between Canadians and Americans – can be deceptive. There are deep cultural differences that if not understood and managed can have a bearing on an activist's prospects for success in a Canadian campaign.

Politeness is highly valued in Canadian society; bluntness is not. There is no better illustration of this than Bill Ackman's now famous conversation with Canadian Pacific Railway's board chair, John Cleghorn, on the tarmac of a private airport. After hearing Bill Ackman's thesis for operational change at Canadian Pacific, John Cleghorn responded that he "saw the logic" in what Pershing Square was proposing and concluded with "Welcome to CP", a response that was interpreted by Ackman as acceptance of his thesis and a capitulation to his demands. However, in light of the warfare that ensued, it became apparent that the response was merely an example of the "Canadian yes", a response which really means "maybe" or possibly "no thanks". This same penchant for politeness also makes it difficult to gauge the degree of support from shareholders. The polite interest expressed by Canadian institutional shareholders can be misinterpreted by the activist as an indication of support where none is intended.

There is also at work in Canada a subtle suspicion and resentment towards U.S. activists that challenge Canadian boards and companies. This "Yankee go home" sentiment was certainly evident in varying degrees in the Icahn/Lions Gate, Pershing Square/Canadian Pacific, JANA/Agrium and Mason Capital/TELUS contests. Strategies to minimize its effect include partnering with a Canadian player, courting favourable coverage in Canadian media, and including well regarded Canadians on the activist's slate.

But recruiting Canadian nominees to the activist's slate comes with its own challenges. Canada, while geographically large, is actually a small country and most of the large cap issuers are headquartered in the same two cities. As a result, the universe of A-list corporate directors is relatively small and, not only are directors often known to each other, they will likely have other ties in the community. This can make it difficult for a U.S. activist to field a sizeable slate of high-profile, well-qualified Canadian directors, asmany of them will be unwilling to engage in a public contest against others in their own community.

Finally, both of these factors – the small community and the premium placed on politeness – may dictate that the U.S. activist moderate its tactics to avoid alienating support from Canadian institutional shareholders, the media and retail investors. U.S.-style political campaign tactics and *ad hominem* attacks do not play well in Canada and Canadian nominees on the activist's slate may insist that a less aggressive tone be taken in communications.

Acquisition Reporting Rules

Critics often point to the apparently strict Schedule 13D reporting regime that requires reporting at 5% and complain that Canada's early warning reporting regime that requires reporting at 10% is excessively friendly to activist shareholders. What these critics overlook is the fact that the real reporting threshold in the U.S. is not 5% but rather 5% *plus* whatever else the activist can acquire in the 10 day period before the report is due. As we saw with Pershing Square's initial 13D report on Canadian Pacific and in numerous other cases, the initial report is often in excess of 5% and even in excess of the Canadian threshold of 10%. In Canada, early warning reporting requires a hard stop at 10% as disclosure by way of press release is required immediately once he threshold is crossed and a moratorium on further purchases applies for one full business day after the formal early warning report is filed (except where the Canadian equivalent of 13G reporting is permitted). Amendments to the early warning regime, debated at length in Canada, would have reduced the reporting threshold to 5% but would have kept all other elements of the regime intact leaving Canada with the world's strictest, least shareholder friendly regime. In part due to a comprehensive submission made by the Managed Funds Association and the Alternative Investment Management Association, Canadian securities regulators have backed off this proposal at least for the time being.

Practical Obstacles to Acquiring and Disposing of a Stake

Other practical obstacles to activism in Canada include the paucity of large cap targets, the relative illiquidity of the Canadian market, and legal and practical constraints on the activist's ability to liquidate its position. The largest company listed on the TSX has a market cap of Cdn$110.4 billion and the smallest member of the TSX 60 Index has a market cap of Cdn$3.2 billion. Unsurprisingly, Canadian shareholder activism, like the market itself, tends to be dominated by contests involving small cap companies. The median market cap of Canadian targets of activist campaigns in Canada in 2014 was a mere Cdn$132.5 million.While Canadian Pacific, Agrium and TELUS are examples of large Canadian companies targeted in activist campaigns, so far it appears that these examples are outliers.

