DAVIES

Governance Insights 2024

A Review of Shareholder Activism in Canada for 2024: Key Decisions and Trends to Watch for in 2025

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Despite a strong start to the year, activist activity in Canada in 2024 tapered to pre-pandemic levels. This reversion to more historic annual totals follows a notable resurgence of shareholder demands directed at Canadian public companies in 2023, when shareholder engagement reached its highest levels since record-setting 2018.

The passing of another year invites reflection on the trends currently animating the Canadian activism space. Activists remain focused on demands similar to those made in past years, with an increase in M&A and ESG-related demands appearing on the agenda. Large-cap Canadian-listed companies – those with market capitalizations over C$1 billion – continue to be disproportionately targeted by U.S. activists, consistent with recent years. Canadian real estate investment trusts (REITs) remained activist targets for another year as the sector finds itself still on the rebound from the impact of the COVID-19 pandemic. Lastly, the phenomenon of "activist swarms" continued in 2024 to beleaguer Canadian issuers for another year.

In this installment of *Governance Insights*, we examine these trends and offer insights for both issuers and activists. We also review two high-profile 2024 activist campaigns where the investor achieved a decisive victory, in each case resulting in a wholesale change of the board – a feat rarely achieved even once in a single year. As well, we explore the latest developments related to advance notice by-laws, joint acting and company-side defensive tactics.[1]

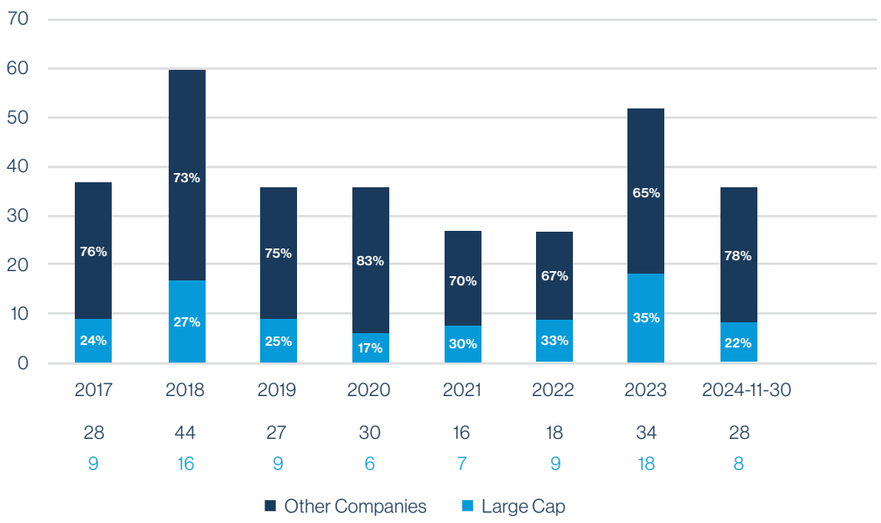
1 Unless otherwise noted, 2024 data referred to in this article is presented as of November 30, 2024.

The Past Year

The number of publicly listed Canadian companies subject to shareholder demands in 2024 (36 companies) reflects a 25% decline from the same period in 2023 (49 companies). The 2024 figure, however, is not far below the average for the four years preceding the pandemic (41 companies).

This year's decline in activism might be explained by the fact that the S&P/TSX Composite Index gained nearly 8% in 2023, which left fewer vulnerable targets available last year for forward-looking activists planning their campaigns for the 2024 calendar ahead. In fact, the strong resurgence of activism in 2023 was preceded by a year in which the S&P/TSX Composite Index declined by almost 9%, while the near all-time lows in activism in 2022 followed a year in which the S&P/TSX Composite Index gained almost 20%. The pattern of the last few years might suggest that market returns in one year may be an indicator of activity levels for the following year. With outsized market returns of nearly 20% delivered by the S&P/TSX Composite Index year-to-date in 2024, we will be on the lookout to see whether stronger markets this year will yield fewer campaigns next year.

