



2021 Proxy Season Review

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2021 Proxy Season Timeframe

July 1, 2020 – June 30, 2021

Sources for the list of shareholder activism include Bloomberg, Activist Insight and Kingsdale Advisors. Fight information retrieved from securities filings, company and activist press releases, court filings and news articles. Institutional Shareholder Services and Glass Lewis recommendations compiled from ISS Consulting Services and Proxy Insight. All currency in CAD unless otherwise noted. Some percentage charts may not sum to 100% due to rounding. Data current as of October 13, 2021.

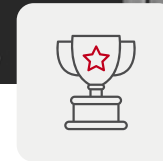


What Counts as a Proxy Contest?

We consider the fight to be on if a shareholder publicly targets a company by:

- Making its activist intent known through a news story, a press release, a 13D or early warning report;
- Requisitioning a shareholder meeting;
- Announcing an intention to nominate alternate directors;
- Soliciting alternative proxies;
- Conducting a “vote no” campaign on either the election of directors or M&A transactions; or
- Announcing an intention to launch a hostile bid.

This is regardless of whether a vote or the hostile bid takes place.



What Counts as a Win?

For Activists: Achieving all or most of their objectives or successfully blocking a transaction. If an activist receives any of its asks, it's considered a partial win.

For Management: An activist receives nothing.

Hostile Bids: If the target's board successfully fends off the bid or increases the value of the offer and reaches a friendly deal, we consider that a win for management (and shareholders).

Friendly Transactions: An activist wins if they successfully block the transaction.

Introduction

The opportunist activist has always lurked in the shadows waiting to strike. And while many allowed companies to focus on navigating uncharted territories last year, 2021 was the start of a new game.

A post-COVID landscape where some companies may have been weakened is a near-ideal scenario. Tempting targets, shareholder unrest due to low valuations and devastated sectors created a climate that had many activists believing that companies would rather settle than fight. Some activists may have used 2020 to build positions at long-term low prices that can now serve as a foundation for a campaign for change.

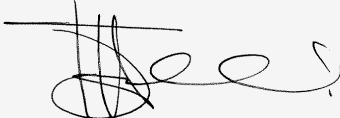
In 2021, Canadian issuers were subject to the most proxy contests (47) since 2013, and activists sought to make big changes in the boardroom, looking to replace all or the majority of the board 86% of the time – the highest rate over the past five proxy seasons. The majority of attacks were targeted at micro-cap companies where it's generally easier to overhaul an entire board and make significant changes.

We've long said there's no such thing as a friendly deal. In 2021, Canada saw more cases of transaction-related activism (18) than it has in the past five years. Activists were also more successful at thwarting M&A transactions they opposed – winning nearly five times more than they did in 2020 – as they scrutinized deals seen as opportunistic amid the pandemic. Even deals that seemed guaranteed faced opposition and, in several cases, prompted bidders to sweeten their deals for the benefit of all target shareholders. Activism can be a low-cost or free option to get a much higher price, and with the rapid adoption of virtual communication technologies, activists can conduct a coast-to-coast sentiment check in a matter of hours not days.

All of this means that director–shareholder engagement remains critical.

Companies are accountable to their owners, and it's imperative they understand your strategy. Proactive and consistent engagement will help companies address potential issues, deter activism and demonstrate board capability while instilling market confidence.

Wes Hall
Executive Chairman & Founder

A handwritten signature in black ink, appearing to read 'Wes Hall', with a stylized flourish at the end.

Ian Robertson
President, Canada

A handwritten signature in black ink, appearing to read 'Ian Robertson', with a stylized flourish at the end.

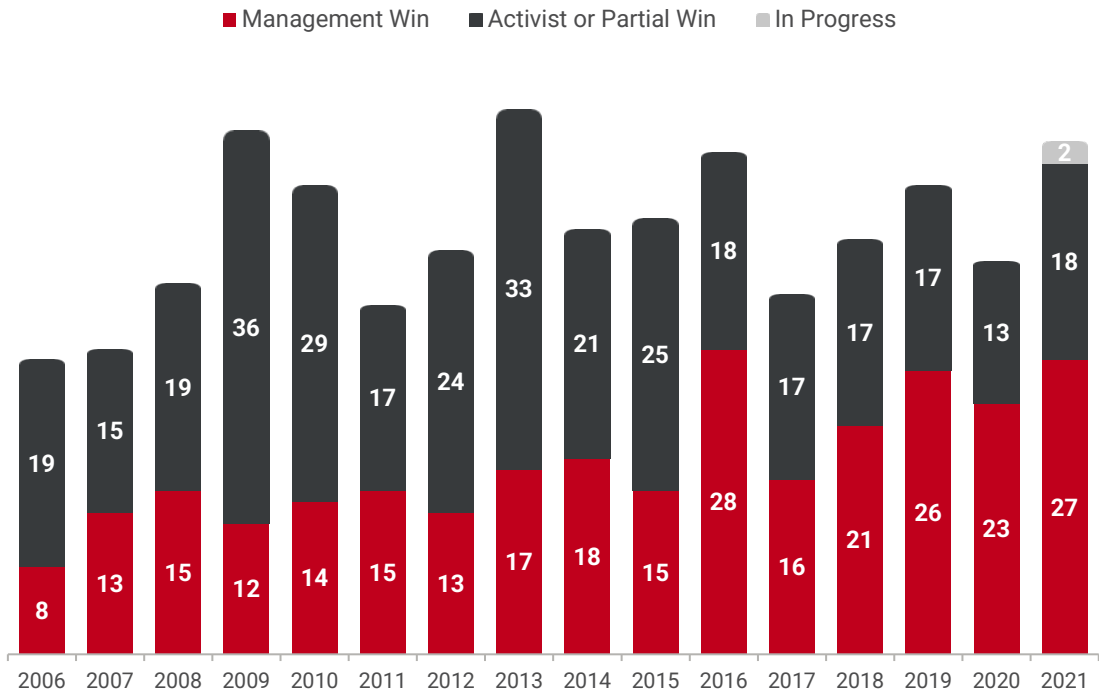
Michael Fein
President, U.S.

A handwritten signature in black ink, appearing to read 'Michael Fein', with a stylized flourish at the end.

Proxy Contest Overview – Canada (2006 – 2021)



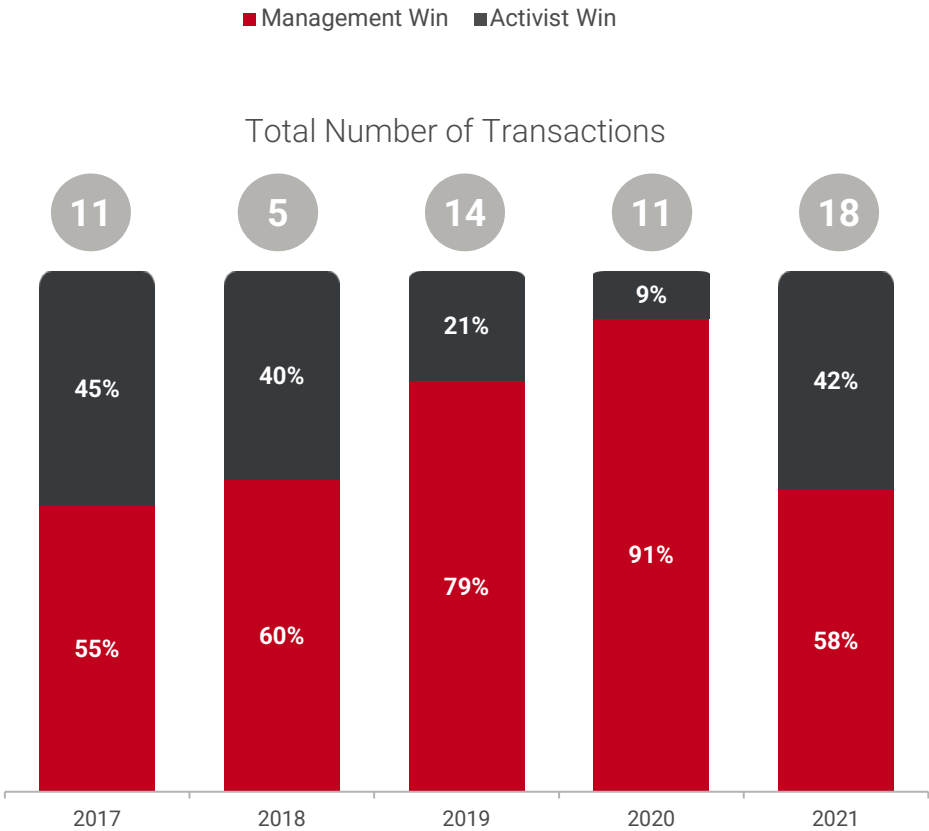
Proxy Contests in Canada (2006 – 2021)



In 2021, Canadian targets were subject to the most proxy contests (47) since 2013 when 50 fights were initiated, as shareholder activism and contested M&A rebounded after the pandemic slowdown.