While small cap targets allow the activist to acquire a proportionately larger ownership stake and thus greater influence, the investment will necessarily be small and the payoff for a win is unlikely to be sufficient to attract the interest of sizable U.S. hedge funds. At the same time, less liquid markets for such companies can make acquiring and eventually liquidating that stake much more difficult than unloading a 2% stake in Apple.

There are also regulatory differences between Canada and the U.S. that can make exiting a position more difficult in Canada. Once a shareholder becomes a “control person”, any sale of shares by the shareholder must be qualified by a prospectus or sold pursuant to a prospectus exemption. A shareholder is deemed to be a control person at 20% ownership and could be considered a control person at lower levels if there are other indicia that the shareholder “materially influences” the control of the company. The consequences are similar to being considered an “affiliate” under U.S. rules, and like the U.S. Rule 144 exemption, there is an exception that allows a control person to sell into the market on an orderly basis subject to volume limitations. However, Canadian volume limitations are more restrictive than Rule 144 and control persons are required to give seven days advance public notice of sales out of their block, and then are only permitted to sell shares for a period of 23 days before a new notice must be filed. Not only does this mean that the control person must wait seven days before effecting a sale, but the advance public notice can have the effect of depressing the price of the company’s shares as the marketplace accounts for the overhang of a block of shares that are expected to be sold into the market. These restrictions can be compounded by trading blackouts that might apply to the shareholder if it is also an insider of the company because of board representation.

Group Formation and Canada’s “Mandatory” Bid Rule

One of the challenges faced by activists is to gauge and organize support from other major shareholders. Where the activist is an American, finding a Canadian partner is one way to minimize any “Yankee go home” sentiment. More importantly, Canadian institutional investors – in particular the behemoth Canadian pension funds – typically hold substantial positions in significant Canadian companies which makes their support critical to the success of an activist campaign. However Canadian institutions are wary about aligning themselves publicly with a dissident shareholder, at least at the beginning of a long contest, primarily out of concern to preserve their freedom to trade in the securities of the target issuer. Their concern stems from a desire to avoid the risk of being characterized as “joint actors” with the activist.

Under Canadian securities legislation, if the activist has an agreement or understanding with another shareholder to exercise voting rights in concert, they will be *presumed* to be joint actors. If the agreement or understanding is with respect to the *acquisition* of shares of the target company, they will be *deemed* to be joint actors. While this same result would likely arise from the application of the similar U.S. “group” concept, the consequences in Canada are very different. Canada has what can be colloquially described as a “mandatory take-over bid” rule which requires that the acquisition of more than 20% of the outstanding voting equity securities of an issuer be made by way of formal bid to all shareholders or pursuant to certain limited exemptions. The holdings of joint actors are aggregated for purposes of determining whether the 20% mandatory bid threshold has been reached. The mere formation of a group holding 20% or more will not trigger the rule, but the first purchase of even a single share by a member of the group will require compliance with the formal take-over bid regime unless the purchase can be made pursuant to one of the limited statutory exemptions. Accordingly, the activist and the institutional shareholder will need to ensure that their purchases and sales are coordinated in a manner to ensure compliance with the take-over bid rules and with Canada’s early warning disclosure rules, similar to U.S. 13D disclosure rules. As a result, the activist and the shareholder will be unable to trade without each other’s knowledge and, presumably, agreement. Recent case law in Canada confirms that the issue is not merely a theoretical one. In the August 2013 decision of the Alberta Queen’s Bench in *Genesis Land Development Corp. v. Smoothwater Capital Corporation*, the Court found that activist shareholder Smoothwater Capital was acting jointly and in concert with other shareholders of the targeted company from the date on which the parties participated in a conference call together with a proxy solicitation advisor (although the Court did accept that communications prior to that date did not rise to the level of joint action).

