SHAREHOLDER ACTIVISM AND CANADA’S ‘NEW CORPORATE NORM’

By

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ABSTRACT

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The purpose of this project is to attribute shareholder activism’s dramatic growth in Canada over the past decade to the cumulative effect of three structural factors. These components include: (1) the rise of institutional investing, which has resulted in an array of strategic enhancements developed by activist hedge funds, strengthening minority shareholder influence; (2) macro-economic volatility, which has produced the situational urgency for short-run share price improvement in traditionally strong Canadian sectors; and lastly, (3) the development of a corporate and securities law regime in Canada that has given rise to a localized activist-haven, providing procedural windfalls that have allowed for minority shareholders to exert unprecedented levels of control in corporate governance matters. The thesis argues that each of these three components have given rise to a surge in shareholder activism, whilst contemporaneously influencing modern Canadian investment practices so significantly, that a new corporate norm (NCN) now exists in Canada.

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1. INTRODUCTION

Roughly a decade ago, the term shareholder activist, or activist investor, hardly existed as a corporate colloquialism; today, it serves as one of the most pervasive, albeit polarizing terms, in contemporary business lexicon. What began as a relatively small group of vaguely-categorized, US-based activist funds, cumulatively managing less than $12 billion (USD) in 2003, now represents an activist asset class that boasts more than $112 billion (USD) in total assets in the United States alone; not including the various multi-strategy funds that incorporate activist methods alongside their traditional investment strategies.¹ The effect of this ten-fold growth in the United States has been palpable, with mega-corporations such as McDonald’s, Apple, Hess, JP Morgan Chase, Proctor & Gamble and Sony all being “subject to activist campaigns” within the last number of years.²

Importantly, shareholder activism is no longer an exclusively American phenomenon.³ On a global scale, the dollar figure jumps to a staggering $249.8 billion (USD) when one calculates the total value of all activist-held stocks internationally,⁴ prompting some scholars to suggest that activism⁵ has evolved into a “dynamic institutional force” in the contemporary economic environment.⁶ Canadian data is neatly aligned with these

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³ Christoph Van der Elst, “The Corporate Response to Shareholder Activism” (2014), 11:2 ERA Forum 229 at 229-230, online: <http://link.springer.com/article/10.1007%2Fs12027-014-0345-0>
⁵ In this paper, when making a reference to “activism”, this refers to “shareholder activism”.
global trends, with unprecedented levels of proxy activity being reported since 2008, and major Canadian corporations undergoing significant restructuring in lieu of activist demands, mirroring trends in the US. Indeed, shareholder activism has become an international trend, growing exponentially since the beginning of the twenty-first century, shifting global capital flows, altering firms’ strategic and financial decision-making, and permanently transforming corporate governance models.

The above figures, impressive as they are, fail to elucidate the underlying reasons for the sustained growth in activist behaviour, nor do they explain what the broader ramifications of this dramatic incline are. Academics and business pundits alike have cited the 2008 global financial crisis as the likely catalyst for contemporary activism, specifically attributing the activist surge to the apparent need to repair the “profound failure in corporate governance, particularly its risk management practices” at many systemically important financial institutions.

This justification, cogent as it appears, is an oversimplification that fails to provide a persuasive account of why activism persists today, nearly a decade after the 2008 financial crisis, and how it specifically fits within Canada’s contemporary corporate infrastructure.

This paper contends that there is an explanatory-void when it comes to pin-pointing cogent reasons for shareholder activism’s rampant proliferation in recent years. The

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8 Section four of this paper will cite a number of Canadian examples specific to the energy and materials sectors which will effectively illustrate the palpable impact that activists have had on corporate governance amongst major Canadian corporations.
9 Zenner, supra note 1 at 1.
present project will fill this void by identifying a multitude of structural (macro-level) and behavioural (micro-level) factors that have permanently influenced modern investment practices in Canada, and abroad. The breadth of this paper will be dedicated to identifying three such factors, namely, the rise of institutional investment, widespread economic volatility, and a lenient Canadian legal regime. Additionally, this paper will introduce an overarching theme that highlights the uniqueness of Canada’s contemporary economic situation, ultimately aimed at framing the entirety of this written endeavour; this theme will be labelled the new corporate norm (NCN). ¹¹

Additionally, attributing the activist surge to the financial crisis, or any single-variable explanation, fails to acknowledge and differentiate between the wide array of activist approaches and strategies that have developed over time. This paper will identify a specific method of shareholder activism that consistently promotes mutually rewarding corporate partnerships between minority shareholders and their managers—namely “constructive” activism. This paper will conclude by advocating for the consistent utilization of constructive activism, in addition to robust board engagement, and pragmatic reform, which together, render an optimal way forward for Canadian investors and boards, amidst the new corporate norm.

1. Outline

Chapter two delves into the discussion of who the contemporary shareholder activist is, while drawing distinctions between the varying sub-categories. This paper’s

¹¹ Moreover, the “new corporate norm” is a concept that will serve as the thematic back-drop for the structural and behavioural factors enumerated in this paper’s thesis.
normative position is that there is a palpable difference between black-hat activists, and white-hat activists, or constructive activists—a dichotomy which will be elucidated therein. This section will also run through “the targeting process” or the typical activist motivations, and follow this up by delineating the various strategies that activists will typically engage in to achieve those ends. Admittedly, there are difficulties in ascertaining the long-run viability or efficacy of activist strategies; those challenges will be acknowledged in this chapter’s final subsection, titled “Limitations and Long Run Ambiguity”.

Chapter Three will introduce the first structural factor that has influenced modern investing, and more specifically, the frequency and efficacy of modern activist intervention, specifically, the gradual awakening of shareholder rights that occurred, primarily in the United States, and later in Canada, over the last century. This brief historical overview will illustrate the notable rise of institutional investment vehicles, identifying the pedigree for modern activist objectives, and the foundation that has led to more innovative investor engagement campaigns. More specifically, this section will speak to the evolution that investors underwent, to arrive at their current level of sophistication, a micro-level, behavioural analysis.

Chapter four will expound the second structural factor that has influenced modern investment practices in Canada, particularly, the current state of global macro-economic volatility. This broad-ranging topic will include a more focussed analysis of floundering WTI crude oil prices, and depressed share-valuations in traditionally strong Canadian sectors, particularly the energy and materials sectors. This chapter will also examine

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12 One of the pragmatic aspects of this piece is the fact that Canadian data will almost always follow American statistics, primarily because the shareholder activism phenomena originated in the US, and has garnered more widespread attention there. Canadian data has been cited where available.
specific activist case studies within these two sectors, in an effort to illustrate the varying approaches to shareholder activism in real-life Canadian situations, again highlighting the dichotomy between “white-hat” and “black-hat” activists, as well as the utility of the constructive activist approach.

Chapter five, this paper’s penultimate section, will touch on the final structural factor, namely the macro-level influence of the observably lenient corporate and securities law regimes in Canada; more specifically, examining the rules governing meeting requisitions, early-warning reporting, shareholder proposals, the statutory power to remove directors, take-over bids, the oppression remedy, as well as the influence of mandatory majority voting stipulations. Each of these provisions feature excessively-accessible thresholds that offer shareholders a myriad of procedural windfalls; opportune passageways that allow investors to influence the corporation and exert corporate control.

Finally, chapter six will tie the first five chapters together, outlining an optimal way forward for corporate managers, as they operate within the new corporate norm. This conclusory section will provide recommendations on how to balance short-term activist dynamism, with the common goal of long-term value creation, again condoning constructivist shareholder strategies, and encouraging the adoption of elaborate and comprehensive shareholder engagement strategies, essential for board’s and their management. This section will also examine reforms to the proxy voting infrastructure, as well as the mandate behind the CCGG’s new “Universal Proxy Policy” which advocates the use of a mandatory form in every contested director election.
2. The New Corporate Norm

Before proceeding to the next chapter, it is pertinent to first expand on the notion of the *new corporate norm (NCN)* in Canada. The NCN is an observational construct that runs contemporaneous to the proliferation of shareholder activism; in fact, one could suggest that it serves as the situational backdrop, or causal framework, that has cultivated activism’s well-documented surge over the last decade. Moreover, it is meant to describe the unique structural circumstances that have directly impacted modern investment behaviour over the last century. These factors include, but are not limited to the factors set to be explicated in the forthcoming chapters, namely, the rise of institutional investment, increased sophistication of investor engagement and control, widespread economic volatility, and a lenient Canadian legal regime. Each of these components can be characterized as catalysts, structural and behavioural forces that have initiated and accelerated a transformation in trading behaviour, causing a permanent shift in investment practices altogether, leading to an economic environment significantly different from previous decades. Fundamentally, these unsettled economic times have forced investors to be agile, nimble, and ultimately adapt amidst an ever-changing business landscape. Henceforth, the *new corporate norm* will serve as a catch-all phrase which characterizes this contemporary economic environment, more specifically, an environment that has molded and shaped the modern shareholder activist.
2. WHAT IS A SHAREHOLDER ACTIVIST?

While traditional investors may acquire a stake in a company because of their philosophical or personal alignment with the strategic direction of management, “shareholder activists” are typically perceived as “investors, who dissatisfied with some aspect of a company’s management or operations, try to bring about change within the company without a change in control”. First, “activism” in this sense, presumes a repudiation of the target firm’s status quo, a reflection of the board of director’s administration and strategic direction. Second, “activism” presupposes the shareholder’s solicitation for change, with the express intention of improving operational efficiency, curtailing share price underperformance, and ultimately unlocking inherent shareholder value on short-term, and potentially long-term, business horizons. While traditional hedge fund categories may affect share prices gradually, activist funds seek to influence their target firms more directly, often assuming hands-on advisory roles to a corporation’s senior management, and involving themselves in day-to-day strategic decisions.

1. Activists: Different Sizes and Shapes

Contemporary activist funds are typically compartmentalized into three categories, (1) “established pure-play activists”, (2) “new activists”, and (3) “multi-strategy hedge funds”. The first category represents funds whose principal investment strategy is to generate “risk-adjusted excess returns”, or “alpha”, by acquiring stakes in companies, engaging management and “proposing their views of a superior path to shareholder value

14 Zenner, supra note 1 at 1.
creation”. Examples of pure-play activist funds includes notable players such as Icahn Enterprises founded by American business magnate Carl Icahn, Pershing Square Capital Management founded by William (Bill) Ackman, JANA Partners, founded by Barry Rosenstein, and Third Point Management founded by Dan Loeb. The second category represents “new activist funds”, often founded by former leaders of successful pure-play funds. These newly-established firms are focused on quick-results, flaunting their track-record from past corporate turn-arounds, to attract additional investment. The third category represents the late-adopting “multi-strategy funds” that have been forced to broaden their traditional “passive” methods to include activist strategies. Often times, multi-strategy funds will take a “long-only” position at the beginning of their campaign, and eventually “evolve to a more activist-oriented approach over time”.

Professor Brian Cheffins’ literature has further categorized contemporary activism into two specific types, based on the individual investor’s intent, and the specific timing of their activist executions. These groups have been termed “offensive” activists and “defensive” activists; the former describes a situation when an outsider gradually acquires a stake in a corporation with the premeditated objective of agitating management to affect change, “a 2012 boardroom coup at Canadian Pacific Railway Ltd. (CP), the iconic railway operator, constitutes the most prominent instance of this form of activism in a Canadian context.” The latter, namely defensive activism, occurs when an existing shareholder becomes dissatisfied with the directors strategic direction and seeks change in a reactive manner, “a protracted tussle between Vancouver-based telecommunications giant Telus Inc.