After a decade of dominance by activists, the last four proxy seasons have seen management boast a greater percentage of wins. Management has levelled the playing field by learning from the experience of others and by being better prepared. Management now select a fight team before engaging with an activist and proactively deploy defensive tactics, such as an advance notice by-law and a shareholder rights plan.

Contested Transaction-Based Win Rates (2017 – 2021)



Activists were more successful this past year at thwarting M&A transactions they opposed, gaining ground after a dominant year for management in 2020. Activist opposition also prompted bidders to sweeten their deal terms in a handful of contested transactions in 2021 for the benefit of all target shareholders.

Proxy Fights by Geography

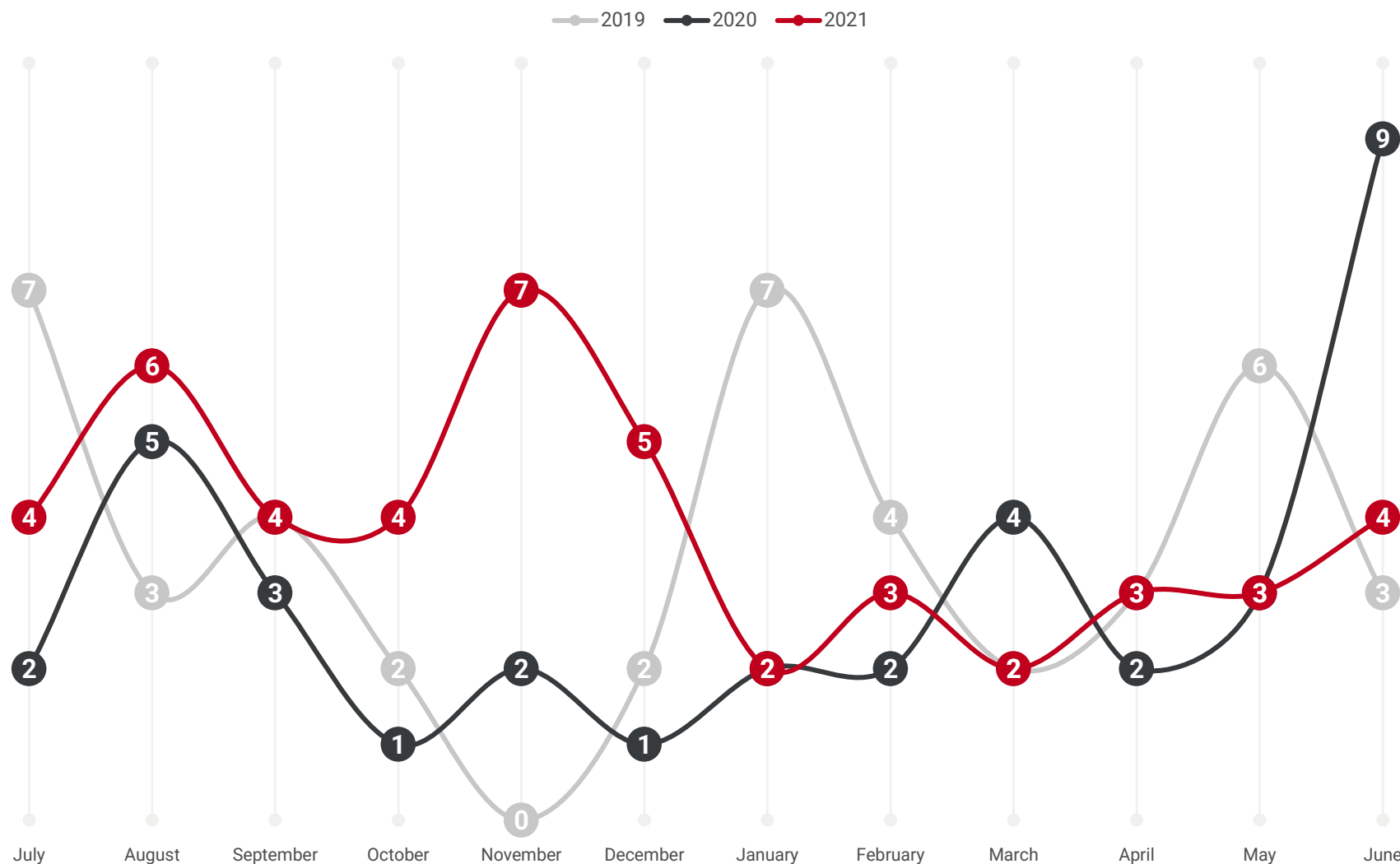


Market Cap Definitions – Canada

Micro: \$0 – \$200M, Small: \$200 – \$1,000M, Mid: \$1,000 – \$10,000M, Large: \$10,000M – No Cap

Based on Canadian corporate headquarters of target company. International companies' stocks are listed in Canada. Market caps as of date when proxy contest was initiated by the activist. Market cap source: Bloomberg
 "Other" campaigns are: 1) Aberdeen: opposition to the company's re-domiciliation plans from the Cook Islands to Singapore; and 2) Melcor: calling on controlling shareholder to acquire the rest of the company

Activism: A Year-Round Event



Companies should be always on guard. Activism is a year-round event.

A proxy fight has been initiated against at least one Canadian company in 35 of the last 36 months. From the 2014 proxy season to June 30, 2021, there have only been three months that did not see a new case of shareholder activism. The busiest and lightest months vary in each of the last three years, illustrating how difficult it is to predict overall activity levels or when a company could be targeted.

This is often because the AGM season gives way to the requisition season. Typically, activists will not requisition a meeting until enough time has passed after a company's AGM. After receiving a meeting requisition, companies have 21 days to respond and can delay a meeting for a prolonged period, sometimes as long as four to five months.

Activists have also realized that institutional shareholders prefer to see a long track record of attempts to work constructively with a company before mounting a proxy campaign and that shareholders can be leveraged to help negotiate or pressure for settlements on behalf of all shareholders.

Virtual Meetings & Activism

While the 2021 proxy season marked the second year that companies hosted their AGMs in primarily virtual formats, it was the first year where we saw a contested virtual meeting in Canada.

Prior to their AGM in December 2020, Rifco Inc. signed a meeting protocol with the activists, establishing procedures such as virtual balloting. At the virtual meeting, shareholders were presented with a combined ballot that allowed them to vote for any mix of management and activist nominees; a change from the single-slate, competing proxy cards that were mailed ahead of time.

The lack of contested virtual meetings in Canada shows the reluctance of transfer agents to scrutineer such meetings. While Rifco's case proves it can be done, clear protocols – most notably on balloting and fielding shareholder questions, as well as indemnification of the transfer agent – will need to be established.

Given these complexities, combined with the fact that Institutional Shareholder Services (ISS) and Glass Lewis (GL) have voiced concerns with virtual-only meetings in a post-COVID world (contested or not), we expect most companies to host contested meetings physically, where possible.

