

LH LAUREL HILL

2023



**TRENDS IN
SHAREHOLDER
ACTIVISM**



EXECUTIVE SUMMARY

Since 2015, Laurel Hill Advisory Group has tapped into our industry-leading experience and expertise to publish a comprehensive annual report outlining the key trends, risks, and challenges in corporate governance and shareholder activism. We take great pride that this publication has become a valuable resource for our clients to prepare for the upcoming proxy season and to identify and manage risks throughout the year.

This year, owing to the ever-increasing scope and volume of our traditional annual report, we have published two distinct reports, our recently published [2023 Trends in Corporate Governance Report](#) covering non-contested director elections, auditor votes, executive compensation, shareholder proposals, virtual meetings, and ESG developments, among other areas of interest, and this *2023 Trends in Shareholder Activism Report* covering the latest information and data on board and transactional activism, unsolicited offers, and short-selling activism. We are confident this format change will ensure each report is a more focused reference tool and will continue to deliver the current and trending information and insights you have come to expect from the Laurel Hill team.

In our *2023 Trends in Corporate Governance Report*, we noted that many key governance trends throughout the Canadian 2023 proxy season were largely aligned with 2022 developments. The same cannot be said for shareholder activism on a year-over-year basis. **The rise in shareholder activism has been spectacular.** This has been driven by traditional activists such as activist hedge funds and non-traditional activists such as institutional shareholders, private equity firms, and even individuals and groups of retail shareholders who have also publicly and aggressively challenged corporate Canada.

After trending down in 2021 and 2022, board and transactional activism in 2023 set near-record numbers. Board activism is up this year by a staggering 145% over 2022, and transactional activism is up by a very impressive 71% over 2022. Combined, these two forms of activism are up by 117%. Shareholder appetite to seek board change at underperforming companies, to rally fellow shareholders to oppose “undervalued” or “ill-conceived” M&A transactions, or to make other public demands has simply been voracious.

Part of this can be attributed to the return of professional activism by activist hedge funds, which had fewer opportunities as markets sank in 2020 following the pandemic’s start. As markets boomed in 2021 and into 2022, providing shareholders with strong and consistent returns, this presented a challenging environment for activists to attract a receptive shareholder audience. Fast forward to the end of 2022 and into 2023, the increased market volatility and uncertainty, coupled with soaring interest rates causing distress in certain sectors and increasing the cost of capital, exposed many companies. These dynamics have proven to be a very fertile ground for activism.

While the total number of board activism campaigns spiked this year, over the past two years, there was an increasing trend to take decisive action to effect change, evidenced by the fact that 73% and 74% of all board activism situations in each of 2022 and 2023, respectively,

involved solicitation efforts. This clearly demonstrates activists’ confidence and willingness to take their concerns to battle. Moreover, activists are using all tools at their disposal, including public broadcast solicitation, “vote against” and “vote withhold” campaigns, litigation and premium-to-market tender offers. We have also seen several instances of multiple activists targeting the same company or the same deal.

This activist confidence has translated to activist success: Activists have enjoyed unmatched levels of success in the last two years, securing a partial or full win in 88% and 79% of Board Fights in 2022 and 2023, respectively. These striking levels of success will continue to embolden more activism.

The size of target companies for board activism has reverted to historical levels this year: After dropping to a combined 54% of targets in 2022, micro- and small-cap companies accounted for a combined 70% of targets this year. Historically, we have seen most board activism target micro- and small-cap companies—on average, over the last ten years, in 72% of cases.

Unsolicited offers, commonly known as hostile bids, continue to have their place in the activist landscape. Through the third quarter of 2023, there were two hostile bids, namely at Alpha Lithium Corporation and Canaccord Genuity Group Inc., although this is up from just one in all of 2022. The hostile bid at Canaccord also crossed over into board activism.

Finally, short-selling activism has been trending down in the last few years in Canada to only three cases in the first half of 2023. This may partly be due to a lack of overvalued targets in our market, as compared to the US. The potential for a tighter Canadian regulatory regime around short-selling and short-selling activism may also be a factor in dissuading activity.

We are very pleased to share this inaugural *2023 Trends in Shareholder Activism Report*. As always, our team is available to speak with you about your specific needs and concerns.

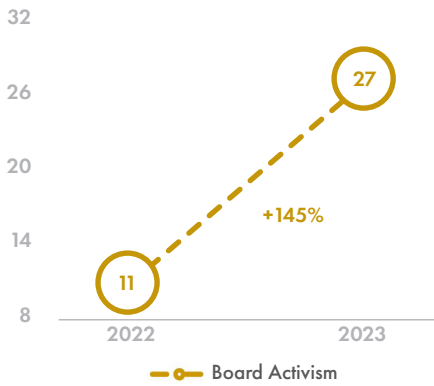
Sincerely,

David Salmon, President

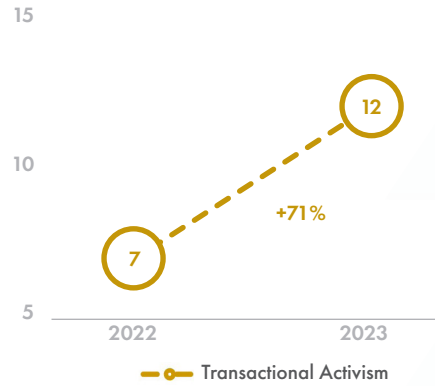
November 2023

ACTIVISM TRENDS AT A GLANCE

BOARD FIGHTS AND AGITATIONS



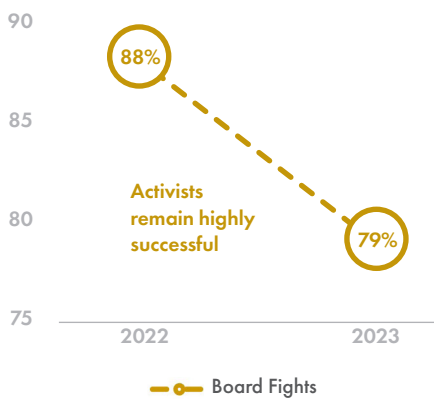
TRANSACTIONAL FIGHTS AND AGITATIONS



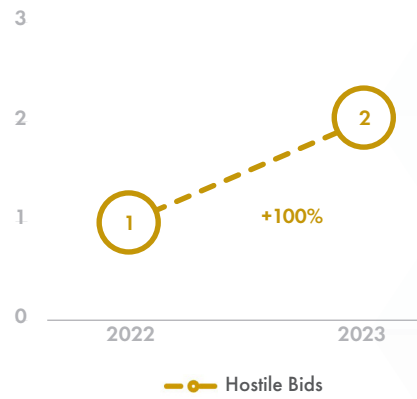
FIGHT RATES (BOARD FIGHTS ONLY)



DISSIDENT WIN RATES (BOARD FIGHTS ONLY)



UNSOLICITED OFFERS

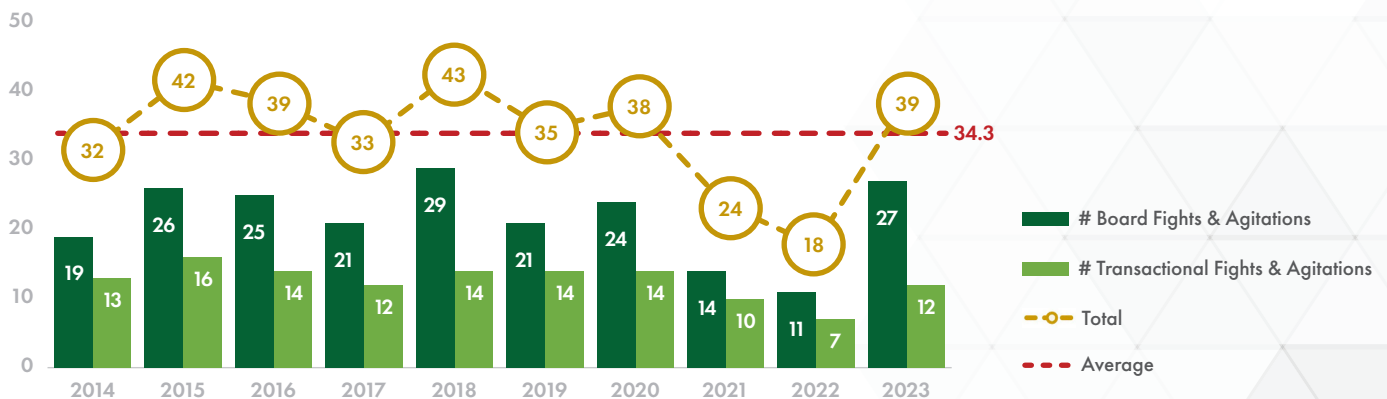


SHORT-SELLING ACTIVISM



Sources: Refer to corresponding sections herein for more detailed data and sourcing.

BOARD AND TRANSACTIONAL ACTIVISM SITUATIONS



Source: Laurel Hill. Laurel Hill. Compiled from Diligent Market Intelligence data, www.sedarplus.ca filings, and other press releases through September 30, 2023, subject to our determination of what is a Board Fight, Board Agitation, Transactional Fight, and Transactional Agitation, all as defined in our Board Activism and Transactional Activism sections below.

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BOARD ACTIVISM

INTRODUCTION

It has been an incredibly challenging year for many Canadian boards and management teams in the face of near record-setting levels of board activism and striking dissident success. Following a downturn in board activism in the last two years, with just 14 and 11 total Board Fights and Board Agitations in 2021 and 2022, respectively, public board activism has roared back with 27 cases so far this year, an increase of 145% over 2022. This number is just shy of the ten-year high of 29 cases in 2018. However, this year's 20 Board Fights—which we consider board activism cases involving dissident solicitation activities—are at a ten-year high. While the number of total board activism campaigns has spiked this year, activists in each of the last two years have aggressively pursued their cases for change, undertaking Board Fights in 73% and 74% of all board activism situations in 2022 and 2023, respectively. This clearly demonstrates activists' confidence and willingness to take their concerns to battle. And for the second straight year, activists were very successful. Following last year's knockout Board Fight dissident win rate of 88%—based on dissident partial wins and full wins as a percentage of Board Fights—this year, dissidents secured an impressive win rate of 79%. The real estate sector was a notable target for board activism this year, accounting for 15% of all target issuers, the first time the sector has experienced public activism since 2020.

One of the standout board activism cases this year was the “vote against” campaign at Aimia Inc., a Canada Business Corporations Act (CBCA)–incorporated company. It was the first CBCA company targeted for such a campaign since the August 2022 introduction of new CBCA majority voting requirements. There were four other “vote withhold” campaigns this year at non-CBCA companies. These types of campaigns have been the source of recent market commentary of a surge in “stealth” or “sneak” board attacks. In particular, “vote against” campaigns can be a highly effective instrument to remove unwanted directors (as boards are not afforded the opportunity to reject the resignations of “failed” directors except in certain “exceptional circumstances”) and for the first time, they expose CBCA–incorporated, non-TSX companies to a majority voting framework. These campaigns can catch companies by surprise and can be undertaken using the low-cost public broadcast solicitation exemption. **We discuss these dynamics in our section “Majority Voting and the First Year of the New CBCA Requirements.”**

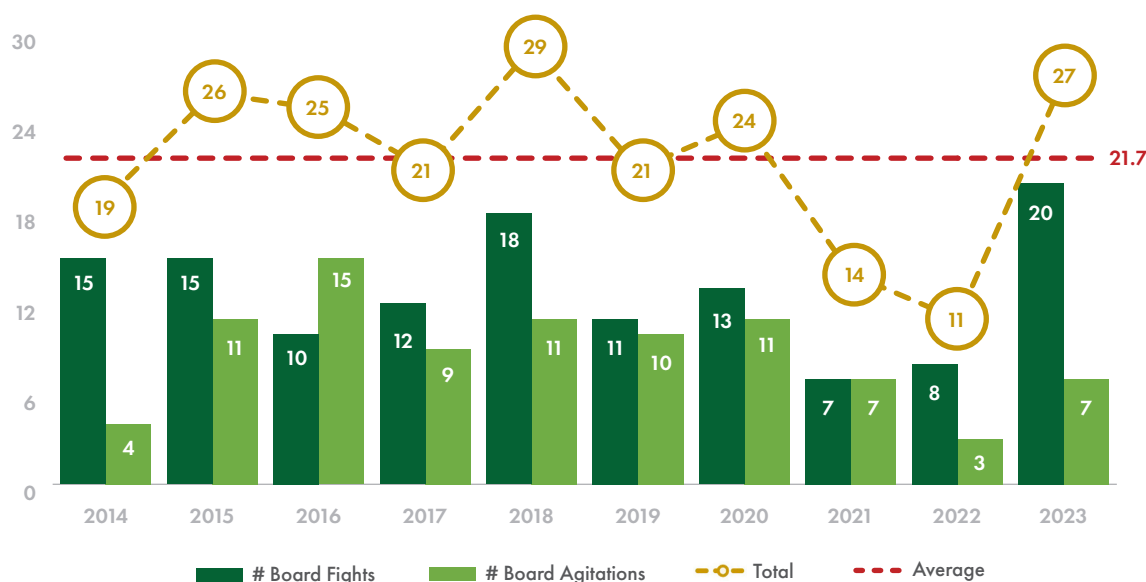
The setting of a requisitioned meeting date was the subject of a court ruling in the board activism contest at First Capital Real Estate Investment Trust. **We discuss the activism dynamics involving multiple dissidents, the court ruling, and key takeaways in our section “First Capital and the Court Ruling in Setting the Requisitioned Meeting Date.”**

We saw new board activism strategies at play, including at Nickel 28 Capital Corp., where the activist successfully executed a premium-to-market tender offer, often called a mini-tender offer, to put itself in a better position to effect board change. That case also involved i) a court ruling on the dissident's advance notice submission, ii) the dissident's strategic use of a universal proxy to pivot to a “vote withhold” campaign after the court ruled in favour of the company, iii) the board's consideration of the application of the company's majority voting policy following the “defeat” of all five management nominees, and iv) the board's independent review committee decision to reject two of the resignations. **We discuss that case in our section “Nickel 28 Case Study in Tender Offers, Advance Notice Provisions, Universal Proxies, and Majority Voting Policies.”**

Finally, the management-led group's unsolicited offer for Canaccord Genuity Group Inc. crossed into board activism when a shareholder requisitioned a meeting to replace the members of the company's special committee, given its concerns that the special committee was not supportive of the bid. **We summarize these dynamics in the next section.**



BOARD FIGHTS AND BOARD AGITATIONS



Source: Laurel Hill. Compiled from Diligent Market Intelligence data, www.sedarplus.ca filings, and other press releases through September 30, 2023, subject to our determination of what we consider a Board Fight and a Board Agitation, as defined below.

HOW LAUREL HILL CLASSIFIES BOARD ACTIVISM SITUATIONS

What we consider a “Board Fight”: We define a Board Fight as a board-focused activism situation where the dissident solicits shareholders to support its dissident nominees or, in the case of a “vote withhold” or “vote against” campaign, where the dissident solicits shareholders to withhold from or vote against management nominees, provided in either case that the dissident has filed an information circular or has issued a press release containing the National Instrument 51-102 public broadcast solicitation exemption disclosure. By this measure, we include instances where management has yet to issue its information circular. We also include the rare instances where the meeting is held despite management not having issued an information circular (such as when the dissident is compelled to call a meeting following a requisition because management has not done so within the required timeframe). We also include the occasional cases where the dissident does not conduct any such solicitation, but where dissident nominees are included in the management information circular. We use the meeting date to determine the year of the fight, except that if the fight is settled or withdrawn prior to the meeting date, we use the date of the settlement or withdrawal.

What we consider a “Board Agitation”: We define a Board Agitation as a board-focused activism situation that does not meet one of the Board Fight parameters described opposite. This includes situations such as i) dissident campaigns that are settled or withdrawn prior to the dissident solicitation (i.e., prior to a dissident information circular or a press release with public broadcast solicitation exemption disclosure), ii) dissident meeting requisitions or director nominations (pursuant to advance notice provisions) that are rejected by management as invalid, with no further action, iii) dissident threats or filings that the dissident may consider board nominations, with no further action, iv) dissident announcements that the dissident intends to withhold its vote from or vote against incumbent board members, v) dissident director nominee “ambushes” at a meeting with no advance notice, and vi) shareholder proposals related to adding or removing director nominees. We use the date of the last announcement related to any such activity to determine the year of the agitation.

The lines are, of course, often blurry between board and transactional activism. Activists seeking board change have underlying strategic concerns and want to see the company make certain fundamental changes, such as the ones we see in transactional activism situations. The opposite is also true: Activists making transactional demands often also threaten board change to have their concerns addressed. We strive to assess each situation and place it in a single category based on what we view as most fitting according to the activist’s publicly stated primary objectives. However, some campaigns may ultimately be placed in more than one category. To provide one example, a dissident soliciting shareholder support for its dissident board nominees would be considered a Board Fight, but where that dissident also solicits votes against that company’s plan of arrangement, that would also be considered a Transactional Fight.

2022 Q4–2023 Q3 BOARD FIGHT AND BOARD AGITATION DETAILS

Below is a summary of the Board Fights and Board Agitations initiated or concluded in the past year (since our last report), with the targets in order by year and then alphabetically.

Target	Target Sector	Target Capitalization	Dissident(s)	Fight or Agitation?	Fights only: Dissident Solicitation	Settlement?	Fights only: Who Won?
2022 Q4 Board Fights and Board Agitations							
Asante Gold Corporation	Mining	Mid (250M–1B)	Unknown	Agitation	N/A	No	N/A
Asante Gold announced that at its annual and special meeting, six of nine management nominees and the equity incentive plan all received the affirmative votes of just over 50% of votes cast. The company commented that it appeared that a group of shareholders participated in a solicitation to vote “withhold” on certain directors and vote “against” the equity incentive plan. The group included two company directors who had endorsed all items of business in management’s information circular. The company stated that it was commencing an investigation into the solicitation efforts. There was no previous disclosure of any dissident solicitation.							
2023 Q1–Q3 Board Fights and Board Agitations							
Aimia Inc.	Consumer Products & Services	Mid (250M–1B)	Mithaq Capital SPC	Fight	Public Broadcast	No	Dissident Partial Win (1 of 8 seats)
Mithaq Capital conducted a “vote against” campaign against all eight incumbent directors at Aimia’s annual meeting due to its concerns regarding performance and strategy. The board chair was defeated, while the other directors only narrowly passed. Despite the defeat, the board chair remained a director for almost three months, as permitted under the new CBCA majority voting requirements. Since the new CBCA majority voting requirements came into effect in late 2022, Aimia was the first company to be targeted under such a “vote against” campaign. We discuss the new CBCA majority voting requirements in “Majority Voting and the First Year of the New CBCA Requirements” below.							
American Hotel Income Properties REIT LP (AHIP)	Real Estate	Small (50M–250M)	K2 Principal Fund L.P. and K2 & Associates Investment Management Inc. (K2 Group)	Agitation	N/A	Yes	N/A
In advance of its annual meeting, AHIP announced that it and its general partner, American Hotel Income Properties REIT (GP) Inc. (AHIP GP) entered into a support agreement with K2 Group, including certain standstill restrictions and voting covenants, providing K2 Group with the right to nominate one individual for election to the board of directors of AHIP GP at the meeting. K2 Group had not previously made any public announcements.							
Aurinia Pharmaceuticals Inc.	Life Sciences	Large (1B–10B)	MKT Capital Ltd., ILJIN SNT Co., Ltd.	Fight	“Exempt Solicitation” ¹	No	Dissident Full Win (2 of 3 seats)
MKT Capital called on shareholders to “vote withhold” from three management nominees and to “vote against” the advisory say–on–pay resolution at the company’s annual meeting for issues related to performance, excessive executive compensation, and other governance failures and further called on the board to pursue a strategic review leading to a sale of the company. The dissident also alerted shareholders to a filing by ILJIN SNT Co., Ltd. regarding ILJIN’s letter to the board that it was withholding its votes from seven of eight director nominees (all but the CEO). Two directors failed to receive majority support at the meeting and so resigned pursuant to the company’s majority voting policy. In addition to the directors, the say–on–pay failed. The company subsequently announced that it was undertaking a strategic review and that it had accepted the resignations, followed by an announcement of the appointment of two new directors and then, shortly after, a third new director appointed in collaboration with MKT Capital in addition to a cooperation agreement.							
BlackBerry Ltd.	Technology	Large (1B–10B)	Dorsey Gardner	Agitation	N/A	No	N/A
Following BlackBerry’s announcement of a review of its portfolio of businesses, Gardner went public with his concerns that the company was susceptible to a buyout by Fairfax Financial Holdings Limited, led by V. Prem Watsa, at an unfairly low price, given anticipation of Fairfax becoming a 16% shareholder (upon conversion of debentures) and Watsa’s role as BlackBerry’s lead director. Gardner called upon the board to remove Watsa from the compensation, nomination, and governance committee and to recommend to shareholders that they withhold their votes from his reelection at the upcoming annual and special meeting (noting that at the 2022 annual and special meeting he received just over 50% of votes in favour). Should he remain on the board after the 2023 meeting, Gardner further called on the board to i) appoint a special committee (excluding Watsa) to oversee the review of the portfolio of businesses, ii) implement a shareholder rights plan to protect minority shareholders from an unfair buyout or take–private transaction, and iii) dismiss the company’s selected financial advisor from the review given that firm’s perceived conflict in also advising Fairfax on recent transactions. At the 2023 meeting, Watsa received over 81% of votes in favour.							