Group Formation and Canada’s Insider Trading Laws

Canada’s insider trading laws are another impediment to the activist’s engagement with Canadian shareholders. Although Canadian and U.S. securities laws are similar in many respects, in the area of insider trading the law is markedly different and proceeds from a wholly different conceptual base. Under Canadian securities legislation, a person in a “special relationship” with the public company is precluded from trading with knowledge of material information that has not been generally disclosed. This prohibition extends to anyone who learns of material information from a special relationship person. The Canadian rules are more or less black and white and do not turn on notions of “duty” and “misappropriation”. Under Canadian legislation, the category of “special relationship” person is large and includes a person that beneficially owns more than 10% of the voting securities of a company. Thus, an activist holding more than 10% of a company’s shares is a person in a special relationship with the company. Non-public information that the activist may learn in its discussions with the target company about, for example, the target’s business plans or its response to the activist’s proposals may amount to material undisclosed information which, if communicated from the activist to the institutional shareholder, will restrict that shareholder’s ability to trade. It is even possible in these circumstances that information about the activist’s own plans vis-à-vis the target could amount to material undisclosed information which, if disclosed to the institutional shareholder, would similarly restrict the shareholder’s ability to trade. For these reasons, Canadian institutions of shareholders will be reluctant to align themselves with, or perhaps even talk to, the activist.

Selective Disclosure Constraints on Activists

In Canada, the extent to which an activist can communicate information to other shareholders is not entirely resolved. As noted above, disclosure by a “special relationship” person (for example, a 10%-plus shareholder) to another person constitutes tipping under Canadian securities law. Tipping is prohibited regardless of how the tipper acquired the information. Moreover, unlike in the U.S., selective disclosure is prohibited even if the recipient of the information has agreed to maintain its confidentiality and refrain from trading.

For the activist shareholder holding more than 20% of a company’s shares, the question is whether the activist’s disclosure to others of its intention to pursue a board change or proxy contest constitutes prohibited tipping. It may be that the activist’s plans do not amount to a “material fact”, that is, a fact “that would reasonably be expected to have a significant effect on the market price or value of the securities”, but if they do, the only basis upon which disclosure of those plans to another would not amount to tipping is if the disclosure was made “in the necessary course of business”. “Necessary course of business” does not mean in the “ordinary course of business”. What is unresolved however is whether these words mean “in the necessary course of the *issuer’s* business” – to allow communications between an issuer and its counsel or an issuer and its lender, for example – or whether they can be read to mean “in the necessary course of the *tipper’s* business”. The specific statutory carve-out for a person considering, evaluating or proposing to make a takeover bid or become a party to a business combination that allows the person to disclose material information in the necessary course of the *tipper’s* business to effect such a transaction does not apply here. Given this uncertainty and given the activist’s susceptibility to legal challenge, activists in Canada are constrained from freely communicating information to other shareholders whose support they are seeking.

Challenges for Balance Sheet Activism

Despite vocal criticism of balance sheet activism and statistics suggesting that balance sheet activism is in decline, activists continue to consider share buy-backs in assessing the value creation potential of targets. A share buy-back was a key component of Highfield Capital Management’s campaign against Tim Hortons in 2013 and a return of capital by way of share buy-backs or dividends was a term of the 2014 settlement of the Bioniche Life Sciences Inc./Wells proxy contest. Last year, the dissident shareholder campaigns against Canadian resource company Sherritt International and, separately, against Canadian junior gold company Monument Mining included a pitch for share buy-backs. Last month, Canadian investment and merchant bank Aberdeen International successfully defended against a campaign by Meson Partners and Nightscape Capital by promising, among other things, that it would institute a share buy-back.

What surprises U.S. activists seeking to advance a share buy-back as a solution to a capital allocation problem is that Canadian tax law can make share buy-backs unattractive for shareholders – and especially unattractive for U.S. and other foreign shareholders. Under Canadian tax law, when a shareholder has its shares repurchased by the issuer (other than on the open market such as through a normal course issuer bid), the shareholder is deemed to receive a dividend equal to the amount received by the shareholder in excess of the “paid-up capital” of the shares (paid-up capital per share is a tax law concept which refers generally to the average subscription price paid to the issuer for its shares on their original issuance). When the issuer’s shares have a low paid-up capital relative to the buy-back price, the tax treatment to both Canadian resident and non-resident shareholders can be quite adverse. For many Canadian shareholders, dividends are taxed at a higher rate than capital gains. For U.S. shareholders, the deemed dividend will generally be subject to a 15% Canadian withholding tax (or 25% for shareholders not entitled to the benefits of the Canada-U.S. tax treaty), whereas if they sold into the market and realized a capital gain that gain would not be subject to Canadian tax at all.