Figure 1: Number of Canadian Issuers Subject to Activist Demands (2017 – 2024/11/30)



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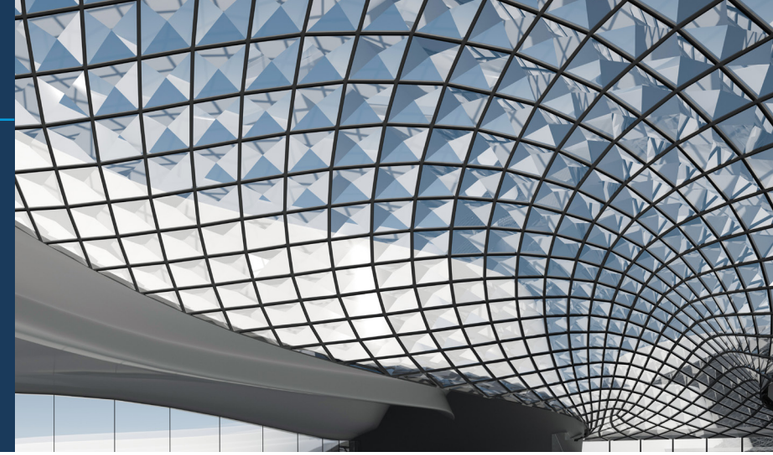
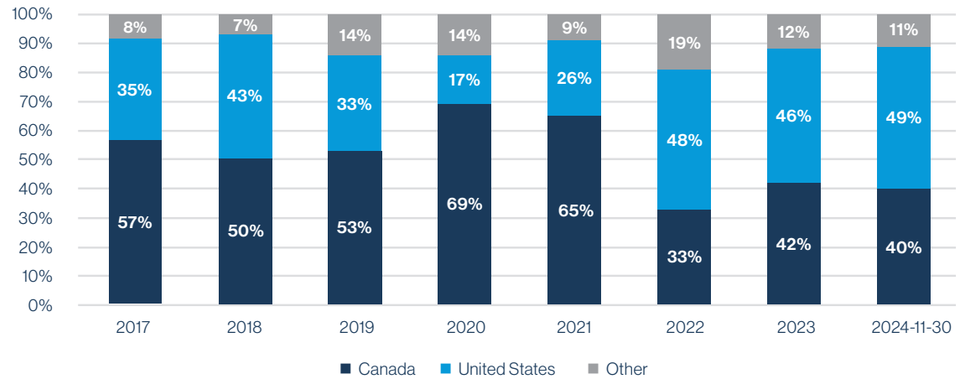


STEADY AIM: ACTIVISTS CONTINUE TO FOCUS ON LARGE-CAP COMPANIES

According to the TMX Current Market Statistics, roughly 12% of issuers listed on the Toronto Stock Exchange and TSX Venture Exchange (excluding exchange-traded products and close-ended funds) have a market capitalization exceeding C$1 billion. Yet, these companies continue to be disproportionately targeted by activists. In 2024, large-cap companies represented 22% of all companies subject to public demands. Figure 1 illustrates the historical number of large-cap and total issuers subject to shareholder demands.

Activist activity targeting large-cap companies continues to be driven by U.S.-based shareholders. Since the beginning of 2022, U.S.-based activists seeking change at Canadian-listed companies were responsible for almost half of all activist demands directed at these larger issuers. This may be explained in part by the fact that U.S.-based professional activists are more likely to target large issuers because their market capitalizations afford activists room to build a meaningful stake without moving the market. Figure 2 illustrates the continuing presence of U.S. activists in Canada.

