

10 YEARS AFTER

The proxy contest at Canadian Pacific Railway in May 2012 was a defining moment for shareholder activism that reverberates to this day, writes Josh Black.



Canada has seen dozens of proxy fights in the 10 years since Bill Ackman's Pershing Square Capital Management won seven seats on the board of Canadian Pacific Railway (CP), but few have lived up to the profile of that event.

At the time, Ackman's fund was already known in financial circles for some big victories, including a lucrative bumptrage campaign at Sears Canada. Although Ackman was an acknowledged specialist in finding hidden value, especially in real estate, like many activists at the time its operating chops were far less proven. Ackman himself was reeling from a defeat at supermarket chain Target and was on the board of department store JCPenney, fighting a losing battle that would end with Ackman's resignation in 2013.

In contrast, Canadian Pacific was the most well-known company in Canada. Five of its board members, which included the current or former CEOs of the Royal Bank of Canada, several oil companies, grain giant James Richardson & Sons, and a former deputy prime minister of the country, were members of the venerable Order of Canada, the country's highest civilian honor.

"There were plenty of proxy fights but nothing of that sort of profile," Wes Hall, the founder of Kingsdale Advisors, which acted as proxy solicitor for Pershing Square, remembers. "If you retired as the CEO of a large company in Canada, you got to be on the board of CP. It was a retirement present, a rite of passage. It was unheard of to challenge a board like this."

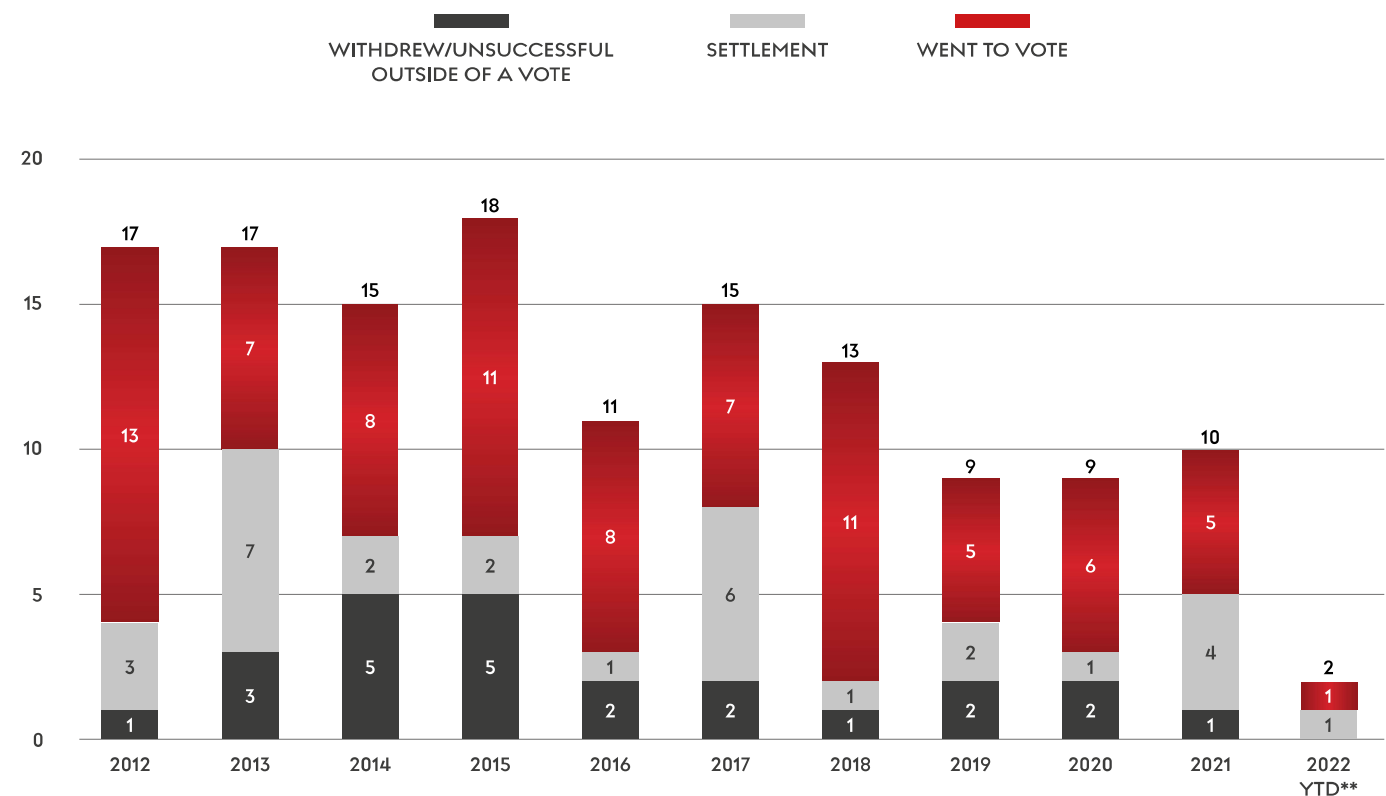
Patricia Olasker, a partner at law firm Davies Ward Phillips & Vineburg and counsel to Pershing Square, recalls that, "The reaction from the Canadian business community was harsher and more uniformly opposed than we might have expected."

