

# THE KINGSDALE CONNECTION



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# Compensation design isn't the problem, it's communication

By WES HALL, ICD.D, Founder and CEO  
*Published in The Globe and Mail on January 6, 2016*

In all of the recent discussion about the shortcomings of compensation design in Canada, one fundamental fact has been overlooked: It's not the model or the metrics that are creating the problem, it's a disconnect between management and shareholders when it comes to how each values and defines the long term.

As someone who has helped companies win more than 100 say-on-pay votes over the past five years, I'm confident in saying it's not compensation design that is broken. It's the communication between directors and shareholders that has gone off the rails.

There are numerous examples of CEOs who are paid handsomely and supported by shareholders even when their stock is down. The question is, what characteristics set them apart?

In short, their shareholders believe these CEOs are doing the right things – the things they have asked them to do. There is a close alignment between the board and shareholders when it comes to understanding the long-term strategy of the company and how performance and value creation is viewed within that. If you can't quickly complete the sentence "Here is what long-term value creation means," how can you expect your shareholders to understand the model you're proposing?

**“If you can't quickly complete the sentence “Here is what long-term value creation means,” how can you expect your shareholders to understand the model you're proposing?”**

In any stock, there are two types of shareholders whose interests need to be balanced if the goal is to secure a high level of support for CEOs and other corporate directors on say-on-pay votes. There are shareholders who will vote based on the share price today and shareholders who will vote based on the asset. The trick is to ensure the first group understands the long-term initiatives they should be valuing now. In many cases, supporters of a company, especially one in the midst of a turnaround, will give a CEO credit for doing all the right things – but the problem is that the market does not yet value these initiatives immediately in the stock price.



When the economy is running on all cylinders, compensation models are usually seen as functional by shareholders. However, when we have years of sustained decline, as we have in the energy and resource sectors, many companies need to catalyze a turnaround or fundamentally reposition themselves to survive. In these circumstances, CEOs are responsible for making decisions that ignore the current share price and instead strive to set the company up for success in the long term. They need to be encouraged to focus on the things they can control to turn around the stock in the long run, not the things they can't in the short term.

It's important to realize that compensation is not set arbitrarily. It's not even set by outside consultants and compensation committees. It's set by the market, where an auction takes place for the few special leaders capable of providing the change shareholders demand.

In some ways, the debate around pay for performance has become more complex than it needs to be. At the end of the day, shareholders want a model that rewards tough choices that benefit the long term, rather than sweeping problems under the rug, and that shares their pain when they feel it. In our experience, shareholders generally agree that, while it may take years to see results reflected in the share price, it is fair to pay management for doing the right things today. They just need to agree on what the right things are.

As much as this is about numbers, it's about storytelling. Rarely is a low or failing say-on-pay vote the result of one issue in a single year. It's more the product of a few years of concerns and a feeling by shareholders that their opinions have not been valued.

The CEOs who receive supportive say-on-pay votes in challenging times are successful because they aggressively communicate their pay for performance story, realizing that if they don't, the proxy advisors or media will tell it for them. They put themselves in the shoes of their major shareholders to understand their expectations and how their proposal will be received. "High pay" is relative, so companies should spend time thinking about their peer group, how their pay aligns with performance, and the time horizon to evaluate.

Directors who are reluctant to engage in this sort of outreach and dialogue with their shareholders should be aware that it may soon be forced upon them as their largest shareholders band together to demand that what they consider to be best practices be implemented across their portfolio.

# Kingsdale Governance Summit encourages boards to get engaged

Listen to your shareholders. Although simple, this was the recurring theme across all panels at our 2016 Governance Summit: *Certainty in Uncertain Times* and can be a powerful proactive defence against activism and shareholder dissatisfaction.

With close to 150 senior leaders from boards, management, and investors in attendance by invitation only, the event provided an opportunity to hear insider stories and advice from directors, activists, and institutional investors to help prepare for the upcoming proxy season. The summit took place under Chatham House Rules that allowed for a frank discussion and some tough questions to be asked. While we can't attribute specific comments to an individual speaker, we wanted to make sure all of our clients and friends have access to the key lessons from the conference.



