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TRENDS IN CORPORATE GOVERNANCE

2022

LH LAUREL HILL

TRUSTED ANNUAL MEETING AND YEAR-ROUND GOVERNANCE PARTNER: We work collaboratively with a broad cross-section of Canadian companies, delivering AGM and year-round corporate governance, executive compensation, shareholder engagement, and shareholder communications advice and execution. Our long-term relationships result from delivering unmatched service and value each and every year.

#1 BOARD PROXY CONTEST WIN-LOSS RECORD: We have Canada's best win-loss record in formal board-related proxy contests, with 48 wins to only 11 losses in our 15-year history, a win rate in excess of 80%, and a winning head-to-head record against each of our competitors. We are a highly sought-after advisor in board proxy contests both by management and activists.

TOP RANKED IN FRIENDLY AND CONTESTED TRANSACTION MANDATES: We are consistently ranked in the top two **(number one in 2022 year-to-date)** in Canada each year by number of friendly and contested merger and acquisition, recapitalization, and reorganization meeting mandates.

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2022

LETTER FROM THE PRESIDENT

It is with great pride that I share Laurel Hill's 8th annual *Trends in Corporate Governance Report*. Our report is Canada's most comprehensive and longest-running annual guide to the trends, risks, and challenges affecting Canadian issuers. As in years past, our report focuses on shareholder activism, shareholder proposals, environmental, social, and governance (ESG), executive compensation, diversity, and several other related areas.

As we progress into a post-pandemic environment, the corporate world continues to adapt to understand stakeholder views and expectations and then translate them into meaningful sector- and business-specific actions and disclosures. We continue to see environmental and social (E&S) considerations dominate the shareholder and other stakeholder agenda. Issuers that fail to keep pace with the demands of this new landscape risk access to capital, risk greater opposition to what were once "routine" annual meeting business items, and risk shareholder activism campaigns for board and management change.

Building on last year's ESG activism at Exxon Mobil Corporation, E&S concerns have factored into the Canadian activism landscape, namely at Suncor Energy Inc. and Enthusiast Gaming Holdings Inc. At Suncor, Elliott Investment Management L.P. took aim at Suncor's high rate of employee fatalities relative to its peers – a "social" concern – as part of its rationale for board and senior management change. In the Enthusiast situation, the dissident, among other items, raised "social" concerns about dysfunctional management relationships, retention and recruitment issues, and a culture of divisiveness. In both cases, the activists can claim some success.

The predominance of ESG activism is also evident in this year's shareholder proposals: A noteworthy 88% of all shareholder proposals in 2022 concerned E&S matters, up from an already strong 62% in 2021. Our review of the global record on "say-on-climate" votes to date, however, suggests that the initiative may be stalling. There remains considerable skepticism about the value of say-on-climate and the potential for unintended consequences.

While stakeholders are demanding greater E&S action and accountability, it has not been without pushback, including concerns over corporate "greenwashing" – disclosures that overstate or misrepresent a company's commitments, actions, or progress on E&S matters; the debate over who is best to oversee these matters – business or government; and the broad variance in scoring metrics. A healthy discourse on these topics can only assist in getting all stakeholders to a place which ideally benefits all parties.

The big picture for board activism in 2022 includes some interesting developments. While the number of public campaigns is on pace to fall short of 2021 levels, i) increasingly larger companies have been targeted, ii) most situations involved proxy fights, demonstrating that activists have had strong conviction in their cases for change, and iii) virtually every proxy fight resulted in a partial or complete dissident win. Similar to board activism, transactional activism is also moderately lower this year as compared to 2021 but we have also seen increasingly larger companies and larger transactions targeted.

Finally, we explore other material governance developments, including i) the impact, particularly for non-TSX issuers, of new *Canadian Business Corporations Act* majority voting rules, ii) gender diversity and diversity beyond gender expectations, iii) scrutiny of the tenure of auditors, iv) executive compensation pay-for-performance alignment and equity compensation considerations, and v) things to consider related to virtual meetings going forward.

The Laurel Hill team continues to grow and be at the forefront of strategic shareholder communications, corporate governance, and executive compensation. This report explores and provides insights on the key topics and trends we experience throughout our engagements. On behalf of the Laurel Hill team, I thank you for your time, support, and for allowing us the opportunity to work with the leaders of corporate Canada. Laurel Hill is very proud of our deep, stable, and experienced team of capital markets professionals and our reputation as a trusted advisor.

Please enjoy our report. We welcome your feedback and look forward to speaking with you as you prepare for 2023.

Sincerely,

David Salmon
President

October 2022

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TRENDS IN ACTIVISM

INTRODUCTION

Environmental, social, and governance (ESG) activism is definitively here in Canada. ESG activism refers to environmental and social (E&S) considerations as drivers for shareholder activism. Global events over the last few years have galvanized stakeholders across a range of E&S issues and pushed E&S to the top of the corporate agenda. Several traditional activists have repurposed themselves as ESG activists. The large index investors – themselves leading voices on ESG – are receptive to ESG activist ideas.

The successful 2021 U.S. Board Fight at Exxon Mobil Corporation illustrates: A new ESG activist firm, with just 0.02% ownership, convinced Exxon shareholders – among them BlackRock, Vanguard, and State Street – to support three director nominees with strong environmental credentials. We spoke about these developing global dynamics in our report last year.

What's new this year: Now we're seeing these dynamics play out at Canadian companies. A case in point is this year's board activism at Suncor Energy Inc. where Elliott Investment Management L.P. took aim at Suncor's high rate of employee fatalities relative to its peers – a "social" concern – as part of its rationale for board and senior management change. The day following news of a new fatality at the company, the CEO stepped down. Ten days later, Suncor announced a settlement with Elliott, which involved the appointment of three new independent directors (two of whom would serve on a recently created CEO search committee) and a commitment to undertake a strategic review – a clear win for Elliott.

We also saw ESG activism in this year's board battle at Enthusiast Gaming Holdings Inc., where the dissident, among other items, raised "social" concerns about dysfunctional management relationships, retention and recruitment issues, and a culture of divisiveness. The dissident won two of six board seats pursuant to a settlement.

Beyond board battles, shareholder proposals are a clear indicator of ESG activism: 87% of proposals at Canadian companies this year involved E&S demands, dominating all other types of proposals.

The bottom line: Activists are looking for E&S weaknesses. If they have material concerns and can tie them to long-term shareholder value, they will very likely find a receptive audience with your investors. While this may not be the only narrative, it is finding increasing relevance.

2022 GLOBAL CASES OF ESG ACTIVISM

Target	Industry	Activist
Guess?, Inc. (U.S.)	Apparel Stores	Legion Partners
Legion Partners' withhold campaign, citing sexual harassment allegations, won support from a majority of independent shareholders, but not enough to force the resignation of company founders.		
McDonald's Corporation (U.S.)	Restaurants	Carl Icahn
The Kroger Company (U.S.)	Grocery Stores	Carl Icahn
Icahn's campaign at McDonald's, highlighting mistreatment of pigs, failed to win board seats though the fast-food giant subsequently replaced two directors. Icahn withdrew similar Kroger demands following the McDonald's defeat.		
Griffon Corporation (U.S.)	Building Materials	Voss Capital
Voss Capital gained one seat on the board of the fan maker following a campaign citing diversity and equality issues among its complaints.		
Huntsman Corporation (U.S.)	Chemicals	Starboard Value
Starboard Value's inclusion of climate change and emissions demands in this contest failed to garner any board seats at the company's annual meeting.		
Glencore Plc (Switzerland)	Industrial Metals & Minerals	Bluebell Capital Partners
Bluebell Capital Partners' demands for Glencore to demerge its coal business and sell non-core assets failed to gain traction at the company's annual meeting.		

Source: Insightia, "ESG Activism 2022."[1]

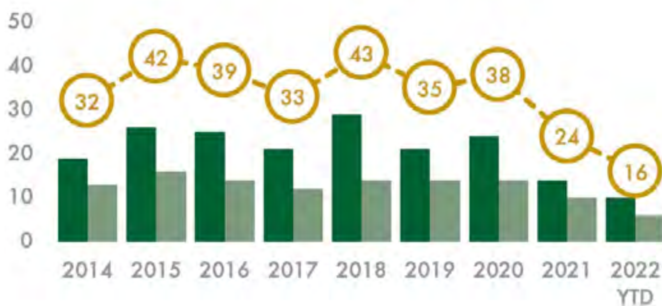
[1] Insightia, "ESG Activism 2022," https://www.insightia.com/esg_2022/

The broader picture for board activism in Canada in 2022 – beyond ESG activism – is that while the number of public campaigns is on pace to fall short of 2021 numbers: i) the size of targeted companies is up, ii) most situations involved proxy fights, and iii) virtually every proxy fight resulted in a partial or complete dissident win. Two of Canada's largest companies, Canadian National Railway Limited (CN Rail) and Suncor, were the target of board activism. Looking ahead to 2023, the new *Canadian Business Corporations Act* (CBCA) majority voting requirement will expose non-TSX issuers to the potential for increased levels of activism. With this in mind, we note that smaller companies such as those on the venture exchanges are traditionally the target of most board activism activity.

We are on track to see fewer cases of transactional activism this year as compared to 2021, although M&A activity – a key driver for this type of activism – has also dropped off from last year. Yet, we have seen opposition to several sizeable M&A transactions, most notably involving Turquoise Hill Resources Ltd., Yamana Gold Inc., Cominar Real Estate Investment Trust, and TransGlobe Energy Corporation.

We are pleased to report below on the overall numbers of publicly disclosed board and transactional activism cases. Each year, Laurel Hill is on the front lines witnessing other board demands and transactional opposition that never breaks publicly – and 2022 was no exception.

BOARD AND TRANSACTIONAL ACTIVISM SITUATIONS



Source: Laurel Hill. Compiled from Activist Insight data, www.sedar.com filings and press releases through September 30, 2022, subject to our determination of what we consider a Board Fight, Board Agitation, Transactional Fight, and Transactional Agitation, all as defined in our Board Activism and Transactional Activism sections below.

Boards and management teams had their hands full this year with shareholder proposals: The number of proposals submitted to a vote in 2022 was up 97% from 2021, and the number of targeted companies was up 28% year over year. As noted earlier, shareholder proposals related to E&S demands eclipsed all other categories this year, accounting for 87% of all proposals, up from an already notable 62% in 2021. Among them, shareholder proposals requesting say-on-climate advisory votes were submitted to seven banks this year and went to a vote at six. The say-on-climate advisory vote proposals received relatively strong support with an average of 22.1%. However, based on our review of the global experience with say-on-climate, the initiative may be stalling. There remains considerable skepticism about the value of say-on-climate and the potential for unintended consequences.

The number of unsolicited offers continues to remain very low – two last year and one so far this year. We discuss the reasons behind the Alberta Securities Commission (ASC) rulings in last year's hostile bid by Brookfield Infrastructure Partners L.P. for Inter Pipeline Ltd. related to the use of derivatives and associated disclosure, tactical shareholder rights plans, and deal termination fees. The ASC rulings, like previous rulings in connection with two other hostile bids (Aurora Cannabis Inc./CanniMed Therapeutics Inc. and ESW Capital, LLC/Optiva Inc.), also reinforce the notion that regulators are serious about maintaining the letter and the spirit of the new takeover bid regime.

Activist short sellers have recently experienced retail investor backlash to short selling popular "meme" stocks. They are also the target of inquiries by the U.S. Justice Department and the Securities and Exchange Commission (SEC). While activists undertook fewer campaigns last year compared to 2020, they also enjoyed one of their best-performing years in 2021.

ACTIVISTS ARE LOOKING FOR E&S WEAKNESSES. IF THEY HAVE MATERIAL CONCERNS AND CAN TIE THEM TO LONG-TERM SHAREHOLDER VALUE, THEY WILL VERY LIKELY FIND A RECEPTIVE AUDIENCE WITH INVESTORS. WHILE THIS MAY NOT BE THE ONLY NARRATIVE, IT IS FINDING INCREASING RELEVANCE.

BOARD ACTIVISM

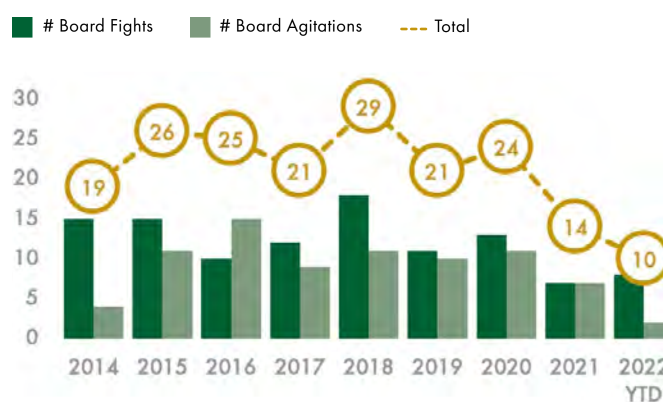
By count alone, board activism at Canadian companies appears to be trailing off, from 24 situations in 2020 to 14 in 2021, and – at ten so far this year – we are on pace to see fewer cases in 2022. Yet, a closer look at the underlying dynamics and numbers reveals that Canada's boardrooms and management teams must continue to pay close attention to the possibility of board activism and prepare accordingly. Activists are increasingly targeting larger companies: This year, mid-cap and larger companies accounted for 40% of targets, up from 14% last year. For the first time since the mega-cap Board Fights at Canadian Pacific Railway Limited (2012) and Agrium Inc. (2013), we saw two mega-cap targets, CN Rail[2] and Suncor. Activists are more than ever going to battle to address their concerns: 80% of all board activism situations this year were Board Fights involving dissident solicitation efforts. Activists have won almost every Board Fight this year: They secured either a partial or complete win in 88% of all Board Fights. Finally, as we discussed above, Canada is starting to see ESG concerns – more specifically, "E" and "S" concerns – forming part of the rationale for board change.

How Laurel Hill classifies board activism situations:[3]

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 above. This includes situations such as i) dissident campaigns that are settled or withdrawn prior to 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.

BOARD FIGHTS AND BOARD AGITATIONS



Source: Laurel Hill. Compiled from Activist Insight data, www.sedar.com filings, and press releases through September 30, 2022, subject to our determination of what we consider a Board Fight and what we consider a Board Agitation, as defined above.

[2] The Board Fight at CN Rail was launched in 2021 but concluded in 2022. We now record this case as a 2022 Board Fight, consistent with our methodology.

[3] 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 situations. And the opposite is also true: Activists making transactional threats and demands often also threaten board change if their concerns are not 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 are ultimately 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 concurrently solicits votes against that company's plan of arrangement, that would also be considered a Transactional Fight.

BOARD FIGHT AND BOARD AGITATION DETAILS

We are pleased to summarize 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.

<table>
<tr><th>Target</th><th>Target Sector</th><th>Target Capitalization</th><th>Dissident(s)</th><th>Fight or Agitation</th><th>Fights only: Dissident Solicitation</th><th>Settlement</th><th>Fights only: Who Won</th></tr>
<tr><td colspan="8">2021 Board Fights and Board Agitations</td></tr>
<tr><td>Fancamp Exploration Ltd.</td><td>Mining</td><td>Micro (<50M)</td><td>Peter H. Smith, James Hunter, Mark Fekete, Heather Hannan</td><td>Fight</td><td>Circular</td><td>No</td><td>Management Win</td></tr>
<tr><td colspan="8">This long-running Board Fight, which we detailed in our report last year, finally concluded with a full management win at the company's annual meeting in October after the company agreed to terminate a proposed business combination which the dissidents had vowed to terminate if successful in reconstituting the board. As part of the agreement, one of the dissident nominees withdrew from the dissident slate and agreed to be appointed to the company board.</td></tr>
<tr><td>FAR Resources Ltd (now Foremost Lithium Resource & Technology Ltd.)</td><td>Mining</td><td>Micro (<50M)</td><td>Scott Taylor, Jason Barnard, Christina Barnard</td><td>Fight</td><td>Circular</td><td>No</td><td>Dissident Full Win (3 of 3 seats)</td></tr>
<tr><td colspan="8">The dissidents charged that the incumbent board was responsible for share price underperformance and lacked a coherent strategy and relevant experience. They proposed three nominees to replace the entire board at the company's annual meeting and secured a full win.</td></tr>
<tr><td colspan="8">2022 Board Fights and Board Agitations</td></tr>
<tr><td>Benchmark Metals Inc.</td><td>Mining</td><td>Small (50M–250M)</td><td>Delbrook Capital Advisors Inc.</td><td>Agitation</td><td>N/A</td><td>Yes</td><td>N/A</td></tr>
<tr><td colspan="8">Following Delbrook's private communications with the Benchmark board in which it put forward governance recommendations it considered would improve the company's operational, financial, and stock price performance, and enhance long-term value, Delbrook announced that it had reached a board refreshment agreement with the company to replace two incumbent directors with its two nominees and to make certain other committee changes.</td></tr>
<tr><td>Canadian National Railway Company</td><td>Industrial Products & Services</td><td>Mega (>10B)</td><td>TCI Fund Management Limited</td><td>Fight</td><td>Circular</td><td>Yes</td><td>Dissident Partial Win (2 of 4 seats)</td></tr>
<tr><td colspan="8">Last September, on the heels of CN Rail's failed bid to acquire Kansas City Southern which TCI had opposed, TCI requisitioned a meeting to replace four incumbent board members and put forward a new CEO candidate, charging that the board lacked railroad experience and operational expertise, and that the company needed a new CEO. After announcing a March date for the requisitioned special meeting, in January CN Rail announced a new CEO after the incumbent announced his retirement (not TCI's CEO nominee, who had earlier withdrawn from the process), certain board changes, and a settlement with TCI where the parties mutually agreed to appoint two independent directors prior to the next annual meeting.</td></tr>
<tr><td>Canagold Resources Ltd.</td><td>Mining</td><td>Micro (<50M)</td><td>Sunvalley Company DMCC</td><td>Fight</td><td>Circular</td><td>No</td><td>Dissident Full Win (3 of 3 seats)</td></tr>
<tr><td colspan="8">Sunvalley complained of decades of business and financial mismanagement at the hands of the board chair (formerly the CEO) and other members of the board, including the company's rejection of Sunvalley's premium financing offer to advance the company's flagship project. Sunvalley proposed to replace three of five incumbent board members at the company's annual meeting and shareholders supported them resulting in a full win.</td></tr>
<tr><td>DIRTT Environmental Solutions Ltd.</td><td>Industrial Products & Services</td><td>Small (50M–250M)</td><td>22NW Fund, LP</td><td>Fight</td><td>Circular</td><td>No</td><td>Dissident Full Win (7 of 7 seats)</td></tr>
<tr><td colspan="8">22NW requisitioned a special meeting last November to replace six of eight incumbent directors, although it did not at that time disclose its reasons for change. In December, DIRTT adopted a shareholder rights plan and set the requisitioned special meeting for April to coincide with its annual meeting. In January, the company announced the departure of the CEO (also a director). The company put forward seven nominees (including six incumbents), while the dissident added an additional nominee to its six originally proposed nominees resulting in a battle for the entire board. In its proxy materials, the dissident complained of poor corporate governance, high cash burn, and perpetual underperformance as key reasons for change. It secured a full win at the meeting.</td></tr>
<tr><td>Enthusiast Gaming Holdings Inc.</td><td>Communications & Media</td><td>Mid (250M–1B)</td><td>Greywood Investments, LLC</td><td>Fight</td><td>Circular</td><td>Yes</td><td>Dissident Partial Win (2 of 6 seats)</td></tr>
<tr><td colspan="8">Greywood complained of company underperformance resulting from what it characterized as an ineffective board and an ineffective and overpaid CEO. Greywood further raised "social" concerns about dysfunctional management relationships, retention and recruitment issues, and a culture of divisiveness. It proposed six board nominees at the company's annual meeting (management proposed nine, increasing the current board size from six). Pursuant to a settlement, two of the dissident's nominees were appointed to the board and the CEO stepped down (but remained on as board chair).</td></tr>
</table>

BOARD FIGHT AND BOARD AGITATION DETAILS (CONTINUED)

Target	Target Sector	Target Capitalization	Dissident(s)	Fight or Agitation	Fights only: Dissident Solicitation	Settlement	Fights only: Who Won
Gambier Gold Corp.	Mining	Micro (<50M)	FruchtExpress Grabher GmbH & Co KG	Fight	Circular	No	Dissident Full Win (5 of 5 seats)
The dissident requisitioned a meeting given its concerns regarding basic governance, disclosure, and communication with shareholders as well as concerns that the company was being improperly managed. The company did not disclose the meeting requisition and instead called an annual meeting. The dissident proposed five board nominees, while management proposed four nominees. Shareholders gave their support to the dissident resulting in a full win at the meeting. The CEO and CFO were immediately replaced.							
Hexo Corp.	Life Sciences	Small (50M–250M)	KAOS Capital Ltd. (Adam Arviv)	Fight	Public Broadcast	Yes	Dissident Partial Win (2 of 5 seats)
The dissident proposed five nominees to replace the majority of the board at the company's annual meeting, which it charged had overseen a number of destructive financings, putting the company in severe financial distress. It noted that the departure of the former CEO last October was not sufficient to halt the precipitous slide in the company's share price. Pursuant to a settlement after the filing of the management information circular (where management proposed nine nominees), the company and the dissident agreed on a seven-person board, which would see four incumbent directors (including the board chair) step down and two of the dissident's nominees appointed. The parties further agreed to appoint an eighth director after the meeting.							
IAMGOLD Corporation	Mining	Large (1B–10B)	Resource Capital Fund VII L.P.	Fight	Public Broadcast	Yes	Dissident Full Win (3 of 3 seats)
Following several weeks of failed private negotiations with the board, Resource Capital Fund went public with its proposal to replace three incumbent board members with its three nominees at the upcoming annual meeting, charging that the board desperately needed mining, operational, and governance experience, a plan for an operational turnaround, and a credible CEO search process. Pursuant to a settlement, the parties agreed to replace three incumbent directors with two of three of Resource Capital Fund's originally proposed nominees and a third mutually agreed individual. One of the Resource Capital Fund nominees was installed as board chair and at least one of the new directors was placed on all standing committees, plus the CEO search committee. The parties further agreed that the reconstituted nominating and corporate governance committee would recommend one additional nominee for inclusion in the board slate at the company's annual meeting.							
Makara Mining Corp.	Mining	Micro (<50M)	Noel Querido	Fight	Public Broadcast	No	Management Win
The dissident, acting jointly with two incumbent directors, sought to remove four incumbent directors and install one new director (which would have resulted in a three-person board) by requisitioning a shareholder meeting, charging that the four targeted incumbents were failing to act in the best interests of the company and driving the company into insolvency. The company called a special meeting and included the dissident's resolutions in the company's management information circular, while the dissident did not issue its own circular. The resolutions were defeated at the meeting.							
Suncor Energy Inc.	Oil & Gas	Mega (>10B)	Elliott Investment Management L.P.	Agitation	None	Yes	N/A
Elliott went public with its letter to Suncor's board outlining concerns related to financial and operational performance, and that the share price had lagged nearly all North American peers. It charged that an overly bureaucratic corporate culture contributed to repeated operational challenges and safety issues, noting the company's high rate of employee fatalities. Elliott called for the replacement of five incumbent board members (with Elliott's unnamed candidates) and for the company to i) undertake a review of executive leadership, ii) enhance capital returns, and iii) undertake a strategic review to consider the sale of its retail assets. On the day following Suncor's announcement of a new operations fatality, the CEO stepped down. The company subsequently announced a settlement with Elliott, which involved the appointment of three new independent directors (two of whom would serve on a recently created CEO search committee) and a commitment to undertake a strategic review.							