¹ MKT Capital did not publish its own dissident circular, but instead relied upon an “Exempt Solicitation” pursuant to Rule 14a–6(g) of the US “Securities Exchange Act of 1934.” For statistical purposes, however, we do count this case as a “Public Broadcast” solicitation. For an explanation of “Exempt Solicitation,” refer to <https://www.investopedia.com/terms/s/sec-form-px14a6g.asp#:~:text=SEC%20Form%20PX14A6G%2C%20a%20notice,statement%20files%20SEC%20Form%20PX14A6G>

Target	Target Sector	Target Capitalization	Dissident(s)	Fight or Agitation?	Fights only: Dissident Solicitation	Settlement?	Fights only: Who Won?
Blue Moon Metals Inc.	Mining	Micro (<50M)	McClintock Group	Agitation	N/A	No	N/A
<p>The McClintock Group outlined concerns with the company's advancement of its principal asset and that the company may be preparing to sell it at a significant discount to market value, a recent dilutive equity financing and share consolidation, CEO share sales at a 50% discount to market, and other governance issues. The dissident stated that it was prepared to step in at the board level and effect board and management change. Since the company's initial rebuttal, there have been no further public developments.</p>							
Canaccord Genuity Group Inc.	Financial Services	Mid (250M–1B)	SKKY Capital Corporation Limited	Fight	Public Broadcast	No	Dissident Partial Win (1 of 2 seats)
<p>Following the launch of a management-led unsolicited offer for Canaccord, SKKY Capital announced that it had requisitioned a meeting to remove the four members of the board's special committee who were evaluating the takeover bid and install two new independent directors. The dissident objected to the strategic direction being pursued by the board, which, in its view, resulted in the special committee being unsupportive of the management bid. Canaccord pointed out that the dissident had signed an irrevocable lock-up agreement to tender its shares to the bid and to vote against any other transaction. A few days later, the company announced the resignation of five directors, including the four members of the special committee, and the appointment of one new independent director, namely one of the dissident nominees. The reconstituted special committee included two independent directors—one existing director and the new director. A week later, the company announced two new independent directors, and both were added to the special committee. The dissident later withdrew its meeting requisition. The unsolicited offer ultimately was terminated following its expiry when certain substantive conditions, including conditions related to regulatory approvals, could not be satisfied. We discuss the unsolicited offer for Canaccord in more detail in our "Unsolicited Offers" section below.</p>							
Charlotte's Web Holdings Inc.	Life Sciences	Small (50M–250M)	Jesse Stanley, Joel Stanley	Fight	Public Broadcast	No	Management Win
<p>The dissidents—founders of the company who left the board in 2021—conducted a "vote withhold" campaign against four of the six incumbent directors at the company's annual meeting, citing poor stock price performance and pointing to concerns with the company's business strategy, uncontrolled spending, poor hiring practices, excessive compensation, and execution failures. These four nominees were defeated and tendered their resignations. The board rejected the resignations, stating, "The Committee carefully considered all relevant factors and determined that there are exceptional circumstances that warrant the rejection of the offers to resign. The majority voting objectives of the Toronto Stock Exchange and the Policy are the continuous improvement of corporate governance standards through provision of a meaningful means for security holders to hold individual directors accountable. The withhold campaign launched by the activist shareholders, however, was not aligned with those objectives. The withhold campaign was instead designed to circumvent the procedures and processes in place to allow shareholders to vote based on full and complete disclosure with respect to director nominees and to make an informed decision with respect to the election of directors to the Board. Based on these principles, the Committee recommended the Board reject the offers to resign. The Board considered the Committee's recommendation along with other relevant factors, including the subject directors' significant past contributions to the Board, expertise, and integral role in stewarding the Company, and determined to reject the offers to resign."²</p>							
Citadel Income Fund (Fund)	Closed-End Funds	Micro (<50M)	Saba Capital Management, L.P.	Fight	Circular	Yes	Dissident Partial Win
<p>Saba Capital requisitioned a meeting to replace the trustee and manager of the Fund and to approve its termination and wind-up, charging "significant issues at Citadel, including abysmal trading performance resulting in an extraordinarily high discount to Net Asset Value (NAV), an extremely high level of Unit redemptions, the Fund's historically exorbitant expense ratio, and unacceptable corporate governance." Saba further expressed its frustration with a provision of the Fund's Declaration of Trust that "the threshold to requisition a meeting is 20%, which is a significant deviation from other funds—where the standard threshold is five percent (or ten percent, at most)" and further, that "any requisitioning unitholder...is NOT ALLOWED TO VOTE their Units at the meeting they requisition, as the Declaration of Trust deems a requisitioning party to be an "interested party" whose votes will not count."³ The Fund called the meeting for a date over five months later, then postponed the meeting for a further month to allow the trustee more time to complete its review of strategic alternatives. The Fund then cancelled the meeting on the basis that it believed Saba Capital was acting jointly and in concert with other unitholders without adequate disclosure and also announced that unitholders would have the opportunity to redeem up to 40% of the outstanding units at NAV, less redemption costs of 5% of NAV. Saba Capital subsequently withdrew its meeting requisition after a settlement was reached with the Fund involving the redemption offer being increased to 70% of the outstanding units, less reduced redemption costs of 4.5% of NAV, and the Fund being repositioned.</p>							
First Capital Real Estate Investment Trust	Real Estate	Large (1B–10B)	Ewing Morris and Co. Investment Partners Ltd., Sandpiper Asset Management Inc./Artis Real Estate Investment Trust (Sandpiper Group)	Fight	Circular (Sandpiper Group)	Yes	Dissident Partial Win
<p>From October 2022 through March 2023, First Capital Real Estate Investment Trust fought public battles with Ewing Morris and Co. Investment Partners Ltd. and Sandpiper Group. While the campaigns were distinct in some respects, given the overlap in their timing and the issues at hand we count this as a single Board Fight. Our characterization of who won this Board Fight—a Dissident Partial Win—is based on our overall assessment of the two campaigns together. We detail the timeline and dynamics of this complex and unique case in the section below, "First Capital and the Court Ruling in Setting the Requisitioned Meeting Date."</p>							

² Charlotte's Web Holdings, Inc., "Charlotte's Web Announces Appointment of Bill Morachnick as Chief Executive Officer," <https://www.prnewswire.com/news-releases/charlottes-web-announces-appointment-of-bill-morachnick-as-chief-executive-officer-301926083.html>

³ Saba Capital Management, L.P., "Saba Capital Management Requisitions Special Meeting of Citadel Income Fund Unitholders," <https://www.businesswire.com/news/home/20230227005342/en/Saba-Capital-Management-Requisitions-Special-Meeting-of-Citadel-Income-Fund-Unitholders>

Target	Target Sector	Target Capitalization	Dissident(s)	Fight or Agitation?	Fights only: Dissident Solicitation	Settlement?	Fights only: Who Won?
Givex Corp. (formerly known as Givex Information Technology Group Limited)	Technology	Small (50M–250M)	Inter.Act Venture Fund Inc	Fight	Public Broadcast	No	Management Win
<p>In November 2022, the dissident requisitioned a meeting to add one new director and to vote on its three proposals to address what it viewed as operational and governance concerns resulting in poor stock performance. The company determined to put the matters to a vote at its 2023 annual and special meeting and included the dissident nominee and proposals in the management information circular. The dissident matters were all defeated.</p>							
H&R Real Estate Investment Trust	Real Estate	Large (1B–10B)	K2 & Associates Investment Management Inc.	Fight	Public Broadcast	Yes	Dissident Partial Win (2 of 4 seats)
<p>The dissident announced that it had submitted to H&R notice of its intention to nominate four trustees at H&R's upcoming annual and special meeting due to its concerns about board sluggishness and inaction relating to the execution of H&R's strategic repositioning initiatives and buy-back strategy. Three weeks later, H&R announced a settlement with K2 involving the appointment of two new independent trustees.</p>							
Jaxon Mining Inc.	Mining	Micro (<50M)	R7 Capital Ventures Ltd.	Agitation	N/A	TBD	TBD
<p>In September, the dissident announced that it had proposed four nominees for election to the board due to its concerns related to underperformance and governance. There were no further public developments through September 30, the cutoff for this writing.</p>							
Mind Medicine (MindMed) Inc.	Life Sciences	Small (50M–250M)	FCM MM HOLDINGS, LLC (Dr. Scott Freeman)	Fight	Circular	No	Management Win
<p>Following the dissident's public disclosures in August and September 2022 of its letters to the board calling on the company to adopt a new strategic plan refocusing on its core drugs, cutting cash burn, urging the company to terminate its planned equity offering, and proposing that Dr. Scott Freeman (co-founder and former Chief Medical Officer) be appointed to the board, FCM conducted an unsuccessful campaign to elect four of its nominees (four of six seats) at the company's annual meeting.</p>							
Nickel 28 Capital Corp.	Mining	Small (50M–250M)	Pelham Investment Partners LP	Fight	Circular	No	Dissident Partial Win (1 of 5 seats)
<p>The activism at Nickel 28 initially involved a successful mini-tender offer by Pelham to put itself in a stronger position to effect board change. The Board Fight involved Nickel 28's rejection of Pelham's advance notice submission of its five nominees. That decision was subsequently validated by the Supreme Court of British Columbia. This dissident had utilized a universal proxy to solicit votes "for" its nominees and to "withhold" on management's nominees. Following the Court's ruling, Pelham pivoted to a straight "vote withhold" campaign. All five of the management nominees received more "withhold" than "for" votes, and all were required to resign pursuant to the company's majority voting policy. The company later announced the reconstitution of the board, namely the acceptance of three director resignations, the rejection of two resignations, and the appointment of three new directors, including a representative of Pelham. We detail this complex and unique case in "Nickel 28 Case Study in Tender Offers, Advance Notice Provisions, Universal Proxies, and Majority Voting Policies" below.</p>							
Noranda Income Fund (Fund or NIF)	Mining	Small (50M–250M)	Riverstyx Capital Management, LLC, LM Asset Fund Limited Partnership, Doug Warwick	Agitation	N/A	Yes	N/A ⁴
<p>In November 2022, Riverstyx Capital and LM Asset Fund requisitioned a meeting of the Fund's unitholders to replace four of seven incumbent trustees of the Fund's operating trust, Noranda Operating Trust, based on concerns related to their independence to Glencore Canada, owner of 25% of the Fund's units, stating, "For years, we have watched with growing dismay as Glencore's hand-picked "independent" trustees approved multiple agreements between the Fund and Glencore that we believe are inappropriately and grossly favorable to Glencore, not adequately disclosed, and have impaired the Fund's value."⁵ In December, the Fund set a March date for the requisitioned meeting, but in January announced an arrangement agreement with Glencore Canada for the acquisition of all of the Fund's units not already owned by Glencore Canada for cash of \$1.42 per unit. The dissidents responded that they did not support the proposed acquisition under its current terms and intended to vote against the deal, stating, "The transaction is an opportunistic attempt by Glencore Canada to take advantage of NIF's depressed trading price and current challenges to acquire a valuable asset at a significant discount to its inherent value."⁶ A few days prior to the February meeting to approve the arrangement agreement, the Fund announced an increase in the deal price to \$1.98 per unit and voting support agreements with the dissidents. This case spans both a Board Agitation and a Transactional Agitation and is therefore also reported in our "Transactional Activism" section below.</p>							

⁴ The requisitioned meeting was withdrawn pursuant to the voting support agreements signed in connection with the increase in the arrangement agreement purchase price. We ascribe the dissidents "success" in connection with forcing the improved deal price (refer to our Transactional Activism section below), but no win or loss in respect of the Board Agitation as it became moot.

⁵ Riverstyx Capital Management, LLC and LM Asset Fund Limited Partnership, "Noranda Income Fund Investors Requisition Special Meeting to Align Board with Unitholder Interests," <https://www.newswire.ca/news-releases/noranda-income-fund-investors-requisition-special-meeting-to-align-board-with-unitholder-interests-872534046.html>

⁶ Riverstyx Capital Management, LLC and LM Asset Fund Limited Partnership, "Noranda Income Fund Unitholders Comment on Glencore Canada Buyout Proposal," <https://www.newswire.ca/news-releases/noranda-income-fund-unitholders-comment-on-glencore-canada-buyout-proposal-807401755.html>

Target	Target Sector	Target Capitalization	Dissident(s)	Fight or Agitation?	Fights only: Dissident Solicitation	Settlement?	Fights only: Who Won?
Northwest Copper Corp.	Mining	Micro (<50M)	Grant Sawiak	Fight	Public Broadcast	No	Dissident Full Win (6 of 6 seats)
<p>The dissident nominated a full slate of six nominees to replace the entire board at the company's annual meeting, citing poor stock price performance, excessively dilutive equity financings, and an ever-changing operational philosophy. He also noted that the board seemed either unaware of or unwilling to respond to the abusive tactics of two short sellers. The company postponed the June meeting until September, citing the need for more time to adequately prepare. In response, the dissident announced that he would apply to Canadian provincial securities regulators for a cease trade order on any financings undertaken by the company prior to the meeting. In August, the company announced the retirement of the board chair, the appointment of a new director, and the further postponement of the meeting by two weeks, citing the receipt of a revised advance notice submission from the dissident disclosing for the first time that the dissident's campaign was being jointly funded by another shareholder, John Kimmel, and consequently the need for additional time for the company and for shareholders to consider these matters fully. Following the management information circular, the company disclosed that it had filed an application with the British Columbia Securities Commission (BCSC) alleging that the dissident group, which they believed further included another shareholder, Tony Ianno, failed to make required joint actor disclosures. In advance of the BCSC hearing scheduled in September, the company postponed the meeting for a further week to allow for some separation time between the anticipated decision date and the meeting date. The company reported that the BCSC dismissed the company's application. At the meeting, the dissident successfully elected all his nominees.</p>							
Primo Water Corporation	Consumer Products & Services	Large (1B–10B)	Legion Partners Asset Management, LLC	Fight	Circular	Yes	Dissident Partial Win (2 of 4 seats)
<p>Legion Partners proposed four nominees for election at Primo Water's annual meeting, citing the need to refresh a long-tenured board that had failed to hold management accountable for long-term operating performance and neglected to provide effective oversight of operational execution, profitability, and capital spending. Primo Water declared that the advance notice submission was invalid and that it would not recognize the nominees at the meeting. Legion Partners filed a lawsuit in the Ontario Superior Court of Justice asking the Court to validate its nominees and further, "seeking a declaration by the Court that the Board's actions to alter its advance notice bylaws in November were oppressive and unfairly prejudicial to Legion Partners and represent a breach of the Board's fiduciary and other duties."⁷ Following the submission by Legion Partners of supplemental information, the board determined to waive deficiencies in the advance notice submission and to accept the nominations of two of four of the dissident nominees. Pending the outcome of the Court application, Legion Partners solicited "for" its two nominees and to "withhold" on the company's four longest-tenured directors. Primo Water and Legion Partners agreed to dismiss the Court application such that all four of the dissident nominees would be able to stand for election at a rescheduled annual meeting. Soon thereafter, the parties negotiated a settlement agreement involving the immediate appointment of two of the dissident nominees and two incumbent directors not standing for re-election. The company also agreed to amend its advance notice bylaws to "(i) clarify that director questionnaires submitted by nominating shareowners will request only information required by applicable law to be disclosed to shareowners and (ii) remove the ability of the Company to request certain additional information from nominating shareowners, including as to the qualifications, experience, economic or voting interest and independence of any shareowner nominee."⁸</p>							
RIV Capital Inc.	Life Sciences	Micro (<50M)	JW Asset Management, LLC	Fight	Public Broadcast	Yes	Dissident Partial Win
<p>In December 2022, the dissident requisitioned a meeting to replace five of seven directors, taking aim at what it characterized as the board's lack of a coherent strategy or business plan, its approval of an ill-advised and overpriced acquisition, its approval of transactions with related parties, and excessive director compensation. In January, the company announced a special meeting date in June (notably, to a date over five months following the requisition). In February, the company announced a settlement agreement with the dissident concerning the dissident's separate application with the Ontario Superior Court of Justice related to the company's acquisition referenced above, which also involved the withdrawal of the requisition. We ascribe the dissident a "partial win" since its board activism arguably helped force the settlement concerning the acquisition, and the terms of the settlement appear favourable to the dissident.⁹</p>							
Search Minerals Inc.	Mining	Micro (<50M)	Joseph Lanzon	Agitation	N/A	TBD	TBD
<p>In September, the dissident threatened to requisition a meeting to replace two directors who, in his view, were responsible for leading a board that had destroyed shareholder value and stakeholder engagement, mismanaged the company's finances, and put the company's government funding and exploration licenses at risk, all underscored by board independence and other governance concerns. There were no further public developments through September 30, the cutoff for this writing.</p>							
Sernova Corp.	Life Sciences	Mid (250M–1B)	"Concerned Shareholders"	Fight	Circular	No	Dissident Full Win (2 of 2 seats)
<p>The Concerned Shareholders successfully campaigned for their two nominees at the company's annual meeting (two of eight seats) to refresh a board that it claimed had failed to prepare and execute a plan to improve the company's performance and returns, had not acted in response to stagnated progress on investor relations initiatives, and that had exhibited a lack of transparency and responsiveness to shareholders' concerns.</p>							

⁷ Legion Partners Asset Management, LLC, "Legion Partners Takes Legal Action to Protect the Rights of Primo Water Shareholders," <https://www.businesswire.com/news/home/20230322005443/en/Legion-Partners-Takes-Legal-Action-to-Protect-the-Rights-of-Primo-Water-Shareholders>

⁸ Primo Water Corporation, Form 8-K (May 3, 2023), https://www.sec.gov/ix?doc=/Archives/edgar/data/884713/000114036123022730/ny20008869x2_8k.htm

⁹ RIV Capital Inc., "RIV Capital Settles Application Initiated by JW Asset Management," <https://www.newswire.ca/news-releases/riv-capital-settles-application-initiated-by-jw-asset-management-882862061.html>