From left: Judy Cotte (RBC GAM), Matthew DiGuiseppe (TIAA-CREF), Zach Oleksiuk (BlackRock) and Amy Freedman (Kingsdale moderator)

## Next Generation of Activism Requires Discussion

The nature of activism has changed over the last ten years. Whereas activists were once perceived as self-interested villains or “corporate raiders”, today’s activists are taking a more constructive approach. As a result, today when a company is approached by an activist, a more nuanced engagement approach is needed beyond just coming out swinging.

“Constructivists” are the new wave of activists. They are looking to bring ideas and solutions forward that require the participation of management to implement and, like management, are not eager for a noisy public spat (at least at the outset).

Activists, especially those inclined to take a constructivist approach, typically do extensive research before approaching a company. In many cases this research is beyond anything the company itself can do due to the willingness of competitors, former employees and other market participants to talk to the activist. What we are seeing are more cases where an activist brings forward specific operational suggestions and detailed white papers for change, that go beyond the usual activist asks for things like share buybacks and board seats.

When confronted by a constructivist with ideas that have clearly been well researched, attendees to our summit were told good boards are not threatened by new ideas. They will listen and welcome feedback so they can continue to improve. Inexperienced or entrenched boards will put their egos first and respond in a more emotional manner, immediately rebuffing any approach without considering the potential value.

It was observed that in many of these situations, the companies that respond in this knee-jerk fashion are the ones who need change the most, suffering from poor corporate governance or dissatisfaction in their shareholder base.

## Make Shareholder Engagement a Priority

In today’s rapidly changing shareholder environment, setting a new standard for leadership in the boardroom means setting a new standard for engagement with investors. In the past, boards may have been able to get away with minimal shareholder dialogue but in 2016, those shareholders who are not getting answers will hold boards accountable.

Improved communication is a cross-cutting theme that, if acted on, will proactively address a lot of the increasingly prevalent challenges facing public companies such as the rise of activism and shareholder opposition to executive compensation packages.

Institutional investors have been more vocal in their demand for access to directors and desire for a clear process for regular interaction. Their frustration stems from the fact that corporate communication becomes a routine exercise of checking regulatory boxes and issuing obligatory press releases, leaving companies with the mistaken impression they’ve ‘communicated’. There is a big difference between disclosure and engagement.



Victor Dodig (President & CEO of CIBC) chatting with Wes Hall.

Attendees to our summit were told that ensuring your shareholders know *why* you’re making the decisions you are is just as important as *what* the decisions are. Even if you have to make a tough decision that shareholders may not be happy with, if they understand your thinking behind the decision they may understand that, while unpopular, your decision was necessary. In situations where a contested vote is involved, telling this story before your opposition does is especially important.

Activists have also become increasingly vocal, criticizing companies for over-complicating something as straightforward as talking to their owners. They believe that elaborate communications protocols are simply an attempt to insulate directors from inquisitive shareholders. They want two-way communication and an understanding of how their input, as owners, will influence corporate strategy, and if it does not, transparency as to why.

So what can boards do? It's important that board members are seen as accessible and the lead director is available to engage directly with shareholders. This sends a signal from the top that shareholder views are important. Shareholders are resourceful, and if you do not provide an answer, they will get it from someone else in the market who may not share the story you want. This means it is important to have an ongoing dialogue and an IRO in regular contact with your shareholders, not just when there is an issue that needs to be managed or good news to be sold.

Shareholders want to know their concerns have been acknowledged and taken seriously, which is why it's important for management and boards to close the feedback loop by following up with shareholders after a discussion to let them know what you're doing to address their concerns. If negative sentiment is expressed, make the effort to understand why shareholders feel the way they do and what you can do to change it. The ideal solution would be to proactively reach out to shareholders to gauge how they're feeling ahead of proxy season or a vote to answer questions before they turn into issues. Being attuned to your shareholders and knowing when they need to speak to a director versus management, such as on compensation, is key.

