## THE ACTIVIST REPORT **11** 13D Monitor

Volume 5 Issue 7

#### Proxy Contests in Canada: What U.S. Investors Need to Know

Michael Partridge and Jon Feldman, Goodmans LLP

In April 2015, FrontFour Capital Group LLC announced its intention to nominate three new directors for election at the 2015 annual general meeting of Legacy Oil + Gas Inc., an intermediate oil and gas producer based in Calgary, Alberta and listed on the Toronto Stock Exchange. On May 26, 2015, Legacy agreed to be acquired by Crescent Point Energy Corp. at a price that represented a 36% premium over Legacy's stock price before FrontFour's announcement.

continued on page 4

### Under the **Threshold**





On June 15, 2015, Barington Capital Group and **Ancora Advisors** (collectively, the

"Group" - an approximate 4% owner) sent a letter to DHI Group, Inc. (DHX). In the letter, the Group urged the Board to engage an investment

continued on page 10

#### Around the World



On June 28, 2015, it was revealed through a disclosure to the French market regulator,

that Elliott Associates LP has taken a 1.3% position in Alcatel-Lucent. Elliott's position is reportedly through equity swaps. This announcement

continued on page 11

#### Activism Makes for Strange Bedfellows



It has been reported that Fiat Chrysler Automobiles NV Chief Executive Sergio Marchionne has reached out to activist investors to help prod General Motors into a merger. A Company's CEO going to an activist for help is almost like Devil Anse Hatfield reaching out to Randy McCoy for a cup of sugar. In an even stranger occurrence, the Kingdom of Saudi Arabia is looking for activists as it opens its stock exchange to foreigners for the first time. The CEO of the Saudi Stock

Exchange said, "These activist shareholders are basically there to allow us to better align with best global practices and hopefully that will accelerate our convergence to higher standards of corporate governance, investor relations, issuer disclosures and hopefully broaden and make more sophisticated our research coverage of our listed companies".

#### **Investor Communications Network**

152 West 57th Street, 41st Floor New York, NY 10019 www.13DMonitor.com (212) 223-2282

July | 2015

## 10 Questions with Jon Pollock

Officer and Equity Partner of Elliott Management Corporation with responsibility for global situational investing, global trading and operations. Jon joined Elliott in 1989 as an analyst and later became a senior portfolio manager. In 1995, he opened Elliott's London office and for the next 14 years ran the firm's European and Asian businesses, opening additional offices in both Hong Kong and Tokyo. In 2009, he returned to New York to become Head of Global Situational Investing. Jon has been involved in a number of significant Elliott investments including Delphi Automotive, Lehman Brothers and Hess Corporation.

13DM: You oversee Elliott's \$26 billion portfolio. How does activism fit into your overall investment strategy?

JP: There is an activist element to many of the areas in which we invest whether it's in equities, credit (stressed or distressed),

continued on page 2

## IN THIS ISSUE

<u>ltem</u>	Pg.
10 Questions with Jon	
Pollock	1
Proxy Contests in Canada	1
Under the Threshold	1
Around the World	1
<b>Monthly Activist Activity</b>	9
One to Watch	9
<b>Activist Directory</b>	32

The specific securities identified and described herein may or may not be held at any given time by the portfolio of 13D Activist Fund, an SEC registered mutual fund managed by an affiliate of 13D Monitor.

#### THE ACTIVIST REPORT

#### JON POLLOCK (cont'd. from pg. 1)

private equity or direct real estate. In all of these positions we seek to hedge out as much market risk as possible leaving us exposed to the idiosyncratic risks of a given situation. These include both the risks we have identified through our due diligence process and those that we either did not or could not identify. Through direct involvement in our positions, we attempt to positively shape investment outcomes while minimizing our exposure to these idiosyncratic risks. Equity activism fits well with our strategy of deep involvement in our positions with the goal of driving returns.

**13DM:** Elliott has a very thorough process with respect to its activist investments. Tell us about that process.

JP: Elliott has always been drawn to investments whereby "manual efforts" can both mitigate risk and create profitable outcomes. Activism falls into that category and, over the past decade, our U.S. equity activist team, headed by Jesse Cohn, has developed a process that we believe is unique and repeatable. The process is rooted in our detailed diligence effort and centers on a three-pronged test:

- 1) Value: Each prospective investment must have a clear path to create value. This means that there must be value in the business that is currently being obscured due to poor execution, corporate structure or some other reason, and that the value is sufficient to warrant the expenditure of time and resources.
- 2) Pathway: There must be a way

for us to achieve the value result we see. This ranges from a conversation with a constructive management team to a proxy contest or even a bid for the company, but we must be able to draw a line from thesis to realization of value.

3) Case: There has to be some level of frustration or a general awareness that the company is missing out on the value opportunity.