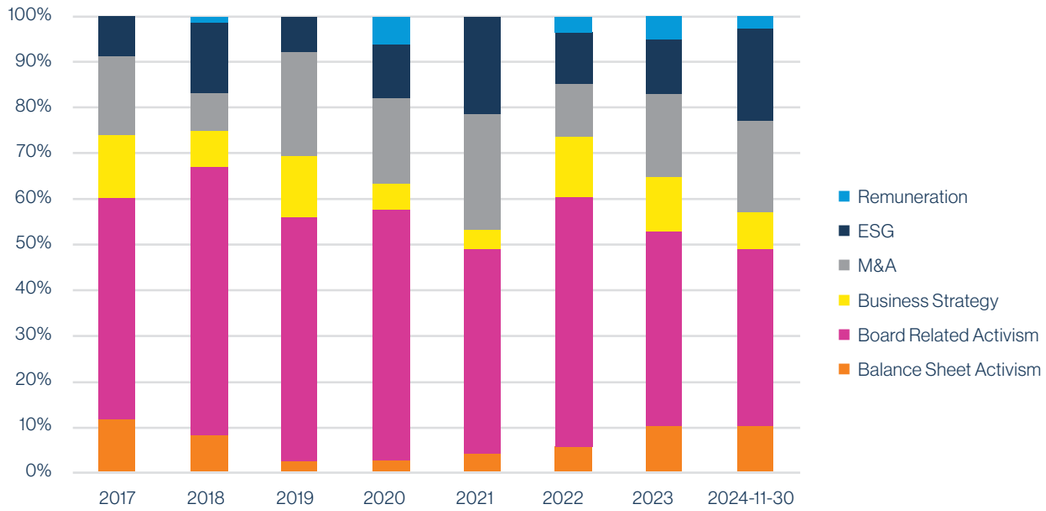
Figure 2: Breakdown of Activist Jurisdiction (2017 – 2024/11/30)



ZEROED IN: CAMPAIGN FOCUS REMAINS CONSISTENT

The variety of shareholder demands has remained consistent over the past year and a half. Notably, the proportion of demands focussed on M&A and ESG matters has increased during the same period, as seen in Figure 3.

Figure 3: Public Demands to Canadian Issuers Proportionally by Type of Demand (2017 – 2024/11/30)



TWO RESOUNDING VICTORIES FOR ACTIVISTS: THE GILDAN CAMPAIGN FOR STATUS QUO AND THE DYE & DURHAM CONTEST FOR CHANGE

2024 witnessed two high profile campaigns in which the activist claimed a resounding win. In the case of Montreal-headquartered apparel manufacturer Gildan Activewear Inc., following the unexpected departure of the company's CEO amid tensions with the Gildan board, activist investor Browning West commenced a campaign that culminated in the replacement of the entire incumbent board and the reinstatement of the CEO. This campaign saw a chorus of shareholders rallying around Browning West's cause, amplifying the pressure on the incumbent board.

Similarly, later in 2024, the nine-month battle between the Toronto-based legal technology company Dye & Durham Limited and activist investor Engine Capital LP, which aired differences over the company's strategic direction, came to a close with Engine Capital garnering shareholder approval for its slate of directors, prompting the replacement of the entire incumbent board and resignation of the CEO.

Shareholder support for such drastic and wholesale change is generally noteworthy in the Canadian activist space, and the occurrence of two such events in one year is all the more extraordinary. Time will tell if these contests are harbingers of a shift to more decisive shareholder engagement. At the very least, for now they stand as encouraging examples to investors of the outcomes that are possible when shareholders act decisively when the circumstances warrant.

> Time will tell if the resounding activist victories in Gildan and Dye & Durham are harbingers of a shift to more decisive shareholder engagement in Canada.

Developments in Advance Notice By-Laws

South of the border, the adoption of universal proxy rules by the U.S. Securities and Exchange Commission (SEC) in September 2022 led many issuers to amend their advance notice by-laws, with some amendments sparking high-profile legal battles. These developments offer lessons for Canadian companies considering adopting or amending an existing advance notice by-law. This section explores the key differences between U.S. and Canadian practices and provides practical guidance for Canadian boards.

THE CANADIAN CONTEXT

In the U.S., advance notice by-laws are often issuer-friendly, imposing onerous disclosure requirements on nominating shareholders, including the completion of lengthy questionnaires. These sometimes byzantine requirements can empower a willing board to reject director nominations on technical grounds, effectively affording the issuer the opportunity to thwart a proxy contest or extract time or leverage for negotiations with the dissident.