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15 Zenner, supra note 1 at 3.
16 Ibid. at 3
and hedge fund Mason Capital Management about a plan the company announced in 2012 to convert non-voting Telus shares into voting common shares might appear to be an even more prominent example of British Columbia-oriented offensive shareholder activism.\(^{18}\)

Professor Cheffins’ bifurcated characterization of shareholder activists coalesces well with the three different activist characterizations above, as the offensive activists will typically fall in either the “established pure-play activist” category, or the “new activist” category. While “defensive”, or more reactive activists, will usually stem from a “multi-strategy hedge fund”, ostensibly looking to hit the reset-button on a “long-only” position.

Moreover, notable activist fund manager Jeffrey Ubben of ValueAct draws an intriguing normative distinction between different varieties of activists, when he served as part of a shareholder activism discussion panel for the Milken Institute. Ubben referenced a distinction between “white-hat” and “black-hat” activist investors. As one can imagine, the black-hat variety carries with it a negative connotation, and was characterized as “the activist investor whose first call, with an agenda, is to the media, and whose second call is to the CEO”. Indeed, investors of the black-hat variety have the “inclination and temperament” to begin campaigns without attempting to engage with the prospective company, instead, setting a public agenda with an adversarial, short-term goal in mind.\(^{19}\) In contrast, according to Ubben, the white-hat investor approaches management with a more

\(^{18}\) Cheffins, *supra* note 17 at 3-4.

cooperative mindset, initiating dialogue with management teams that ultimately want to be in business with that particular activist.  

This naturally leads us into another distinction, particularly the difference between “public” and “private” activism. Private activism, as the term suggests, is undetectable, and unobservable, often taking the form of “private negotiations with management and the board, private consultations and meetings, private phone calls and entering into dialogue with directors and management”. This method has also been called “quiet diplomacy” and is closely aligned to the “white-hat” strategies described by Ubben. In stark contrast, “public activism” includes tactics such as “press campaigns, blogging and other e-methods of public ‘naming and shaming’”. Indeed, methods of public activism are most closely associated with Jeffery Ubben’s “black-hat” strategy, and will be discussed at length in Chapter four’s section on contemporary investor strategies, namely, “online asymmetrical warfare”.

While activists are known to enter the corporate picture as naysayers of the status quo, soliciting boards to split up enterprises and overrun previous acquisition arrangements, statistics show more examples of cooperative-style activists accumulating significant stakes in a business to “publicly advocate for accelerated growth through bolt-on acquisitions, or even for business combinations with larger competitors”. This is precisely what Ubben means when he describes the “white hat” activist, and the “private” approach to shareholder engagement. Furthermore, Toronto-based proxy solicitation firm, 

Kingsdale Shareholder Services has corroborated Ubben’s normative distinction by suggesting that they have witnessed the emergence of a cooperative class of activists they have termed “constructivists”, namely those “who want to sit down with the board of directors and look at more collaborative, corporate change”. The notion of “constructive board engagement” is a theme that was also explicitly referenced in Tory’s top ten mergers and acquisitions trends of 2016, as an “increasingly important” aspect of the “changing corporate governance landscape”. This distinction not only reaffirms the notion that modern activists have been recognized to come in many shapes and sizes, with varying methods, approaches and dispositions, but more importantly, this illustrates how there are superior methods available to investors looking to unlock suppressed share value. Indeed, the constructivist methodology will be championed here as the optimal way for investors to model their behaviour within the new corporate norm. The forthcoming sections will illustrate this normative dichotomy in contemporary activist methodology, affirming the utility and efficacy of a collaborative approach.

2. Modern Activist Strategies and Short Run Success

Proponents of shareholder activism will reference the significant role activists play as the “necessary monitoring intermediary between corporate management and broader shareholders”. It is true, when approached tactfully, shareholder activism has become an efficient and impactful way for investors to proactively minimize agency costs, or in


23 Ibid.


25 Typically through the use of “constructivist” methods.
other words, ensure that the authority delegated to the board and management, as agents of the investors,\(^{26}\) is subject to the necessary constraints and incentives. The chief motivation is to reduce deviations from behaviour that maximizes the value of the corporation. The appropriate shareholder rights, remedies and channels of communication are therefore essential to corporate efficiency and share value maximization, and the following activist motivations will describe how investors will typically arrive at that end.

(a) Activist Motivations

The following motivations, often termed “the targeting process”\(^{27}\) are indicative of the “watch-dog” function typically assumed by the contemporary shareholder activist. Shareholders will typically engage management and the board for any of the following five rationales: (1) “capital underperformance”, where the target has yielded poor financial results relative to its peers (ie. a floundering share price); (2) “capital allocation” issues, where the target should “lever up” to return capital to shareholders, typically in the form of dividends or share buy-backs; (3) “corporate clarity”, where the target should divest or spin-off certain assets or divisions, focusing on core strengths; (4) “corporate control”, where the target would be best advised to put itself up for sale, seek a control-price premium or abandon a proposed acquisition; and finally, (5) “governance” issues, which may include a captive board, barriers for shareholder influence, or director compensation issues.\(^{28}\) The fastest growing governance demands are those that fall within the ambit of “corporate clarity”, with spin-offs and divestiture arrangements having increased by thirty

\(^{26}\) See Canada Business Corporations Act, RSC 1985, c C-44, ss 102 (1)  
\(^{27}\) Zenner, supra note 1 at 9.  
\(^{28}\) Ibid. at 5.
percent since 2009. That said, most activist arguments are “fundamentally driven by share price underperformance”. SharkRepellent data from 2009 to present day has shown that the average corporation subject to a publicly-disclosed activist campaign has underperformed the broader market by more than ten percent in the months leading up to the activist’s announcement. Indeed a weak share valuation is a tell-tale sign that the target is “low-hanging fruit”; however, all five motivations outlined above are indicators of “buy-low” opportunities, where a strategic realignment or a creative restructuring can generate previously-unrealized returns. In this sense, activists have often been termed the “stewards of capital”, serving as the ambassadors for wealth creation and the changes necessary to arrive at that end. However, as the previous section suggested, it is the activist’s executional approach that will typically dictate the overall success of an activist campaign, in both the short and long run.

(b) Activist Strategies and Influence

Traditionally, initiating corporate change in a publicly-traded corporation, (ie. responding to any of the five targeting criteria outlined above) would require a substantial share block to accrue an influential proportion of votes; however, modern investment practices have licensed shareholders with the ability to wield this transformative potential from an average holding of roughly six percent of the total shares of that class, according to

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29 Zenner, supra note 1 at 5.
30 Ibid. at 5-6
31 Ibid. at 2
2010 figures.\textsuperscript{32} Furthermore, recent data from SharkRepellent has suggested that nearly 60\% of activist campaigns targeting corporations with at least $25\text{ billion (U.S.) in market capitalization, were “initiated by activists who owned less than 1\% of shares outstanding at announcement”\textsuperscript{33}}. In essence, effecting corporate change has \textit{never been more accessible}; and, the diminutive size of the average activist holding is a theme that will resurface in the discussion on the structural effects of the contemporary Canadian legal regime, particularly in relation to meeting requisitions, early-warning reporting, shareholder proposals and the statutory power to remove directors, among others—all of which will be examined in detail in Chapter 5.

Shareholder activists leverage these minority holding positions by utilizing a number of impactful strategies, with the inherent intention of influencing management. These strategies range from media campaigns (public), to “investor confrontations with managers” where dissatisfaction is expressed behind closed doors (private), to more “formal interventions [designed] to change corporate strategy and performance.”\textsuperscript{34} Implicit in these strategies is the ability to coordinate with other activists, to probe management “behind-the-scenes”, and to directly participate in governing functions by way of their corporate franchise, nominating and electing directors at the Annual General Meeting (AGM). Often times, dissident shareholders will execute director “ambush” strategies at the AGM, “characterized as the appearance at a shareholders’ meeting by a dissident shareholder, whose unannounced and unexpected purpose is to replace one or more of the

\textsuperscript{33} Zenner, \textit{supra} note 1 at 5-6.
\textsuperscript{34} \textit{Unocal Corp v. Mesa Petroleum Co.}, 493 A.2d 946, 959 (Del. 1985)
corporation’s directors”. Additionally, as part of the statutory framework enshrined in the Canadian Business Corporations Act (1985), shareholder activists have the ability to submit formal written proposals to the firm’s directors, they also have the right to requisition a meeting assuming their holding meets the statutory threshold, and they can bring actions for conduct that is deemed “oppressive” or “unfairly prejudicial” to their interests.

Arguably the most drastic form of recourse that an activist investor can employ is known as a “proxy contest”; a battle for corporate control, whereby a dissident group of investors will solicit their fellow shareholders for their “proxy vote”. The term “solicitation” includes a request for a proxy, a request to execute the proxy, a communication to shareholders, and the sending of a formal proxy to shareholders. In essence, a “proxy” vote can be described as a dissident shareholder’s implied right to serve as the authorised representative of the shareholder being solicited, ultimately voting the shares on their behalf.

Despite the incredible financial expenditure, the potential for negative press, and the significant investment of time, proxy contests have historically resulted in the outright renunciation of major corporate transactions, and in the most extreme of scenarios, have prompted the replacement of entire boards. According to a 2013 Fasken Martineau study on proxy contests, there were over one hundred proxy battles in Canada between 2008 and 2013.

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36 See Canada Business Corporations Act, RSC 1985, c C-44, ss 137, 143 and 239 [CBCA].
37 See Canada Business Corporations Act, RSC 1985, c C-44, ss 147[CBCA].
38 An elaborate list of proxy solicitation rules can be found under Section 67 and 147-150 of the CBCA, as well as National Instrument 51-102.
2012, representing an 84 percent increase from the previous five-year period.\(^{39}\) Granted, Fasken’s 2015 update to this study has suggested a slowing in proxy contests, as proxy contests dipped to their lowest level since 2010; however, those figures are based off of 2014 proxy data.\(^{40}\) Canadian data collected from the 2015 proxy season, corroborates the notion that activism has become more pervasive, as the front half of 2015 saw more proxy fights than the 2014 total, while analysts maintain that this upward trajectory is bound to continue in 2016.\(^{41}\)

(c) The Board’s Response: Defense Mechanisms

It is pertinent to note that corporate managers and the board will not readily succumb to activist demands, instead typically seeking out a number of “traditional”, combative, defence mechanisms to frustrate the aforementioned activist motivations. It is pertinent to distinguish these traditional defense mechanisms from the more collaborative strategies that will be delineated later on in this paper, as there is a significant difference between the two. Historically, opponents of activism have often suggested that dissident strategies on the part of shareholders ultimately “distract management from focusing on business strategy and corporate operations”, hampering overall productivity and business efficiency.\(^{42}\)

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\(^{40}\) Ibid. at 7.

\(^{41}\) Kingsdale, supra note 7 at 5-6.

\(^{42}\) Jussa, supra note 24 at 3.
The standard mechanisms utilized by boards to thwart the standard activist executions include, (1) multi-class share structures, where founders are entitled to preferential vote-per-share ratios, (2) staggered board provisions, where board members are elected on interchanging years, (3) charter and by-law provisions and amendments, and finally (4) shareholder rights plans, or the “issuance of shares at a deep discount that causes significant economic and voting dilution”.43 Finally, and perhaps most importantly, “there is no better defense against activism than share price outperformance”.44 As suggested above, the primary activist criteria when selecting potential targets is share price underperformance, more specifically underperformance “relative to peers or the broader market”. Granted, share price performance is not an activism “vaccine”, as statistics have shown that approximately one third of firms targeted by activists had excess returns relative to the rest of the market in the year preceding the campaign announcement.45 Clearly, there is a more complex calculus than share price performance alone.