"People were indignant, derisive," she said. "The whole idea that you could change a board of that stature was laughable."

THE ROCKET

Pershing Square announced it had accumulated a roughly 12% stake worth \$1 billion in October 2011. The investment was led by Paul Hilal, a partner at the hedge fund who had been a college buddy of Ackman's before pursuing a career first in banking, then as interim-CEO of WorldTalk Communications, which he led through a restructuring and sale, and several years at other hedge funds.

RESOLVED PROXY CONTESTS* AT CANADA-BASED COMPANIES BY METHOD AND OUTCOME YEAR



*A proxy contest is defined as gain board representation demands that are publicly rejected by the target company.

SOURCE: INSIGHTIA / ACTIVISM
**Data as of April 22, 2022.

Researching CP, Hilal contacted Hunter Harrison, the retired CEO of Canadian National Railway, a rival to the railroad, for advice. After an hours-long conversation that left Harrison racing to get back into the C-Suite, Pershing Square proposed to CP that Harrison replace the incumbent CEO Fred Green. The activist fund also wanted two board seats, it said.

Meanwhile, Pershing Square ensured it was quick out of the traps by requisitioning a meeting to deter CP from postponing its regular annual meeting and sending a so-called “skinny circular” – an incomplete slate of director candidates that was added to as the activist recruited more nominees.

“Every investing Canadian probably had CP stock in their portfolio, so Pershing’s message went widespread very quickly,” said Aaron Atkinson, now a partner at Davies with Olasker, but at the time a member of the team at Fasken Martineau defending CP. “I think you still see that to this day. The activist generally has the upper hand, if they play their cards right.”

As the two sides negotiated – mostly directly, including a clandestine meeting between Ackman and CP Chairman John Cleghorn in an aircraft hangar outside Montreal – it became clearer that CP didn’t feel obliged to settle. In despair at a long silence from Cleghorn, Ackman fired off an email threatening to hire Toronto’s biggest ballroom and host a town hall to take his case directly to shareholders, which he did on January 30. The campaign “took off like a rocket from there,” Olasker said.

RESOLVED PROXY CONTESTS* AT CANADA-BASED COMPANIES, IN THE PERIOD JANUARY 1, 2012 - APRIL 22, 2022.

OUTCOME	NO. PROXY CONTESTS
ACTIVIST GAINS AT LEAST ONE BOARD SEAT	60
ACTIVIST GAINS NO BOARD SEATS	76
TOTAL CONTESTS	136

*A proxy contest is defined as gain board representation demands that are publicly rejected by the target company.

SOURCE: INSIGHTIA / ACTIVISM

*Data as of April 22, 2022.

CP RISING

Ackman’s town hall, including a fireside chat with Harrison, wowed investors. The arguments were detailed but relatable, recalls Wes Hall. In comparison, CP seemed to want to avoid talking directly to shareholders.

“The idea for the town hall was Bill’s,” recalled Townsend Belisle, creative director at Haystack Needle, the agency that produced the activist’s campaign website and town hall broadcast. “The Pershing team is really big on transparency and thoroughness, demonstrating the integrity of its due diligence.”