In contrast, the corporate and governance regimes regulating the use of advance notice by-laws in Canada generally seek to balance the interests of issuers and nominating shareholders. Canadian case law emphasizes that advance notice by-laws should be used as a "shield" to protect against ambushes at shareholder meetings, not a "sword" to exclude legitimate director nominations or to buy time for management to counter dissident shareholders. Additionally, because Canadian corporate statutes generally require shareholder ratification for the adoption or amendment of by-laws, the governance community, including Institutional Shareholder Services Inc. (ISS) and Glass, Lewis & Co. (Glass Lewis), as well as the Toronto Stock Exchange (TSX), has established standards for the adoption of advance notice by-laws that temper their use by issuers. As discussed below, the general approach in Canada is that the disclosure requirements imposed on a nominating shareholder should be limited to information that is required in a dissident proxy circular under applicable laws.

REGULATORY INTERVENTION IN CANADA

Recent developments raise questions about whether Canadian securities regulators (as opposed to Canadian courts) will intervene in disputes over advance notice provisions. In *Jacob Cohen and YourWay Cannabis Brands Inc.* (June 22, 2023), the British Columbia Securities Commission (BCSC) declined to assume jurisdiction in an application challenging an issuer's use of an advance notice provision to reject a dissident's director nominations. The BCSC regarded the matter squarely as one of corporate law and therefore a matter to be decided by a court. Noting that it did "not see any issue of law or policy engaged [...] involving securities

or trading securities which would engage the public interest," the BCSC declined to find that its public interest powers afforded the shareholder any remedy under securities law.

Securities regulators in Canada have shown little interest in hearing advance notice disputes, making reliance on the courts all the more critical for enforcing the appropriate use of these provisions. But court proceedings can move slowly, and delays are likely to impede the real-time protection of shareholder rights often required in the context of pending proxy contests, leaving shareholders on the back foot. Securities regulators may be better positioned to respond swiftly, offering expedited processes that align with the urgency of director nominations ahead of shareholder meetings.

GUIDANCE FOR BOARDS ON ADOPTING ADVANCE NOTICE BY-LAWS

Advance notice by-laws are essential tools for public companies, helping to prevent surprise nominations at shareholder meetings and ensuring that all shareholders have sufficient information to make informed decisions. When adopting or amending these by-laws, Canadian boards should consider the following best practices:

1. **Timing and Process of Adoption:** The timing of adopting or amending by-laws can impact the deference afforded to the board. It is generally recommended that any adoption or amendment of an advance notice provision be undertaken proactively on a "clear day," free of any existing or threatened proxy contest. Whenever a board is considering adopting or amending its by-law, it should:
   - > seek advice from internal and external advisors;
   - > establish processes to manage conflicts of interest; and
   - > deliberate thoroughly, documenting its decision-making process.

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Taking these steps can strengthen the board's position under the business judgment rule, which affords deference to informed and reasonable decisions made in the company's interests.

2. **Reasonable Notice Periods:** Advance notice by-laws should provide shareholders with a reasonable period of time in which nominations may be submitted. ISS and Glass Lewis suggest that a "reasonable" notice period is generally a minimum of 30 days prior to the date of the annual meeting, and recommend a broad time period (e.g., a 35-day window) during which shareholders may submit nominations. Proxy advisors will typically recommend that shareholders vote against advance notice provisions if the minimum notice period is either too close to (e.g., 10 days) or too far in advance of (e.g., 60 days) the annual meeting.

3. **Reasonable Disclosure Requirements:** Disclosure obligations for nominating shareholders should not be more onerous than those for management and board nominees or require disclosure that exceeds what is required in a dissident proxy circular. Imposing additional requirements, such as completing extensive questionnaires that could deter or thwart legitimate nominations may not stand up to judicial scrutiny.

4. **Strict Requirements and Board Discretion:** ISS recommends that advance notice provisions should not require the nominating shareholder to be present at the shareholders' meeting, whether in person or by proxy, and the nominees should not be required to agree, in advance of election, to comply with the director policies and guidelines of the corporation. In addition, ISS requires that boards retain ultimate discretion to waive any or all sections of the advance notice provision.

