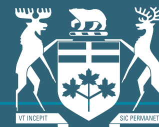
OSC ONTARIO SECURITIES COMMISSION

Capital Markets Adjudicators' Policy Forum

Emerging Issues in Shareholder Activism and Related Control Contests

November 20, 2024



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Introductions & Participants

- Naizam Kanji, Executive Vice President & General Counsel,
  Ontario Securities Commission (Moderator)

- Jennifer F. Longhurst, Partner, Co-Lead of Critical Situations & Shareholder Activism,
  McCarthy Tétrault LLP

- Jon Feldman, Partner, Head of Shareholder Activism Practice,
  Goodmans LLP

- Jason Koskela, Vice President, Mergers & Acquisitions,
  Ontario Securities Commission

Agenda | Overview

1. Current State of Shareholder Activism: Overview, Trends & Evolution
2. Shareholder Activism: Key Players & Objectives
3. Regulatory Context for Shareholder Activism
4. Shareholder Activism & Proxy Contests: Timeline & Key Issues
   - Market Impact and Typical Timeline of Activist Situations
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   - Canadian vs US Securities Regulators
   - Issues Raised for Staff / Tribunals
   - Remedies in Shareholder Activism
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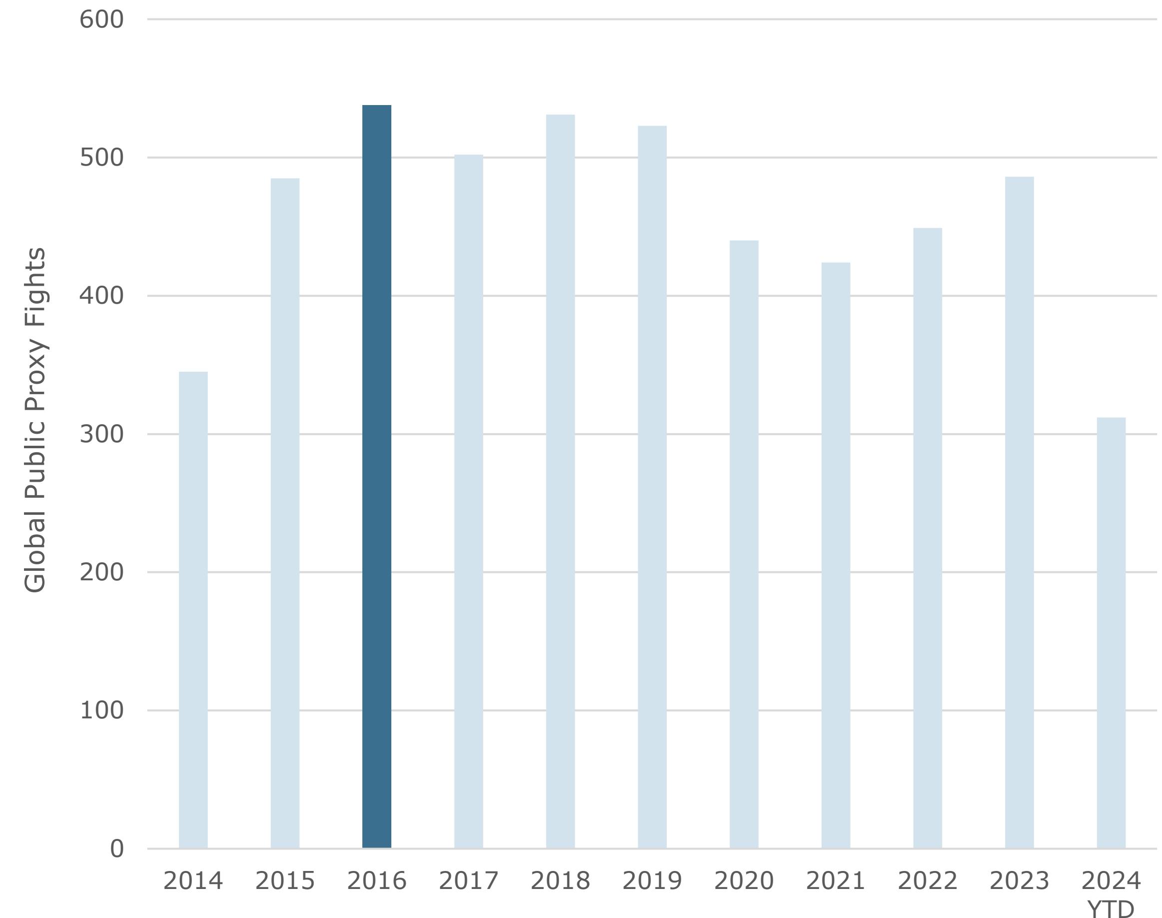
Current State of Shareholder Activism: Overview, Trends & Evolution

Overview

- Action of a shareholder or group of shareholders trying to bring about change in a public company using the voting rights attached to their shares.
- Shareholder activism exists in a “market for corporate influence”.
- The growth of activism, and the influence of would-be Activists, has been significant the past 10+ years, and has been driven by several factors.
- Shareholder activism has evolved, displacing more traditional contests for control, such as take-over bids, as have the strategies deployed by Issuers and Activists and the corporate and securities law issues it engages.
- Private companies and entities are also becoming embroiled in Activist situations but the focus in this presentation is on public companies.
- Form of activism depends on identity of Activist, investment thesis and time horizon, as well as the Issuer’s structure and governance model.

Trends & Evolution

- Over the past decade there has been an increasing trend in activism globally, with 2023 setting a record in terms of total number of public campaigns launched. In 2024, activity has picked up significantly and is now on track to achieve similar, if not higher, levels compared to last year.
- Assets under management ("AUM") for Activist strategy funds has grown substantially in recent years; the 50 most significant Activists ended 2023 with approximately $156 billion in equity assets, nearly tripling over the past decade.
- Universe of would-be Activists is also expanding, with one key factor being greater market receptiveness to the efforts of Activists.
- Activism can impact CEO turnover, as CEOs are three times more likely to be replaced within 12 months after an Activist receives a Board seat compared to those without such a campaign.
- Activists and Issuers are increasingly leveraging research firms, the media, courts, securities regulators, and engagement (sometimes as a formal alliance in the case of Activists) with other shareholders to augment their influence.
- The vast majority of activism remains behind-the-scenes, with Activists agitating for, and often successfully achieving, change, before a public contest or campaign ever emerges, or the activism approach becomes publicly known.