There is no work-around to this tax-leakage problem. In an issuer bid, U.S. shareholders would typically sell into the market at the bid-affected price rather than to the issuer so as to avoid this result. However, this is not usually a desirable option for the activist who intends to continue to hold the shares in order to benefit from the long-term value creation anticipated from the implementation of its plan.

In addition, there are limits on the ability of a Canadian company to borrow in order to repurchase its shares. A Canadian company is only entitled to deduct interest for tax purposes to the extent the borrowed money is used for the purposes of earning income. The Canada Revenue Agency will accept that this test is satisfied where the borrowed money is used to return the stated capital of the shares or to distribute non-consolidated retained earnings to shareholders. However, interest on monies borrowed to fund buy-backs in excess of these amounts would not be deductible.

Activist campaigns that advocate for the payment of a special dividend face similar problems –a 15% Canadian withholding tax on the dividend paid to U.S. shareholders. It may be possible for U.S. holders to swap out of the shares with a Canadian shareholder ahead of the record date for the dividend while retaining economic exposure to the shares. However, there are transaction costs associated with this strategy and, of course, challenges in regaining access to the shares. In many situations, these significant tax issues give issuers potent ammunition against an activist's demands for share buy-backs and dividends.

Uncertainty Over Vote Buying

One of the more aggressive (though rare) tactics that some Canadian boards have used in recent years in the context of contested meetings has been the payment of "soliciting-dealer fees" to encourage votes in favour of management.

In a soliciting dealer fee arrangement, registered broker-dealers are offered a fee (e.g., $0.10 per share) for each vote that they solicit from their clients. The fees have been used for many years in the context of take-over bid transactions, where obtaining a certain level of tender by shareholders is crucial to the success of the bid. The fees have also commonly been used in connection with the solicitation of votes in favour of negotiated merger transactions. Though the fees have been the subject of periodic criticism, they are widely used in M&A transactions. In contrast, due to different rules and a more stringent duty owed by broker-dealers in the United States to their clients, U.S. broker-dealers will not accept payment for the solicitation of votes from clients and routinely decline to participate in soliciting dealer groups assembled by Canadian broker-dealers in connection with Canadian M&A transactions.

In 2012 and 2013 Canada witnessed the introduction of soliciting dealer fee arrangements in the proxy contest context:

In 2012, the incumbent board of EnerCare Inc. facing a proxy contest from a dissident shareholder publicly announced that it would pay brokers a solicitation fee of $0.05 for each share voted by retail shareholders in favour of the re-election of the incumbent board.

Also in 2012, Canadian telecommunications company, TELUS, offered to pay soliciting-dealer fees for votes in favour of the elimination of its dual-class share structure in order to fend off opposition from Mason Capital which sought to block the transaction.

In 2013, in one of the most high-profile developments in JANA Partners' proxy fight to replace members of the board of Agrium, Agrium offered to pay soliciting dealer fees of $0.25 per share for each share voted in favour of the election of all of Agrium's incumbent directors. Unlike EnerCare (which had been a much lower profile contest), Agrium did not make any public disclosure of the payment of soliciting dealer fees, offering the fees in a confidential communication to broker-dealers.

Agrium's use of soliciting dealer fees garnered overwhelming criticism from Agrium shareholders, the marketplace, academics and the international press. Although soliciting dealer fees were familiar in the Canadian market, the payment of fees by a board of directors to encourage votes in favour of their own re-election was widely seen as inconsistent with basic principles of corporate democracy and good governance. Nonetheless, despite the negative reaction and the attention brought to soliciting dealer fees in the Agrium contest, nothing prohibits a board of directors from paying soliciting dealer fees in future contests and no regulator, court or legislature has yet outlawed the practice. Until that happens, activists remain at risk that a Canadian board faced with threat of displacement by an activist may be convinced that the use of this tactic is in the company's best interests.