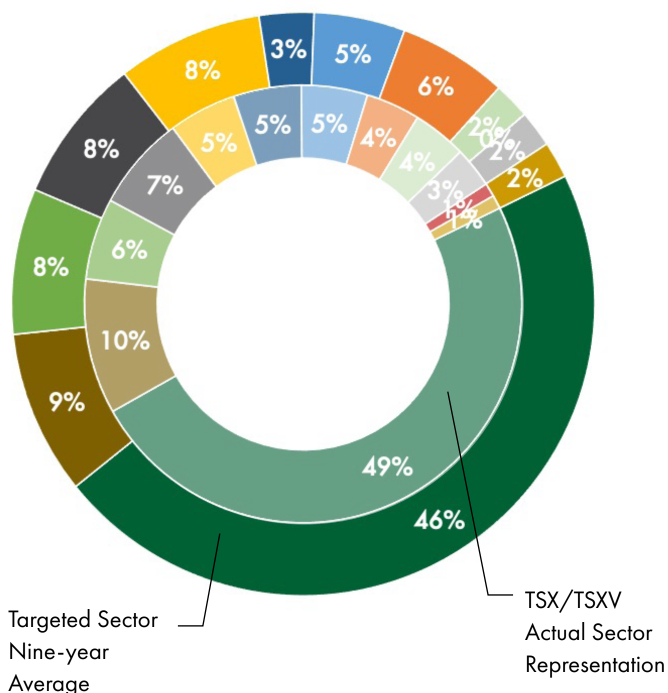
Source: Laurel Hill. Compiled from Activist Insight data, www.sedar.com filings, and press releases through September 30, 2022.

BOARD ACTIVISM BY THE NUMBERS

TARGET SECTORS

Targets skewed heavily to the mining sector once again this year, accounting for 50% of all Board Fights and Board Agitations combined, though down from 57% of targets last year. We note, however, that mining companies represent 49% of all TSX and TSXV issuers combined (excluding CPCs, SPACs, and ETFs) and, on average, over the last nine years, mining companies accounted for 46% of targets, so they are targeted in close correlation to the composition of Canada's public companies. Over time this correlation applies for most sectors, and we have seen every sector targeted. The bottom line: No sector should consider itself immune from activism.

TARGETED SECTOR NINE-YEAR AVERAGE VS. TSX/TSXV ACTUAL SECTOR REPRESENTATION



Source: Laurel Hill. Average sector representation is based on the nine-year average of the data in the "Target Sectors" chart below. TSX/TSXV sector representation is based on current TSX/TSXV data.[4]

Over the past three years, several sectors have stood out for increased levels of activism:

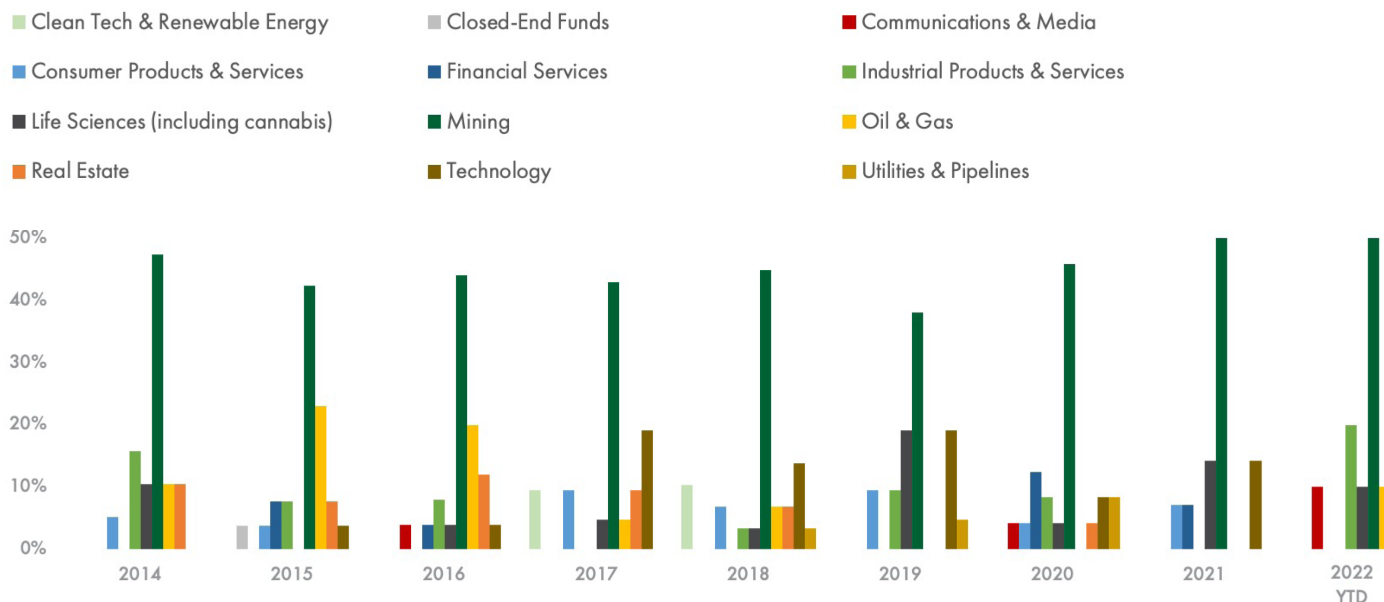
- Industrial Products & Services companies dropped from 8% of targets in 2020 to 0% in 2021 but jumped to 20% of targets (two cases) this year. The sector accounts for 6% of the combined TSX/TSXV.
- Oil & Gas issuers, which until this year had avoided any public board activism since 2018, accounted for 10% of targets (one case). The sector accounts for 5% of the combined TSX/TSXV.
- Life Sciences (including cannabis) companies continue to account for notable levels of board activism, at 10% of targets (one case) this year, though down from 14% last year. The sector accounts for 7% of the combined TSX/TSXV.
- Communications & Media companies dropped from 4% of targets in 2020 to 0% in 2021 but accounted for 10% of targets (one case) this year. The sector represents 1% of the combined TSX/TSXV.

In our report last year, we noted that Financial Services and Utilities & Pipelines companies were among the most notable sectors for increased levels of activism over the preceding three years. These have dropped off this year:

- Financial Services companies, which accounted for 13% of targets in 2020, dropped to 7% in 2021, and to 0% this year. The sector accounts for 5% of the combined TSX/TSXV.
- Utilities & Pipelines companies, which experienced more significant board activism in 2019 and 2020 than in prior years, have not seen any board activism in either 2021 or 2022. The sector accounts for 1% of the combined TSX/TSXV.
- We also note that Technology company targets are down, from 14% last year to 0% of targets this year. The sector accounts for 10% of the combined TSX/TSXV.

[4] TSX/TSXV, July 2022, "The MiG Report" (adjusted to exclude CPCs, SPACs, and ETFs), https://www.tsx.com/resource/en/2899

TARGET SECTORS

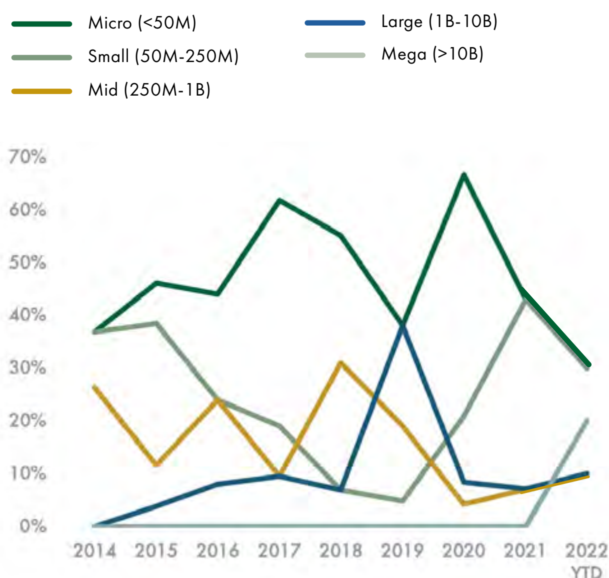


Source: Laurel Hill. Compiled from Activist Insight data, www.sedar.com filings, and press releases through September 30, 2022 (for all Board Fights and Board Agitations). Sectors are as reported by the TSX/TSXV for companies listed on those exchanges or TSX/TSXV equivalents (as determined by us) for companies listed on other exchanges.

TARGET CAPITALIZATIONS

We have historically seen most Board Fights and Board Agitations in the micro- and small-cap spaces – on average in 47% and 25% of cases, respectively, over our nine-year reporting period – which aligns with the fact that the majority of Canada's public companies are listed on venture exchanges such as the TSXV, rather than the TSX. More recently, however, board activism has been targeted at increasingly larger companies. For the first time in 2019, mid-cap and larger companies accounted for more than half of all targets at 57%. The pandemic cooled that rate significantly, reducing mid-cap and larger targets to just 12% in 2020 and 14% in 2021. The reality was that many activist hedge funds, private equity firms, and other significant and sophisticated investors, who tend to undertake activism at larger companies, showed restraint. However, the gloves are off this year: In 2022 mid-cap and larger targets accounted for 40% of all targets. Most notably, for the first time in our reporting period, two mega-caps were targeted, accounting for 20% of targets.

TARGET CAPITALIZATIONS



Source: Laurel Hill. Compiled from Activist Insight data, www.sedar.com filings, and press releases through September 30, 2022 (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 numbers 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. This year, Board Fights accounted for a noteworthy 80% of all board activism situations, while on average, over our reporting period, they have accounted for 59% of all cases. Activists have clearly shown confidence in their cases for change, along with a willingness to take their concerns to battle, and the results (as we discuss in Dissident Win Rates below) have supported this conviction.

FIGHT RATES

Source: Laurel Hill. Compiled from Activist Insight data, www.sedar.com filings, and press releases through September 30, 2022, subject first to our determination of what we consider a Board Fight and what we consider a Board Agitation, both as defined above.

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.

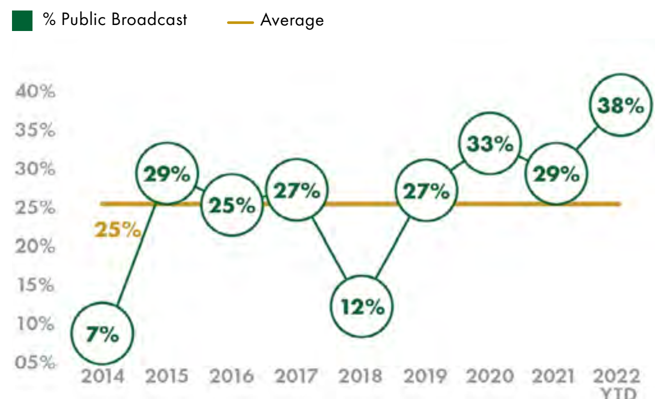
The exemption offers dissidents a low-cost method to initiate board and transactional activism campaigns. It also delivers a timing advantage because management cannot conduct solicitation before sending its management information circular. Dissidents generally issue an information circular and form of proxy to solicit votes if the situation is not settled by the time management issues its proxy materials. However, in this year's Board Fight at Makara Mining Corp. the dissident solicited solely using public broadcast through to the meeting date (the management proxy circular and form of proxy contained the dissident's resolutions). Solicitation using only public broadcast can be an effective way to conduct a "vote withhold" campaign (or now a "vote against" campaign given the new CBCA majority voting requirements, discussed further below) to oppose management's nominees if the dissident is not proposing alternative nominees. It similarly lends itself well to a "vote against" campaign to oppose M&A transactions. While this is a simplified view of the public broadcast solicitation exemption, it certainly has its advantages for activists.

How Laurel Hill classifies public broadcast solicitation situations:

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 support 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 solicitation rates have been erratic year to year but have been trending upwards. This year, public broadcast solicitation accounted for 38% of all Board Fights, while on average, over our reporting period, it accounted for 25% of all Board Fights.

PUBLIC BROADCAST SOLICITATION RATES



Source: Laurel Hill. Compiled from Activist Insight data and www.sedar.com filings through September 30, 2022, 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.

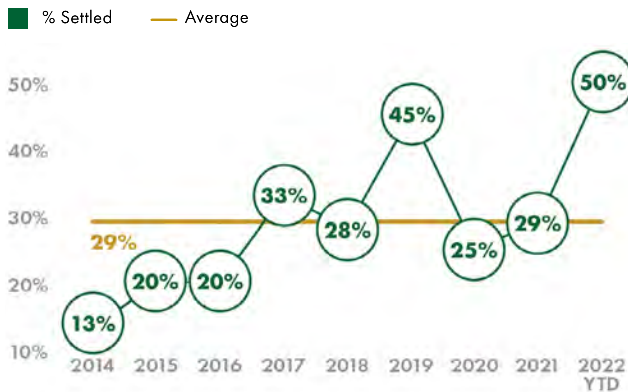
SETTLEMENT RATES

Settlement rates are the percentages of Board Fight outcomes in which management announces a settlement with the dissident (regardless of which side it favours, if any) after a Board Fight has commenced and prior to the meeting date (if set). 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 been on the rise over the last three years, reaching a high of 50% this year, suggesting that settlements are increasingly prominent. In any case, the average settlement rate of 29% over our reporting period indicates a healthy propensity to settle.

How Laurel Hill classifies a settlement:

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).

SETTLEMENT RATES



Source: Laurel Hill. Compiled from Activist Insight data and www.sedar.com filings through September 30, 2022, subject first to our determination of what we consider a Board Fight and then what we consider a Settlement, both as defined above.

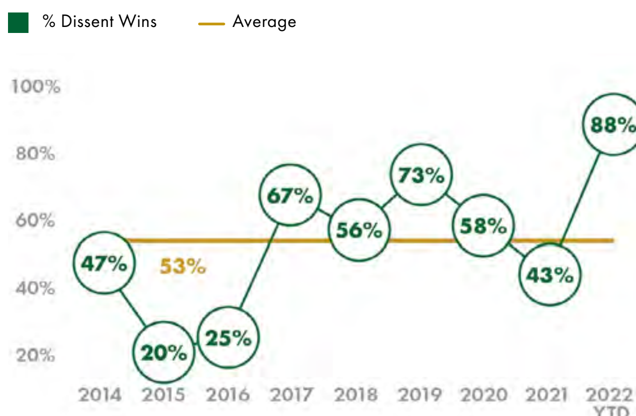
DISSIDENT WIN RATES

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 in advance of the meeting or through the meeting vote. This was a blowout year for dissidents – they secured a full win or partial win in 88% of all Board Fights. While 2022 may prove to be an anomaly, the average dissident win rate over our reporting period is a striking 53%, and dissidents win rates are generally trending upwards.

How Laurel Hill classifies a dissident win:

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 in advance of the meeting or through the vote at the meeting.

DISSIDENT WIN RATES



Source: Laurel Hill. Compiled from Activist Insight data and www.sedar.com filings through September 30, 2022, subject first to our determination of what we consider a Board Fight and then what we consider a Dissident Win, both as defined above.

MAJORITY VOTING AND CBCA CHANGES

An important tool for disaffected shareholders at TSX-listed companies has been the ability to leverage TSX-mandated majority voting requirements to hold boards accountable and to potentially force out undesirable directors without the complexities, costs, and risks associated with proposing alternative director nominees. Since 2014, TSX-listed issuers have been required to adopt a majority voting policy that provides, in the case of uncontested elections, that if the number of "withhold" votes exceeds the number of "for" votes for any nominee, such "failed" nominee must immediately submit their resignation, and that the board has 90 days to determine whether or not to accept the resignation, which should be accepted absent exceptional circumstances.

In the last three years, shareholders have increasingly used majority voting to express their discontent with management nominees at TSX companies, as illustrated below.

FAILED NOMINEES AND 50-60% SUPPORT NOMINEES AT TSX COMPANIES

	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

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

We are likely to see these numbers continue to rise: Given recent changes to the CBCA, majority voting as a tool for activism is now accessible among a much larger population of issuers, namely CBCA-incorporated non-TSX issuers. Several long-awaited CBCA amendments became effective August 31, 2022, pursuant to Bill C-25 and related regulations,[5] which: i) require majority voting for director elections, ii) require annual director elections, iii) prohibit slate voting for director elections, and iv) amend the submission period for shareholder proposals:

- The new majority voting requirement provides 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 nominee will not be elected. However, an incumbent "failed" nominee will be permitted to remain a director until the earlier of (a) the 90th day after the date of the meeting and (b) 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.
- Directors of distributing corporations are now required to be elected for a term ending not later than the close of the issuer's next annual meeting of shareholders. The CBCA previously permitted three-year director terms.
- Directors of distributing corporations are now required to be elected individually. The CBCA previously permitted slate voting.
- Shareholder proposals must be submitted during the 60-day period between 90 and 150 days before the anniversary date of the issuer's last annual meeting to be included in the issuer's proxy circular for the next annual meeting. The CBCA previously required shareholder proposals be submitted at least 90 days before the anniversary date of the notice of meeting in connection with the issuer's last annual meeting.

The regulations provide the following analysis: "The changes to the election process are expected to result in many benefits. The amendments are expected to increase board accountability towards shareholders. The adoption of a majority voting system, including voting for directors individually, holding annual elections, and the ability to vote 'against' a director, will allow shareholders to influence boards more effectively and make boards more responsive and accountable to shareholders compared to the traditional voting approach. Shareholders will also have a greater ability to propose and obtain approval on shareholder proposals. The amendments will also increase board quality by providing a more effective way to remove underperforming or undesired directors from the board than the traditional voting approach. This is expected to encourage directors to improve their contributions and accountability to the board."

[5] Bill C-25, "An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act and the Competition Act," https://laws.justice.gc.ca/eng/AnnualStatutes/2018_8/page-1.html and Regulations, "Regulations Amending Certain Regulations Administered by the Department of Industry: SOR/2022-40," https://www.gazette.gc.ca/rp-pr/p2/2022/2022-03-16/html/sor-dors40-eng.html

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 Continuous Disclosure Obligations, which specifies that a form of proxy must provide a "for" or "withhold" option. While National Instrument 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. Until such time as the Canadian Securities Administrators (CSA) provide clear guidance on whether it considers the CBCA's "against" requirement to be substantially similar to the CSA "withhold" requirement, CBCA issuers will need to carefully consider the options that it provides on forms of proxy, namely whether to include a hybrid "against/withhold" option or a third "withhold" option, and ensure that sufficient disclosure is made as to how votes under such options will be counted and interpreted.

WHAT YOU NEED TO KNOW:

TSX-listed issuers are very familiar with TSX requirements related to majority voting, annual director elections, and prohibitions on slate voting. There are certain differences between the CBCA and TSX majority voting requirements, however, and impacted issuers may want to consider revoking or amending their TSX-compliant majority voting policies to avoid discrepancies with the CBCA. Most notably, there is effectively no longer board discretion: "Failed" directors will not be elected under the CBCA (except that they may be reappointed under very limited circumstances). As a result, they will not be required to resign, and the board will not be able to accept or reject the resignation as under TSX rules. CBCA-incorporated non-TSX issuers will for the first time, however, be required to hold director elections under a majority voting mechanism. We note that these new requirements will provide shareholders at non-TSX issuers with a new tool to attempt to force out undesirable incumbent directors without having to propose their own nominees. Non-TSX issuers should be prepared for the possibility of board activism using majority voting, including "vote against" campaigns using the low-cost public broadcast solicitation exemption. This form of activist campaign does not require any advance notice, can be submitted with little to no time for reaction by the issuer, and can be concerning for issuers with low historical vote participation. Finally, until such time as there is clear guidance from the CSA in respect of its "withhold" requirement, all CBCA issuers will need to carefully consider the voting options it makes available to shareholders and the associated disclosure.

NEW U.S. SEC UNIVERSAL PROXY RULE

Further to a rule first proposed in 2016, the U.S. Securities and Exchange Commission (SEC) has moved forward with the adoption of a universal proxy rule in contested director elections. The new rule is effective at SEC registrant meetings held on or after August 31, 2022: "Under new Rule 14a-19, the universal proxy card must include all director nominees presented by management and shareholders for election at the upcoming shareholder meeting. To facilitate the use of universal proxy cards, the Commission amended the current proxy rules so each side can list the other side's director candidates on its universal proxy card. The new rules also establish new notice and filing requirements for all soliciting parties, as well as formatting and presentation requirements for universal proxy cards. In addition, the final rules require shareholders presenting their own director candidates in the contest to solicit holders of a minimum of 67 percent of the voting power of shares entitled to vote in the election. Registered investment companies and business development companies are not subject to the universal proxy rules."[6] Ontario's Capital Markets Modernization Taskforce, in its July 2020 consultation report, also proposed the adoption of a universal proxy in contested elections. Given the new U.S. rules, we would not be surprised to see Canada's regulators eventually adopt some form of universal proxy requirements, although given the relatively small number of proxy fights in our market this is unlikely to be a short-term priority.

DUAL-CLASS SHARE STRUCTURES

The debate around dual-class share (DCS) structures was reignited this year by two headline stories – the boardroom battle at Rogers Communications Inc.[7] and the Shopify Inc. management proposal at the company's annual meeting related to the voting power of its founder and CEO. Two decades ago, 22% of companies in The *Globe and Mail's* Board Games had dual-class structures. Investor pressure, including through shareholder proposals, has only moderately reduced the use of DCS structures over time: The 2021 Board Games reported that 37 out of 220 constituents, or 17%, of the S&P/TSX Composite Index had a DCS structure.[8] Institutional Shareholder Services (ISS) recently reported, "Canada has over 100 dual-class controlled public companies with unequal voting rights at last count in the ISS Canadian coverage universe. Of these, 66 are TSX-listed companies."[9] The number of DCS companies weighs more heavily on Canada's capital markets than on most: "Companies with unequal voting rights make up a much higher proportion of the Canadian composite index than the global average and a very significant number of Canada's largest employers have them."[10]

There is no shortage of detractors from DCS structures among certain shareholders, governance professionals, and market observers. Superior voting rights – typically controlled by the founder and their family members and heirs – provide disproportionate influence relative to economic interest over board composition, senior leadership appointments, and governance decisions. They also provide an effective veto on takeover bids, as we saw last year at Audet-family controlled Cogeco Inc. and Cogeco Communications Inc.[11] In some cases, this may be to the detriment of the inferior voting class. And while new TSX listings have for many years been required to provide "coattail"[12] protections to the inferior voting class, there are still several grandfathered dual-class companies.

"AT ITS HEART, THE IDEA OF DUAL-CLASS SHARES IS TO ALLOCATE MORE POWER TO INSIDERS AND TRANSFER MORE RISK TO OUTSIDERS, AND ENTRENCH THAT SYSTEM SO IT IS INVULNERABLE TO DEMOCRATIC CHANGE."

Kevin Thomas, CEO of the Shareholder Association for Research and Education[13]

[6] U.S. SEC Fact Sheet, "Universal Proxy Rules for Director Elections," https://www.sec.gov/files/34-93596-fact-sheet.pdf

[7] We do not count the situation at Rogers in our board activism numbers. It is difficult to characterize Edward Rogers as a "dissident" given his role as chair of the company's board of directors, his role as chair of the Rogers family's control trust that oversees the family's 97% ownership of the company's voting shares, and because he was proven to have unilateral power to affect his desired board and management change.

[8] Globe and Mail, "Use of dual-class shares on the rise in Canada," https://www.theglobeandmail.com/business/article-dual-class-shares-canada/

[9] ISS, "Dual-Class Shares in Canada," https://insights.issgovernance.com/posts/dual-class-shares-in-canada/

[10] Globe and Mail, "Rethinking Rogers's dual-class share structure," https://www.theglobeandmail.com/business/commentary/article-dual-class-share-structures-always-end-in-tears/

[11] Altice USA, Inc. and Rogers Communications Inc. went public with an offer to buy Audet-family controlled Cogeco Inc. and Cogeco Communications Inc. Altice would acquire the companies and then sell all their Canadian assets to Rogers. Promptly following both the initial and then a revised offer, the Cogeco board rejected both offers given that the Audet family communicated that it was not willing to sell, seemingly at any price. Altice and Rogers clearly sought to exert public pressure on the board and on the family to engage in a sale, but the Audet family would not be moved.