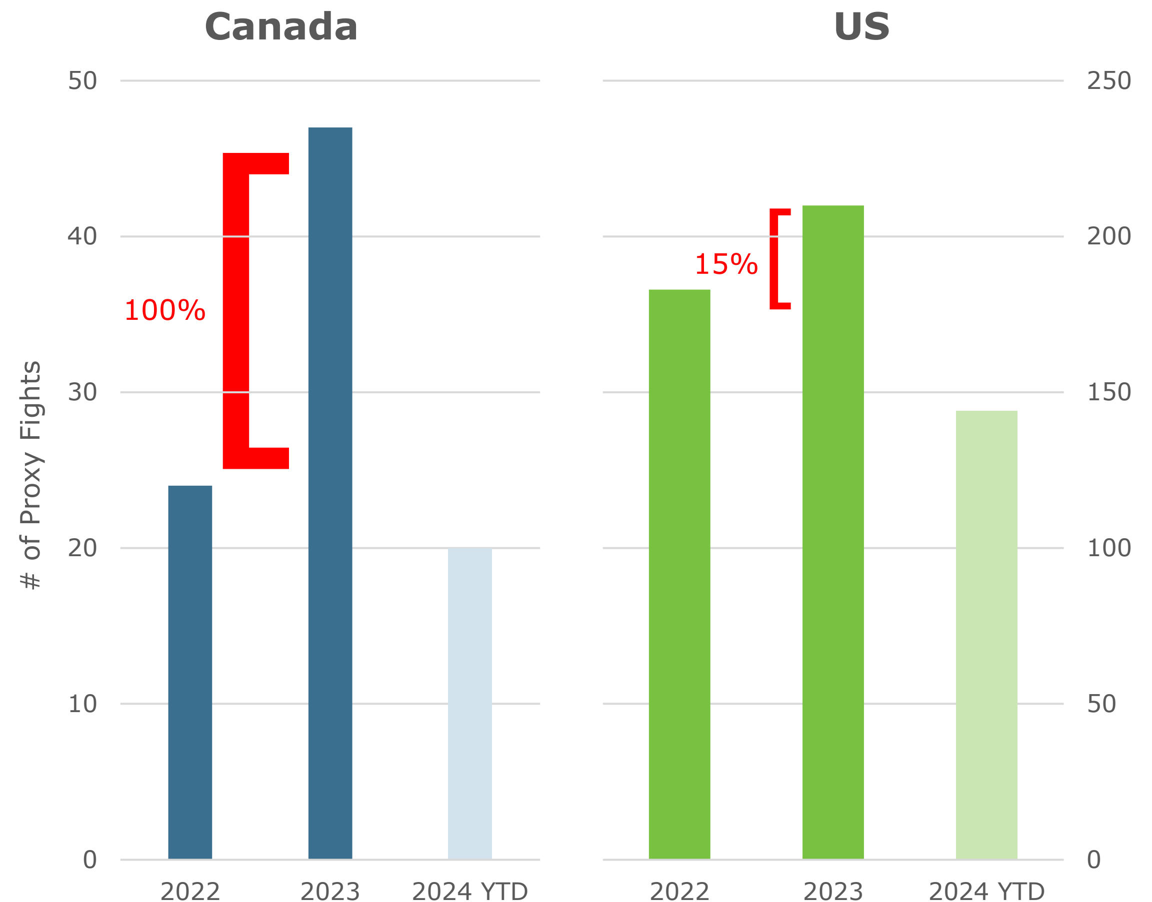
Canada & Activism: Higher Growth Rate

- While record amounts of activism were seen on both sides of the border in 2023, the growth rate in Canada has been much more significant than in the US, as total Activist campaigns in Canada doubled last year, compared to 2022. In 2024, the level of activity remains high despite a lower growth rate.

- The success rate for Activists seeking Board control or Board representation grew by >60% in Canada in 2023, where in the US, Activist successes have enjoyed a much less significant increase. As a result, the growth in Canada is substantive and consequential and has resulted in more campaigns in 2024.

- Many view Canada as being a more Activist-friendly jurisdiction, owing to some of the shareholder-friendly rights uniquely available in Canada.

- Seeking Board representation or Board control altogether, is the most common objective for Activists when targeting Canadian companies.



Shareholder Activism: Key Players & Objectives

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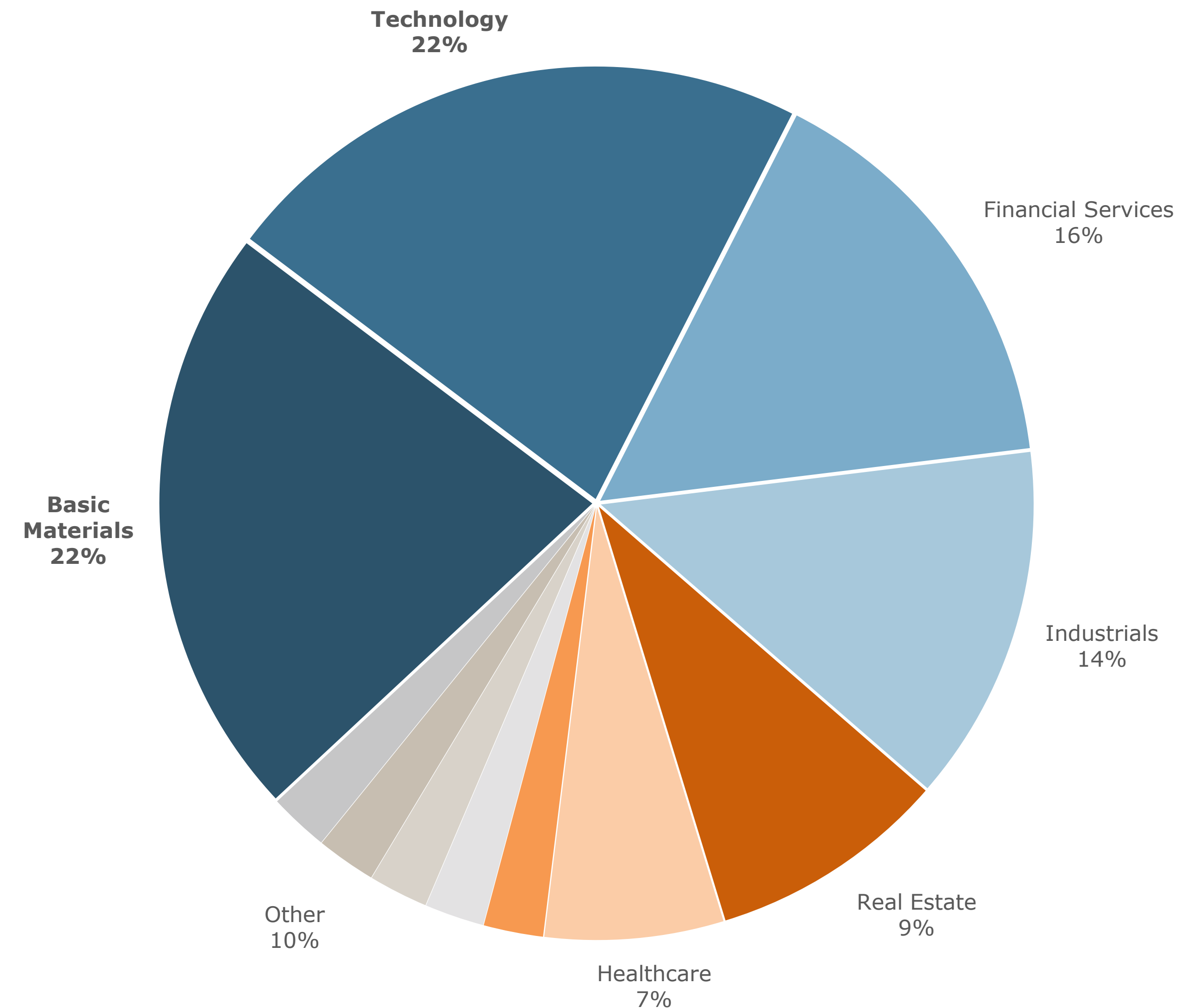
Who are the Targets?