5. **Clarity and Simplicity:** By-laws should be drafted clearly and concisely.

RECENT LESSONS FROM THE U.S.

While Canadian boards operate under different legal standards, recent U.S. case law offers cautionary tales for Canadian boards:

- **Masimo Corporation:** Masimo Corporation adopted by-law amendments in the face of a proxy contest brought by Politan Capital. Politan challenged the by-laws before the Court of Chancery of Delaware. The amendments required disclosure of highly confidential and potentially proprietary information that, in practice, would have operated to deter investment funds from making director nominations to the board. Masimo's by-law amendments sparked outrage among seasoned activist investors and prompted the Managed Funds Association to file an amicus brief urging the Delaware Chancery Court to find the by-laws to be unenforceable because they were "designed to discourage shareholder engagement." Ultimately, and in the face of mounting pressure, Masimo reversed its by-law amendments, rendering the case moot. The case underscores the importance of balancing the company's need for information with a shareholder's right to nominate directors without undue hindrance.
- **AIM ImmunoTech:** AIM ImmunoTech Inc. adopted a complex, 1,099-word sentence by-law provision in the face of recurring nomination notices made by a group of activists. The Supreme Court of Delaware found that the provision was so complex that it had to be invalidated for being "indecipherable." The Supreme Court noted that an unintelligible by-law is invalid under "any circumstances."

BCSC Sets High Bar to Find Joint Actor Relationship

In a win for shareholders, the BCSC released important guidance on "acting jointly or in concert" in a proxy contest. In *NorthWest Copper Corp.* (December 22, 2023), the BCSC declined to find a joint actor relationship between a dissident shareholder and another shareholder, notwithstanding that the latter had funded the dissident's proxy contest to replace an incumbent board and had selected one of the nominees included in the dissident's slate.

A JOINT ACTOR FINDING REQUIRES "CLEAR, CONVINCING AND COGENT EVIDENCE"

Although the BCSC's final conclusions were fact-specific, in reaching its decision it noted that a party alleging a joint actor relationship must provide clear, convincing and cogent evidence to support a finding of joint acting – not mere speculation or inference. Significantly, the Commission stated that a high bar to a joint actor finding must be set in order not to stifle the "free flow of information and opinion among shareholders," even if that means some joint actors "will fly under the radar."

For persons to be found acting jointly or in concert in connection with the solicitation of proxies for voting on a dissident slate, generally such persons must be found to be operating with a common specific purpose and with a

In spite of the Commission's articulation of the evidentiary requirements needed to support a joint actor finding—requirements that clearly eschew speculation and inference—some issuers continue to brandish the "acting jointly or in concert" characterization as a sword to stifle shareholder engagement and discussion. This makes the guidance provided in *NorthWest Copper* all the more significant (and helpful) for shareholders and their advisors as they navigate contested situations.

form of mutual understanding about how shares will be voted. Notably, for the Commission the mere alignment of concern between shareholders does not constitute a "plan of action or a commitment to pursue" a course of action.

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EARLY WARNING REPORTING NOT TRIGGERED ON MERE FORMATION OF GROUP

The Commission also provided important guidance regarding activists' obligations to comply with Canada's early warning reporting (EWR) rules. Those rules require a shareholder to report when it has acquired, whether alone or with its joint actors, 10% or more of an issuer's shares. The BCSC confirmed that the mere formation of a joint actor group whose collective ownership satisfies the 10% early warning threshold does not require the filing of an EWR report. Rather, a group's EWR obligation is triggered only when a group member subsequently acquires shares of the issuer. The formation of a group that includes a person who is already an EWR filer in respect of the issuer, however, would require such person to update its report if the formation of the group constitutes a change of a material fact contained in their existing report. As well, the Commission confirmed that the EWR regime applies to acquisitions of securities generally, not just in the context of a take-over bid or similar merger scenario. Accordingly, shareholders should be mindful of their reporting obligations when accumulating shares in connection with a potential proxy contest.

For more details regarding the BCSC's decision, refer to our bulletin: "*In a Win for Shareholders, B.C. Securities Commission Provides Joint Actor Guidance for Proxy Contests*".