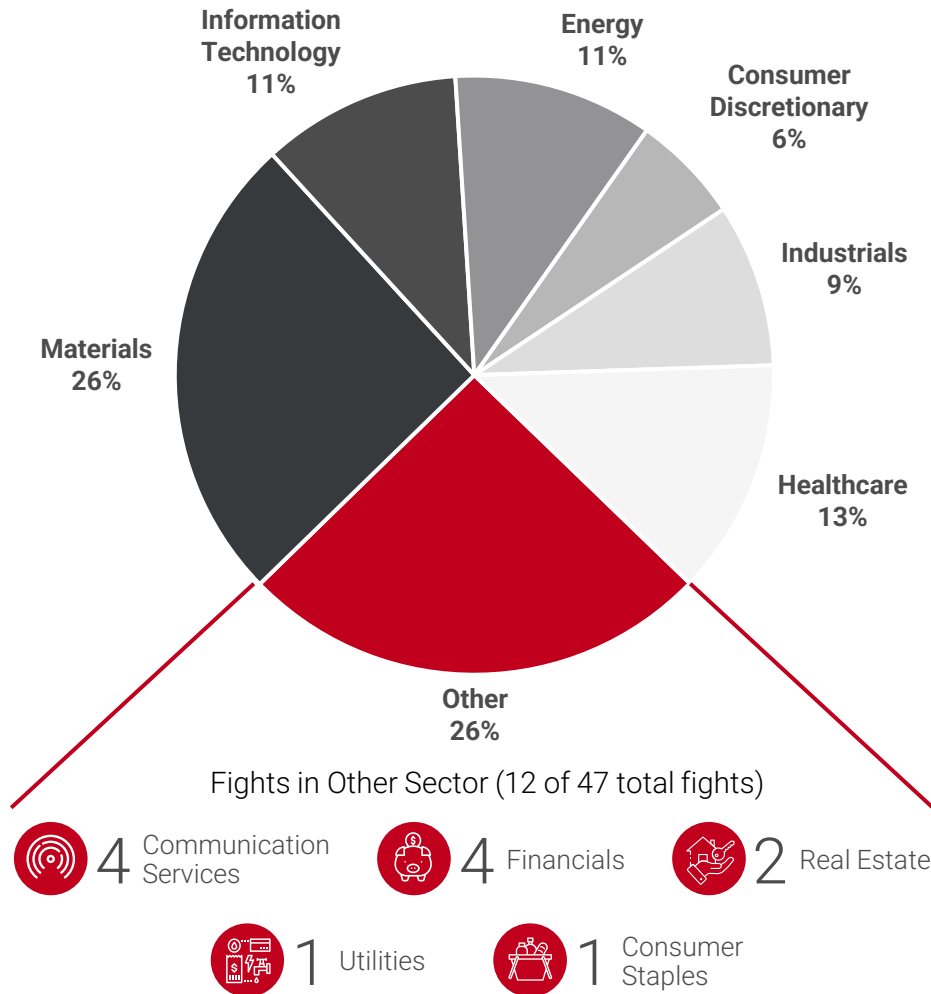
Companies, however, should not find comfort in the ongoing limitations to in-person events. Activists will be activists and if there's a virtual will, there's a virtual way.



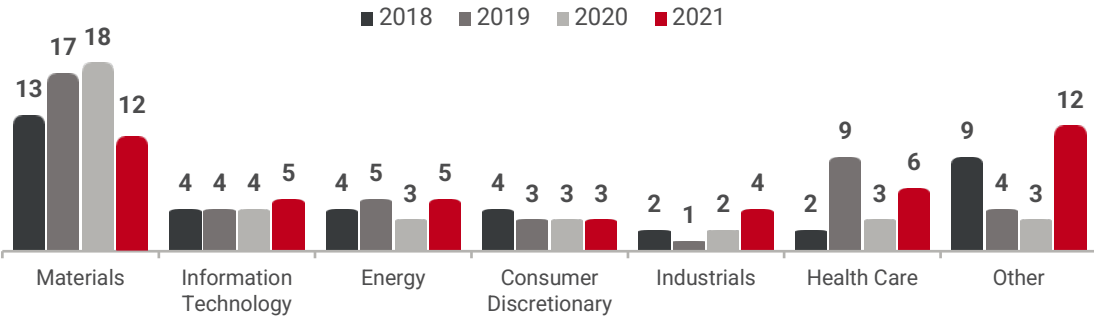
Most Active Sectors



Breakdown of Most Active Sectors in 2021

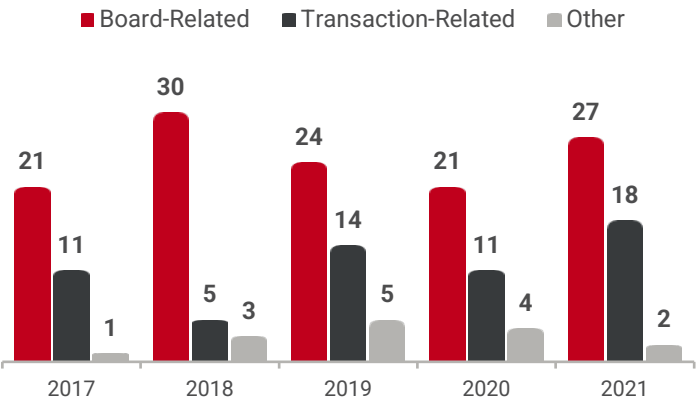


Number of Proxy Fights by Sector (2018 – 2021)



Once again, Materials is the most active individual sector in Canada, reflecting the large number of resource companies listed on the TSX. The 2021 proxy season saw a YoY decline in the number of targets in the Materials sector and a corresponding increase in the Other category.

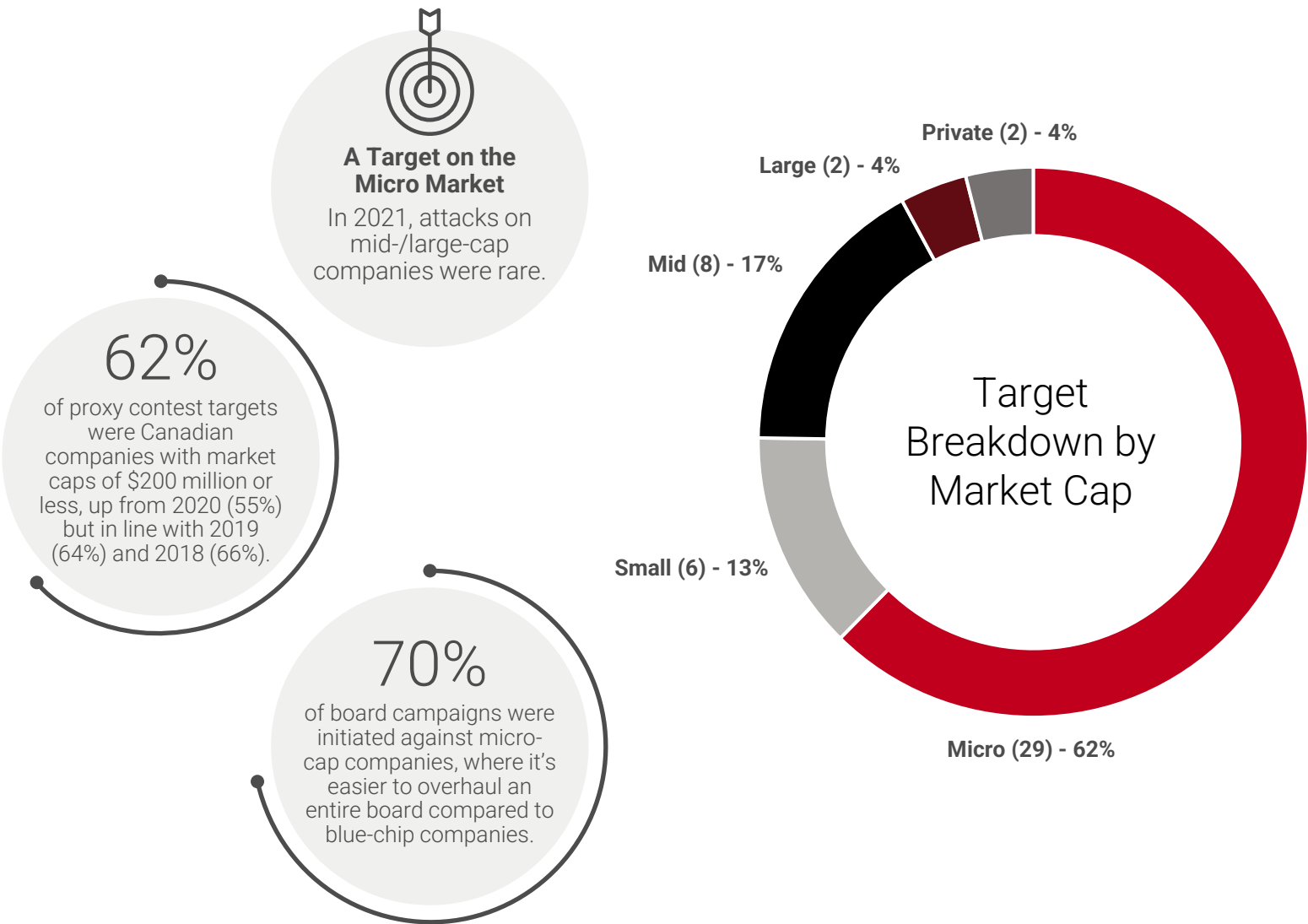
Board- vs. Transaction-Related Proxy Contests



