CHAPTER 03

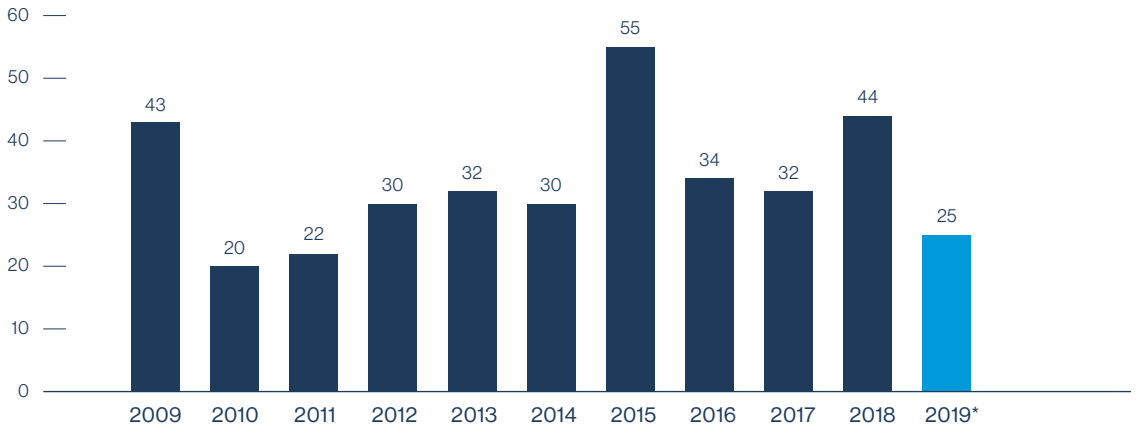
Shareholder Activism: 2019 Trends and Major Developments

While 2019 to date has witnessed fewer proxy contests in Canada compared with the corresponding period in 2018, activity increased in some industries, notably the resource sector, to levels not seen since 2015. We have also observed a number of important developments, including some that may be indicative of broader trends in proxy contest strategy. Two key developments in 2019 that we discuss in this chapter were the increased public involvement of institutional shareholders in contested situations and an uptick in activists' use of universal proxies. This year, market participants also received the long-awaited regulatory response to concerns about the use of soliciting dealer fees (or "vote buying") in proxy contests, which we review. We also discuss a recent decision of the B.C. Supreme Court, affirming that controversies relating to proxies should be resolved in favour of facilitating shareholders' right to vote. We round out our discussion with some practical guidance for both issuers and activists as they prepare for the 2020 proxy season.

Proxy Contest Activity in 2019: Key Highlights

Canadian proxy contest activity through the first eight months of 2019 trended lower than in the corresponding period in 2018 (25 compared with 29).[58] However, the overall activity level remains robust and is roughly consistent with proxy contest activity in the majority of the last 10 years, as shown in Figure 3-1.

FIGURE 3-1:
Proxy Contests in Canada (2009–2019 YTD*)



* As of August 20, 2019

Proxy contests in 2019 also followed a pattern similar to those in 2018 when categorized by the dissidents' principal objectives:

- In nine (approximately 36%) of the campaigns to date, activists sought to replace either a majority of the board of directors or the entire board.
- An additional six (approximately 24%) were "short-slate" campaigns targeting a minority of the board.
- The remaining 10 (approximately 40%) related to transactional or other non-board matters.

As we noted in *Davies Governance Insights 2018*,[59] the natural resource and energy sectors were hotbeds of activism in late 2018, with high-profile campaigns being launched against Detour Gold Corp. (by Paulson & Co. Inc.), Hudbay Minerals Inc. (by Waterton Global Resource Management Inc.) and Crescent Point Energy Corp. (by Cation Capital Inc.). This trend appears to be continuing in 2019,

with 10 of the 25 contests to date being launched against companies in the natural resource and energy sectors, including a high-profile campaign involving TransAlta Corporation (by Mangrove Partners and Bluescape Energy).

Update on Soliciting Dealer Arrangements: IIROC Opposes "Vote Buying" in Proxy Contests

After years of calls for action by market participants and a public consultation process undertaken by the Canadian Securities Administrators (CSA), in May 2019 the Investment Industry Regulatory Organization of Canada (IIROC) released guidance to its dealer members (IIROC Notice) with respect to managing potential conflicts of interest in soliciting dealer arrangements.[60] While IIROC stopped short of an outright prohibition on the practice of "vote buying" in contested director elections, the admonition is sufficiently direct that we expect dealers will decline to participate in these one-sided fee engagements in the future.