**The return you get—the change in votes and successful outcomes—really changes when you actually pay attention to what's going on.**

### When Dealing with Proxy Advisors, All Information is Important

Institutional Shareholder Services (ISS) and Glass, Lewis & Co. (GL) can make or break a vote and both provided useful insight to our attendees. They agreed that it can be difficult to navigate the complicated world of governance, but there are best practices you can adopt to ensure your company is optimally positioned for success.

All information is important. If there is a lack of clarity or detail, advisors will assume the worst case scenario. It is crucial to provide a strong rationale to support management. To ensure you have complete, meaningful information to bring to the table, you should have already reached out to your shareholders to understand their perspectives. This will allow you to have a holistic, well-informed dialogue with the proxy advisors.

Attendees were told that the board of directors, especially the Chairman, are the best people for the proxy advisors to meet with. Discussions with the board are typically more meaningful than those with the IR team and even the CEO who tend to try and sell the company line as opposed to engaging in thoughtful discussion about some of the complex governance decisions ISS and GL might be interested in. That being said, both agreed it is still important to be aware of the point of view of management and shareholders to fully understand where a company stands.

Proxy advisors' voting recommendations are driven by policies, which include both quantitative and qualitative analysis. Decisions are not always based on black and white numbers as discretion sometimes comes into play. Although the items they take into account are the same across the board, how your company measures up takes individual factors into consideration, such as the unique circumstances surrounding your sector and improvements that your company has made over the years in regard to issues like pay structure and realizable pay. This inclusive model reinforces the importance of transparency and disclosure, especially when it comes to issues like say-on-pay.

### Compensation: Working Out the Kinks

In order for all shareholders to understand compensation, simplicity and clarity in the circular are essential. Overly complicated explanations and inconsistency in the general approach to compensation muddle the message and confuse shareholders. To avoid this, one panelist suggested using methods to pinpoint where shareholders should be looking in the circular and writing simply and clearly so that everyone from the smallest retail shareholder to the largest institution will understand.

Our panelists agree the biggest tension between issuers and shareholders is the pay for performance assessment. The company will assess one way, and the shareholders will assess it another. Shareholders are working from what's in the proxy materials and making decisions based on that level of disclosure. Tension stems from the "broken telephone" effect where shareholders may not have full insight into the board's thinking, especially in instances where discretion has been used.

For example, the need to retain talent in the current fluctuating markets is often used to justify high compensation in the face of poor company performance. While this may be true in some instances, companies need to be careful not to overuse the "need for retention" as an explanation to award questionably high compensation. (Continued on next page)

## KINGSDALE 2016 GOVERNANCE SUMMIT: CERTAINTY IN UNCERTAIN TIMES

### TALES FROM NOTABLE DEALS OF 2015:

TRUDY CURRAN (CANADIAN OIL SANDS)  
TAMIKO OHTA (TALISMAN ENERGY)  
PETER VOLK (PACIFIC EXPLORATION & PRODUCTION)

### INSIDE THE PROXY ADVISORS:

DEBRA SISTI (ISS)  
MICHAEL VOGELE (GLASS LEWIS)

### WHAT EVERY ISSUER SHOULD KNOW

#### ABOUT THEIR BIGGEST INVESTORS:

JUDY COTTE (RBC GAM)  
MATTHEW DIGUISEPPE (TIAA-CREF)  
ZACH OLEKSIUK (BLACKROCK)

### KEYNOTE ADDRESS:

VICTOR DODIG  
PRESIDENT & CEO, CIBC



### MEET THE NEXT LEVEL OF ACTIVISM:

PHIL EVERSHERD (OXFORD PARK CAPITAL)  
ZACHARY GEORGE (FRONTFOUR CAPITAL)

### COMPENSATION MODELS TO GET BEHIND WHEN THE MARKET IS DOWN:

BILL MACKENZIE (HERMES EOS)  
DARIAN RICH (BARRICK GOLD)  
PAUL SCHNEIDER (OTPP)  
ANNA TUDELA (GOLDCORP)

### THE ART OF SHAREHOLDER

#### ENGAGEMENT:

MÉLANIE HENNESSEY (NOVAGOLD)  
BASSEM SHAKEEL (MAGNA)  
NADEEM VELANI (CP RAILWAY COMPANY)

Although there are adjustments to be made on behalf of management and boards in approaching and explaining compensation, the framework itself is generally sound. Appropriate use of discretion and flexibility are needed to ensure compensation passes the common sense test and aligns with the current shareholder experience. If you're having compensation issues, don't blame the framework, fix your approach.