- The metals and mining sector is the most frequently targeted sector in Canada, with nearly 1 in 4 Activist campaigns launched against these Issuers; within the sector precious metals and gold-focused companies are frequent targets.
- Comparatively, in the US, less than 1% of all activism is concentrated within metals and mining, as technology, consumer and financials companies are the most frequent targets south of the border.
- In both regions, small and microcap companies are more often targets than larger companies; however, in recent years bigger companies have increasingly found themselves as targets, and often by multiple Activists.
- Common demands from Activists in Canada include issues relating to governance, capital allocation, and transactions.



Source: Carson Proxy Advisors

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Who are the Activists?

- Historically in Canada, individual shareholders, insiders and smaller funds have frequently targeted smaller resource companies, however, we are observing an increase in well-known, US-based Activists targeting Canadian companies, small and large.
- Some Canadian-based Activists recently active in the Canadian market include Sandpiper Group, G2S2, Ewing Morris, Anson Funds, Turtle Creek, Cardinal Capital, Letko, and K2 Associates.
- Additionally, private equity funds, former insiders, public interest groups, shareholder advocacy groups, would-be acquirers and even historically passive institutional investors are leveraging, or publicly or privately supporting, Activist strategies to achieve a broad range of objectives.

Top Activists[1]	Notable Canadian Targets
Spruce Point Capital Management	Saputo, WSP, Lightspeed Commerce
Night Market Research	Patriot Battery Metals
Letko, Brosseau & Associates	Teck Resources
Elliott Investment Management	Suncor, Triple Flag Precious Metals, Kinross
Grizzly Research LLC	WELL Health, Emerita Resources

[1] *Ordered by the greatest number of campaigns launched against Canadian Targets over past ≈2 years.*

What are the Activists' Goals?

- Replace directors and/or maintain discipline of management *e.g.*, address agency problem.
- Oppose Board-supported transactions – Examples:
  - *Nellore Capital / Magnet Forensics* – challenge of sale to Thoma Bravo and selective roll to certain shareholders
  - *Ewing Morris / Sandpiper Group / First Capital* – challenge asset sale and capital allocation strategies
  - *Ritchie Bros. / IAA / Luxor Capital* – oppose RBA's merger with IAA
  - *Hudson's Bay / Catalyst* – oppose R. Baker take-private transaction
  - *Air Transat / Groupe Mach* – oppose Air Canada acquisition of Air Transat
  - *Teachers' / Magna* – oppose Magna's dual class share structure collapse

What are the Activists' Goals? (cont'd)

- Catalyze a transaction / sale / spin-off:
  - *Starboard / Algonquin Power* – sell majority of renewable assets
  - *Engine Capital / Parkland* – divest itself of certain assets
  - *Glencore / Teck Resources* – sell coal business
  - *Elliott Management / NRG* – launch strategic review
- Balance sheet activism
- Operational changes
- Other governance changes *e.g.*, remove or reinstate CEO / management
- Oppose implementation of poison pill
- Proposals to amend bylaws
- Oppose other Issuer special business

Other Key Players: Role & Influence

- Proxy Advisory Firms: ISS, Glass Lewis, et al.
- Proxy Solicitors: Carson Proxy, Laurel Hill, Kingsdale, Morrow Sodali, McKenzie Partners, D.F. King, Okapi Partners, etc.
- Media & social media, and PR firms
- Other shareholders and stakeholders of the Target
- Courts
- Canadian and US securities regulators – staff, tribunals and enforcement
- Antitrust regulators (*e.g.,* HSR Act, Clayton Act in US)
- Financial investment / advisory firms
- Asset managers / index funds (including investment in Activist funds and potential impact of pass-through voting)

Other Key Players (cont'd): Institutional Shareholder Services (ISS)

- Provides guidance to investors on how they should vote at shareholder meetings, including contested meetings.
- Some institutional investors may not have sufficient resources to properly analyze all proposals.
- ISS has published proxy guidelines outlining their anticipated voting recommendations, with variances for US and Canadian markets.
  - Can sometimes lead to divergent outcomes or rules *e.g., Ritchie Bros. / Luxor* (2023) and *Primo Water / Legion* (2023).
- In a proxy contest, ISS typically meets with both sides before issuing recommendations to shareholders.
- If the proxy contest involves a potential change of control of the Board, ISS requires Activists to show a well laid out and detailed business and strategic plan "making the case for change" that is superior to the Issuer's plan already in place.
  - Lower threshold if "short slate" and CEO not being targeted.
  - Iterative process with meetings / on-going discussions between ISS and Activist and Target.

Other Key Players (cont’d): Glass Lewis & Co.

- Glass Lewis’ process is less transparent than ISS; it will not meet with either side in a proxy contest, and historically has been less likely than ISS to support Activists.
  - However, Glass Lewis now conducts public webcasts with Targets and/or Activists to outline their case, for those prepared to pay.
- Deals with short slates in a manner similar to ISS but is regarded as more friendly towards management.
- Similar approach to ISS regarding a change in Board control.
- Generally, has less impact on a vote than an ISS recommendation but influence may be growing.
- Increased divergence between ISS and Glass Lewis recommendations.
- Introduction of the “universal proxy card” in the US has had some impact on ISS and Glass Lewis recommendations (including which card the advisor recommends voting on).