3. Limitations and Long Run Ambiguity

Admittedly, it is not within the ambit of this paper to unequivocally champion the long-term merits of investor-led activism, or more specifically, debate whether activism has an adverse impact,46 a beneficial impact,47 or zero impact,48 on the long-term

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43 Jussa, supra note 24 at 3.
44 Zenner, supra note 1 at 11.
45 Ibid. at 11-12.
prospects of a corporation. Indeed, this paper will remain impartial to these viewpoints, as there is no conclusive data suggesting that shareholder activism positively-influences shareholder value in the long-run, making it difficult to offer a normative conclusion on the efficacy of activism in general. However, this paper will take a normative stand when it distinguishes between the various methods of engagement that a shareholder can pursue whilst attempting to influence management—combative versus collaborative.

Furthermore, attempting to scientifically assess whether shareholder activism “works” is an exercise in futility for a number of reasons; first, the identification problem, as simply identifying cases of shareholder activism are often difficult and illusive; and second, the causality problem, as it’s often difficult to establish a link between an activist-lead change, and an improvement in corporate performance. That being said, there exists a vast expanse of literature specifically dedicated to the empirical effects of shareholder activism on firm value, paying specific attention to the dichotomy posed between short-term and long-term performance. While older literature may be less relevant to the today’s capital market environment, characterized by large funds accumulating sizable share blocks with the intention of lobbying management to increase shareholder value, two separate 2013 studies have offered some semblance of authority on the empirical effects of shareholder activism broadly-speaking.

48 Roberta Romano, “Less is More: Making Institutional Investor Activism A Valuable Mechanism of Corporate Governance”(2001) 18 Yale J. on Reg. 174 at 177, online: <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2974&context=fss_papers>
49 Gillan, supra note 13 at 5.
The first study to be considered here was conducted by Professors Lucien Bebchuk, Alon Brav and Wei Jiang. Briefly, and without delving too deeply into the minutia of their work, Bebchuk and team surveyed approximately 2000 activist interventions between 1994 and 2007.\textsuperscript{50} Using a sophisticated regression analysis, the academics were able to draw two conclusions; the first, that there was no evidence indicating that activism would decrease a firm’s operational performance after an activist campaign had taken place, and second, that shareholder activism actually improved operating performance, provided increased payouts and created higher CEO turnover.\textsuperscript{51} The second 2013 study, published by Professors Rose and Sharfman, provided further empirical evidence suggesting that \textit{certain} variations of shareholder activism have been found to increase firm value.\textsuperscript{52}

Importantly, statistics show that activist campaigns don’t automatically generate risk-adjusted excess returns (alpha). In other words, not all activist funds are automatically successful; however, these institutions have been found to outperform the broader market over the short term by about three percent, in the wake of an activist announcement.\textsuperscript{53} The two studies outlined above appear to provide a fairly convincing account of activism’s utility as a positive stimulus in modern capital markets; however, a more all-encompassing survey of the literature in this area, specifically including older publications, makes these assertions less convincing. With this in mind, a suitable barometer for activism’s presumed efficacy is the ten-fold growth enjoyed by the activist asset class in the US alone, from 2003

\textsuperscript{50} An intervention involving a hedge fund establishing beneficial ownership greater than 5 percent of the common shares of a company.
\textsuperscript{53} Zenner, supra note 1 at 3.
to today, as well as the global figures which reaffirm this proliferation. Indeed, the exponential increase in capital allocated to these activist funds remains uncontroversial, and should serve as a fair and suitable gauge for activism’s overall utility, even if definitive empirical or quantitative conclusions are not academically practicable. 54

3. INSTITUTIONAL INVESTMENT & INNOVATION

The enforcement of shareholder rights and remedies specifically targeted at influencing corporate management and firm performance have dramatically evolved over the last century. This evolution has coincided with the institutionalization of the actors exercising those rights, namely shareholders, and their steady climb toward sophisticated self-awareness. Examining the historical development and evolution of the activist space will uncover themes like the general awakening of shareholder rights that occurred in the United States during the World War Two era, the notable rise of institutional investment vehicles, as well as the proliferation of modernized activist objectives and innovative activist strategies, resulting in activists’ advanced level of complexity visible in today’s new corporate norm. Indeed the role played by pure-play activist funds, hedge funds and pension funds have permanently altered the bargaining-position of investors in relation to the board and senior management, significantly contributing to the proliferation of activist activity today.

54 Zenner, supra note 1 at 1-2.
1. Investors vs. The Board: A Brief History of the Agency Problem

To gain further insight into the development of the modern day activist, it is useful to examine the historical relationship between investors and directors, and how this dynamic has specifically transformed over the past century. The theoretical underpinnings of the shareholder-executive affinity stems from the perception of managers (and officers) as “self-interested” decision-makers, and investors as “apathetic” residual claimants. The 1989 work by Easterbrook and Fischel effectively frames the inherent tension between investors and managers in the modern business corporation:

“In most substantial corporations— firms with investment instruments freely traded, which we call public corporations— each investor has a small stake compared to the size of the venture. The investor is therefore ‘powerless’. The managers, on the other hand, know how the business is running and can conceal from investors information about the firm and their own activities.”

More specifically, the incongruity of interests recognized between these two factions has served as the principal point of contention in agency theory— commonly termed the ‘separation of ownership and control’. Professor Douglas Litowitz echoes the early twentieth century work of Berle and Means when he explains that the rise of “giant corporations with millions of shares and the development of secondary markets for those shares” brought about this “separation”. Shareholders theoretically “own” the firm, but are so “scattered and unorganized” that they exercise virtually no control, in the classic sense.

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55 The reader should note that shareholder activism’s early evolutionary development transpired in the United States, and is thus US-centric in its very nature. These early developments paved the way for the global reverberations that have been experienced over the last decade.


of property ownership.\textsuperscript{58} This is precisely what Easterbrook and Fischel were intimating in 1989 when they made the claim that the modern investor is “powerless”.

The tension that inherently exists between the risk-bearing function assumed by shareholders, and the decision-making function of corporate managers stems from the fact that the decision-makers who “initiate and implement important decisions are not the major residual claimants”, and they therefore do not “bear a major share of the wealth effects of their decisions”.\textsuperscript{59} Moreover, “contracts are not costlessly written and enforced, and this separation, or incongruity, of interests is what results in agency costs. “Agency costs include the costs of structuring, monitoring, and bonding a set of contracts among agents with conflicting interests.”\textsuperscript{60} Assuming that an agent seeks to maximize his or her own utility, it is expected that he or she will not always act in the best interests of the principal. This has plagued investors of modern publicly-held business corporations since their proliferation in the early 20th century, when they first began to replace the more classic forms of entrepreneurship, like sole proprietorships and partnerships. The founders of more traditional forms of commerce were never compelled to contemplate these conflicts of interest, as the decision-makers were contemporaneously the owners. Indeed, recent years have been riddled with illustrative examples of corporate scandals and executive mismanagement that lend credence to the above theory, including the likes of Enron, Worldcom, Bre-X and YBM Magnex.

\textsuperscript{58} Douglas Litowitz, “Are Corporations Evil?” (2004) 58:3 U. Miami L. Rev. 811 at 817, online: <http://repository.law.miami.edu/umlr/vol58/iss3/3> 
\textsuperscript{60} \textit{Ibid.} at 304.
2. Shareholder Evolution

Historically, there has always existed an impetus to correct the principle-agent predicament pervasive in most publicly traded business corporations; however. During the early 1900’s, American insurance companies, mutual funds and banks were entering the embryonic stage of participating in corporate life, so as to bridge the disconnect between ownership and control. Shareholders were serving on boards on rare occasions, and beginning to involve themselves in the strategic decision-making of certain firms. By today’s standards, J. P. Morgan and his associates were likely the earliest examples of modern-day shareholder activists, involving themselves with corporations, lobbying boards, and attempting to influence management. However, during this era, several laws and policies were passed with the intention of curtailing the influence of “financial intermediaries”, or large-scale investors. This had the practical effect of limiting their role in corporate participation, stifling shareholder development and the climb toward sophisticated self-awareness.

The Glass Steagall Act, an American banking statute from 1933, was instrumental in restricting investor development, as it “prohibited U.S. banks from owning equity directly”. Moreover, several of the regulatory reforms that arose in the wake of the 1929 stock market crash “limited the liquidity of, and otherwise raised the costs to investors of active participation in corporate affairs.” The totality of these developments created a distancing effect between the “owners” and the “controllers” in publicly owned companies across the United States. Investors became increasingly alienated from any corporate

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61 Gillan, supra note 13 at 5.
62 Ibid. at 1
63 Ibid. at 3
governance-type functions, while management became more entrenched, and less transparent. Throughout the 1930’s, managers created an ostensible buffer-zone between themselves and their investors, resulting in information asymmetries that made corporate oversight increasingly difficult.\textsuperscript{64} If an investor was dissatisfied with firm performance, the most straightforward and economically rational response would have been to take the “Wall Street Walk”, and divest one’s shares. Indeed, this strategy assumes that there is little value in the rights and remedies available to the typical minority shareholder, and that the cost of enforcing those rights may be insurmountable, or not rationally worthwhile for the provider of capital.

An anecdotal comment by Barry Rosenstein, the founder of prominent activist firm JANA Partners, accurately illustrates this struggle endured by organized activism in the early years. As he explains, management would exercise every option imaginable to thwart the first sign of a dissident investor; indeed, they would “put in a pill, put in a staggered board, sue us, call the SEC, call the justice department, change the by-laws, everything they could. And today, you don’t get any of that; none of it, because all they’re doing is hanging themselves, alienating the shareholder base.”\textsuperscript{65}

It was not until 1942, that this trend began to reverse, stimulated by the SEC’s introduction of a rule (the technical predecessor of Rule 14A-8 in the US) permitting shareholders “to submit proposals for inclusion on corporate ballots”.\textsuperscript{66} This juncture proved critical to the comprehensive development of activism internationally, as it exists

\textsuperscript{64} Gillan, \textit{supra} note 13 at 3.
\textsuperscript{65} Milken Institute, “Activist Investors and the Search for Alpha” Online: https://www.youtube.com/watch?v=S5j00ZS0vNY
\textsuperscript{66} Gillan, \textit{supra} note 13 at 3.
today, and sparked a shift in shareholder behaviour. From 1942 through to the 1970’s, activism was almost exclusively carried out by individual investors, in sporadic and unorganized fashion, as it was not until the 1980’s, that an institutional activist movement began to materialize, motivated by the growing importance of pension funds in the American investment space. These funds were the first agents to submit shareholder proposals, and actively pressure management “behind the scenes”, likely the earliest signs of “private” or “white hat” activism, as explained in Chapter One. The 1980’s also saw a significant spike in the frequency of hostile takeover bids, and the role of “corporate raiders”, a group that has been characterized as “the ultimate activists”, chiefly for their bullish intervention strategies, which closely resemble the “black-hat” approach described by Jeffrey Ubben. Corporate raiders essentially “used the market for corporate control to try and impose discipline on boards and management”, another significant step toward more robust, contemporary activist strategies.

Upon the arrival of the 1990’s, professional money-managers were still in the adolescent stages of realizing the magnitude their potential influence. The most “activist”-like institutional investors during this period were the public pension funds, and union funds. Both were becoming gradually more empowered by way of the regulatory changes taking place in the background, specifically those that “enhanced the ability of shareholders to communicate on voting issues.” It was during this time that institutional investors began to recognize that basic improvements to corporate governance could result in

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67 Gillan, supra note 13 at 3.
68 Milken Institute, “Activist Investors and the Search for Alpha” Online: https://www.youtube.com/watch?v=SSj0ZS0vNY
69 Gillan, supra note 13 at 4.
70 Ibid at 4.
material improvements to share value. The substantial influx in resources, know-how, voting power, and shareholder incentives, triggered the accumulation of massive equity holdings toward the end of the twentieth century, and by the turn of the millennium, the prominence of hedge funds, and private equity funds became undeniable. These funds had become “increasingly important players in financial markets, particularly in their capacity as monitors of corporate performance and agents of change.”