From the shareholders on our panel the biggest piece of advice was that an ongoing dialogue between the Compensation Committee and shareholders is the simplest way to ensure mutual understanding of the compensation structure. Discretion isn't inherently bad, shareholders just want to know about it. That's why the board is there. If the Compensation Committee isn't exercising some form of discretion, are they really doing their job? Relying solely on a rigid formula is just as bad as relying completely on discretion. It's about finding the balance.

## Certainty in Uncertain Times

We chose certainty in uncertain times as the theme of our 2016 summit because, in today's market turmoil, it's not uncommon to feel doubt or ambiguity. It's important to remember you cannot control the macroeconomic or geopolitical environment, but what you can control is the destiny of your career and your company by being focused on your goals and what you can do to achieve them. This is the time to figure out how you want your company to be positioned in a new environment once this uncertain time passes. Simply put by one of our panelists, "Just keep swimming."

## PROXY ADVISOR UPDATES

### "OVERBOARDING" GUIDELINES UPDATE—ISS AND GLASS LEWIS

**ISS:** NEXT FEBRUARY, DIRECTORS WILL BE CONSIDERED "OVERBOARDED" IF HE IS EITHER A CEO OF A PUBLIC COMPANY WHO SITS ON MORE THAN ONE OUTSIDE BOARD AS WELL AS THE COMPANY OF WHICH HE IS THE CEO OR A DIRECTOR (NOT A CEO) WHO SITS ON MORE THAN FOUR PUBLIC COMPANY BOARDS.

**GL:** EXECUTIVE DIRECTORS SERVING ON MORE THAN TWO BOARDS IN TOTAL AND NON-EXECUTIVE DIRECTORS SERVING ON MORE THAN FIVE BOARDS IN TOTAL WILL BE CONSIDERED OVERBOARDED. FURTHER, GLASS LEWIS RELAXED GUIDELINES FOR VENTURE ISSUERS WHERE THE AUDIT COMMITTEE MEMBERS OF THE SUBJECT COMPANY MAY NOW SIT ON UP TO FOUR AUDIT COMMITTEES.

**POLICY DIFFERENCES:** BOTH ISS AND GLASS LEWIS HAVE ADOPTED A STRICTER STANCE IN EVALUATING EXCESSIVE COMMITMENTS OF DIRECTORS. UNLIKE ISS, GLASS LEWIS' "OVERBOARDING" RECOMMENDATIONS ARE NOT DOUBLE-TRIGGERED AND THE "OVERBOARDING" ISSUE ALONE WILL AFFECT NEGATIVE RECOMMENDATIONS.

### NEW EQUITY PLAN SCORECARD FRAMEWORK - ISS

ISS HAS OVERHAULED THEIR FRAMEWORK FOR EVALUATING TREASURY-BASED EQUITY PLAN PROPOSALS. PREVIOUSLY, THE COST OF AN EQUITY PLAN AS WELL AS SEVERAL OVERRIDING FACTORS CONSTITUTED THE CRUX OF THE ANALYSIS. NOW, THE SUBJECT COMPANY'S TOTAL EQUITY PLAN SCORECARD SCORE BASED ON THREE PILLARS (PLAN COST, PLAN FEATURES AND GRANTING PRACTICES), IN COMBINATION WITH THE OVERRIDING FACTORS ALREADY ESTABLISHED, WILL DETERMINE WHETHER SUPPORT IS WARRANTED.