Regulatory Context for Shareholder Activism

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Canadian Context

- Canada viewed as shareholder-friendly regulatory environment for activism owing to various corporate law, securities law and TSX requirements. For example:
  - Annual individual director elections; no classified Boards.
  - Majority voting for TSX-listed issuers; mandatory majority voting for CBCA-incorporated public companies.
  - Right of 5%+ shareholder / group of shareholders to requisition a special meeting for any business.
  - Right of shareholder(s) to bring a shareholder proposal on any matter that shareholder proposes to raise at a meeting (in some cases subject to 1% / $2,000 FMV of shares; in other cases, subject to holding 1 share; if to elect directors, subject to 5%+ ownership).
  - Lower ownership thresholds and resubmission thresholds for shareholder proposals than in the US, and (in most jurisdictions) no limit on the number of proposals that may be brought.
  - Higher 10% early warning reporting / alternative monthly reporting system thresholds than the US 13G / 13D regime.
  - More stringent ISS / Glass Lewis and TSX guidelines and common law re: tactical uses of advance notice bylaws.
  - "15-shareholder or less" and "public broadcast" solicitation exemptions available to Activists (only).
  - Fewer structural defences available to Canadian public companies.
- Nonetheless, there are other features of the Canadian regulatory environment that can make activism more challenging, and there are various self-help remedies Targets can and do deploy in the context of activism.

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Canadian Context (cont'd)

- Overlap of Courts / Tribunals and Corporate / Securities Laws:
  - Courts (Corporate Law): Oversee directors' duties and compliance with corporate law, with inherent jurisdiction and unlimited remedies.
    - *E.g.,* oppression remedy; breach of duties claims; shareholder proposal & requisition rights; plan of arrangements; compliance with requirements for shareholders' meetings and proxy solicitations, etc.
  - Courts (Securities Law): Jurisdiction to oversee certain securities law matters.
    - *E.g.,* non-compliance with takeover bid regime (s.105 & s.128, OSA); breach of early warning requirements (absent a takeover bid) (*e.g., Genesis v Smoothwater,* ABQB, 2013); securities class actions.
  - Tribunals (Securities Law): Mandate to protect investors from unfair, improper or fraudulent practices, foster fair, efficient and competitive capital markets, foster capital formation, and contribute to stability of the financial system and reduction of systemic risk.
    - Overlapping role with Courts and corporate law in regulating public companies.
    - Focus on compliance with securities laws / regulations (*e.g.,* take-over bids, early warning reporting, conflict of interest transactions, etc.) or public interest concerns (*e.g.,* defensive tactics, M&A policy, remedies).
    - Review of TSX decisions.
    - More limited remedies than Canadian Courts.

Shareholder Activism & Proxy Contests: Timeline & Key Issues

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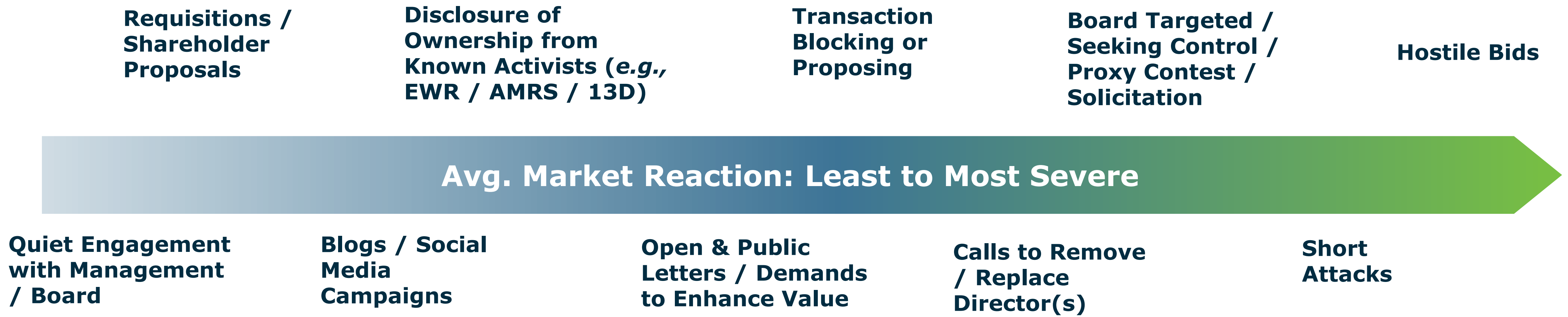
Shareholder Activism: Potential Market Impact

- Shareholder activism is broad-ranging in its strategy and the effects it has on a public Target. Sometimes, simply the presence of an Activist, without any known intent, can materially move a stock price as the investment community anticipates and welcomes potential change. Below are the principal reoccurring tactics used by Activists and the average effect they have on a Target's stock price. Activists will sometimes use more than one tactic, or have tactics evolve over time as their campaign progresses.

There is no "one size fits all" playbook.



Shareholder Activism: Typical Timeline

Early engagement matters

Build Stake

- Accumulate initial stake (may include "hidden" economic ownership amassed through derivatives)
- File HSR
- Continue to build stake
- File 13D / Early warning report
- Team up with other institutional or activist shareholders

Apply Pressure

- Request meetings with management and/or Board
- Send private letters threatening public action
- Issue public letters to Board
- Become aggressive with management on analyst calls
- Threaten "withhold the vote" campaign
- Threaten to agitate against Board's preferred strategic alternatives or to vote against Board-approved M&A activity
- Seek to stir up third-party interest and rally other investors

Seek Control Influence

- Demand Board seats
- Launch short-slate proxy contest (or control slate, rarely)
- Aggressive Early warning / 13D disclosures
- Aggressive use of derivatives ("riskless voting")
- Make public bear hug (rarely)
- Commence tender offer (rarely)

Possible Lines of Target Defence

- Pre-emptively adopt / execute a portion of Activist's agenda:
  - Refresh Target's Board and/or management
  - Modify compensation or governance policies under scrutiny
  - Undertake strategic review and/or sale or other strategic transaction
  - Revise strategies, operations, capital allocation, etc.
  - Secure support of other major shareholders
- Negotiate, settle or challenge the Activist:
  - No "one-size-fits all" approach
  - Cooperation agreements are becoming more standardized
- Legal challenges:
  - Securities regulatory complaints, hearings and litigation
  - Corporate law and other legal or regulatory challenges (*e.g.,* reject meeting requisition, proposal, or advance notice nomination)

