Shareholder Activism: Current Issues and Trends

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The case for activism?
1. Why your company might be vulnerable to attack

2. The hottest topics in shareholder activism
   - Vote buying
   - Golden leashes
   - Zombie directors
   - Trends in regulatory developments
   - Trends in case law
   - Shareholder smack-down

3. Practical advice you can give your board
Why your company is vulnerable

• Several types of activists
• Performance issues
• Say-on-pay
• Poison pill vote
• Executive terminations
• Majority voting
• Major corporate events
• Asset class and business line
## Canadian Large Cap Activism

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<td>- Pershing Square&lt;br&gt;  - Underperformance&lt;br&gt;  - Management Change</td>
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<td>- Jana Partners&lt;br&gt;  - Underperformance&lt;br&gt;  - Return of Capital&lt;br&gt;  - Spin Off</td>
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Soliciting Dealer Fees

• Compensation to retail brokers for soliciting client votes

• Practice began in M&A → Take-Over Bids
  • Morphed to Plan of Arrangement → Fees for Proxies
    – e.g., TSX/LSE merger
    – Telus non-voting share collapse

• Use in proxy contest is new
  • EnerCare (2012)
  • Agrium (2013)
Soliciting Dealer Fees

Agrium’s broker fee fails to pass the smell test

JANA Partners Calls On Agrium To Halt Vote

Asks Investment Advisers and Brokers to Put Clients’ Interests First

Further Information Available at www.JANAAgri.com

NEW YORK, April 2, 2016

NYSE: AGU

PROXY BATTLE FINANCIAL ADVISERS

Circuitous campaign

The practice of offering incentives to brokers to make recommendations to their clients to vote on one side or another in proxy battles and takeover votes is an undesirable one. It is not vote-buying, but it will tend to distort financial adviser-investor relationships and sooner or later to weaken trust.

A current instance is the competition between Agrium Inc.’s proposed slate of directors and those being advanced by a hedge fund, Jana Partners LLC. While Jana’s mailing to Agrium shareholders...
Nominee Compensation

- Nominees' independence scrutinized
  - Independence *from* dissident matters
  - JANA/Agrium
    - JANA's nominees were offered a profit participation in JANA's Agrium investment
    - Crystallizes on three year anniversary
    - Agrium labelled these "golden leashes" that created short-term incentives
  - Hess/Elliot Partners
    - Elliot offered similar compensation to its nominees but rescinded the compensation in connection with a settlement
- CCGG has come out against nominee compensation
Majority Voting

Zombie Directors
Majority Voting

- 87% of the TSX Composite Index have majority voting policies
- TSX rule changes now prohibit slate voting but majority voting policies not mandatory – "comply or explain"
- Rare for a director to receive withhold vote - average percentage of votes withheld from an individual was 4.4%
Majority Voting

- Emerging issue in how boards deal with directors who fail the vote
- Banro Corporation board rejected resignations offered by directors receiving majority withhold votes
- Potential regulatory response to prescribe how issuers deal with offers of resignation
Regulatory Developments to Watch

- The philosophical debate
- CSA Guidelines for proxy advisory firms
- Proposed changes to early warning reporting regime
  - lowering threshold from 10% to 5% and other changes
- Poison pill/defensive tactics proposals
  - Shareholder collective decision making (CSA) versus deference to board decisions (AMF)
Trend in Case Law

• Significant shift from where we thought courts might be heading based on developments two years ago (International Energy and Mineral Resources v. Mosquito Consolidated Gold Mines)

• Recent cases have demonstrated increasing deference to board actions that limit shareholder franchise

• Business judgment rule and presumptions of good faith are formidable obstacles to any challenge by a dissident

• BC courts continue to issue a large proportion of notable decisions on shareholder contests
Independent Chair Decisions

- Several cases addressing when an independent chair for a shareholders meeting is required
- An interest in the outcome of the meeting does not disqualify the chair – *Hastman v. St. Elias Mines*
- However, chairs should be careful to stay above the fray:
  - Court may order an independent chair to "create a perception of fairness" – *Shopplex.com v. Brown*
  - "Reasonable apprehension of bias" – *Western Wind Energy v. Savitr Capital*
Courts giving leeway to Boards/Chairs

• Perpetuation of a board of directors due to repeated failure to obtain minimum quorum at AGM was not oppressive to a dissident shareholder – *Ebrahim v Continental Precious Minerals Inc*

• 5 month delay to hold requisitioned special shareholder meeting in tandem with AGM was reasonable – *Marks v. Intrinsyc Software*
Courts giving leeway to Boards/Chairs, cont'd

• Court upheld a board's cutting off of the meeting requisition right on the basis of board's determination that a requisitioned meeting was not in the best interests of the company when AGM would be held in six months – *Wells v. Bioniche Life Sciences*

• A director need not recuse himself from consideration of a requisition to remove him from the board – *Xemplar Energy Corp v. Tam*

• Advanced notice bylaw is not oppressive, even when coupled with an adjournment of a shareholders meeting – *Northern Minerals v. Mundoro Capital; Maudore Minerals v. The Harbour Foundation*
Holding Shareholders to a High Standard

- A chair may disallow proxies that were solicited on the basis of a misleading circular – *Hastman v. St. Elias Mines*
- Joint actor relationship may be formed by participation in a solicitation – *Genesis Land Development v. Smoothwater Capital*
- Failure of a dissident to disclose joint actor may require adjournment – *Genesis Land Development v. Smoothwater Capital*
- Meeting requisition invalid for failing to identify nominees *Wells v. Bioniche*
Trend in Case Law

*Mason v. TELUS* empty voting saga

- Trial judge upheld board's rejection of Mason requisition on technical grounds.
- BC Court of Appeal reversed – requisition was valid
- BC Motions court ordered Mason's business to be included at meeting called by TELUS (2 days later) even though Mason had not had opportunity to solicit proxies for its resolution
Shareholder Smack-Down
Shareholder Smack-Down

- Recent successes in court battles may embolden boards to be more aggressive. For example:
  - cutting off requisition rights
  - postponing meetings
  - more aggressive Advance Notice By-laws?
  - discarding dissident proxies?
  - vote buying?
Shareholder Smack-Down

• Tread with caution

• Courts appear to be applying deferential standards of review (business judgment rule) uncritically – can this last?

• Contrast to Delaware standard of review:
  • When directors faced with threat to corporate control, they must demonstrate a "compelling justification" if their acts have the primary purpose of thwarting shareholder rights (*Blasius Indus. v. Atlas*)
Practical Advice

• Fix corporate governance foot faults
• Relax – you have the upper hand
• Know thy enemy
• Pre-empt activist's agenda
• Engage communications strategist
• Engage proxy solicitation firm
• Communicate with proxy advisory firms
• Think about settlement
• Don't assume shareholder loyalty
• It's about money
• Don’t make enemies
Questions

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