Soliciting dealer arrangements generally refer to agreements entered into with one or more registered investment dealers whereby the dealer is paid a fee for each security successfully solicited to (i) vote in connection with a matter requiring securityholder approval, such as a plan of arrangement or a director election; or (ii) be tendered to a takeover bid.

Historically, the use of soliciting dealer arrangements has been fairly common and relatively uncontroversial in merger and acquisition transactions. In these circumstances, the soliciting dealer is typically paid a commission by the acquirer for each security that is tendered to the bid or voted in favour of the arrangement.

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However, the use of soliciting dealer arrangements in a contested director election is significantly less common. When they are used in this context, the dealer is paid a commission, subject to a minimum and maximum amount, for each vote cast by the dealer's clients in favour of management's director nominees, conditional on the election of management's nominees. As we have previously discussed,[61] the use of soliciting dealer arrangements in contested director elections has been criticized by institutional shareholders, corporate governance watchdogs and the media. There have been only three publicly disclosed instances where soliciting dealer arrangements were entered into in connection with a Canadian proxy contest for the election of the directors of an issuer, all of which were implemented by the issuer:

- Octavian Advisors, LP's efforts to elect four of the eight directors of Enercare Inc. in 2012;
- JANA Partners LLC's efforts to elect five of the 12 directors of Agrium Inc. in 2013; and
- PointNorth Capital Inc.'s efforts to elect six of the eight directors of Liquor Stores N.A. Ltd. (now Alcanna Inc.) in 2017.

The IIROC Notice emphasizes IIROC Dealer Member Rule 42 and its related guidance, which requires that all existing or potential material conflicts of interest between a dealer and a client must be addressed "in a fair, equitable and transparent manner and considering the best interest of the client." Conflicts that cannot be addressed in such a manner must be avoided.

The IIROC Notice acknowledges that significant conflicts of interest are inherent in a soliciting dealer arrangement that results in fees paid only for votes in favour of one side, or only if a particular side is successful. The IIROC Notice states that such arrangements raise significant and unmanageable conflicts of interest for a dealer and that such conflicts should be avoided.

It is notable that Canada's securities regulators declined to take action of their own and prohibit the practice, viewing the matter as within the scope of IIROC's existing mandate on conflicts of interest. The CSA has, however, endorsed the IIROC Notice, signalling that the practice of vote buying is of concern to both IIROC and the Canadian securities regulators. Parties that propose to implement the practice in contested elections can likely expect recourse from IIROC and/or the CSA.

Universal Proxies on the Rise, but Still a Rarity in Canadian Proxy Contests

As discussed in our report *Shareholder Activism and Proxy Contests: Issues and Trends*,[62] Canadian proxy solicitation rules permit a company or a dissident shareholder to use a "universal" proxy card that lists the names of each management director nominee and each dissident director nominee. As a result, a shareholder may choose any combination of directors it determines would be best.

In contrast, the standard form of proxy, whether used by a dissident or the issuer, lists only that party's nominees. Shareholders can submit only one form of proxy, with any subsequent proxy revoking a previously submitted proxy, forcing a shareholder voting by proxy to choose one side's nominees over the other. In these circumstances, the shareholder would have to attend the meeting in person in order to vote for a mixed slate of nominees proposed by an issuer and a shareholder in a contested director election.

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A universal proxy in a contested director election is generally viewed by governance experts as a shareholder-friendly tool that facilitates shareholder choice. However, there are a variety of strategic and other considerations that guide a party's choice on whether to adopt it. The first widely publicized use of a universal proxy in Canada was in the 2012 Canadian Pacific Railway (CP Rail) proxy contest, when a universal proxy was used by both the activist and the issuer. As shown in Table 3-1, our research reveals that the practice has been used (or at least publicized) by at least one of the parties in 14 contests in total since the CP Rail contest. Our research also shows that 2019 to date has yielded the highest number of contests (four) in which a universal proxy has been used. The data also reveal that a universal proxy has never been used by the issuer alone, and the issuer matched the shareholder's use of a universal proxy three times.

While a party can expect to receive governance accolades for using a universal proxy, the decision to do so requires an assessment of other considerations. On the one hand, if only one side uses the universal format, that side may increase the likelihood that shareholders will choose to use that side's card for voting purposes, thus providing earlier insight into voting trends. On the other hand, a party using a universal proxy also increases the chances that votes may be cast for the other side's nominees at the expense of some of its own. In addition, since a shareholder soliciting proxies will often issue its own dissident proxy circular after the issuer has issued its circular, an issuer wishing to use a universal proxy may be forced to reissue its proxy in the midst of the contest to include the dissident's nominees, a process that may prove confusing to shareholders. In CP Rail, the issuer was able to initiate the use of a universal proxy because the Pershing Square nominees had been publicly disclosed in advance of the issuance of the CP Rail circular.