### FRAMEWORK FOR EVALUATING COMPENSATION FOR EXTERNALLY MANAGED ISSUER - ISS

ISS FINALIZED THEIR EVALUATION FOR COMPENSATION PRACTICES AT "EXTERNALLY-MANAGED ISSUERS" ("EMIs"). ISS WILL APPLY A CASE-BY-CASE POLICY FRAMEWORK FOR EVALUATING EMI COMPENSATION PRACTICES VIA RECOMMENDATIONS ON A SAY-ON-PAY RESOLUTION OR BY WITHHOLDING VOTES FROM INDIVIDUAL DIRECTORS WHERE THE EMI HAS PROVIDED MINIMAL OR NO DISCLOSURE ABOUT ITS MANAGEMENT SERVICES AGREEMENTS AND HOW SENIOR MANAGEMENT IS COMPENSATED. NUMEROUS OTHER FACTORS, INCLUDING THE SIZE AND SCOPE OF THE AGREEMENT AND THE OVERALL PERFORMANCE WILL ALSO BE TAKEN INTO CONSIDERATION.

### FRAMEWORK FOR EVALUATING PROXY ACCESS—GLASS LEWIS

GLASS LEWIS GENERALLY SUPPORTS AFFORDING SHAREHOLDERS THE RIGHT TO NOMINATE DIRECTOR CANDIDATES TO MANAGEMENT'S PROXY AS A MEANS TO ENSURE THAT SIGNIFICANT, LONG-TERM SHAREHOLDERS HAVE THE ABILITY TO NOMINATE CANDIDATES TO THE BOARD. GLASS LEWIS MAY CONSIDER VARIOUS FACTORS INCLUDING: (I) THE SPECIFIED MINIMUM OWNERSHIP AND HOLDING REQUIREMENT FOR SHAREHOLDERS TO NOMINATE ONE OR MORE DIRECTORS, (II) COMPANY SIZE, (III) PERFORMANCE AND (IV) RESPONSIVENESS TO SHAREHOLDERS AMONG OTHER THINGS.

ON A SIDE NOTE, WHILE THE U.S. BENCHMARK GUIDELINES FOR ISS HAVE INSTITUTED A COMPREHENSIVE FRAMEWORK TO EVALUATE PROXY ACCESS PROPOSALS, THE CANADIAN BENCHMARK GUIDELINES HAVE YET TO INCORPORATE A FORMAL FRAMEWORK.

### EXCLUSIVE FORUM PROVISIONS—GLASS LEWIS

BUNDLED BY-LAW OR CHARTER AMENDMENTS ARE STILL WEIGHED ON A CASE-BY-CASE BASIS BUT GLASS LEWIS WILL RECOMMEND THAT SHAREHOLDERS VOTE AGAINST BY-LAW OR CHARTER AMENDMENTS SEEKING TO ADOPT EXCLUSIVE FORUM PROVISIONS, EXCEPT IN SPECIAL CIRCUMSTANCES.

### NOMINATING COMMITTEE PERFORMANCE—GLASS LEWIS

PREVIOUSLY, GLASS LEWIS' GUIDELINES DID NOT GENERATE ANY RECOMMENDATIONS BASED ON THE LACK OF PERIODIC DIRECTOR ASSESSMENT OR BOARD REFRESHMENT. GLASS LEWIS HAS UPDATED ITS GUIDELINES TO RECOMMEND THAT SHAREHOLDERS WITHHOLD VOTES FROM THE CHAIR OF THE NOMINATING COMMITTEE FOR A SUBJECT COMPANY'S POOR PERFORMANCE AS A RESULT OF THE BOARD'S FAILURE TO ENSURE DIRECTORS WITH RELEVANT EXPERIENCE, EITHER THROUGH PERIODIC DIRECTOR ASSESSMENT OR BOARD REFRESHMENT, ARE APPOINTED.

### QUORUM FOR MEETING OF DIRECTORS—BY-LAW AMENDMENTS—GLASS LEWIS

GLASS LEWIS HAS CLARIFIED THAT THEY WILL LOOK AT WHETHER OR NOT THE QUORUM FOR A MEETING OF DIRECTORS IS THE MAJORITY OF DIRECTORS WHEN ASSESSING BY-LAWS OR CHARTER ADOPTION OR AMENDMENTS.