Judicial Erosion of Meeting Requisition Right

In Canada, shareholders with 5% of the shares can requisition a shareholders' meeting whereas in the U.S. shareholders do not have that right. This shareholder right is a key differentiator of Canadian corporate law allowing shareholders of Canadian companies to remove directors in between annual shareholder meetings. In contrast, under Delaware and other U.S. corporate codes, company charters may deny shareholders the right to call a meeting, or, where there is such a right, the bylaws can erect onerous obstacles, such as those recently encountered by Pershing Square in trying to convene a meeting of Allergan shareholders to consider Valeant's unsolicited acquisition proposal.

The requisition right also has utility beyond bringing on a shareholders meeting and can be used as leverage in negotiations with the target board. In Pershing Square's proxy fight against Canadian Pacific Railway, Pershing Square was concerned that the CP board might schedule its annual general meeting at a later date than its customary early May timeframe. In early January, Pershing Square submitted a meeting requisition for a special meeting to remove CP directors, but advised CP that it would withdraw the requisition if CP confirmed that the AGM would not be delayed. CP did so and Pershing Square withdrew the requisition.

In practice though, the requisition right is considerably less useful than it appears to be in theory. Canadian courts have taken to holding shareholders to an extraordinarily high standard of technical compliance in submitting requisitions and have demonstrated a propensity to invalidate requisitions on technical grounds. Canadian courts have also grafted their own additional requirements onto the statutory requirements for requisitions.

For example, in *Wells v. Bioniche Life Sciences Inc.*, a 2013 decision of the Ontario Superior Court of Justice, shareholders owning 6% of the company's shares had submitted a meeting requisition but had not become the registered holders of the shares they beneficially owned. Nor did the shareholders have the depositary (which was the registered shareholder) submit the meeting requisition on their behalf. The Bioniche board rejected the requisition as invalid because it was not signed by a registered holder of 5% of the company's shares even though the shareholder was known by the board to beneficially own sufficient shares to requisition a meeting. On review by the court, the court upheld the board's rejection of the requisition on technical grounds.

Bioniche is also an example of Canadian courts grafting additional requirements for requisitions onto those prescribed under the statute. In that case, the court found the requisition to be invalid where the dissident proposed the removal of directors but did not provide any names or biographical information for new directors to be proposed by the dissident. The corporate statutes which create the requisition right do not require such information – in fact the corporate statutes do not even contemplate that a shareholder requisitioning a meeting to remove directors will necessarily propose nominees to fill the vacancies created by the removals. This constituted a new court imposed requirement. The court's requirement for such information to be provided with a requisition could also mean that a dissident must have recruited its nominees well in advance of the date by which notice must be provided under the rules in the company's bylaws requiring advance notice of director nominations (typically 30-60 days in Canada).

Perhaps the most serious limitation on the utility of the requisition right is the fact that Canadian courts have interpreted the obligation imposed by the statute on a board of directors to "call" a meeting within 21 days as being satisfied simply by the announcement of a date for the meeting. The board need not actually hold the meeting or even mail notice of meeting within the 21 days. Delays of up to four to seven months have been accepted by the courts. Often, boards in responding to a requisition will schedule the requisitioned meeting to be held at the same time as the annual general meeting, even where the annual meeting is as much as six months away. This was the case in *Marks v. Intrinsyc Software International* where the board, citing the disruption and expense of holding a special meeting of shareholders, scheduled the requisitioned meeting to occur at the same time as the annual general meeting, 155 days following the date of the requisition. In considering the dissident's complaint over the delay, the Ontario Court deferred to the business judgment of the board and accepted the scheduling of the requisitioned meeting as reasonable. The activist has a high hurdle to clear in persuading the court that the requisitioned meeting must occur at any other time than the scheduled annual general meeting.