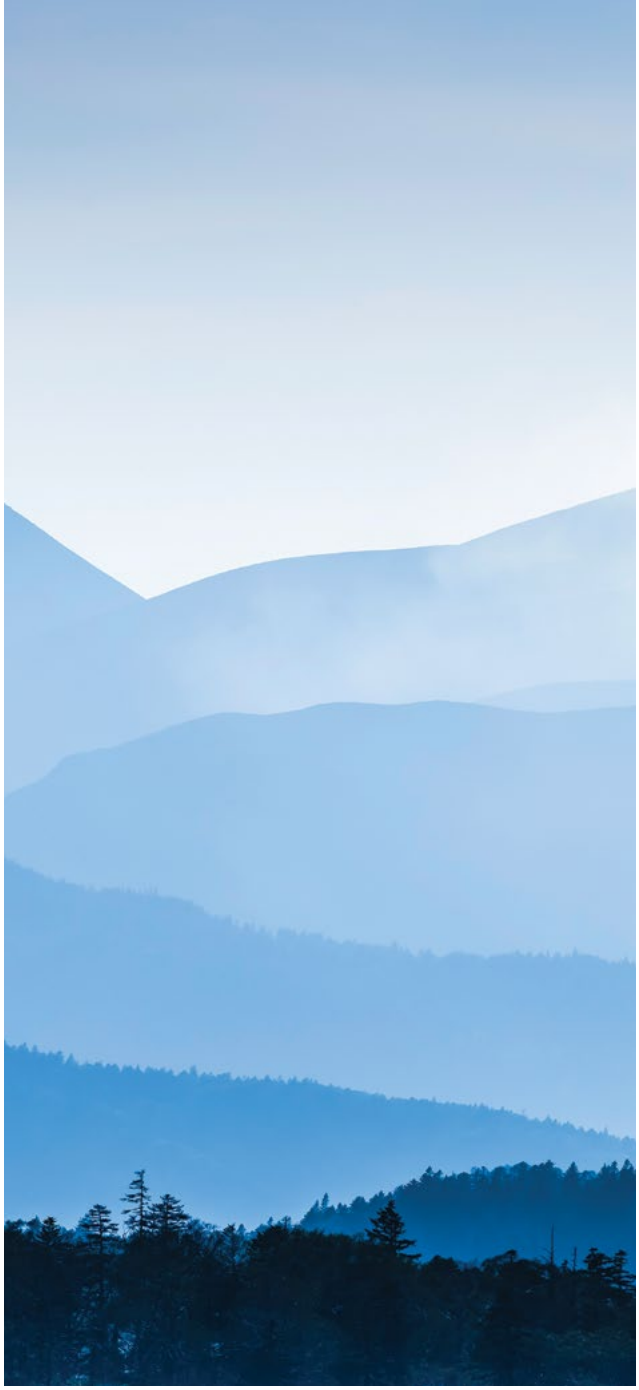

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TABLE 3-1:
Universal Proxies in Canadian Contests

Year	Issuer	Shareholder	Party Utilizing Universal Proxy	Outcome
2012	Canadian Pacific Railway Limited	Pershing Square Capital Management LP	Both parties	Shareholder win
2012	International Datacasting Corporation	Adam Adamou (former director of the issuer)	Shareholder	Shareholder loss
2013	MFC Industrial Ltd.	IAT Reinsurance Ltd.	Shareholder	Shareholder partial win
2013	Agrium Inc.	JANA Partners LLC	Shareholder[63]	Shareholder loss
2014	Americas Gold and Silver Corporation (formerly Scorpio Mining Corporation)	Tocqueville Asset Management	Shareholder	Shareholder win
2014	Sherritt International Corporation	Clarke Inc.	Both parties	Shareholder loss
2015	Dynacor Gold Mines Inc.	Red Oak Partners, LLC	Shareholder	Shareholder loss
2017	Granite Real Estate Investment Trust	FrontFour Capital Group LLC and the Sandpiper Group	Shareholders	Shareholder win
2017	Espial Group Inc.	Vantage Asset Management Inc.	Shareholder	Shareholder win
2018	Crescent Point Energy Corp.	Cation Capital Inc.	Shareholder	Shareholder loss
2018	DavidsTea Inc.	Rainy Day Investments Ltd. (controlled by Herschel Segal, the co-founder and former director of the issuer)	Shareholder	Shareholder win
2019	Hudbay Minerals Inc.	Waterton Global Resources Management Inc.	Shareholder	Shareholder win
2019	Methanex Corporation	M&G Investment Management Limited	Both parties	Shareholder partial win
2019	Knight Therapeutics Inc.	Medison Biotech (1995) Ltd.	Shareholder	Shareholder loss
2019	Aurinia Pharmaceuticals Inc.	ILJIN SNT Co., Ltd.	Shareholder	Shareholder loss

Note: Our research excludes proxies used in connection with a requisitioned special meeting to remove incumbent directors and elect new directors in their place.