Key Issues Raised for Securities Regulators

- Proxy contests for control or influence
- Illegal proxy solicitation
- Non-compliance with early warning / alternative monthly reporting requirements
- Use of cash settled swaps
- "Joint actor" or "group" formation allegations
- Management or dissident information circular disclosure
- Voting support agreements
- Aggressive or defensive tactics *e.g.,* novel poison pills that expand deemed beneficial ownership or have triggers <20%; onerous or weaponized advance notice bylaws; private placements to dilute Activist's voting power and/or secure "friendlies"; rejection of Activist's nominees; increasingly aggressive Target responses

Proxy Contest Overview

- A proxy contest occurs when a dissident shareholder solicits shareholders’ proxies and/or the right to vote those shareholders’ shares in favour of the dissident’s director nominees or proposals at a Target’s shareholders meeting.
- Proxy contests can be Board-related or transaction-related.
- In recent years, a lot of activist activity includes a focus on (or themes surrounding) accomplishing ESG objectives (*e.g.,* Exxon / Engine No. 1; Suncor / Elliott Management).
- In Canada:
  - In 2023, the most targeted sector was financial services, with a notable rise in M&A activism agitating for or opposing transactions.
- In the US:
  - In 2023, the most targeted sector was consumer products (retail, auto, manufacture). There was a marked uptick in Activist demands related to management / Board compensation, ESG and Board independence.

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Proxy Solicitations

- “Solicitations” are a key feature of activism and proxy contests, and defined broadly:
    - Requesting a proxy, whether or not accompanied by or included in a proxy;
    - Requesting a securityholder to execute / not execute a proxy or to revoke a proxy; and
    - The “sending of a…communication to a shareholder under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy”.
- Under Canadian corporate and securities law, unless an exemption is available, the solicitation of proxies requires the preparation and mailing of a prescribed form of management or dissident information circular.
- Frequently, Activists and Targets will allege illegal proxy solicitations by the other party (including through complaints to Staff).
- Corporate statutes (CBCA, Part XIII; OBCA, Part VIII) and securities legislation (NI 51-102 (Part 9)) govern the solicitation of proxies.

Proxy Solicitations (cont'd): How Activists Solicit Proxies

- Dissidents, but not issuers, have certain exemptions from sending a dissident information circular, including:
  - "15-shareholder-or-less" exemption (NI 51-102, Part 9; CBCA, s.150(1.1)) – leveraged for shareholder one-on-ones.
  - "Public broadcast" exemption (NI 51-102, Part 9; CBCA, s.150(1.2)) – leveraged for broad-based campaigns via public broadcast, speech and publications.
  - "Skinny circular" with certain prescribed disclosure required if "soliciting" in connection with a significant transaction and/or if nominating or proposing to nominate director(s).
- Vote "No" or "Withhold" Campaigns:
  - Generally, exempt in the US and falls within "public broadcast" exemption in Canada.
  - Less utility in the US due to lack of mandatory majority voting requirements.
  - Can have strategic / tactical value to Activists.

Proxy Solicitations (cont’d): Universal Proxy Cards

- 2023 SEC amendments now require use of Universal Proxy Cards (“UPC”) in contested elections, which includes names of all director nominees, regardless of whether they were nominated by management or shareholders.
    - Prior to the adoption of the UPC, Targets and Activists would often each send a separate proxy card listing only their own slate of nominees.
    - Mandatory minimum solicitations by Activists.
- No mandatory UPC regime in Canada – strategic decision *e.g.*, *CP Rail / Pershing Square* contest (2012).
- UPC gives shareholders the ability to mix and match between each side’s slate of nominees (has always been the case in Canada).
- The Capital Markets Modernization Taskforce in Canada has recommended following the US model.
- Benefits include enhancing shareholder democracy.

Beneficial Ownership Rules & Reporting

- Activist's accumulation of beneficial ownership, in stealth, often key to success.
- Beneficial ownership rules seek to capture the "true owner" of the shares.
- In Canada:
  - Beneficial ownership of ≥10% of a class of voting or equity securities triggers an immediate EWR and press release obligation.
  - "Alternative Monthly Reporting System" available to "eligible institutional investors" (assuming passive intent; disqualification if proposing a transaction or soliciting proxies).
- In the US:
  - Beneficial ownership of ≥5% of a class of voting equity securities triggers a 13D or 13G filing (depending on intentions).
- Allegations of inadequate, late (or non-existent) early warning reporting are frequently leveled in proxy contests (*e.g.*, *Genesis v Smoothwater*, ABQB, 2013).

Beneficial Ownership Rules & Reporting (cont'd):13D Amendments

- SEC amended the Regulation 13D / 13G regime in 2023 to provide more timely information to meet the needs of today's investors:
  - Shorter filing deadlines to address speed at which investors can now acquire stock.
  - Addresses ownership of cash-settled derivatives – had *proposed*, but did *not* adopt, amendments that would have deemed a total return receiver to beneficially own the referenced shares underlying cash-settled derivatives held for the purpose or effect of changing or influencing control of the issuer.
  - Recognizes that shareholder activism is important to the capital markets and not all information asymmetries are bad or warrant a regulatory response.
  - Provides helpful guidance on "group" formation.
- In Canada, the CSA is considering amendments to EWR / AMRS regimes, including:
  - Treatment of derivatives *e.g.*, *Re Bison* (ASC, 2021).
  - Guidance on changes of plans and intentions.

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Beneficial Ownership Rules & Reporting (cont'd): Cash Settled Swaps

- Cash settled swaps may be used by Activists in the proxy contest context.
- Allegations related to inappropriate use of derivatives may come before securities commissions (*e.g.*, on basis that the shareholder can direct or influence the voting of the referenced securities, or that shareholders have "parked" securities).
- Guidance provided in *Re Sears Canada* (OSC, 2006) and in NP 62-203 *Take-over Bids and Issuer Bids.*
- *Re Bison Acquisition Corp.* (ASC, 2021):
  - Arose in context of a hostile bid by Brookfield for Inter Pipeline (IPL), with Brookfield acquiring significant economic exposure to IPL through a mix of swaps and shares, in aggregate providing it with ≈19% economic exposure and <10% voting influence.
  - ASC found that Brookfield complied with the early warning regime as it did not have beneficial ownership of, or control or direction over, the swap shares held, but found its conduct to be prejudicial to the public interest.