Target	Target Sector	Target Capitalization	Dissident(s)	Fight or Agitation?	Fights only: Dissident Solicitation	Settlement?	Fights only: Who Won?
Sierra Metals Inc.	Mining	Small (50M–250M)	Arias Resource Capital	Fight	Circular	No	Management Win
<p>The dissident unsuccessfully campaigned for its five nominees (which included two former company directors) at the company's annual and special meeting to significantly reconstitute a seven-seat board that, in its view, had overseen "Sierra's mounting losses, share price collapse and financial liquidity crisis."¹⁰ Notably, shareholders Cranley Investment Holdings, LLC, Inteligo Bank Ltd., and Alberto Gubbins publicly and separately announced their support for management's nominees.</p>							
Slate Office REIT (Slate)	Real Estate	Small (50M–250M)	G2S2 Capital Inc.	Fight	Public Broadcast	Yes	Dissident Partial Win (2 of 4 seats)
<p>In October 2022, G2S2 Capital requisitioned a meeting at Slate to appoint four new trustees, remove five incumbents, approve an amendment to the Declaration of Trust to reduce the external asset and property manager's board nomination rights from two to one and hold an advisory vote to internalize the asset and property management functions. The dissident cited concerns about a misalignment of interests between the asset and property manager and Slate's unitholders, that the market had lost confidence in Slate, that there was trivial ownership among the independent trustees, and that Slate's recent announcement of a convertible debenture offering would be dilutive. In November, Slate announced an annual and special meeting date in March (notably, a date over five months following the requisition), indicating that it had moved up its annual meeting date. In February, Slate announced a settlement agreement with G2S2 Capital by which two of the dissident nominees were appointed to the board and the requisition was withdrawn.</p>							
Snow Lake Resources Ltd.	Mining	Micro (<50M)	"Concerned Shareholders"	Fight	Circular	No	Dissident Full Win (6 of 6 seats)
<p>In June 2022, the Concerned Shareholders requisitioned a meeting to replace the board with their six nominees to address what they described as the company's plunging share price, governance concerns related to board independence and oversight of management, and excessive director and executive compensation. The company set an annual and special meeting date in December (notably, a date over five months following the requisition). The meeting was then postponed until January to investigate the possibility of improper dissident solicitation and disclosure, and to allow the company time to respond to a securities commission request for information related to an investigation which it believed may be connected to the dissidents. The dissidents attempted to hold the meeting as originally scheduled, but no representatives of the company attended, preventing quorum. The dissidents announced that they had postponed the meeting by one week. The company stated that both purported meetings were invalid and would not be recognized by the company. The dissidents successfully elected all their nominees at the January meeting.</p>							
Solarvest BioEnergy Inc.	Clean Technology & Renewable Energy	Micro (<50M)	Garth Greenham, LMC Communications Inc.	Fight	Public Broadcast	TBD	TBD
<p>In August, the dissidents requisitioned a meeting to replace all four directors, charging that the board and management "have failed to be responsive to shareholder expectations and has no discernible accomplishments in creating shareholder value, operational advancement or financing."¹¹ The company announced a meeting date in November.</p>							
Tenet Fintech Group Inc.	Technology	Micro (<50M)	"Concerned Shareholders"	Fight	Circular	No	Dissident Full Win (3 of 3 seats)
<p>The Concerned Shareholders proposed three nominees, including the two founders of the company (one of whom was the recently terminated CEO, the other a recent director not renominated by management), to replace all three incumbent directors at the company's annual meeting due to their distress and anger over the CEO's termination, which further resulted in cancelled financing and other adverse impacts on the business. Immediately before the meeting, the incumbent directors and the CEO resigned. The dissident nominees were elected at the meeting and reinstalled the former CEO.</p>							
Thunderbird Entertainment Group Inc.	Communications & Media	Small (50M–250M)	Voss Capital, LLC	Fight	Circular	Yes	Dissident Partial Win (3 of 6 seats)
<p>In November 2022, Voss Capital announced that it had submitted notice to Thunderbird of its intention to name up to six nominees at the company's annual and special meeting scheduled in December, based on its disappointment with the board's strategic direction, lack of urgency to create value, and unresponsiveness to shareholder concerns. It stated that it looked forward to the reconstituted board undertaking a strategic review. The company postponed the meeting by three months, citing the need for additional time to consider the dissident's announcement properly. In January, Thunderbird announced a settlement with Voss Capital involving the immediate appointment of two of its nominees to the board (replacing two incumbent directors), the company's nomination of a third Voss Capital nominee of the company's choice at the upcoming meeting, and the commencement of a strategic review.</p>							
WesCan Energy Corp.	Oil & Gas	Micro (<50M)	Leo Berezan	Agitation	N/A	Yes	N/A
<p>The dissident, himself an incumbent director, proposed four nominees at the company's upcoming annual and special meeting, citing concerns with company underperformance and governance. A week later, the company announced a settlement with the dissident involving the nomination of three new independent directors at the meeting.</p>							

Source: Laurel Hill. Compiled from Diligent Market Intelligence data, www.sedarplus.ca filings, and other press releases through September 30, 2023.

¹⁰ Arias Resource Capital, "Arias Resource Capital Proposes Five Nominees for Sierra Metals Board," <https://www.globenewswire.com/news-release/2023/05/02/2658728/0/en/Arias-Resource-Capital-Proposes-Five-Nominees-for-Sierra-Metals-Board.html>

¹¹ Garth Greenham, "Solarvest concerned shareholders requisition AGM," <https://www.stockwatch.com/News/Item/Z-CISVS-3440900/C/SVS>

MAJORITY VOTING AND THE FIRST YEAR OF THE NEW CBCA REQUIREMENTS

The new CBCA majority voting requirements, which took effect August 31, 2022, specify that in the case of an uncontested election, shareholders of “distributing” corporations (i.e., publicly traded companies) be permitted to vote “for” or “against” individual director nominees rather than “for” or “withhold.” If a nominee fails to receive more “for” than “against” votes, such a nominee will not be elected. However, an incumbent “failed” nominee will be permitted to remain a director until the earlier of i) the 90th day after the meeting date or ii) the date on which their successor is appointed or elected. In addition, such a failed nominee may continue to serve on the board to satisfy CBCA Canadian residency or independence requirements.

Since 2014, TSX-listed companies have been required to adopt a TSX-compliant majority voting policy. In the case of an uncontested election, if the number of “withhold” votes exceeds the number of “for” votes for any nominee, such “failed” nominee must immediately submit their resignation. The board then has 90 days to determine whether or not to accept the resignation, which they should allow absent exceptional circumstances. While the new CBCA requirements are not a material departure from the existing TSX majority voting framework, they can be a highly effective instrument to force out unwanted directors since, unlike the TSX framework, failed nominees are not elected, and there is no opportunity to reject resignations. For CBCA-incorporated, non-TSX companies who have not previously been subject to any majority voting policy requirements, the new CBCA requirements create fresh risks altogether.

Since the new requirements took effect, there was only one “vote against” campaign at a CBCA company, Aimia Inc., as we summarized in our previous section. For additional context, in the last year, there were four “vote withhold” campaigns at non-CBCA companies: Asante Gold Corporation¹², Aurinia Pharmaceuticals Inc., Charlotte's Web Holdings Inc., and Nickel 28 Capital Corp.¹³ While these numbers are far from compelling evidence of a surge in “vote against” or “vote withhold” campaigns, these types of campaigns are an option for activists at a larger pool of companies now that CBCA non-TSX issuers are subject to majority voting.

Absent a public opposition campaign, shareholders can, of course, still “quietly” deliver negative outcomes and put directors at risk of failing. Looking at trends for director results at uncontested meetings, there has been an uptick over the last few years in the numbers of failed and 50–60% support levels for management nominees and the numbers of corresponding companies, although there was a drop-off in numbers from 2022 to 2023.



FAILED AND 50–60% SUPPORT LEVELS FOR NOMINEES AT TSX UNCONTESTED MEETINGS

	Failed <50% Support		50–60% Support	
	# Nominees	# Companies	# Nominees	# Companies
2020	1	1	13	6
2021	2	2	18	14
2022	7	3	41	18
2023	3	3	20	16

Source: Laurel Hill. Compiled from ISS Corporate Solutions data at uncontested TSX company meetings held from January 1 to August 15 each year.

In our *2022 Trends in Corporate Governance Report*, we noted that CBCA issuers should be aware that the requirement for a “for” or “against” option regarding the election of directors conflicts with the requirement set out in Section 9.4 (6) of National Instrument 51–102 (51–102) Continuous Disclosure Obligations, which specifies that a form of proxy must provide a “for” or “withhold” option. Further, while 51–102 provides an exemption from its requirements related to proxies and information circulars where the issuer complies with the requirements set out in its governing corporate legislation, the exemption is only available where such other requirements are “substantially similar” to its requirements. As an update, in January the Canadian Securities Administrators published an exemption for CBCA issuers from the 51–102 form of proxy requirement, stating, “The exemption aims to clarify applicable rules by exempting CBCA-incorporated reporting issuers from the requirement under securities legislation to specify that securities be “voted” or “withheld” from voting in the form of proxy for the uncontested election of directors where these issuers comply with the applicable requirements under the CBCA and associated regulations.”¹⁴

¹² As summarized in the section above, the vote withhold campaign at Asante Gold Corporation appears to have been a private solicitation.

¹³ As summarized in the section above, the dissident at Nickel 28 Capital Corp. initially solicited for its own nominees but later pivoted to a vote withhold campaign.

¹⁴ Canadian Securities Administrators, “The CSA Exempts CBCA-Incorporated Reporting Issuers from Director Election Form of Proxy Requirement,” <https://www.securities-administrators.ca/news/the-csa-exempts-cbca-incorporated-reporting-issuers-from-director-election-form-of-proxy-requirement/>

WHAT YOU NEED TO KNOW:

TSX–mandated majority voting requirements, long–championed and hard–fought by investors, give shareholders the ability to force out unwanted directors without undertaking a board contest while leaving boards with some room to reject the resignations of failed directors in exceptional circumstances. The new CBCA requirements take that a step further, effectively removing that board discretion. Dissident shareholder “vote against” and “vote withhold” campaigns can, of course, catch unsuspecting boards by surprise, yet in the last year, we have seen only one and three such campaigns, respectively. Yes, we will likely see a few more of these campaigns each year, particularly at micro– and small–caps, where director relationships may be more personal. These may be a good fit for some activists and some situations, as they can be undertaken using the low–cost public broadcast solicitation exemption. In our experience, however, most activists prefer to run their own nominees, whether a full or partial slate, to provide board continuity and to exert greater influence in addressing the activists’ concerns.

FIRST CAPITAL AND THE COURT RULING IN SETTING THE REQUISITIONED MEETING DATE

We briefly summarized First Capital Real Estate Investment Trust’s (First Capital or REIT) public battles with both Ewing Morris & Co. Investment Partners Ltd. (Ewing Morris) and Sandpiper Group further above. Here, we detail the timeline and dynamics of this complex and unique case and the Ontario Superior Court of Justice ruling regarding the setting of the requisitioned meeting date.

- In October 2022, Ewing Morris went public with its concerns at First Capital about underperformance, excessive executive compensation, and what it described as an incoherent strategy relating to capital allocation, debt reduction, and distributions. It sought the removal of the board chair and the appointment of two new trustees.
- First Capital pointed out Ewing Morris’ failure to disclose its partnership with Dori Segal, the REIT’s former trustee and CEO, who it said had departed the board in 2021 at the request of the trustees and had since attempted to negotiate a return to the REIT, and that REIT had brought the issues surrounding this lack of disclosure to the Ontario Securities Commission.
- In December, Sandpiper Group announced that they had requisitioned a unitholder meeting for the replacement of four trustees due to what it described as First Capital’s underperformance, misguided plan, flawed portfolio disposition strategies, combative approach to unitholders,

lack of board and management accountability for underperformance, and excessive executive pay relative to performance.

- First Capital set an annual and special meeting date in May, over five months following the requisition, noting that it had moved up its traditional June date for its annual meeting.
- In January, Sandpiper Group applied to the Ontario Superior Court of Justice for an order to move up the meeting date to March 1 or as soon thereafter.
- In February, the Court ruled for Sandpiper Group and First Capital to move the meeting date up to March 28.
- First Capital announced that it had implemented board refreshment, with the board chair stepping down following his planned retirement and the appointment of a new independent trustee.
- Two weeks later, the REIT announced a settlement with Ewing Morris and Vision Capital Corporation (Vision had not previously made any public demands or statements) involving the appointment of an additional independent trustee.
- The next day, Sandpiper Group announced that the REIT had made a settlement offer involving adding one of its non–Sandpiper trustees, but no removals. Sandpiper Group rejected what it characterized as a cosmetic offer that would effectively preserve the status quo.
- In March, First Capital announced that it had reached a settlement with Sandpiper Group that provided for the withdrawal of the meeting requisition but no board changes.

Gowling WLG recently summarized:

Canadian corporate statutes establish a regime for shareholders to requisition a meeting of shareholders. The provisions of these statutes were reflected in First Capital's declaration of trust, which governed the rights of First Capital's unitholders and the duties of the Board. These statutes require boards to call a requisitioned meeting within 21 days of the requisition date. However, with the exception of the Business Corporations Act (British Columbia), pursuant to which directors must hold a requisitioned meeting not more than four months after the date of the requisition, other provincial and federal statutes do not prescribe the time periods within which a board must hold the meeting once it has been requisitioned. Neither did First Capital's declaration of trust.¹⁵

The judge in this case further outlined that a board must hold a requisitioned meeting expeditiously and within a reasonable timeframe and that, while the board has discretion in scheduling the meeting according to its business judgment, the role of the court is to determine whether the board applied appropriate prudence and diligence in arriving at its decision. More specifically, the court may assess the process the board followed and the factors it considered.

¹⁵ Gowling WLG Article, “ONTARIO COURT PROVIDES GUIDANCE TO BOARDS CALLING REQUISITIONED MEETINGS,” <https://gowlingwlg.com/en/insights-resources/articles/2023/ontario-court-guidance-to-requisitioned-meetings/>

It is the Board's responsibility to determine when to hold a requisitioned meeting, but it must be held expeditiously and within a reasonable time. In these circumstances, "expeditiously" does not mean at the soonest available date; it means "without unreasonable or unjustifiable delays".... The scheduling of a requisitioned meeting is "left to the business judgment of the directors to be determined by them acting honestly, in good faith and with a view to the best interests of the corporation".... Where the business judgment of the Board is at issue, the role of the court is to determine "whether the board applied the appropriate degree of prudence and diligence in coming to its decision on the timing of the special meeting".... In determining whether the Board has properly exercised its business judgment, the court can consider the process of the Board's decision making as well as the grounds upon which the decision was made and the factors taken into consideration.... Courts must defer to the business judgment of the Board provided that its decision falls "within a range of reasonableness" and will not interfere with the Board's decision unless the Board is shown to have acted for an improper purpose or unreasonably.... "[e]verything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way."¹⁶

In terms of the Board's process, the judge examined i) that the board held only one meeting to discuss the requisition and decide the meeting date, ii) that the board meeting lasted only two hours and contained other agenda items, and iii) that the four trustees targeted by Sandpiper Group actively participated in the requisitioned meeting date discussions and decision, calling into question their independence and objectivity on the matter, and concluded: "A relatively short single meeting at which the potential for a conflict does not appear to have been acknowledged or considered does not reflect a robust, independent and objective process of deliberation."¹⁷

In terms of the Board's justifications, the judge examined i) the costs and distractions of holding two meetings, ii) the desire to give First Capital's "Optimization Plan" more time to unfold and, more specifically, for another quarter of financial results to be available, and iii) that unitholders should have more time to consider the issues to be addressed at the requisitioned meeting, and concluded that none these reasons were particularly compelling when scrutinized.¹⁸

In closing, "Having carefully scrutinized the Board's decision making process and the range of possible reasonable outcomes, I find that the Board did not call conjunction with an early AGM, resulted in an "unreasonable or unjustifiable" delay."¹⁹

WHAT YOU NEED TO KNOW:

The fact that a requisitioned meeting is set for a date over five months after the requisition may not in and of itself be problematic. This year alone, requisitioned meetings at Citadel Income Fund, RIV Capital Inc., Slate Office REIT, and Snow Lake Resources Ltd. were all set for over five months from the requisition dates. To be clear, none of those meeting dates were subjected to court scrutiny. While the judge in the Sandpiper case observed that a delay of five months appeared to be an unreasonably long time, his focus was on the particular circumstances.²⁰ What process did the board follow? What were the board's reasons? What factors did it consider? Was the board prudent and diligent in arriving at its decision? When these types of questions can withstand scrutiny, courts are likely to defer to the board's business judgment.

Gowling WLG's takeaway:

Sandpiper is a timely reminder to all boards of the process to follow and factors to consider when setting the date for a requisitioned meeting. A truly considered process may require more than a single meeting of the board. And during those meetings, any potential conflicts of interest and prejudice to requisitioning holders should be addressed. In some cases, this might require creating a special committee or using in camera sessions where individuals with potential conflicts of interest recuse themselves from participating in discussions and voting on resolutions to be passed at the board meeting. In addition, the entire process and factors considered should be properly documented in the minutes of the meeting(s) of the board (and special committee, if applicable).²¹

¹⁶ Sandpiper–First Capital Decision, "Superior Court of Justice – Ontario, CITATION: Sandpiper Real Estate Fund 4 Limited Partnership v. First Capital Real Estate Investment Trust, 2023 ONSC 794," paragraphs 14–19 <https://www.osler.com/osler/media/Osler/reports/mergers-acquisitions/Sandpiper-Real-Estate-Fund-et-al-v-First-Capital-Real-Estate-Investment-Trust-et-al-Endorsement-Jan-27-2023.pdf>

¹⁷ Sandpiper–First Capital Decision, paragraph 57, <https://www.osler.com/osler/media/Osler/reports/mergers-acquisitions/Sandpiper-Real-Estate-Fund-et-al-v-First-Capital-Real-Estate-Investment-Trust-et-al-Endorsement-Jan-27-2023.pdf>

¹⁸ Sandpiper–First Capital Decision, paragraphs 63–64, <https://www.osler.com/osler/media/Osler/reports/mergers-acquisitions/Sandpiper-Real-Estate-Fund-et-al-v-First-Capital-Real-Estate-Investment-Trust-et-al-Endorsement-Jan-27-2023.pdf>

¹⁹ Sandpiper–First Capital Decision, paragraph 80, <https://www.osler.com/osler/media/Osler/reports/mergers-acquisitions/Sandpiper-Real-Estate-Fund-et-al-v-First-Capital-Real-Estate-Investment-Trust-et-al-Endorsement-Jan-27-2023.pdf>

²⁰ Sandpiper–First Capital Decision, paragraph 63, <https://www.osler.com/osler/media/Osler/reports/mergers-acquisitions/Sandpiper-Real-Estate-Fund-et-al-v-First-Capital-Real-Estate-Investment-Trust-et-al-Endorsement-Jan-27-2023.pdf>

²¹ Gowling WLG Article, "ONTARIO COURT PROVIDES GUIDANCE," <https://gowlingwlg.com/en/insights-resources/articles/2023/ontario-court-guidance-to-requisitioned-meetings/>

NICKEL 28 CASE STUDY IN TENDER OFFERS, ADVANCE NOTICE PROVISIONS, UNIVERSAL PROXIES, AND MAJORITY VOTING POLICIES

This year's Board Fight at Nickel 28 Capital Corp. (Nickel 28) by dissident shareholder Pelham Investment Partners LP (Pelham) is a valuable case study in board contest strategies and tactics employed by both activists and management. We summarize the timeline, dynamics, and key takeaways below.

In March, following Pelham's failed attempts at constructive engagement with the Nickel 28 board regarding Pelham's board independence and excessive executive compensation concerns, Pelham commenced a mini-tender offer (which was not a National Instrument 62-104 take-over bid) to acquire shares of Nickel 28 at a premium to market.

