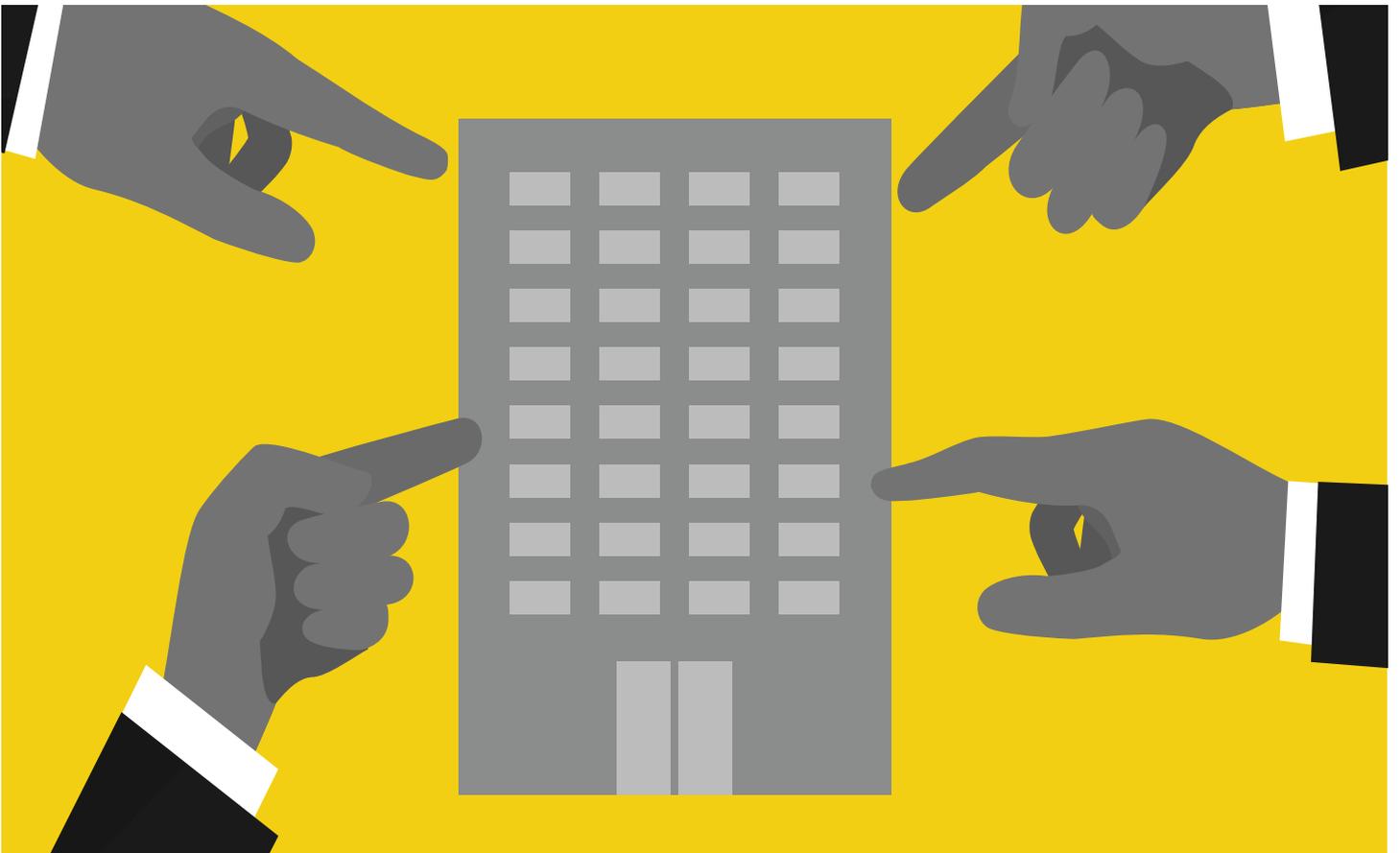




■ **INDEPTH FEATURE** Reprint January 2024

SHAREHOLDER ACTIVISM & ENGAGEMENT

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in shareholder activism and engagement.



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Ghaith Sibai is a partner in the shareholder activism, mergers & acquisitions, and corporate governance practices at Davies Ward Phillips & Vineberg LLP. He works on both sides of high-profile shareholder activism matters and public and private M&A, as well as complex governance issues and internal investigations. He has advised acquirers, targets, hedge funds, boards and special committees on transactional and other corporate matters. He teaches a masters course in corporate remedies at Osgoode Hall Law School with an emphasis on shareholder activism, public M&A and take-private transactions.

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Q. Could you provide an overview of recent trends in shareholder activism in Canada? What factors and influential topics are driving activists to target companies?

A. Shareholder activism in Canada experienced a resurgence in 2022 and 2023 after a slump in the months following the onset of the coronavirus (COVID-19) pandemic in North America. Large-cap Canadian listed companies – those with market capitalisations exceeding C\$1bn – have been disproportionately targeted, often by US hedge fund activists seeking opportunities north of the border. In 2023, a relatively new phenomenon – ‘activist swarms’ – emerged. Described as multiple shareholders of a single issuer making contemporaneous, but uncoordinated, public demands from the company’s leadership, these activist swarms made headlines in 2023. In Canada, First Capital Real Estate Investment Trust and Ritchie Bros were targeted by multiple shareholders. As has always been the case, activists target companies for various factors, such as governance gaps and underperformance relative to peers.