The Canadian Coalition for Good Governance (CCGG) released its Universal Proxy Policy in September 2015.[64] The policy recommended an amendment to Canadian corporate and securities laws that would make the use of a universal proxy form mandatory in every contested director election at a Canadian public company. To date, no such legislation has been passed. It is possible that governance standards will evolve over time, making universal proxies the norm, as is the case with say-on-pay, but given market practice to date and legislative inertia on the subject since CCGG released its policy, proxy contest participants remain left to their own strategic considerations in deciding whether to deploy the practice for the foreseeable future.

Activism Goes Mainstream: Institutional Shareholders Find Their Voice

For the past several years, institutional shareholders have exerted significant influence in the evolution of Canadian corporate governance practices, with shareholder-friendly policies like say-on-pay and majority voting gaining widespread acceptance. The creation of CCGG in 2009 marked a significant advance in institutional shareholders openly advocating for improved governance practices. CCGG now comprises over 50 major institutional investors that collectively manage almost $4 trillion in assets.

While CCGG and institutional investors have been vocal in their demands for changes to Canadian governance standards, they have historically taken a decidedly quieter approach with respect to specific proxy contests, often making no public comment. In 2019, we may have seen the tide beginning to turn. Not only did the past year witness institutional investors more vocally engaging in active contests, but in one case, the institutional investor launched a successful proxy contest of its own.

Historically, any involvement by an institutional shareholder in a Canadian activist situation – whether in support of the issuer or the activist – has taken place out of the public eye. Pershing Square won a resounding victory in the now infamous CP Rail proxy contest in 2012, with widespread support among the shareholder base, which included a substantial number of institutional investors. This widespread support may not have been obvious, since, with the exception of two late-breaking endorsements, the support was not publicized. One press report on the eve of the shareholders' meeting indicated that, as it planned its approach to CP Rail, Pershing Square took comfort from the fact that many Canadian institutions were seeking a catalyst to deliver the message that they wanted change at CP Rail.[65]

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Seven years after CP Rail, the Canadian market is more accustomed to activism, and, perhaps for that reason, 2019 has seen a number of examples of institutional shareholders publicly exerting their influence in contested situations, including those below.

– TransAlta Corporation, a Calgary-based power generator and electricity marketer with shares listed on both the Toronto Stock Exchange (TSX) and the New York Stock Exchange (NYSE), was subject to an activist approach by Mangrove Partners in early 2019. TransAlta entered into a transaction with Brookfield Renewable Partners, one of its major shareholders, leading Mangrove to actively oppose the transaction and launch a public campaign, which included a withhold campaign with respect to certain directors of TransAlta. One of TransAlta's major institutional shareholders (and its single largest shareholder) – RBC Global Asset Management (RBC GAM) – publicly supported the Brookfield transaction and entered into a support agreement with TransAlta to vote for management's slate of directors at the upcoming shareholders' meeting. Ultimately, the shareholders voted overwhelmingly in favour of all of management's director nominees to the TransAlta board, including two Brookfield nominees who were nominated pursuant to the transaction. For more details, see our bulletin *The (Not So) Long Arm of the OSC: Commission Declines Jurisdiction in Public Interest Dispute*.[66] The public support of RBC GAM undoubtedly had some influence on the votes of other shareholders.

– Aimia Inc., the TSX-listed loyalty rewards firm best known for operating the Aeroplan program before selling it to Air Canada, has been subject to a continuing clash with its largest shareholder, Mittleman Investment Management, since 2018. Mittleman had threatened to launch a proxy contest in 2018, but the two parties entered into a settlement that included a two-year standstill. Aimia recently sued Mittleman, alleging, among other things, that it engineered a covert campaign to gain control of the company in breach of the standstill. Litigation against a significant shareholder carries significant risks for the issuer, including potential costs, management distraction and negative publicity. Even when the litigation may be justified, other shareholders may wish to stay above the fray rather than risk being drawn into the fight itself. In a rare step, a representative of RBC GAM, one of Aimia's major institutional shareholders, threw its public support behind Aimia in a statement to the *Financial Post*, calling the Aimia board of directors "seasoned" and "capable" and stating that "[t]his is a highly credible group of individuals with strong pedigrees who, once freed from the distractions of dissident shareholders with unclear agendas, can execute some basic steps to enhance value for shareholders in the near term."[67] While this public statement presumably will have no bearing on the outcome of the litigation, it may provide some cover to the Aimia board as it prosecutes its claim.