ISS HAS ALREADY TRADITIONALLY LOOKED AT THE QUORUM OF THE MEETING OF DIRECTORS IN ASSESSING BY-LAW OR CHARTER AMENDMENTS AND REQUIRES SUCH QUORUM TO BE AT LEAST 50% OF THE DIRECTORS.

### ENVIRONMENTAL AND SOCIAL RISK OVERSIGHT—GLASS LEWIS

GLASS LEWIS HAS CODIFIED ITS POSITION FOR CASES WHERE THE BOARD OR MANAGEMENT HAS FAILED TO SUFFICIENTLY IDENTIFY AND MANAGE A MATERIAL ENVIRONMENTAL OR SOCIAL RISK THAT DID OR COULD NEGATIVELY IMPACT SHAREHOLDER VALUE. IN THOSE CASES, GLASS LEWIS WILL RECOMMEND THAT SHAREHOLDERS WITHHOLD VOTES FROM DIRECTORS RESPONSIBLE FOR RISK OVERSIGHT IN CONSIDERATION OF THE NATURE OF THE RISK AND THE POTENTIAL EFFECT(S) ON SHAREHOLDER VALUE.

### TRANSITIONAL AND ONE-OFF AWARDS—GLASS LEWIS

GLASS LEWIS CLARIFIED THAT SIGN-ON ARRANGEMENTS AT THE EXECUTIVE LEVEL SHOULD BE CLEARLY DISCLOSED AND ACCOMPANIED BY A MEANINGFUL EXPLANATION OF THE PAYMENTS AND PROCESS BY WHICH THE AMOUNTS ARE REACHED. BASIS FOR "MAKE-WHOLE" PAYMENTS SHOULD ALSO BE PROVIDED. GLASS LEWIS WILL ALSO CONSIDER TARGET LEVELS OF COMPENSATION AND COMPENSATION PAID TO OTHER EXECUTIVES (INCLUDING PREDECESSOR PAY) IN EVALUATING WHETHER OR NOT THE PAYMENTS ARE APPROPRIATE.

# CSA changes take-over bid regime

The Canadian Securities Administrators recently published the long awaited amendments to the Canadian take-over bid regime. The changes aim to strike a better balance of leverage between target boards and hostile bidders. They will be in effect as of May 9, 2016, except in Ontario where certain legislative amendments are required. Specifically, the changes will require that take-over bids:

- (1) receive tenders of more than 50% of the outstanding shares that are subject to the bid, excluding securities beneficially owned controlled by the bidder;
- (2) remain open for a minimum deposit period of 105 days (down from the proposed 120 days) subject to certain exceptions which include agreement by the target board; and
- (3) be extended by the offeror for an additional 10 days after the minimum tender requirement has been achieved and all other terms and conditions of the bid have been complied with or waived.

The new amendments materially tip the balance of power to the benefit of target boards as they will now have 105 days to source a superior offer instead of the current 35 days. The new rules will make hostile bids more challenging for bidders considering there will be increased completion risk, significantly higher costs, and more time for target boards to seek alternatives.

## Kingsdale's Take

We expect that with the fixed duration of a bid, hostile take-overs will become more like election campaigns where you need to win and hold tenders until a known set date. In addition, success or failure now turns on collective, not individual, decision making.

Due to these changes, we expect more resources to be expended on long-term public relations strategies and solicitation campaigns. With the removal of the ability to waive the minimum tender condition and mandatory 10 day extension, the argument "Don't worry about missing out on the bid, wait and see what happens, you'll have 10 days to decide" may prove effective in getting shareholders – especially retail – to hold off on tendering.






The challenges these amendments will create for hostile bidders will likely cause them to turn to alternatives, like proxy battles and other aggressive M&A tactics. Hostile bids will be less appealing considering the changes require bidders to leave their bids open for 105 days, with no option to withdraw. As it stands now, bidders can rescind their bid as soon as the 35 day bid period is up, and every 10 days thereafter. With the current volatile state of the commodities market, committing to a fully financed fixed bid price for 105 days is risky and it will be more difficult to sign shareholders to lock-up agreements for that long of a period. To avoid this uncertainty, we expect to see a spike in attempts to reach friendly deals as well as bully M&A tactics.