Gone are the Days of the Friendly Deal

While the battle for board seats remains the most common form of activism, Canada saw more cases of transaction-related activism in 2021 than it has in the past five years.

Proxy Contests by Market Cap



Market Cap	Count
Board Campaign	
Micro	19
Small	3
Mid	3
Large	1
Private	1
Total	27
Transaction Campaign	
Micro	6
Small	2
Mid	3
Large	1
Private	0
Total	12
Takeover/Hostile Bid	
Micro	2
Small	1
Mid	2
Large	0
Private	1
Total	6
Others	
Micro	2
Small	0
Mid	0
Large	0
Private	0
Total	2

Market Cap Definitions – Canada
Micro: \$0 – \$200M, Small: \$200 – \$1,000M, Mid: \$1,000 – \$10,000M, Large: \$10,000M – No Cap

Why are Micro- and Small-Caps such Big Targets?



1. Few investors at these companies subscribe to ISS and GL research. Activists who ask for whole or majority slates know they won't have the burden of developing a compelling business plan the proxy advisors seek.

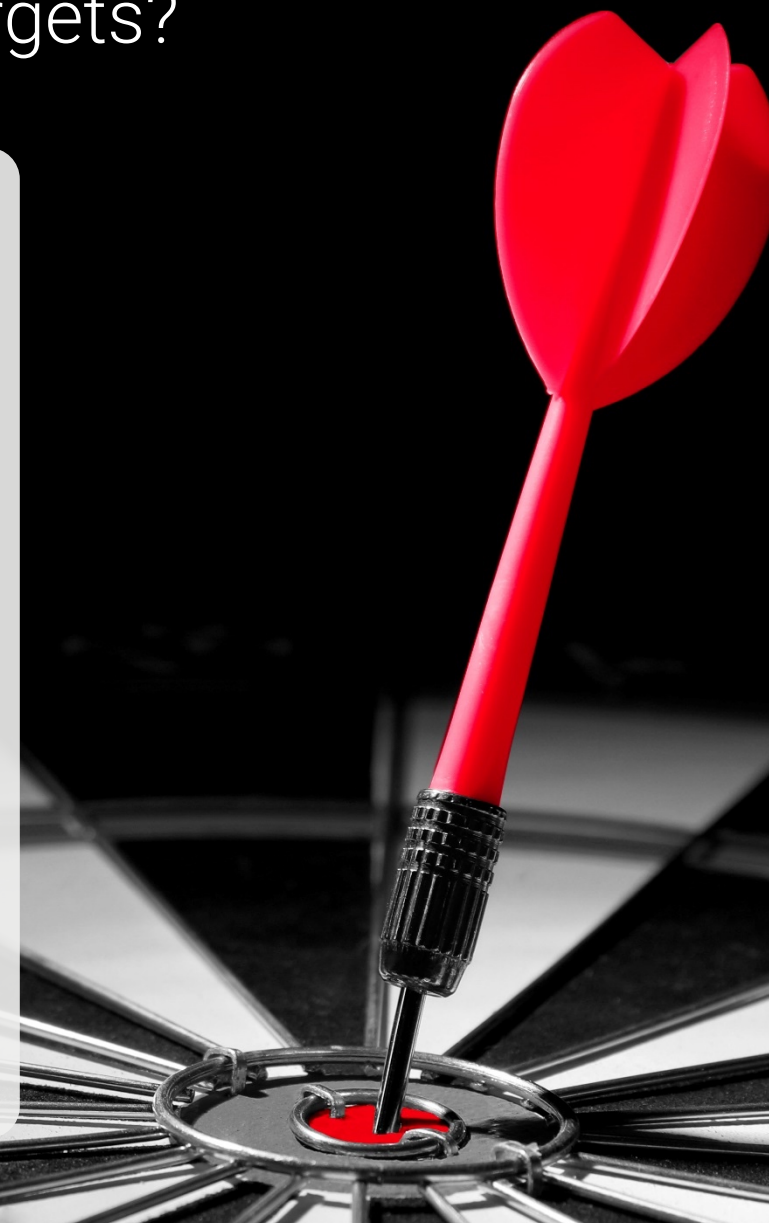
2. A lack of resources for shareholder engagement combined with a poorly communicated (or non-existent) strategy allows an activist to craft the perception that the company is and will remain troubled until external action is taken.

3. The threshold for shareholders to requisition a meeting in most Canadian jurisdictions is 5% of a company's I/O shares. It's easier for an activist to gain that shareholding in a small-cap vs. a company with a billion-dollar market cap.

4. Large companies often keep "defensive playbooks" for activist situations. Many small companies may simply ignore an activist, hoping they go away. Alternatively, they frequently rely on their year-round advisors who may have limited proxy contest experience.

5. Smaller companies often have interlocking relationships in executive and director roles, raising questions about their governance practices and independence issues. These flaws are further highlighted when a company has a track record of poor shareholder returns.

6. Seasoned activists also know that, unlike them, smaller companies are unlikely to have an A-list defence team on standby, increasing the chances for early – perhaps even irreversible – mistakes by the company.



The Attack is Coming from Inside

Micro- and small-cap companies may be surprised to learn who the activists are. This proxy season, we saw four contests involving founders. Here are three of note:

Market Cap:
\$19M

Fancamp Exploration Ltd. vs. Peter H. Smith

After being asked to step down as CEO in August 2020, Fancamp's founder and incumbent director, Peter H. Smith, launched a proxy contest to overhaul the existing board and to stop the company's acquisition of ScoZinc Mining Ltd. In mid-September, the company struck a settlement with certain shareholders who broke ranks with the lead activist. Two members from the activist slate were appointed to Fancamp's board. While the ScoZinc transaction was terminated in favour of a private placement, the incumbent board ultimately kept control of the company.

Market Cap:
\$40M

Mason Graphite Inc. vs. Concerned Shareholder

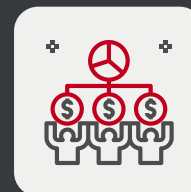
The activist's director nominees consisted of Mason Graphite's co-founder and former head of corporate development, as well as its former chair and two incumbent directors (including the activist). It was a comprehensive win for the activist, who defeated the management slate at the company's December 2020 AGM.