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– Perhaps the most significant example of a potential sea change in institutional shareholder behaviour is the proxy contest launched in March 2019 by M&G Investments with respect to Methanex Corporation (TSX and Nasdaq), a Canadian company that supplies and markets methanol worldwide. M&G is a U.K.-based investment manager with approximately

US$338 billion of assets under management, and it had not commenced a proxy contest in its 85-year history. M&G was the largest shareholder of Methanex, holding approximately 16.5% of the shares, and was a long-term holder, having held the stock for over a decade.[68] M&G objected to Methanex's strategy to potentially undertake a significant capital expenditure without a partner. M&G pursued its contest in a measured and reasoned manner and arrived at a settlement with Methanex in less than three weeks. The settlement provided M&G with two board seats and a clear process to re-evaluate the potential capital expenditure project.

The notion that established institutional investors such as M&G and RBC GAM would take such an active and public stance in contested situations would have been unheard of a few years ago. It would seem no single factor is driving these and other institutions into a more activist stance. However, we expect the growth of index investing coupled with less liquidity in Canada compared with other markets restrain institutions from so easily doing the "Wall Street Walk" and selling their shares in the face of poor performance. In light of these and other factors, we expect this trend to continue, as institutional shareholders face increased pressure to take an active role with respect to their investments.

AIMIA LITIGATION SEEKS TO KEEP THE STANDSTILL RUNNING

When does a standstill expire? That is a key question at issue in a July 2019 lawsuit filed by TSX-listed Aimia Inc. against its largest shareholder, Mittleman Investment Management. As part of a settlement of a proxy contest in March 2018, Aimia and Mittleman entered into a standstill agreement whereby Aimia agreed to nominate two Mittleman nominees to the board and Mittleman agreed to vote in favour of the management nominees at the 2018 and 2019 shareholder meetings. The agreement also contained a broad standstill covenant that prohibited Mittleman from running a proxy contest. By its terms, the standstill ended on July 1, 2019.

In mid-July, 17 days after the Aimia board was elected at the 2019 shareholders' meeting, Aimia appointed two additional directors to its board, a move publicly criticized by Mittleman and other shareholders. Five days later, Aimia commenced legal proceedings against Mittleman, seeking, among other things, an order enjoining Mittleman from taking any steps to remove or replace directors elected at the 2019 shareholder meeting until the next annual meeting of shareholders. In support of its claim, Aimia alleged numerous breaches by Mittleman of the standstill agreement during its term. If successful, the Aimia lawsuit would effectively extend the expiry of the standstill covenant, at least as it relates to director elections, through the end of the 2020 proxy season.

Regardless of the outcome, the case raises an interesting interpretive issue when assessing the terms of a standstill. In that regard, the court will need to determine whether a covenant to vote in favour of the management slate should effectively insulate the board from the activist for the duration of its term in office, even if the express standstill provision has expired. We will be following this case closely and expect that, absent a settlement, the outcome of the case will depend to a significant degree on the court's findings of fact.

Synex Decision Affirms that Enfranchising Shareholders Is a Key Objective of Proxy Regulation

In the era of advance notice bylaws, the chance of a shareholder successfully carrying out an ambush at an annual meeting and electing directors from the floor has decreased to near zero. Perhaps for that reason, 2019 witnessed the first decision of a Canadian court in 30 years to consider and validate the strategy pursued by a shareholder at the annual meeting of Synex International Inc., at which the shareholder elected an entirely new board from the floor. Notably, the shareholder cast his votes in favour of his slate of director nominees using the discretionary authority given to him by shareholders who appointed him as their proxyholder on management's form of proxy. For more details, see our bulletin *Policy Prevails over Fine Print*.[69]

In *Russell v Synex International Inc.* (*Synex*),[70] the B.C. Supreme Court concluded that when a shareholder uses a management form of proxy to appoint someone other than the named management appointees and does not provide any voting instructions, the proxy provides full discretionary voting authority to the named proxyholder. Notably, the Court also determined the shareholder should not be bound by the typical "default" voting provisions in the fine print of the management proxy form, which provided that, in the absence of voting instructions, the proxy is to be voted in favour of management's recommendations. According to the Court, to impose those default instructions on a third-party proxyholder would be inconsistent with "business common sense." Accordingly, the shareholder in this case was able to elect an entirely new board by relying on the private proxy solicitation exemption and without issuing his own form of proxy.

