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# 10 Questions with Patricia Olasker

Patricia Olasker spearheads the activism practice of Davies Ward Phillips & Vineberg, advising both activists and issuers. Davies has been involved in virtually all high-profile activist campaigns in Canada, including Canadian Pacific and Allergan/Valeant (on behalf of Pershing Square), MHR Fund Management in respect of Lions Gate, Invest REIT, Telus, Agrium (on behalf JANA Partners), Tim Hortons (on behalf of Scout Capital), TransCanada Corporation and Sherritt International. A past chair of the Securities Advisory Committee of the Ontario Securities Commission, she is also an adjunct professor of law at Osgoode Hall Law School.

**13DM:** For some of our American subscribers who might not be familiar with you and Davies Ward, tell us a little about your practice.

**PO:** Our firm's practice has historically been very transactional and we have leading M&A, tax and litigation practices in Canada. The lawyers in our shareholder activism practice draw on their deep experience in M&A and broad knowledge of corporate and securities law in our engagements. Knowing the ins and outs of a proxy contest is certainly an important expertise that we bring to our engagements. But equally important is the value that we can bring to clients before and after a contest with our advice on strategy, structuring, corporate governance and regulatory issues and our mature judgment on the tough calls.

Something that sets our firm's work in activism apart in Canada is the privilege we have had in working on Canada's largest and most high-profile proxy contests in recent years. This is a testament to our ability to bring creative solutions to complex issues involved in large cross-border proxy contests.

**13DM:** You actively represent both companies and activists. What are the benefits and detriments to such a practice?

**PO:** I'm always a bit surprised by this question. We are not ideologues. We are advisers, and what we do best is help our clients, whether activist or company, assess legal risk and choose the course of action to achieve the best outcome. We represent bidders and targets, buyers and sellers, plaintiffs and defendants – it's really no different.

Obviously, having a deep understanding of both sides – their motives, concerns, tactics and strategies – gives us a huge advantage, whether your goal is conciliation or combat. Representing both activists and companies, we are able to expertly test our advice against what we would do if we were on the other side. Any detriments? Maybe a bit of a trust issue on the company side. But only initially, until they come to appreciate our loyalty to their cause and our expertise born of this broader experience.

**13DM:** . There are several laws and regulations that make activism easier in Canada. Tell us about some of those.

**PO:** Generally, Canadian corporate statutes provide shareholders with greater influence over corporate governance than they have under Delaware law. The main advantages that shareholders have in Canada are:

- Shareholders holding 5% or more (10% for Quebec corporations) have the right to cause the corporation to call a shareholders' meeting to remove and replace one or more directors with a majority vote.
- Shareholders are required to disclose their ownership only upon crossing 10% ownership (although shareholders also have to comply with Rule 13D and its 5% threshold if the company is also listed in the United States).
- There are few obstacles for shareholders to propose their own nominees for election at a shareholders' meeting. In recent years, advance notice bylaws have become commonplace among Canadian companies. But they are generally much less onerous than bylaws of U.S. companies. Institutional Shareholder Services (ISS) has played a role in reining in advance notice bylaws, recommending against ratification bylaws that impose unduly onerous requirements on shareholders submitting director nominations. For example, typical Canadian bylaws require that a notice of nomination be provided just 30 days prior to the meeting date, with modest disclosure information, such as biographical information about the nominees and the nature of the nominating shareholder's interest in the company.
- Canadian companies do not have staggered boards. Consequently, it is possible for a dissident shareholder to elect the entire board at a single annual meeting.
- Canadian proxy solicitation rules are also more relaxed. Preclearance of a proxy circular with Canadian securities regulators is not required. In addition, there are favorable exemptions from the requirement to mail a circular where the activist is soliciting from 15 or fewer shareholders or is soliciting only through the media.

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**13DM:** Despite having many shareholder-friendly laws, it does not seem that the Canadian shareholder base is as activist-friendly as the U.S. Is that true? Are there other customs, laws or regulations in Canada that favor companies?

