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Emerging Trends in Shareholder Activism and ESG Litigation

On September 19, 2024, The Advocates' Society held its 14th Annual Securities Symposium. As part of the program, Patrick Gadson (Vinson & Elkins LLP, New York) and Kelly Osaka (Dentons Canada LLP, Calgary) joined Brian Kolenda (Lenczner Slaght LLP, Toronto) to discuss emerging trends in shareholder activism and ESG litigation. Their discussion, summarized below, emphasized the importance of understanding market participants and political sentiment, while highlighting upwards trends in greenwashing-related litigation, and the increasing prominence of proxy firms.

Greenwashing in the Canadian Market

The panel opened with a discussion about greenwashing in the Canadian market in light of the rise of greenwashing advertising class actions in the US. Greenwashing refers to a company providing to the public, or to investors, misleading or false information about the environmental impact of a company's products and operations. Kelly Osaka explained that with the introduction of Bill C-59, which seeks amendments to the *Competition Act* to target deceptive marketing practices through greenwashing, regulators will likely be emboldened to investigate greenwashing claims. She highlighted two recent Canadian greenwashing campaigns against coffee manufacturer, Keurig, and against Canada's five largest banks, and expects to see a further trend in this direction.

She also explained that Bill C-59, which provided amendments to the *Competition Act* and received royal assent earlier this year, has led to some confusion in the market about what it means for environmental marketing to be based on "adequate and proper test" or "adequate and proper substantiation." However, she observed that these concerns may be placated by the results of the Competition Bureau's public consultation process set to conclude at the end of September 2024.

Key Considerations When a Company is the Target of an ESG Activist

Environmental, social and governance (ESG) is a shorthand for an investment strategy that prioritizes environmental, social, and governance issues. According to Patrick Gadson, when a company is a target of an ESG activist, it is important to know who the activist is. Specifically, whether they are both willing and capable to bring their campaign all the way through to a proxy contest.

In some cases, an activist may engage another shareholder to assist in their pursuit. In such circumstances, it may not always be obvious who a company may have to pacify and may lead to miscommunication between the parties.

Another critical consideration is the financial means and magnitude of a shareholder’s investment in a company. Proxy battles are expensive and activists with deep pockets and larger shareholdings are more likely to see a campaign through to its end.

The Politics of ESG

ESG is a multi-stakeholder issue and political dynamics may influence a company’s attitude towards ESG reporting. Patrick Gadson explained that the political leaning of a company’s shareholders, employees, and customers may also influence a company’s approach to ESG. The result of this is the maturing of ESG language that a company may use and may factor into how aggressive a company may be with respect to ESG.

Further, a company’s ESG policy may also depend on where the company is located. For example, and as explained by Kelly Osaka, individual US states have already enacted their own anti or pro-ESG legislation, but Canada is still in the process of developing ESG guidelines. For example, the Canadian Securities Administrators released Proposed National Instrument 51-107 regarding the disclosure of climate-related matters and the Canadian Sustainability Standards Board released its draft standards along with a proposal for them to come into effect in January 2025. As a result of these developments, she anticipates impending ESG disclosure requirements, preceded by a transition period.

Proxy Battles

The panel concluded with a discussion of proxy battles. Patrick Gadson observed an upward trend in the costs associated with proxy bottles, explaining that this is partly due to an increase in advisor’s fees, a “doubling down” on advisors, and dependent on the tactics a company is willing to deploy. He also observed that the proxy battles that go the full distance seem to be winnable on both sides.

The panelists also discussed the increasing role of ISS and Glass Lewis in proxy battles and their role in corporate policy-setting. This follows the changes in US securities laws allowing for proxy firms to provide recommendations, which has resulted in the outsourcing of corporate governance review systems from within the shareholder base to these proxy firms. It was observed that large institutions will typically follow the recommendations of ISS and Glass Lewis and that substantial resources are spent lobbying these two firms. It was also noted that these firms publish ESG guidance.