The amendments will likely do away with the need for tactical shareholder rights plans (poison pills) in context of hostile bids. Poison pills have up to now been used as a tool to extend an offer period and were historically cease traded by securities commissions anywhere between 60 to 90 days (latest example being the Canadian Oil Sands' poison pill against Suncor's bid). With the minimum offer period extended to 105 days, it is unlikely that securities commissions will allow a poison pill to be put in place which would effectively extend the 105 period aside from very extenuating circumstances. There are however other potential uses of poison pills that are unaffected by the amendments, including pills designed to avoid creeping take-overs.

## DID YOU KNOW?

KINGSDALE'S SERVICES ARE APPLICABLE TO ALL CORPORATE STAKEHOLDERS INCLUDING DEBTHOLDERS. WE HAVE ACTED ON A WIDE RANGE OF SUCCESSFUL DEBT TENDER AND EXCHANGE OFFERS, AS INFORMATION AGENT, PROXY SOLICITOR AND DEPOSITARY. WE UNDERSTAND THE NUANCES OF WHAT IT MAY TAKE TO GET DEBTHOLDERS OVER THE LINE. THINK OF US FOR ALL YOUR OUTREACH NEEDS.

## SELECT DEBT-RELATED EXPERIENCE

<p>KINGSDALE IS PROUD TO HAVE ACTED ON BEHALF OF GRAN COLOMBIA GOLD IN THEIR DEBT RESTRUCTURING, WHICH HAD 86.85-95% NOTEHOLDER SUPPORT.</p> 	<p>KINGSDALE IS PROUD TO HAVE ACTED ON BEHALF OF CAPITAL POWER IN THEIR EXCHANGE OFFER, WHICH HAD 87% NOTEHOLDER SUPPORT.</p> 	<p>KINGSDALE IS PROUD TO HAVE ACTED ON BEHALF OF DISCOVERY AIR IN THEIR DEBENTURE MATURITY EXTENSION AND ON THEIR CHANGE OF CONTROL PROVISION AMENDMENTS, WHICH HAD 95.74% DEBENTURE HOLDER SUPPORT.</p> 
<p>KINGSDALE IS PROUD TO HAVE ACTED ON BEHALF OF CITIGROUP IN THEIR EARLY REDEMPTION BY WAY OF TENDER</p> 	<p>KINGSDALE IS PROUD TO HAVE ACTED ON BEHALF OF INNVEST REIT ON THEIR 25% EARLY REDEMPTION FEATURE</p> 	

# Inside the hostile takeover of the year: Canadian Oil Sands & Suncor Energy

Hostile bids in Canada are at best a rare occurrence, especially in the close knit city of Calgary. In what is likely to be the last hostile bid of its kind before the CSA's new takeover rules take effect, Kingsdale's client, Canadian Oil Sands ("COS"), was successful in turning an unsolicited bid from Suncor Energy Inc. friendly in a roller coaster of a ride. A number of interesting lessons accompany this battle.

On October 5, 2015, Suncor launched a hostile bid to acquire all outstanding shares of COS for 0.25 of a Suncor share, a 43% premium at the time of launch. This offer followed an informal proposal from Suncor of 0.32 in March 2015. Because of its close leverage to the collapsing price of oil, COS had seen its stock drop from approximately \$13 to \$6 during the year. COS' Board recommended shareholders reject the offer, deeming it "substantially undervalued".

Compounding this challenge, a number of external factors colluded against COS including the crash of the oil market and production outages that underscored concerns shareholders already had about a lack of reliability.

## The Last Poison Pill?

COS had implemented a shareholder rights plan extending the bid to 120 days that Suncor challenged, requesting the bid close in the original 60 days. The Alberta Securities Commission ruled 90 days was appropriate. With the new take-over bid rules officially coming into play on May 9<sup>th</sup>, which tip the balance of power in favour of target boards, this may be the last time we see a target company implement a tactical shareholder rights plan. With the minimum offer period extended to 105 days, it is unlikely that securities commissions will allow a poison pill to be put in place.