Ontario Capital Markets Tribunal Rejects Novel Rights Plan

Canadian issuers continue to use shareholder rights plans ("poison pills") to prevent creeping acquisitions of negative control blocks of 20% or more of their outstanding stock. In *Riot Platforms, Inc. v Bitfarms Ltd.* (November 19, 2024), the Ontario Capital Markets Tribunal considered the use of a rights plan to restrict a shareholder's accumulation of shares below the customary 20% threshold in the face of a meeting requisition initiated by the shareholder. In its reasons, the Tribunal provided meaningful guidance to issuers considering whether such plans could be used to frustrate a dissident's accumulation of shares in the run up to a proxy contest.

BACKGROUND

On July 24, 2024, the Tribunal cease-traded a shareholder rights plan (Rights Plan) adopted by Bitfarms Ltd. (Bitfarms) following a complaint brought by a significant shareholder of Bitfarms, Riot Platforms Inc. (Riot). The Rights Plan was notable for its 15% share ownership threshold, which was significantly lower than the near-universal 20% threshold commonly used by Canadian public companies. In 2023 and 2024, Riot submitted several confidential proposals to Bitfarms regarding a potential business combination of the two companies, but its overtures were unsuccessful. In the first half of 2024, Riot acquired a toehold position representing just under 15% of the outstanding common shares of Bitfarms and requisitioned a special meeting of Bitfarms' shareholders to nominate new directors for election to the Bitfarms board. In response, Bitfarms adopted the Rights Plan on the basis that the 15% trigger was necessary to protect the integrity of its ongoing strategic review process.

Under Canadian securities laws, a shareholder is able to acquire up to 19.9% of a public company's shares without triggering the take-over bid rules. A formal requirement to make an offer to all shareholders, together with the associated regulatory protections, is only mandated where a shareholder reaches or exceeds the 20% threshold. The 20% benchmark has been a cornerstone of Canada's take-over bid regime for approximately 60 years, enduring numerous changes to other aspects of the rules, including an overhaul in 2016.

THE TEST FOR A PUBLIC INTEREST ORDER IN THE CONTEXT OF A SHAREHOLDER RIGHTS PLAN

Although Canadian securities laws do not regulate shareholder rights plans per se, securities regulators are often called upon to invoke their public interest powers to prohibit plans that are impugned by shareholders or would-be acquirors for undermining the Canadian bid regime, even when the issuer has not violated any laws. Until *Riot Platforms*, it was uncertain exactly when and why the regulators would step in to consider the propriety of a rights plan, leaving issuers, acquirors and their advisors with important questions unanswered.

Significantly, then, in *Riot Platforms* the Tribunal articulated the standard by which its public interest inquiry should be carried out, reasoning that it is in the public interest to cease trade a shareholder rights plan

It will be interesting to see whether the Tribunal's decision in *Riot Platforms* invites more litigation concerning novel and tactical shareholder rights plans in the future, including in the activist space where plans could be used to frustrate stake building and grouping by activists.

that does not otherwise contravene Ontario securities law where (i) the applicant demonstrates that the plan undermines, in a "real and substantial way," and with "public effect," one or more clearly discernible animating principles underlying Ontario securities law, and (ii) the respondent does not demonstrate exceptional circumstances that would justify the continuation of the plan.

Although the Tribunal concluded that, on the facts, the Rights Plan should be cease traded, it also left open the possibility that a shareholder rights plan with a trigger below 20% could be permitted in exceptional circumstances. Notably, the Tribunal suggested such exceptional circumstances could include the conduct of the bidder, whether the bidder had achieved a "blocking" position, or where the issuer adduces credible evidence of a real and ongoing strategic review process or forthcoming value-enhancing transaction. It will be interesting to see whether these features of the Tribunal's decision invite more litigation concerning novel and tactical shareholder rights plans in the future, including in the activist space where plans could be used to frustrate stake building and grouping by activists.

For more details regarding the Tribunal's decision, refer to our bulletin: "*Capital Markets Tribunal Establishes New Framework in Evaluating Poison Pills*".