Q. What types of shareholder activism campaigns are you seeing? What strategies are being deployed to force companies to effect change?

A. The data for the last few years on the mix of activist demands made against Canadian issuers suggest that activists may be recalibrating their messages in the post-pandemic era. Activists pursuing changes in the composition of the board have increased their focus on executive compensation, board-related activism and M&A activism, while demands relating to environmental, social and governance (ESG) factors in this context may have declined. Such a decline may reflect the shifting and sometimes polarising attitudes to ESG investing more generally. One type of demand that is often made independently of board-related demands is M&A activism, which was on the upswing in 2023. These demands generally involve an activist pushing a target to implement a transaction or actively challenging an announced transaction. A recent prominent example of such a campaign was Ritchie Bros. Auctioneers Incorporated’s acquisition of IAA, Inc.

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Q. Could you highlight any examples of shareholder activism which resulted in strategy changes at high-profile companies in Canada?

A. We witnessed a number of activist swarms in 2023. Responding to an activist swarm can be challenging given the disparate demands and multiple constituencies involved, all with their own objectives. One response strategy is to ‘divide and conquer’ by seeking to placate certain shareholders in the group while isolating those whose demands might be more challenging to satisfy. This strategy was witnessed in the US in Salesforce’s settlement with ValueAct Capital, which involved four other activists, and in Canada in First Capital’s settlement with Ewing Morris and Co. and Vision Capital Corp. This latter settlement led to a subsequent settlement between First Capital and Sandpiper Group, whereby Sandpiper withdrew its meeting requisition and board nominees and agreed to a standstill in exchange for a reimbursement of its expenses. A more recent and yet to be resolved example is Gildan Activewear, which is being targeted by multiple activist shareholders who want to see its

former chief executive reinstated after he was let go by the Gildan board. Gildan chose to settle with one shareholder, Coliseum Capital Management, including by appointing Coliseum’s co-founder and managing partner to the Gildan board, while several other shareholders continue to push for the reinstatement of Gildan’s former chief executive. Browning West, which holds about 5 percent of Gildan’s shares, has now requisitioned a special meeting of shareholders with the intention of reconstituting a majority of the Gildan board, citing concerns relating to governance and strategic direction, particularly after the company’s mishandled succession process. At least seven other shareholders have echoed similar concerns over the company’s handling of the succession process.

Q. Have any recent legal or regulatory developments in Canada helped to facilitate activism and make campaigns more likely to succeed?

A. Recent amendments to the Canada Business Corporations Act (CBCA) have enabled true majority voting for directors, significantly empowering

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‘vote no’ campaigns. In 2023, there was one notable campaign against a CBCA company, and more may emerge in 2024. For example, recommendations from proxy advisory firms to vote against directors for governance issues could be more influential. Even if a ‘vote no’ campaign does not directly remove a director, it can apply pressure for change. Directors close to losing majority support may need to address shareholder concerns more proactively. With CBCA company shareholders now having increased voting power, directors should focus on continuous shareholder engagement and respond effectively to their feedback.

Q. What advice would you offer to companies on priming their defences against potential activist attacks? What steps should they take to monitor and anticipate an activist campaign?

A. To prime their defences against potential activist attacks, companies should conduct regular vulnerability assessments, identifying and addressing any weaknesses in their performance, governance, capital structure, strategy and communication. Companies should

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also monitor their shareholder base and the market sentiment, anticipating any potential triggers or catalysts for activism. Companies should be prepared to respond quickly and effectively to any activist approaches, engaging legal and financial advisers and proxy solicitation firms as needed. Companies should also review their advance notice bylaws and other governance policies to ensure they are consistent with best practices and do not create undue barriers for shareholder nominations or proposals.

Q. How important is it for companies to proactively engage with key stakeholders, including activists, on a regular basis? What shareholder engagement methods should be considered?

A. It is important for companies to proactively engage with key stakeholders, including activists, on a regular basis, as this can help to build trust, credibility and support, as well as to identify and address any concerns or expectations. Ideally, a company will clearly and transparently communicate its vision, strategy and value proposition, and demonstrate how these align with shareholder interests.

Companies should also solicit and consider shareholder feedback and be open to constructive dialogue and collaboration with activists, where appropriate. Companies should also use various shareholder engagement methods, such as investor meetings, roadshows, webcasts, surveys and advisory votes, to reach out to different segments of their shareholder base and to tailor their messages accordingly.

Q. What are your predictions for shareholder activism in the months ahead? In your opinion, will continuing activist activity demand ongoing corporate engagement?

A. Shareholder activism is likely to remain a significant force in the Canadian market in the months ahead, as activists continue to seek opportunities to deploy their capital and influence corporate decision making. 2023 was a banner year for activism in Canada. No fewer than 47 companies were targeted by activists, excluding shareholder proposals, well beyond even pre-pandemic levels of activity. We see little reason to expect this activity to abate in 2024. While

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scrambled macroeconomic indicators may have tempered the market for public M&A activity, continued uncertainty is unlikely to dissuade activists from taking on underperforming companies. As evidenced by the trend of activist swarms, most recently witnessed with Gildan Activewear as 2023 ended, even shareholders who would not typically be viewed as having an activist posture are becoming more vocal. Continuing activist activity will demand ongoing corporate engagement, as companies will need to maintain and enhance their relationships with shareholders, monitor and anticipate activist threats, and defend and communicate their strategies and value creation. □

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