[12] These rules mandate that listed companies allow holders of subordinate or non-voting common equity to participate equally in a takeover bid with holders of superior voting shares.

[13] Globe and Mail, "Shopify shareholders grant CEO Tobias Lutke 40% voting stake, approve 10-for-1 stock split,"https://www.theglobeandmail.com/business/technology/article-shopify-tobias-lutke-founder-share-stock-split/

In 2013, the Canadian Coalition for Good Governance (CCGG) published a "Dual Class Share Policy"[14] that includes a thoughtful summary of the advantages and disadvantages of DCS structures, reproduced below:

Advantages	Disadvantages
• DCS structures allow controlling shareholders which hold the multiple voting (MV) Shares, the board of directors and management to focus on the long term success and profitability of the DCS company, thereby permitting long term investment decisions to be made instead of having to satisfy short term financial expectations which can be detrimental to building long term value • DCS structures encourage entrepreneur-controlled companies to access the public capital markets and thereby provide investors the opportunity to purchase shares in companies that otherwise might not have been available to them • DCS structures are an effective takeover defence which protects DCS companies from opportunistic acquirers • DCS structures are helpful in those sectors which still have legislated Canadian ownership or control restrictions • Some studies show that, over time, companies which have DCS structures outperform companies which do not have DCS structures Those who are in favour of DCS structures also make the following arguments: • Our economic and legal system is premised on the principle of freedom of contract. Accordingly, provided there is full, true and plain disclosure of all material aspects of the DCS structure before an investor purchases subordinate voting (SV) Shares, there is no reason to disallow the structures • Good governance and bad governance can be found in all types of corporations, whether or not they have DCS structures. If the issue is how to deal with potential conflicts of interest between a DCS corporation and its controlling shareholders, then that issue can be addressed directly by having independent and unrelated board committees which vet transactions rather than by prohibiting DCS structures generally • DCS structures, if combined with meaningful equity ownership by the controlling shareholders, can align the interests of controlling shareholders with those of minority shareholders	• DCS structures confer voting power on the holders of the MV Shares well beyond the economic interest of those holders, thus providing shareholders that take a DCS company public the ability to access public capital (generally at a cost which is less expensive than private capital) and to continue to control the DCS company yet pass off the majority of the financial risk to the public owners of the SV Shares • DCS structures may result in a non-assertive board of directors in light of the fact that only the holders of MV Shares have the actual ability to elect or replace the board • DCS structures can entrench poorly performing management, can result in nepotism or cronyism in management succession and can insulate management from accountability for their actions • Situations have arisen where holders of MV Shares have been able to extract funds and other assets from a DCS company through unreasonable compensation plans or self-dealing • Situations have arisen where a DCS company's cash flow has been diverted to personal projects championed by the holders of MV Shares which are unrelated to the company's core business and strategy • Some studies show that, over time, companies which have DCS structures underperform companies which do not have DCS structures

[14] CCGG, "Dual Class Share Policy," https://ccgg.ca/policies/

Supporters of DCS structures may point to an October 2020 National Bank of Canada report[15] on the performance of an index of Canadian family-controlled companies relative to the S&P/TSX Composite Index. Over a 15-year period, it found the Family Index registered an absolute return of 180.9% compared to 140.5% for the S&P/TSX Composite Total Return Index (7.1% compared to 6.0% in annualized terms). The report further noted:

> *"Public or private family-owned businesses are united by their long-term vision and their interest in maintaining their perenniality and fostering sustained growth from generation to generation. They generate long-term competitive advantages not only for their shareholders, but also for a multitude of stakeholders such as their employees, suppliers and customers, which is beneficial for the economy and community in general. Family businesses create an environment conducive to the emergence of women in senior management positions. Our analysis shows that 13% of CEOs of NBC Canadian Family Index companies are women versus 5% for the S&P/TSX Composite. For director positions, this percentage is 28% for the Family Index compared to 18% on average at Canadian companies."*

The major proxy advisory firms, for their part, appear to be paying attention to certain investor concerns. In their 2022 Canadian benchmark policies, both ISS and Glass Lewis specified that they will generally vote against proposals to create a new class of common stock, while Glass Lewis further indicated that it will generally support recapitalization proposals to eliminate DCS structures. Going a step further this year, Glass Lewis will recommend against the governance chair if there is not a reasonable DCS sunset clause:

> *"We have updated our approach to companies that have multi-class share structures with unequal voting rights. Beginning in 2022, we will recommend voting against the chair of the governance committee at companies with a multi-class share structure and unequal voting rights when the company does not provide for a reasonable sunset of the multi-class share structure (generally seven years or less)."*[16]

ISS disclosed in a 2022 report entitled *Dual-Class Shares in Canada*[17] that it had sought feedback from its U.S. clients on whether to start to apply its 2015 U.S. DCS policy to grandfathered companies – and the answer was a resounding "yes." While this is U.S. focused, any change in U.S. policy may ultimately impact Canadian policy on this subject. The report stated:

> *"According to the 2021 ISS Global Policy Survey, 94 percent of investors responded in the affirmative to the following question: Since 2015, ISS policy for the U.S. has been to recommend votes against directors of newly-public companies that have certain poor governance provisions, such as multiple classes of stock with unequal voting rights without a reasonable sunset to the structure, a classified board structure, or supermajority vote requirements to amend governing documents. However, companies that became public prior to the 2015 ISS policy change were grandfathered (exempted from the policy), and no negative ISS vote recommendations for these provisions have been issued at such companies. In your opinion, for the companies with poor governance structures that were previously grandfathered, should ISS revisit these problematic provisions and consider issuing adverse voting recommendations in the future where they still exist? (i.e., at companies that still maintain these poor governance provisions?)"*

WHAT YOU NEED TO KNOW:

While certain shareholders, governance professionals, and market observers will undoubtedly continue to criticize DCS structures as well as call for sunset provisions, no new DCS listings, and the removal of DCS companies from major indices, it's clear that investor appetite remains for IPOs and secondary trading in companies with DCS structures. It seems likely there is sufficient debate on the pros and cons of DCS structures to sustain them for many years to come. The Rogers and Shopify headlines, however, are an opportunity for renewed board discussion at DCS companies about the continued value of existing structures, versus the incumbent risks and costs, and the appropriateness of introducing sunset provisions.

[15] National Bank of Canada, "National Bank of Canada unveils The Family Advantage Fall 2020 Report," https://www.nbc.ca/en/about-us/news/news-room/press-releases/2020/20201013-rapport-avantage-familial-automne-2020.html

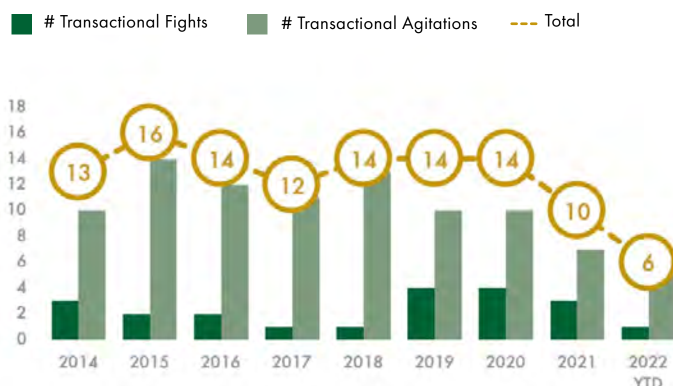
[16] Glass Lewis, "Glass Lewis 2022 Policy Guidelines" (Canada), https://www.glasslewis.com/wp-content/uploads/2021/11/Canada-Voting-Guidelines-GL-2022.pdf?hsCtaTracking=d62ce515-1858-4541-99d0-1bb9bc0f7f4b%7Cb73b5fb0-8d9a-4021-a6b2-ad683c483c94, page 8

[17] ISS, "Dual-Class Shares in Canada," https://insights.issgovernance.com/posts/dual-class-shares-in-canada/

TRANSACTIONAL ACTIVISM

It is not surprising to see the overall number of transactional activism cases down this year versus last year, given the levelling of M&A activity[18] following a record-breaking year in 2021.[19] Similar to board activism, however, increasingly larger companies are being publicly challenged on transactional and other transformative matters: This year, 67% of targeted companies with a market capitalization of $250 million or greater were targeted, the highest such number since 2018. Activity in this space continues to be frequently driven not by traditional activists, but by long-term institutional shareholders, private equity firms, and even public companies. Make no mistake, shareholders will not sit idly by in the face of deals that appear to undervalue the company, that have not undergone a rigorous process, or that have unmanaged conflicts of interest, among other concerns. We continue to also see examples of public demands for strategic reviews, asset sales, and changes in leadership, governance practices, executive compensation, capital allocation, and dividend policy.

TRANSACTIONAL FIGHTS AND TRANSACTIONAL AGITATIONS



Source: Laurel Hill. Compiled from Activist Insight data and www.sedar.com filings through September 30, 2022, subject to our determination of what we consider a Transactional Fight and what we consider a Transactional Agitation, as defined opposite.

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 above) that does not include active solicitation efforts. We also include actions that are designed to impede transactions, such as 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.

18 KROLL, "Canadian M&A Insights Summer 2022," https://www.kroll.com/-/media/kroll-images/pdfs/canadian-ma-insights-summer-2022.pdf

19 Torys LLP, "Canadian M&A outlook for 2022," https://www.torys.com/our-latest-thinking/publications/2022/01/canadian-ma-outlook-for-2022, Figure 1

TRANSACTIONAL FIGHT AND TRANSACTIONAL AGITATION DETAILS

Below is a summary outlining 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 transactional activism 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.

<table>
<tr><th></th><th>Target Sector</th><th>Target Capitalization</th><th>Dissident(s)</th><th>Fight or Agitation</th><th>Dissident(s) Success</th></tr>
<tr><td colspan="6">2021 Transactional Fights & Transactional Agitations</td></tr>
<tr><td>Cominar Real Estate Investment Trust</td><td>Real Estate</td><td>Large (1B–10B)</td><td>Letko, Brosseau & Associates Inc.</td><td>Agitation</td><td>No</td></tr>
<tr><td colspan="6">Letko publicly opposed Cominar’s plan of arrangement with a consortium led by an affiliate of Canderel Management Inc. but did not undertake any solicitation. The deal was approved by unitholders.</td></tr>
<tr><td>Victoria Gold Corp.</td><td>Mining</td><td>Mid (250M–1B)</td><td>Livermore Partners</td><td>Agitation</td><td>No</td></tr>
<tr><td colspan="6">Livermore publicly released a letter to Victoria Gold’s CEO calling on the company to monetize its single asset. In the short term, the company has not publicly responded, and the dissident’s efforts have not proven successful.</td></tr>
<tr><td colspan="6">2022 Transactional Fights & Transactional Agitations</td></tr>
<tr><td>Avante Logixx Inc.</td><td>Technology</td><td>Small (50M–250M)</td><td>Undisclosed</td><td>Agitation</td><td>Yes</td></tr>
<tr><td colspan="6">Avante announced that it and SSC Security Services Corp. had mutually agreed to terminate a proposed arrangement agreement by which SSC would acquire Avante. Instead, the parties agreed to an alternative transaction by which SSC would acquire a wholly owned subsidiary of Avante. Avante noted that following the initial deal announcement "it became apparent through written communications from shareholders that the proposed transaction was not going to receive the requisite shareholder support." The company concurrently announced agreements with its largest shareholder and with the company's founder and a significant shareholder resulting in wholesale changes to the company's board.</td></tr>
<tr><td>Emerald Health Therapeutics, Inc.</td><td>Life Sciences</td><td>Micro (<50M)</td><td>"Opposing Shareholders"</td><td>Agitation</td><td>No</td></tr>
<tr><td colspan="6">The unnamed “Opposing Shareholders” publicly opposed Emerald’s plan of arrangement with Skye Bioscience Inc. but did not undertake any solicitation. The deal was approved by shareholders.</td></tr>
<tr><td>TransGlobe Energy Corporation</td><td>Oil & Gas</td><td>Mid (250M–1B)</td><td>Horizon Partners</td><td>Fight</td><td>TBD</td></tr>
<tr><td colspan="6">Horizons issued a series of public broadcast solicitation press releases calling on fellow shareholders to vote against the company's proposed share exchange plan of arrangement with VAALCO Energy, Inc., arguing that the deal severely undervalued the company. TransGlobe pushed the shareholder meeting date back by one week, saying that shareholders needed more time to decide. The shareholder vote remains outstanding as of this writing.</td></tr>
<tr><td>Turquoise Hill Resources Ltd.</td><td>Mining</td><td>Large (1B–10B)</td><td>Pentwater Capital Management LP</td><td>Agitation</td><td>No</td></tr>
<tr><td colspan="6">Pentwater publicly released a series of letters from November 2021 through January 2022 addressed to both individual board members and the entire boards of Turquoise and 51% owner Rio Tinto. The letters criticized corporate governance practices and conflicts of interest and took aim at Rio Tinto's reported responsibility for cost overruns and scheduling delays at Turquoise’s partially owned underground mine. Pentwater demanded the protection of Turquoise minority interests, including that Rio Tinto, not Turquoise, should be responsible for compensation claims related to mine issues, and that Rio Tinto should allow Turquoise minority shareholder representation on the board. In the short term, the company has not publicly responded, and the dissident’s efforts have not proven successful.</td></tr>
<tr><td>Turquoise Hill Resources Ltd.</td><td>Mining</td><td>Large (1B–10B)</td><td>Pentwater Capital Management LP, SailingStone Capital Partners LLC</td><td>Agitation</td><td>TBD</td></tr>
<tr><td colspan="6">In March, Rio Tinto announced that it had made a proposal to the Turquoise board to acquire the 49% of the company that Rio Tinto did not currently own for $34 cash per share. Pentwater and SailingStone each issued public letters to Turquoise’s independent directors opposing the proposed acquisition, effectively calling it highly opportunistic. A special committee of independent members of the Turquoise board was established to consider the proposal and retained an independent valuator to prepare a formal valuation. The company subsequently announced that the special committee found that the proposal did not reflect full and fair value for the company and terminated its review and consideration of the proposal. Rio Tinto submitted a revised proposal for $40 per share. The Turquoise board, after further negotiation, ultimately agreed to a deal at $43 per share. SailingStone and Pentwater have each publicly commented that the deal continues to undervalue the company. The shareholder vote remains outstanding as of this writing.</td></tr>
</table>

TRANSACTIONAL FIGHT AND TRANSACTIONAL AGITATION DETAILS (CONTINUED)

	Target Sector	Target Capitalization	Dissident(s)	Fight or Agitation	Dissident(s) Success
Yamana Gold Inc.	Mining	Large (1B–10B)	Redwheel, VanEck	Agitation	Yes
Yamana and Gold Fields Limited agreed to an all-share arrangement agreement under which Gold Fields would acquire Yamana at a premium, to create a top-four global gold major. Shareholders of Gold Fields appeared unhappy with the deal, driving down Gold Fields shares 23% on the NYSE on the announcement date, virtually eliminating the premium for Yamana shareholders in the process. VanEck, a 5.3% Gold Fields shareholder and an 11.3% Yamana shareholder, described it as "another poorly structured deal" and Redwheel, a 3% Gold Fields shareholder, noted that the decline in the stock price was evidence that the market thought it "a serious error." Gold Fields since announced an increase in the company's dividend policy and a planned TSX listing to address concerns. As of this writing, Gold Fields and Yamana shareholder approval votes are pending. However, we do ascribe a win to the dissidents for their public statements which arguably influenced the improved dividend policy and planned TSX listing.					

Source: Laurel Hill. Compiled from Activist Insight data, www.sedar.com filings, and press releases through September 30, 2022.

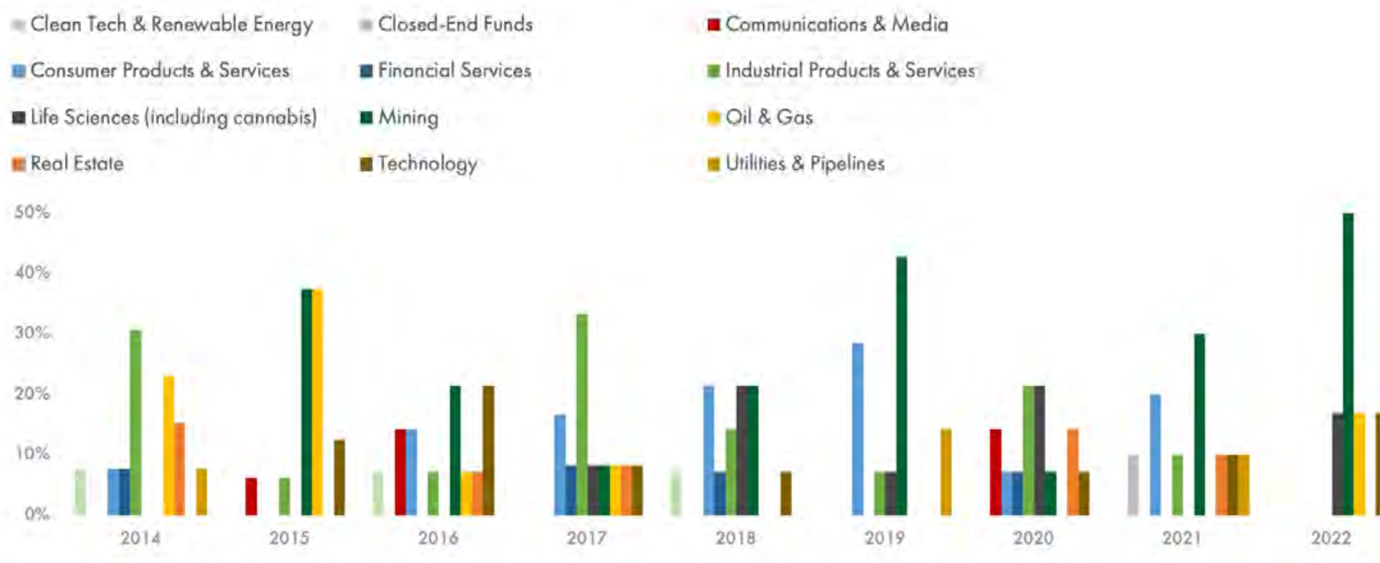
TRANSACTIONAL ACTIVISM BY THE NUMBERS

TARGET SECTORS

Merger and acquisition activity is a key driver for transactional activism and it appears there is moderate correlation between the overall composition of public M&A activity and target sectors for transactional activism: For example, in 2021 the top five sectors for Canadian public M&A were basic materials, consumer products (non-cyclical), financial services, energy, and communications.[20] As we detail below, mining companies, consumer products & services companies, and utilities & pipeline companies were among the top sectors for transactional activism last year. On the other hand, financial services and communications company deals were not the targets of any transactional activism, while real estate and technology companies were targets. Of course, this is a simplified comparison given that not all M&A transactions require shareholder approval and given that transactional activism sometimes also involves demands that are not related to live M&A transactions. The bottom line: From year to year, there are targets across various sectors, no matter how big or small.

This year, mining companies were targeted in 50% of transactional activism cases, while life sciences (including cannabis) companies, oil & gas companies, and technology companies were each targeted in approximately 17% of cases.

TARGET SECTORS



Source: Laurel Hill. Compiled from Activist Insight data and www.sedar.com filings through September 30, 2022 (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.

[20] Torys LLP, "Canadian M&A outlook for 2022," Figure 3

TARGET CAPITALIZATIONS

The largest M&A transactions appear disproportionately targeted for transactional activism relative to the overall number of the largest public M&A transactions. For example, in 2021 deal value ranges for acquisitions "of" Canadian public companies were as follows: Less than $100 million, 42% of deals; $100 million to $500 million, 37% of deals; $500 million to $1 billion, 6% of deals; $1 billion or more, 14% of deals.[21] While deals worth $1 billion or more accounted for only 14% of all deals, they made up 30% of all transactional activism cases. This is a simplified comparison given the above splits do not account for acquisitions "by" Canadian public companies, given that not all deals require shareholder approval, and that transactional activism sometimes involves demands not related to live M&A transactions. It is no coincidence, however, that we generally see larger and more sophisticated investors – frequently long-term institutional investors – undertake transactional activism campaigns and that these investors tend to be invested in larger companies. This year, 67% of companies targeted for transactional activism were mid-caps or greater, the highest such number since 2018.

TARGET CAPITALIZATIONS

Source: Laurel Hill. Compiled from Activist Insight data and www.sedar.com filings through September 30, 2022 (for all Transactional Fights and Transactional Agitations), subject to our determination of the capitalization group per the capitalization reported on the primary stock exchange.

[21] Torys LLP, "Canadian M&A outlook for 2022," Figure 2

SHAREHOLDER PROPOSALS

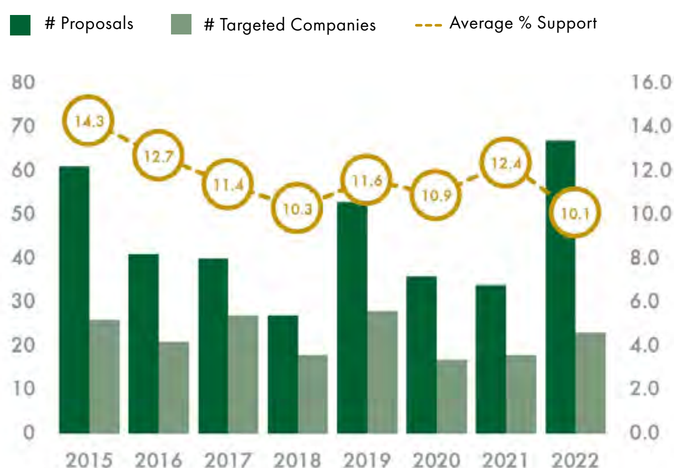
Shareholders and shareholder advocates are as aggressive as ever in this important area of shareholder activism and E&S issues are at the top of their minds. We described in our report last year the dominance of environmental and social shareholder proposals in 2021 and this has continued into 2022: As a percentage of all proposals, E&S proposals have risen from 25% in 2020 to 62% in 2021 and reached 87% in 2022. We have also seen more companies face a greater number of shareholder proposals this year: In 2022, 97% more proposals at 28% more companies went to a shareholder vote as compared to 2021. Of course, these are only the proposals that were submitted to a vote – each year, we also see a considerable number of proposals negotiated, withdrawn, and not submitted to a vote. Interestingly, there was a decrease in the average level of shareholder support (excluding proposals supported by management) from 12.4% in 2021 to 10.1% in 2022. However, 31 of 67 of this year's proposals related to three common matters which received very little support (on average 2.3% support), skewing the average down. In the absence of these proposals, average support this year would have been 17%. Shareholder proposals related to holding say-on-climate advisory votes continue to gain attention. There were six shareholder proposals this year at the Big Six banks to adopt an advisory say-on-climate vote. While none of the proposals passed, they received relatively strong support with an average of 22.1%. The global experience, however, suggests that say-on-climate may be stalling. There remains considerable skepticism about the appropriateness and value of say-on-climate, including the potential for unintended consequences.