3. Innovative Activist Strategies

Finally, the contemporary, new-age activist funds have built upon the genesis of the historical evolution outlined in the previous section; more specifically, they have reinvented hedge funds strategies, opting for short-run game-plans, instead of assuming large, relatively long-term positions in prospective firms. Furthermore, the proliferation of savvy activist investing has given rise to more advanced methods of managerial-engagement, which have statistically increased the accessibility, frequency and success-rate of achieving shareholder objectives, yielding record levels of activist campaigning, and increased proxy contest activity.

Broadly speaking, these forms of innovation in the realm of investing are typically perceived as an intuitively good thing; however the forthcoming paragraphs will illustrate the utilization of certain innovative activist tactics that don’t always have corporate collaboration front of mind. Indeed, the strategies outlined under the umbrella of “online asymmetric warfare” are often utilized to intimidate management rather than seek out

\[^{71}\] Gillan, supra note 13 at 4.
mutually advantageous pursuits, while other strategies, such as and “wolf pack” activism, “minority short-slates”, as well as the emergence of “proxy access” stipulations will typically take a less adversarial approach.

(a) Online Asymmetric Warfare (Public Activism)

*Online asymmetric warfare* serves as a convenient catch-all phrase for instances of activism that is *publicly* executed in the digital media and online news space. This concept was briefly presented in the introductory section as “public” activism, where investors will often “verbosely articulate their campaign demands” using both social and traditional media platforms. These strategies are purposefully designed to set a public agenda, rather than collaborate or constructively engage management behind-the-scenes. Breaking the term down into its component parts, the “online” aspect is instrumental, as the proliferation of online space has introduced an entirely new mode for communication and connectivity. Investors now have the ability to connect, coordinate and voice their opinion to thousands of their online subscribers, a large portion of which are eager to retransmit the publications via common “share”, or “retweet” functions. This has provided activists with an enabling tool that has revolutionized the notions of accessibility, influence, and authority. Few could have predicted the incredible accessibility of computer-mediated applications, and the immediacy that is inherent in an individual’s ability to create, share and exchange information online. Meanwhile, the “asymmetric warfare” characterization

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72 Milken Institute, “Activist Investors and the Search for Alpha “Online: https://www.youtube.com/watch?v=S5j00Z50vNY
73 Jussa, *supra* note 24 at 25.
74 Milken Institute, “Activist Investors and the Search for Alpha “Online: https://www.youtube.com/watch?v=S5j00Z50vNY
describes a specific conflict in which the resources of the two combatants substantially differ. Such struggles often involve unconventional strategies, where the weaker of the two parties will attempt to use certain tactics to offset deficiencies in quantity or quality.  

In these instances, an activist will typically voice their repudiation of the company directly to the public at large, usually via the online social platforms described above. The primary motivation for these campaigns is the obvious propensity for the online communication to go “viral”, in-turn pressuring board’s to succumb to activist demands. During these digital campaigns, the activists wield exclusive control of the content, timing, and method of communication, often leaving the target corporation scrambling to coordinate a response and neutralize the flow of information. Again, these strategies explicitly circumvent the courtesy of closed-door meeting with the board, and are typically orchestrated by “black-hat” investors with the hope of creating a “buzz” in the financial marketplace, often driven through the volatility of public opinion.

To illustrate this tactic in practice, one need only reference the portfolio of enigmatic billionaire activist, Karl Icahn of Icahn Enterprise, who just this past May (2015), caused Apple Inc.’s market capitalization to spike by approximately $8.35 billion American dollars in a single trading day, after publishing a ‘Tweet’ that hyperlinked to a rather suggestive open letter from Mr. Icahn to Apple CEO, Tim Cook. The letter lauded the tech giant’s optimistic future in both the television and automobile industries, and went on to suggest that Apple’s stock should have been trading at $240 (U.S.), an appraisal that stood

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76 Milken Institute, “Activist Investors and the Search for Alpha” Online: https://www.youtube.com/watch?v=S5jO0ZS0vNY
84% higher than the $128.74 (U.S.) the stock opened at on that fateful day. Indeed, Icahn’s lofty appraisal saw shares shoot above $130 (U.S.) by the closing bell, allowing Apple’s seventh largest shareholder, none other than Icahn Enterprise with 52.8 million common shares, to enjoy a one day surge of $76.5 million (U.S.). Icahn’s fellow billionaire activist, and founder of Pershing Square Capital Management, Bill Ackman, employed a Canadian iteration of these same tactics in a heated public exchange with former CO Railway chairman John Cleghorn, in 2012. Within the introductory paragraph that preceded Ackman’s assault on Cleghorn and the CP board, he quite eloquently explained the way these situations typically unfold, shedding light on the roles and motives of some of the key players involved: “[...] some egos have been bruised, and the arms dealers (the media) are calling for and attempting to gin up a fight. They of course sell more papers if a fight occurs so their motives are clear. When a border skirmish takes place, sometimes it leads to full out war and other times, things die down [...].”

While these well-documented examples, executed by renowned activist-moguls, appear to be sustainable, statistics show that oversaturating the media with content can be disadvantageous to the activist. Indeed, “high news flow campaigns” have been found to underperform those campaigns defined by less media noise, as they can be perceived by other market participants as desperate or exhibitionist. While these social media strategies have the incredible potential to be positive and engaging, they seem to habitually regress into black-hat, vigilante campaigns, which do not represent an optimal way forward, or a sustainable approach for activism generally, despite their tendency

78 Jussa, supra note 24 at 25.
contribute to the overall upturn in activist activity. Moreover, the up-tick in share price valuation in response to these campaigns is generally episodic, a short-run phenomena, as opposed to a sustainable, long-run, value-creating strategy.

(b) Wolf Pack Activism

*Wolf Pack activism* is another recent investor-related phenomenon that has contributed to the frequency and efficacy of shareholder engagement in recent times. This strategy has been oft-cited in a number of recently published activism articles, including Forester Wong’s *Wolves at the Door*, which examines 1922 different activist hedge fund campaigns, and outlines evidence consistent with the wolf pack formation hypothesis published in preceding works.  

79 These strategies take place when activists congregate around a common target,80 with one actor ostensibly taking the lead, while a pack of peripheral activists “piggyback on the leader’s efforts”, providing support for the lead wolf.81 In these situations, an initial share-block acquisition made by the lead activist will spur substantial entry by those similar-minded, peripheral “wolf pack” members, a strategy that has been shown to statistically increase the probability of a successful activist

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campaign. Indeed, the presence of a wolf pack is associated with a statistically significant 6% increase in the success rate of activist campaigns.\textsuperscript{82}

Like most activist tendencies, the wolf-pack approach originated in the US, and included a number of high-profile cases where it was publicly known that activist players were conspiring. These examples include the well-documented affiliation between Starboard Value and Barrington Capital Group in the Darden case, the Jana Partners and Longview Asset Management affiliation in the PetSmart case, and finally, the Third Point Capital Management and Marcato Capital Management’s affiliation in the Sotheby’s case.\textsuperscript{83}

Moreover, wolf-pack executions are often polarizing, as they float within a regulatory grey-area, as the prospect of coordination amongst prospective investors invites the opportunity to act in breach of disclosure requirements stipulated by that specific sovereign’s securities law regime. In Canada, prospective shareholders must be wary of any meetings or cooperative communications held between themselves, particularly in lieu of the disclosure obligations that may be triggered by the application of the “joint actor” concept. As per section 91(1) of the Ontario Securities Act, shareholders are presumed to be acting jointly if they have an understanding to vote shares jointly.\textsuperscript{84}

Should shareholders, acting jointly or in concert, hold or have the power to exercise control over 10% or more of the outstanding securities of that class, they will be required to issue a press release and file an “early warning report”, disclosing their ownership of securities and their intentions. The critical aspect of the disclosure requirement would be

\textsuperscript{82}Wong, supra note 79 at 6.
\textsuperscript{83}Flaming, supra note 81.
\textsuperscript{84}See Section 91(1) of the Ontario Securities Act.
the corporation’s subsequent response to the publication of the shareholder’s dissident intentions. *Genesis Land Development Corp. v. Smoothwater Capital Corporation (2013)* provides useful guidance on when shareholders may be considered to be acting “jointly or in concert”, as Justice Barbara Romaine explained that early warning requirements apply not only in the context of takeover bids, but also in the context of proxy battles. Indeed, the overall purpose of the current reporting regime for ownership securities is to ensure the market is advised of accumulations of significant blocks of shares that may influence the control of a company. 85 Moreover, *Genesis* also determined that acting jointly or in concert is a question of fact, and furthermore, can be the result of an agreement, commitment or understanding, which need not be formal or written. 86

Again, the guiding idea around wolf-pack investing is how sophisticated and self-aware activist hedge funds have become, whilst operating within the new corporate norm. Activist campaigns are more comprehensive, organized, and coordinated than ever before, and it is precisely this attention to the finite details that yields the increased probability of success for affecting corporate change, regardless of whether activists are forced to tip toe around strict legal parameters, such as the notion of “acting jointly or in concert”.

(c) Minority Short Slates

*Minority Short Slates* are another tactic that have recently grown in popularity amongst shareholder activists, in contrast with the more traditional “control slate”

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85 *Genesis Land Development Corp. v Smoothwater Capital Corporation*, 2013 ABQB 509 at para 9. (CanLII), online: <http://canlii.ca/t/g0kgp>
arrangements. While a control slate describes a situation where the activist solicits proxies in support of nominees that, if elected, would make up a majority of the board of directors, a minority short slate, as the name would suggest, occurs when a dissident is soliciting proxies in support of nominees that would constitute a minority on the board. In these situations, the dissident is seeking a minority position on the board from the outset, with the intention of being more efficient.

There are a number of pragmatic rationales as to why an activist would choose to run a short slate as opposed to a control slate. First, it is simply easier to win a short-slate as opposed to a control slate, as you only need to establish that “two or three of your nominees are better than the existing directors, not an entire slate of incumbents”; and second, when seeking smaller representation, management will be more willing to entertain the prospect of a small expansion, or they may be more willing to identify a “few sacrificial lambs”. Indeed, this initiative is more likely to be perceived as a fair and just compromise. Finally, this strategy also represents an adaptive aspect as well; as activists take on increasingly sophisticated targets, the activists “subsequent willingness to go to a fight has diminished”, and this strategy represents an optimal and efficient course of corrective action from the activist’s perspective. Instead of exhausting infinite resources in a long and drawn out battle with the board, it’s far more practicable to take smaller, incremental steps, toward a more modest method of corporate influence.

87 Kingsdale, supra note 7 at 7.
88 Ibid. at 7.
89 Ibid. at 7.
(d) Proxy Access

*Proxy Access* is this section’s fourth and final mechanism that has improved activists’ ability to execute their dissident campaigns, specifically by providing them with the ability to “nominate their own directors and have information about them included in a company’s proxy materials”. In these situations, activist nominees would be included in the management information circular “in a manner consistent with how a company presents its own nominees”. This has the practical effect of allowing investors to avoid the cost of sending out their own proxy cards when they are dissatisfied with a corporation’s board. Currently, the proxy access protocol is very limited in Canada, but the Canadian Coalition for Good Governance (CCGG) has been instrumental in putting this mechanism on the radar, making recommendations on setting a minimum holding size that is proportionate to a target company’s market cap, a threshold that when met would allow the shareholder to “nominate the lesser of three directors and 20 percent of the total number of directors”. Analysts have noted that corporations that are slow to move on high-level governance objectives like board diversity (ie. women serving on boards), and “say-on-pay”, will be early targets to proxy access implementation.