Joint Actor / Group Formation & Allegations

- Activist may be characterized as a “joint actor” or “group” with other shareholders under securities laws.
- In Canada:
  - If Activist has an agreement, arrangement, or understanding with another shareholder that they intend to exercise their voting rights in concert, *presumed* to be joint actors (rebuttable presumption).
  - If the agreement, arrangement, or understanding is with respect to the acquisition of Target shares, *deemed* to be joint actors.
- In the US:
  - When two or more persons act as a group in order to acquire, hold or dispose of securities of an issuer, *deemed* to be one filing person.
  - Discussions in private or meetings in public forums where shareholders independently and freely exchange ideas will *not* be sufficient to satisfy the group requirement under Rule 13(d).
- Allegations of Activist/shareholder “joint actorship” (and resulting breaches of securities laws) frequently alleged in shareholder activism.
- Ultimately, whether two or more shareholders are joint actors or have formed a group is a “high bar” and depends on the facts *e.g.*, *Re NorthWest Copper* (BCSC, 2023) and *Re DIRTT Environmental* (ASC, 2023).

Joint Actor / Group Formation & Allegations (cont'd)

- In Canada:
  - Holdings of "joint actors" are aggregated for purposes of early warning reporting and determining whether Canada's mandatory takeover bid rules have been triggered:
    - Acquisition of 10%+ of the Target's outstanding voting or equity securities require "early warning report" or "alternative monthly report" (NI 62-103).
    - Acquisition of >20% of the Target's outstanding voting or equity securities must be made through a formal take-over bid (NI 62-104), unless the purchase is made pursuant to an exemption from the take-over bid requirements.
    - The mere formation of a group holding >10% or >20% will *not* trigger the early warning requirements or take-over bid requirements, respectively.
- In the US:
  - If a "group" beneficially owns 5%+ of a class of securities, all group members will be subject to reporting under Rule 13(d), even if any members individually owns less than 5% (Rule 13(g) / 13(d)).
  - No formal take-over bid threshold but tender offer requirements under US Securities Exchange Act of 1934 are triggered based on factors set out in Court interpretation of "tender offer".
- Joint actorship may also have implications with respect to Target poison pills.

Joint Actor / Group Formation & Allegations (cont'd): *NorthWest Copper* and *Re DIRTT*

- Relatively "high bar" to proving that shareholders are acting "jointly and in concert".
- Requires evidence of some agreement, commitment or understanding and a common specific purpose or planned result.
- Onus falls on the person alleging joint actorship and requires clear, convincing and cogent evidence, which is not ambiguous or speculative.
- Remedies should be focused on protecting investors and maintaining fair and efficient capital markets.
- Balancing act between permitting some groups to "fly under the radar" and allowing the free flow of information and opinion among shareholders.

Voting Support Agreements

- Frequently, in the context of a settlement between a Target and an Activist, parties will enter into cooperation or support agreements, with the Target agreeing to appoint ≥1 of the Activist's nominees to the Board, and the Activist agreeing to customary standstill restrictions and to vote "for" (or not vote "against"), the Target management's slate of nominees.
- In the face of an actual or threatened proxy contest, Targets may enter into support agreements with "friendly" shareholders, whereby shareholders agree to vote for management's slate of nominees and/or other management-recommended business, sometimes for multiple shareholders' meetings.
  - *E.g.,* Gildan Activewear entered into such a support agreement with Colliseum Capital in December 2023, in the face of the threatened contest by Browning West.
  - *E.g.,* Dye & Durham entered into a cooperation agreement with Blacksheep Capital in October 2024, in the face of the pending proxy contest by Engine Capital.
- TSX 2023 guidance indicates it will review voting support agreements between Issuers and shareholders in the context of treasury issuances or other transactions reviewable by the TSX and, in those situations, "positive" voting agreements *may* require disinterested shareholder approval; "negative" voting agreements are not generally considered to materially affect control and, thus, not require shareholder approval. (TSX Staff Notice 2023-0001)
- Under securities laws, voting support agreements *may* give rise to concerns over (i) "tipping"; (ii) illegal "proxy solicitations"; (iii) non-compliance with securities laws around "restricted securities" relative to other classes of securities; and/or (iv) public interest concerns over defensive tactics.

Settlements vs Proxy Contest

Settlement	Proxy Contest
• Less contentious and avoids distraction and expense of a proxy contest.	• Target would incur pain, distraction and expense of proxy fight.
• Settlement strongly improves potential for Activist representation on Board.	• Activist may not obtain Board representation or expense reimbursement.
• Target could increase size of the Board to keep all incumbents and allow Activist representation on Board.	• Incumbent directors defeated in the proxy fight removed from the Board and potential reputational damage.
• If successful, Activists typically obtain 1–3 director seats (some or all of which may be filled by independent directors unaffiliated with the Activist).	• In proxy fight, Target could lose several incumbent Board seats, including the CEO. o Difficult for an Activist to successfully target CEO.
• Activist likely subject to agreements / obligations to Target if Activist nominee(s) added to Board: o Standstill provisions (with springs); o Voting / support agreement provisions; o Non-disparagement clauses; o Confidentiality / information sharing restrictions; and o Expense reimbursement.	• Activist will not be subject to any agreements / obligations aimed at protecting the Target in the future.
• Activist nominees may be appointed to specific Board committees.	• Activist nominees will not be entitled to serve on specific Board committees.

Aggressive or Defensive Tactics

- Tactical Private Placements:
  - Sometimes, Targets, in the face of an actual or threatened bid or proxy contest, will undertake a private placement to dilute the Activist's or Bidder's voting influence, putting treasury shares in the hands of "friendlies" (who also frequently enter into voting support agreements).
  - In *Eco Oro* (OSC, 2017), the OSC set aside a TSX decision to approve a private placement of shares by Eco Oro to friendly shareholders (without requiring shareholder approval), and cease traded the newly issued shares until shareholder approval was obtained; those shares also could not be considered outstanding for voting purposes at the requisitioned shareholders' meeting.
- Novel Poison Pill Terms:
  - Issuers sometimes attempt to make tactical amendments to existing rights plans, or adopt tactical rights plans, to capture voting agreements as part of the definition of beneficial ownership (*e.g., Access Holdings / Tuckamore* (2014)) or to capture derivatives and swaps as part of the definition of beneficial ownership and for purposes of determining the threshold trigger for the rights plan (*e.g., Brookfield / IPL* (2021); *Gold Royalty / Elemental Royalties* (2021)).
  - The OSC and FCAAS in *Aurora Cannabis* (2018) indicated they would not tolerate pills with unusual features that interfere with the takeover bid regime. The ASC in *Re Bison* (2021) permitted an unusual poison pill due to public interest concerns with the conduct of the acquiror.
- Increasingly Aggressive Target Responses:
  - Increasingly common to see litigation brought by Targets to thwart an Activist's objectives *e.g.,* alleging joint actorship, deficient circular disclosure, EWR non-compliance, illegal proxy solicitation, etc.
  - Concern by Activists of "scorched earth" tactics by Targets to seemingly "win" at all costs, including by publicly attacking the reputation of Activists and their nominees, rejecting Activist nominees, delaying or cancelling requisitioned meetings, or complaining to securities regulators.