Market Cap:
\$42M

FSD Pharma Inc. vs. Concerned Shareholders

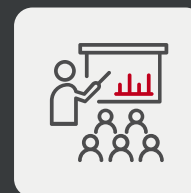
Several shareholders, including two of FSD Pharma's founders and incumbent directors, pushed for a board overhaul. After a bitter feud, which saw the company's CFO terminated for allegedly helping the activists, the concerned shareholders swept up all board seats at the AGM.

Micro- and Small-Cap Strategies



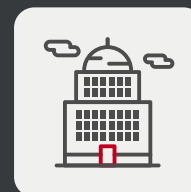
Pay Attention to Your Shareholders

It's relatively cost-effective to conduct a shareholder ID and analysis to determine the company's shareholder base. Small companies can then start by engaging with the top five shareholders who are unknown to management.



Don't Ignore AGMs

One of the first things activists will look at is the previous year's turnout. A low turnout means an activist's position will have a disproportionate impact. Shareholder engagement helps drive healthy voter turnout.



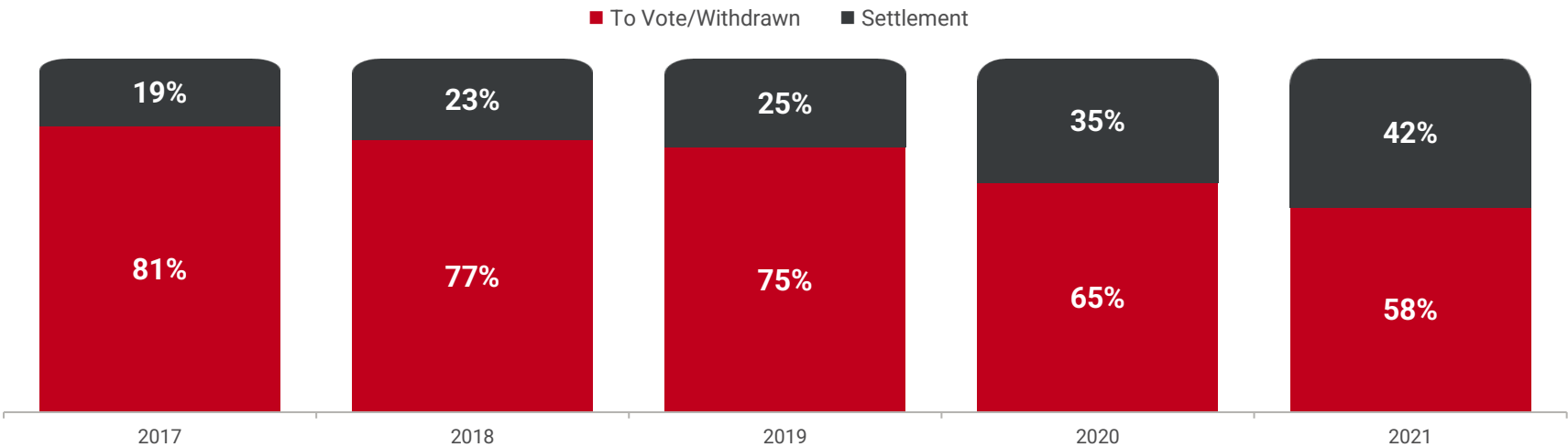
Go for Governance Gold

Governance can't be treated as administrative, nor can it be put to the side, as under-resourced leadership teams focus only on the numbers. A friend-and-family filled board will be low-hanging fruit for an activist. Always have an evergreen list of prospective directors in case rapid refreshment is needed.

Settlements vs. Votes



Portion of Contests that Led to Settlement vs. Vote/Withdrawn



Settlements have steadily risen over the past five years. Fights can be a costly distraction for management, and as companies continue to grapple with the impacts of COVID-19, the best solution may be to partially give into the activist through a negotiated settlement.

Board Seats Gained – Five-Year Average (2017 – 2021)

Settlement



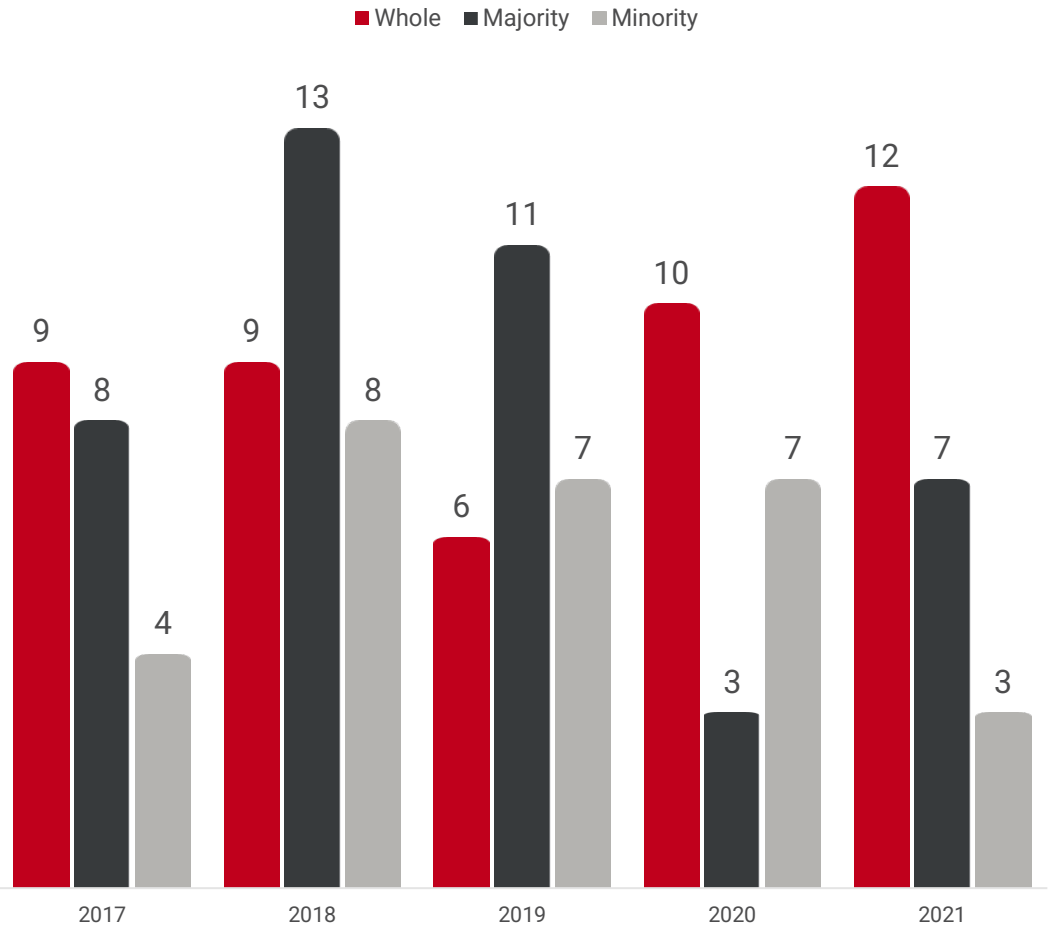
Vote or Withdrawn



Activist Slate Type

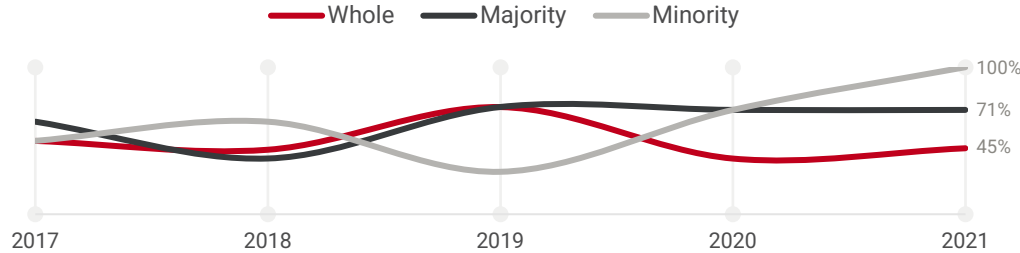


Activist Slate Type (2017 – 2021)



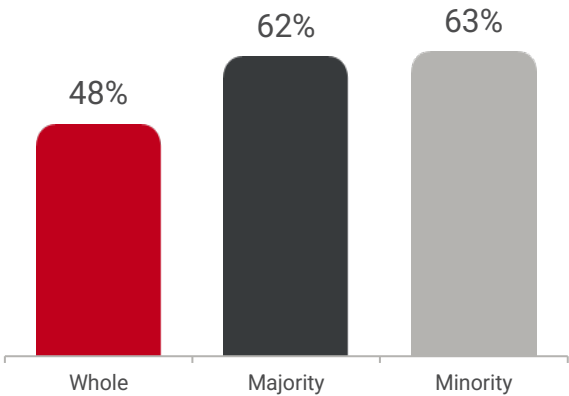
Activists sought to make big changes in the boardrooms. In 2021, activists looked to replace all or majority of the board 86% of the time, the highest rate over the past five proxy seasons.