TOTAL FOLLOWER RETURN* OF MANTLE RIDGE AND PERSHING INVESTMENTS WITH PUBLIC DEMANDS, GLOBALLY (EXCLUDES INVESTMENTS EXITED PRIOR TO 2012)

ACTIVIST	COMPANY	FIRST INVESTED DATE	STATUS	EXIT DATE	ACTIVIST TOTAL FOLLOWER RETURN (%)	S&P 500 TOTAL RETURN IN COMPARABLE PERIOD (%)	ACTIVIST TOTAL FOLLOWER RETURN VS S&P 500 TR (%)
PERSHING SQUARE CAPITAL MANAGEMENT	CHIPOTLE MEXICAN GRILL	SEP 06, 2016	CURRENT		257.6	116.6	141.0
PERSHING SQUARE CAPITAL MANAGEMENT	AGILENT TECHNOLOGIES	AUG 15, 2019	EXITED	AUG 16, 2021	135.0	62.8	72.2
PERSHING SQUARE CAPITAL MANAGEMENT	ALLERGAN (PRE-MERGER)	FEB 15, 2014	EXITED	MAR 17, 2015	74.4	15.4	59.0
MANTLE RIDGE	DOLLAR TREE	NOV 12, 2021	CURRENT		48.1	-8.2	56.3
PERSHING SQUARE CAPITAL MANAGEMENT	CANADIAN PACIFIC RAILWAY LIMITED (FIRST INVESTMENT)	OCT 28, 2011	EXITED (RECENTLY REINVESTED)	AUG 03, 2016	137.9	86.6	51.3

*Total Follower Return, at the level of a stock, represents the hypothetical total return (inclusive of dividends) that an investor would have generated had it invested in the stock when the activist position was announced, for a price equivalent to the next available closing price (exclusive of trading costs and other fees). For current activist investments, the calculation references both the date of and the price at the most recent market close (in this case as of date of calculation, April 22, 2022), while for exited activist investments the date and closing price of the activist exit is referenced instead.

SOURCE: INSIGHTIA / ACTIVISM

*Data as of April 28, 2022.

Pershing Square's town hall formed the centerpiece of a campaign website called cprising.com, which the hedge fund maintains to this day as a celebration of its efforts. Few websites at the time provided more than the basic documents shareholders require in a proxy contest. Tactical innovations from the contest such as letting the nominations introduce themselves and providing extensive presentations for future downloads are now standard in activism.

"Haystack's approach is to present several options for clients to consider," Belisle said in an interview. "When other activists hire us, they might pick two or three of the 15 tactics offered. Bill often engaged more than half of them," he said.