Real Estate in the Crosshairs

In Canada, REITs—the most common form of publicly-traded real estate entity—continue to be the target of investor demands. Over the past six years, REITs made up an average of 5% of targeted issuers in the relevant year, increasing to 8% of targeted issuers in 2024. This increase might be linked to the COVID-19 pandemic, which ushered in work-from-home policies and online shopping habits that shaped perceptions among investors of the viability of the REIT sector. Additionally, the Canadian real estate sector experienced stagnant levels of growth and declining asset values in 2022 and 2023 as the economy wrestled with inflation and high interest rates. These factors have resulted in turbulent times for real estate issuers. With macroeconomic and sector-wide trends shining the spotlight on REITs as underperformers, activists have put their capital to work looking for solutions to the problems faced by REITs. Two of the most critical problems are discussed below.

THE GAP TO NET ASSET VALUE

In recent years, many REITs have experienced a disconnect between the value of their public equity and their underlying assets. With the COVID-19 pandemic, retail, office and diversified REITs have been especially affected. With unitholder bases consisting mostly of retail investors, REIT unit prices are subject to gloomy public speculation. Although REITs have proposed value-creation plans to demonstrate thoughtful capital allocation, they remain vulnerable due to the gap between the self-assessed net asset value of their assets and the public value of the REIT's equity.

INVESTOR PROTECTION

Unlike corporations, which are creatures of statute, REITs are formed and largely governed by contract. Historically, this has resulted in differences in investor protections and customary corporate governance practices. The Canadian Coalition for Good Governance and other stakeholder groups have warned investors that REITs may not offer the same standards of investor protection as companies subject to the rules and requirements of corporate statutes. Although many REITs have amended their governing contracts to introduce investor protections substantially similar to Canada's federal corporate statute (such as the right to requisition a meeting of unitholders, an oppression remedy and a prescribed fiduciary duty of trustees analogous to the duty of loyalty owed by corporate directors), inconsistencies remain.

In addition, externally managed REITs have been targeted by activists asserting that an internal management structure would be less costly and more efficient and would minimize conflicts of interest between management and unitholders.

Activists Continue to Swarm

The phenomenon of activist swarms continues to play out in Canada. Defined by "Bloomberg" as multiple shareholders of a single issuer making contemporaneous but uncoordinated public demands from the company's leadership, these activist swarms have made headlines in recent years. We previously covered this topic in our 2023 Governance Insights article, "*As the Pandemic Abates, Activists Advance: Shareholder Activism Rebounds in Canada*."

In 2024, multiple shareholders targeted several large companies, including Dye & Durham Limited, Parkland Corporation and Gildan Activewear Inc. In each instance, the targeted company confronted disparate demands from multiple constituencies, each with its own objectives. For instance, in both the Gildan and Dye & Durham boardroom battles, the company entered into a settlement with one of its shareholders while continuing to attempt to address the concerns of others. This strategic response to an activist swarm seeks to "divide and conquer" by placating certain shareholders within the group while isolating those whose demands might be more challenging to satisfy.

As activist swarms become more prevalent, companies need to be proactive in their engagement strategies. By developing a comprehensive understanding of their shareholder base and maintaining open lines of communication, companies can better anticipate and address shareholder concerns before they escalate. Additionally, companies should be prepared to negotiate and potentially settle with activists whose objectives align with the company's best interests.

We expect the activist swarm "playbook" – how companies respond to swarms and how activists respond to competing demands from other shareholders – to continue evolving as this trend persists.

The Davies Guide to Shareholder Activism and Proxy Contests in Canada

For a more general guide to the principal legal and practical issues faced by both shareholders and target companies in the context of activism and proxy contests, refer to our *Guide to Shareholder Activism and Proxy Contests in Canada*.

Note on the data: Activism data in this chapter was sourced from Diligent Market Intelligence and excludes shareholder proposals.

Key Contacts

If you would like to discuss any of the issues raised in this report or receive more information, please contact any of the individuals listed below or visit our website at www.dwpv.com.

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