Pelham explained:

Shareholders Need a Voice. Pelham LP believes that, in the absence of a motivated large shareholder, it seems unlikely that the Company's governance will improve and, over time, management's ownership of the Company will continue to creep. Pelham LP is prepared to take an active role in ensuring the future success of the Company, for the benefit of all shareholders.²²

The company recommended that shareholders not tender to the offer, characterizing it as "Significantly Undervalued, Highly Conditional and Predatory"²³ and adopted a shareholder rights plan to protect against creeping take-over bids.

In a clear attempt to push through the annual meeting and to disenfranchise Pelham from voting any shares that it may acquire under the offer, one day prior to the April expiry of the offer, Nickel 28 filed a notice of meeting and record date for a June 2023 annual and special meeting of shareholders, aggressively moving up its annual meeting by two months from the date of its 2022 annual meeting, and setting the record date as the expiry date of the offer. While Pelham's offer contemplated this entrenchment tactic by including a proxy in favour of Pelham if the company set a meeting record date prior to the expiry of the offer, this would, in theory, complicate Pelham's ability to vote the tendered shares as Pelham would have to arrange with each depositing shareholder to manually grant it a proxy for the tendered shares.

Pelham successfully purchased all shares tendered to the offer. The managing member of the general partner of Pelham commented:

I would like to thank the shareholders who tendered shares. As well, we acknowledge the numerous unsolicited expressions of frustration with Company management that we have received. There is no doubt in my mind that the current board and management have lost shareholder support, and any mandate to undertake business on behalf of shareholders. We very much hope for a change in course on the board's part and remain open to dialogue should they seek to re-establish shareholder support and, as the Company's single largest shareholder, we call on them to do so.²⁴

In May, Pelham submitted notice to the company of its intention to nominate a full slate of five directors at the company's annual and special meeting. The company, however, announced that the proposed chairman of the meeting determined that Pelham's advance notice submission was invalid based on two defects, namely that the notice did not disclose proxies from other shareholders obtained pursuant to the tender offer and that it did not disclose that one of Pelham's nominees was the subject of management cease trade orders at a company on which the nominee served as a director. The chairman declared that the nominations were invalid and that any votes cast for such nominees would not be effective. The chairman further instructed the commencement of a proceeding in the Supreme Court of British Columbia seeking a declaration confirming the decisions made by him in respect of the advance notice and the shareholder meeting.

Despite the chairman's decision to invalidate Pelham's nominees, Pelham filed its information circular and a universal proxy (Nickel 28 did not use a universal proxy) and campaigned for shareholders to vote "for" the dissident nominees and to "withhold" from the management nominees, anticipating a Court ruling validating the dissident nominees. The Court, however, confirmed the chairman's decisions. Pelham continued to use its universal proxy but pivoted to a straight "vote withhold" campaign against the management nominees.

Nickel 28 announced that at the meeting, all management nominees received more "withhold" votes than "for" votes and that the board would consider the application of the company's majority voting policy. Several days later, the company announced that the board determined that the principles underlying the majority voting policy would apply, and each of the directors resigned. In addition, the board appointed a new independent director who would also serve as the sole member of an independent review committee (IRC) to determine whether the resignations should be accepted.

²² Pelham Investment Partners LP, "Pelham Investment Partners LP Announces Premium All-Cash Tender Offer to Acquire Common Shares of Nickel 28 Capital Corp. and Addresses Misleading Statements by Management," <https://www.newswire.ca/news-releases/pelham-investment-partners-lp-announces-premium-all-cash-tender-offer-to-acquire-common-shares-of-nickel-28-capital-corp-and-addresses-misleading-statements-by-management-817667152.html>

²³ Nickel 28 Capital Corp., "Nickel 28 Cautions Shareholders to Take No Action in Response to Significantly Undervalued, Highly Conditional and Predatory Mini-tender Offer," <https://www.businesswire.com/news/home/20230322005327/en/Nickel-28-Cautions-Shareholders-to-Take-No-Action-in-Response-to-Significantly-Undervalued-Highly-Conditional-and-Predatory-Mini-tender-Offer>

²⁴ Pelham Investment Partners LP, "Pelham Investment Partners LP Announces Completion of its Tender Offer for Shares of Nickel 28 Capital Corp. and Expresses Disappointment with Management's Actions," <https://www.pnewswire.com/news-releases/pelham-investment-partners-lp-announces-completion-of-its-tender-offer-for-shares-of-nickel-28-capital-corp-and-expresses-disappointment-with-managements-actions-301808174.html>

Two months later, the company announced the reconstitution of the board, namely the acceptance of three director resignations, the rejection of two resignations, and the appointment of three new directors, including a representative of Pelham.

In determining to reject two of the resignations, “The IRC concluded that exceptional circumstances justified not accepting these resignations. Such circumstances included those surrounding the AGM, including its contested nature and the issuance of the previously disclosed decision of the Supreme Court of British Columbia shortly before the AGM, as well as the importance in the context of the Company’s business and affairs of maintaining appropriate Board continuity including to safeguard the Company’s key relationships.”²⁵

Every contested board situation requires a customized approach, including an analysis of the pros and cons of using a universal proxy. Yet this case demonstrates some compelling reasons for its use, particularly for dissidents. Pelham’s universal proxy allowed it to communicate that it was aligned with governance best practices—and that the company was not—which likely resonated with shareholders since governance deficiencies were central

to Pelham’s narrative. It also allowed Pelham to pivot easily to a “vote withhold” campaign following the Court’s ruling, and when Pelham ultimately deposited its proxies with the tabulator, all “withhold” votes from management’s nominees (whether before or after the Court’s ruling) were accepted. Finally, there was a split-vote recommendation from one of the major proxy advisory firms. Since only Pelham had a universal proxy, the firm in question recommended a vote using Pelham’s proxy, providing it with a strategic information advantage.

Finally, as discussed in detail above, “vote withhold” campaigns that seek to leverage majority voting policies can be a valuable tool for shareholders to express their discontent with management’s nominees and defeated directors’ resignations are generally accepted. However, this case demonstrates how non-CBCA boards can ultimately use discretion to reject resignations based on exceptional circumstances. There was another such example this year at Charlotte’s Web Holdings Inc. (detailed above), in which the resignations of four defeated director nominees were also rejected.

WHAT YOU NEED TO KNOW:

Mini-tender offers, such as the one employed by Pelham, are a new board activism strategy. In the past, these types of premium-to-market tender offers were used by activists to create a larger vote-blocking position in opposition to a board-approved transaction. We believe this is the first time that an activist seeking board change at a Canadian company has undertaken a mini-tender offer to bolster its ownership and chances of success in advance of a potential board contest. An activist seeking to increase its stake in a target company in advance of a fight may prefer to acquire shares more quietly on the open market and avoid paying a premium, and also to avoid a public attack by the target (as was the case here), yet these offers can help an activist to communicate its message to the market in advance of a fight and can generate inbound messages of support from other shareholders, laying the groundwork for a successful fight. Of course, there are potential technical challenges surrounding proxies for shares acquired under an offer (as was the case here), but these can be managed.

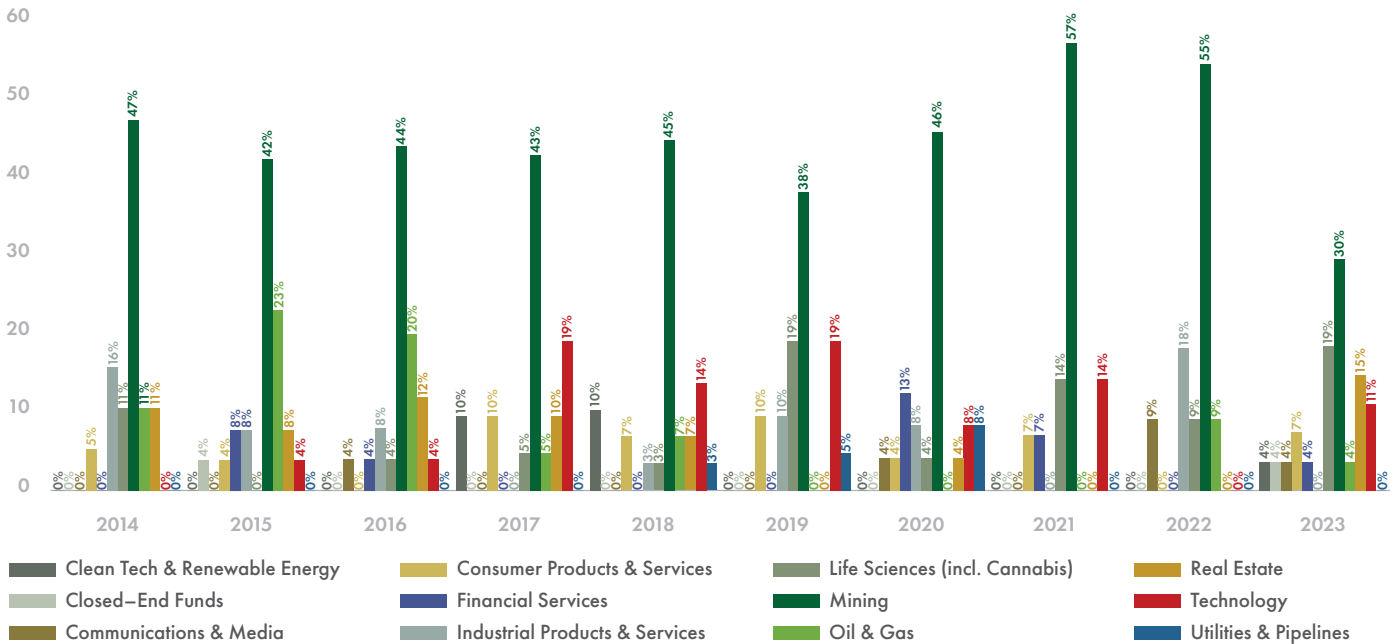
TARGET SECTORS

The **real estate** sector has been the standout target sector for board activism this year, as measured by year-over-year percentage increase, accounting for 15% (4 of 27) of all target issuers, the first time the sector has experienced public activism since 2020. The **technology** sector accounted for 11% (3 of 27) of all target issuers, up from 0% in 2022, while the **life sciences (including cannabis)** sector accounted for 19% (5 of 27) of target issuers, up from 9% (1 of 11) in 2022. Conversely, the **mining** sector, which over the last ten years has, on average, accounted for 45% of board activism targets, this year dropped from 55% (6 of 11) targets in 2022 to 30% (8 of 27). The **industrial products & services** sector also dropped off this year to 0% from 18% (2 of 11) of targets in 2022.



²⁵ Nickel 28 Capital Corp., “Nickel 28 Announces Reconstitution of Board of Directors,” [https://www.businesswire.com/news/home/20230814287835/en/Nickel-28-Announces-Reconstitution-of-Board-of-Directors#:~:text=\(%E2%80%9CNickel%2028%E2%80%9D%20or%20the,other%20things%2C%20considering%20whether%20the](https://www.businesswire.com/news/home/20230814287835/en/Nickel-28-Announces-Reconstitution-of-Board-of-Directors#:~:text=(%E2%80%9CNickel%2028%E2%80%9D%20or%20the,other%20things%2C%20considering%20whether%20the)

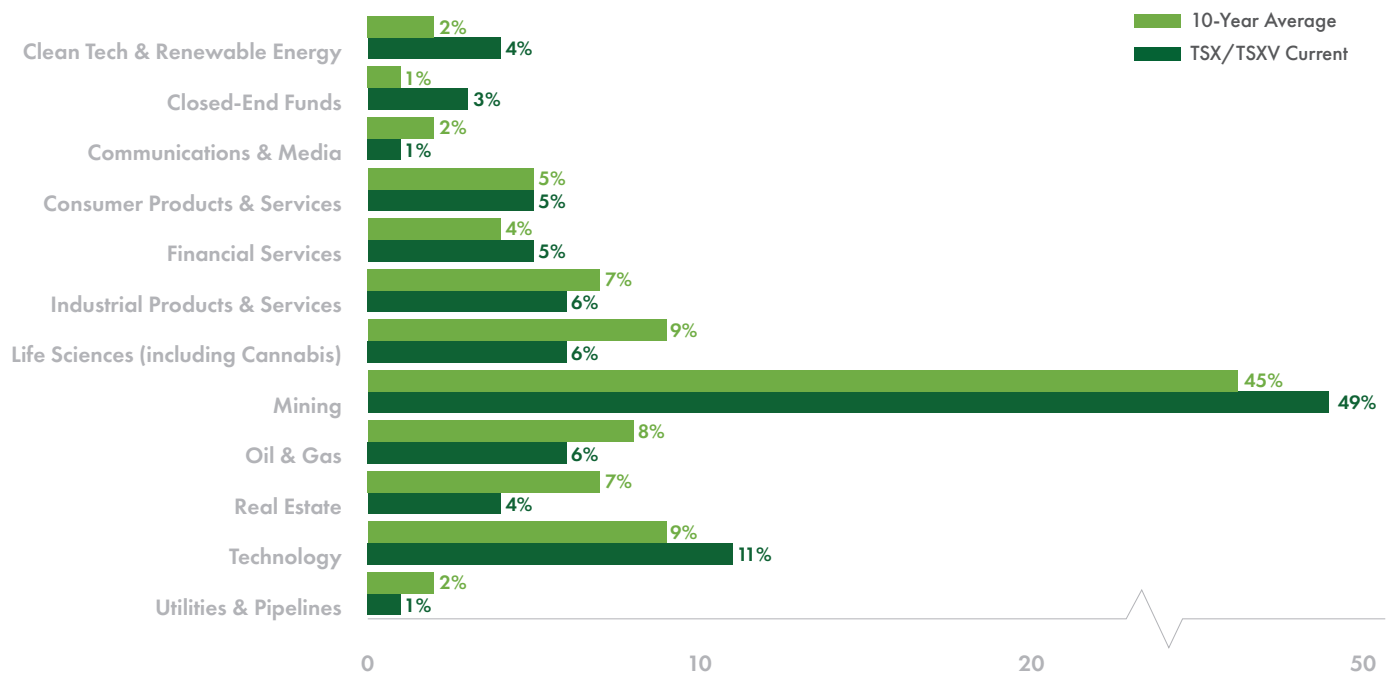
TARGET SECTORS



Source: Laurel Hill. Compiled from Diligent Market Intelligence data, www.sedarplus.ca filings, and other press releases through September 23, 2023 (for all Board Fights and Board Agitations). Sectors are reported by the TSX/TSXV for companies listed on those exchanges or TSX/TSXV equivalents (as determined by us) for companies listed on other exchanges.

Largely influenced by macroeconomic developments, there will always be ebbs and flows in target sectors from one year to the next. From a longer-term perspective, however, the distribution of target sectors for board activism is, in fact, closely correlated with the composition of Canada’s public companies, as represented below. **The bottom line: No sector should consider itself immune from activism.**

TARGET SECTORS' 10-YEAR AVERAGE VS. TSX/TSXV CURRENT SECTOR REPRESENTATION

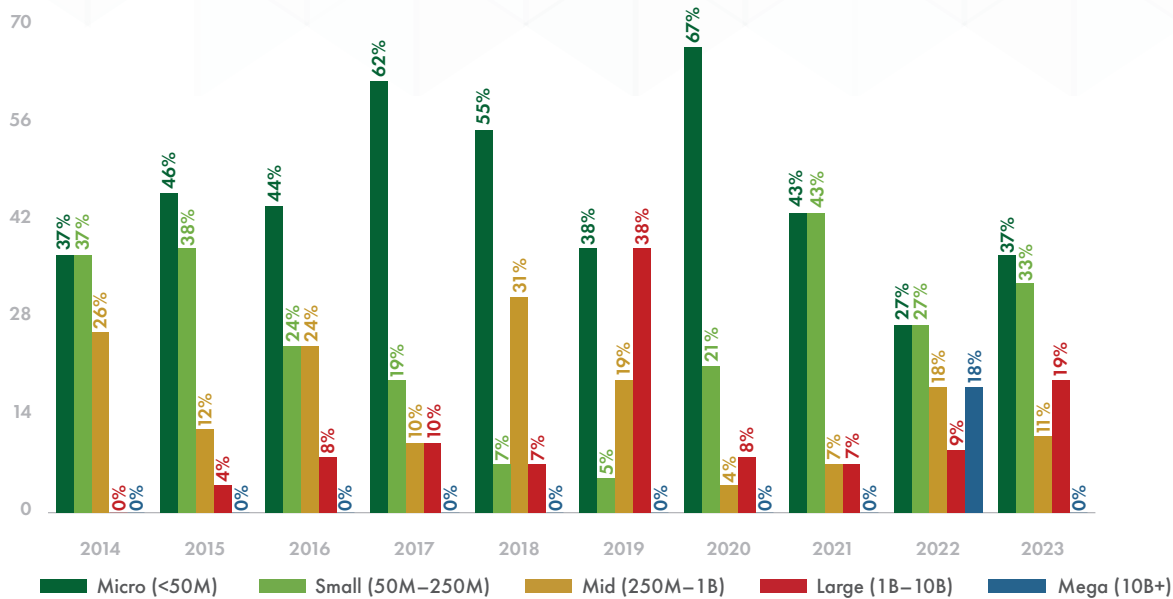


Source: Laurel Hill. Average sector representation is based on the 10-year average of the data in the “Target Sectors” chart above. TSX/TSXV sector representation is based on current TSX/TSXV data.²⁶

²⁶ TSX/TSXV, August 2023 “The MiG Report” (adjusted to exclude CPCs, SPACs, and ETFs), <https://www.tsx.com/resource/en/3087/mi-g-report-august-2023-en.pdf>

TARGET CAPITALIZATIONS

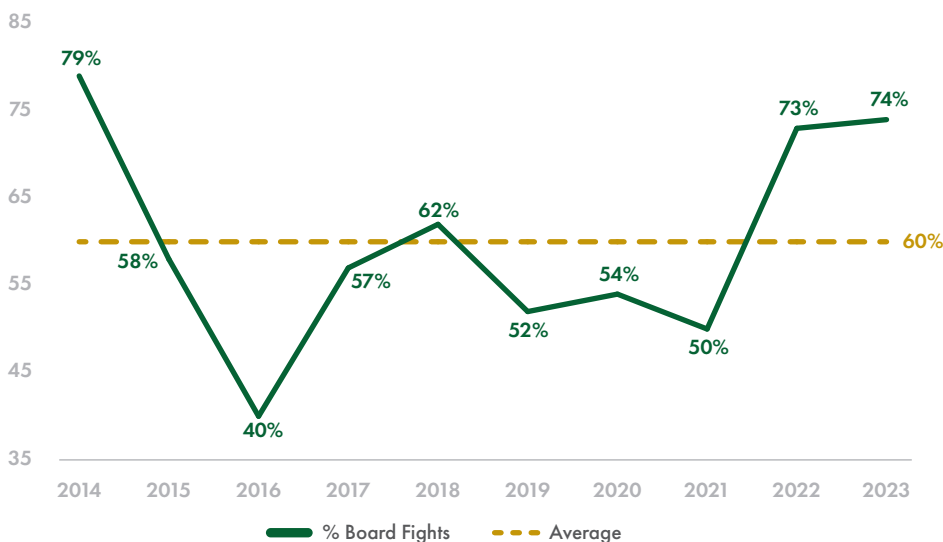
On a year-over-year basis, micro- and small-caps combined moved up from 54% (6 of 11) of targets in 2022 to 70% (19 of 27) of targets in 2023. Notably, mega-caps were not targeted this year after accounting for 18% (2 of 11) of targets last year. For greater context, over the last ten years, on average, in 72% of cases, most board activism targets were micro- and small-cap companies, aligning with the fact that most of Canada's public companies are listed on venture exchanges such as the TSXV rather than the TSX. According to TSX/TSXV data, TSXV companies account for approximately 64% of all TSX and TSXV companies combined.²⁷



Source: Laurel Hill. Compiled from Diligent Market Intelligence data, www.sedarplus.ca filings, and other press releases through September 30, 2023 (for all Board Fights and Board Agitations), subject to our determination of the capitalization group per the capitalization reported on the primary stock exchange.