When this chapter is considered holistically, it becomes quite apparent that the evolution of the modern activist investor has reached a level of sophistication that is unprecedented in corporate history. Whether through activists’ utilization of proxy fights (outlined above), their willingness to execute public campaigns within the digital and news

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91 Ibid. at 24.
92 Ibid. at 16.
93 Ibid. at 8.
94 Ibid. at 24.
media space, the use of wolf pack strategies, minority short slates, or proxy access—investors have undoubtedly reached a new stratum of complexity. Going forward, there needs to be continued emphasis on improving and refining these strategies, just as they were gradually optimized in the past. Online engagement, for example, holds tremendous potential as a tool for meaningful collaboration between investors and management, and does not necessarily need to be utilized as a conduit for corporate duress.

4. MACRO-ECONOMIC VOLATILITY

Again, this paper’s chief contention is to illustrate how activism’s ten-fold growth since 2003 95 can be attributed to the cumulative effect of three distinct structural factors; the following macro-economic component represents yet another vital step toward realizing this initial hypothesis. The following section will proceed to survey the effect that a weakened Canadian economy has had on the activist experience, specifically how the collapse of WTI crude oil and other commodity prices have sparked an onslaught of activist intervention in this country specifically. This section will also reference Canadian proxy contest data, reviewing recent case-studies in these specific sectors, reaffirming the heightened activist presence over the past decade, and the overwhelming demand for share price improvement in the short term.

95 Figure based on American data, but serves as a useful proxy to illustrate international growth.
1. Effects of a Forty Dollar Barrel

It should come as little surprise that no single variable has impacted the performance of the Canadian economy more markedly than the current global crude oil surplus, which has caused WTI crude oil prices to collapse from around $105 (U.S.) a barrel, to less than $40 (U.S.), in just over a year.96 The tangible result of this crash has been well-documented, with “thousands of lay-offs, deep cuts to capital spending [...] slashed dividends”, the freefall of the Canadian dollar, and of course, the obvious dissatisfaction of investors in urgent search of a contingency plan, amidst plummeting share prices.97 Bank of Canada governor Stephen Poloz issued a somber reminder when he explained that the drop in oil “has delivered a $50-billion cut to Canada’s national income”; adding that this commodity “price shock” is being felt not only in the energy sector, but “across most regions and sectors”.98 The slide in oil and other commodities has also weighed heavily on Canada’s stock market, which has plummeted twenty per cent since mid-2014. Indeed, the “S&P/TSX Index is down nearly seven per cent from where it was five years ago”.99

Fueling this pessimism, is the infamous September 2015 report from Goldman Sachs Group, Inc., which saw the investment bank cut their 2016 WTI price estimate down to $45 (U.S.) a barrel, from their May 2015 projection of $57 (U.S.). Goldman went on to warn that if the industry became lethargic in scaling back production, the “global supply surplus

97 Ibid.
99 Ibid.
could force prices as low as $20 (U.S.) a barrel”.100 Granted, a $20 barrel of WTI crude oil represents a seemingly worst-case scenario, Goldman is not alone, as the International Energy Agency has also echoed this cautionary tale, suggesting that crude oil supplies (outside OPEC) will decline to their lowest levels in over two decades,101 while the International Money Fund warned that “new oil flowing from Iran could push prices even lower”.102 In terms of quantifying the effect that a $20 (U.S.) barrel of oil might have on Canadian oil and gas producers, Jameson Berkow103, has suggested that there are “few, if any, Canadian oil and gas producers that would be able to turn a profit, or even maintain production at such a low level.” Peters & Co.’s Fall 2015 Oil and Gas Overview pointed out that, “of the oil weighted companies [...] even if we include hedging, only a few will be generating positive cash flow in 2015/2016.” This statement was predicated on an expected WTI price of $50 (U.S.), so the outlook becomes markedly more pessimistic when the predictions are based on current $40 (U.S.) environment, or Goldman’s worst-case $20 (U.S.) oil price environment, especially considering the average “break-even cost” across all of Western-Canada’s oil producers is approximately $60 (U.S.) WTI a barrel, with the exclusion of the oil sands. 104 According to Moody’s economic and consumer credit analytics, “the lowest cost producer of liquid petroleum products in North America is Canada’s own Seven Generations Energy, whose operating facility in Alberta has a break-

101 Ibid.
102 Kirby, supra note 98.
103 Economic Analyst and Western Bureau Chief for Business News Network
104 The cost of production per barrel for the oil sands-based firm is substantially more than $60 (U.S.), and their production process is far less nimble or agile, with a prospective halt bearing massive long-term sustainability ramifications.
even cost around $20 (U.S.). Should Goldman’s worst-case forecast ring true, North America’s lowest cost WTI oil producer would hardly break even.

For the purposes of this inquiry, the most relevant question stemming from Canada’s current economic struggle is: how has this bleak situation affected corporate decision-making, and shareholder behaviour, specifically in hostile situations? Upon referencing the most recent Canadian proxy contest data for the energy sector, there had already been more proxy contests in the front half of 2015 than there were in all of 2014. Not quite as desolate, the materials sector had yet to surpass its 2014 total as of last September; however, there was a strong indication that the gap would close by year end. It’s pertinent to note that these statistics only convey proxy fights that are publicly disclosed, distorting the true frequency of shareholder engagement, as many Canadian large-cap corporations are confronted by activists behind closed doors. Regardless of the true frequency, it is abundantly clear that “shareholders have begun to lose patience with management’s attempt to weather declining oil prices”.

2. The Canadian Fall-out

(a) Energy Sector

Some of last year’s most notable proxy contests specifically from the energy sector include the likes of Legacy Oil+Gas versus FrontFour Capital, Gran Tierra Energy Inc.

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105 Berkow, supra note 100.
106 As of September 2015
107 Kingsdale, supra note 7 at 6.
108 Ibid. at 6.
109 Ibid. at 6.
versus West Face Capital, Americas Petrogas versus Horizon Capital, among many others. A concise summary of the above trio will effectively distill the essence of contemporary energy sector proxy battles in Canada, illustrating the pressure that management has experienced during such challenging economic times, while conveying typical activist cadences, and utilizing various intervention strategies to affect change within their targeted corporation.

FrontFour Capital Group is a U.S.-based activist investor, who pushed for board changes at Legacy Oil+Gas, a struggling Calgary-based energy-producer, with assets in both Saskatchewan and Alberta. Indicative of the turmoil wreaking havoc in the energy sector at large, Legacy is one of many oil-producers that have “slashed capital spending and sought other ways to bolster their balance sheets”, with the possibility of selling properties to improve its finances. Indeed, Legacy’s stock was under severe pressure throughout 2015, “with skidding oil prices, high debt levels and a slowdown in asset sales”. 110 Connecticut-based FrontFour Capital Group, which controlled roughly 6.8 per cent 111 of Legacy at the time they announced their activist interest, expressed a desire to nominate three new directors, ensuring that the board “acts in a manner consistent with governance best practices and maximizes value for all shareholders.” 112 This serves as a classic example of an activist wanting to influence the strategic direction of a company by imposing its presence directly, through board representation. FrontFour was saavy in their pursuit for

111 Aligned with 6% average activist holding suggested in, Brav supra note 32 at 203.
112 Jones, supra note 110.
corporate influence by opting for the more progressive, “Minority Short Slate” approach, opting for incremental change, rather than an all-out mutiny.

The Gran Tierra – West Face scenario is a another strong example of a “white-hat” or “constructive” activist coming to a diplomatic agreement with their target company’s management, again in the interest of securing board positions, fortifying their influence over the tactical decision-making of the target company. In this example, the activists proposed a partial slate of directors to be placed on the target issuer’s board, which contemporaneously grew from six to eight total seats, with West Face (the activist in this instance) now occupying four of the eight. All indications are that West Face collaborated with management on amicable terms, as suggested by the now-former executive chair of the board, stating, “I am proud of what we have accomplished, and with Gary Guidry as CEO and a Board that benefits from both continuity as well as new perspectives, I believe Gran Tierra is well positioned for the next phase of its journey.” 113

Americas Petrogas (AP) serves as another useful case study, one where management specifically felt pressured to sell assets during a period of record-low share valuations (typical of this sector in modern times), in a desperate attempt to raise capital. Horizon Capital, a merchant bank, serving as the activist in this instance, called upon the shareholders of Petrogas to vote against a special resolution, which would have approved the sale by the parent company of all the outstanding common shares of AP at a historical low-point in the valuation of the company. The shares of AP traded as high as $4.38 (CAD)

in February of 2012, and more recently had hovered just under $1.60 (CAD) before oil prices started declining in April 2014, approximately nineteen times and seven times higher than the June 16, 2015 closing price of 0.23 (CAD). In a series of public statements, Horizon expressed their displeasure with how the proposed transaction was opportunistic, dramatically undervaluing AP, which served as the consortium’s only productive asset at that time.\textsuperscript{114} In this instance, coordinated communication amongst minority shareholders effectively realigned a disjointed management team with the sentiments of the broader investor-base, ultimately steering the company in a different direction.

(b) Material Sector

While the material sector had not eclipsed its proxy contest totals from 2014 at the mid-point of 2015 (as the energy sector did), it did in-fact boast a larger total number of proxy contest than the energy sector as of September 2015. Cases in the resource space include Stan Bharti’s Aberdeen International and its public battle with both the Texas-based activist fund Meson Capital, and the U.K.-based Nightscape Capital. Another example involved dissident shareholders of New Millennium Iron, a group that ultimately “accused the company” of “destroying value”, taking the necessary steps to replace the board of directors. In a similar situation, Fission Uranium, the largest undeveloped uranium deposit in Canada’s Athabasca region was also faced with a proxy challenge from a select group of dissident retail investors at its AGM this past December.

\textsuperscript{114} Horizon Capital Management Inc, “Horizon Capital calls upon all Americas Petrogas shareholders to vote against the proposed transaction with Tecpetrol”, Newswire (6 July 2015), online: <http://stream1.newswire.ca/media/2015/07/06/20150706_C7259_PDF_EN_436128.pdf>
Each of these scenarios provide palpable Canadian examples of an underperforming sector, and a steady loss of patience amongst the shareholder base. Kingsdale Shareholder Services vice-president of communications Ian Robertson offers some useful insight when analyzing the high frequency of proxy contests in both the energy and material sectors, by stating “when times are good, shareholders are more likely to stomach suboptimal decisions by management, since strong market returns tend to mask a lot of problems.”\(^\text{115}\)

In this sense, Robertson adds that there may be an inclination to turn a “blind eye” to corporate governance inadequacies; however, when markets take a turn for the worse, and share prices are exposed, shareholders are more likely to scrutinize how management is coping with tough financial realities to get a company back on track. Robertson adds that “part of the situation is that governance issues often become symbolic in terms of whether or not a board is on the same side as shareholders.”\(^\text{116}\)

One of the most notable material sector shareholder-situations of 2015 happened to involve Toronto-based gold mining company, Barrick Gold. This dissident situation serves as a not-so-subtle reminder that so-called “big companies” are no longer necessarily immune from shareholder activism.\(^\text{117}\) Indeed, this prominent case involved a “dispute over management compensation and accountability”, where chairman John Thornton vowed to modify the mining company's compensation plan, after 75% of shareholders voted against the pay structure. “Reportedly Barrick was under pressure by Canadian pension funds and other major investors.” Kingsdale Shareholder Services has suggested

\(^{115}\) Kevil, supra note 22. \\
\(^{116}\) Ibid. \\
\(^{117}\) The report explains that the immunity from shareholder activism historically enjoyed by larger firms is no longer accurate. The figures in the report suggest that the number of large and mega cap companies that find themselves being targeted by shareholder activists nearly tripled in 2014, in comparison to previous years; see Zenner, supra note 1 at 6.
that “shareholders have appeared to ‘reach their breaking point’ in terms of compensation-related concerns.” The report explains that “say-on-pay” initiatives are rarely one-year affairs, and are often symptoms of underlying concerns investors have over executive pay levels and shareholder returns.\(^{118}\) Indeed, compensation related issues were explicitly called out as a key activist motivation within the “targeting process”, classified under the broad category of “governance issues” outlined in the introductory section of this paper.\(^{119}\)

The primary takeaway from the examination of both these struggling Canadian industries is that contemporary investors are not in the mood to “stomach suboptimal decisions by management”. Kingsdale Shareholder Services’ vice-president of communications Ian Robertson illustrates this sentiment effectively when he states, “When times are good, shareholders are more likely to stomach suboptimal decisions by management, since strong market returns tend to mask a lot of problems. Maybe there’s a bit of a willingness to turn a blind eye to some of the corporate governance concerns”.\(^{120}\) Indeed, it is fairly clear after conducting this more inclusive analysis of the current Canadian economic environment, and specifically the effect it has had on shareholder sentiment, that the market’s downturn has exacerbated the influx in activist investment.