Relationship Between Activist Slate Type and Activist Win Rate



The three activists who vied for minority slates were victorious in 2021, beating targets Bausch Health Companies Inc., AEX Gold Inc. and Ovintiv Inc. Activists who sought to replace entire boards faced the biggest challenge of the three slate types. Nevertheless, they were successful nearly half the time last year, meaning once the fight is on, activists prove to be formidable opponents for management.

Win Rate vs. Slate Type (2017 – 2021)



Once an activist sets their sights on reshuffling a board of a target company, their chances of winning are almost as good as a coin toss. From 2017 to 2021, activists were successful at replacing entire boards 48% of the time.

Whose Side are They On?

Institutional Shareholders



TOP 100 GLOBAL INVESTMENT MANAGERS' VOTING RECORDS (2021 Proxy Season)

Investment Managers	Total Meetings	Meetings Voted with Management	Meetings Voted with Activist	Meetings Voted All Activist	% Voted with Management	% Voted with Activist	% Voted All Activist
Top 10	150	109	41	21	72.67%	27.33%	14.01%
Top 25	321	227	94	50	70.72%	29.28%	15.58%
Top 50	475	327	148	76	68.84%	31.16%	16.01%
Top 100	611	402	209	104	65.79%	34.21%	17.02%
All Managers	744	480	264	118	64.52%	35.48%	15.86%

TOP 100 GLOBAL INVESTMENT MANAGERS' VOTING RECORDS (2013 – 2021)

Investment Managers	Total Meetings	Meetings Voted with Management	Meetings Voted with Activist	Meetings Voted All Activist	% Voted with Management	% Voted with Activist	% Voted All Activist
Top 10	1,862	1,146	716	315	61.55%	38.45%	16.92%
Top 25	3,978	2,423	1,555	657	60.91%	39.09%	16.52%
Top 50	6,592	3,784	2,808	1,175	57.40%	42.60%	17.83%
Top 100	10,071	5,762	4,309	1,822	57.21%	42.79%	18.10%
All Managers	20,229	11,807	8,422	3,790	58.37%	41.63%	18.74%

In the last year alone, global investment managers supported activists, at least partially, **35%** of the time in contested situations, whereas it was **almost 42%** over the last eight years.

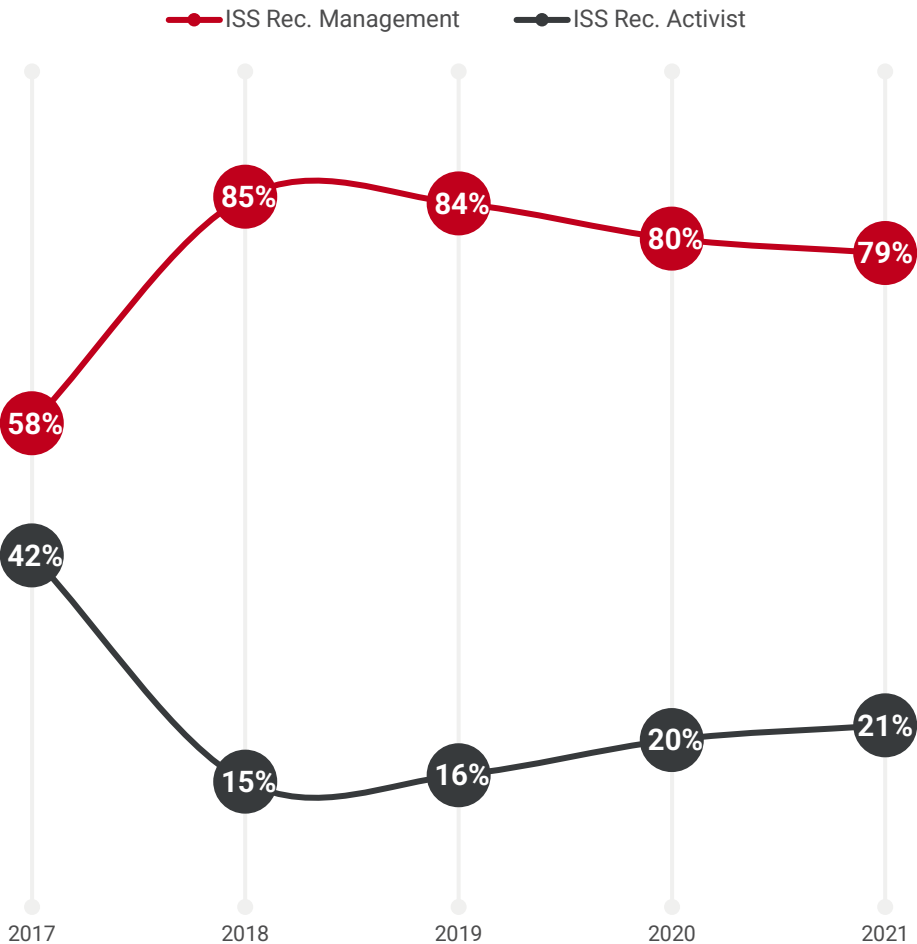


While those who support activists are still in the minority (for now), companies cannot assume their institutional investors will give leadership the benefit of the doubt and side with management, especially when an activist delivers a compelling case for change.

Proxy Advisors – Whose Side are They on?