PROPOSALS BY THE NUMBERS

Total Proposals, Total Target Companies, and Average Support Levels

This year, the number of shareholder proposals submitted to a vote at Canadian companies nearly doubled – from 34 in 2021 to 67 in 2022. The number of targeted companies increased from 18 in 2021 to 23 in 2022. The average shareholder support level (excluding proposals supported by management) decreased from 12.4% in 2021 to 10.1% in 2022. It is notable, however, that 31 of this year's 67 proposals presented three new and unique demands – all submitted at multiple companies, and all receiving low support (on average 2.3% support), which skewed the average down. The three demands were: i) to adopt French as the company's official language (15 proposals with average support of 1.0%), ii) to explore the possibility of becoming a benefit company (nine proposals with average support of 4.2%),[22] and iii) to increase employee participation in board decision-making (seven proposals with average support of 2.8%). In the absence of these proposals, average shareholder support this year would have been 17%.

SHAREHOLDER PROPOSAL KEY METRICS



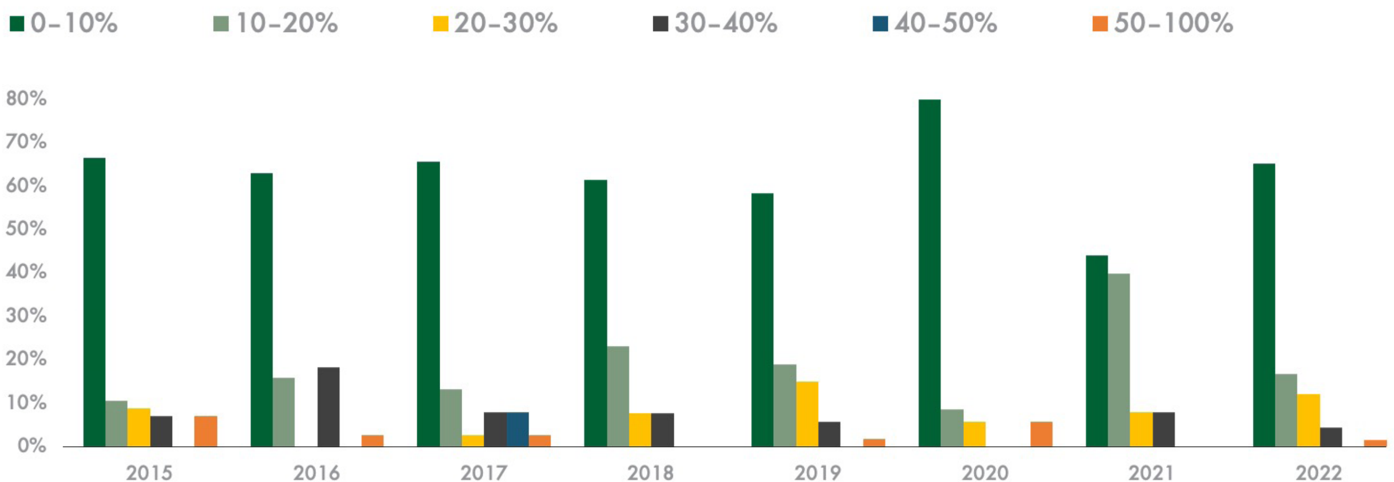
Source: Laurel Hill. Compiled from ISS Corporate Solutions data for proposals submitted to a vote at meetings held January 1 to June 30 each year. Average % support excludes any proposals supported by management.

[22] For a backgrounder on benefit companies: Osler, Hoskin & Harcourt LLP, "B.C.'s new legislation on benefit companies," https://www.osler.com/en/resources/regulations/2020/b-c-s-new-legislation-on-benefit-companies

DISTRIBUTION OF SUPPORT LEVELS

In our report last year, we observed that 2021 showed higher numbers of proposals receiving support in the 10-20% range, whereas previously, proposals were dominated by support in the 0-10% range. In 2022, however, most proposals once again received 0-10% support (driven in large part by the three low-support demands we described above), accounting for 65.2% of all votes.

DISTRIBUTION OF SUPPORT LEVELS

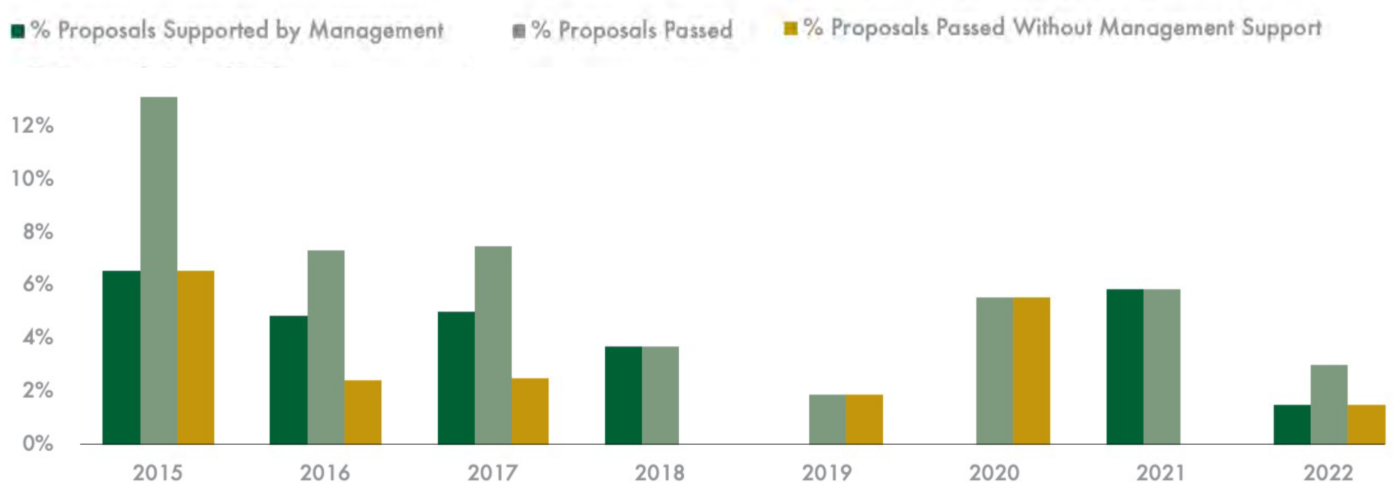


Source: Laurel Hill. Compiled from ISS Corporate Solutions data for proposals submitted to a vote at meetings held January 1 to June 30 each year, excluding any proposals supported by management.

MANAGEMENT SUPPORT AND PASS LEVELS

The percentage of proposals supported by management this year was 1.5% (1 of 67), down from 5.9% in 2021 and below the eight-year average of 3.4%. The percentage of proposals that passed was 3.0% (2 of 67), half the eight-year average of 6.0%. The percentage of proposals that passed this year without management support was 1.5% (1 of 67), below the eight-year average of 2.6%. Proposals that were supported and passed by management are detailed below.

MANAGEMENT SUPPORT AND PASS LEVELS



Source: Laurel Hill. Compiled from ISS Corporate Solutions data for proposals submitted to a vote at meetings held January 1 to June 30 each year.

DISTRIBUTION OF PROPOSALS BY CATEGORY

As noted previously, this year's proposals were once again dominated by environmental and social demands, accounting for 86.6% of all proposals, up from 61.8% in 2021. We take a deep dive on each category below.

DISTRIBUTION OF PROPOSALS BY CATEGORY – BY PERCENTAGE

Source: Laurel Hill. Compiled from ISS Corporate Solutions data for proposals submitted to a vote at meetings held January 1 to June 30 each year, subject to our determination of category.

DID YOU KNOW?

As a result of changes to the CBCA, effective August 31, 2022, shareholder proposals must now be submitted during the 60-day period between 90 and 150 days before the anniversary date of the issuer's last annual meeting to be included in the issuer's proxy circular for the next annual meeting. The CBCA previously required shareholder proposals be submitted at least 90 days before the anniversary date of the notice of meeting in connection with the issuer's last annual meeting. Please refer to the Majority Voting and CBCA Changes section for further details.

2022 PROPOSAL DETAILS BY CATEGORY

Category	# Proposals	Avg. Support	General Trend
Environmental & Social	58	10.1%	The number of E&S proposals continues to rise and dominate, from 9 in 2020 to 21 in 2021, to 58 this year, eclipsing all other categories.

Environmental & Social:

- One proposal's scope encompassed both environmental and social considerations, namely, to adopt a statement of corporate purpose and establish board committee oversight to make this new purpose a reality, which received 5.7% support. This marks the second year for this type of proposal. In 2021, there were four such proposals.

Environmental:

- Nine proposals variously called on the target company to either limit or cease fossil fuel financing and/or activity, or to set up or strengthen environmental targets and/or commitments. These proposals received average support of 15.4%. In 2021, there were three such proposals.
- Six proposals to adopt an advisory say-on-climate vote, up from one in 2021. They received average support of 22.1%. We discuss say-on-climate in considerable detail below.
- Two proposals to provide disclosure on loans granted in support of the circular economy, down from five in 2021. The 2022 proposals received average support of 16.4%.
- One new proposal to establish a climate change and environment board committee, which received support of 9.2%.

2022 PROPOSAL DETAILS BY CATEGORY

<table>
<tr><th>Category</th><th># Proposals</th><th>Avg. Support</th><th>General Trend</th></tr>
<tr><td colspan="4">Social:
• Fifteen proposals to adopt French as the company's official language, a new type of proposal this year. These proposals received average support of 1.0%.
• Nine proposals to explore the possibility of becoming a benefit company, a new type of proposal this year. These proposals received average support of 4.2%.
• Seven proposals to increase employee participation in board decision-making, a new type of proposal this year. These proposals received average support of 2.8%.
• Four proposals were broadly related to equity, diversity, and inclusion (EDI), up from one in 2021:
◦ Two of the four proposals related to reporting on Indigenous community relations, recruitment, advancement, internal education on Indigenous reconciliation, and procurement from Indigenous-owned businesses, very similar to the first such proposal in Canada in 2021 (an amended form of which was supported by the company in question and approved by shareholders). One of the two 2022 proposals was supported by management (the only shareholder proposal to have received management support this year) and received 99.0% approval. The other received 16.6% support.[23]
◦ One of the four proposals called on the company to produce a report on racial diversity within its workforce. Despite management opposition, the proposal received 62.8% support, making it the only proposal to have passed this year without management support.[24]
◦ The fourth proposal called on the company to report on workforce composition and compensation practices related to EDI efforts and received 17.7% support.
• Three proposals seeking disclosure related to employee or supply chain human rights that received average support of 21.1%. In 2021, there were seven proposals that addressed similar concerns.
• One proposal to assess and mitigate human rights and reputational risks involved in the financialization of housing, a new type of proposal this year. This received 21.7% support.</td></tr>
<tr><td>Compensation</td><td>4</td><td>11.3%</td><td>Proposals in this category have seen a notable increase this year, from one in 2021 to four this year, though they remain minimal as compared to 23 in 2019 and nine in 2020.</td></tr>
<tr><td colspan="4">• Three proposals to disclose the CEO-to-median-employee compensation ratio, which received average support of 14.3%. This form of proposal was last popular in 2019 and 2020, going to a vote at eight and five companies, respectively, but at only one company in 2021.
• One proposal to review the company's senior leadership compensation policy so it is linked to company performance, notably at a company that holds an annual say-on-pay advisory vote. The proposal received 2% support.</td></tr>
<tr><td>Gender Diversity</td><td>3</td><td>12.4%</td><td>The number of gender diversity proposals has remained steady at three this year, unchanged from 2021 though down from a high of seven in 2020.</td></tr>
<tr><td colspan="4">• Three proposals to report annually on the representation of women in all levels of management, which received average support of 12.4%.
• In 2021 there were three proposals to set gender diversity at the board level at 40%, no such proposals were put forward this year.</td></tr>
<tr><td>Governance</td><td>2</td><td>5.4%</td><td>Proposals in this category continue to decline, dropping from 14 in 2019, to five in 2020, three in 2021, and two this year.</td></tr>
<tr><td colspan="4">• One proposal, at a dual-class share company, to adopt a majority voting standard among subordinate voting shareholders, received 8.8% support.
• One proposal to disclose measures to restore shareholder confidence in the company's capacity to increase performance, which the proponent argued was necessary given relatively low support for certain directors at the 2021 annual meeting. The proposal received 2% support.</td></tr>
<tr><td>Strategy & Transactions</td><td>0</td><td>N/A</td><td>In some years, we have seen a small number of proposals related to corporate strategy and transactions, with six such proposals in 2021 (all in connection with a single event at a single company), but there were no such proposals this year.</td></tr>
<tr><td>Cybersecurity</td><td>0</td><td>N/A</td><td>While the oversight and management of cybersecurity risks continues to be a critical area of focus for boards and management teams, there have not been any proposals in this area since 2020.</td></tr>
</table>

Source: Laurel Hill. Compiled from ISS Corporate Solutions data and www.sedar.com filings for proposals submitted to a vote at meetings held January 1 to June 30, 2022, subject to our determination of category. Average support percentage excludes any proposals supported by management.

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23 Following receipt of a similar proposal at another company, the company in question reached a negotiated agreement to substantially implement the proposal. As a result, the proposal was withdrawn and not submitted to a vote.

24 Following receipt of a similar proposal at one of the Big Six banks, the bank in question agreed to commission and publish an independent racial equity audit of its Canadian and U.S. employment policies. As a result, the proposal was withdrawn and not submitted to a vote.

SAY-ON-CLIMATE

In our report last year, we discussed the nascent global say-on-climate campaign – its origins, objectives, proponents, and early successes, but also investor skepticism as to whether the initiative may prove to be the new say-on-pay. The campaign is a response to investor frustration with the slow pace of corporate climate action and has clearly been a catalyst for greater discussion and engagement in this critical area. We detail the 2021 and 2022 management and shareholder say-on-climate proposals below – and the numbers suggest that say-on-climate may be stalling. Despite the Children's Investment Fund Foundation's stated aim to file more than 100 say-on-climate resolutions globally, after two years only 56 companies globally have held a vote in the form of a management or shareholder proposal. Further, based on research from MSCI that only 40% of companies it studied (MSCI ESG Ratings coverage companies which had held or scheduled a say-on-climate vote) had committed to hold a vote again in the future,[25] we estimate that only about 14 of the 35 companies that held a management vote in 2022 will definitively hold one again – and only eight of those 14 future votes will be annual votes. In our view, so few recurring votes make it difficult to create any real sense of staying power or momentum for the initiative. And while say-on-climate management proposals will undoubtedly be supported by shareholders (even at reduced levels in 2022 as compared to 2021, see below), say-on-climate shareholder proposals experienced lower levels of support in 2022 as compared to 2021 (on average 22.1% in 2022, down from 23.6% in 2021). Investors have now had two years to study and consider say-on-climate, and if the initiative was truly gaining ground, it would be reasonable to expect a year-over-year increase in average support.

Say-on-Climate is a global campaign – and an initiative of Children's Investment Fund Foundation – with plans to call on leading companies to disclose carbon emissions each year in a manner consistent with the recommendations of the Task Force on Climate-related Financial Disclosures, to publish a credible climate transition plan (including any progress made year over year), and to give shareholders an annual advisory vote on the plan.

VOTE DETAILS – GLOBAL MANAGEMENT PROPOSALS

Company	Country	Industry	2021 For %	2022 For %
Aena S.M.E. SA	Spain	Transportation	96.4	97.0
Amundi SA	France	Diversified Financials	n/a	97.7
Anglo American Plc	U.K.	Materials	n/a	94.2
Atlantia SpA	Italy	Transportation	n/a	99.1
Aviva Plc	U.K.	Insurance	100	97.9
Barclays Plc	U.K.	Banks	n/a	80.8
BP Plc	U.K.	Energy	n/a	88.5
Canadian National Railway Company	Canada	Transportation	92.1	98.5
Canadian Pacific Railway Limited	Canada	Transportation	n/a	86.9
Carmila SA	France	Real Estate	n/a	98.0
Carrefour SA	France	Food & Staples Retailing	n/a	n/r
Centrica Plc	U.K.	Utilities	n/a	80.0
Electricite de France SA	France	Utilities	n/a	99.9
Elis SA	France	Commercial & Professional Services	n/a	95.5
ENGIE SA	France	Utilities	n/a	96.7

[25] MSCI, "Say on Climate: Investor Distraction or Climate Action?," https://www.unpri.org/stewardship/climate-transition-plan-votes-investor-briefing/9096.article

Company	Country	Industry	2021 For %	2022 For %
Equinor ASA	Norway	Energy	n/a	97.5
Ferrovial SA	Spain	Capital Goods	99.3	94.6
Getlink SE	France	Transportation	n/a	97.3
Glencore Plc	U.K.	Materials	94.4	76.3
Holcim Ltd.	Switzerland	Materials	n/a	95.0
Icade SA	France	Real Estate	n/a	99.3
Kingspan Group Plc	Ireland	Capital Goods	n/a	96.0
London Stock Exchange Group Plc	U.K.	Diversified Financials	n/a	98.7
M&G Plc	U.K.	Diversified Financials	n/a	79.6
Mercialys SA	France	Real Estate	n/a	81.1
NatWest Group Plc	U.K.	Banks	n/a	92.6
Nexity SA	France	Real Estate	n/a	87.9
Repsol SA	Spain	Energy	n/a	85.2
Rio Tinto Plc/Rio Tinto Limited	U.K./Australia	Materials	n/a	84.3
Santos Limited	Australia	Energy	n/a	63.1
Shell Plc	U.K.	Energy	88.7	79.9
Standard Chartered Plc	U.K.	Banks	n/a	83.0
TotalEnergies SE	France	Energy	91.9	88.9
UBS Group AG	Switzerland	Diversified Financials	n/a	84.0
Woodside Energy Group Ltd.	Australia	Energy	n/a	51.0

Source: Compiled from ISS Corporate Solutions data for management proposals submitted to a vote at meetings held January 1, 2021, to June 30, 2022.

KEY OBSERVATIONS – GLOBAL MANAGEMENT PROPOSALS

- Every proposal was supported by management.
- While the number of companies to hold a vote in 2022 more than doubled from 2021, from 16 to 35, less than half of the companies (seven out of 16) that held a vote in 2021 repeated one in 2022.
- A total of 28 "new" companies held a vote in 2022 as compared to 2021.
- There have been 44 unique companies to hold a vote in either 2021 or 2022.
- Year-over-year average support levels are down from 97.2% in 2021 to 89.0% in 2022.
- There have been only two Canadian and two U.S. companies to hold a vote, while most companies were based in the U.K., France, and Spain.

VOTE DETAILS – GLOBAL SHAREHOLDER PROPOSALS

Company	Country	Industry	2021 For %	2022 For %
Bank of Montreal	Canada	Banks	n/a	15.2
Booking Holdings Inc.	U.S.	Consumer Services	37.5	n/a
Canadian Imperial Bank of Commerce	Canada	Banks	n/a	24.3
Canadian Pacific Railway Limited	Canada	Transportation	85.4	n/a
Charter Communications, Inc.	U.S.	Media & Entertainment	39.0	n/a
H&M Hennes & Mauritz AB	Sweden	Retailing	2.7	n/a
Monster Beverage Corporation	U.S.	Food, Beverage & Tobacco	7.0	n/a
National Bank of Canada	Canada	Banks	n/a	23.6
Royal Bank of Canada	Canada	Banks	n/a	21.6
The Bank of Nova Scotia	Canada	Banks	n/a	20.7
The Toronto-Dominion Bank	Canada	Banks	n/a	27.0
Union Pacific Corporation	U.S.	Transportation	31.6	n/a

Source: Compiled from ISS Corporate Solutions data for shareholder proposals submitted to a vote at meetings held January 1, 2021, to June 30, 2022.

KEY OBSERVATIONS – GLOBAL SHAREHOLDER PROPOSALS

- Every proposal was opposed by management, except for the 2021 proposal at Canadian Pacific Railway Limited (CP Rail).
- None of the six companies targeted in 2021, whose votes all failed (except CP Rail) were again targeted in 2022. In the case of CP Rail, say-on-climate was presented as a management proposal in 2022.
- There were six "new" targeted companies in 2022, namely the Big Six Canadian banks (excluding companies where a proposal was withdrawn, such as at one Canadian bank).
- With just one exception, the targets have been Canadian and U.S. companies.
- Year-over-year average support levels are down, from 23.6% in 2021 to 22.1% in 2022. Average support in 2021 excludes the vote at CP Rail (given that it was supported by management).

SO, WHAT'S THE PROBLEM?

It has been argued (including by many of the Canadian banks in their proxy circulars recommending that shareholders vote against) that, as a governance principle, climate strategy is inextricably tied to corporate strategy, and corporate strategy is the board's domain. By asking shareholders to weigh in on corporate strategy, this fundamentally and improperly shifts accountability from the board to shareholders. Boards must consider the interests of all stakeholders, not just those of shareholders, in the formulation of strategy. Strategy is dynamic, not a once-a-year exercise that lends itself to a once-a-year vote. And boards have (or should have) the appropriate expertise, governance structures, and access to highly technical risk analysis and information (the volume, complexity, and sensitivity of which would be impractical to fully disclose to shareholders) to approve the necessary trade-offs between strategy and priorities to make the best decisions.

As a more practical matter, if say-on-climate were widely adopted, institutional investors would be required to potentially vote on thousands of proposals each year and this may pose an unrealistic burden on their resources. This is further complicated by the lack of consensus or convergence around measurement and disclosure frameworks and standards, although progress is being made. This raises another concern that decisions on say-on-climate may be outsourced to proxy advisory firms. If shareholders want to vote on climate strategy, it is argued that they should not then delegate that vote to third parties.

Another concern is that the binary nature of a "for" or "against" vote makes say-on-climate an inadequate communication tool because it provides no meaningful and actionable information about shareholder sentiment: Does a positive vote mean that the shareholder likes your plan, your progress, or your disclosure, or one or all of those elements? Does support simply indicate shareholder appreciation that you are doing something? Conversely, does a negative vote mean that the shareholder disagrees with your plan, your progress, or your disclosure, or any or all of those elements? Or is it a protest vote because the vote is advisory only, similar to certain shareholders' approach to say-on-pay, or because they are opposed in principle to say-on-climate votes? What, in fact, does the shareholder like or dislike? The voting results alone provide little meaningful feedback or insight.

A number of other potential unintended consequences have been expressed, including: Given the high levels of support for management-supported votes, will companies adopt one to greenwash unambitious plans? Will boards be motivated to enjoy strong votes which inappropriately favour climate action instead of a more balanced strategy? Or might they adopt one to replace meaningful shareholder engagement? Will companies campaign against more targeted shareholder proposals in favour of their own management say-on-climate votes? Does present day shareholder support make it more difficult for shareholders to challenge in the future? Does shareholder support ease pressure on the company to take further action? Will shareholders become passive and simply rubber stamp their approval of mediocre plans or substandard practices?

Institutional investors such as Vanguard and other market participants have expressed some of these concerns:

> *"Like other stakeholders, Vanguard remains cautious about the value of a Say on Climate vote. We recognize the possible benefits in terms of strengthening shareholder engagement but are concerned about the potential implications and unintended consequences for governance and accountability."*[26]

> *"Companies are eager to show climate action without doing the real work behind it," said Guillaume Pottier, a corporate engagement strategist at the French research nonprofit Reclaim Finance. "It's easy to have big investors who aren't experts give you a 95% rubber-stamp approval for a fake climate plan." Why would companies with questionable climate plans want investors weighing in, especially when most companies are averse to shareholder dictation on any issue? Experts at MSCI, Harvard, and the proxy voting advisory firm Glass Lewis (which typically sides with management) agree with Pottier that since the first votes took place in 2021, 'say on climate' has mostly served to validate low-quality plans and preempt more proactive investor involvement. "It complicates meaningful engagement with management," Pottier said, "and you're in a more difficult position to ask anything else of the company."*[27]

[26] Harvard Law School Forum on Corporate Governance, "Policy Insights: Say on Climate," https://corpgov.law.harvard.edu/2022/06/08/policy-insights-say-on-climate/

[27] QUARTZ, "Are 'say on climate' shareholder votes just more corporate greenwashing?," https://qz.com/2162711/are-say-on-climate-shareholder-votes-just-more-greenwashing/

IS THERE A BETTER APPROACH?