\(^{118}\) Kevil, supra note 22.

\(^{119}\) Zenner, supra note 1 at 9.

\(^{120}\) Kevil, supra note 22.
5. AN ATTRACTIVE LEGAL REGIME

This paper's final substantive section will examine the intricacies of the Canadian corporate and securities law landscape that have proven to be particularly accommodating to activist campaigns, allowing investors to effect tangible corporate change with relative ease, specifically in comparison to more stringent policies south of the border, and around the globe. Investors, insomuch as they are rational beings, will undoubtedly avoid jurisdictions that are unfavourable to their campaign prospects. Canada has been described as “one of the most activist-friendly jurisdictions in the world”121 because of its friendly regulatory regime, particularly when one compares it to the more stringent policies in the United States. The specific Canadian legal features known to be particularly hospitable to opportunistic shareholders include, the meeting requisition threshold, early-warning requirements (which were briefly described in section three), shareholder proposal rules, the statutory power to remove directors, take-over bid disclosure obligations, the oppression remedy, and the influence of mandatory majority voting stipulations. This section will contend that the cumulative effect of these statutes, instruments and rules, have produced an activist haven in Canada, which ultimately serves as another compelling reason for activism's overall surge throughout the last decade.

1. Meeting Requisition Threshold

The first area to be examined is the investor’s right to call a special shareholder’s meeting, a platform to put forth an agenda of proposed changes and potential adjustments. Canadian Corporate law affords shareholders the ability to requisition a meeting, separate from the Annual General Meeting (AGM), under Section 143 of the Canada Business Corporations Act (CBCA). Granted, a number of formal stipulations must be followed to execute this request, including sending the requisition to each director and the registered office of the corporation, as well as stating the specific item of business desired to be transacted at the meeting.\(^{122}\) Most importantly however, shareholders requesting the meeting are required to hold a minimum of five-percent of the issued voting shares of the Canadian public company in question. This minimum holding requirement is significant because of our procedural similarity to the United States’ 13D disclosure requirements. In contrast to the mandatory American threshold of five-percent, Canadian reporting is not triggered until the acquisition of ten-percent or more of the outstanding equity securities of any class.\(^{123}\) In Canada, as mentioned in the section on Wolf-pack strategies, once the ten-percent mark has been eclipsed, shareholders are obliged to issue a press release disclosing “identity, ownership position and investment intent”, while contemporaneously filing an “early warning report” with the Canadian securities regulators within two business days. Supplementary reporting is required each time a ten-percent shareholder increases their holding of that same class of securities by an increment of two-percent or

\(^{122}\) See Canada Business Corporations Act, RSC 1985, c C-44, ss 143 [CBCA].
\(^{123}\) Griggs, supra note 121 at 33.
more. This threshold remains significant for meeting requisitions, as activist investors have the meeting requisition tool available to them while being sheltered by an ineffectual early warning requirement threshold (10 percent).

2. Early Warning Requirements

Furthermore, the Canadian early-warning report regime is particularly significant to the overall efficacy of activist investing in Canada, especially when one considers the 2010 study by Brav, Jiang and Kim, outlined earlier, which asserts that an average activist holding hovers just above six percent. With that figure in mind, one may conclude that prospective shareholder activists are able to canvass Canadian targets, and acquire holdings nearly 4% larger than the average activist holding (according to their data), without tipping off the market, by way of a press release, or early warning report. This provides investors with a significant advantage in a number of areas, not least of which is the power to requisition a meeting under section 143 CBCA, but also allowing prospective activists to remain ostensibly undetected, until they finally initiate contact with the directorship and the corporation’s office. At this point directors have only twenty-one days to respond and “call” or schedule the meeting. Furthermore, should the directors fail to act expediently in setting a meeting date, the Court also has the power to order that a meeting be held, under Section 144 CBCA. Lastly, shareholders are also financially

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125 Brav, supra note 32 at 203.  
126 As per Paulson v. Algoma Steel, directors have latitude when setting the date for a meeting, keeping in mind the business judgment of the directors, and their willingness to act honestly, in good faith and with the corporation’s best interests in mind.
accommodated under Section 143(6) CBCA, which stipulates that the corporation will reimburse investors for expenses reasonably incurred by them in requisitioning, calling or holding the meeting. Thus, any trepidation the prospective activist may have about “out-of-pocket” expenses associated with requisitioning a meeting, is statutorily absolved.

In certain cases, the mere motion of filing a meeting requisition can exert sufficient pressure on the board to effect change, with a number of compelling Canadian examples involving the likes of Maple Leaf Foods in 2010, Viterra Inc. in 2011, Rona in 2012 and Wesdome Gold Mines Ltd. in 2013 offer support for this assertion. The 2010 situation involving Maple Leaf and activist investor West Face Capital, ignited when West Face requisitioned a meeting for shareholders to approve a number of non-binding resolutions relating to the size and composition of the board of directors. In this instance the meeting requisition served as a source of leverage for the activist, as Maple Leaf expediently negotiated a settlement agreement whereby they made a number of governance changes, and most notably added a West Face representative to their board of directors.¹²⁸

In Viterra Inc.’s 2011, the activist in this instance, Alberta Investment Management Corp (AIMCo) publicly criticized the grain company’s board of directors by way of a press release. Viterra responded by ensuring two of their board-members at the time would not stand for re-election. AIMCo was not satisfied with Viterra’s reaction, and threatened to requisition a special meeting; less than two weeks later, an AIMCo representative was

¹²⁷ See Canada Business Corporations Act, RSC 1985, c C-44, ss 143, 144 [CBCA].
appointed to the Viterra board. Furthermore, in Rona’s situation, Invesco similarly leveraged their meeting requisition into board seats in 2012 when it announced its aim of replacing Rona’s existing slate of eleven directors. Finally in 2013, Resolute Performance Fund, the holder of 19,324,000 common shares of Wesdome Gold Mines Ltd. requisitioned a meeting to remove six incumbent directors, and to replace those seats with Resolute nominees. In the following weeks, Wesdome and Resolute agreed to reconstitute the board with four Resolute nominees, including of these nominees becoming the new president and CEO. The meeting requisition tool is an observably viable instrument in the activist tool-kit, an impactful bargaining tool that is virtually risk-proof for investors, as they are statutorily protected from financial expenditure in these situations, outlined above.

3. Shareholder Proposal Rules

Another impactful shareholder tool is the “shareholder proposal”, which is essentially a resolution put forward by a shareholder, or a group of shareholders, for consideration at a shareholder’s meeting (ie. AGM or Special Meeting), ultimately designed to provide shareholders with the ability to formally voice their concerns regarding the corporation’s affairs, and to affect change within a corporation, regarding a specific issue, or set of issues. To submit a proposal under the CBCA, a shareholder must comply with the

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detailed technical requirements set out under section 137 of the statute. Under the CBCA, a registered holder of shares may "(a) submit to the corporation notice of any matter that he proposes to raise at the meeting and (b) discuss at the meeting any matter in respect of which he would have been entitled to submit a proposal." 132 These statutes require a corporation to include such proposals in any management proxy circular distributed before an annual general meeting, allowing shareholders to communicate certain matters. That being said, there are restrictions on the eligibility to submit shareholder proposals, so as to reduce the number of frivolous submissions, and to ensure those launching the proposals have a vested interest in the company. According to s. 137 (1.1) the shareholder must have held over 1% of outstanding vote shares, or shares with a fair market value of greater than $2000. Furthermore, as per the statute, the investor must have held their shares for at least six months prior to date of the proposal. The CBCA does however allow investors to pool their holdings so as to meet the minimum share value requirement. Lastly, the investor must also provide a written supporting statement, under 500 words, articulating their reasons for the proposal. Cumulatively, these requirements are hardly a collection of barriers for shareholder considering the proposal process; most notably, the CBCA’s willingness to allow investors to pool their holdings, so as to ensure that that 1% threshold requirement is fully accessible. Again, this speaks to how attractive the Canadian investment environment is for prospective activists. 133

132 See Canada Business Corporations Act, RSC 1985, c C-44, ss 137 [CBCA].
133 See Canada Business Corporations Act, RSC 1985, c C-44, ss 137 [CBCA].
4. **Statutory Power to Remove Directors**

Additionally, another powerful corporate statute unique to Canadian law is found under Section 109 of the Canada Business Corporations Act (CBCA), which provides shareholders with the authority to remove any director or directors from office, by ordinary resolution at a special meeting.\(^{134}\) The green-light permitting the removal of directors is a theme mirrored in the United States, specifically in the Delaware case of Unocal, where it is stated, “if the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out”.\(^{135}\) Despite Unocal’s explicit verbiage above, the US does not have an analogous statutory provision in the way Canada does with Section 109 CBCA.

Section 109 is unique to Canada, and licenses investors with the express authority to expel directors at a special meeting. In order to successfully execute the removal of a director, a dissident shareholder will likely need to engage the support of their fellow shareholders, while ensuring that the “election of directors” is a topic explicitly mentioned on the meeting agenda.\(^{136}\) Dissidents have a wide range of options for garnering support among shareholders; however, they will tend to rely on proxy contests as the most effective means to replace directors. Once the company has called an annual or special meeting under Section 143 (outlined above), any shareholder can solicit proxies either for or against any matter properly before the meeting. Dissident Proxy circulars are the documents that must be sent to all shareholders by any shareholder who solicits the votes of shareholders against management, subject to certain exceptions. If the proxy solicitation

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\(^{134}\) See Canada Business Corporations Act, RSC 1985, c C-44, ss 109 [CBCA].  
\(^{135}\) *Unocal Corp v. Mesa Petroleum Co.*, 493 A.2d 946, 959 (Del. 1985)  
\(^{136}\) See Canada Business Corporations Act, RSC 1985, c C-44, ss 109 [CBCA].
process is triggered, there are a number of rules to follow (outlined both in the CBCA, and in Part 9 of National Instruments 51-102), the main requirement being that proxy solicitation must be done “publicly”, via a dissident proxy circular, briefly outlined above, in section two. Again, the reoccurring theme is that the administrative steps required of the investor under S.109 are again relatively simple, making corporate change accessible.

5. Take-over Bid Disclosure Obligations

Another notable feature of Canadian corporate law, favourable to activists, is the law governing take-over bid requirements, which is structured to allow for the accrual of 19.99 percent of outstanding shares, before mandatory take-over bid proceedings are triggered. In other words, an offer to acquire voting or equity securities that equals or surpasses the twenty-percent threshold of a specific class of security must proceed by way of a formal take-over bid, barring any exceptions. This stipulation grants investors the freedom to secure a holding just shy of one-fifth the total outstanding shares of any publicly-traded Canadian company, free of any take-over bid obligation, or share-price premium.\(^{137}\) The savvy investor, assuming his or her intention was to accumulate as large a holding as possible, whilst circumventing a mandatory takeover bid, would typically hover around 9.99%, safe from any disclosure obligation (as per the early-warning stipulations above); at which point they would make an at-once purchase of an additional 10% of the outstanding shares, cumulatively owning about one fifth of the corporation's shares at the time they are formally obligated to disclose this information to the market, via the early warning

\(^{137}\) Goodmans LLP, *supra* note 124.
reporting regime.