FIGHT RATES

Fight rates are the percentages of Board Fights relative to the total number of board activism situations, calculated by dividing the number of Board Fights each year by the total number of Board Fights and Board Agitations that year. **In the last two years, Board Fights have accounted for a noteworthy 73% and 74% of all board activism situations, while on average, over the last ten years, they have accounted for 60% of all cases.** For the second straight year, activists have clearly shown confidence in their cases for change, along with a willingness to take their concerns to battle, and the results (as discussed in Dissident Win Rates below) have supported their conviction.



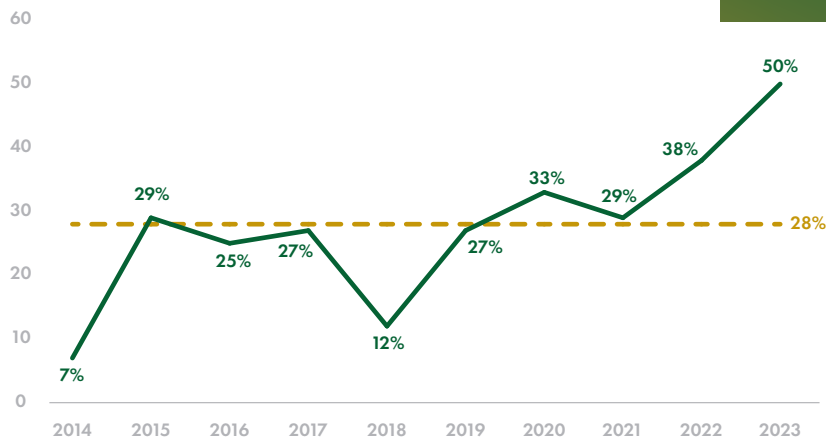
Source: Laurel Hill. Compiled from Diligent Market Intelligence data, www.sedarplus.ca filings, and other press releases through September 30, 2023, subject first to our determination of what we consider a Board Fight and what we consider a Board Agitation, both as defined above.

²⁷ TSX/TSXV, August 2023 "The MiG Report" (adjusted to exclude CPCs, SPACs, and ETFs), <https://www.tsx.com/resource/en/3087/mi-g-report-august-2023-en.pdf>

PUBLIC BROADCAST SOLICITATION RATES

Public broadcast solicitation rates are the percentages of Board Fights in which dissidents solicit solely pursuant to the National Instrument 51-102 public broadcast solicitation exemption rather than by proxy circular solicitation.

Public broadcast solicitation rates have generally trended upward in recent years, reaching a ten-year high of 50% in 2023. We fully expect this trend to continue. On average, over the last ten years, 28% of all Board Fights have used public broadcast only. Public broadcast solicitation is a low-cost, high-impact strategy, particularly in the context of “vote against” and “vote withhold” campaigns, which are on the rise. It also gives dissident shareholders a strategic timing advantage over management, as management cannot conduct solicitation prior to sending its management information circular.



WHAT WE CONSIDER A “PUBLIC BROADCAST SOLICITATION”:

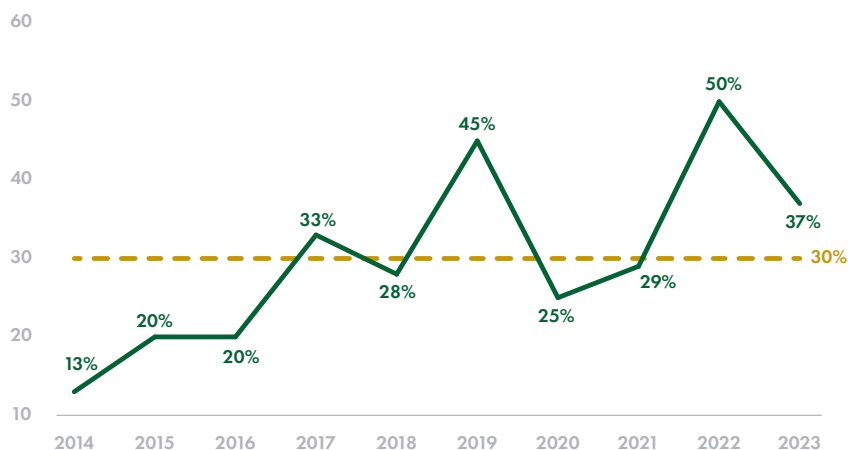
The following scenarios count as public broadcast solicitation: i) concluded cases prior to the management proxy circular where the dissident solicited only by public broadcast and the matter was settled or withdrawn, ii) concluded cases following the management proxy circular where the dissident solicited solely by public broadcast through to earlier of the matter being settled or withdrawn or the meeting date, and iii) outstanding cases where the dissident has so far only solicited by public broadcast and management has yet to issue its proxy circular. We do not count as public broadcast solicitation cases where the dissident initially conducted a public broadcast solicitation and later issued an information circular—we count these as proxy circular solicitations.

— % Public Broadcast
 - - - Average

Source: Laurel Hill. Compiled from Diligent Market Intelligence data, www.sedarplus.ca filings, and other press releases through September 30, 2023, subject first to our determination of what we consider a Board Fight and then what we consider a Public Broadcast Solicitation, both as defined above.

SETTLEMENT RATES

It is not uncommon for both sides to want to arrive at a settlement to avoid the costs, distractions, and reputational risks of a campaign that goes all the way to the meeting date. Settlement rates have trended upward in recent years, reaching a ten-year high of 50% in 2022, but dropped to 37% this year. Nevertheless, the average settlement rate of 30% over the last ten years indicates a healthy propensity to settle.



WHAT WE CONSIDER A “SETTLEMENT”:

We define a settlement as a Board Fight outcome whereby management announces a settlement (regardless of which side it favours, if any) with the dissident after a Board Fight has commenced and prior to the meeting date (if set).

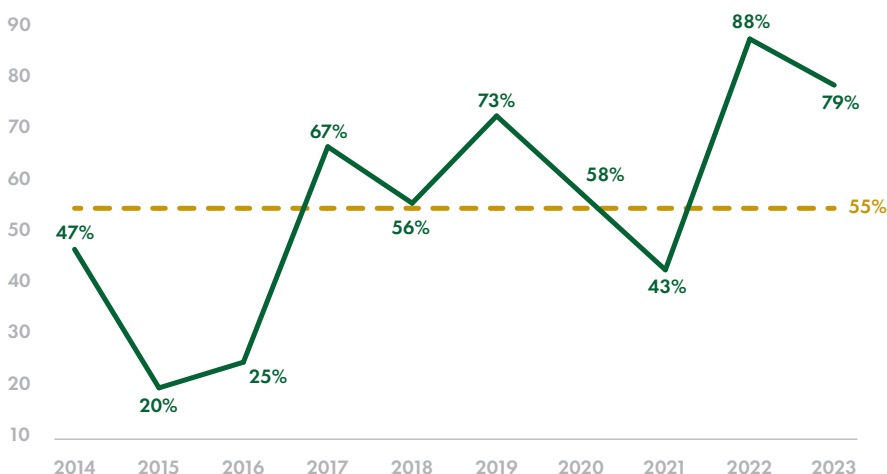
— % Settled
 - - - Average

Source: Laurel Hill. Compiled from Diligent Market Intelligence data, www.sedarplus.ca filings, and other press releases through September 30, 2023, subject first to our determination of what we consider a Board Fight and then what we consider a Settlement, both as defined above.

DISSIDENT WIN RATES

Dissident win rates are the percentages of Board Fight outcomes in which the dissident achieves some or all of its publicly stated objectives, either through a settlement before the meeting or through the meeting vote. **This was another very successful year for dissidents—they secured a partial or full win in 79% of cases, following a knockout 88% dissident win rate in 2022.**

The average dissident win rate continues to trend upwards, sitting at an impressive 55% average over ten years. As noted in Fight Rates above, activists have clearly shown confidence in their cases for change, along with a willingness to take their concerns to battle, and these impressive Dissident Win Rates have supported their conviction.



WHAT WE CONSIDER A “DISSIDENT WIN”:

We define a dissident win as a Board Fight outcome where the dissident achieves some (“Dissident Partial Win”) or substantively all (“Dissident Full Win”) of its publicly stated objectives, either through a settlement preceding the meeting or through the vote at the meeting.

Source: Laurel Hill. Compiled from Diligent Market Intelligence data, www.sedarplus.ca filings, and other press releases through September 30, 2023, subject first to our determination of what we consider a Board Fight and then what we consider a Dissident Win, both as defined above.

TRANSACTIONAL ACTIVISM

INTRODUCTION

It has also been a very active year for transactional activism in Canada. Similar to how board activism trended down in the last two years and resurged this year, transactional activism cases jumped by 71% this year, from seven cases in 2022 to 12 cases so far in 2023. The industrial products & services sector is the standout target sector for transactional activism this year as measured by a year-over-year percentage increase, accounting for 15% (2 of 12) of all target issuers, up from 0% in 2022. In contrast to board activism, we continue to see Canada’s larger companies are targets for transactional activism, with mid-cap companies and above representing 58% (7 of 12). Notably, one mega-cap was targeted this year, following no mega-cap targets last year.

We have seen considerable public opposition to M&A transactions, including headline-grabbing Transactional Fights—which we consider to be transactional activism cases involving dissident solicitation activities—against the arrangement agreements at Ritchie Bros. Auctioneers Incorporated (RBA), Magnet Forensics Inc., and Pipestone Energy Corp. In the case of RBA and Magnet, the dissidents solicited votes against the deal using their own form of proxy, an aggressive strategy seldom employed in Canada. Other cases involved Glencore plc’s public campaign against the corporate separation proposal at dual-class Teck Resources Limited (in favour of its own proposal to acquire the company) and public opposition to transactions at Absolute Software Corp. and Noranda Income Fund.

US activists Ancora Holdings Group, LLC and Starboard Value LP made demands at Algonquin Power & Utilities Corp., which ultimately pushed the company to undertake a strategic review and pursue a sale of its renewables business. Engine Capital LP published multiple letters to the board of Parkland Corporation calling for a strategic review, announcing its intention to withhold its votes from all board nominees at the company’s upcoming meeting, and proposing other initiatives to unlock shareholder value.

The RBA case is one of Canada’s largest and most complex Transactional Fights, involving i) public opposition from six shareholders, including Luxor Group Capital, LP’s “vote against” campaign utilizing a dissident circular and proxy,

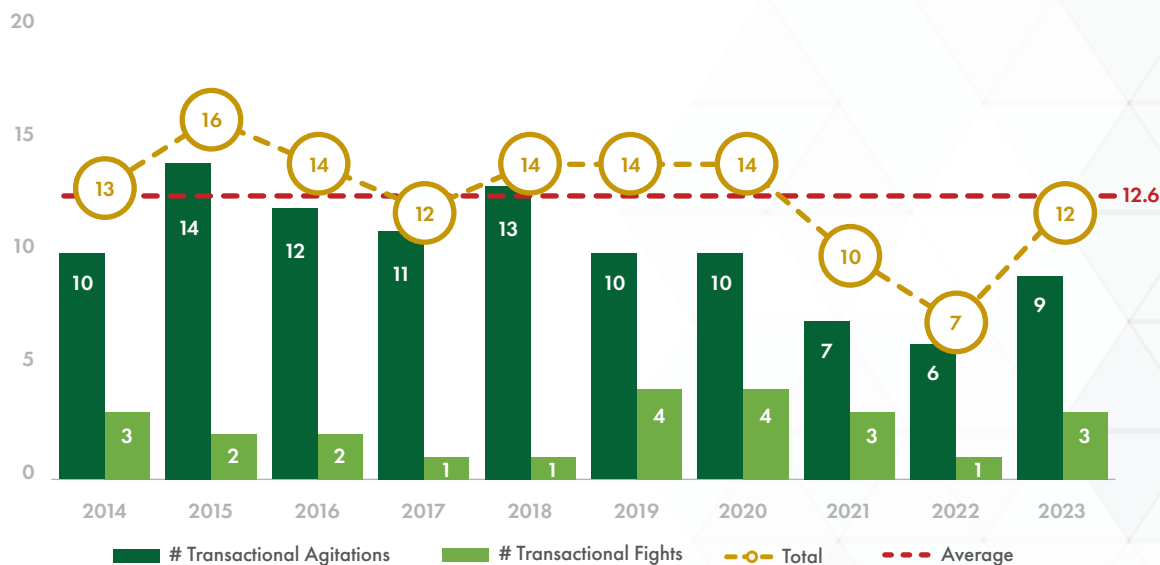
ii) activist investor Starboard Value striking an equity investment deal with RBA allowing RBA to amend the deal terms, iii) ISS and Glass Lewis recommendations to RBA shareholders to “vote against” the deal, and iv) public expressions of support for the deal by four RBA shareholders. **We discuss these dynamics in our section, “RBA Merger with IAA—Dynamics of a Complex Multi-Activist Transactional Fight.”**

Rio Tinto Ltd.’s 2022 proposed take-private of Turquoise Hill Resources Ltd (Turquoise Hill) drew public opposition from two

major shareholders. Rio Tinto negotiated a unique agreement with the dissidents regarding dissent rights but later terminated the agreement in the face of mounting opposition and likely regulatory intervention. We detail these dynamics in the next section.

We also report on a recent court ruling in the 2010 Baffinland Iron Mines Corporation plan of arrangement concerning dissent rights and the determination of fair value in “Dissident Rights and the Baffinland Court Ruling.”

TRANSACTIONAL FIGHTS AND TRANSACTIONAL AGITATIONS



Source: Laurel Hill. Compiled from Diligent Market Intelligence data, www.sedarplus.ca filings, and other press releases through September 30, 2023, subject to our determination of what is a Transactional Fight and what is a Transactional Agitation, as defined below.

HOW LAUREL HILL CLASSIFIES TRANSACTIONAL ACTIVISM SITUATIONS

What we consider a “Transactional Fight”: We define a Transactional Fight as an activist solicitation to defeat a vote on a board-supported item other than the election of directors. This most often refers to a solicitation (using the same solicitation criteria as we use for a Board Fight) against a vote on a merger or acquisition, asset sale, recapitalization, reorganization, redomiciliation, or similar “transformative” matter. We use the meeting date to determine the year of the fight, except that if the fight is settled or withdrawn prior to the meeting date, we use the date of the settlement or withdrawal.

What we consider a “Transactional Agitation”: We define a Transactional Agitation as public opposition to a board-supported item other than the election of directors (such as the “transformative” examples opposite) that does not include active solicitation efforts. We also include actions that are designed to impede transactions, such as premium-to-market mini-tender offers to acquire blocking positions. Finally, we include public demands (excluding shareholder proposals) such as to undertake strategic reviews, to sell assets, or to make other changes such as those related to C-suite leadership, governance practices, executive compensation, capital allocation, and dividend policy. We use the date of the last announcement related to any such activity to determine the year of the agitation.

2022 Q4–2023 Q3 TRANSACTIONAL FIGHT AND TRANSACTIONAL AGITATION DETAILS

Below is a summary of the Transactional Fights and Transactional Agitations initiated or concluded in the past year (since our last report), with the targets in order by year and then alphabetically. We measure dissident success by whether the dissident opposition or demands are successful outright or help to achieve at least some degree of success, such as improved deal terms or some other superior outcome.

Target	Target Sector	Target Capitalization	Dissident(s)	Fight or Agitation?	Dissident Success?
2022 Q4 Transactional Fights & Transactional Agitations					
Real Luck Group Ltd.	Technology	Micro (<50M)	KAOS Capital Ltd. (Adam Arviv)	Agitation	No
The dissident called on the company to undertake a strategic review, warning that it was on the path to bankruptcy. The company responded that it had received two inconsistent proposals from the dissident, neither of which it believed were in the best interests of the company and its shareholders.					
TransGlobe Energy Corporation	Oil & Gas	Mid (250M–1B)	Horizon Partners	Fight	No
Horizon issued a series of press releases calling on fellow shareholders to “vote against” TransGlobe's proposed share exchange arrangement agreement with VAALCO Energy, Inc., arguing that the deal severely undervalued the company and that the share consideration in VAALCO created significant risk. TransGlobe pushed the meeting back by one week, saying shareholders needed more time to decide. Shareholders approved the transaction.					
Turquoise Hill Resources Ltd.	Mining	Large (1B–10B)	Pentwater Capital Management LP, SailingStone Capital Partners LLC	Agitation	Yes
Rio Tinto's March 2022 proposal to the Turquoise Hill Resources Ltd. board to acquire the 49% of Turquoise Hill that it did not already own for \$34.00 cash per share, later revised to \$40.00 per share, drew public opposition from Pentwater Capital Management LP and SailingStone Capital Partners LLC, who criticized the proposal as highly opportunistic. In September 2022, Rio Tinto and Turquoise Hill executed an arrangement agreement at \$43.00 per share. Pentwater and SailingStone, however, commented that the deal continued to undervalue the company. To ensure shareholder approval, Rio Tinto negotiated an agreement with Pentwater and SailingStone regarding the dissent process providing, among other things, that i) Pentwater and SailingStone would withhold their votes at the meeting, that the dissent proceedings would be conducted by arbitration, ii) Pentwater and SailingStone would be paid 80% of the \$43.00 deal price upon closing, and iii) the balance would be paid following the final determination of the arbitration. Rio Tinto also agreed to increase the dissent condition under the arrangement agreement from 12.5% to 17.5% of the outstanding Turquoise Hill shares to accommodate Pentwater and SailingStone's combined ownership. The unique deal was not made available to any other minority shareholders, which raised concerns for the Turquoise Hill special committee and drew the attention of Quebec's securities regulator, the Autorité des marchés financiers, who reportedly considered it to raise public interest concerns. Rio Tinto terminated the deal, but still offered to pay any minority shareholders validly exercising dissent rights an upfront payment of 80% of the transaction price, provided that dissenting shares did not exceed 17.5% of the outstanding Turquoise Hill shares. After multiple shareholder meeting postponements, in December 2022 shareholders approved the transaction. We ascribe the dissidents “success” given that their activism ultimately concluded with the unique 80% upfront payment “guarantee” under the dissent process.					
2023 Q1–Q3 Transactional Fights & Transactional Agitations					
Absolute Software Corp.	Technology	Mid (250M–1B)	Edenbrook Capital, LLC	Agitation	No
The dissident announced its opposition to the company's all-cash arrangement agreement with an affiliate of Crosspoint Capital Partners, L.P. stating, “In short, we believe this transaction is unfair to public shareholders as it undervalues the Company and allows a prospective new owner to benefit from share price erosion caused by Company missteps, while public shareholders who supported the Company's turnaround are left in the lurch.” ²⁸ Shareholders approved the transaction.					
Algonquin Power & Utilities Corp.	Clean Technology & Renewable Energy	Large (1B–10B)	Ancora Holdings Group, LLC, Starboard Value LP	Agitation	Yes
Following Algonquin's termination of a proposed acquisition, Ancora publicly urged Algonquin's board to accelerate the company's previously announced divestitures, “We are pleased that Algonquin has decided to terminate this poorly conceived Transaction following months of widespread pushback from shareholders. Given that Algonquin's stock price has declined by approximately 45% over the past 12 months and stagnated over the longer term, leadership needs to establish momentum and execute on its previously disclosed plan to sell \$1 billion in assets.” ²⁹ Several days later, it was reported that activist investor Starboard Value had “held amicable discussions with the Canadian utility for weeks.” ³⁰ Several weeks later, Algonquin announced a strategic review of its renewables business. Starboard Value issued a public letter outlining its case for the sale of the renewables business. Following the conclusion of the strategic review, Algonquin announced that it would pursue a sale of the renewables business.					