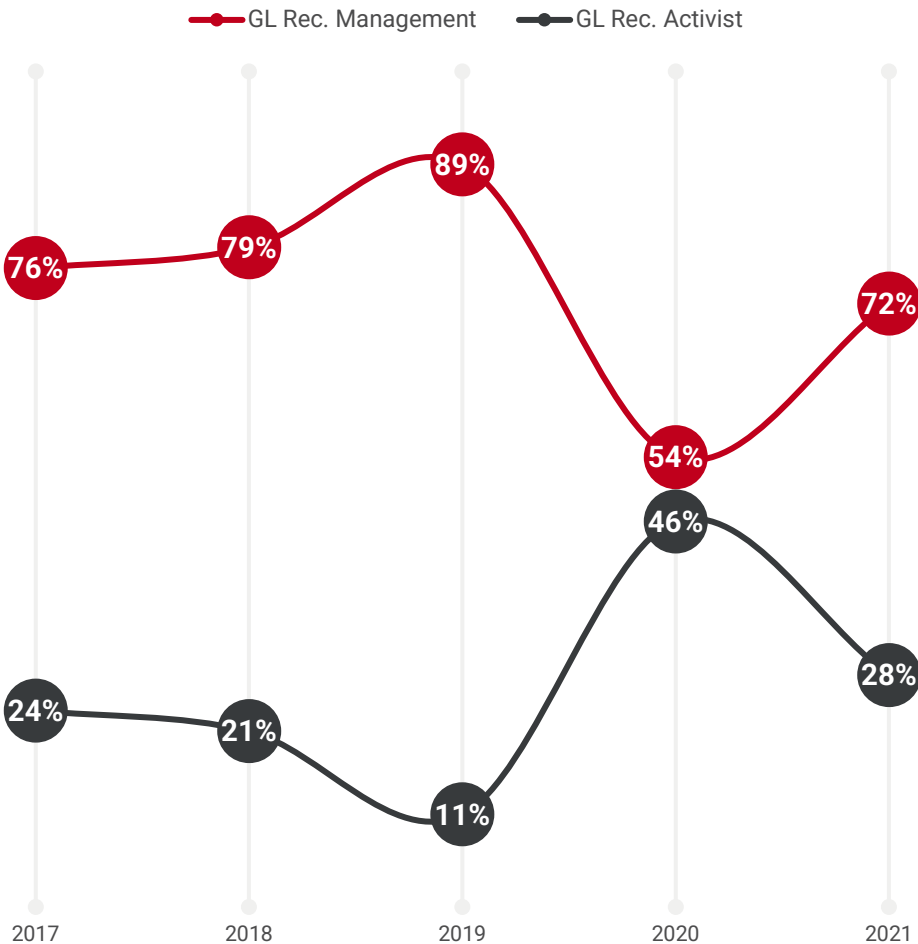
ISS Recommendations in Proxy Fights



ISS has shown strong support for management during proxy contests over the past four years, as activists fail to meet the high bar to prove the case for change. Management has steadily garnered support from ISS in four of every five cases.

GL has sided with activists more frequently than ISS over the same time period, especially during the 2020 proxy season when GL supported activists almost half the time. In 2021, activists had GL's support more than a quarter of the time.

GL Recommendations in Proxy Fights



Proxy Advisors: Correlation of Recommendation to Win

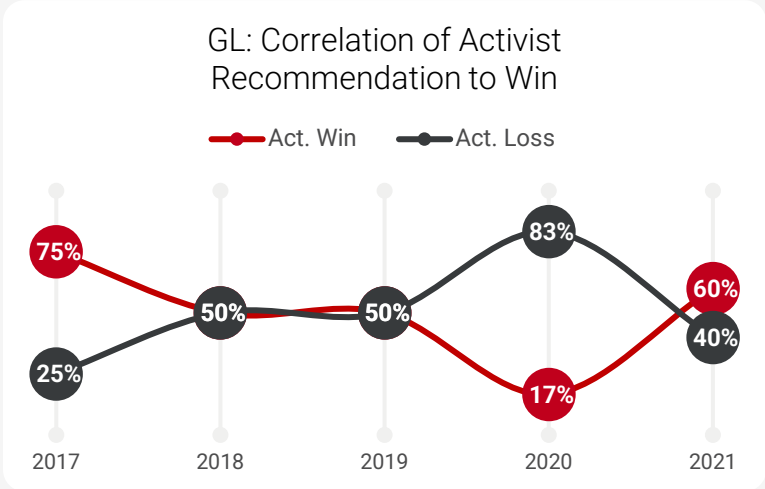
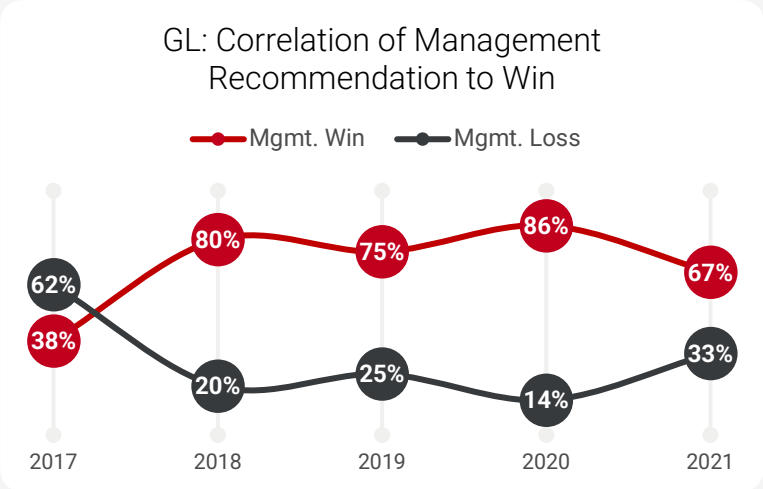
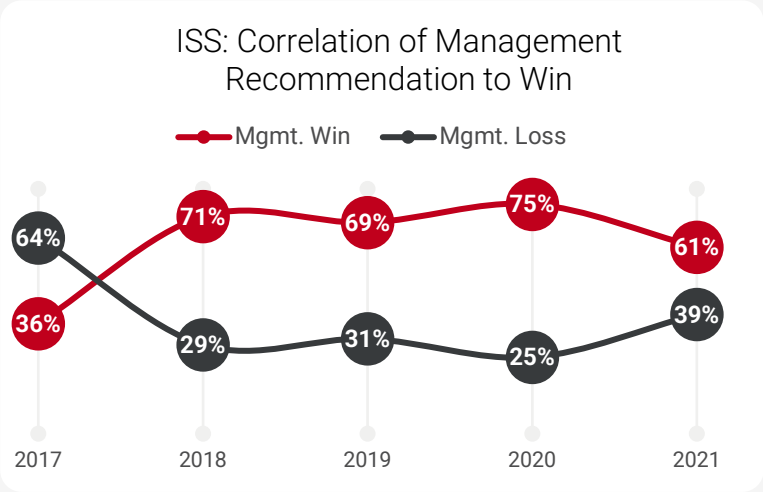


A favourable recommendation from a proxy advisor does not guarantee a win.

At best, the correlation between a positive recommendation from ISS or GL and a win was 67% for GL and 61% for ISS in 2021. This decrease is likely because most fights in 2021 were targeted at micro- or small-cap companies where ISS and GL have less influence.

We note that ISS has resumed their pre-COVID level of stringency since the start of the 2021 proxy season, particularly in light of multiple contested deals that are considered as "opportunistic" by activist shareholders.

In challenging times, such as the pandemic, management tend to be more strategic in engaging directly with institutional shareholders and trying to sway them from their adherence to ISS and GL. In contested situations, regardless of the broader circumstances, institutional investors will take a case-by-case approach.



Contested M&A Overview



Canadian M&A activity has come roaring back in 2021, reaching record levels after a subdued 2020, buoyed by access to cheap debt and a rebound in economic confidence. But one thing has remained the same – the end of the friendly deal. Even the most seemingly routine merger now comes with increased risks.

The Three Main Reasons Why More Deals are Facing Opposition:

1

Activism can be a low-cost or free option to get a much higher price, and in recent years, there have been high-profile cases that show it works and is worth doing. In fact, some investors have made this a repeated tactic.

2

Institutional investors are becoming more comfortable using activist tactics. While institutional investors are normally long-term shareholders, using activist tactics allows them to bring attention to their concerns and drive the changes they feel are needed to create long-term value. A long-term shareholder may also quietly align or partner with an activist who then takes on the role of agitator.

Partnering with an activist has two key benefits:

1. Having the activist do the leg work helps image-conscious institutional investors save face.
2. Activists are agile and able to launch and manage campaigns quickly, whereas institutional investors would have to engage multiple teams, such as legal and compliance.

3

The pandemic may have also helped spur new avenues; just as companies have relied on new technologies and methodologies to move forward and maintain profitability, activists have also learned new strategies. The rapid adoption of virtual communication technologies allows activists to have an extended reach and enhanced coordination in an abbreviated timeline. Video conferencing has become widely adopted, making it easier and cheaper to connect while remaining just as authentic and credible. This means a shareholder looking to take the temperature of their fellow investors can conduct a coast-to-coast sentiment check in a matter of hours not days.

Contested Canadian M&A Snapshot



Canadian National Railway vs. TCI Fund Management

TCI first opposed CN's pursuit of Kansas City Southern (KCS) in May 2021, citing regulatory risks and urging the railroad operator to abandon the deal. In early September, the U.S. regulator blocked CN's proposal to create a voting trust in which it planned to hold acquired KCS shares over anti-competition concerns. Such a decision would have made closing the transaction difficult, and as a result, the deal was terminated. Subsequently, TCI launched a proxy fight to replace four CN board members and the CEO.