Pointing to recognized industry practices and standards, including the *Securities Transfer Association of Canada Proxy Protocol* and the mechanisms in corporate and securities laws to enfranchise shareholders, the Court saw no reason to challenge the proposition articulated in the 1989 Ontario case *Canadian Express Ltd. v Blair* [71] that "disputed proxies must be construed in light of surrounding circumstances and where possible in a manner consistent with business common sense." Furthermore, the Court concluded that the entire regulatory scheme is geared to facilitating shareholders' right to vote.

In *Synex*, the Court noted that proxies are "fundamentally instruments of agency by which the proxyholder is appointed to represent the shareholder's interests." Accordingly, the proxyholder's specific authority at any particular meeting is only as broad as the language in the instrument conferring the authority. The Court examined in detail each of the three separate forms of proxy that had been used to appoint the shareholder as proxyholder and found that any apparent conflict in the default voting instructions in the form should be resolved in favour of enfranchising shareholders. In that regard, it would be inconsistent with business common sense for a shareholder to appoint a third party as its proxyholder only to restrict that third party to the default voting instructions crafted by management.

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Activism Preparedness: Some Practical Tips for Boards... and Activists

Accepted wisdom dictates that the best way for a public company to avoid a proxy contest is to ensure that it isn't an attractive target. Canadian public companies would be well-advised to devote time to preparing for activism, focusing on early detection, identifying and rectifying weaknesses in performance and clearly articulating their plans and strategies. We have set out below some practical actions that should be part of every issuer's preparations. We also provide some tips on how a company might best engage with an activist shareholder, should one emerge.

From the activist's perspective, there are many opportunities in the Canadian market to effect positive change, whether it be through campaigns to alter board composition or governance structures, or to pursue operational or transactional strategies. In doing so and planning its approach, an activist should carefully evaluate the potential legal pitfalls in executing its strategy – an early misstep can provide a target with an opening to slow the activist's momentum or, in some cases, stop the activist altogether. Below are some key Canadian legal considerations for the activist when planning a Canadian campaign.

In our view, proper preparation on both sides mitigates the chances of one side gaining a tactical advantage through legal manoeuvring or otherwise, which then allows both sides to make their best case to win the hearts and minds of shareholders.

Practical Guidance for Boards Before an Activist Emerges

1 Establish and maintain a response team

Create a standing internal response team composed of select members of senior management in key areas, including legal, finance, operations, strategy and investor relations. Designate a single spokesperson (often the CEO) and establish procedures to meet as necessary and engage with the board in the event an activist situation emerges. The internal team should be supported as appropriate by an external response team, often consisting of legal, financial and proxy advisers, as well as communications and public relations (and sometimes government relations) specialists.

2 Analyze your vulnerabilities and critically assess potential solutions

An activist's thesis almost always cites financial or other underperformance, whether on an absolute basis or relative to peers, and often links the underperformance to deficient governance structures and/or ineffective leadership. Evaluate the company through the eyes of an activist, looking for vulnerabilities, such as negative trends compared with your peer group and your environmental, social and governance profile (including board tenure), as well as existing or emerging value-creation opportunities. Identify possible solutions as well as the viability and associated risks of each. Doing so is valuable in itself and also facilitates a rapid response once an activist and its thesis emerge.

3 Ensure meaningful and constructive shareholder engagement

A robust shareholder engagement program, including engagement led by non-executive directors, should feature in most issuers' governance practices. The program should involve developing profiles of key institutional and other shareholders, including their voting policies and past voting history. Meet with significant shareholders, explain your business strategy and plans, understand their concerns, assess their support for management and the board and, where suitable, proactively communicate about identified vulnerabilities, explaining the company's position. During this process, you may identify influential shareholders that would be willing, if needed, to take a public stand in favour of the issuer, and you may even learn that an activist is afoot, depending on the type of feedback received.

4 Develop and maintain an evergreen communications plan

Even in the best of times, releasing a public company communication can prove cumbersome, given the need for internal vetting procedures and protocols to ensure regulatory compliance. In an activist situation, this can often cause delays in responding to public statements by an activist, whose organization is often much smaller and nimbler and which is less constrained. To the extent practicable, an issuer can reduce delays in responding by having a ready-made and vetted communications plan that details the company's plans and strategies and includes potential responses to anticipated criticisms arising from its vulnerability analysis and shareholder engagement.