²⁸ Edenbrook Capital, LLC, “Edenbrook Capital Sends Letter to Absolute Software Board,” <https://www.prnewswire.com/news-releases/edenbrook-capital-sends-letter-to-absolute-software-board-301829066.html>

²⁹ Ancora Holdings Group, LLC, “Ancora Urges Algonquin's Board of Directors to Accelerate Previously Announced Divestitures Following Termination of the Kentucky Power Transaction,” <https://www.businesswire.com/news/home/20230417005825/en/Ancora-Urges-Algonquin%E2%80%99s-Board-of-Directors-to-Accelerate-Previously-Announced-Divestitures-Following-Termination-of-the-Kentucky-Power-Transaction>

³⁰ BNN Bloomberg, “Canada's Algonquin Power attracts activist investor Starboard,” <https://www.bnnbloomberg.ca/canada-s-algonquin-power-attracts-activist-investor-starboard-1.1910761>

Target	Target Sector	Target Capitalization	Dissident(s)	Fight or Agitation?	Dissident Success?
Avante Corp.	Technology	Micro (<50M)	George Christopoulos	Agitation	TBD
The dissident issued two press releases voicing his concerns regarding the company's management, governance, and multiple changes to its business strategy, and his objective that the company be sold. There were no further public developments through September 30, the cutoff for this writing.					
Azimut Exploration Inc	Mining	Small (50M–250M)	Coloured Ties Capital Inc., BullRun Capital Inc.	Agitation	Yes
The dissidents went public with their criticisms of the company's business strategy and governance, and their requests for shareholder engagement and board representation. Coloured Ties later applauded a company announcement, which it characterized as a positive shift in the company's business model.					
CF Energy Corp.	Utilities & Pipelines	Micro (<50M)	Leean International Corp.	Agitation	Unknown
The dissident issued a press release outlining several governance failures, which it believed were responsible for poor stock price performance and invited other shareholders to join it in seeking compensation from the company for its losses.					
Magnet Forensics Inc.	Technology	Mid (250M–1B)	Nellore Capital Management LLC	Fight	No
Nellore Capital published its own dissident circular and proxy, and conducted a “vote against” campaign in opposition to Magnet’s arrangement agreement with Morpheus Purchaser Inc. (Purchaser), a company controlled by Thoma Bravo, providing for i) the acquisition of all of the company’s publicly traded subordinate voting shares (SVS) for \$44.25 in cash, other than SVS owned by the company’s two founders and its board chair (the Rollover Shareholders), who were also the owners of all of the company’s multiple voting shares (MVS), and ii) the acquisition of 55% of the SVS and the MVS held by the Rollover Shareholders for stock in the Purchaser valued at \$39.00 per share and the acquisition of their remaining shares for \$39.00 in cash. Nellore Capital criticized that the “structure is unfair, the timing is opportunistic and the offer price is insufficient” and, in particular, took exception to the fact that the founders and the board chair were rolling their shares (even at a reduced price), which was not an option for SVS holders. ³¹ Shareholders nevertheless approved the transaction.					
Noranda Income Fund (Fund or NIF)	Mining	Small (50M–250M)	Riverstyx Capital Management, LLC, LM Asset Fund Limited Partnership, Doug Warwick	Agitation	Yes
In November 2022, the dissidents requisitioned a meeting of the Fund’s unitholders to replace four of seven incumbent trustees of the Fund’s operating trust, Noranda Operating Trust, based on concerns related to their independence to Glencore Canada, owner of 25% of the Fund’s units, stating “For years, we have watched with growing dismay as Glencore’s hand-picked “independent” trustees approved multiple agreements between the Fund and Glencore that we believe are inappropriately and grossly favorable to Glencore, not adequately disclosed, and have impaired the Fund's value.” ³² In December, the Fund set a March date for the requisitioned meeting, but in January announced an arrangement agreement with Glencore Canada for the acquisition of all units not already owned by Glencore Canada for cash of \$1.42 per unit. The dissidents responded that they did not support the proposed acquisition under its current terms and intended to vote against the deal, stating, “The transaction is an opportunistic attempt by Glencore Canada to take advantage of NIF’s depressed trading price and current challenges to acquire a valuable asset at a significant discount to its inherent value.” ³³ A few days prior to the February meeting to approve the arrangement agreement, the Fund announced an increase in the deal price to \$1.98 per unit and voting support agreements with the dissidents. This case spans both a Board Agitation and a Transactional Agitation and is therefore also reported in our “Board Activism” section above.					

³¹ Nellore Capital Management LLC, “Nellore Capital, the largest shareholder of Subordinate Voting Shares with 1.2mm and 9.99% of the shares, opposes Thoma Bravo’s proposed acquisition of Magnet Forensics,” <https://www.newswire.ca/news-releases/nellore-capital-the-largest-shareholder-of-subordinate-voting-shares-with-1-2mm-and-9-99-of-the-shares-opposes-thoma-bravo-s-proposed-acquisition-of-magnet-forensics-859194991.html>

³² Riverstyx Capital Management, LLC and LM Asset Fund Limited Partnership, “Noranda Income Fund Investors Requisition Special Meeting to Align Board with Unitholder Interests,” <https://www.newswire.ca/news-releases/noranda-income-fund-investors-requisition-special-meeting-to-align-board-with-unitholder-interests-872534046.html>

³³ Riverstyx Capital Management, LLC and LM Asset Fund Limited Partnership, “Noranda Income Fund Unitholders Comment on Glencore Canada Buyout Proposal,” <https://www.newswire.ca/news-releases/noranda-income-fund-unitholders-comment-on-glencore-canada-buyout-proposal-807401755.html>

Target	Target Sector	Target Capitalization	Dissident(s)	Fight or Agitation?	Dissident Success?
Parkland Corporation	Industrial Products & Services	Large (1B–10B)	Engine Capital LP	Agitation	Yes
<p>Engine Capital published a letter to the board of Parkland calling on it to undertake a strategic review, including evaluating the sale or spinoff of non-core assets, to refresh the board and add directors with convenience merchandising and capital allocation experience, and to better align executive pay with performance. The dissident published a second letter following the management information circular for the company's annual and special meeting expressing its continued frustrations, including with the company's re-nomination of the 24-year tenured board chair, and indicating that it intended to withhold its votes from all incumbent directors at the meeting. Despite 90% shareholder approval for the board chair at the meeting, the company subsequently announced his retirement from the board. The dissident published a third letter to the board commending it for certain steps to unlock shareholder value related to refreshing the board, simplifying the business, enhancing the profitability of the core business, maximizing free cash flow, and deleveraging the balance sheet, but called on the board to undertake various additional initiatives to unlock shareholder value.</p>					
Pipestone Energy Corp.	Oil & Gas	Mid (250M–1B)	GMT Capital Corp.	Fight	No
<p>GMT Capital published a dissident circular and conducted a "vote against" campaign in opposition to the share exchange arrangement agreement by which Pipestone would be acquired by Strathcona Resources Ltd. "We think there is almost nothing to like about the Strathcona merger terms. The merger would result in a combined entity that trades at a lower valuation, suffers from a huge share overhang, is dangerously levered, and has a poorer ESG profile."³⁴ Shareholders nevertheless approved the transaction.</p>					
RB Global, Inc., formerly Ritchie Bros. Auctioneers Incorporated, (RBA)	Industrial Products & Services	Large (1B–10B)	Luxor Group Capital, LP, Janus Henderson Investors US LLC, Deep Field Asset Management LLC, Eminence Capital, LP, David E Ritchie, C Russell Cmolik	Fight	No
<p>In November 2022, RBA announced a merger agreement with IAA, Inc. under which RBA would acquire IAA in a stock and cash transaction subject to, among other things, RBA shareholder approval of the issuance of RBA common shares to IAA shareholders under the merger and IAA shareholder approval of the merger. The transaction drew intense public opposition from six different RBA shareholders, most notably Luxor, who published its own dissident circular and proxy and conducted a "vote against" campaign. It also involved activist investor Starboard Value making an equity investment in RBA in exchange for board representation in the merged company. The investment allowed RBA, citing shareholder feedback, to amend the merger agreement to shift to more cash in the cash/stock mix for IAA shareholders and to pay a one-time dividend to RBA shareholders contingent on closing of the merger. The amended terms did not dissuade Luxor in its opposition, and five other shareholders subsequently came out against the transaction. In addition, both ISS and Glass Lewis recommended that RBA shareholders vote against the deal. In March, both sets of shareholders approved the deal, in the case of RBA only by a 54/46 margin. We provide a detailed summary of the timeline and dynamics of this case, one of Canada's largest and most complex examples of transactional activism, in "RBA Merger with IAA—Dynamics of a Complex Multi-Activist Transactional Fight" below.</p>					
Teck Resources Limited	Mining	Mega (10B+)	Glencore plc	Agitation	Yes
<p>In connection with Glencore's proposed bid to acquire dual-class Teck, which was rejected by the Teck board, Glencore published an open letter to Teck's Class B subordinate voting shareholders that its proposed merger was superior to Teck's proposed reorganization into two independent, publicly listed companies containing its energy transition metals business and its steelmaking coal business. Glencore committed that should the Teck board properly engage with Glencore, its proposal would remain open to improvements, and that should the board not engage, and provided the separation not proceed, Glencore was willing to take its offer directly to shareholders. Glencore further highlighted the comments of Dr. Norman Keevil, one of the principal controlling shareholders of Teck through his ownership of Class A multiple voting shares, and himself opposed to a sale to a foreign buyer, that he would ultimately not go against the overwhelming views of shareholders, "Dr. Keevil confirmed that: 'If everybody wants to go the other direction, I can't go swimming against the tide. The A shares are like the governor in an engine. So if the engine starts to move too fast, they can slow things down a little bit, so people can think about it, and act responsibly. But the A shares can't go against what the majority of what the B shares want to do. That just isn't there.'"³⁵ Notably, both ISS and Glass Lewis recommended a vote against the separation proposal. On the day of the annual and special meeting, when it was clear that the separation proposal would be defeated, Teck announced that it had withdrawn it from a vote at the meeting.</p>					
Zimtu Capital Corp.	Financial Services	Micro (<50M)	Robert Williamson, Talmage Adams	Agitation	TBD
<p>The dissidents publicly outlined several proposed capital allocation initiatives and indicated that they intended to undertake a board contest. The dissidents subsequently criticized the company's newly announced private placement and proposed several alternatives. The company announced a 15% reduction in the private placement raise. There were no further public developments through September 30, the cutoff for this writing.</p>					

Source: Laurel Hill. Compiled from Diligent Market Intelligence data, www.sedarplus.ca filings, and other press releases through September 30, 2023.

³⁴ GMT Capital Corp., "Open Letter from Tom Claugus, President of GMT Capital Corp., for why he Opposes Proposed Acquisition of Pipestone Energy Corp. (TSX: PIPE) by Strathcona Resources Ltd.," <https://www.globenewswire.com/news-release/2023/09/21/2747614/0/en/Open-Letter-from-Tom-Claugus-President-of-GMT-Capital-Corp-for-why-he-Opposes-Proposed-Acquisition-of-Pipestone-Energy-Corp-TSX-PIPE-by-Strathcona-Resources-Ltd.html>

³⁵ Glencore plc, "Open Letter to Teck Class B Shareholders," <https://www.glencore.com/media-and-insights/news/Open-Letter-to-Teck-Class-B-Shareholders>

RBA MERGER WITH IAA—DYNAMICS OF A COMPLEX MULTI-ACTIVIST TRANSACTIONAL FIGHT

We briefly summarized the transactional activism surrounding Ritchie Bros. Auctioneers Incorporated's (RBA) proposed merger agreement with IAA, Inc. further above. This has been one of Canada's largest and most complex Transactional Fights, involving i) public opposition from six shareholders, including a "vote against" campaign utilizing a dissident circular and proxy, ii) an activist investor striking an equity investment deal with RBA

allowing RBA to amend the deal terms, iii) ISS and Glass Lewis recommendations to RBA shareholders to "vote against" the deal, and iv) public expressions of support for the deal by four RBA shareholders. Ultimately, both RBA and IAA shareholders approved the deal, although in the case of RBA, only by a 54/46 margin. We summarize the timeline, dynamics, and key takeaways below.

November 7, 2022	RBA announced a merger agreement with IAA under which RBA would acquire IAA in a stock and cash transaction valued at approximately \$7.3 billion, subject to, among other things, RBA shareholder approval of the issuance of RBA common shares to IAA shareholders under the merger and IAA shareholder approval of the merger.
December 16	Luxor Group Capital, LP (Luxor) announced that it intended to vote against RBA's proposed merger with IAA. The news release headline stated, "Serious Concerns with Proposed IAA Merger, including the Undervaluation of RBA Shares, the Potential Erosion of RBA Business Quality, the Dilution of RBA Shareholders, and the Business Outlook of IAA." ³⁶
January 23, 2023	RBA announced a securities purchase agreement with activist investor Starboard Value LP and certain of its affiliates (Starboard) pursuant to which Starboard would make a \$500M convertible preferred equity and common share investment in RBA, and which provided for the appointment of Starboard's CEO to the board of RBA upon RBA and IAA shareholder approvals of the merger. Starboard would not be entitled to vote the common shares acquired under the agreement at the RBA meeting to approve the merger. That same day, RBA announced an amended merger agreement with IAA, citing shareholder feedback, that provided for a shift to more cash in the cash/stock mix for IAA shareholders and a one-time dividend to RBA shareholders contingent on closing of the merger. The announcement referenced support for the merger by Ancora Holdings Group, LLC (Ancora), a shareholder of both RBA and IAA, following Ancora's private discussions with each of RBA and IAA regarding Ancora's concerns with the initial transaction terms. Pursuant to an agreement between IAA and Ancora, Ancora's nominee would be appointed to the RBA board upon closing of the merger (such nominee would be one of four IAA board designees to the merged board).
January 24	Luxor commented on the Starboard investment and the amended merger terms, "Luxor is deeply concerned that management and the board of directors (the Board) of RBA chose to further entrench themselves by entering into a completely unnecessary financing with Starboard Value LP (Starboard). After announcing a transaction for IAA that was deeply unpopular among shareholders, instead of listening to those concerns and engaging on the merits with its constituents, management and the Board further harmed their common shareholders by transferring, in Luxor's estimation, in excess of \$145 million to a third party who does not appear to have ever been invested in the Company. In a collective drive to save face and consummate the ill-conceived IAA Merger, management and the Board issued a valuable security worth 130% of par, per Luxor's estimation, to a non-shareholder. Given RBA's strong financial position and the operating performance of standalone RBA, the only conclusion Luxor can draw is that RBA's management and Board hoped that by issuing the preferred security to Starboard (the Starboard Perpetual Preferred) at massively below-market terms, the hollow endorsement that came along with the US\$145 million transfer would somehow turn away the tide of shareholder discontent. Luxor is certainly not swayed. Luxor believes that the "revised" IAA Merger has done little to change the financial terms for RBA shareholders. Indeed, the minor change in equity issuance by RBA in the revised deal is overwhelmed by the extravagant terms offered to Starboard." ³⁷
January 30	RBA shareholder Janus Henderson Investors US LLC sent a letter to the RBA board explaining why it opposed the transaction.
February 3	RBA shareholder Deep Field Asset Management LLC (Deep Field) issued a public letter to RBA shareholders urging them to reject the transaction.
February 8	Ancora released a presentation detailing its rationale for supporting the transaction and included responses to Luxor's criticisms.

³⁶ Luxor Group Capital, LP, "Luxor Capital Issues Open Letter to Board of Ritchie Bros. on Ill-Advised Proposed Acquisition of IAA," <https://www.globenewswire.com/news-release/2022/12/16/2575471/0/en/Luxor-Capital-Issues-Open-Letter-to-Board-of-Ritchie-Bros-on-Ill-Advised-Proposed-Acquisition-of-IAA.html>

³⁷ Luxor Group Capital, LP, "Luxor Capital Comments on "Restructured" Ritchie Bros. Proposed Merger with IAA," <https://www.globenewswire.com/en/news-release/2023/01/24/2594696/0/en/Luxor-Capital-Comments-on-Restructured-Ritchie-Bros-Proposed-Merger-with-IAA.html#:~:text=Luxor%20believes%20that%20the%20%E2%80%9Crevise,extravagant%20terms%20offered%20to%20Starboard>

February 13	Luxor announced that it had filed its proxy materials and sent RBA shareholders a letter highlighting its concerns with the proposed merger, and further noted, “Luxor has now been joined by many other top shareholders and sell-side analysts voicing their dismay with this merger, both publicly and in private conversations, noting its lack of merit and inherent value—destroying components.” ³⁸
February 15	RBA shareholder Eminence Capital, LP announced that it would vote against the merger and issued a public letter to RBA shareholders highlighting its rationale.
February 16	Deep Field issued a second public letter against the transaction.
February 23	Ancora issued a presentation entitled “RESPONSE TO LUXOR’S APPARENT ‘SHORT AND DISTORT’ CAMPAIGN AGAINST IAA & RITCHIE BROS” which charged, “In recent weeks, a ‘wolf pack’ of RBA shareholders has opposed the deal by attempting to smear IAA with falsehoods and half-truths” and “We question whether Luxor’s campaign is just about breaking up the deal and forcing IAA’s shares down, so that it profits from the decline.” ³⁹
March 3	RBA noted, “We have received strong support for the IAA acquisition from many of our shareholders, both privately and publicly—including Independent Franchise Partners, Eagle Asset Management and Vontobel Asset Management, who are among our largest shareholders—as well as from independent third-party industry analysts and other stakeholders. Stakeholders recognize the outstanding strategic and financial benefits and substantial, sustainable shareholder returns the transaction is expected to generate.” ⁴⁰ RBA noted, “Vontobel Asset Management...has joined many other Ritchie Bros.’ shareholders, including a number of our largest shareholders, in publicly supporting the IAA acquisition.” ⁴¹
March 6	Luxor announced, “Today, both ISS and Glass Lewis issued well-considered recommendations for Ritchie Bros.’s shareholders to Vote Against the flawed and ill-advised merger with IAA. Using their own analysis, these leading independent firms have confirmed Luxor’s publicly articulated analysis and views. They now join the chorus of other voices who have already, publicly and privately, said this deal should be voted down. It is clear that ISS and Glass Lewis agree that a standalone Ritchie Bros. will drive more value for shareholders, with less risk, than a merger with IAA’s second-tier business,” said Doug Snyder, President of Luxor. “The ISS and Glass Lewis reports are a clear rebuke of the strategic rationale of the merger, and corroborate Luxor’s assessment that RBA is undervalued on a standalone basis. It is also clear that the overall governance and process run by the Ritchie Bros. board was lacking. With this additional affirmation, we expect shareholders to overwhelmingly Vote Against this merger and return Ritchie Bros. to its strong standalone path,” continued Mr. Snyder.” ⁴²
March 13	David E Ritchie, co-founder, former chairman and director of RBA, and C Russell Cmolik, former President and director of RBA announced their opposition to the merger. ⁴³
March 14	IAA shareholders approved the merger.
March 15	RBA reported that RBA shareholders approved the issuance of RBA common shares to IAA shareholders under the merger, approximately 54% “For” to 46% “Against.”
March 20	RBA announced completion of the merger.