**PO:** In the March 2015 edition of *The Activist Report: 13D Monitor* we included an article entitled "Debunking the Myth: Why Activism Is Tough in Canada", in which we addressed this question in detail. As we discussed in that article, there are cultural differences between Canada and the United States that, if not understood and managed, can work to the activist's disadvantage. One of these differences is the premium Canadians place on politeness. 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. In light of the warfare that ensued, however, 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 toward U.S. activists who challenge Canadian boards. This "Yankee go home" sentiment was evident in varying degrees in the Icahn/Lionsgate, Pershing Square/Canadian Pacific, JANA/Agrium and Mason Capital/Telus contests in which we were involved.

In terms of laws and regulations, although Canada's 10% threshold for acquisition reporting is often cited as an advantage to activists, in Canada there is no 10-day reporting window. The activist must issue a press release promptly after hitting the 10% threshold and must refrain from trading for one full business day after the formal early warning report is filed (except where the Canadian equivalent of 13G reporting is permitted). Canada's control block distribution rules create obstacles to the activist disposing of a stake in a Canadian company. Joint actor rules are uncertain, and the violation of them can have significant consequences, including the accidental tripping of Canada's mandatory 20% bid rule. In addition, Canadian institutional investors, whose support is often crucial in campaigns for major Canadian companies, will be very wary of publicly supporting an activist for fear of being characterized as a joint actor with them and impairing their ability to trade in the securities of the target company. In addition, because of the broader scope of Canada's selective disclosure laws, activists are constrained from freely communicating information to other shareholders whose support they are seeking.

Finally, I think it's fair to say that the legal playing field in Canada is generally tipped in favor of boards of directors. The legal environment in which proxy contests occur in Canada has been defined by a series of cases which, when looked at together, reveal that Canadian courts apply a very deferential standard of review to board decisions in proxy contests and are rarely skeptical of directors' motivations. Although the business judgment rule has been imported by Canadian courts from the United States, Canadian courts apply the rule more liberally and with less focus on the prerequisites for its application. Canadian courts have not adopted anything akin to the *Blasius* standard developed by Delaware courts in *Blasius Industries v. Atlas* that puts the burden on the board to demonstrate a "compelling justification" for actions that have the primary purpose of impeding the exercise of stockholder voting power. Examples abound of Canadian courts deferring to decisions of boards aimed at denying or delaying a shareholder's ability to challenge the incumbent board, applying the business judgment standard. Arguably, this deference has emboldened target boards to be aggressive in their defense against shareholders. At the same time, securities commissions, which are in Canada the forum of choice for complaints about the conduct of target boards in the M&A context, have been slow to engage in the proxy contest arena. In addition, whether the securities commissions will favor the company's position or the activist's may vary depending on the province of Canada in which the hearing occurs.

**13DM:** In Canada, contested proxy fights are often resolved with a universal ballot. Describe what that is to our readers, and what is your opinion on it? Does it favor one side over the other?

**PO:** A universal ballot, or universal proxy, can provide quite a lot of flexibility for an activist. In effect, in a universal proxy, the activist can list all of the management nominees along with the members of the dissident's slate, allowing shareholders to then pick and choose among all nominees. Like a real election! Universal ballots are possible in Canada because there is no requirement to obtain the consent of an individual to include his or her name in a form of proxy.

This can be important where shareholders are generally supportive of the dissident but do not favor the election of all of the dissident nominees. Often the number of dissident nominees that shareholders will be willing to elect (or ISS will recommend) is not clear at the outset of a

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# PATRICIA OLASKER (cont'd. from pg. 2)

proxy contest. The universal proxy allows for tailoring of the ideal mix of dissident and management nominees at a later date.

I should note that a universal ballot is not always the best choice for the dissident. In some circumstances it may be preferable to present shareholders with a starker choice – *i.e.*, shareholders are asked to pick one side, not some middle ground. But ultimately, if there are significant shareholders who want to support a mixture of the dissident and management slates, a bespoke proxy can be prepared for them. In practice we have found that a consensus seems to form among the shareholders as to which of the dissident's nominees and which of management's should be elected, and proxies are submitted accordingly. Without a consensus among shareholders, vote splitting among different nominees could result in the failure to elect any of the dissident's nominees, despite widespread support for some dissident representation.