6. The Oppression Remedy

The CBCA also provides for a very powerful statutory right to shareholders who are able prove that they have been legally “oppressed”, via an application to the Court. As per section 241(2) of the CBCA, Canadian oppression legislation will allow an action where the complainant can demonstrate that the defendants (typically the corporation, its affiliates, or directors) have acted in a manner which is: (a) oppressive, (b) unfairly prejudicial, or (c) unfairly disregards the interests of an aggrieved party (ie. security holder). On an application under 241(2), the Court is to make an order with a view to remedying, or estopping the matters complained of, and has considerable discretion with respect to the kind of orders it makes. On the surface, this notion of oppression may appear vastly broad, but the Court has effectively limited the range of the remedy through rigorous interpretation, amidst a wide expanse of case law. Furthermore, the equitable undertones in the statute illustrate the Court’s willingness to seek the most “just” result, emphasizing a notion of fairness, an observable commitment by the Court to ensuring shareholders are not being subjected to director misconduct.

In *BCE Inc. v 1976 Debentureholders* (2008) the Supreme Court of Canada set out a two-step approach to the oppression provisions in section 241 of the CBCA. The approach in BCE was then affirmed and applied in an oppression action three years later, in *Icahn Partners LP v Lions Gate Entertainment Corp.* (2011). In BCE, the Court reviewed two approaches to the interpretation of the oppression provision, the first emphasized a strict
reading of the types of conduct enumerated (such as oppression or unfair prejudice), and the second focused on the broader principles underlying and uniting the various aspects of oppression. It adopted an approach that synthesized these two methods, requiring the court to (1) look first to the principles underlying the oppression remedy, in particular the concept of the applicant’s reasonable expectations (subjective inquiry); and (2) if a breach of a reasonable expectation is established, consider whether the conduct complained of is “oppressive” or “unfairly prejudicial” (objective inquiry). Conduct that may be oppressive in one situation may not be in another.  

7. **Mandatory Majority Voting Stipulations**

One final legal development that has favoured shareholder activists, is the 2012 and 2014 amendments to the Toronto Stock Exchange rules governing director elections. Indeed, in 2012, amendments to the TSX rules stipulated that TSX-listed issuers must (1) annually elect directors, (2) elect directors individually, and (3) publicly disclose votes received for each director. Furthermore, TSX-listed issuers are also under an obligation to annually disclose whether they obliged in adopting a majority voting policy in their management information circular. If the policy was not followed, the corporation must explain its practices for electing directors and communicate why they have not adopted such a policy (comply or explain). This amendment initiated an immediate behaviour-

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adjustment, as in 2003, only 17% of the largest Canadian companies held “individual” elections, rising to 83% in 2012. 139

Furthermore, the 2014 amendments to the TSX Company Manual moved the needle further toward shareholder democracy, requiring that issuers implement a majority voting policy by June 30, 2015. The TSX’s most updated policy explains that “save for exceptional circumstances, a director must immediately tender his or her resignation if he or she is not elected by at least a majority of the votes cast”. This is a marked difference from the regime of plurality voting held previously, where a slate of directors would be elected “even if only one vote ‘for’ is cast for each director and all other votes are withheld.” 140

The amendments to the TSX rules have also been amplified by the heightened disclosure requirements under National Instrument 51-102, as well as the active role played by the CCGG in drawing increased attention to the level of shareholder support for board candidates. When one considers this multi-faceted shift toward improved shareholder democracy, in addition to the lengthy list of accommodating legal rules specific to this jurisdiction (outlined above), one can easily assert that Canada’s legal regime has contributed to the surge in contemporary activist activity.

139 Canadian Society of Corporate Secretaries Corporate Democracy Summit, keynote speech of Dan Chornous, Chair of the Board, Canadian Coalition for Good Governance, online: <http://www.ccgg.ca/site/ccgg/assets/pdf/keynote_address>
6. The Way Forward: Engagement, Reform & Constructivism

The inarguable surge of the “pure-play” activist asset class, as well as “the support of activist strategies by long-only investors”, would suggest that shareholder activism has become a permanent fixture in today’s corporate world. 141 Chernos et al. have confirmed that this is the case in Canada as well, when they state, “the spectre of mass shareholder activism has its roots in the United States, it is now clear that large, complex and carefully orchestrated shareholder lawsuits have become a permanent feature of the Canadian legal landscape.” 142 Indeed, managers, executives and boards are living in a new corporate norm in Canada, and globally as well; an environment where shareholders who are not satisfied with their firm’s transparency-level, communication-strategy, governance mandate, or overall performance, will tirelessly hold boards accountable, using a plethora of engagement strategies. That being said, the obligation is on Boards and management to adapt to this new breed of investor, developing innovative skills and strategies of their own, necessary for responding to these dissident groups, and proactively preventing these situations altogether.

The contemporary activist will often become frustrated as often corporate communication between investors and management becomes a procedural exercise of completing regulatory tasks and observing obligatory press releases. This often leaves corporations with the misleading impression that they’ve communicated with their shareholders. There is a significant difference between routine disclosure and active

141 Zenn, supra note 1 at 3.
142 Mendy Chernos et. al. “Recent Watershed Developments in Oppression Remedies and Shareholder Activism” (2005), Annual Review of Civil Litigation 33 at 33, online: <https://www.mccarthy.ca/pubs/Recent_Watershed_Developments_in_Oppression_Remedies_and_Shareholder_Activism.pdf>
engagement. An approach that is primarily designed to disseminate information on mass, without soliciting feedback, or making a meaningful attempt to foster conversations with the shareholder-base will usually be deemed inadequate in the eyes of investors. Indeed, the optimal strategy for defending against activism has changed significantly since the financial crisis, when corporations would simply duplicate the strategies employed to repel hostile takeover bids. These strategies would include a “refusal to directly engage” the activist, the implementation of a shareholder rights plan (poison pill), or “ignoring the activist altogether”. The time has certainly come to move away from these “repellent” strategies, and embrace strategies that seek to collaborate with activists in achieving mutually beneficial targets and goals.

Today, manager-investor engagement strategies are implemented by some of the largest corporations in the world, while certain Proxy advisory and solicitation firms have created an entire economy around the ability to regulate and maintain shareholder-management relationships. This conclusory section will first explore how executives and the board can better equip themselves to navigate this new norm, examining industry trends and best practices; second, it will examine instances of regulatory reform that may positively influence investor-board relations from a procedural standpoint, including the CCGG’s recommendation for universal proxies and CSA’s attempt to regulate proxy advisory firms.

143 Zenner, supra note 1 at 12.
1. Board Innovation

For the board, when navigating today's age of activism, there is no substitute for being prepared, fully-informed, and engaged, regardless of the activist’s holding size. This includes extensive knowledge of the fundamental drivers of activism, having an understanding of recent activist campaigns, objectively evaluating potential activist intentions, and facilitating elaborate investor dialogue, whilst keeping a constant pulse on shareholder sentiment. 144 Advanced preparation may provide the board with the precise tools it needs to effectively respond to an activist shareholder, and “if appropriate, resist actions that may not be in the best interest of the company”. Undertakings that a company may wish to consider in order to navigate the new corporate norm include: conducting an introspective “vulnerability assessment”, assembling an internal activist “response team”, establishing a “comprehensive communication plan”, and “fortifying bylaws to include provisions such as advance notice requirements for director nominations and other proposals”. 145

(a) Vulnerability Assessments

“Vulnerability assessments” are often conducted with the assistance of outside counsel, and include everything from a review of a company's corporate governance framework, including its “certificate of incorporation and bylaws”, to an analysis of the company’s “known ownership structure”, as well as its “investor relation program”. 146 Additionally, such an assessment will take into account share price valuation, shareholder

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144 Zenner, supra note 1 at 13.
145 Peterman, supra note 2 at 8.
146 Ibid. at 9.
sentiment at the last shareholder meeting, and any recent dealings with proxy advisory firms, in connection with the Annual General Meeting. The board should seek to understand the composition of their current shareholder base, identifying who the key players are, while always being cognizant of those investors’ expectations, objectives and timelines. Finally, boards should also have a pulse on “market and trading activity, including Schedule 13D filings (or its domestic equivalent), as well as statements from analysts, proxy advisors, large investors, the news and other online media”. The basic idea behind a vulnerability assessment is to unveil the distinct attributes or characteristics that might make a company attractive, or vulnerable, to an activist campaign.

(b) Activist Response Teams

Establishing a designated “activist response team” is an effective way of avoiding mistakes when reacting to, or when anticipating, the announcement of an activist campaign. Assembling a group that includes representatives from an investor relations department, the legal department, the executive and the board, will aid in assessing vulnerabilities, managing relationships and gathering relevant market intel. In the face of a live campaign, this team would be instrumental in negotiating and drafting press releases, while overseeing the flow of communication to the media, two critical PR functions. Part in parcel to this initiative would be for the board and their executives to establish a comprehensive “communication plan”, designed to convey a competing corporate strategy to key shareholders and members of management. The objective here is to cultivate the

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147 Peterman, supra note 2 at 9.
148 Ibid. at 9.
belief and support of shareholders in an attempt to sway them from the ideologies of the dissident contingent. Because an activist’s success will typically depend on the support of other shareholder groups, “management should consider reaching out to other large shareholders [...] offering concessions to prevent them from joining the activist”. 149 Indeed, “companies may head off activist challenges, or limit their effectiveness” by ensuring that a dialogue is kept between key shareholders and management.150 It is critical for the corporation to “convey a cogent and unified message” to their investors, even going so far as retaining an external public relations firm to assemble “persuasive rebuttals to the activist’s criticisms”.151 Another aspect of the all-encompassing communication strategy would include persuading proxy advisory firms (ISS and Glass Lewis, for example) to recommend the corporation’s position to shareholders, instead of the dissident group’s ideals. The role of advisory firms cannot be overstated, serving a critical role in liaising the investor-management relationship, while actively assisting management and the board make sense of the activist environment. 152

(c) Activist Repellent

Another strategy for the board would be to fortify the firm’s bylaws with advance-notice requirements for shareholder proposals and director nominations, as well as provisions restricting who may call a special meeting and what may be covered in those meetings, and various other stipulations meant to frustrate a prospective activist. If

149 Peterman, supra note 2 at 9.
150 Ibid. at 9.
151 Ibid. at 11.
152 Zenner, supra note 1 at 14.
executed properly this broad array of strategies has the potential of providing directors with “time and leverage” when presented with an activist campaign.\(^\text{153}\) Unfortunately, certain overly-restrictive bylaw provisions are not looked upon favourably by certain influential proxy advisory firms and corporate governance rating agencies.\(^\text{154}\) Implementing such provisions should first be carefully deliberated by counsel, giving special consideration to potential investor backlash and negative market reactions, before the by-laws are ultimately amended. Indeed, these type maneuvers, that adjust firm by-laws in an attempt to gain leverage ahead of an activist advance is not an optimal long-term strategy for boards, and should be explored as a last resort.

2. Institutional Reform

In addition to the above strategies, focused on adjusting the behaviour of the board and the executive, it is also pertinent to look at various instances of institutional reform, particularly around the “overall integrity of the proxy voting system in Canada”, including the potential changes to the proxy voting infrastructure, as well as the mandate behind the CCGG’s new “Universal Proxy Policy” introduced in 2015, which advocates the use of a mandatory standardized form in every contested director election involving a Canadian public company.