Other Hot Topics & Issues in Activism

Majority Voting

In Canada, “majority voting” applies to most TSX-listed public companies, and “true majority voting” applies to all CBCA public companies, in the case of “uncontested elections”.

- CBCA:
  - Vote “for” or “against” individual directors, rather than “for” or “withhold”;
  - Director not elected if <50% of the votes cast by shareholders are “for” the nominee; and
  - Director may remain in office for up to 90 days following the failed election and in limited circumstances.
- TSX:
  - Directors put forward for individual (re-)election annually;
  - Director must be elected by a majority (50%+1) of “for” votes; and
  - Director receiving <50%+1 of “for” votes must tender resignation immediately which *should* be accepted by the Board absent “exceptional circumstances”.
- In US, no requirement for majority voting, although some issuers have (or are being encouraged to adopt) “majority voting policies”.
  - Prevalence of “staggered Boards” in US can also undermine utility although decline in staggered Boards over time.

Majority Voting (cont'd): Vote "No" or "Against" Campaigns

- Vote "No" or "Against" campaigns in majority voting for director elections where shareholders rely on public broadcast and/or private solicitation exemptions to solicit voting against one or more directors or a transaction.
- Does *not* entail the shareholder proposing any dissident nominees.
- Cost-effective means to effect Board change or register shareholder objections:
    - Do not need to be successful to count as a win; the initiation of the campaign itself can stimulate the desired engagement and/or settlement;
    - Can be used by shareholders who have missed nomination windows under an Issuer's advance notice bylaws or if their nominated slate was disqualified or rejected by Target; and
    - By launching a campaign, shareholders can continue to exert pressure on the Target Board even though their proposed slate of candidates cannot be elected.

OSC ONTARIO SECURITIES COMMISSION

Special Meeting Requisitions

- Canadian corporate statutes allow shareholders holding 5%+ of shares to requisition a special meeting of the Target's shareholders.
- Target must "call" meeting within 21 days, unless an AGM has already been announced.
- No time period specified as to when the meeting must actually be held (other than in BC):
  - Courts have allowed 4-7 month delays (*e.g.*, *Marks v Intrinsyc*, OSCJ, 2013);
  - Shareholders may object if unreasonable delay;
  - Courts will defer to good faith business judgment within range of reasonableness;
  - Courts have imposed obligations on shareholders to provide detailed biographical information re: dissident nominees (*e.g.*, *Wells v Bioniche*, OSCJ, 2013);
  - But, Target Board process matters in determining when to hold the meeting (*e.g.*, *Sandpiper v First Capital*, OSCJ, 2023).
- Shareholder requisition can be rejected by the Target Board if, among other things:
  - Primary purpose of the meeting is to "enforce a personal claim or redress a personal grievance;" or
  - Primary purpose "does not relate in a significant way to the business and affairs of the corporation".
- Common strategy deployed by Targets to reject, delay or cancel requisitioned meetings.

Advance Notice Bylaws

- Activists concerned that there has been increased "weaponization" of advance notice bylaws by Targets in response to or anticipation of activism.
- Advance notice bylaws ("ANBs") require shareholders wishing to nominate directors to provide advance notice to the Target and comply with certain informational and procedural requirements – prevents an "ambush".
- In Canada:
  - ANBs may be used as a "shield but not a sword" (*Orange Capital LLC v Partners REIT,* OSCJ, 2014); ANBs relate to corporate law meeting requirements so Court is better forum (*Re Jacob Cohen,* BCSC, 2023).
  - TSX guidance discusses legitimate purpose of ANBs.
  - ISS and Glass Lewis voting guidelines for TSX-listed issuers more stringent than in the US.
  - Is trend in US causing Targets to "push the boundaries"? *e.g.*, *Primo Water / Legion Partners* (2023) contest.
- In US:
  - Tactical or overly technical applications of ANBs supported by Delaware courts *e.g.*, *Strategic Investment Opportunities v Lee Enterprises* (Del, 2021) and *Rosenbaum et al v CytoDyn* (Del, 2021).
  - ISS and Glass Lewis US issuer policies more lenient.
  - Wave of bylaw amendments in response to UPC and activism *e.g.*, *Masimo / Politan Capital* (2022-2023) contest.

Advance Notice Bylaws (cont'd): Rejecting Shareholder Nominees

- Frequently, in the context of a proxy contest, Targets will purport to reject an Activist's nominees on the basis of alleged non-compliance with the Targets' advance notice bylaws or other breaches of corporate or securities laws.
- While the tactic is more common in the US, where there are less stringent rules surrounding the appropriate use of advance notice bylaws (including more lenient ISS and Glass Lewis voting policies for US issuers), there have been some instances of Canadian issuers seemingly "weaponizing" their bylaws to thwart nominations of directors by Activists.
- Example: *Primo Water / Legion Partners* (2023) proxy contest, involving Target company Primo (a Canadian corporation cross-listed on the TSX and NYSE and a "US domestic issuer"):
  - Following engagement with Legion, Primo adopted a new advance notice bylaw requiring, among other things, that director nominees complete a lengthy questionnaire that gave broad discretion to the Company to request additional information from the nominees following the submission of their nominations.
  - Primo leveraged the amended US-styled bylaw to reject all of Legions' director nominations.
  - The Activist complained to OSC and TSX Staff and filed an oppression claim in Court, although the claim could not be heard in time to give the shareholder a timely remedy.
  - Primo ultimately acceded to Legion's demands in the litigation in a settlement agreement, accepting all of Legion's director nominations and including the nominees on its UPC. Shortly before the contested shareholders' meeting, the parties settled the contest on terms requiring Primo to put 2 of Legion's nominees on the Board and to adopt certain governance enhancements, including revising its advance notice bylaw to bring it back in line with Canadian standards.