THE LEGACY

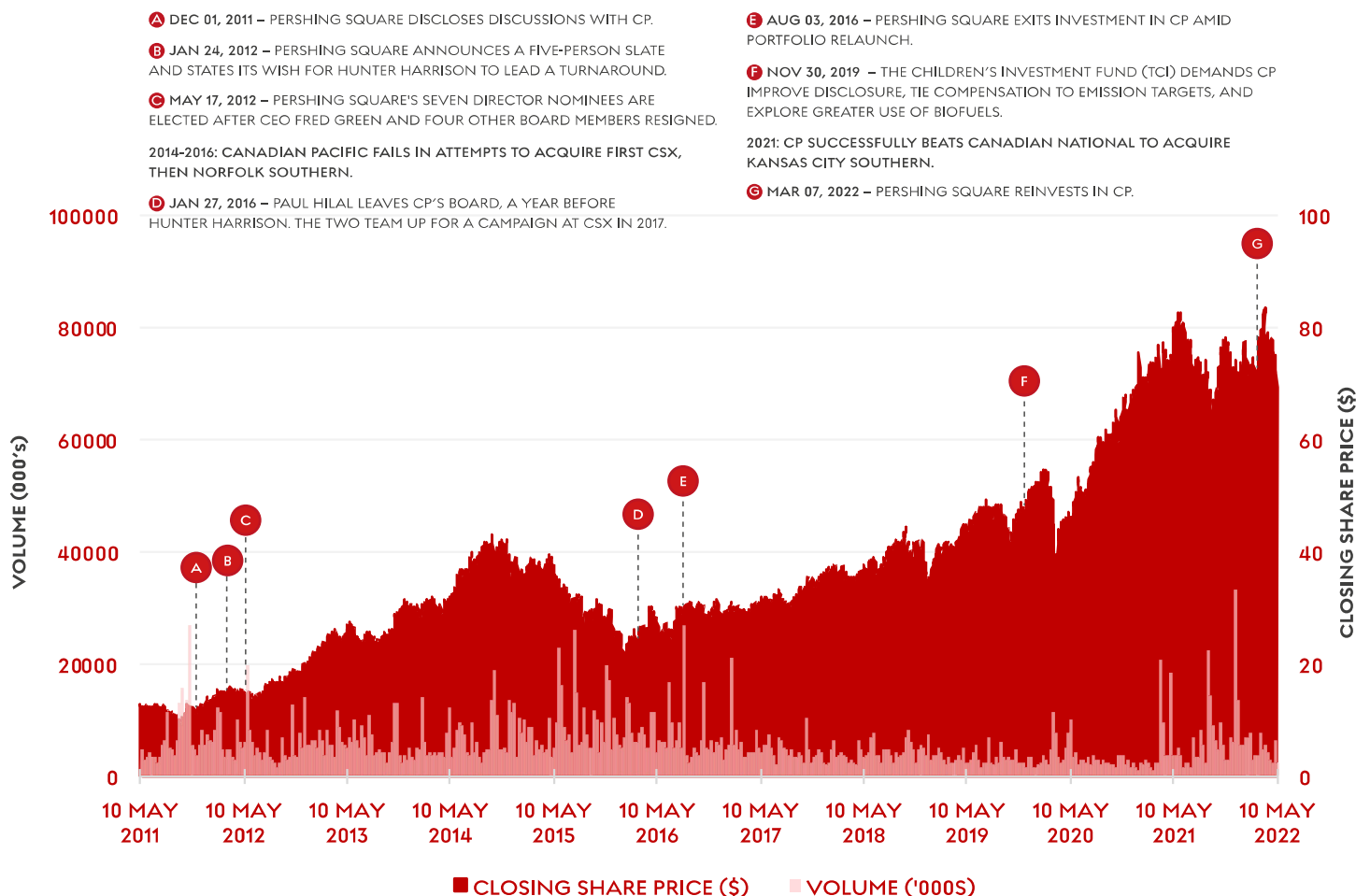
On the eve of the vote, the result was clear enough to management. The CP team invited Pershing Square and its advisers to the bar of the Calgary hotel where the meeting was to take place the next day and informed the dissident that six directors, including CEO Fred Green and Chairman Cleghorn, would resign. All seven of Pershing Square's nominees, including Ackman, Hilal, and Harrison, joined the board for its first meeting as soon as the shareholder vote was concluded.

Perhaps unusually for an activist campaign, the post-proxy fight plan went as smoothly as the election itself. Three incumbent directors resigned after the vote, allowing the newly elected directors to constitute a majority of the board. Harrison was appointed CEO in June.

From the date of the vote until the famed October 2014 investor day where Harrison and his team lauded the impact of the operational changes made since the contest, shares had risen 196%, compared with a 63% rise in Canadian National Railway shares and a 22% increase in the Toronto Stock Exchange (TSX) index of Canadian-listed companies. Although CP missed out on acquiring fellow railroad Norfolk Southern in a flurry of attempted industry consolidation in 2015 and 2016, it signed a deal for Kansas City Southern last year.

In contrast, Pershing Square lurched between hits and misses in the following years, with big wins at Air Products & Chemicals and Allergan forgotten in the midst of frustrations at JCPenney and big losses on a short campaign at Herbalife Nutrition and Valeant Pharmaceuticals International. The fund sold its stake in CP in 2016, with Ackman and Hilal leaving the board that year, but rebuilt a position earlier in 2022. "Since we exited our original investment in CP in 2016, we have

CANADIAN PACIFIC RAILWAY'S SHARE PRICE PERFORMANCE



A DEC 01, 2011 – PERSHING SQUARE DISCLOSES DISCUSSIONS WITH CP.

B JAN 24, 2012 – PERSHING SQUARE ANNOUNCES A FIVE-PERSON SLATE AND STATES ITS WISH FOR HUNTER HARRISON TO LEAD A TURNAROUND.

C MAY 17, 2012 – PERSHING SQUARE'S SEVEN DIRECTOR NOMINEES ARE ELECTED AFTER CEO FRED GREEN AND FOUR OTHER BOARD MEMBERS RESIGNED.

2014-2016: CANADIAN PACIFIC FAILS IN ATTEMPTS TO ACQUIRE FIRST CSX, THEN NORFOLK SOUTHERN.

