

# Shareholder activism's rising tide

By RICHARD SKINULIS

Is shareholder activism on the rise in Canada, or is the media simply playing up the more dramatic battles? Can this kind of activism help the bottom line of companies, or is it a hit-and-miss affair that brings more bad publicity than good?

These were some of the issues discussed at a recent Canada's Venture Capital & Private Equity Association (CVCA) professional development session with the dramatic title of "Under Fire: The Rise of Shareholder Activism in Canada," held in Toronto.

Recent examples of shareholder activism — the proxy fight between Agrium Inc. and activist hedge fund Jana Partners; Rona and its second-largest shareholder Invesco; and hedge fund Pershing Square Capital Management CEO Bill Ackman's successful overthrow of the board of CP Rail — have indeed been in the headlines. In fact, Paul Renaud, president and chief executive officer of OMERS Private Equity, said in his keynote speech that "the number of shareholder actions has gone from six in 2003 to 170 this year and counting. Prior to this year, the busiest year was 2009, right after the financial crisis, when 43 actions were launched."

One theme emerging at the CVCA event was that what was once mainly a U.S. phenomenon appears to be taking root in normally staid Canada as well.

"There is a lot of competition for good companies [and] good activism in the U.S. but there is not a lot of competition for that here in Canada," Wesley Hall, CEO of Kingsdale Shareholder Services, told a panel discussion. "[Consequently] Canada is the promised



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land for activism. It's the land of milk and honey and that's why a lot [of activist companies] are here."

Although activity is up, not all the panel participants thought it was as significant as it appears.

"I don't think shareholder activism is on the rise in Canada," said Alexander Singh, general counsel and secretary of West Face Capital Inc. "What we are seeing are more pitched battles going on in the front pages of the newspapers and, as they involve large Canadian companies, they are garnering more attention. Upwards of 80 per cent of shareholder activism happens in the back rooms and we've been seeing the 20 per cent that are public on the front page of the newspaper."

Effective use of the media was also a theme. *The Globe and Mail* business journalist Boyd Erman, who moderated the panel, offered the media's perspective, saying: "From a press point of view, the first story is usually the biggest [so it's] on the front page [while the



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company's] defence ends up on page three two days later when they finally say something."

These days, the panel was told, activists can show up at a meeting with a mountain of backup material

and a blizzard of PowerPoints, which can throw the company off balance as it tries to react. The lesson: be prepared.

"You don't want to start winging it, but that's what a lot of companies do," said Hall. "I tell my clients: 'You have to get your team ready, invite the activists in, and have a structured conversation.'"

Singh added that who gets involved in that conversation is also important.

"We had a recent situation where we put one of our guys on a company's board as a result of negotiations between the chairman of the board, their general counsel, our portfolio manager and myself," he said. "The CEO and CFO of the company were removed from the discussion, which allowed the chairman to make the business call and the general counsel to make the legal call. We thought that, from both parties' perspective, it was a very productive way of pro-

ceeding."

On the most important and contentious question addressed — does shareholder activism help or hinder Canadian business — the panel was undecided.

"There are times when as an activist you get into the boardroom and you realize that the problem is bigger than you thought and you work with the company to solve the problem," said Hall. "All of a sudden you are an asset to the board as opposed to a liability."

Although Orr said he believes activism can be a good thing for capital markets because it makes boards worried enough to ask if they are doing the best they can, it may not always work out.

"Every now and then when an activist gets in and disrupts things, sometimes it doesn't create [positive results]," he said. "Would you advise your friends to invest in Rona or Agrium today? You might say yes but I don't know."

## The next big thing

Relationship investing — the committed partnering of a company with one or more of its biggest shareholders — has been touted as a way for shareholders to invest more for the long term than for quick profits. Although there is relatively little relationship investing going on in Canada, a CVCA panel saw a bright future for this approach.

"We've seen a real growth in our relationship investor serving among the pension plans," said Scott Lawrence, vice-president and head of relationship investments at CPP Investment Board.

"I think as the marketplace grows a little more familiar with them and if ... companies want to accomplish something that capital markets can't otherwise provide, you will see more of these types of transactions — not just by us but by others that in a constructive, friendly way can help companies advance strategies that in turn will foster more thinking about how relationship investing can be used."