Rather than say-on-climate, we have heard the argument that boards can best serve the long-term interests of shareholders – and of all stakeholders – through robust, year-round, and constructive engagement regarding the approach to this complex and dynamic topic. And if shareholders fundamentally disagree with the overall strategy, they can and should withhold their votes from directors, or seek to replace them, including through public vote "withhold" or "against" campaigns or proxy contests. Targeted shareholder proposals can also be an effective approach.

The U.N. sponsored Principles for Responsible Investments has noted:

> *"Given the drawbacks of transition plan votes, investors should consider more effective vehicles to encourage companies to develop and disclose their strategy/actions on how they intend to transition to net-zero GHG emissions by 2050 or sooner. Investors should use company engagements to secure commitments and integrate expectations about a company's transition plan. If escalation is needed, investors should undertake tailored shareholder proposals and pursue improved board oversight of climate strategy. Deploying proven stewardship mechanisms at the scale and pace that the urgency of the issue demands is likely a better combination for changing corporate practices than recurring votes on transition plans."*[28]

What Do the Proxy Advisors Have to Say?

The proxy advisors will generally defer to management and support management proposals, but regarding shareholder proposals, there is greater skepticism, particularly from Glass Lewis. ISS and Glass Lewis' 2022 guidance on management proposals on climate transition plans is as follows: ISS will consider the completeness and rigor of these plans and have provided guidance around the various pieces of information they'll consider. Glass Lewis will consider things like disclosure around the board's oversight of climate strategy, disclosure around how the board will interpret and use the results of the vote, as well the company's operations and risk profile. ISS and Glass Lewis' 2022 guidance on shareholder proposals is as follows: ISS will consider things like the company's climate disclosure, their actual emissions, whether there have been any controversies, and whether the proposal is unduly burdensome or prescriptive. Glass Lewis has stated that it will generally recommend against.

[28] Principles for Responsible Investment, "Climate transition plan votes: investor briefing," https://www.unpri.org/stewardship/climate-transition-plan-votes-investor-briefing/9096.article#:~:text=Climate%20transition%20plan%20votes%20are,them%20to%20a%20shareholder%20vote

UNSOLICITED OFFERS

The 2016 National Instrument 62-104 takeover bid regime is now well into its seventh full year. We thought we'd look at the big picture regarding unsolicited offers, often referred to as hostile bids, and share a few observations: First, the number of hostile bids is down significantly, and it appears they will stay that way. As we highlighted in recent years, the new bid regime has fundamentally changed how potential bidders think about undertaking an unsolicited offer, now undertaken almost only as a last resort. Second, hostile bids are not dead. At a certain point, a hostile bid – or even a threatened hostile bid – may be a necessary step to decisively move forward where the target board refuses to engage or the parties cannot come to terms, and it may even create public pressure on a target to conclude a friendly transaction. We have also seen a bid employed to help achieve another strategic objective – to disrupt a management recapitalization transaction. Third, regulators are serious about these new rules. We have previously detailed in Aurora Cannabis Inc./ CanniMed Therapeutics Inc. and in ESW Capital, LLC/ Optiva Inc. that the regulators are keen to maintain the letter and spirit of the new takeover bid regime. The recent Brookfield/Inter Pipeline Ltd. rulings, which we detail further below, reinforce this conclusion. They also provide interesting precedent regarding i) the use of derivatives and associated disclosure in the context of a hostile bid, ii) the adoption of tactical shareholder rights plans, and iii) deal termination fees. Finally, you need to be prepared. Among other things, review your defense strategy, identify key advisors, know and understand your shareholder base, and consider structural protections such as shareholder rights plans that guard against creeping takeover bids.

NUMBERS OF HOSTILE BIDS

Source: Laurel Hill. Compiled from www.sedar.com filings through September 30, 2022, based on the date of the takeover bid circular.

HOSTILE BID DETAILS

Below is our summary outlining the Hostile Bids 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	Bidder	Consideration	Outcome
(2021) Petroteq Energy Inc.	Oil & Gas	Micro (<50M)	Viston United Swiss AG	Cash	Unsuccessful
In October 2021, following its initial outreach starting in July 2021 which yielded no progress, Viston launched its all-cash bid for Petroteq. Petroteq initiated a strategic review. The directors of Petroteq initially made no recommendation to shareholders on accepting or rejecting the bid, and simply advised "do not tender" until further communication is received from the board. Following completion of the strategic review in January, the board recommended that shareholders accept the offer. Viston extended and varied the offer several times, pending satisfaction of regulatory and other conditions (certain of which conditions were added since the start of the bid), but ultimately, Viston withdrew the bid prior to expiry after it concluded that several conditions would not be satisfied.					
(2022) Elemental Royalties Corp.	Mining	Small (50M–250M)	Gold Royalty Corp.	Shares	Unsuccessful
In January 2022, following proposals submitted in October and December 2021 which did not result in a negotiated transaction, and following its December 2021 announcement of its intention to make a bid, Gold Royalty launched its all-share bid. Elemental Royalties initiated a strategic review and adopted a shareholder rights plan following Gold Royalty's announcement of its intention to make a bid and then recommended that shareholders reject the bid. Gold Royalty extended the bid once beyond the original expiry date, but then announced that the bid conditions had not been satisfied and terminated the bid.					

Source: Laurel Hill. Compiled from www.sedar.com filings through September 30, 2022.

There are frequently other examples of threatened and proposed unsolicited offers and the past year was no exception:

In May 2021, Wyloo Metals Pty Ltd. (at the time, a 23% shareholder of Noront Resources Ltd.) announced its intention to commence a bid, subject to the completion of a formal valuation (anticipated to be completed by the end of July). The next day, Noront adopted a shareholder rights plan. That proposed bid was trumped in July by a friendly bid by BHP (through a wholly owned subsidiary) for Noront, which received the support of the Noront board. The deal was structured as a takeover bid and open for acceptance for 105 days, except that Noront agreed to reduce the deposit period to 35 days upon request by BHP. In August, Wyloo presented a superior proposal and subsequently converted a company loan into shares, now making it a 37% shareholder. Noront agreed to the Wyloo proposal, but BHP had a right to match and increased its bid above the Wyloo price. BHP subsequently announced three extensions to the expiry time while it attempted to secure Wyloo's support for its bid. Wyloo eventually returned with a further superior bid, a 350% improvement to its original proposed bid. Noront agreed to the proposal and BHP declined to exercise its right to match. The resulting plan of arrangement was approved by Noront shareholders in March and closed.

In April, biotech company Zymeworks Inc. announced that it was in receipt of an unsolicited proposal from All Blue Falcons FZE and its affiliates to acquire Zymeworks for cash. Zymeworks then announced that the board had rejected the proposal and characterized the proposal as opportunistic: "This non-binding, unsolicited activist proposal was timed opportunistically during a period of substantial market dislocation, and prior to several important near-term events for the Company expected in 2022."[29] The disclosure also noted that All Blue had sent it letters starting in January expressing its concerns related to a rejected financing and a public offering, in which it called on the company's directors to "immediately resign without delay" and threatened to initiate "a very public fight." In June, Zymeworks announced that it had adopted a limited-duration shareholder rights plan and in July announced a plan to redomicile to a Delaware corporation. As of this writing, there has been no further disclosure regarding All Blue pursuing its proposal and a meeting to approve the redomicile is pending.

ASC RULINGS IN THE BROOKFIELD-IPL HOSTILE BID

In our report last year, we detailed the February 2021 cash and share unsolicited offer by Brookfield Infrastructure Partners L.P. (Brookfield), together with its institutional partners, for Inter Pipeline Ltd. (IPL) and the resulting IPL strategic review and auction, which yielded a competing arrangement agreement between IPL and Pembina Pipeline Corporation (Pembina). Brookfield's bid (as amended) ultimately prevailed, but the case involved a number of important rulings by the Alberta Securities Commission (ASC), including: i) Brookfield's use of derivatives and associated disclosure, ii) IPL's tactical shareholder rights plan, and iii) the termination fee in respect of the Pembina-IPL arrangement. Last December, the ASC released its written decision[30] providing reasons for its rulings. We are pleased to share our summary and analysis below:

Brookfield's Use of Derivatives and Disclosure

Prior to the launch of its takeover bid, Brookfield had acquired a 9.75% beneficial ownership position and had entered into cash-settled total return swaps[31] (Swaps) representing an additional 9.9% economic interest in IPL, giving it a 19.65% economic interest in IPL. In its takeover bid materials, Brookfield disclosed its full economic interest, including its use of Swaps, and noted that the Swaps provided it with economic exposure comparable to beneficial ownership but not the right to vote or to direct or influence the voting, acquisition, or disposition of any of the underlying IPL shares. It did not, however, provide further details on the Swaps, including that Bank of Montreal (BMO) was both the counterparty to the Swaps and, through affiliate BMO Nesbitt Burns, financial advisor to Brookfield in connection with the bid for IPL. Nor did it disclose its extensive relationship with BMO or that BMO was entitled to a completion fee upon a successful bid. Notably, as Brookfield had not crossed the 10% beneficial ownership threshold pursuant to early warning reporting (EWR) requirements, it had not at any time filed early warning reports.

[29] Zymeworks, "Zymeworks' Board Of Directors Unanimously Rejects Unsolicited, Non-Binding Proposal" https://ir.zymeworks.com/news-releases/news-release-details/zymeworks-board-directors-unanimously-rejects-unsolicited-non

[30] ASC, "Decision, Citation: Re Bison Acquisition Corp., 2021 ABASC 188, Date: 20211221" (Decision), https://www.asc.ca/-/media/ASC-Documents-part-1/Notices-Decisions-Orders-Rulings/Issuers/2021/12/20211221-Bison-Acquisition-Corp.ashx

[31] "A swap is a contract where two parties agree to exchange cash flows in the future. In a cash-settled total return swap, one party (the buyer) agrees with the other party (the counterparty) to exchange cash flows arising from an underlying asset, like shares of stock. The counterparty typically agrees to pay the buyer (a) interest, dividends or other distributions which are paid to holders of the underlying asset and (b) any appreciation in the market value of the underlying asset upon expiration of the swap. Should the underlying asset decline in value, the buyer agrees to pay the difference to the counterparty. A typical cash-settled total return swap thus yields the buyer a financial payoff which is economically equivalent to buying the underlying asset, holding that asset for the duration that the swap contract is open, and selling the asset at the market price upon termination of the swap. Absent any hedging, the counterparty has a financial payoff which is the reverse of the buyer's–that is, economically equivalent to selling the underlying asset and repurchasing that asset from the buyer at the market price upon termination of the swap. However, ... a swap counterparty typically hedges its exposure to the underlying asset (including by purchasing the asset) and profits by charging a fee for acting as a dealer," ASC Decision, pages 24-25.

IPL and Pembina filed applications with the ASC for certain relief orders, charging that Brookfield's lack of disclosure regarding the Swaps was abusive to IPL shareholders and the Alberta capital markets:

- They charged that Brookfield used the Swaps to avoid EWR obligations while it planned its takeover bid, allowing Brookfield to avoid triggering a surge in the IPL stock price, which would have made its bid more expensive.
- They charged that Brookfield failed to provide proper disclosure of the Swaps, including under takeover bid rules, and that it also made misleading disclosures. They complained that a certain Brookfield disclosure referring to its near 20% economic interest simply as the "Brookfield block" effectively blurred the distinction between its beneficial ownership and its Swaps position. This was compounded by multiple media reports that similarly referenced Brookfield's near 20% stake. It was argued that this had the effect of dampening interest in the IPL auction, which prevented IPL from obtaining the highest possible price for shareholders, and that it created the impression that the Brookfield bid was a done deal, which may have signaled to shareholders that they need not even make the effort to vote on the Pembina-IPL arrangement.
- They charged that Brookfield used the Swaps to try to defeat shareholder approval of the Pembina-IPL arrangement. It was argued that given BMO's extensive relationship with Brookfield, and the fact that a successful bid would result in BMO being paid the completion fee, that BMO was a captive and compliant Swaps counterparty, and it would be in BMO's best interest to vote any hedged Swaps shares against the Pembina-IPL arrangement. And even if BMO abstained from voting any such IPL shares, the proportional weight of the Brookfield "against" vote would increase. In either case, this would make shareholder approval of the Pembina-IPL deal that much more difficult.
- They charged that Brookfield further used the Swaps to help satisfy the statutory minimum tender condition of 50%, namely that more than 50% of IPL shares other than shares beneficially owned or under the control or direction of Brookfield or parties acting jointly or in concert with Brookfield be tendered to the bid. It was argued that, in line with the same captive and compliant argument, BMO would be compelled to tender any hedged Swaps shares to the Brookfield bid and these shares would be unfairly counted toward the minimum tender condition.

The ASC ruled that Brookfield had not, in fact, breached EWR requirements, as it was satisfied that Brookfield did not have the right to control or direct the voting or tendering of the Swaps shares. The ASC determined, however, that Brookfield used the Swaps to avoid EWR requirements and that it intentionally issued incomplete and misleading disclosures. It ruled that Brookfield "failed to meet its disclosure obligations and also engaged in conduct that was clearly abusive of IPL shareholders and the Alberta capital market in general."[32] The ASC ordered that Brookfield provide IPL shareholders with certain specific disclosure regarding the Swaps, including BMO's role as Swaps counterparty, information concerning the scope of Brookfield's relationship with BMO, and the details of the BMO completion fee. It also deemed BMO to have hedged all the Swaps shares and concluded that BMO would be likely to tender all Swaps shares to the Brookfield bid. Consequently, it raised the minimum tender condition for the bid from 50% to 55%.

IPL's Tactical Shareholder Rights Plan

Following the launch of the Brookfield bid, IPL adopted a supplemental shareholder rights plan (Supplemental Rights Plan) that included a technical revision to the company's existing shareholder rights plan to treat certain financial derivatives, such as the Swaps utilized by Brookfield, as equivalent to beneficial ownership for the purposes of the 20% triggering threshold under the two plans. Brookfield filed an application with the ASC that the Supplemental Rights Plan and the break fee (discussed below) were improper defensive tactics. It charged that the Supplemental Rights Plan, which it also criticized for not having been approved by shareholders, unfairly prevented Brookfield from utilizing the statutory 5% open market purchase exemption under takeover bid rules or from increasing its Swaps position. Further, Brookfield argued that if the Supplemental Rights Plan ever served a legitimate purpose for IPL shareholders – which Brookfield denied – once the Pembina-IPL arrangement had been struck, it should have been terminated. The ASC, however, concluded that the IPL board acted reasonably in adopting the Supplemental Rights Plan – that it did so to prevent Brookfield from accumulating an even larger position, given that the size of Brookfield's economic exposure had the potential to hinder the auction process and negatively influence shareholder support for any competing transaction, and that the Swaps shares had the potential to distort the outcome of any competing transaction vote. It also agreed with arguments that the Pembina-IPL deal vote effectively served as a proxy for a vote on the Supplemental Rights Plan and that maintaining the Supplemental Rights Plan through the Pembina-IPL vote was necessary to protect the integrity of that vote.

32 ASC Decision, page 91

Pembina-IPL Termination (or Break) Fee

In connection with the Pembina-IPL arrangement, IPL agreed to pay Pembina a termination fee in certain circumstances if the deal failed to proceed, equivalent to 2.3% of IPL enterprise value and to 4.2% of IPL equity value. Brookfield sought an order from the ASC to reduce or eliminate the break fee, arguing that a 4.2% break fee was excessive, especially considering its competing "superior" proposal. The ASC disagreed, relying on a precedent case which accepted that a break fee is appropriate where: i) it is needed to induce a competing bid, ii) the bid represents better value for shareholders, and iii) the fee reflects "a reasonable commercial balance between its potential negative effect as an auction inhibitor and its potential positive effect as an auction stimulator" *(the CW Shareholdings Test)*.[33] The ASC concluded that the Pembina-IPL break fee met each of these elements, deferring to the board's judgement that the Pembina-IPL deal represented the "better value for shareholders." Further, the ASC noted that the quantum of the break fee was within precedent ranges, considering the elevated risk to Pembina of a failed transaction given the significant Brookfield toehold position.

WHAT YOU NEED TO KNOW:

This case has drawn increased attention to the potential for abuse relating to the use of derivatives in the context of a takeover bid, including with respect to "hidden ownership"[34] and "empty voting"[35] issues. Prospective bidders should carefully consider the use of derivatives and associated disclosure. The case has also highlighted that tactical shareholder rights plans, provided they protect the bona fide interests of shareholders of the target company, are not abusive. Finally, target companies would be well-advised to stress-test termination fees against the *CW Shareholdings Test.* More broadly, the ASC rulings reinforce our conclusion from two previous hostile bid cases involving securities commission rulings, specifically in Aurora Cannabis Inc./CanniMed Therapeutics Inc. (detailed in our 2018 case study) and in ESW Capital, LLC/Optiva Inc. (detailed in our 2021 report), that the regulators are serious about maintaining the letter and spirit of the new takeover bid regime.

SHORT-SELLING ACTIVISM

Boards and management teams will likely not be disappointed to hear that activist short sellers – primarily based in the U.S. – have recently faced several headwinds. In our report last year, we detailed the early 2021 short-selling squeeze where retail investors, outraged over heavy short-selling of certain popular stocks, banded together through message boards to drive demand in such "meme" stocks, most notably GameStop Corp., propelling stock prices to outrageous highs and forcing short sellers to close out their positions at devastating losses. Among them was Citron Research, one of the most prominent activist short sellers. The firm later announced that it would no longer publish short reports. So began a relatively challenging year for activist short sellers, with further headwinds from a generally bullish environment, continued backlash from retail investors and corporations, congressional scrutiny calling for more government oversight, and probes by the U.S. Justice Department and the U.S. SEC.

In December, "the Justice Department subpoenaed certain market participants seeking communications, calendars and other records relating to almost 30 investment and research firms, as well as three dozen individuals associated with them" and the "Securities and Exchange Commission... sent some requests for information."[36] The government and regulatory scrutiny may simply be too much for some firms:

> *"With US investigators rummaging through bank records and personnel files, Block questioned his old analysis that an occasional inquiry would be a cost of doing business. It now seems more existential. He wonders aloud how long he'll stick with the business."*[37]

A site that tracks activist short-selling campaigns recorded 135 new major global short campaigns (12 in Canada) in 2021,[38] about 24% lower than the 177 global campaigns (16 in Canada) it recorded in 2020.[39] For the first half of 2022, the site recorded 65 new global campaigns (6 in Canada), about 18% lower than the corresponding number of global campaigns in the first half of 2021.[40]

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33 ASC Decision, page 48

34 "A sophisticated investor may be able, through the use of equity swaps or similar derivative arrangements, to accumulate a substantial economic interest in an issuer without public disclosure and then potentially convert this interest into voting securities in time to exercise a vote (this is referred to as 'hidden ownership')," ASC Decision, page 63

35 "It is also possible for an investor, through derivatives or securities lending arrangements, to hold voting rights in an issuer and possibly influence the outcome of a shareholder vote, although it may not have an equivalent economic stake in the issuer (this is referred to as 'empty voting')," ASC Decision, page 63

36 BNN Bloomberg, "Vast DOJ Probe Looks at Almost 30 Short-Selling Firms and Allies," https://www.bnnbloomberg.ca/vast-doj-probe-looks-at-almost-30-short-selling-firms-and-allies-1.1718553

37 BNN Bloomberg, "A short seller's life upended: Carson Block questions future," https://www.bnnbloomberg.ca/a-short-seller-s-life-upended-carson-block-questions-future-1.1792498

38 Breakout POINT, "Activist Short Selling in 2021," https://breakoutpoint.com/blog/2022/01/activist-short-selling-in-2021/

39 Breakout POINT, "Activist Short Selling in 2020," https://breakoutpoint.com/blog/2021/01/activist-short-selling-in-2020/

40 Breakout POINT, "Activist Short Selling in H1-2022," https://breakoutpoint.com/blog/2022/07/activist-short-selling-in-h1-2022/

ACTIVIST SHORT-SELLING CAMPAIGNS (CANADA)

Sources: 2013-2019 data from Insightia, 2020-2022 data from Breakout POINT[41]

Despite these challenges, activist short sellers in fact experienced one of their best performing years in 2021: "Last year we saw 135 campaigns launched by activists. Only six stocks are up since being targeted. This is a tremendous hit rate of about 95%. 105 campaigns are down more than 50%, again this represents more than 77% of all the campaigns. Twenty-one campaigns are down more than 90%. This stellar performance was hardly predicted at the beginning of 2021 when shorts were frequently written off."[42] Ben Axler, founder of Spruce Point Capital, which has frequently targeted Canadian companies, including Lightspeed Commerce Inc. (September 2021) and Nuvei Corporation (December 2021), noted: "[2021] was marked by volatility and speculative bubbles in the equity markets which provided a favorable backdrop for our fund."[43]

In previous reports we noted new and increased attention here in Canada on certain predatory and unfair short-selling practices, such as "short and distort" campaigns, "naked" shorting, and short trading in connection with financings. We also detailed the December 2020 *CSA Consultation Paper 25-403 – Activist Short Selling*,[44] which among other things, set out questions for consultation related to i) the nature and extent of activist short-selling activity in Canada, ii) the Canadian and international regulatory framework, and iii) issues related to enforcement and other potential remedial actions. The consultation period closed on March 3, 2021, and as of this writing there has been no further CSA update. Regarding "naked" shorting, however, the Investment Industry Regulatory Organization of Canada (IIROC), which regulates all trading activity on debt and equity marketplaces in Canada, in August published guidance[45] to its participants that now effectively prohibits the practice of entering a short sale trade without reasonable expectation of settling the trade on the settlement date. The guidance states:

> *"IIROC expects that prior to the entry of a short sale order a Participant has reasonable certainty that it can access sufficient securities for it to settle any resulting trade on settlement date, which generally is two days following the trade date. If the Participant knows or ought reasonably to know that it is unlikely that sufficient securities will be available and accessible to deliver on settlement date, the order is not permitted to be entered. For example, a Participant may not be able to demonstrate a reasonable expectation that sufficient shares would be available on settlement date in cases where: the person on behalf of whom the short sale order is entered has previously executed trades where shares were not available to deliver on settlement date, or the securities being sold short are difficult to borrow. For added clarity, where a client expects to receive securities after the settlement date of a short sale trade, the Participant is not permitted to rely on those securities to establish a 'reasonable expectation' to settle because the securities would not be available to deliver on the settlement date of the short sale trade."*

WHAT YOU NEED TO KNOW:

The retail investor backlash related to short-selling activity such as at GameStop as well as government and regulatory scrutiny of this space may be a gut check for some activist short sellers. If you consider, however, that the 2021 campaigns performed exceptionally well, there is no reason to expect a long-term softening of short-selling activism. Of course, should the U.S. Justice Department or SEC inquiries find evidence of wrongdoing and/or lead to stricter rules, all bets are off. The CSA have also been paying attention to certain concerns in this area and we await further developments since their consultation paper last year. In the interim, IIROC's recent decision to prohibit "naked" short selling is a welcome development.