D JAN 27, 2016 – PAUL HILAL LEAVES CP'S BOARD, A YEAR BEFORE HUNTER HARRISON. THE TWO TEAM UP FOR A CAMPAIGN AT CSX IN 2017.

E AUG 03, 2016 – PERSHING SQUARE EXITS INVESTMENT IN CP AMID PORTFOLIO RELAUNCH.

F NOV 30, 2019 – THE CHILDREN'S INVESTMENT FUND (TCI) DEMANDS CP IMPROVE DISCLOSURE, TIE COMPENSATION TO EMISSION TARGETS, AND EXPLORE GREATER USE OF BIOFUELS.

2021: CP SUCCESSFULLY BEATS CANADIAN NATIONAL TO ACQUIRE KANSAS CITY SOUTHERN.

G MAR 07, 2022 – PERSHING SQUARE REINVESTS IN CP.

Share price data sources: CSI - www.csidata.com and Xignite

SOURCE: INSIGHTIA / ACTIVISM

*Data as of April 28, 2022.

continued to closely follow the company and have admired the company's industry-leading execution and operational excellence," Ackman told his investors.

Hilal teamed up with Harrison again, convincing rival rail company CSX to buy out the railroader's non-compete clause from his contract at CP and replace a majority of the board without a proxy fight. Harrison died just a few months after taking the helm at CSX but the success of the campaign established Hilal's Mantle Ridge as a leading activist in its own right. Even an investment in Aramark just as the hospitality services provider was battered by the COVID-19 pandemic has not checked its progress, and the activist has since moved on to Dollar Tree.

IN CANADA

The result of the contest sent shockwaves through corporate Canada, with the high-profile and extensive nature of the defeat for such an illustrious board putting other directors on notice. A year later, Jana Partners launched a proxy fight at chemicals giant Agrium. It was the only fight Jana has ever taken to a vote, but Agrium triumphed in a manner that left Jana's founder Barry Rosenstein fuming.

Walied Soliman, co-chair of the special situations team at Norton Rose Fulbright Canada, notes that most of the activist campaigns in the early 2010s ended favorably for companies. "In many respects, CP wasn't a catalyst but an anomaly," he told *Insightia* last month. "In terms of lessons learned for future boards, it was exactly how not to run a campaign."

However, his co-chair, Orestes Pasparakis, admits that the result was a boon for the burgeoning activism defense industry, with more directors seeking to preempt campaigns. "What CP did for us was show that companies were more vulnerable than they thought," he said. "That allowed companies to tool up and really consider how to defend themselves."

Atkinson too points to the development of the activism advisory industry as one lesson of the contest. "Today, you'd probably have a lot more conversation between intermediaries," he said. "My recollection was that there wasn't a ton of back-channeling, particularly at the beginning. Direct communication has its benefits but also its drawbacks."

Some of the impacts of the contest were more subtle. The long contest was a significant distraction for CP and could probably have been settled earlier. Boards have reconsidered their role, understanding that they have off-ramps in a contest, but that they are not infinite, Olasker said. "Directors feel very empowered," she told *Insightia Monthly*. "Activism gives them more of a voice and an opportunity to speak up against management or to engage with shareholders."

Traditional shareholders have also taken up the baton, realizing both that they can have more impact on underperforming companies and on drawing proxy contests to a close sooner. "Canadian institutions are now more willing to go public early on, maybe even take up some of the tools used by activists," notes Olasker. "That was one of the sea-changes brought about by CP." [ia:](#)



IN THE LATEST EPISODE OF *BEYOND THE BOARDROOM*, HOST KIERAN POOLE IS JOINED BY CARSON BLOCK, FOUNDER OF MUDDY WATERS RESEARCH. BLOCK SHARES WITH US HIS THOUGHTS ON THE DEPARTMENT OF JUSTICE'S PROBE INTO SHORT SELLING TACTICS AND LESSONS HE HAS LEARNED FROM CAMPAIGNS THAT DID NOT GO AS PLANNED.



THIS MONTH ON *THE CORPORATE DIRECTOR PODCAST*, DOTTIE SCHINDLINGER AND MEGAN DAY ARE JOINED BY STUART CABLE, VICE-CHAIR AND GLOBAL CHAIR OF M&A AT GOODWIN, AND ALEXANDRA KENNEDY, DIRECTOR OF CLIENT SERVICES AT TWITTER, TO DISCUSS DIVERSITY IN THE BOARDROOM.