Canadian courts have also allowed boards to use technicalities to defeat requisition rights. Following their first failed attempt to requisition a meeting, the dissident Bioniche shareholders submitted a second requisition that did not have the technical flaws of the first requisition. However, before they had done so, the board of Bioniche announced that it had set a date for the company's AGM and established a record date for the meeting. This announcement was made six months prior to the meeting date, much earlier than the date would normally be announced. The board then relied on a provision in the corporate statute that relieves a board from having to call a shareholders meeting in response to a requisition where a record date for a meeting has already been set. Although the court agreed with the dissident shareholders that the board's early announcement of the record date for the AGM was clearly calculated to allow the board to reject a valid requisition, the court declined to find fault with the board's actions, applying the deferential business judgment rule standard of review to the board's conduct and concluding that the effect of delaying the ability of the dissidents to challenge management by six months was reasonable in order to allow the board to pursue the business plan that it believed was in the company's best interests.

As a consequence of these limitations, the vast majority of proxy contests unfold at annual shareholders meeting and are not initiated by requisitions: of the 135 proxy contests in Canada in the five year period 2010 to 2014, only 18 were initiated by a requisition. The combined effect of these judicial developments presents a significant challenge for shareholders seeking to requisition a meeting to change a board. On the one hand, unless they have a strong case as to why a meeting must be held swiftly, the requisition would have to be submitted well in advance of the next annual meeting to avoid being held off by the board until the regular AGM. However, at such an early point, many activist shareholders will have not yet recruited their dissident slate in order to put forward a requisition that meets the requirements that the courts have imposed on requisitioning shareholders.

Judicial Deference to Board Action

At the same time Canadian courts are holding activist shareholders to high standards of technical compliance in order to exercise shareholder rights, they are also displaying a high degree of deference to board decisions in proxy contests. Even where directors have taken aggressive defensive measures in response to activists shareholders, Canadian courts apply a very deferential standard of review and are rarely skeptical of directors' motivations.

Like Delaware courts, Canadian courts have adopted the business judgment rule. Under this rule, a court will not second guess a decision of the board that falls within a reasonable range of alternatives available where the decision has been made independently and without a conflict of interest, in good faith, and on a reasonably informed basis based on information available at the time.

Although the business judgment rule has been imported by Canadian courts from the United States, Canadian courts apply the rule more liberally and with much less focus on the prerequisites for its application. Canadian courts have also applied the business judgment rule in circumstances where Delaware courts have applied more rigorous standards of review. For example, even in the context of a hostile tender offer for a company, Canadian courts will apply the business judgment standard of review to defensive actions taken by a board of directors rather than the "enhanced scrutiny" standard applicable in Delaware.

Notably, in the context of actions taken by directors that impact the exercise of the shareholder franchise, Canadian courts have not adopted anything akin to the *Blasius* standard developed by Delaware courts in *Blasius Indus. v. Atlas* that puts the burden onto the board to demonstrate a "compelling justification" for actions, such as postponing a shareholders meeting, that have the primary purposes of impeding the exercise of stockholder voting power. The *Bioniche* case, discussed above, is a good example. Although the board in that case made numerous decisions aimed at denying and delaying the dissident's ability to challenge the incumbent board, those decisions were reviewed under the deferential business judgment standard. Examples abound of Canadian courts deferring to decisions of directors, applying the business judgment standard in proxy contests. Among them:

- the facilitation by Lions Gate's board of directors of a transaction that had the effect of significantly diluting Carl Icahn in the context of Icahn's attempt to acquire control of the company through a hostile tender offer and proxy contest (a transaction blessed by the British Columbia Court of Appeal but later condemned by the SEC in a March 13, 2014 press release announcing the settlement of charges brought by the SEC against Lions Gate);
- the decision by a board of directors to postpone a meeting of shareholders in order that the board could amend its bylaws to require a dissident (who was planning to attend the meeting) to give advance notice of its nominees for election to the board;
- the decision of a board of directors to schedule a requisitioned shareholders meeting five months after the receipt of the requisition.

Canadian courts have also accorded a high degree of deference to decisions of individual officers and directors, including to rulings of chairs of shareholders meetings on the validity of dissident proxies. This deference arguably emboldens boards to be more aggressive in their defense against shareholders.