[41] 2013-2019 data from Insightia, "Shareholder Activism in Canada 2021," https://www.activistinsight.com/canada_2021/, 2020-2022 data from Breakout POINT, "Activist Short Selling in 2020," "Activist Short Selling in 2021," "Activist Short Selling in H1-2022"

[42] Breakout POINT "Activist Short Selling in H1-2022"

[43] Institutional Investor, "Short Activist Spruce Point Soars in Turbulent Year for Short Sellers," https://www.institutionalinvestor.com/article/b1w8h9txpzc67s/Short-Activist-Spruce-Point-Soars-in-Turbulent-Year-for-Short-Sellers

[44] OSC, "CSA Consultation Paper 25-403 – Activist Short Selling," https://www.osc.ca/en/securities-law/instruments-rules-policies/2/25-403/csa-consultation-paper-25-403-activist-short-selling

[45] IIROC, "Guidance on Participant Obligations to have Reasonable Expectation to Settle any Trade Resulting from the Entry of a Short Sale Order," https://www.iiroc.ca/news-and-publications/notices-and-guidance/guidance-participant-obligations-have-reasonable-expectation-settle-any-trade-resulting-entry-short?s=09

TRENDS IN GOVERNANCE

ENVIRONMENTAL, SOCIAL, AND GOVERNANCE

Environmental, social, and governance (ESG) continues to drive the conversation among investors as there is such a wide range of existing and emerging considerations within each pillar. Some of this year's hot topics include biodiversity, supply chain management, cybersecurity, and diversity beyond gender.

Continuing to reinforce the increasing perspective of ESG, this year's 2022 ESG Global Study by Capital Group found that 61% of respondents believe that ESG is not a passing fad, while 26% were neutral and 13% believed that ESG will fall out of fashion.[46] To help quantify this ESG appetite, as per the chart below, research from the Global Sustainable Investment Alliance projects that by 2024 ESG-mandated assets will comprise over half of all professionally managed assets.

GLOBAL ASSETS UNDER PROFESSIONAL MANAGEMENT (USD$T)

Non-ESG mandated   ESG-mandated

Source: Deloitte Insights

While on the surface this projected annual increase of ESG-mandated investments and their importance appears to be positive, investor concerns exist around sustainable investing in today's markets including company commitments versus execution, and the ongoing issue of greenwashing. We will dive deeper into these investor criticisms throughout this section.

ESG-mandated assets, as defined by Deloitte, are "professionally managed assets in which ESG issues are considered in selecting investments or shareholder resolutions are filed on ESG issues at publicly traded companies."[47]

[46] Capital Group, "ESG Global Study," https://www.capitalgroup.com/individual/what-we-offer/esg/perspectives/esg-global-study.html

[47] Deloitte Insights, "Ingraining sustainability in the next era of ESG investing," https://www2.deloitte.com/us/en/insights/industry/financial-services/esg-investing-and-sustainability.html

CANADIAN ESG REPORTING UPDATE

As we discussed in last year's report, investors and companies continue to express a desire for more uniform standards for reporting on ESG related topics. To help close the gap on these issues, on March 24, the International Financial Reporting Standards Foundation (IFRS Foundation) and Global Reporting Initiative (GRI) announced a collaboration agreement with the International Sustainability Standards Board (ISSB) and the Global Sustainability Standards Board (GSSB) to establish an interconnected approach for sustainability disclosures.

Eelco van der Ender, CEO of GRI stated, "The MoU between GRI and the IFRS Foundation is a strong signal to capital markets and society that a comprehensive reporting system, which combines financial and impact materiality for sustainability reporting, is possible on a global scale. Aligning GRI's established and widely adopted standards for sustainability impacts with the investor-focused standards being developed by the ISSB will benefit both companies and investors, as well as a wide range of stakeholders around the world."[48]

This is an example of how organizations are working together to help move the needle on more uniform and cohesive disclosure. Regulators are also working to develop ESG disclosure practices by implementing certain issuer requirements. Canada's federal government tabled its latest budget on April 7, 2022, and this budget included a promise to implement mandatory climate-related reporting obligations for federally regulated banks and insurance companies. This mandatory reporting requirement is expected to be phased in starting in 2024 and will likely have significant impact on the Canadian capital markets outside of these targeted issuers.[49]

A major Canadian development in climate-related reporting happened on October 18, 2021 when the CSA published for comment Proposed National Instrument 51-107 *Disclosure of Climate-related Matters* (NI 51-107), which has the goal of improving the comparability of climate-related issuer disclosure so investors can make more informed investment decisions.[50] These proposed disclosure requirements are primarily in line with recommendations from the *Task Force on Climate-related Financial Disclosures* (TCFD), initially published in June 2017, and relate to four core disclosure elements from the TCFD recommendations (governance, strategy, risk management, and metrics and targets). The CSA has stated that it does not anticipate these new disclosure requirements, once approved, will come into force before December 31, 2022, and they will be phased in over a one-year period for non-venture listed issuers, and over a three-year period for venture-listed issuers.[51]

Shortly following the announcement of NI 51-107, on November 3, 2021, the IFRS Foundation announced the formation of the ISSB to help provide investors and other capital market participants with more standardized information about sustainability related risks and opportunities. More recently, in March 2022 the newly formed ISSB published two exposure drafts with disclosure rules for general sustainability and climate-related areas.

As per an update by Miller Thomson LLP on September 1, 2022, "Once finalized, the ISSB Exposure Drafts will form the basis of the IFRS Sustainability Disclosure Standards that will aim to provide a comprehensive global baseline for sustainability and climate-related disclosures that meet the informational needs of investors. The ISSB Exposure Drafts are likely to influence the direction the CSA takes when it finalizes its proposed Canadian Rules. While the CSA was initially ahead of the curve when it first proposed the Canadian Rules back in 2021, the subsequent publications of the SEC's proposed rules and the ISSB Exposure Drafts (which both mandate much more demanding disclosures than what the Canadian Rules require) is a signal that the Canadian Rules need further refinement. Otherwise, Canadian issuer access to global capital markets may be hampered if the disclosures mandated by the Canadian Rules do not keep pace with the regulatory responses taken by regulators in the United States and at the international level."[52]

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48 GRI, "IFRS Foundation and GRI to align capital market and multi-stakeholder standards," https://www.globalreporting.org/news/news-center/ifrs-foundation-and-gri-to-align-capital-market-and-multi-stakeholder-standards/

49 MLT Aikins LLP, "It's Official: Mandatory ESG Disclosure Is Coming to Canada," https://www.mltaikins.com/esg/its-official-mandatory-esg-disclosure-is-coming-to-canada/

50 Canadian Securities Administrators, "Canadian securities regulators seek comment on climate-related disclosure requirements," https://www.securities-administrators.ca/news/canadian-securities-regulators-seek-comment-on-climate-related-disclosure-requirements/

51 McMillan LLP, "CSA Propose Standardized and Reinforced Climate-Related Disclosure — Primer on Proposed National Instrument NI 51-107 *Disclosure of Climate-related Matters*," https://mcmillan.ca/insights/csa-propose-standardized-and-reinforced-climate-related-disclosure-primer-on-proposed-national-instrument-ni-51-107-disclosure-of-climate-related--matters/

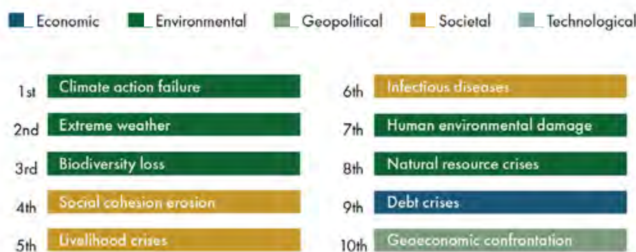
52 Miller Thomson LLP, "Will the new International Sustainability Standards Board succeed in unifying global sustainability and climate-related disclosure rules?," https://www.millerthomson.com/en/publications/communiques-and-updates/securities-practice-notes/september-1-2022-2/international-sustainability-standards-board-global-climate-related-disclosure-rules/?utm_source=vuture2022&utm_medium=email&utm_campaign=securities-practice-notes-2022-september-1

FOUR ESG HOT TOPICS

1) Biodiversity

To date, while climate has been the primary focus of conversation when it comes to the "E" pillar, many industry experts believe biodiversity is a key missing component of ESG. For the last 17 years the World Economic Forum has published a Global Risks Report which discusses key findings from its annual survey. This year's report gathered insights from nearly 1,000 global experts and leaders. One question in this year's survey was to "Identify the most severe risks on a global scale over the next 10 years." Biodiversity ranked third on this list behind climate action failure and extreme weather.[53]

WORLD ECONOMINC FORUM'S SURVEY OF MOST SEVERE RISKS ON A GLOBAL SCALE OVER NEXT 10 YEARS



Source: World Economic Forum Global Risks Perception Survey 2021-2022

The American Museum of Natural History defines biodiversity as "the variety of life on Earth at all its levels, from genes to ecosystems, and can encompass the evolutionary, ecological, and cultural processes that sustain life."[54] As humans, in order to maintain a healthy ecosystem to provide the air we breathe and the food we eat, this variety of life is essential.[55]

To put biodiversity into perspective from an economic significance perspective, it is estimated that between 15% and 45% of the world's GDP is directly linked to biodiversity. To date, investors have utilized qualitative data as the primary metrics for measuring a specific company's efforts on biodiversity. This qualitative data includes ESG scores, company-specific commitments related to biodiversity, and corporate policies and procedures. However, there is a more effective quantitative way to measure biodiversity, similarly to how investors are utilizing CO_2 as a quantitative metric to assess a company's specific impact related to climate. This quantitative measure is a numerical indicator called Mean Species Abundance (MSA), which quantifies a company's impact on diversity pre- and post-corporate operational activity.

Natixis Investment Managers has further broken-down biodiversity loss into four main factors as discussed below:

1. **Land use.** The change in biodiversity as forests are converted to farmland.
2. **Climate change.** The amount of greenhouse gases emissions.
3. **Nitrogen oxide emissions.** Mainly linked to fertilisers.
4. **Water.** The amount of freshwater eco-toxicity.

These four factors can be used to generate a company-specific aggregated score which would represent the company's biodiversity footprint. To ensure this score captures the full picture of a business, the assessment must include the full value chain of the organization.

France and the Netherlands have already implemented reporting initiatives for biodiversity, and other countries are in the process of considering similar approaches. According to Carmine de Franco, Head of Research at Ossiam, an affiliate of Natixis Investment Managers, "Just as carbon footprint reporting has been mandatory in many countries, so biodiversity reporting is likely to become mandatory over time."[56]

While there are many ways in which boards are overseeing environmental risk and opportunities, this is an area which should be added to the consideration, if not already.

53 World Economic Forum, "The Global Risks Report 2022, 17th Edition," https://www3.weforum.org/docs/WEF_The_Global_Risks_Report_2022.pdf

54 American Museum of Natural History, "What is Biodiversity," https://www.amnh.org/research/center-for-biodiversity-conservation/what-is-biodiversity

55 The Royal Society, "Why is biodiversity important?," https://royalsociety.org/topics-policy/projects/biodiversity/why-is-biodiversity-important/#:~:text=Biodiversity%20is%20essential%20for%20the,also%20value%20nature%20of%20itself

56 Natixis Investment Managers S.A., "Biodiversity: The Missing Piece in the ESG Puzzle," https://www.im.natixis.com/en-institutional/insights/biodiversity-the-missing-piece-in-the-esg-puzzle

2) Supply Chain Management

Over the past few years, the global supply chain has undergone a historic level of distress due to worldwide issues including the COVID-19 pandemic, political unrest between Russia and Ukraine, and the ongoing push for climate change. As of result of these persisting issues, supply chain management continues to be a top area of focus for investors. The COVID-19 pandemic impacted company supply chains across the globe through disruptions and delivery uncertainty and staffing shortages.[57] Companies are forced to modify supply chains to help alleviate these potential impacts and ultimately position new supply chains to be resilient to future uncertainty.[58]

Supply chains are progressively taking a more forward-facing role for businesses as opposed to historically being considered a back-office function that was unfamiliar to the average consumer or investor. The idea of an ethical supply chain helps move companies towards modern consumer and investor expectations by incorporating social, human rights, and environmental considerations into conducting business.[59]

A paper published by KPMG entitled "Ethical supply chains and procurement" outlined six steps companies can take to help build a sustainable and resilient supply chain:

1. **Ethical supply chain assessment**

   Identify potential points of failure in your environmental, social and governance (ESG) framework, and identify and prioritize solutions.

2. **Visibility**

   Achieve real-time transparency through end-to-end tracking and traceability of suppliers and products.

3. **Risk landscape**

   Investigate suppliers and assess key current and potential risks in the supply chain.

4. **Optimize**

   Transform the supply chain to determine the optimal balance of cost, cash, service, and ESG, helping to deliver both profitability and sustainability.

5. **Embed governance**

   Perform due diligence on suppliers to measure ethical integrity and embed a robust governance framework to uphold ethical practice in the supply chain.

6. **Proactive management**

   Work collaboratively with stakeholders to go beyond just compliance and use predictive analytics to pre-empt and mitigate potential disruptions.[60]

Companies will need to maintain a dynamic supply chain to best navigate current and future challenges such as the ongoing COVID-19 pandemic. Investors will be paying close attention to companies' responses and resilience to supply chain risks when evaluating current and/or potential new investments.

[57] Ernst & Young Global Limited, "How COVID-19 impacted supply chains and what comes next," https://www.ey.com/en_ca/supply-chain/how-covid-19-impacted-supply-chains-and-what-comes-next

[58] Thomson Reuters, "How the pandemic has prepared global supply chains for the crises to come," https://www.thomsonreuters.com/en-us/posts/tax-and-accounting/pandemic-preparation-global-supply-chains/

[59] Future of Customer Engagement Experience, "The ethical supply chain: Definition, examples, stats," https://www.the-future-of-commerce.com/2020/01/22/ethical-supply-chain-definition-stats/

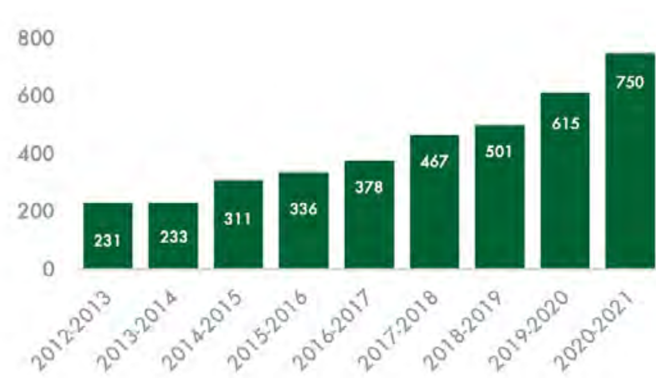
[60] KPMG, "Ethical supply chains and procurement," https://assets.kpmg/content/dam/kpmg/xx/pdf/2021/07/ethical-supply-chains-and-procurement.pdf

3) Cybersecurity

In today's world, technology is integral to virtually every business, from accepting funds from customers, to being the foundation of supply chains and operations, to privacy and confidentiality of data. As technology continues to develop and play a larger and more significant role for businesses, cybersecurity is paramount to ensure the risks associated with business-specific technology are properly managed. Companies that fail to properly manage their unique cybersecurity risks could face severe consequences, including business disruptions, damage to reputation, legal actions, and ultimately destruction of share price.[61]

According to a report published by Blake, Cassels & Graydon LLP, the number of Alberta and British Columbia combined self-reported breaches, including both the private and public sector, has steadily increased from 231 in 2012-2013 to 750 in 2020-2021, with an increase of nearly 22% over the last year.[62]

BREACHES (PRIVATE AND PUBLIC SECTOR) ALBERTA AND B.C. COMBINED



Source: Blake, Cassels & Graydon LLP: Canadian Cybersecurity Trends Study 2022, Third Edition

The Government of Canada introduced Bill C-26, *An Act Respecting Cyber Security* which, among other things, seeks to enact the *Critical Cyber Systems Protection Act* (CCSPA). This proposed Act would require specific compliance and reporting for certain classes of federally regulated personal, partnership, or unincorporated organizations in sectors deemed vital to Canadian security (Designated Operators). A specific list of Designated Operators has not yet been identified; however, Bill C-26 has provided a list of vital services or systems in its Schedule One which includes telecommunications services, interprovincial or international pipeline and power line systems, nuclear energy systems, transportation systems within the legislative authority of Parliament, banking systems, and clearing and settlement systems. These duties include establishing a cybersecurity program, notifying appropriate regulators of certain events, mitigating supply-chain and third-party risks, immediately reporting cyber security incidents, and maintaining compliance records. The Bill has only passed first reading in the House of Commons, but if implemented would require additional compliance and record-keeping duties by the applicable companies.[63]

Clearly, cybersecurity is having an increasing impact on Canadian businesses year over year, and there is legislation already on the horizon that could require companies to provide additional compliance. From a board perspective, cybersecurity oversight should be part of the board's skill set. At the very least, it is critical that boards and management teams evaluate their cybersecurity governance to ensure they are not only staying compliant but remain ahead of any threats to their unique business.

Cyber Risk Score: Based on a survey by RBC Global Asset Management, "Of the nearly 800 investors surveyed in the United States, Canada, Europe, and Asia, 67% reported concerns about cyber security. Anti-corruption was the second most prevalent concern, followed by water. Cyber threats weighed heaviest on U.S. investors, at 71% of respondents. In Canada, 65% of investors cited cyber security as a concern, on par with a number of other ESG risks including climate change and executive compensation but slightly trailing anti-corruption."[64]

[61] Institutional Shareholder Services, "ISS ESG 'Foreword' Video Series, Episode 22: Why Cybersecurity Risk Keeps Investors Up at Night," https://www.youtube.com/watch?v=aXrlbcfT1f8

[62] Blake, Cassels & Graydon LLP, "Canadian Cybersecurity Trends Study 2022, Third Edition," https://communications.blakes.com/29/122/uploads/blakes-cybersecurity-trends-study-2022.pdf?intIaContactId=0zXAFppEYyUNS%2fbOsR2UHw%3d%3d&intExternalSystemId=1

[63] Stikeman Elliott LLP, "Bill C-26: Introducing Canada's Critical Cyber Systems Protection Act," https://www.stikeman.com/en-ca/kh/canadian-technology-ip-law/bill-c26-introducing-canadas-critical-cyber-systems-protection-act

[64] RBC Global Asset Management, "Cyber security is the top ESG concern for institutional investors," https://www.rbcgam.com/en/ca/article/cyber-security-is-the-top-esg-concern-for-institutional-investors/detail

Proxy Advisors and Cybersecurity

In response to growing investor concern, ISS acquired the cyber risk score business FICO® to provide investors and boards with cyber risk scores within ISS' QualityScore ratings to assist clients in evaluating company-specific risk. "With this Cyber Risk Score, investors and boards can assess, manage and mitigate cyber risk with a quantitative, and behavioral analytical approach."

Last year, Glass Lewis announced a strategic partnership with security ratings firm BitSight to provide clients with cybersecurity risk exposure within their research reports. This additional data is provided in the company's unique "BitSight cyber security rating profile" within Glass Lewis' research report. The BitSight Security Rating score ranges from 250 to 900. The higher the rating, the more effectively the company is implementing good security practices. These ratings are calculated through a propriety algorithm that analyzes and classifies externally observed data. This data feeds into four classes of data (compromised systems, diligence, user behaviour, and data breaches) which in turn generates a company-specific rating.[65] According to Glass Lewis' Chief Commercial Officer, "The BitSight Security Rating and insights will allow our clients to identify cyber risk exposure, potentially minimizing both reputational risk and long-term financial losses."[66]

This addition of dedicated cybersecurity data from ISS and Glass Lewis is a signal of the importance of this topic and the significance it has for investors in evaluating current and potential investments. For this reason and others, we strongly encourage boards to have the discussion of cybersecurity to determine how it will be managed within the organization and overseen at the board level. Moreover, like so many components of ESG where third-party reporting is based on publicly available information, it is important to be telling your story on cybersecurity and not having reporting agencies rely on information not directly from your viewpoint.

65 Glass, Lewis & Co., "BitSight for Glass Lewis Proxy Paper Research Reports," https://www.glasslewis.com/bitsight-public-company-partnership-page/#:~:text=BitSight%20Security%20Ratings%20range%20from,and%20classifies%20externally%20observable%20data

66 Glass, Lewis & Co., "BitSight and Glass Lewis Partner to Expand Investor Understanding of Cybersecurity Risk," https://www.glasslewis.com/press-release-bitsight-partnership/

4) Board Diversity Beyond Gender

In last year's report we discussed how the "S" pillar of ESG was on the rise. This area continues to gain momentum with a major focus on board diversity beyond gender, which considers not just women diversity, but the inclusion of "designated groups." The term "designated groups" is taken from the federal *Employment Equity Act* and includes women, Aboriginal peoples, persons with disabilities and members of visible minorities. In addition to the expansion of board diversity, the conversation has quickly moved from "why" diversity is important for issuers, to "how" issuers can move the needle on diversity at their company. As an example, we are seeing increasing scrutiny of board tenure to drive change (we will speak on this in greater detail later in our governance section). As this trend continues to develop, investors are going to be paying more attention to a board's overall diversity, and how the company provides disclosure to address gaps in board diversity. Companies will benefit from including robust diversity disclosure regarding the status, process and specific considerations of diversity through the inclusion of a formal diversity policy, not simply the targets themselves.

On January 1, 2020, new CBCA regulations came into force requiring that all publicly listed CBCA corporations provide additional disclosure regarding the diversity of designated groups at the board and senior management levels in their annual proxy circulars. The federal government stated it will review these new provisions in 2025 to determine whether further action is required if board and executive officer diversity has not increased.[67] This legislation is an example of how the needle is moving on diversity beyond gender in Canada. In the United States, certain institutional investors have already begun taking action to push for board diversity beyond gender. In January 2021, State Street Global Advisors (SSGA) announced that it had amended its custom voting policy to include the following guidelines for racial and ethnic diversity: "If a company in the S&P 500 does not disclose, at minimum, the gender, racial and ethnic composition of its board, we may vote against the Chair of the nominating committee. In 2020 SSGA further amended their policy guidelines to state that they 'may withhold support from the Chair of the nominating committee also when a company in the S&P 500 does not have at least one director from an underrepresented community on its board.'"[68]

67 Norton Rose Fulbright Canada LLP, "New CBCA diversity disclosure requirements confirmed," https://www.nortonrosefulbright.com/en-ca/knowledge/publications/806cb42e/new-cbca-diversity-disclosure-requirements-confirmed

68 State Street Global Advisors, "Proxy Voting and Engagement Guidelines," https://www.ssga.com/library-content/pdfs/ic/proxy-voting-and-engagement-guidelines-us-canada.pdf

As part of ISS' 2021 annual proxy voting guidelines for the United States, a new policy was adopted relating to board racial and ethnic diversity. This policy came into effect for meetings after February 1, 2022, and is applicable to constituents of the Russell 3000 or S&P 1500 index.[69] "For companies in the Russell 3000 or S&P 1500 indices, highlight boards with no apparent racial and/or ethnic diversity, generally vote against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) where the board has no apparent racially or ethnically diverse members. An exception will be made if there was racial and/or ethnic diversity on the board at the preceding annual meeting and the board makes a firm commitment to appoint at least one racial and/or ethnic diverse member within a year."[70]

These are examples of how institutional investors and proxy advisors are increasing their expectation of board diversity beyond having women on boards. As investors in the U.S. and Canada continue to expect more from companies, issuers will need to take this wide lens of board diversity into consideration to avoid scrutiny and potential negative vote recommendations. It is likely that Canada will see increased diversity considerations beyond gender by investors, which would be shown through voting and engagement conversations with issuers.

PwC has outlined a three-step approach that companies can follow to enhance their strategies, policies and reporting readiness for disclosure and inclusion.