Of these components, the value criterion is always required and it is nearly always necessary to have multiple paths to create value. We may evaluate opportunities where the pathway or case is less clear, but ultimately the optimal scenario contains all three.

**13DM:** Elliott has excelled at activism in the Technology sector. Tell us more about the opportunities that you see in Tech?

**JP:** Technology has been an attractive sector for us and one where we continue to see significant opportunity.

We like technology because it is complex. Given the speed at which technology markets change and how winners and losers can be determined, it makes value investing with a long-term horizon that much more challenging. While every situation is unique and every technology subsector is being impacted by slightly different market and competitive dynamics, we do frequently see some recurring themes in our investments. The most common of these is that the company we are investing in has often seen its growth rate stagnate due to competition, market saturation or some

other force and it is desperately seeking to restart growth. Frequently this results in poor utilization of resources – whether R&D, personnel, M&A, etc. – that creates damage to returns and, often, to the company's still valuable core franchise.

Within tech specifically, we have built out infrastructure that has augmented our ability to identify and facilitate change at the companies we invest in. Our team includes finance professionals, but we also have engineers and tech executives, as well as operators and operational consultants who we work with to help conduct due diligence on the products, markets and operations. This team works for extended periods of time to identify the value that can be unlocked through proper investment in the business, operational improvements and changes to the organization or corporate structure. We also buy companies which helps give us further insight into operations as well as access to executives who can help us with our public projects.

**13DM:** Elliott is consistently successful in attaining board representation at its portfolio companies but yet rarely needs to launch a proxy fight. Is this a reflection of your deep relationships with large institutional shareholders? What else do you attribute this to?

JP: Over the past several years, we think that many institutional shareholders have invested in their teams and now have a strong understanding of which companies have underperformed and which boards can use better oversight. Elliott has maintained a good dialogue

continued on page 3

# "...over the past decade, our U.S. equity activist team, headed by Jesse Cohn, has developed a process that we believe is unique and repeatable."

The specific securities identified and described herein may or may not be held at any given time by the portfolio of 13D Activist Fund, an SEC registered mutual fund managed by an affiliate of 13D Monitor.

#### THE ACTIVIST REPORT

#### JON POLLOCK (cont'd. from pg. 2)

with large shareholders and we think this move toward greater accountability is a very positive development for shareholders and markets overall.

Beyond that, I think we've been able to identify situations where the facts suggest that change is actually needed. When a company consistently underperforms its peers and makes poor management and board-level decisions, we believe it is obvious not only to investors, but also to the company and its advisors. In

situations that, when the facts are laid bare and we can offer topnotch executives serve on the Board and address issues, we have found that our message resonates.

13DM: Unlike many activists, Elliott has an international activist footprint with current engagements in South Korea (Samsung), Hong Kong (Bank of East Asia) and Scotland (Alliance Trust). What are some of the challenges and advantages to activism in other jurisdictions?

**JP:** The local legal, regulatory and cultural frameworks are important considerations in calibrating our chances of success. Does the company benefit from a significant "home court" legal advantage? shareholders change or does management benefit from a standing practice of domestic institutional and retail support? with all of our investments, we evaluate it using the same consistent application of our framework: 1) is there value in the opportunity?; 2) is there a pathway for us to create the change we believe is needed?; and 3) is there a case to be made to our fellow holders that the change is needed? By taking our time and devoting the necessary resources to being diligent, we hope to get the analysis right.

13DM: Also, unlike many other activists, Elliott is prepared to, and often does, acquire portfolio companies at the right price. How has this worked out for you?

JP: In certain cases, the changes a company needs in order to improve its business are best done in a private setting. In those situations, we frequently seek to play a role in taking the company

"Though we are pleased that activism

has become more broadly accepted, we

believe the majority of the opportunity

set is still in front of us."

**13DM:** In your activist investment in Hess, you offered to compensate your director nominees to the extent the company's stock appreciated. This is not an unusual compensation structure for activist investors but a structure that has been criticized by others. Do you see any conflict of interest or other material issue from this compensation arrangement?

JP: We think these structures can be appropriate for certain situations and we continue to think about the best way

> implement absolute some

them. The end goal is to get the board members for the company in guestion. In cases, not a majority, the ideal board candidate

private. And broadly, those situations have generated a very successful outcome for us.

**13DM:** Elliott is a very successful multi strategy firm with activism as just one of its strategies. How much of its capital is devoted to the activist strategy? Does this allocation change as the markets change and some strategies become more compelling than others?