"Capital markets, particularly in Canada, are going to be very sporadic, and that means there is going to be demand," said Alan

Hibben, managing director of mergers and acquisitions at RBC Capital Markets. "The thing that is holding it back at the moment is that most of the boards that I'm talking to have no real conviction — they are very happy to [just] manage the business and hope that they get through because the macro economic backdrop is so difficult. I think what is going to need to happen is ... [what] has not been met by the public markets will have to be met by relationship investors."

• Richard Skinulis

# Tax Court encourages conference approach

By DONALEE MOULTON

The Tax Court of Canada has introduced settlement conferences for lawyers on both sides of a tax dispute, and "substantial indemnity" costs in cases where settlement negotiations fail. Now, if the court awards a judgment equal to or better than a proposed settlement offer, the successful party may be entitled to as much as 80 per cent of his or her solicitor and client costs.

"I can put my client in a position for the first time to recover costs. It's wonderful," said Toronto tax lawyer Peter Aprile.

Prior to issuing Practice Note 18 introducing substantial indemnity costs, the tax court relied on a tariff that spelled out what costs would be paid. For example, for discovery, a party could be reimbursed between \$350 and \$700. Now, in cases where a settlement has been broached, substantial indemnity costs can be awarded.

The tariff rates are "signifi-

cantly out of step with current costs. Even when a party is successful, they are usually out a lot of money," said Natasha Reid, a lawyer with Thorsteinssons in Vancouver.

That reality influenced the decisions clients made, said Aprile, the principal of ATX Law. "This factors in to whether or not to proceed, or you might take a lower settlement earlier.

"Now I put in a settlement offer at the earliest opportunity. I would not have done this previously because there was nothing to encourage me to do this."

The substantial indemnity costs force lawyers and their clients to consider what happens if they win at trial — and also the possibility of losing. "The risk of paying enhanced costs needs to be taken into account," said Carman McNary, a partner with Fraser Milner Casgrain in Edmonton. "The rule is a bit of a hammer that imposes greater pressure."

The hammer is not theoretical, he said. "There are a number of decisions already issued by the court with significant cost awards."

There is one important nuance that distinguishes cases before the tax court from many other types of cases, and affects whether substantial indemnity costs can be paid.

The Department of Justice and the Canada Revenue Agency are compelled to settle on what is called a principled basis. In other words, there must be a reason in law to settle; settlement for the sake of expediency is not permitted. "The court has held that, for an offer made on a non-principled basis, indemnity costs don't apply because the government couldn't have accepted the offer in the first place," said Aprile.

He points to one problem with the application of the new indemnity costs. In cases where there is no room for a middle ground — where it is all or nothing — the court does not view this as a settle-

ment and, therefore, the 80 per cent indemnity costs do not apply.

"The court is saying that an offer of zero per cent isn't a settlement offer," Aprile said. "What is the impetus to settle in these cases?"

"The settlement rules don't seem to account for a party to recover in these cases. I think they should."

The tax court's new indemnity costs are linked to settlement conferences, which in turn are linked to promoting earlier resolution of problems without the need for a trial.

"The Tax Court of Canada is one of the most efficient courts in this country," said Aprile. "However, the court is always trying to achieve the best result without a trial."

Settlement conferences promote that goal. They are informal meetings with a judge from the tax court — not the trial judge — that enable both sides to present their case and get a glimpse into the thinking of

the court. "It allows the judge to give the parties a sense of how he or she might rule. Hopefully, that moves parties toward a settlement if appropriate," said Reid. "It's a low-cost, low-time approach."

It's also helpful if the case proceeds to trial, in that both sides should be better informed. For the taxpayer, it is often the initial insight into the CRA's case.

"The CRA is compelled to be there. That is the first time we have any interaction with that person," said Aprile. "You learn something even if resolution isn't achieved."

The use of settlement conferences is also very much in keeping with the philosophy of the tax court.

"The Tax Court of Canada takes access to justice as a fundamental principle. It is very much a people's court," said McNary. "All of this is intended to manage the load at the court in a way that frees up court time for those cases that have to proceed to trial."