## Strategy

COS recognized that with a collapsing oil market, a single unreliable asset, and growing fear in the market, an aggressive and proactive communications and shareholder outreach strategy was needed to

fend off Suncor and provide the Board with leverage. Their strategy focused on three key elements:

- Using travelling teams of management and directors to conduct roadshows and direct outreach to large holders;
- With a large percentage of the stock being retail, they mounted one of the largest outreach campaigns in Canada to date and;
- Recognizing that new developments and environment were trending against them, they proceeded with a highly effective strategic communications campaign to convince shareholders not to tender: Convince them the long-term value of COS was sound; that Suncor, as much as it protested, was willing to pay more; and create an image, that despite being the target, momentum was on COS' side. In observing the PR strategy, the *Financial Post* remarked: "*Canadian Oil Sands, the hunted turned hunter*".

Some interesting tactics they used included a unique website to capture shareholder information and contact in real time; a new "corporate trailer" video that operated as an ad to showcase the long-term value of the company; and advertising campaigns from COS and major shareholder Seymour Schulich.

## Results

When Suncor's original offer expired on Jan. 8, 2016, it was clear their strategy had worked. In a matter of 48 hours Suncor had gone from telling the market they were 'slightly ahead of where they wanted to be' to refusing to disclose the tender result to the market. Based on this strategy and tender results outcome, COS was able to extract an extra half a billion dollars from Suncor in a \$20 a barrel oil price environment. Suncor approached COS and increased its bid to 0.28 a Suncor share, which the Board accepted.

## KINGSDALE'S IAN ROBERTSON WINS TOP 40 UNDER 40 EMERGING LEADER AWARD

*HE IS THE ONLY CANADIAN IN HIS AWARD CATEGORY ON THE LIST OF U.S. AWARD WINNERS.*



KINGSDALE WOULD LIKE TO CONGRATULATE IAN ROBERTSON, OUR EXECUTIVE VICE PRESIDENT, COMMUNICATION STRATEGY, ON HIS M&A ADVISOR TOP 40 UNDER 40 EMERGING LEADERS AWARDS WIN. IAN RECEIVED THE PRESTIGIOUS AWARD IN THE MARKETING, COMMUNICATION, AND BUSINESS DEVELOPMENT CATEGORY. THE ANNUAL EMERGING LEADERS AWARDS CELEBRATES AND RECOGNIZES THE ACHIEVEMENTS OF M&A, FINANCING, AND TURNAROUND PROFESSIONALS WHO HAVE REACHED A SIGNIFICANT LEVEL OF SUCCESS AND MADE A NOTABLE CONTRIBUTION TO THEIR INDUSTRY AND COMMUNITY. OF THE AWARD WINNERS IN IAN'S CATEGORY, HE REPRESENTED THE ONLY INTEGRATED PROXY ADVISORY FIRM IN NORTH AMERICA, AND WAS THE ONLY CANADIAN WINNER.

CURRENTLY, IAN OVERSEES KINGSDALE'S STRATEGIC COMMUNICATIONS DIVISION, PROVIDING CLIENTS WITH CUSTOMIZED FINANCIAL, INVESTOR AND CORPORATE COMMUNICATIONS ON TWO PARALLEL BUT INTEGRATED TRACKS: CRISIS PREVENTION AND CRISIS MANAGEMENT.

OUR SERVICES INCLUDE PROACTIVE MEDIA RELATIONS, MEDIA TRAINING, EXECUTIVE COMMUNICATIONS AND PRESENTATION TRAINING, PRESS RELEASES, CRISIS COMMUNICATION, LETTERS TO SHAREHOLDERS, STRATEGIC COMMUNICATIONS, RETAIL OUTREACH SCRIPTS, INVESTOR PRESENTATIONS, WEBSITE DESIGN AND MANAGEMENT, AND MANY MORE.

THE READ MORE ABOUT THE TOP 40 UNDER 40 [CLICK HERE](#).

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