\(^\text{153}\) Peterman, supra note 2 at 9.
(a) Proxy Vote Reconciliation

Canada’s proxy voting system has been subject to widespread criticism, related specifically to the lack of transparency around the voting process, as well as the system’s known susceptibility to double-count votes. This creates the possibility of counting more votes at an AGM, or special meeting, than a corporation’s total outstanding shares; a problem that is conveniently masked by low retail shareholder vote-turnout. What adds to the problematic nature of this situation is the fact that voters are often unaware of the very realistic possibility that their votes may go uncounted, which is especially problematic “when billions of dollars are on the line in a transaction or proxy fight”.155 Indeed, the voting gap is believed to stem from the “broad range of interconnected parties” involved voting tabulation process, including voting tabulators having wrong voting entitlements, varying approaches for reconciling proxy votes from intermediaries, as well as “no formal channels of communication between meeting tabulators and intermediaries about how votes have been treated and if they have been accepted, rejected, or pro-rated.” 156

In an attempt to ameliorate this systemic breakdown, the Canadian Securities Administrators (CSA) have “launched an initiative to establish AGM vote reconciliation protocols in time for the 2016 proxy season”. 157 This initiative's top priority was to improve the overall quality of communication between all stakeholders involved in this process, and standardize the operational procedures utilized in meeting vote reconciliation, in an effort to restore investor confidence in the reliability and accuracy of the proxy voting infrastructure. In January of 2015, the CSA outlined a number of potential improvements

155 Kingsdale, supra note 7 at 19.
156 Ibid. at 19.
157 Ibid. at 19.
that would greatly contribute to the restoration of this voting process, these include:
modernizing tabulator’s information collection methods, ensuring data is complete and
accurate, determining the total number of votes an intermediary is entitled to vote,
“increasing consistency in how meeting tabulators reconcile proxy votes submitted by
intermediaries to Official Vote Entitlements”, and instituting clear communication channels
between tabulators and intermediaries, specifically in regard to whether proxies are
accepted, rejected or pro-rated.\textsuperscript{158} Indeed, it is imperative to institute the necessary
procedural enhancements to ensure the proxy voting system functions coherently,
transparently, and ultimately provides a true and accurate representation of the sentiment
of all investors holding voting shares.

(b) Universal Proxy Protocol

The Canadian Coalition for Good Governance introduced a “Universal Proxy Policy”
in September 2015, when they aptly recognized that voters who physically attended
investor meetings were far better off, democratically speaking, than those who were not in
attendance. The CCGG’s policy “recommends an amendment to Canadian corporate and
securities laws that would mandate the use of a universal proxy form in every contested
director election”. The universal proxy would enumerate the names of all director
nominees, regardless of whether they were nominated by the issuer, or by dissident
shareholders.\textsuperscript{159}

\begin{flushleft}
\textsuperscript{158} Kingsdale, \textit{supra} note 7 at 19.
\textsuperscript{159} Davies, Ward, Phillips & Vineberg LLP, “Governance Insights” (16 November 2015) at 77, online:
<https://www.dwpv.com/~/media/Files/PDF_EN/2015/2015-11-16-Davies-Gov-Insights-2015.ashx>\end{flushleft}
The CCGG recognized that currently, in contested director elections, “shareholders who attend a shareholder’s meeting in person can vote for any combination of directors” regardless of whether they were nominated by the issuer, or by dissident shareholders. In contrast, shareholders who communicate their votes by proxy (not physically in attendance) will typically receive separate proxy forms from the issuer and the dissident group, each listing their own nominees. However, shareholders are only able to submit one form of proxy; subsequently submitting a second form would revoke the first submission. In essence, those who cannot physically attend the shareholder’s meeting are “limited to voting for only one set of nominees”, compromising the authenticity of the votes exercised by proxy, as those selections are unacceptably constrained. Compounding this issue is the ever-increasing number of investors that hold shares through nominees or intermediaries, inflating the number of votes by proxy, a group deprived of the “same rights and flexibility as those attending in person”. 160

While the use of universal proxies is currently permitted under the current statutory regime in Canada, they are hardly put into practice. Commentators of the Canadian activist experience point to the widely publicized victory of Bill Ackman’s activist hedge fund, Pershing Square Capital Management, over Canadian Pacific Railway in 2012, as the first time a universal proxy was implemented successfully. Commentators suggest that management of CP presumably did so “pre-emptively so that its card would not be viewed as less flexible than Pershing Square’s”. In an effort to permanently level the playing field, thereby ensuring that shareholders who vote by proxy enjoy the same rights and freedoms as those who vote in person, the CCGG is recommending the mandatory use of a

160 Davies, Ward, Phillips & Vineberg LLP, supra note 159 at 77.
single form that lists the names of all the director-nominees on the same page. The CCGG explains in its proposal that mandating the use of universal proxies will “improve director accountability and enhance shareholder democracy by ensuring that shareholders can choose the best candidates from among those nominated.”

(c) Proxy Advisory Firm Guidelines

Another example of increased regulatory focus in the activist space is showcased through the Canadian Securities Administrators’ (CSA) attempt to “establish a list of guidelines or best practices” overseeing proxy advisory firms. In April 2014, National Policy 25-201 Guidance for Proxy Advisory Firms was released for comment, and one year later it was adopted. The CSA policy wanted to address four key areas, namely, (1) the mitigation of all actual or potential conflicts of interest, (2) increased transparency when formulating voting recommendations, (3) proxy voting guidelines and the (4) open communication of all sources and information for which the proxy recommendations are founded on.

Proxy advisory firms, like global leaders ISS and Glass Lewis, are “perceived as holding significant influence over corporate governance issues and transformative transactions, with many institutional shareholders relying on their analysis and advice”. The functions of a proxy advisory firm will typically include analyses of issues raised at shareholder meetings, as well as “making voting recommendations”, “establishing voting

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161 Davies, Ward, Phillips & Vineberg LLP, supra note 159 at 77-78.
guidelines for issuers”, and “providing consulting services to issuers”.\textsuperscript{162} Proxy advisory firms are also known to provide seamless voting systems that vote shares according to their specific recommendations, generally executed by way of an electronic or web-based platform. Indeed, these firms provide a variety of services to shareholders (usually institutional shareholders), often making determinative recommendations that can often have fundamental consequences in close shareholder votes, effecting issues like executive compensation, electing directors, adopting or amending corporate by-laws, or any important corporate transactions.\textsuperscript{163}

With the popularization of activist investing, and the growing importance of proxy advisory firms, various concerns have been expressed, specifically relating to their “internal practices and methodologies”, “conflicting mandates” with issuers and investors, and “a lack of transparency into how they formulate their recommendations”. With these concerns in mind, the CSA introduced their proposed guidelines in 2014, emphasizing the importance of corporate social responsibility, transparency and clarity. Granted there is still a contingent of critics who believe that the CSA’s policy is not strict enough, National Policy 25-201 did successfully mandate stringent disclosure requirements on proxy advisor web domains, strict proxy voting guidelines and the mandatory inclusion of voting recommendation information.\textsuperscript{164}

\textsuperscript{162} Davies, Ward, Phillips & Vineberg LLP, supra note 159 at 79.
\textsuperscript{163} Davies, Ward, Phillips & Vineberg LLP, supra note 159 at 79.
\textsuperscript{164} Ibid. at 79.
3. Conclusion: Constructive Activism & Navigating the New Corporate Norm

Shareholder activism has been essential in ultimately correcting the modern investor’s bargaining position in relation to the board and management, ultimately minimizing information asymmetries and rectifying collective action problems, by leveraging innovative engagement strategies and transforming those strategies into impactful corporate control mechanisms. Indeed, Canadians live in a new corporate norm, defined by economic volatility, competitiveness, and uncertainty. Times have changed dramatically from the late-80’s, when Easterbrook and Fischel ordained that investors were rendered “powerless” in relation to the managers of the modern business corporation.165 With activists holding over $249.8 billion (USD) in shares,166 there is no denying that shareholder activism is here to stay, having permanently evolved into a “dynamic institutional force”.167

Granted, as this paper has repeatedly suggested, not all varieties of activist engagement can be deemed equal, or beneficial for that matter, and this undertaking has anointed the “constructivist” approach as the optimal way forward for investors. Again, as was illustrated in section two, constructive activism encompasses a series of engagement techniques designed to empower the investor, whilst ensuring that the integrity of the board, and the long-term prospects of the corporation, are acknowledged, and respected. Moreover, constructivist strategies avoid the temptation of initiating public engagement strategies, and online asymmetric warfare.168 Rather, these activists “want to sit down with

165 Easterbrook, supra note 56 at 1416.
166 Black, supra note 4 at 22.
167 Goranova, supra note 4 at 1230.
168 This would include making a call to the press, before making a call to management.
the board of directors and look at more collaborative, corporate change”. There is a clear imperative to cooperate, and more specifically, to work toward the common goal of share value maximization, not only over short-term horizons, but long-term as well. This specific activist methodology would be especially compatible with more progressive boards that have instituted shareholder outreach programs and activist response teams, outlined earlier in this section.

Finally, a more inclusive academic perspective would suggest that constructive shareholder activism simply represents the next stage of the shareholder evolution that was conveyed in section two of this paper. More specifically, it can be perceived as a marked improvement from where investors have historically lived, a heightened level of investor functioning that has manifested from the uniqueness of the new corporate norm, and structural forces that have accelerated the proliferation of activism altogether. This growth is now directed toward refining the way investors influence the companies they provide capital to. A corollary of this evolution is the importance of ensuring that companies, and specifically management, are subscribing to robust and well-structured shareholder outreach programs in a way that fosters and facilitates sustainable relationship building with their shareholders.

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169 Kevil, supra note 22.
Works Cited


Canada Business Corporations Act, RSC 1985, c C-44, ss 109 [CBCA].

Canada Business Corporations Act, RSC 1985, c C-44, ss 137 [CBCA].

Canada Business Corporations Act, RSC 1985, c C-44, ss 143 [CBCA].
Canada Business Corporations Act, RSC 1985, c C-44, ss 144 [CBCA].

Canada Business Corporations Act, RSC 1985, c C-44, ss 147 [CBCA].

Canada Business Corporations Act, RSC 1985, c C-44, ss 239 [CBCA].

Canadian Society of Corporate Secretaries Corporate Democracy Summit, keynote speech of Dan Chornous, Chair of the Board, Canadian Coalition for Good Governance, online: http://www.ccgg.ca/site/ccgg/assets/pdf/keynote_address


Chernos, Mendy et. al. “Recent Watershed Developments in Oppression Remedies and Shareholder Activism” (2005), Annual Review of Civil Litigation 33, online: <https://www.mccarthy.ca/pubs/Recent_Watershed_Developments_in_Oppression_Remedies_and_Shareholder_Activism.pdf>


Genesis Land Development Corp. v Smoothwater Capital Corporation, 2013 ABQB 509. (CanLII), online: http://canlii.ca/t/g0kgp


Horizon Capital Management Inc, “Horizon Capital calls upon all Americas Petrogas shareholders to vote against the proposed transaction with Tecpetrol”, Newswire (6 July 2015), online: http://stream1.newswire.ca/media/2015/07/06/20150706_C7259_PDF_EN_436128.pdf


Romano, Roberta “Less is More: Making Institutional Investor Activism A Valuable Mechanism of Corporate Governance”(2001) 18 Yale J. on Reg. 174, online: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2974&context=fss_paper


Strauss, Marina, “War of words: The e-mails that touched off a battle at CP” The Globe and Mail (6 September 2016), online: <http://www.theglobeandmail.com/globe-

*Unocal Corp v. Mesa Petroleum Co.*, 493 A.2d 946, 959 (Del. 1985)

Van der Elst, Christoph, “The Corporate Response to Shareholder Activism” (2014), 11:2 ERA Forum 229 online: <http://link.springer.com/article/10.1007%2Fs12027-014-0345-0>