5 Monitor trading activity and changes in the shareholder base

Implement a stock watch program to monitor trading activity and regulatory filings (such as Canadian early warning reports and U.S. 13F, 13G and 13D filings). A robust program can reveal "under the radar" market accumulations, identify suspicious trading activity and facilitate a real-time understanding of the issuer's shareholder base, including changes in hedge fund and institutional shareholdings.

Practical Guidance for Boards When Engaging with an Activist

1 Ensure the board is engaged

The board should be involved in the response process once an activist emerges, particularly given that most activist situations stem from dissatisfaction with the management or direction of the company, matters that are ultimately the board's responsibility. The board may wish to consider establishing a special committee of the board, either out of convenience to ensure a nimbler response or to address any director conflicts. The board should establish a channel for regular contact with the response team to ensure a robust and timely response.

2 Diligence the activist

Once an activist emerges, you can be sure that the activist has conducted extensive diligence on the company. The issuer should do the same regarding the activist. Doing so often yields intelligence on matters such as the shareholder's likely tactics, its potential allies and the size of its stake. Seek to understand the shareholder's track record; identify key decision-makers and their credentials; identify known relationships with other significant shareholders, analysts, proxy advisers, asset managers and media; and evaluate the shareholder's exposure to the issuer, including, if possible, through derivative instruments.

3 Objectively review and assess the activist's proposals

Objectively, rather than emotionally, review and assess any proposal from an activist on its merits, separating the messenger from the message. Drawing on the information from your vulnerability analysis and shareholder engagement, consider possible responses and adjust your communication plan accordingly. The scope and extent of your response will be driven in part by whether the proposal has been made public; however, you should be prepared for the activist to eventually "go public," particulary if private discussions are not yielding results.

4 Assess the legality of the activist's conduct

The board should review the activist's actions in accumulating its position and securing any allies to identify any potential non-compliance with corporate and securities laws, such as early warning reporting requirements, restrictions on insider trading and tipping and rules governing joint actors (discussed below). While a complaint to a regulator or litigation might be considered, commencing any legal process should be carefully evaluated since it carries its own risks.

5 Develop a response plan specific to the activist and its proposals

In addition to updating communications, plans and strategies, the board and response team should consider whether and how to engage with the activist, recognizing that it is seldom in the company's interest to ignore or outright-reject an active shareholder. If a decision is made to engage, identify the representatives best suited to meet with the activist (guided in part by the activist's complaint). Determine the range of potential outcomes of engaging and assess whether settlement is a realistic possibility. If a settlement is not attainable, consider whether to adopt or execute a portion of the activist's proposal. If a decision is made to challenge the activist, develop a response plan aimed at garnering the most support from shareholders based on ongoing shareholder engagement. It is vital to maintain credibility throughout the process by avoiding personal attacks or emotional responses.

Practical Guidance for Activists Prior to Launching a Campaign

Given the tremendous amount of time and resources spent on identifying a target and developing a thesis, activist shareholders would be well-advised to develop their accumulation and approach plans with an understanding of potential legal pitfalls under Canadian corporate and securities laws. Even a seemingly minor "foot fault" can potentially lead to a loss of valuable time, a weakening of leverage or an outright loss. It is also true that while the relative lack of structural defences available to Canadian issuers can favour the activist, we have written elsewhere on certain factors that may surprise foreign activists when compared with the U.S. experience.[72]

1 Carefully consider disclosure triggers when building a toehold

Canadian reporting rules can seem fairly generous compared with those of other jurisdictions, given that, except where the target is subject to a formal takeover bid (in which case the trigger is 5%), a shareholder is not required to publicly disclose its stake until hitting a 10% ownership threshold. In addition, if the shareholder qualifies as an "eligible institutional investor," in many cases disclosure can be delayed until 10 days after the month in which the threshold is crossed (the Canadian equivalent of a 13G filing). However, absent those circumstances, an activist needs to be mindful that Canadian rules impose a "hard stop" at 10%, meaning that trading must cease until one business day has elapsed after the date on which the shareholder's early warning report has been filed. A similar moratorium of one business day applies when there is a material change in a previously filed report requiring disclosure.

2 Be aware of disclosure and other potential risks when seeking allies

Disclosure Triggers

If the activist is seeking allies among the shareholder base, Canadian joint actor rules could apply to aggregate the holdings of the activist with those allies, potentially triggering a disclosure obligation under early warning reporting rules sooner than anticipated or requiring an amendment to an existing filing. In one notable case, a court required an activist to update its early warning report in light of a joint actor finding and also delayed the shareholders' meeting by several weeks, buying valuable time for the target issuer.[73] The aggregation could also lead to more challenging issues if the combined ownership of the activist and joint actors approaches 20%, given that Canada has a bright-line takeover trigger at a combined holding of 20%.