1. Discover what's possible: Assess where the organization aspires to be and what's standing in the way of getting there, as well as where the data currently exists across the organization. Answer the question, "where are you today?"
2. Align values and purpose and develop a strategy/road map: Knowing why you're doing what you're doing (your mission), where you're trying to go (your vision), and how you're going to go about it (your values) are the glue that holds an organization together, and ensuring the various groups are aligned in advance of developing your strategy/road map is a critical first step. Once you have the right stakeholders at the table, think big and be aspirational about what you want to achieve.
3. Realize a return on inclusion: Success is achieved when there is engagement with D&I at every level of the organization. Road maps must begin to shift mindsets from D&I as an HR or business issue to a leadership issue that affects the bottom line and shareholder value.[71]

[69] JD Supra, LLC, "ISS Policy Changes for 2021: Increased Expectations for Diversity and Accountability," https://www.jdsupra.com/legalnews/iss-policy-changes-for-2021-increased-19696/

[70] Institutional Shareholder Services, "United States, Proxy Voting Guidelines Benchmark Policy Recommendations," https://www.issgovernance.com/file/policy/2021/americas/US-Voting-Guidelines.pdf

[71] PwC, "Getting serious about diversity and inclusion as part of your ESG reporting," https://www.pwc.com/us/en/services/esg/library/diversity-equity-inclusion-reporting.html

ESG INVESTING CRITICISMS

Skepticisms of Sustainable Investing

Naturally, as hype and interest grow around a topic, so does skepticism. As such, this section will examine some of the criticisms facing ESG as it relates to sustainable investing. A major criticism of investors is skepticism surrounding whether companies will, in fact, achieve the ESG commitments set out in their disclosure.[72] A 2021 study conducted for the Edelman Trust Barometer report, which captured a variety of ESG-related research from institutional investors, found that 72% of investors globally did not believe that companies would achieve their ESG commitments.[73] So, while investors expect enhanced disclosure and commitments surrounding ESG-related issues, there is a high amount of investor distrust that companies will actually follow through on their commitments.

As another example, last year the *Globe and Mail* published an article about BlackRock's former chief investment officer of sustainable investing, Tariq Fancy. Mr. Fancy's major criticism was that "Only governments have the wide-ranging powers, resources and responsibilities that need to be brought to bear on the problem," which he claims was made very clear through the management of the COVID-19 pandemic. Mr. Fancy further explained his stance by comparing the COVID-19 pandemic to the fight on climate change. With COVID-19, the government did not leave the management of the pandemic up to individual choices, but rather imposed necessary restrictions and public health measures to contain the number of infected patients. In his view, climate change can be seen as a similar challenge as COVID-19, as changes need to be made to daily behaviours of people to help flatten the curve of greenhouse gas emission. However, governments around the globe have failed to take any significant action to address this threat, whether that is taking extreme measures to fight climate change behaviourally or pushing efforts more aggressively to discover new technologies and solutions to the problems at hand. Ultimately, Mr. Fancy claimed that "ESG isn't as useful to investing as I had hoped. Acting responsibly is not as profitable as advertised. Moreover, going through the investment process is a bizarre place to try to create social impact in the first place. Investment professionals are like competitive athletes: They're trained to chase yield and profits."[74]

Furthermore, an article by the *Economist* outlined the following three fundamental problems with ESG investing:

1. Because it lumps together a dizzying array of objectives, it provides no coherent guide for investors and firms to make the trade-offs that are inevitable in any society. Elon Musk of Tesla is a corporate-governance nightmare, but by popularising electric cars he is helping tackle climate change. Closing down a coalmining firm is good for the climate but awful for its suppliers and workers. Is it really possible to build vast numbers of wind farms quickly without damaging local ecology? By suggesting that these conflicts do not exist or can be easily resolved, esg fosters delusion.
2. It is not being straight about incentives. It claims that good behaviour is more lucrative for firms and investors. In fact, if you can stand the stigma, it is often very profitable for a business to externalise costs, such as pollution, onto society rather than bear them directly. As a result the link between virtue and financial outperformance is suspect.
3. Finally ESG has a measurement problem: the various scoring systems have gaping inconsistencies and are easily gamed. Credit ratings have a 99% correlation across rating agencies. By contrast, esg ratings tally little more than half the time. Firms can improve their esg score by selling assets to a different owner who keeps running them just as before.

To help address these issues, the article goes on to suggest that the focus of ESG should simply be on emissions to hone in on this array of topics and spotlight the most significant danger of ESG as a whole.[75]

[72] Corporate Secretary, "Research finds investor skepticism around companies' ESG plans," https://www.corporatesecretary.com/articles/shareholders/32800/research-finds-investor-skepticism-around-companies%E2%80%99-esg-plans

[73] Daniel J. Edelman Holdings, Inc., "2021 Trust Barometer Special Report: Institutional Investors," https://www.edelman.com/trust/2021-trust-barometer/investor-trust

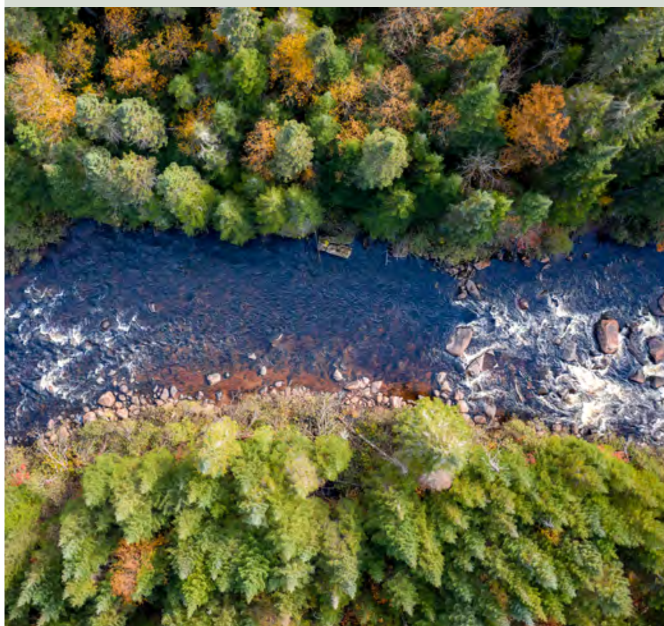
[74] The Globe and Mail, "BlackRock hired me to make sustainable investing mainstream. Now I realize it's a deadly distraction from the climate-change threat," https://www.theglobeandmail.com/business/commentary/article-sustainable-investing-is-a-deadly-distraction-from-actually-averting/

[75] The Economist, "ESG should be boiled down to one simple measure: emissions," https://www.economist.com/leaders/2022/07/21/esg-should-be-boiled-down-to-one-simple-measure-emissions

Greenwashing

As noted in the *Economist* article's third point, another major topic of discussion that takes aim at the reliability and legitimacy of ESG investing is greenwashing. According to Refinitiv, as of May 2022, Canadian responsible equity funds' assets under management grew 24% from C$17.3 billion a year earlier to C$22.4 billion. Globally, assets in responsible equity funds totaled $3.3 trillion.[76] As ESG investing continues to gain traction across the globe, greenwashing has become an increasingly controversial topic for both investors and regulators.

Manulife Investment Management defines greenwashing as "the act of making false claims or providing misleading information about how environmentally friendly something actually is."[77] According to Norton Rose Fulbright, "Greenwashing can artificially inflate company stock as customers and investors divert spending power to companies with the best eco-credentials. Disclosures related to sustainability can therefore be material from the perspective of securities regulators."[78]



In response to this threat on the legitimacy of ESG investments, industry regulators around the globe have started to take action. The SEC has been enforcing additional disclosure standards that investment managers must comply with for those funds labeled "ESG."[79] This increased disclosure has already resulted in fines administered by the SEC for non-compliance. On May 23, 2022, the SEC charged American money manager BNY Mellon Investment Advisor Inc. for making false claims and failing to include required disclosure surrounding certain ESG mutual funds. BNY Mellon paid a penalty of $1.5 million to settle these disclosure concerns.[80] While the U.S. has been actively working to amend current legislation to help increase required disclosure for ESG funds, Canada has affirmed its stance to continuing a relatively relaxed approach to regulating these funds.[76] In January 2022, the CSA published "CSA Staff Notice 81-334 – ESG-Related Investment Fund Disclosure" which includes ESG related fund guidance. In response to this guidance, Blake, Cassels & Graydon LLP has stated "the guidance provided by the CSA does not create new legal requirements, or modify existing ones, but seeks to clarify and explain how, in staff's view, the current securities regulatory requirements should be applied to ESG-related investment fund disclosure."[81]

More recently this year, the SEC launched investigations related to greenwashing at two major investment firms (Goldman Sachs Asset Management and Deutsche Bank) surrounding ESG-related fund concerns.[82] These recent cases are fueling skepticism around ESG investment vehicles, especially since these companies are seen as industry leaders in the investment space. As more regulation and investigations regarding greenwashing are launched globally, we will likely see more issues uncovered around ESG investment vehicles surrounding misrepresentation and overstatement of these investments.

Assuming the amount of ESG assets under management continues to grow in the foreseeable future, and the U.S. remains focused on increasing legislation in this area, then it is likely Canada will see further guidance to help protect investors from greenwashing through additional disclosure and reporting requirements.

76 Thomson Reuters, "Analysis: Canada's light touch regulation of ESG funds risks 'greenwashing' claims," https://www.reuters.com/business/sustainable-business/canadas-light-touch-regulation-esg-funds-risks-greenwashing-claims-2022-07-03/

77 Manulife Investment Management, "What is greenwashing?," https://www.manulifeim.com/retail/ca/en/viewpoints/investor-education/what-is-greenwashing#:~:text=Simply%20put%2C%20greenwashing%20is%20the,environmentally%20friendly%20something%20actually%20is

78 Norton Rose Fulbright US LLP, "Greenwashing disputes on the rise," https://www.nortonrosefulbright.com/en-us/knowledge/publications/e87c69e7/greenwashing-disputes-on-the-rise

79 Bloomberg, "The SEC War on Greenwashing Has Begun," https://www.bloomberg.com/news/articles/2022-06-15/the-sec-s-war-against-greenwashing-and-esg-misuse-has-begun

80 U.S. Securities and Exchange Commission, "SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations" https://www.sec.gov/news/press-release/2022-86

81 Blake, Cassels & Graydon LLP, "CSA Publishes Guidance on ESG-Related Investment Fund Disclosure," https://www.blakes.com/insights/bulletins/2022/csa-publishes-guidance-on-esg-related-investment-f#:~:text=The%20CSA%20guidance%20was%20published,related%20aspects%20of%20the%20fund

82 Citywire, "Two funds in focus as Goldman faces SEC probe over ESG," https://citywire.com/pro-buyer/news/two-funds-in-focus-as-goldman-faces-sec-probe-over-esg/a2389768

BOARD ESG OVERSIGHT

In last year's report we included a section called "Board Stewardship" which outlined a series of questions and subsequent exercises to help boards establish and manage ESG issues, risks, and topics. As the world of ESG continues to evolve, along with investor expectations for sufficient ESG oversight, the following section discusses how boards can effectively manage and deliver on ESG-related areas to help avoid negative impacts from stakeholders.

> According to PwC, "Management teams need a strategic plan that takes advantage of market opportunities and addresses material risks. In its oversight role, the board is responsible for ensuring that the company's strategy is appropriate, takes account of material risks, and is likely to deliver results. Because ESG is grounded in risks and opportunities, the ESG lens is often a more comprehensive way of packaging existing work and analysis."[83]

To help meet investor expectations on ESG, "Harvard Law School Forum on Corporate Governance" published an article in March 2022 outlining six key considerations that companies and directors can utilize to best prepare their organization for the next proxy season.

1. **The board is a core part of a company's ESG narrative**

   Investors want to understand with which ESG issues the board engages, what efforts have been made to identify ESG risks and opportunities significant to the company, whether and how often the board is getting updates from management on ESG matters, and whether ESG considerations are woven into key strategic decision-making. Investors are looking for boards that comprehend, and are transparent with, their company's progress, targets and aspirations on ESG. Directors and management teams that can tell their company's ESG story can demonstrate the scope of their ESG oversight and confirm that the board is equipped to oversee and address material ESG issues.

2. **Understand what is material and why**

   Directors should understand how their company has assessed materiality, including whether it has done a materiality assessment that considers issues from long-term and downside risk perspectives, and be conversant with the ESG issues identified as material to the short-, medium-, and long-term financial health of the company's business.

3. **Seek quality data**

   When overseeing their company's ESG disclosures, directors may wish to consult with management about whether the data disclosed would be decision-useful and comparable for investors and if there is an appropriate balance between quantitative and qualitative disclosures. Directors should also consider whether sufficient processes and internal controls are in place for tracking and reporting key ESG metrics, bearing in mind that the SEC has indicated it expects ESG metrics to be treated with a comparable degree of scrutiny as financial metrics.

4. **Search for blindspots**

   Integrating ESG issues into business decisions also requires boards and management to regularly assess potential blindspots, given the multi-faceted nature and impact of many ESG issues. For example, the net zero transition raises questions regarding timing, feasibility, expectations regarding technological solutions, access and affordability. Diversity, equity and inclusion affects not just a company's workforce but also customers and suppliers. Boards and management should recognize that ESG issues will continue to evolve as they look for ways to identify and adapt to changes.

5. **Focus on goals and progress; not ratings**

   While ESG ratings may, in some cases, be useful to help companies identify potential opportunities, they are, at best, a historical snapshot, and because of their reliance on publicly disclosed data (and sometimes inconsistent methodologies), may not provide a full or useful picture of the company's comparative ESG performance. The different proprietary methods to assess ESG performance can also result in inconsistent outputs. The ultimate test of a company's ESG performance is whether it can sustainably generate return over the long-term. Each company will need its own strategy for doing so, and management and directors should remain focused on evolving and adapting the business while recognizing the limitations of ESG ratings.

6. **Demonstrate accountability and credibility**

   When companies commit to net zero, diversity and other ESG targets, investors and other stakeholders look for evidence of accountability and credibility. Boards can help management parse between goals that have achievable pathways and those that are still aspirational. Particularly where targets include commitments over multiple decades, boards should increasingly appreciate that they will be expected to monitor progress and consider interim reporting and goal setting.[84]

Of course, while all of these are excellent considerations for a board, we would be remiss not to mention the importance of engagement with your stakeholders. Understanding the context of what is important to your unique shareholder base and incorporating this into board discussions will only serve to improve the output of these decisions.

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[83] PwC, "ESG oversight: The corporate director's guide," https://www.pwc.com/us/en/services/governance-insights-center/pwc-esg-oversight-the-corporate-director-guide.pdf

[84] Harvard Law School Forum, "Board Oversight of ESG: Preparing for the 2022 Proxy Season and Beyond," https://corpgov.law.harvard.edu/2022/03/28/board-oversight-of-esg-preparing-for-the-2022-proxy-season-and-beyond/

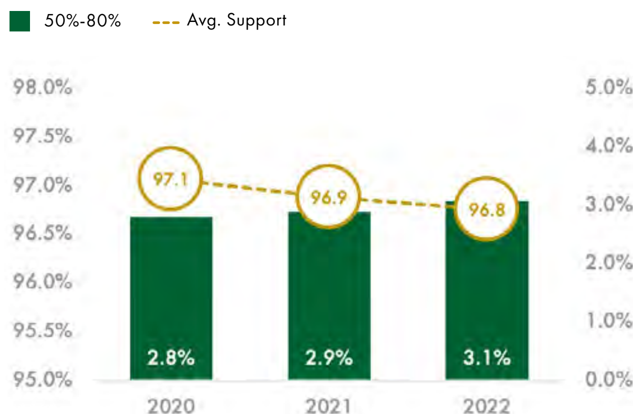
ELECTION OF DIRECTORS AT UNCONTESTED MEETINGS

The election of directors is at the heart of the representational democracy enshrined in capital markets. Any shareholder, regardless of size, can register their dissatisfaction with the board by casting negative votes against one or more directors. That said, the results of this resolution are almost always overwhelmingly positive. In 2022 approximately 86.6% of all directors received over 95% of votes cast in favour of their election.

- As a result of this overwhelming support for directors there is increased scrutiny on any directors receiving less than 80% of votes cast in favour—or worse, fail to get majority support. As noted in last year's report, the proxy advisors have a Board Responsiveness policy. In cases where directors receive less than 80% of votes cast in favour and are still elected to the board, ISS and Glass Lewis (the Proxy Advisors) expect a follow up response by the company regarding the low level of support in the following year's proxy statement, which is discussed further in this report in the section on executive compensation. In short, issuers should disclose if there was board-shareholder or management-shareholder outreach to determine the concerns of shareholders and whether any changes were made to address shareholders' concerns.
- Failure to do so could result in negative recommendations by the proxy advisors for the nomination committee members.

Over the last three years, average votes cast in favour of all directors at TSX Composite Index companies has dropped 0.3% from 97.1% average support in 2020 to 96.8% average support in 2022. Over the same period, the percentage of directors receiving less than overwhelming support (i.e., between 50% to 80% of votes cast in favour) has increased from 2.8% in 2020 to 3.1% in 2022. No directors of TSX Composite Index companies received less than 50% support in non-contested elections in the last three years.

ELECTION OF DIRECTORS AT UNCONTESTED MEETINGS



Source: ISS Governance Research and Voting

Some general explanations for this trend include:

- A highly volatile stock market with some companies performing poorly in the pandemic.
- Negative say-on-pay votes spilling over in subsequent years to negative votes for compensation committee members.
- The decline of certain industries such as airlines and cannabis.
- Increasing shareholder expectations regarding board diversity.

DIVERSITY

As noted in the previous section, diversity in an expanded form continues to be an important voting topic for which institutional shareholders express their dissatisfaction by casting negative votes for members of the nomination committee. Institutional investor and proxy advisor voting policies generally evaluate diversity as it relates to the representation of women on boards; however, disclosure requirements under the CBCA are expanding, and the representation of members of designated groups on the board of directors and in executive officer positions is now required. Diversity voting policies in the U.S. in the last two years are starting to consider racial diversity, while in Canada only a few major funds consider racial diversity in voting decisions.

Globally, diversity became a hot topic in the early 2010s with many countries and regulators taking various approaches:

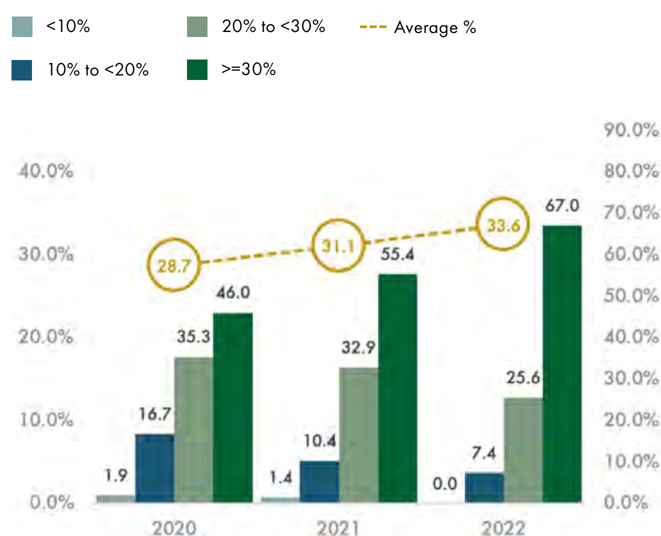
1. **Hard targets:** Regulators in countries like Norway and Spain were the first adopters of hard targets such as 40% representation of women on the board of directors.
2. **Soft targets:** Regulators in Canada did not adopt any hard targets but did implement a "comply or explain" regime whereby companies are required to disclose the number of women on the board, and if there are none, then disclose why the company has failed to have any women directors. Proxy Advisors and institutional investors in Canada now have hard targets such as 30% for constituents of the TSX Composite Index.
3. **No regime:** The U.S. continues to be an outlier among developed nations for not adopting a stricter regulatory regime. In August 2021 the SEC approved the Nasdaq push to require race and gender disclosures (similar to Canada's comply or explain regime).

Despite the varying strictness of each regulatory system, there has been progression with gender representation on boards worldwide. In Canada, over the last three years, the percentage of directorships held by women continues to increase, and TSX Composite Index companies with less than 30% of board seats held by women are in the minority.

For all shareholder meetings held to date in 2022, boards with 30% or more women represent two thirds (67%) of all TSX Composite Index constituents and, for the first time, no meetings have been held by TSX Composite Index companies with zero women nominated to the board. On average, women hold 33.6% of board seats on TSX Composite Index companies.

Compensation committee members may continue to see some negative votes from European institutional investors and North American ESG-focused investors who apply a 40% target to boards of Canadian companies. This generally does not have a significant impact on voting results because of the limited number of investors with such high thresholds.

REPRESENTATION OF WOMEN ON BOARDS OF TSX COMPOSITE INDEX COMPANIES



Source: ISS Governance Research and Voting

BROKER NON-VOTES

A developing trend for 2022 is the cessation of broker non-votes by some large U.S. institutional investors. Originally instituted to assist with reaching quorum for large retail-held issuers, a broker non-vote is when the bank, broker or other holder of record executes the vote on the behalf of the beneficial holder. Under stock exchange rules, banks, brokers and other holders of record who hold shares in beneficial form may have the authority to vote in their discretion on "routine" proposals when they have not received instructions from underlying owners. The broker non-votes only apply to routine matters, which excludes directors and generally only applies to auditors.

To reinforce, this is not to say that the underlying shareholder is not able to vote, should they vote their position then takes precedent.

The benefit of broker non-votes for Canadian publicly listed companies is when the votes are cast, they increase the participation rate and make it easier to meet the minimum quorum requirements. Many Canadian companies have quorum requirements of 25% of shares issued and outstanding which can be challenging to meet without a large institutional investor base, particularly for the venture-listed issuers.

Starting in 2022, certain major U.S. institutional investors have ceased casting broker non-votes. Anecdotally, Laurel Hill has seen vote participation decrease by a few percentage points for its major clients with heavy U.S. ownership. If this trend continues and more large U.S. institutions cease executing broker non-votes, then vote participation may fall even further. To be fair, Canadian companies with large U.S. institutional ownership are generally not at risk of meeting quorum, but it is disconcerting to see vote participation unexpectedly fall.

APPOINTMENT OF AUDITORS

An emerging trend in 2022 is the scrutiny of institutional investors on the tenure of auditors. In several cases it led to unexpected negative votes for large TSX-listed issuers. Institutional investors are generally not concerned with the auditor resolution if audit fees are less than other fees paid to the auditor; but increasingly, institutional investors are applying custom voting policies. Proxy Advisors report the tenure of the auditor in each of their respective voting recommendation reports, but do not make voting recommendations based on tenure. Up until recently, almost all institutional investor custom voting policies did not consider tenure, with only the most ESG-focused funds having any consideration for long auditor tenure as a negative factor. However, there seems to be a rapid proliferation of auditor tenure voting policies among institutional investors, which consider either 10-years, 20-years, or 25-years of tenure to be excessive and worthy of a negative vote.

Institutional investors who cast votes based upon auditor tenure are still a relatively small minority, but many companies have noticed support rates decline from what was typically 99%+ of votes cast in favour. In 2020, there wasn't a significant difference between the average votes cast for auditors with tenure greater than 10 years and all auditor resolutions. However, since then, support for long-tenured auditors continues to drop. Average support for auditors at TSX Composite Index companies with tenure greater than 10 years was 94.7% in 2022, and support for auditors with tenure in excess of 25 years was only 91.8% of votes cast, whereas the average support for all auditor resolutions was 96.2%.