**13DM:** In the JANA/Agrium proxy fight, Agrium was able to narrowly secure a victory by, among other things, paying brokers for votes for management. Describe this practice. Is it still used in Canada?

**PO:** My partner, Alex Moore, was the adviser to JANA in the Agrium contest, and I have been infected with his indignation on this issue. The "vote buying" that arose in the Agrium proxy contest arose through Agrium offering to pay Canadian broker-dealers a "solicitation fee" for proxies that were submitted in support of management. The payment of solicitation fees has been common (though not without criticism) in the context of M&A transactions for many years in Canada, but not in the context of director elections. Although there had been one other company prior to Agrium that had paid solicitation fees in connection with a board election, that company was much smaller than Agrium and the issue did not attract the same attention that the use of the tactic by Agrium drew. In response to the late revelation that Agrium was paying fees for favorable votes, there was widespread and public objection – including an editorial in a national newspaper calling for the end to the practice – and, subsequently, several large Canadian institutional shareholders have stated that they had considered revoking their support for management upon learning of the tactic.

Despite calls to outlaw the practice, we haven't seen any rule changes. But even without new regulation, it is doubtful whether paying solicitation fees for management votes is consistent with existing Canadian corporate and securities laws. Regardless of its legality, the condemnation of the practice in the Agrium contest has likely ensured that no company would again deploy this tactic.

**13DM:** Tax inversions, many with Canadian companies, have been frowned upon in the United States. How are they thought of in Canada, and do you expect to see more in the future?

**PO:** We have been involved in a number of tax inversion transactions: Burger King/Tim Hortons, Paladin Labs/Endo Health and, more recently, the Progressive Waste Solutions/Waste Connections transaction. Canada is considered a highly desirable place to re-domicile. We have a reasonable corporate tax rate, a sophisticated, liquid and well regulated stock exchange and a corporate and securities law regime with which Americans are comfortable. In addition, Canada does not tax income that is earned by a foreign subsidiary and distributed to the Canadian parent. As a result, earnings from foreign subsidiaries can be readily accessed by a Canadian parent company and distributed to shareholders. This is in contrast to the U.S. tax code that imposes U.S. corporate tax at a relatively high rate on both income earned in the United States and income that was earned in a foreign jurisdiction and distributed to a U.S. parent company.

We understand the debate about the ethics of corporate tax minimization and appreciate that the re-domiciling of U.S. companies abroad is a sensitive political issue. But my view is that a good manager must, as an owner would, manage expenses prudently on behalf of the shareholders, and that includes ensuring that a multinational business has a tax-efficient corporate structure that does not disadvantage the company relative to its peers.

The popularity of Canada as a favorable place of incorporation has been good for Canada. Inversions of U.S. corporations into Canada bring more income into the country that is then subject to tax in Canada. In addition, they increase the number of companies with Canadian headquarters, Canadian listings and Canadian management. It also signals to the world that Canada is a great place to do business. Not surprisingly, inversions of U.S. companies into Canada are thought of highly in Canada. Until the United States amends its tax laws to make them more conducive to businesses with multinational operations, we do expect to see more inversion transactions.

**13DM:** Pershing Square's successful proxy fight at Canadian Pacific greatly increased the credibility of activist investors in Canada. How are Canadians viewing what is now happening at Valeant? Is it harming all of the credibility that activists have built up in Canada over the past five years?

**PO:** Before responding, I have to declare my interest here: we advised Pershing Square in relation to its joint bid with Valeant for Allergan, and I am invested in Pershing Square's publicly traded fund, which is, as the whole world knows, still heavily invested in Valeant.