³⁸ Luxor Group Capital, LP, “Luxor Capital Group Files Definitive Proxy Materials to Oppose Value-Destroying Acquisition of IAA,” <https://www.globenewswire.com/en/news-release/2023/02/13/2606769/0/en/Luxor-Capital-Group-Files-Definitive-Proxy-Materials-to-Oppose-Value-Destroying-Acquisition-of-IAA.html>

³⁹ Ancora Holdings Group, LLC, “RESPONSE TO LUXOR’S APPARENT ‘SHORT AND DISTORT’ CAMPAIGN AGAINST IAA & RITCHIE BROS.,” https://mms.businesswire.com/media/20230223005447/en/1721440/1/Response_to_Luxor_s_Apparent_Short_and_Distort_Campaign_Against_IAA_and_Ritchie_Bros_February_23_2023.pdf?download=1

⁴⁰ Ritchie Bros. Auctioneers Incorporated, “Ritchie Bros. Mails Letter to Shareholders Regarding IAA Acquisition,” <https://www.newswire.ca/news-releases/ritchie-bros-mails-letter-to-shareholders-regarding-iaa-acquisition-801214853.html>

⁴¹ Ritchie Bros. Auctioneers Incorporated, “Ritchie Bros. Thanks Shareholders for Their Strong Support of IAA Acquisition,” <https://www.newswire.ca/news-releases/ritchie-bros-thanks-shareholders-for-their-strong-support-of-iaa-acquisition-815861919.html>

⁴² Luxor Capital Group, LP, “ISS and Glass Lewis Both Recommend Ritchie Bros. Shareholders Vote AGAINST IAA Merger,” <https://www.globenewswire.com/en/news-release/2023/03/06/2621464/0/en/ISS-and-Glass-Lewis-Both-Recommend-Ritchie-Bros-Shareholders-Vote-AGAINST-IAA-Merger.html>

⁴³ David E Ritchie and C Russell Cmolik, “Ritchie Bros. Co-Founder and Former President & COO Speak Out Against Merger With IAA,” <https://www.newswire.ca/news-releases/ritchie-bros-co-founder-and-former-president-amp-coo-speak-out-against-merger-with-iaa-847030104.html>

WHAT YOU NEED TO KNOW:

This case is unprecedented in Canada for the number of shareholders that publicly opposed the transaction, including through a “vote against” campaign combined with “vote against” recommendations from both ISS and Glass Lewis. Despite these challenges, the company prevailed in securing shareholder approval. We provide several key takeaways drawn from this and other M&A deals.

1. It is critical post-announcement to get in front of your top shareholders and get their pulse on the deal. Talk to them about the why? and the why now? and the integrity of the process you followed. Do not assume support and listen closely. Of course, at this stage, you need to be careful to avoid tripping over proxy solicitation and disclosure rules. Once your proxy materials are live, this engagement should be followed up with a concerted proxy solicitation campaign to drive the vote and continuously assess sentiment.
2. Be sure to manage the ISS and Glass Lewis risks. Their analyses are centred on several considerations, namely strategic rationale, process, conflicts of interest, valuation and premium, market reaction, and, in the case of share exchanges, governance. As you develop your deal announcement and your proxy materials, these areas must be effectively addressed.
3. You must take an activist seriously but not let them draw you off course. If they blindside you publicly, offer to engage and hear them out. If you cannot address their concerns and they pursue a fight, remain focused: Stick to your key messaging, avoid the temptation to rebut them line by line, and avoid getting personal. If the deal does fall through, you may be stuck with a very unhappy shareholder and a fractured relationship.
4. If top shareholders support the deal, ask them to put out a statement of support. You could also ask them to privately communicate their support to ISS or Glass Lewis, if they are subscribers, to help influence positive vote recommendations.

DISSENT RIGHTS AND THE BAFFINLAND COURT RULING

Dissent rights were the subject of headlines in the Rio Tinto-Turquoise Hill arrangement agreement. As detailed above, Rio Tinto signed a unique deal with two activist shareholders concerning the dissent process and terms but ultimately terminated the deal in the face of mounting criticism, including the prospect that the Quebec securities regulator would intervene. In the end, however, all minority shareholders, validly exercising dissent rights, were offered an unusual 80% upfront payment of the arrangement agreement price.

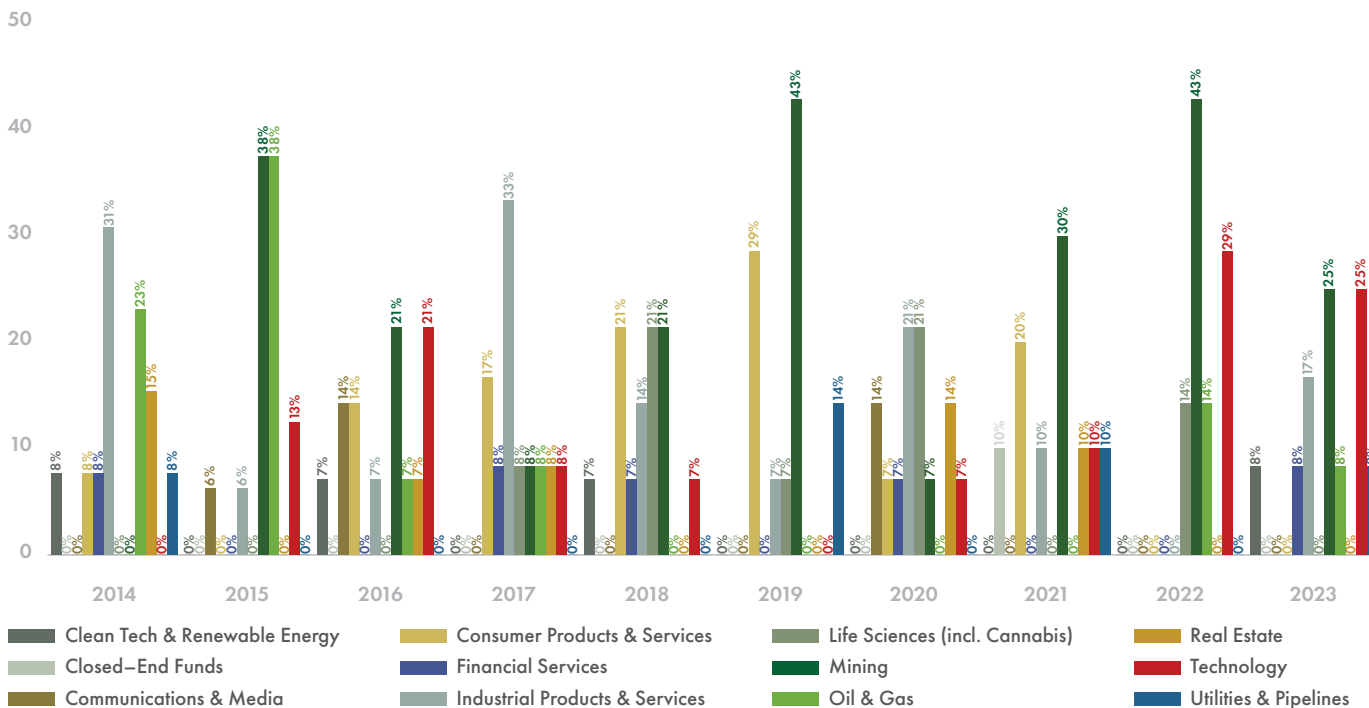
Osler, Hoskin, and Harcourt LLP recently wrote about another case involving dissent rights, namely the recent Ontario Superior Court of Justice decision in the 2010 plan of arrangement at Baffinland Iron Mines Corporation (Baffinland), following a successful joint bid by Nunavut Iron Ore Acquisition Inc. and ArcelorMittal that resulted in the acquisition of 93% of the Baffinland shares, to squeeze out the remaining shareholders. That process included the exercise of dissent rights by a group of shareholders. According to Osler, “the Ontario Superior Court of Justice (Commercial List) found that the price at which a takeover bid process was ultimately consummated was the fair value of the dissenting shareholders’ shares. The Court’s decision is consistent with previous Canadian jurisprudence in this area and confirms that an auction-ending joint bid does not automatically represent a premature and artificial end to a free-market auction nor a distortion of normal market conditions. The judgment reaffirms that Canadian courts will view the clearing price in public M&A transactions as an accurate and reliable indicator of fair value, consistent with prior decisions in Canada.” We encourage readers to review Osler’s article for further background, analysis, and takeaways.⁴⁴



⁴⁴ Osler, Hoskin & Harcourt LLP, “Ontario Superior Court rules on fair value in Baffinland dissent decision,” https://www.osler.com/en/resources/regulations/2023/ontario-superior-court-rules-on-fair-value-in-baffinland-dissent-decision?utm_source=update&utm_campaign=ontario_superior_court_rules_on_fair_value_in_baffinland_dissent_decision&utm_medium=email

TARGET SECTORS

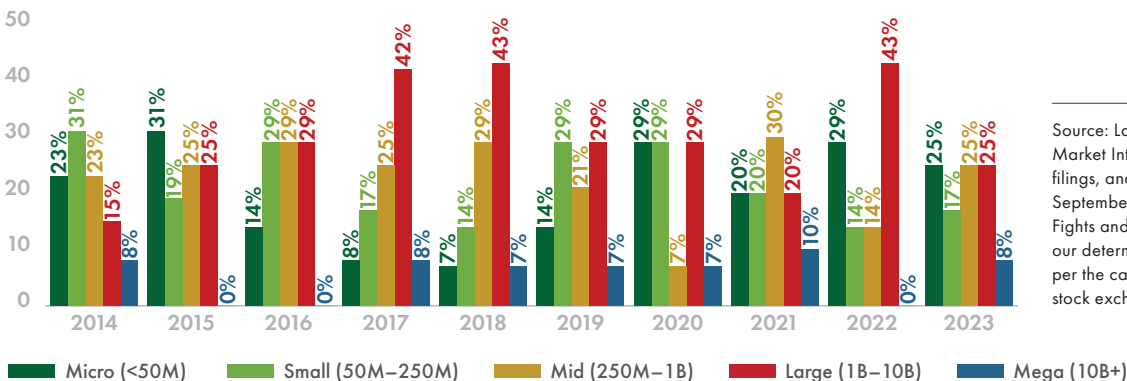
The **industrial products & services** sector was the standout target sector for transactional activism this year as measured by a year-over-year percentage increase, accounting for 15% (2 of 12) of all target issuers, up from 0% in 2022. The **clean tech & renewable energy, financial services, and utilities & pipelines** sectors each accounted for 8% (1 of 12) of all target issuers in 2023 compared to 0% for each of the three sectors in 2022. Similar to what we saw in board activism, the **mining** sector dropped from 43% (3 of 7) of targets in 2022 to 25% (3 of 12) this year. Other notable sectors seeing a drop off are **life sciences (including cannabis)**, down from 14% (1 of 7) of targets in 2022 to 0% this year, and **oil & gas**, down from 14% (1 of 7) of targets in 2022 to 8% (1 of 12) this year. For board activism, we tend to see a high correlation over the long term between target sectors and the composition of Canada's public companies. For transactional activism, unsurprisingly, target sectors are generally more correlated with merger and acquisition activity from one year to the next.



Source: Laurel Hill. Compiled from Diligent Market Intelligence data, www.sedarplus.ca filings, and other press releases through September 30, 2023 (for all Transactional Fights and Transactional Agitations). Target sectors are as reported by the TSX/TSXV for companies listed on those exchanges or TSX/TSXV equivalents (as determined by us) for companies listed on other exchanges.

TARGET CAPITALIZATIONS

We continue to see Canada's larger companies targeted for transactional activism. In 2022 and 2023, mid-caps and above accounted for 57% (4 of 7) and 58% (7 of 12) of all targets, respectively. One mega-cap was also targeted this year, accounting for 8% (1 of 12) of targets, following no mega-cap targeting last year. These numbers align closely with the fact that mid-caps and above have, on average, accounted for 56% of targets over the last ten years. We generally see larger and more sophisticated investors, frequently long-term institutional investors, undertake transactional activism campaigns, and they tend to be invested in larger companies.



Source: Laurel Hill. Compiled from Diligent Market Intelligence data, www.sedarplus.ca filings, and other press releases through September 30, 2023 (for all Transactional Fights and Transactional Agitations), subject to our determination of the capitalization group per the capitalization reported on the primary stock exchange.

UNSOLICITED OFFERS

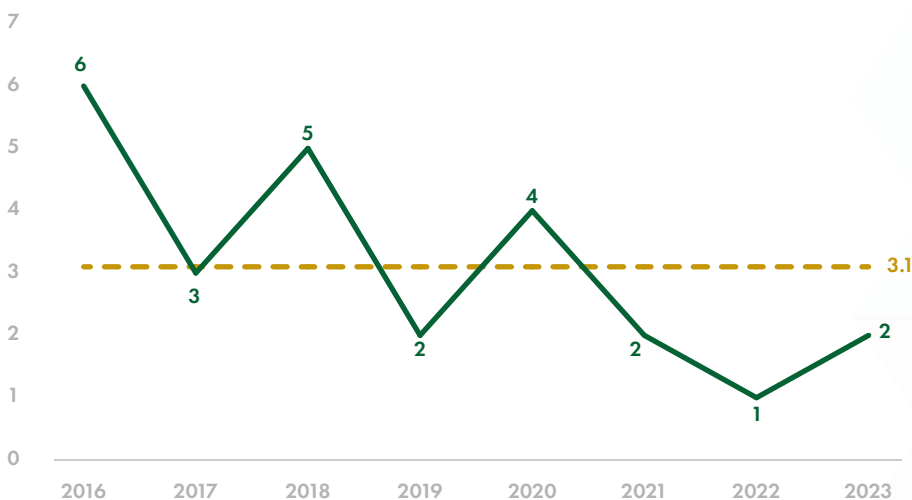
INTRODUCTION

We continue to see very few unsolicited offers, commonly known as hostile bids, only two so far this year, up from just one in all of 2022. Of course, these low single digits have become the norm for hostile bids since the 2016 takeover bid regime took effect. Hostile bids are now undertaken almost only as a last resort to decisively move forward where the target board refuses to engage, or the parties cannot come to terms, and they may even create public pressure on a target to conclude a friendly transaction. We also saw a bid employed to help achieve another strategic objective of disrupting a management recapitalization transaction.

This year's two bids targeting Alpha Lithium Corporation (Alpha Lithium) and Canaccord Genuity Group Inc. (Canaccord) were each notable in their own respects. The bid by Tecpetrol Investments S.L. for Alpha Lithium was characterized by Alpha Lithium as a "stink bid," yet the market moved against the stock, and the board eventually endorsed an improved offer. The management-led group bid to acquire the 79% of Canaccord that they did not already own was fascinating, including the fact

that it crossed over into board activism when a shareholder that was locked up to the bid requisitioned a meeting to replace the members of the special committee that had so far not supported the bid. The incumbent members all resigned. The board appointed new directors, including one of the dissident's nominees, and reconstituted the special committee. In the end, the bid was effectively derailed by regulatory issues. We review in detail the timeline and dynamics of each case further below.

UNSOLICITED OFFERS



— # Hostile Bids
- - - Average

Source: Laurel Hill. Compiled from www.sedarplus.ca filings through September 30, 2023, based on the date of the takeover bid circular.

2022 Q4–2023 Q3 HOSTILE BID DETAILS

Below is a summary of the Hostile Bids initiated or concluded in the past year (since our last report), with the targets in alphabetical order.

Target	Target Sector	Target Capitalization	Bidder	Consideration	Outcome
(2023) Alpha Lithium Corporation	Mining	Mid (250M–1B)	Tecpetrol Investments S.L.	Cash	TBD
Tecpetrol made an all-cash offer directly to Alpha Lithium shareholders at a modest one-day premium. Alpha Lithium initially recommended that shareholders reject the offer and characterized it as a "stink bid." As the offer neared its expiry (which had been extended), Tecpetrol increased the offer price and the board recommended that shareholders accept the bid. As of the September 30 cutoff for this writing, the bid remains open until October 20.					
(2023) Canaccord Genuity Group Inc.	Financial Services	Large (1B–10B)	Management-led group	Cash	Unsuccessful
A management-led group, including the CEO and top executives, took their all-cash offer to acquire the 79% of the company they did not already own directly to shareholders. The hostile bid crossed over into board activism when a shareholder requisitioned a meeting to replace the board's special committee for failing to endorse the bid. The bid was ultimately derailed by regulatory issues that could not be resolved before the bid expired.					

Source: Laurel Hill. Compiled from www.sedarplus.ca filings through September 30, 2023.

TECPETROL HOSTILE BID FOR ALPHA LITHIUM

BIDDER

**Tecpetrol Investments S.L.
(Tecpetrol)**

A company incorporated in Spain and part of the Techint Group of Companies.



TARGET

**Alpha Lithium Corporation
(Alpha Lithium)**

A company developing a portfolio of highly prospective lithium assets in Argentina.

May 15, 2023	Tecpetrol first proposed an unsolicited, non-binding offer of \$1.24 per share in cash to Alpha Lithium's board. Alpha Lithium's board rejected the offer because it determined that the offer was, in its view, opportunistic and not in the best interests of Alpha Lithium and its shareholders.
June 2	Tecpetrol announced its intention to take the bid directly to shareholders. The offer price of \$1.24 per share in cash represented a modest 13.9% one-day premium and a 26% premium to the 20-day volume weighted average price. The most compelling benefit of the offer for Alpha Lithium shareholders was that Alpha Lithium's standalone plan appeared to be challenging and underfunded, while the bid represented immediate liquidity and certainty.

Alpha Lithium repeatedly characterized Tecpetrol's offer as a "stink bid" to disparage the bid and convince shareholders to do nothing and not tender their shares. A stink bid—whether made through a hostile bid or regular market trading—is simply an offer well below the current price that, under most circumstances, will probably not be filled. The magic happens when that order dangling in front of shareholders gets taken up when the stock price dips or dives. It could be that part of the power of a stink bid is that it acts as a self-fulfilling prophecy. If there is an offer to buy a large quantity of stock at a discounted price, shareholders may speculate that the offeror knows something that everyone else trading at the spot price doesn't yet know. With the mandatory 105-day bid window under the takeover bid regime, there is plenty of time for a bidder to convince shareholders that the stock is currently overvalued and for the bid to eventually become attractive, especially in a declining market.

June 26	Alpha Lithium's top shareholder, Kyle Stevenson, owner of about 5% of the company's shares (plus additional derivative securities), announced that he would not tender the bid because the offer was too low.
July 10	Before market open, Alpha Lithium announced the results of a preliminary economic assessment (PEA). A PEA is an early-stage mining resource report which gives some indication of how much value is in the ground.
July 13	The PEA was filed on SEDAR+ after market close.
July 14	In response to the filing of the PEA, the stock price closed at \$1.43, up \$0.10 from the July 7 close, a modest increase of about 7.5%.
July – August	The company then made a series of updates to the PEA over the next two months, which failed to move the stock in the right direction. The announcements pointed to an improvement in the initial findings, but the stock kept going down.
August 14	Prior to market open, the company updated the PEA resource numbers, and the stock closed at \$1.31, down \$0.02 from before the initial PEA announcement.
September 21	The company announced a further update to the PEA, and the stock closed at \$1.19, down over 10% from the July 7 close. While it's difficult to tease out how much of the news affected the stock, among other factors, it seems clear that the PEA announcements were not helping.

STOCK PRICE CHANGE

Date	Activity	Alpha Lithium Closing Stock Price	Closing Stock Price Change from the unaffected price on July 7, 2023
July 7, 2023	Last trading day before announcement of PEA #1 (the unaffected price)	\$1.33	–
July 10, 2023	Announced results of PEA #1	\$1.37	3.0%
July 13, 2023	PEA #1 filed on SEDAR+	\$1.43	7.5%
July 17, 2023	Announced updated PEA #1 numbers	\$1.43	7.5%
August 14, 2023	Filed updated PEA #1	\$1.31	–1.5%
September 21, 2023	Announced updated PEA #2	\$1.19	–10.5%

September 22	Tecpetrol increased the offer to \$1.48, representing a 19% increase from the initial offer price. On September 28, Alpha Lithium announced that the board recommended that shareholders accept the bid. As of the cutoff for this writing, the offer is open until October 20.
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Did the stink bid ultimately help bring these parties together? Was the initial bid even a stink bid? Did the self-fulfilling prophecy come true? Notably, the stock traded below the initial offer price of \$1.24. Stinky or not, the final offer of \$1.48 was near an all-time high for this stock, and most shareholders likely came out ahead.