SUPPORT FOR THE APPOINTMENT OF AUDITOR RESOLUTIONS

Source: ISS Governance Research and Voting

The chart above shows that support for auditor resolutions in general, and regardless of tenure, appears to be decreasing over time. As noted in the previous section, this may be partially attributable to the reduced number of broker non-votes. While we are only seeing broad changes over time on the scale of single percentage points, this has hit the radar of some issuers. Consequently, general counsels and corporate secretaries are likely to be called upon by their audit committees and boards to provide an explanation for the year-over-year decreasing support, and whether there is a remedy.

Companies can avoid negative votes from institutional investors by including additional disclosure in each year's circular to discuss how the company avoids the deemed lack of independence through audit partner rotation or regular requests for proposal from multiple audit firms.

VIRTUAL MEETINGS

Virtual shareholder meetings have, of course, become mainstream since the onset of the pandemic and, in many cases, companies have held virtual-only meetings in each of the last three proxy seasons. As we approach the 2023 proxy season, and as restrictions on in-person gatherings appear unlikely, the question is, what format should issuers employ – a return to in-person only, virtual-only, or a hybrid model? From the corporate perspective, boards and management teams have grown more comfortable with virtual meetings, and as the technology has continued to improve each year so has the shareholder experience. For many issuers, a virtual-only meeting has greatly simplified annual meeting logistics, eliminated costly venue, travel, and accommodation expenses, and allowed a greater number of shareholders worldwide to participate. In the absence of pandemic restrictions, it may be tempting to abandon in-person meetings and proceed with virtual-only meetings. Other issuers, particularly smaller ones, may look forward to a return to in-person only meetings, traditionally conducted at low cost with just a handful of company representatives and shareholders in attendance, versus the higher costs associated with certain virtual meeting platforms.

From the shareholder perspective, there continues to be a concern that companies can hide behind the technology and restrict shareholder rights – namely, that they may i) limit the ability to vote through poor or incomplete disclosure of voting mechanics (while voting is generally available, the complexities and details can be confusing), ii) avoid addressing tough questions and criticisms, and iii) generally avoid fully engaging with shareholders. Institutional shareholders, and the proxy advisory firms ISS and Glass Lewis, have traditionally favoured in-person or hybrid meetings but were supportive of virtual-only meetings throughout the pandemic. ISS and Glass Lewis generally look for proxy circulars to contain clear disclosure of the reasons for holding a virtual-only meeting and certain reassurances regarding the ability of shareholders to fully participate in the meeting. Notably, ISS does not currently have a formal policy regarding virtual meetings while Glass Lewis does. Issuers who fail to comply with Glass Lewis' expectations risk negative votes for members of the governance committee. In February, the Canadian Securities Administrators released guidance related to its expectations regarding disclosure and shareholder participation at virtual meetings. There is uncertainty, however, as to how institutional shareholders and the proxy advisory firms will view virtual-only meetings where there are no material restrictions on in-person gatherings. While it has no direct impact on the voting of its member organizations, CCGG has in the past expressed that it does not support the use of virtual-only meetings as the sole method of conducting shareholder meetings in the long-term.

Hybrid meetings will likely be the gold standard going forward, offering shareholders the ability to participate either online or in-person. For many companies, however, these may not be a realistic option given their complexities and costs. For companies considering virtual-only meetings in a post-pandemic environment, we recommend these be well thought out and not simply be the default position based on the recent shareholder meetings. It is important to understand institutional shareholder views and policies as well as the impact of the proxy advisory firm policies on your institutions. If you are non-compliant, you run the risk of negative institutional votes. Retail shareholders should not be overlooked: If your pre-pandemic in-person meetings were well-attended by retail, a lack of an in-person option may result in pushback and loss of goodwill, although retail is less likely to cast negative votes. Another consideration for some issuers may be the lost opportunity an in-person event traditionally provides to showcase the company and personally engage with clients, employees, and other stakeholders. Conversely, for companies looking to return solely to in-person meetings, shareholders who perhaps never attended your meeting in person may have participated virtually for the last three years. They may pushback if you no longer offer a virtual option. A return to in-person only – particularly in sectors such as communications, technology, and financial services – may also have negative brand implications for companies that wish to be seen as technology forward. The bottom line: Talk to your shareholders and other stakeholders to understand their views, policies, and preferences. Rash decisions that fail to identify and consider all material costs, benefits, and risks can have adverse consequences. Of course, your options will also be guided by your corporate law and constating documents.

ISS GLOBAL POLICY SURVEY AND ANTICIPATED ISS POLICY DEVELOPMENTS FOR THE CANADIAN MARKET

In August 2022, ISS surveyed its clients globally to provide feedback on some governance issues which may inform the creation of future voting policies. The topics under consideration affect U.S. domestic issuers, U.S. foreign private issuers, and other issuers in continents outside of North America.

None of the topics are expected to directly influence the development of policies affecting ISS' Canada voting policy except for one U.S. policy which could apply to Canadian companies dual listed on a U.S. exchange.

The topic under consideration is whether cross-market companies under ISS U.S. coverage should be required to seek shareholder approval for certain share issuances. Currently there is no specific U.S. benchmark or Foreign Private Issuer policy on share issuance mandates. ISS queried its clients to see whether there is an appetite to develop a specific U.S. policy for share issuance mandates; and whether such a policy should apply to Foreign Private Issuers as well.

Other than the previously mentioned topic, there does not appear to be any other for which ISS is going to develop a 2023 policy affecting the Canadian market. ISS annually releases a benchmark policy update in November which takes effect the following February. ISS annually amends or tweaks its current policies, but no new voting policies are expected based on the questions asked in the global policy survey.

EXECUTIVE COMPENSATION

SAY-ON-PAY RESOLUTIONS AND PAY-FOR-PERFORMANCE ALIGNMENT

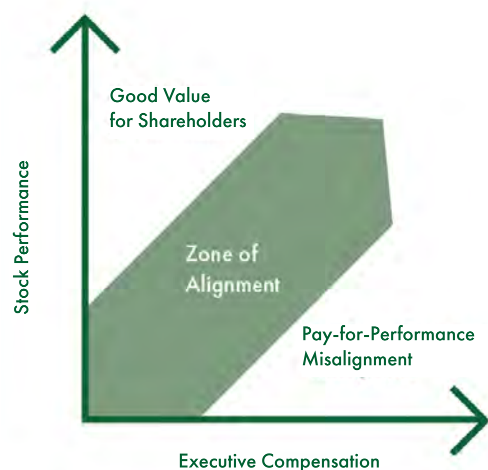
The conceptualization of say-on-pay resolutions arose in response to the criticism that CEOs were getting paid millions of dollars at the same time company stocks were underperforming. This sentiment was shared equally by Occupy Wall Street protesters, sophisticated portfolio managers, and everyone in between. The concept of pay-for-performance arose to create a linkage between, and a justification for, high levels of CEO pay.

Many sophisticated institutional shareholders share the sentiment that higher-than-average CEO pay can be justified as long as the CEO is outperforming the market and a comparable set of peers.

Such a case was the enormous compensation paid to Hunter Harrison by Canadian Pacific Railway (CPR) and facilitated by activist investor Bill Ackman. From his appointment in 2012, following the successful proxy fight by Bill Ackman, until his resignation in 2017, Harrison was paid over $100 million in total compensation, but over the same period he was able to double the stock price of CPR creating about $20 billion of value for shareholders. It was a win-win situation for the CEO and for shareholders. In some ways, almost no amount of compensation is too great if the company's stock outperforms its competitor's stock and the market in general.

On the other side of the pay-for-performance coin is lower-than-average pay for lower-than-par performance. This is tolerated by shareholders because it demonstrates that the pay program is tied to the long-term shareholder interests and should hypothetically create incentives for the CEO and the executives to turn the company around or face continued diminished total compensation.

EXECUTIVE COMPENSATION



Sophisticated institutional shareholders always drive the vote when there is lacklustre support for the say-on-pay resolutions. In "good years" when the stock price is outperforming, there is little scrutiny on the pay program of the company and the resolution is usually rubber-stamped by shareholders. However, it is in "bad years" that boards should anticipate the additional scrutiny that will be placed on the say-on-pay resolution by shareholders and the negative results that could follow if the pay program compensates more than the peers does. In practice, a "bad year" can be anything from negative TSR performance to strongly positive TSR performance in a year when comparable companies have performed well, and the subject company could be seen as an outlier on the low end of the performance scale.

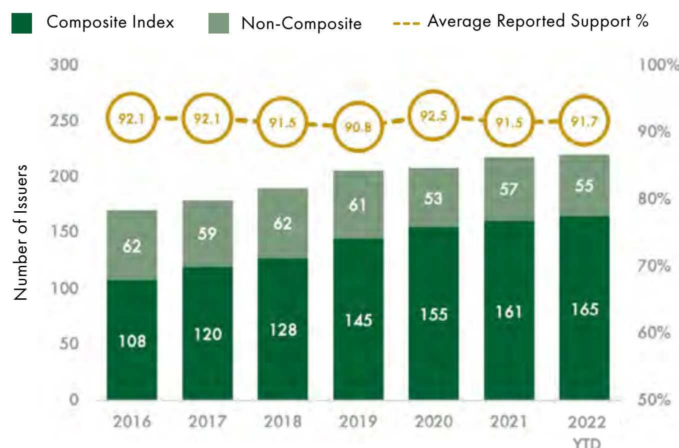
Year over year, we continue to see the pay-for-performance disconnect result in negative proxy advisory recommendations and failed resolutions – 2022 was no different. The takeaway for compensation committee members is simply stated as this: If the company TSR is underperforming, and CEO compensation continues to trend upwards, then shareholders will exercise their voting power to express their dissatisfaction. It is imperative that the compensation, discussion and analysis explains the intent of the compensation plans. In particular, how CEO compensation is intended to increase results for shareholders. In the absence of such disclosure, issuers can expect increased negative feedback from proxy advisors and their subscribers.

MORE SUPPORT FOR SAY-ON-PAY RESOLUTIONS IN 2022

The number of say-on-pay resolutions in 2022 year-to-date is slightly higher than in 2021. There are still two resolutions expected after September 19, 2022, from TSX Composite Index companies which would put the total number of say-on-pay resolutions in Canada at 222, representing an increase of four resolutions from 218 resolutions in 2021. About 70% of TSX Composite Index constituents hold an annual say-on-pay vote.

Average support so far in 2022 is marginally higher at 91.7% compared to 91.5% in 2021. Support is likely higher on average due to fewer observed negative recommendations by proxy advisors in 2022.

SAY-ON-PAY VOTES IN CANADA



Source: ISS Governance Research and Voting

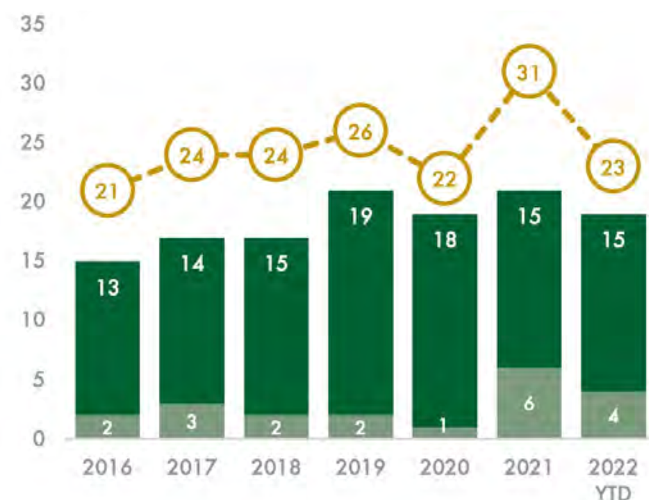
BOARD RESPONSIVENESS TO LOW SUPPORT FOR SAY-ON-PAY RESOLUTIONS

As we discussed, ISS and Glass Lewis each have a "board responsiveness policy" indicating that when a company receives less than 80% of votes cast in favour of the say-on-pay resolution, then the company must include additional disclosure in the next year's circular regarding:

- whether there was any board-shareholder or management-shareholder outreach to determine the concerns of shareholders
- which executive compensation practices caused shareholders to cast negative votes for the say-on-pay resolution
- an assessment of the board and compensation committees of these factors
- whether any changes were made to address shareholders' concerns

So far in 2022, 19 resolutions received weak or failed support as shown in the chart below. Each of the resolutions with low support will be expected to have a response in next year's circular to satisfy the proxy advisors as described above:

BOARD RESPONSIVENESS TO LOW SUPPORT FOR SAY-ON-PAY RESOLUTIONS



Source: ISS Governance Research and Voting, Insightia

Four resolutions failed at the respective meetings with the following levels of support:

Company Name	Meeting Date	ISS Rec	GL Rec	For %
CI Financial Corp.	2022-06-22	Against	For	45.1
Enghouse Systems Limited	2022-03-03	Against	Against	36.5
Agnico Eagle Mines Limited	2022-04-29	Against	Against	24.4
Open Text Corporation	2022-09-15	Against	For	45.0

Sources: SEDAR, Insightia

REASONS FOR FAILED SAY-ON-PAY RESOLUTIONS IN 2022

The primary reason cited by the proxy advisors to oppose these resolutions was the poor link between pay and performance. This means that compared to a peer group of similarly sized companies constructed by the proxy advisors, the subject company appeared to pay towards the high end of the group while during the same period, the total share returns of the stock were towards the bottom of the group. Other reasons that shareholders voted against say-on-pay resolutions in 2022 include: lack of performance-based equity, internal pay disparity (i.e., the CEO being paid much more than the next highest executive), excessive change of control arrangements, disclosure concerns or failure to address concerns from previous years.

	CI Financial	Enghouse Systems Limited	Agnico Eagle Mines Limited	Open Text Corporation
Pay-for-Performance Alignment includes one or more of the following factors: • high quantum of CEO pay relative to peers; • increasing year-over-year CEO compensation; or • declining relative TSR performance.	✓	✓	✓	✓
Lack of Long-term Performance-based Equity	✓	✓		
Internal Pay Disparity		✓		✓
Excessive Change of Control Arrangements		✓		
Disclosure Concerns		✓		
Failure to Address Poor Results of Last Year's Say-on-Pay Resolution		✓		

RECENT ISS AND GLASS LEWIS NEGATIVE RECOMMENDATION RATES

The following table shows the trend of how often ISS and Glass Lewis each recommend against say-on-pay resolutions and how that affects support for the resolution on average.

	2016	2017	2018	2019	2020	2021	2022 YTD	2022 Vote Support	# Failed
Both PAs rec. FOR	149	155	166	180	186	187	197	94.0%	0
Both PAs rec. AGA	3	4	2	1	0	9	5	55.7%	2
ISS Only AGA	6	10	6	5	0	5	3	52.8%	2
Glass Lewis Only AGA	12	10	16	20	22	17	15	81.3%	0
TOTAL	**170**	**179**	**190**	**206**	**208**	**218**	**220**	**91.7%**	**4**

In 2022 year to date, of the 220 say-on-pay resolutions the proxy advisors both recommended "for" 197 times, representing about 89.5% of all resolutions. Of the remaining 23, which received one or more negative recommendations, ISS and Glass Lewis only "agreed" on five of them or about 23% of the time. ISS gave negative recommendations for three resolutions which Glass Lewis recommended favourably; and Glass Lewis recommended negatively on 15 resolutions which ISS decided to recommend "for."

Looking at how much ISS and Glass Lewis' negative recommendations affect vote outcomes; ISS is generally more influential among shareholders. For companies receiving only a negative recommendation from Glass Lewis, average voter support was 81.3% and none of those resolutions failed to carry at the ballot box. This is in stark contrast to the average voter support of 55.7% when both proxy advisors gave a negative recommendation and 52.8% average voter support when ISS gave the sole negative recommendation. Of those eight resolutions in 2022, four failed at the ballot box representing half of all ISS negative recommendations.

Glass Lewis generally makes negative recommendations more frequently than ISS. In 2022 Glass Lewis made a negative recommendation for about 9.1% of all resolutions, whereas ISS only made negative recommendations for about 3.6% of all resolutions. This is consistent with the long-term trend of negative recommendation rates for each proxy advisor.

In summary, while Glass Lewis makes more frequent negative recommendations than ISS, it has less influence on the voting results. While a negative recommendation from Glass Lewis is not to be taken lightly, it falls short of the influence of ISS which puts say-on-pay resolutions at great risk of failing.

EQUITY COMPENSATION PLANS

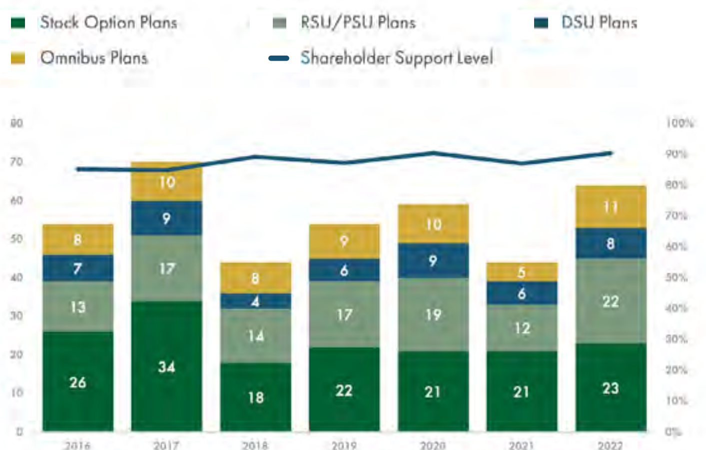
In 2022, shareholder support for equity plan resolutions at TSX Composite Index companies was marginally higher than in previous years. Approximately 28% of plans in the 2022 year to date received one or more negative recommendations from proxy advisors.

Over time, TSX Composite Index constituents seem to be moving away from stock option plans and increasing the use of full-value awards – especially awards that vest upon the achievement of performance conditions. Full-value award plans such as Restricted Share Units (RSUs), Performance Share Units (PSUs) and Deferred Share Units (DSUs) are generally less dilutive and less levered to increases in the underlying stock price than options. This results in payouts that are less variable than with options, and ultimately less dilution on average.

The chart below summarizes average shareholder support and ISS recommendations since 2016 when ISS began using the Equity Plan Score Card (EPSC). The EPSC assigns a score to each of a set of about 12 weighted factors, and scores over 50 out of 100 receive a passing grade (absent any overriding negative factors).

The chart also shows that average shareholder support is correlated with ISS' positive recommendation rate, which demonstrates ISS' significant impact on voting results.

TSX COMPOSITE INDEX EQUITY COMPENSATION PLANS



Sources: ISS Governance Research and Voting, Glass Lewis & Co., Insightia

DIFFERENCES BETWEEN ISS AND GLASS LEWIS RECOMMENDATION RATES

ISS and Glass Lewis have considerably different analysis methodologies for equity plans. ISS uses its EPSC, while Glass Lewis looks at a set of measures that compare the subject company to its peers. Generally, the methodologies favour the same things: lower dilution, lower shareholder value transfer, and lower burn rates – so it seems reasonable that the more conservative plans would get support from both proxy advisors and the more generous plans would be at risk of getting negative recommendations. Ultimately, the data shows that ISS and Glass Lewis recommendations for equity plans agree more than they disagree. The following table shows the vote recommendation alignment between ISS and Glass Lewis. The same recommendation indicates either two "vote for" recommendations or two "vote against" recommendations.

	2021			2022		
ISS-GL Alignment	**ISS FOR Recs**	**GL FOR Recs**	**Total Plans Reviewed**	**ISS FOR Recs**	**GL FOR Recs**	**Total Plans Reviewed**
Stock Option Plans	15	20	21	16	21	23
RSU/PSU Plans	7	10	12	19	19	22
DSU Plans	5	6	6	7	8	8
Omnibus Plans	4	5	5	7	11	11
Total	**31**	**41**	**44**	**49**	**59**	**64**

The following graph shows the seven-year trend for average positive vote support from shareholder. The large dip in overall support in 2021 can be tied to a significant drop in ISS "for" recommendations. In 2022, support from ISS is up marginally, as is overall market support for equity plans.

EQUITY PLANS

Shareholder Average Support vs. Proxy Advisor FOR Recommendations

Shareholder Average Support — ISS Approval Rate — GL Approval Rate

Note: Only three years of data for Glass Lewis recommendations for equity plans are available to Laurel Hill.

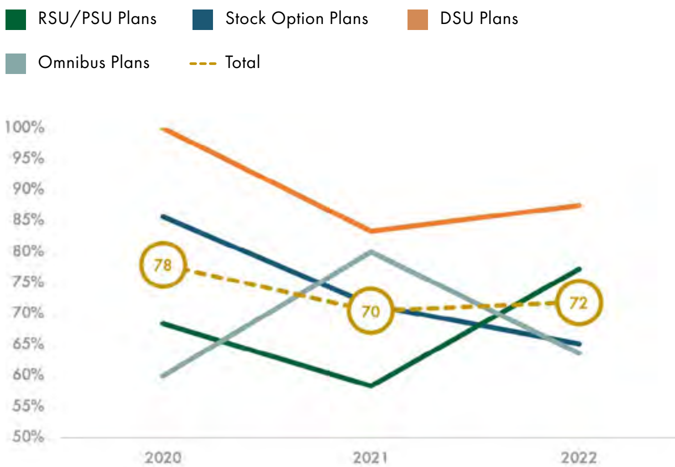
	2020			2021			2022		
	Same Rec	Dif Rec	Align %	Same Rec	Dif Rec	Align %	Same Rec	Dif Rec	Align %
Stock Option Plans	18	3	86%	15	6	71%	15	8	65%
RSU/PSU Plans	13	6	68%	7	5	58%	17	5	77%
DSU Plans	9	0	100%	5	1	83%	7	1	88%
Omnibus Plans	6	4	60%	4	1	80%	7	4	64%
Total	**46**	**13**	**78%**	**31**	**13**	**70%**	**46**	**18**	**72%**

Since 2021, ISS recommended that shareholders vote against 28 resolutions, while Glass Lewis only made eight negative recommendations. Of Glass Lewis' eight negative recommendations, ISS also recommended that shareholders vote against those resolutions. Based on this review, it appears that if issuers align their equity plans with the voting policies of ISS, then it is likely the plan will also be aligned with the voting policies of Glass Lewis and avoid a negative recommendation from either proxy advisor.

PROXY ADVISOR RECOMMENDATION ALIGNMENT BY TYPE OF AWARDS

RSU/PSU Plans   Stock Option Plans   DSU Plans

Omnibus Plans   Total



The chart above shows that recommendation alignment between proxy advisors has been dropping since 2020 and was 72% across all plan/award types last year. Of all plan/award types, the proxy advisors were most aligned on DSU plans, and to a lesser extent RSU and PSU plans. Both of those plan types are full-value awards, which are generally costlier to shareholders per unit dilution than stock option or omnibus plans. Where the proxy advisors disagree is in recommendations for stock option and omnibus plans. The difference usually occurs when ISS makes a negative recommendation and Glass Lewis makes a positive recommendation for the same plan – and not the other way around. This also demonstrates that ISS is the harder standard to meet, and by meeting that standard, issuers are very likely to also meet Glass Lewis' standard.

LAUREL HILL

Trends in
CORPORATE GOVERNANCE

2022

About Laurel Hill

Laurel Hill Advisory Group is North America's leader in strategic shareholder communications and advisory services. 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 are being asked to support an M&A transaction, an unsolicited offer or a unique capital market offering, we get shareholders to act. We are committed to a singular vision – providing industry-leading advice, insights and execution resulting in a successful outcome.

Since our founding in 2008, Laurel Hill has steadily earned a reputation as a trusted advisor. In an industry where experience drives results, our team of professionals has an unmatched 250+ years of combined multi-disciplinary industry experience. When combined with our top-of-class results, year in and year out, Laurel Hill is regularly engaged on the highest profile and most contentious board and transaction mandates. With offices across the country, we leverage our local knowledge and relationships to deliver the best solutions.

We deliver results!

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