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At the time, the Pershing Square/Valeant joint bid for Allergan was considered the most innovative M&A deal of the year. As many have noted, it was the first time an activist had teamed up with a strategic buyer to make a joint acquisition. The pairing of a strategic buyer with an activist brought significant advantages to both parties. Pershing Square got a partner experienced in acquisitions, a track record of getting deals done and a deep insight into the industry in general and the target in particular. Valeant got a deep-pocketed partner, with experience in contested situations and a willingness to be the public face of the campaign.

As we all know, Actavis ultimately acquired Allergan in a friendly deal, putting an end to the Pershing Square/Valeant partnership. Since then, the value of Pershing Square's investment in Valeant has fallen more than 85%. However, the issues facing Valeant are not the result of its partnership with Pershing Square, nor were they the result of any activist agenda. In fact, by putting two representatives on the Valeant board with a powerful shareholder orientation, Pershing Square is an example of an activist bucking the stereotype of being opportunistic and short-term-focused and instead being instrumental in effecting a turnaround that may take some patience.

**13DM:** What do you think the most pressing corporate governance issues will be in Canada over the next five years?

**PO:** Shareholder engagement remains and will continue to be a big issue for corporate boards. In the past five years, with the rise of activism in Canada and the emergence of majority voting requirements, directors know that shareholders are exercising their rights of ownership more than ever and that directors serve at the pleasure of shareholders. Boards are trying to work more constructively with shareholders and have overcome the notion that shareholders should be dealt with exclusively by the management team. But we are still seeing boards struggle with how and when to engage with shareholders and how to deal with shareholders' concerns. Directors are also worried about tripping over selective disclosure issues or saying the wrong thing in these meetings.

To help boards deal with shareholders' growing expectations of access to board members, the Institute of Corporate Directors (an influential association of corporate directors that has broad membership from the Canadian board community) has released a paper that endorses boards engaging directly with shareholders and provides guidance for an effective engagement framework.

At the same time, shareholders are continuing to push for more formal mechanisms to influence board composition. Having successfully lobbied for mandatory majority voting for TSX-listed companies, the Canadian Coalition for Good Governance (CCGG) is currently advocating for proxy access on Canada. CCGG and its members, which include Canada's largest institutional investors, believe that shareholders should be more involved in boards' director nomination processes and expect that giving shareholders the power to require inclusion of their nominees in the company's management proxy circular and on their proxy card will encourage nominating committees to work more collaboratively with major shareholders. The rights that CCGG is seeking are similar to those provided in the proxy access bylaws recently adopted by many U.S. companies. One notable distinction in CCGG's proposal is that CCGG eschews minimum holding periods requirements for a significant shareholder to be able to nominate directors.

**13DM:** Do you see the level of shareholder activism increasing or decreasing over the next five to ten years, and are there any trends that you foresee?

**PO:** In Canada, as in the United States, the consensus is that shareholder activism is now a permanent feature of the corporate landscape. The trend away from knockout proxy contests to earlier, quieter and more cooperative outcomes will continue; the value of having an owner-representative in the boardroom in most circumstances is well established; and the newly emerging relationships between activists and traditional, long-only fund managers who are prepared to support the activist's agenda openly or behind the scenes will continue to flourish. The turbulence of the past year may have taken a few players off the field, but the rest, though bowed, are unbroken. So, for all those reasons, we are convinced activism is here to stay.

On top of these general trends, in Canada, more specifically, we have just undergone a major revision of the takeover bid code. The changes, to take effect next month, fundamentally change the balance of power between target boards of directors and shareholders. The new rules move Canada from its historical shareholder-centric model – in which individual shareholders have the right to accept or reject a bid – to a middle ground somewhere between that historical position and Delaware law. By requiring all hostile bids to remain open for 105 days and by requiring a minimum, non-waivable 50% tender condition in order for a bid to succeed, the new rules are expected to discourage hostile bids in Canada. A bidder faced with these additional barriers (coupled with Canada's unique requirement that the bid be fully financed from day one) may well consider it a better alternative to requisition a shareholders' meeting and replace the board with directors amenable to negotiation. So we see a whole new role for shareholder activism and proxy contests in the market for corporate control in Canada.

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