MANAGEMENT-LED GROUP HOSTILE BID FOR CANACCORD

BIDDER



TARGET

1373113 B.C. Ltd. and a management-led group consisting of officers and employees of Canaccord (Management-led group or Offeror)



Canaccord Genuity Group Inc. (Canaccord or the Company)

The Management-led group, which collectively owned approximately 21% of the outstanding common shares, consisted of Canaccord's President & CEO, Chairman, all members of the Company's Global Operating Committee and additional senior and tenured employees from all Canaccord businesses and geographies.

Canaccord Genuity Group Inc., a full-service financial services company, provides investment products, and investment banking and brokerage services to institutional, corporate, and private clients.

January 9, 2023	A management-led group announced their intention to commence a formal takeover bid to acquire approximately 79% of Canaccord shares not already owned and take Canaccord private. The offer price of \$11.25 in cash per common share valued Canaccord at approximately \$1.1 billion and represented a significant one-day premium of 30.7% and a 41.9% premium to the preceding 20-day volume weighted average price.
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The market appeared to like the deal as the stock price was immediately pinned to the offer price as arbitrage traders moved in and bid up the share price.

	On the same day, the special committee of the board responded and advised shareholders that i) the board had formed a special committee to evaluate an earlier non-binding proposal from the management-led group, ii) the special committee had determined, based on a preliminary analysis by its independent financial advisor, that it was not prepared to support an offer at \$11.25 per share, iii) its independent financial advisor would prepare a formal valuation, iv) the management-led group's financial advisor was not independent of the group and its fairness opinion was not independent and did not constitute a formal valuation, and v) the special committee would consider alternatives, including contacting third parties to gauge interest in making competing bids for the company, its assets or businesses.
February 27	The management-led group formally launched their \$11.25 takeover bid and told shareholders it was an "opportunity for immediate liquidity and certainty of value for redeployment of capital at a compelling valuation" and "surfaces value in a security that is underperforming in the public equity markets." They also criticized the special committee financial advisor's valuation, which the group claimed "is highly theoretical and presents a valuation range that is unrealistic, unachievable in the foreseeable future and not adequately supported as realizable values for Shareholders." ⁴⁵
March 7	SKKY Capital Corporation Limited, an 8.8% shareholder, requisitioned a meeting to remove the members of the special committee—for not supporting the bid and not being responsive to shareholders—and to elect its two new independent nominees. ⁴⁶ In its response, the special committee noted that SKKY Capital had signed an irrevocable lock-up agreement to tender its shares to the offer and to vote against any other transaction.

What started as a hostile bid now further involved a proxy fight.

March 10	Another major shareholder, Crescendo Partners, published an open letter to the chair of the special committee noting that "shareholders are being offered a very substantial premium to the trading price of the stock over the last several months" and calling on the special committee to reach an agreement with the management-led group on an improved price, failing which it will support SKKY Capital's efforts to reconstitute the board. ⁴⁷
March 13	The company announced the resignations of five board members, including the four members of the special committee, noting, "The resignation letter indicated in part that it is the view of the Former Special Committee Directors that they could not satisfy their fiduciary duties to the Company and fulfil their mandate in the circumstances. Further, the Former Special Committee Directors indicated that they believed that the breakdown with management and others through the course of the bid was irreparable." The board appointed one new independent director, namely one of the SKKY Capital nominees. The special committee was reconstituted to include two independent directors, one existing and a new director. The company also noted the special committee's intention to continue to review and evaluate the bid and that it had engaged with securities regulators to allow for a delay in disseminating a directors' circular. ⁴⁸

⁴⁵ 1373113 B.C. Ltd., "MANAGEMENT-LED GROUP FORMALLY COMMENCES ALL-CASH OFFER FOR THE COMMON SHARES OF CANACCORD GENUITY GROUP INC.," <https://www.newswire.ca/news-releases/management-led-group-formally-commences-all-cash-offer-for-the-common-shares-of-canaccord-genuity-group-inc--895175135.html>

⁴⁶ Skky Capital Corporation Limited, "Shareholder of Canaccord Requisitions Shareholders' Meeting to Reconstitute Board," <https://www.newswire.ca/news-releases/shareholder-of-canaccord-requisitions-shareholders-meeting-to-reconstitute-board-836144627.html#:~:text=The%20Concerned%20Shareholder%20feels%20the,or%20before%20May%2010%2C%202023>

⁴⁷ Crescendo Partners LP, "Crescendo Partners, a Large Shareholder of Canaccord Genuity Issues Open Letter to Canaccord Special Committee Chair," <https://www.globenewswire.com/news-release/2023/03/10/2625190/0/en/Crescendo-Partners-a-Large-Shareholder-of-Canaccord-Genuity-Issues-Open-Letter-to-Canaccord-Special-Committee-Chair.html>

⁴⁸ Canaccord Genuity Group Inc., "CANACCORD GENUITY GROUP INC. ANNOUNCES RESIGNATION OF BOARD MEMBERS, APPOINTMENT OF NEW DIRECTOR AND NEW SPECIAL COMMITTEE MEMBERS," <https://www.newswire.ca/news-releases/canaccord-genuity-group-inc-announces-resignation-of-board-members-appointment-of-new-director-and-new-special-committee-members-851923482.html>

March 20	The company announced two new independent directors who were added to the special committee.
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At this point, cracks were starting to show in market sentiment as the stock price slowly drifted off the offer price—indicating some uncertainty among investors that the offer would succeed.

April 6	The reconstituted special committee announced in a directors' circular that it would continue its assessment of the offer and, with the assistance of its advisors, actively engage in a process to identify and evaluate viable alternatives. Pending completion of that process, the board (excluding the conflicted directors) did not make any recommendation to shareholders concerning acceptance of the offer.
May 8	Canaccord announced that it had "now determined that required regulatory approvals will likely not be received in a timely enough manner to permit completion of the Management Offer prior to its current expiry date of June 13, 2023, and may not be received prior to expiration of the financing commitments for the Management Offer on August 9, 2023. The receipt of regulatory approvals is a condition of the Management Offer." It further advised, "At the request of the Special Committee, the management offerors have agreed that it will no longer be a condition of the Management Offer that the Company not commence any process, proposal, plan or intention related to the sale of a material asset of the Company." ⁴⁹

This announcement was poorly received by the market, and the stock closed at \$9.05, almost 20% below the offer price.

June 2	The Offeror announced that it believed there was no reasonable chance that the substantive conditions of the offer would be satisfied prior to the offer's expiry on June 13, including conditions that could not be waived and conditions that it did not intend to waive.
June 5	Canaccord announced that the board recommended shareholders reject the offer due to the unlikelihood that regulatory conditions would be met by the June 13 expiry.
June 14	The Offeror announced that at the expiry time, certain substantive conditions were not satisfied, that it had determined not to extend the offer, and no shares were acquired under the offer. The management group entered a standstill agreement with the company.

The stock closed at \$8.00, a far cry from the \$11.25 offer and even below the unaffected closing stock price on January 6 of \$8.61 (prior to the initial January 9 announcement).

⁴⁹ Canaccord Genuity Group Inc., "CANACCORD GENUITY GROUP INC. PROVIDES UPDATES ON MANAGEMENT TAKE-OVER BID," <https://www.newswire.ca/news-releases/canaccord-genuity-group-inc-provides-updates-on-management-take-over-bid-884416035.html>

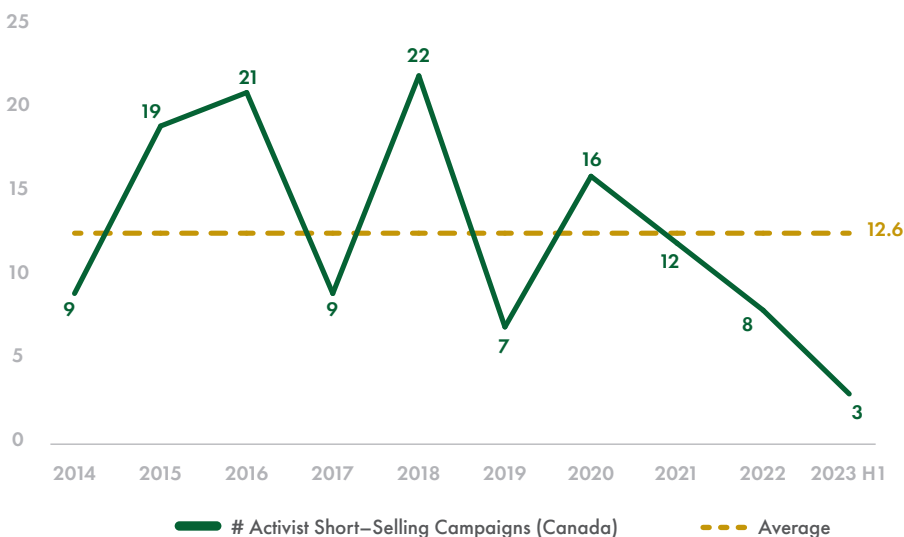


SHORT-SELLING ACTIVISM

INTRODUCTION

Short-selling activism in Canada has been declining in recent years. In the first half of 2023, three activist short-selling campaigns were targeting Canadian companies, on pace to fall below the eight campaigns in 2022. Activists in this space are largely US-based and tend to target overvalued companies. There simply may be fewer opportunities for them in Canada than in the US. Conversely, Canada's low valuations create more opportunities for long-focused activism. The Canadian regulatory regime, with potentially tighter regulations on the way, may also dissuade short sellers from launching campaigns in Canada.

ACTIVIST SHORT SELLING CAMPAIGNS (CANADA)



Sources: 2014–2019 data from Insightia (now Diligent Market Intelligence), 2020–2023 data from Breakout POINT.⁵⁰

⁵⁰ 2013–2019 data from Insightia, "Shareholder Activism in Canada 2021" (this document is no longer publicly accessible); 2020 data from Breakout POINT, "Activist Short Selling in 2020," <https://breakoutpoint.com/blog/2021/01/activist-short-selling-in-2020/>; 2021 data from Breakout POINT, "Activist Short Selling in 2021," <https://breakoutpoint.com/blog/2022/01/activist-short-selling-in-2021/>; 2022 data from Breakout POINT, "Activist Short Selling in 2022," <https://breakoutpoint.com/blog/2022/12/activist-short-selling-in-2022/>; 2023 data from Breakout Point, "Activist Short Selling in H1 2023," <https://breakoutpoint.com/blog/2023/07/activist-short-selling-in-h1-2023/>

CSA PAPER DISCUSSES THE MARKET IMPACT OF ACTIVIST SHORT SELLING

On December 3, 2020, the Canadian Securities Administrators (CSA) published *Consultation Paper 25-403 Activist Short Selling*⁵¹ (Consultation Paper) to facilitate discussion relating to activist short selling and its potential impact on Canadian capital markets through a 90-day consultation period. On December 8, 2022, the CSA published *Staff Notice 25-306 Activist Short Selling Update*⁵² (Staff Notice 25-306), summarizing the comments received pursuant to the Consultation Paper and the CSA's responses. The CSA also noted that since the Consultation Paper was published, it held additional informal discussions and consultations with various regulatory advisory committees and industry groups and actively monitored international developments related to short selling, including activist short selling.

Staff Notice 25-306 noted, "Our consultations and comments received in response to the Consultation Paper show that there continue to be negative views associated with activist short selling and, in general, with short selling. This perception is primarily held by issuers targeted in recent campaigns. Some stakeholders believe that changes to the regulatory requirements should be considered to address perceived problems with short selling, including activist short selling. Some commenters acknowledge there are positive aspects of activist short selling, particularly its contribution to price discovery."

The document further described four main feedback themes, namely i) the use of social media, ii) perception versus evidence, iii) the short-selling regulatory regime, and iv) the need for regulatory change.

Use of Social Media

The CSA acknowledged comments that social media platforms allow prominent activist short sellers to promote and disseminate their short theses about target companies to a broad audience quickly and effectively. More specifically, it acknowledged concerns around the speed at which this information is conveyed and responded to, the accuracy and reliability of the information, and the damage to an issuer's reputation and valuation before it has an opportunity to respond. It also noted comments about the need for laws to ensure social media platforms preserve evidence for review and identification.

The CSA commented that the problematic conduct with social media platforms is not unique to activist short selling and that issuers, investors, and activists (both long and short) rely on these platforms. It acknowledged, however, that unlike issuers and certain investors, activist short sellers are not subject to any specific regulatory framework except for "general prohibitions against fraud and market manipulation, the dissemination of false and misleading statements, and trading with knowledge of undisclosed material information." It continued, "... this may create a perception of imbalance from a regulatory framework

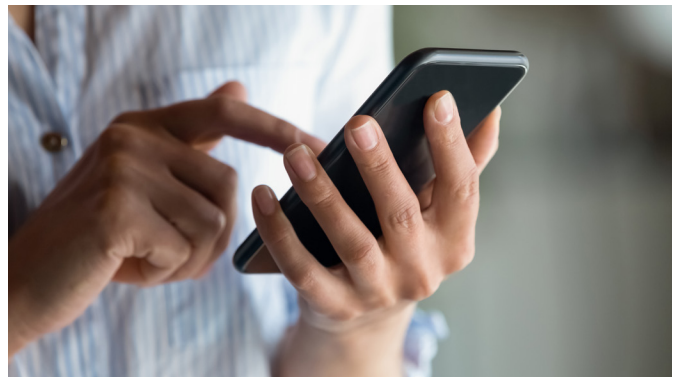
perspective. We note, however, that the purpose of regulation of public disclosure by issuers is to address the information asymmetry that may exist between an issuer's insiders and the market and to help price securities accurately. Activist short sellers do not generally have access to non-public information."

Perception Versus Evidence

With respect to the research presented by the CSA in the Consultation Paper, it was satisfied that it considered all relevant sources of information in forming its view that there was no widespread market abuse related to activist short selling in Canada. It requested that commenters provide any evidence of systemic abuse. The perception of short selling among the respondents was mixed:

The comments highlighted that stakeholders such as issuers, law firms and related industry groups continued to see activist short selling in a negative light, with many believing that problematic conduct permeates this type of activity and that additional regulatory measures are necessary. Other market participants, however, noted the beneficial aspects of activist short selling. This latter group recognized that activist short sellers can play an important check and balance on the higher propensity for promotional information that exists in the market and may be the only voice expressing a "sell" recommendation where their research warrants. These stakeholders cited the lack of evidence of problematic activity as a reason against the introduction of regulatory measures and cautioned that new measures could potentially curtail or deter legitimate activity and negatively impact markets.

The CSA concluded, "We agree that, to the extent any regulatory measures are considered, such measures should be tied to evidence of problematic conduct with activist short selling and consideration be given to potential impacts on the activity, including any unintended consequences on market efficiency and the price discovery process.... Should we see evidence that regulatory changes are needed, they would be considered."



⁵¹ CSA, "CSA Consultation Paper 25-403 Activist Short Selling," https://www.osc.ca/sites/default/files/2020-12/csa_20201203_25-403_activist-short-selling.pdf

⁵² CSA, "CSA Staff Notice 25-306 Activist Short Selling Update," https://www.osc.ca/sites/default/files/2022-12/csa_20221208_25-306_short-selling.pdf

Short Selling Regulatory Regime

The CSA acknowledged concerns surrounding the short selling regulatory regime in general:

Many of the comment letters focussed on the short selling regime in general and raised some concerns that were not specific to the activist short selling issues raised in the Consultation Paper. The views expressed by commenters included: concerns with perceived “naked” short selling and the need to impose pre-borrow requirements; potential harm caused by short selling in connection with prospectus offerings and private placements; a perceived negative impact that resulted from the removal of the tick test in 2012 and a recommendation to consider adopting a regulation similar to the modified uptick rule of the Securities and Exchange Commission (SEC); and inadequate frequency and disclosure of short selling positions and identities (unlike the European Union or Australia).

Need for Regulatory Change

The comments were mixed regarding whether regulatory change was necessary. “Some advocated for sweeping reforms to short selling regulation...while others were of the view that incremental and targeted changes are more appropriate when supported by evidence. Some commenters were of the view that no change was necessary at all. We found that certain market participants (mainly issuers, related industry associations and some law firms) were more supportive of regulatory change.”

WHAT YOU NEED TO KNOW:

The regulators continue to study short selling, including activist short selling. Staff Notice 23–306 noted, “... CSA staff, through its existing committees, continues to monitor and analyze activist short selling initiatives, and short selling in general, to understand whether there are gaps in the regulatory regime that need to be addressed to ensure investor protection and foster fair and efficient capital markets.” On December 8, 2022, the CSA and the Investment Industry Regulatory Organization of Canada (IIROC) jointly published *Staff Notice 23–329 Short Selling in Canada*,⁵³ seeking feedback on general short-selling issues and the existing regulatory framework through a 90-day consultation period. As of this writing, there have been no updates.

US REGIONAL BANK FAILURES AND SHORT SELLING

The big news in short selling globally in 2023 relates to the high-profile US regional bank failures. While short selling did not cause the bank failures, it has been blamed for adding gasoline to the fire. The failed banks had several things in common, which made them ripe targets for short-selling, namely i) the banks grew quickly using short-term funding before collapsing, ii) the bank assets were heavily invested in long-dated treasury bonds and mortgage-backed securities that exposed them to large unrealized losses due to rising interest rates in 2022–23, and iii) the banks had a large concentration of uninsured deposits and other short-term liabilities that could be withdrawn at a moment’s notice.

Short-Selling Negative Feedback Loop: The asset and liability duration mismatch made these institutions vulnerable to a bank run by uninsured depositors. The failure occurred when the uninsured depositors began withdrawing all their deposits simultaneously, which caused the bank run. Short selling put additional downward pressure on stock prices, which helped to put the bank stocks into a negative feedback loop. While many regional banks survived this crisis, some did not, which caused many retail investors to lose billions of dollars in aggregate. The contribution of short-selling to the US regional bank crisis has market participants and politicians calling for increased scrutiny of short-selling, including possibly banning short-selling outright.⁵⁴



⁵³ CSA and IIROC, “Joint CSA and IIROC Staff Notice 23–329 Short Selling in Canada,” https://www.osc.ca/sites/default/files/2022-12/csa-iiroc_20221208_23-329_short-selling.pdf

⁵⁴ Sources: BNN Bloomberg, “Short sellers are on U.S. regional bank stocks: Portfolio manager,” <https://www.bnnbloomberg.ca/short-sellers-are-on-u-s-regional-bank-stocks-portfolio-manager-1.1917335>; mint, “Ban on short selling? US regulators, White House raise alarm on misconduct amid banking crisis,” <https://www.livemint.com/news/world/ban-on-short-selling-us-regulators-white-house-raise-alarm-on-misconduct-amid-banking-crisis-11683251155054.html>; ProMarket, “Short Selling and the Regional Bank Crisis,” <https://www.promarket.org/2023/07/06/short-selling-and-the-regional-bank-crisis/>; Reuters, “Short selling comes under fire as regional banks sell off,” <https://www.reuters.com/markets/us/short-selling-comes-under-fire-regional-banks-sell-off-2023-05-04/>

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TRENDS IN SHAREHOLDER ACTIVISM

About Laurel Hill

Laurel Hill Advisory Group is Canada's leader in strategic shareholder communications and advisory services. Since our founding in 2008, Laurel Hill has earned a reputation as a trusted advisor. We develop and execute results-oriented strategies to secure the desired investor response. Our expertise is built on strategic shareholder communication, corporate governance, executive compensation, shareholder engagement, and shareholder activism matters. Whether shareholders are voting on routine, special, or contested items or considering an M&A transaction, an unsolicited offer, or a unique capital market offering, we get shareholders to take action. We are committed to a singular vision—providing industry-leading advice, insights, and execution, resulting in a successful outcome.



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