JP: While we have offices in different regions and employ many talented people with highly specialized skills, we do not allocate capital by asset class or geography. That gives us the freedom to be opportunistic. Capital follows the idea. If we see opportunities to invest in areas like equity activism we will allocate resources accordingly. If not we will look elsewhere. In addition to equity activism we have significant capital invested in areas such as direct real estate, private equity, commodities, structured credit and distressed investments.

wants to be compensated for the risk in being part of a dissident slate or for committing significant time and energy to turning around a struggling enterprise. Sometimes, the compensation offered by the company to its directors is uncertain (in a dissident slate it is not guaranteed the candidate gets elected despite committing time and his or her name to a proxy contest) or insufficient (successful executives sometimes require higher pay for challenging situations). There has been some progress in the area and the discussion is ongoing, but the end goal is to make sure shareholders get the benefit of the most capable directors.

13DM: As a multi strategy firm, what is your view on activism and its recent evolution? Do you see activism as a trend? An asset class? The new normal? What do you see in the future for this strategy?

JP: Though we are a multi-strategy firm, Elliott has been engaged in activism in both equities and debt for decades. The

continued on page 4

The specific securities identified and described herein may or may not be held at any given time by the portfolio of 13D Activist Fund, an SEC registered mutual fund managed by an affiliate of 13D Monitor.

#### THE ACTIVIST REPORT

#### JON POLLOCK

#### (cont'd. from pg. 3)

rise of the acceptance of activism has been a welcome development with more and more funds welcoming the presence of an activist and more boards and management teams realizing that they are accountable for their performance.

At Elliott, we do not think of activism as an asset class but rather as a tool in valuebased investing. At its heart, activism in the equity space is value-based investing whereby the vast majority of the value is in properly identifying companies with hidden value - companies that have good products or good assets that are simply not being monetized or developed appropriately. This is the value prong of our three-pronged test and where we spend the most amount of time researching and confirming our thesis that there is, in fact, value to be realized.

Though we are pleased that activism has become more broadly accepted, we believe the majority of the opportunity set is still in front of us. Companies frequently remain undermanaged and boards are often poorly engaged or equipped to deal with the issues their companies are facing. Certainly, activist funds have cropped up to address the opportunity, but we have found that complex situations where we can conduct detailed work with a long-term view remain in ready supply and we believe will for the foreseeable future.

13DM: Where they trade now, what is your favorite position in your portfolio and why?

JP: With a \$26 billion book, I have a lot of favorites.

#### PROXY CONTESTS IN CANADA

(cont'd. from pg. 1)

This is just the most recent example of a long standing trend of U.S. activist investor involvement in Canadian companies, a trend that shows no signs of abating anytime soon. From Pershing Square's high profile success in reconstituting the board of Canadian Pacific Railway to numerous other less prominent examples, many U.S. activists have shown a real enthusiasm for investment opportunities north of the border.

While the investment thesis for taking a position in a Canadian company will generally be no different than it would be in the U.S., the legal framework that governs activist initiatives in Canada is different in a number of important ways. Some of these differences favour the investor and some of them favour the company, but it is important in any event for U.S. investors who are considering engaging in proxy contests or other activist strategies involving Canadian companies to understand the differences clearly and to tailor their strategies accordingly. This article outlines some of the most important legal issues relevant to shareholder activism in Canada

#### Building a Position - Disclosure, Joint **Actors and Take-Over Bids**

Disclosure

Canada's "early warning" disclosure regime requires public disclosure of significant ownership positions in Canadian public companies and is similar to the 13D rules with two important differences:

- the Canadian disclosure threshold is 10%: and
- early warning disclosure (a press release followed by a securities filing) is required immediately upon crossing the disclosure threshold and the investor may not acquire any additional shares for one business day after filing its early

warning report.

While the higher disclosure threshold in Canada can be a significant advantage for activist investors, its benefits are mitigated in a couple of ways. First, because Canadian public companies are, on average, significantly smaller than U.S. public companies, the aggregate amount of capital that can be invested before disclosure is required will also often be significantly lower. Second, the requirement for immediate early warning disclosure combined with the one business day trading moratorium precludes the common U.S. tactic of using the 10 day period between tripping the disclosure threshold and filing a 13D report to significantly increase the investor's position.

The early warning system also includes an alternative monthly reporting system that is available to "eligible institutional investors" (including investment managers that are registered under the U.S. Investment Advisers Act of 1940 or are exempt from registration). The principal advantage of the alternative system is that it allows for a significant delay in disclosure - within 10 days after the end of a month in which a reporting trigger has occurred rather than immediately.

An investor that intends to acquire control of an issuer may not use the alternative monthly reporting system but, at present, "activist" intentions short of the acquisition of control do not preclude an eligible institutional investor from using the alternative system. There have been some situations where investors with activist intentions have used the alternative monthly reporting system to strategically accumulate significant positions in Canadian companies (i.e., well in excess of 10%) before having to disclose those positions. Partly as a result over concerns with the propriety of those tactics, the early warning rules are expected to change later this continued on page 5

The specific securities identified and described herein may or may not be held at any given time by the portfolio of 13D Activist Fund, an SEC registered mutual fund managed by an affiliate of 13D Monitor.