"Tipping" and Insider Trading Prohibitions

In any discussions with potential allies, the activist must also consider Canada's insider trading rules, which are generally much stricter than those in the United States and prohibit trading while in possession of and, except in limited circumstances, sharing any material non-public information concerning a public company.

Proxy Solicitation Rules

Canadian rules broadly define a "solicitation" to effectively capture communications reasonably calculated to result in the giving, withholding or revocation of a proxy, with the general rule requiring a proxy circular to be sent to each shareholder whose proxy is solicited.[74] However, an activist can engage in significant solicitation activities in advance of sending a formal proxy circular with the proper use of exemptions, whether it be soliciting from 15 or fewer shareholders or engaging in a public broadcast solicitation through a press release or speech in a public forum. Notably, these exemptions are available only to the activist. However, each exemption has its own limitations and procedural hurdles, and a target issuer can be expected to carefully examine the activist's solicitation activities for any evidence of non-compliance.

3 Start building a director slate early

A large proportion of Canadian issuers have adopted advance notice bylaws, with varying degrees of information requirements associated with submitting a director nomination. While it is easier than in the past to find quality director candidates to stand on an activist slate, building an appropriate slate with due regard to matters such as industry experience, independence and diversity can be a time-consuming task. Importantly, that slate may need to be assembled quite early in (or before the launch of) the campaign, sometimes in advance of the activist requisitioning a special meeting of shareholders to propose nominees for election to the board.

Notes

Chapter 3 – Shareholder Activism: 2019 Trends and Major Developments

58 Proxy contest data in this chapter have been provided by Kingsdale Advisors and are current to August 20, 2019.

59 Davies, online: https://www.dwpv.com/en/Insights/Publications/2018/Governance-Insights-2018.

60 Investment Industry Regulatory Organization of Canada (IIROC), "Notice 19-0092 – *Managing Conflicts of Interest arising from Soliciting Dealer Arrangements"* (May 23, 2019), online: https://www.iiroc.ca/documents/2019/8655bc0b-d4fc-4aab-90eb-ebc5291f4bf9_en.pdf.

61 Davies (April 13, 2018), online: https://www.dwpv.com/en/Insights/Publications/2018/CSA-Reviewing-and-Seeking-Comments.

62 Davies (June 2017), online: https://www.dwpv.com/en/Insights/Publications/2017/Shareholder-Activism-and-Proxy-Contests-Issues-and-Trends.

63 A quasi-universal proxy was used by JANA. JANA offered shareholders the choice of voting among seven management incumbents that JANA would accept, plus five of JANA's nominees on its proxy card, in contrast to Agrium, which listed only the 12 management incumbents on its proxy.

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65 Scott Deveau, "Corporate culture shift underway in Canada after CP Rail proxy fight," *Financial Post* (May 11, 2012), online: https://business.financialpost.com/investing/shift-underway-for-canadas-clubby-corporate-culture-after-cp-rail-proxy-fight.

66 Davies (June 7, 2019), online: https://www.dwpv.com/en/Insights/Publications/2019/OSC-Mangrove-TransAlta-Decision.

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68 M&G Investments, "M&G Investments Sends Letter to Methanex Shareholders" (April 3, 2019), online: https://www.prnewswire.com/news-releases/mg-investments-sends-letter-to-methanex-shareholders-300824071.html.

69 Davies (May 6, 2019), online: https://www.dwpv.com/en/Insights/Publications/2019/Policy-Prevails-over-Fine-Print.

70 *Russell v Synex International Inc.*, 2019 BCSC 34.

71 *Canadian Express Ltd. v Blair* (1989), 46 BLR 92, 1989 CarswellOnt 138.

72 Davies (April 14, 2015), online: https://www.dwpv.com/en/Insights/Publications/2015/Article-Debunking-the-Myth-Why-Activism-is-Tough-in-Canada.

73 See *Genesis Land Development Corp. v Smoothwater Capital Corporation*, 2013 ABQB 509, where the Alberta Court found that activist shareholder Smoothwater was acting jointly and in concert with other shareholders of the targeted company from the date on which the parties participated in a conference call together with a proxy solicitation adviser (although the Court accepted that communications prior to that date did not rise to the level of joint action).

74 See, for example, *Canada Business Corporations Act*, RSC 1985, c C-44, Part XIII, and National Instrument 51-102 – *Continuous Disclosure Obligations*, Part 9.