That said, last year's decision by the Ontario Superior Court in favour of Orange Capital may signal a turning of the tide. There the target Partners REIT interpreted its advance notice policy in a manner that invalidated Orange Capital's nominations to the board. The court upheld Orange Capital's nominations and made two important determinations that may help reshape the landscape for activism in Canada. First, the Court noted that an advance notice policy can only be used "as a shield" to protect shareholders from ambush from the floor of a shareholders meeting and not "as a sword" to prevent nominations by shareholders. Secondly, any ambiguity in an advance notice bylaw should be resolved in a manner that favours shareholders' voting rights, not undermines them. These statements may be an early indication of a possible retreat from the high standard of technical compliance to which shareholders have been held in favour of a standard that is more protective of the shareholder franchise.

Securities Regulators on the Sidelines

In Canada, unlike in the United States, it has been the securities regulators rather than the courts that have weighed in to discipline board responses to hostile bids – with written guidelines on appropriate defensive tactics and a long line of decisions regulating the use of poison pills and effectively banning the "just say no" defence. In the proxy contest arena, however, Canadian securities regulators have largely been watching from the sidelines. This is not a sphere where they have traditionally played, primarily because their jurisdiction to do so is less clear than in the hostile bid sphere. The mandate of Canadian securities regulators – to protect investors and preserve the integrity of the capital markets – has not historically been interpreted to include the regulation of proxy contests. Moreover, efforts by securities regulators to find their footing in this arena had been stymied by the absence of consensus among the Canadian Securities Administrators – the informal organization of the 13 separate provincial and territorial securities commissions in Canada – on where the line is to be drawn between shareholder-centric and board-centric regulation.

The Canadian Securities Administrators' first foray into the regulation of proxy contests – through a 2013 proposal to apply to shareholder activism the same disclosure requirements applicable to possible control acquisitions – had a decidedly anti-shareholder feel. So did a 2013 proposal by the Quebec securities administrators to give directors greater power to reject hostile bids. At the same time, securities regulators have been unwilling to be drawn into complaints by activists and against companies. The British Columbia Securities Commission refused to intervene when Carl Icahn complained that Lions Gate facilitated a dilutive share transaction in order to thwart Icahn's proxy contest. The Alberta Securities Commission refused to even consider a complaint by Pershing Square against potentially illegal proxy solicitation activity by Canadian Pacific. Similarly, neither the Alberta Securities Commission nor the Ontario Securities Commission took action in response to the vote buying by Agrium in the JANA/Agrium proxy contest in 2013.

Since then, however, the Ontario Securities Commission, more than any other Canadian securities commission, has begun to find ways to restrain tactics that undermine the shareholder franchise. Its initial interventions were in cases where the shareholder vote was tied to an M&A transaction, an area where the securities commissions' jurisdiction is undisputed. So, for example, in Vengrowth Funds in 2011, Ontario Securities Commission Staff challenged a merger proposal on the basis that the shareholders did not have the ability to revoke voting support agreements that had been solicited by the acquirer GrowthWorks Fund. Last year, the Ontario Securities Commission intervened to compel changes to Orange Capital's "mini-tender" for units of Partners REIT to eliminate those provisions that impaired the unitholders' right to vote, including a provision that would have given Orange Capital a proxy over tendered units whether or not the units were ever taken up or were ultimately withdrawn. Most recently, in the context of a proposed management buy-out of Tuckamore Capital Management, the Ontario Securities Commission, at the behest of dissident shareholder Access Holdings, forced amendments to Tuckamore Capital Management's shareholders rights plan to make clear that the dissidents' efforts to enter into voting agreements with other shareholders of Tuckamore ahead of a proxy contest would not trigger that rights plan.

We have yet to see the Ontario Securities Commission intervene in a pure proxy contest without the jurisdictional cover of an M&A transaction. However, given the appointment of former Deputy Director Naizam Kanji as the Director of the newly created Office of Mergers and Acquisitions of the Ontario Securities Commission, and Mr. Kanji's well-known investor protection orientation, the Ontario Securities Commission can be expected to continue to assert its jurisdiction to protect the shareholder franchise. Whether other provincial securities commissions in Canada will follow suit remains to be seen.

Personnes-ressource : Patricia L. Olasker