ESG Campaigns and Climate Disclosure

- ESG, and anti-ESG, campaigns less common in Canada than the US.
- Generally, topics relating to climate, diversity, equity and inclusion, executive compensation, lobbying / energy transition, etc.
- Increased politicization of ESG and emergence of an “Anti-ESG” wave (particularly in US).
  - Debate about whether ESG campaigns unnecessarily divert Board and management attention away from their core responsibilities.
- Disclosure-related “greenwashing” litigation, including class actions have been on the rise inside and outside of Canada.
- “Greenwashing” complaints / intervention by anti-trust / competition regulators also on the rise.
- Less commonly a “core” feature in long-investing shareholder activism, but some examples *e.g., ExxonMobil / Engine No. 1* (2021)*; Suncor / Elliott Management* (2022-2023)*; McDonalds / Carl Icahn* (2022).

The Role of Securities Regulators in Activism

Canadian vs. US Securities Regulators

- Securities regulators increasingly “drawn in” by Targets and Activists for legitimate purposes and/or *potentially* to gain a strategic advantage.
- In Canada, CSA have broad powers via “public interest” jurisdiction:
  - Long line of cases in Canada where securities commissions have used their public interest jurisdiction, including in proxy contest / Activist scenarios in some instances.
  - NP 62-202 also addresses “defensive tactics” in M&A but to what extent does that include proxy contests? *E.g.*, *Eco Oro* (OSC, 2017).
  - What is the appropriate role of securities regulators vs courts? *E.g.*, maintaining a “level playing field”. Where does securities jurisdiction end? See *Re Jacob Cohen* (BCSC, 2023).
- In the US, the Target and Activist must each file a preliminary version of their proxy with the SEC for comment (generally, a 10-day review period).
  - SEC will review for compliance (or non-compliance) with securities law.
  - Robust “solicitation”, disclosure and filing requirements.

Issues Raised for Staff / Tribunals

- Activism in the context of take-over bids and issuer bids:
  - Part XX of the OSA; NI 62-104; MI 61-101; NP 62-202 and NP 62-203.
- "Material conflict of interest transactions" – Securities regulators' "real time review":
  - MI 61-101 and CSA Multilateral Staff Notice 61-302.
- Compliance / non-compliance with take-over bid and issuer bid requirements (s.104, OSA).
- Public interest jurisdiction to enforce securities laws or prevent otherwise abusive transactions (even if not in breach of any specific regulatory requirement) (s.127, OSA).
- Review of stock exchange decisions (ss.21.7 & 21.8, OSA).
- Applications for exemptive relief from securities laws (various).
- Only private / interested parties may initiate proceedings before the Tribunal via:
  - Application under s.104 of the OSA (*e.g.,* non-compliance with take-over bid / issuer bid rules);
  - Application under s.127 of the OSA (*e.g.,* public interest) – standing must be granted; and
  - Application under ss.21.7 & 21.8 of the OSA (*e.g.,* TSX decision).

Remedies in Shareholder Activism: Opportunities & Challenges

- Historically, the preference of securities regulators for addressing policy issues is through *ex ante* structural solutions, rather than via *ex post* litigation. However, there continues to be a role for *ex post* solutions to address novel issues, including in the context of shareholder activism.
- Compliance / Non-Compliance Applications (OSA, s.104):
  - Limited to “interested persons” in the take-over bid and issuer bid context.
  - Broader remedies available to securities regulators, including restraining any document / communication, directing compliance, restraining a person from non-compliance, or requiring a variation to a bid or communication.
- Public Interest Applications (OSA s.127):
  - Requires Tribunal to grant standing to a private person to bring an application, but may grant standing where there are securities policy issues at play.
  - Section 127 orders require “extraordinary circumstances” and applicant bears onus that it’s in the public interest to grant an extraordinary remedy. More limited remedies available, although Tribunal may, among other things, reprimand persons, require a person to resign as a director / officer, prohibit a person from serving as a director / officer, and impose administrative monetary penalties. However, remedies unlikely to be granted in a private party application as opposed to a Staff enforcement proceeding.

Remedies in Shareholder Activism: Opportunities & Challenges (cont'd)

- Exchange Decision Applications (OSA ss.21.7 & 21.8):
  - Hearing is broader than an appeal, as Tribunal exercises original jurisdiction and can substitute its own judgement for that of the exchange. Tribunal will normally show deference, and only intervene where certain grounds are met, such as decision being made on an incorrect principle or without regard to all material evidence (or new and compelling evidence is presented that was not before the exchange), or the exchange erred at law.
  - Tribunal has broad remedies, including to make "such other decision as the Tribunal considers proper".
- Defensive Tactics (NP 62-202):
  - Has broad principles that could be extended to apply to proxy contests / shareholder activism.
- Protection of Securityholders (MI 61-101):
  - As with other securities regulation, MI 61-101 imposes enhanced informational and process requirements upon issuers in the context of "material conflict of interest transactions" (and potentially more broadly), including concerning the roles of Boards / special committees in such situations.
  - Directors / officers of issuers are frequently the ones targeted in shareholder activism and using company resources in their defence of such situations; is additional guidance appropriate to regulate their conduct?

Securities Tribunal Decisions Relevant to Shareholder Activism

- *Cablecasting* (OSC, 1978) – Open to public interest intervention in relation to corporate law compliance but suggests high bar.
- *Magna* (OSC, 2011) – Use of public interest to address failure to comply with disclosure requirements in plan of arrangement information circular and deficiencies in Board process in proposing transaction to shareholders for a vote.
- *Re Catalyst / HBC* (OSC, 2020) – Importance of establishing a special committee and engaging independent legal and financial advisors early in the process of considering a material conflict of interest transaction and in the course of reviewing and approving the transaction, and providing appropriate disclosure of the review and approval process.
- *Hecla Mining* (OSC & BCSC, 2016) – Explains distinction between corporate and securities law in the context of private placement public interest considerations.

Securities Tribunal Decisions Relevant to Shareholder Activism (cont'd)

- *Eco Oro* (OSC, 2017) – Suggests greater public interest role for securities tribunals in relation to defensive tactics to proxy contests but decision made on TSX appeal grounds and not Section 127.
- *Groupe Mach* (AMF, 2019) – Willingness to intervene on public interest grounds if securities trading mechanism (mini-tender) potentially impacts corporate law transactional approval.
- *Jacob Cohen* (BCSC, 2023) – Indicates reluctance to intervene where alleged defensive conduct in proxy contest relates to shareholder meeting under corporate law.
- *Mithaq-Aimia* (CMT, 2023) – Demonstrates difficulty of assessing take-over bid defensive tactics of a Target Board where bidder / investor is an Activist that has engaged in a range of control-related strategies.

Q&A | Thank you