KINGSDALE REPRESENTED TCI



Osum Oil Sands Corp. vs. Waterous Energy Fund

Waterous' quest to acquire the shares of Osum that it didn't already own began as a hostile takeover bid after failed negotiations with representatives of Osum's directors. Waterous felt that the status quo was unacceptable as Osum had failed to return capital to shareholders or offer any meaningful liquidity event in 15 years. With support from the three largest shareholders, Waterous commenced with announcing its offer.

During the fight, Osum attempted to stall the offer by applying to the Alberta Securities Commission for a cease-trade order, stating that Waterous' offer was inadequately financed, but its application was dismissed. Waterous later raised its offer, garnering the support of Osum's insiders and successfully completed the transaction.

KINGSDALE REPRESENTED WATEROUS



Inter Pipeline Ltd. vs. Brookfield Infrastructure Partners L.P.

Brookfield launched a hostile bid for Inter Pipeline (IPL) in February 2021 and shocked the market when it revealed its 9.75% stake, plus another 9.9% of economic exposure through total return swaps (TRS). The TRS gave Brookfield economic exposure to IPL without actually beneficially owning the shares.

After being rejected by IPL, Brookfield publicly opposed IPL's friendly sale to white knight buyer Pembina Pipeline Corp. in June. After Brookfield sweetened its offer for the fourth time, the Pembina transaction was terminated. Brookfield took up all IPL common shares that were tendered under the offer and entered into an arrangement agreement to acquire the rest of the equity.

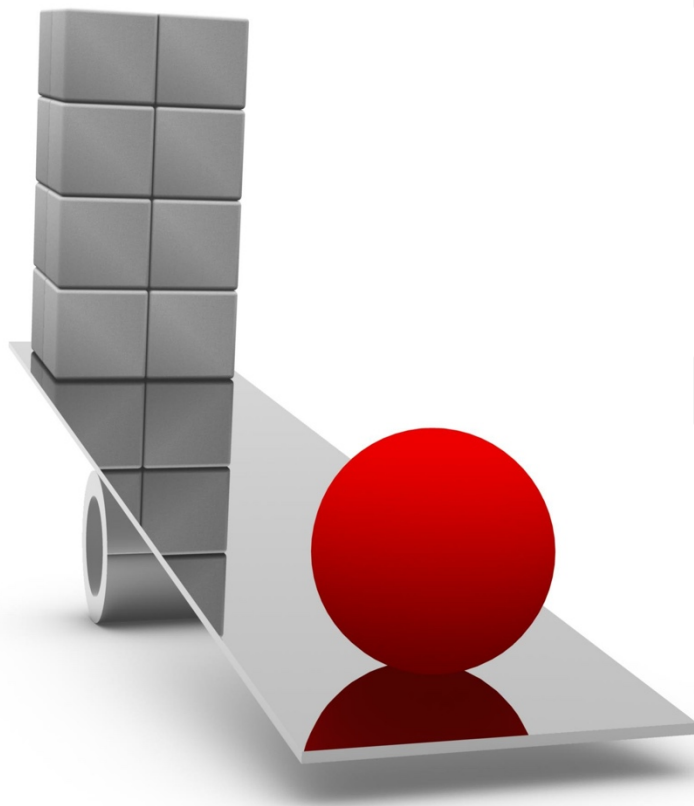
KINGSDALE REPRESENTED INTER PIPELINE



Fancamp Exploration Ltd. vs. Peter H. Smith

Junior mining company Fancamp Exploration Ltd. faced a board and transaction-related contest at the same time. Led by founder and former CEO Peter H. Smith, a group of concerned shareholders mounted the attack to overhaul the board then block the company's planned acquisition of ScoZinc Mining Ltd. In mid-September, the company struck a settlement with certain shareholders, which included two members from the activist slate. Both were appointed to Fancamp's board and the ScoZinc transaction was terminated in favour of a private placement.

KINGSDALE REPRESENTED FANCAMP

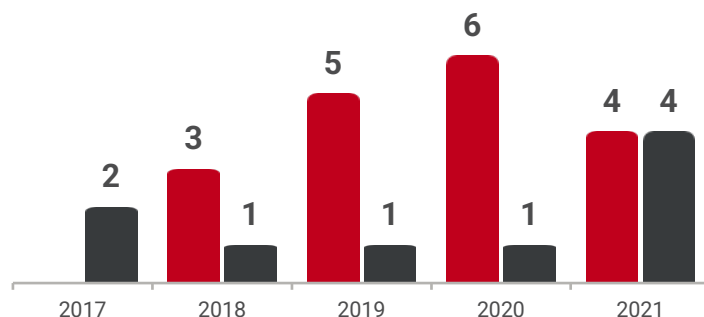


M&A: ISS and GL Voting Recommendations



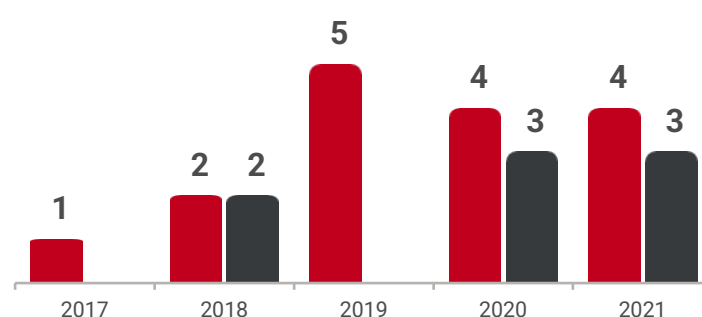
ISS Voting Recommendations on Contested M&A*

■ FOR Transaction ■ AGAINST Transaction



GL Voting Recommendations on Contested M&A*

■ FOR Transaction ■ AGAINST Transaction



In the past five proxy seasons, ISS and GL have opined on 27 and 24 contested M&A situations, respectively. In 2021, ISS and GL sided with management just 50% and 57% of the time, respectively, which is below their five-year averages of 59% and 73%, citing valuation as their main concern.

The list below shows which M&A transactions the proxy advisors recommended against during the past two seasons, illustrating that ISS and GL often come to the same conclusion about a deal, but not always.

Proxy Advisors in Contested M&A Transactions During 2020 – 2021 Proxy Seasons:

Transaction Type	Company	Activist	Proxy Season	ISS Rec	GL Rec	Outcome
Plan of Arrangement with Pembina	Inter Pipeline Ltd.	Brookfield Infrastructure Partners L.P.	2021	AGAINST	AGAINST	Activist Win – Arrangement with Pembina terminated
Plan of Arrangement	Dorel Industries Inc.	Letko, Brosseau & Associates Inc. and Brandes Investment Partners	2021	AGAINST	AGAINST	Activist Win – Go-private terminated
Plan of Arrangement	Rocky Mountain Dealerships Inc.	Burgundy Asset Management	2021	AGAINST	AGAINST	Management Win – Go-private transaction completed
Plan of Arrangement	Great Canadian Gaming Corp.	BloombergSen, CI, Burgundy, and Edgepoint	2021	AGAINST	FOR**	Management Win – Go-private transaction completed
Recapitalization	Calfrac Well Services	Wilks Brothers	2020	AGAINST	AGAINST	Management Win – Recapitalization transaction completed Activist fought back through litigation without success
Plan of Arrangement	Canfor Corp.	Letko, Brosseau & Associates Inc.	2020	FOR	AGAINST	Activist Win – Go-private transaction terminated
Plan of Arrangement	Cobalt 27 Capital Corp.	Anson Funds	2020	FOR	AGAINST	Management Win – Arrangement completed after offer was improved

* Represents transactions subject to a shareholder vote

** GL initially issued an AGAINST recommendation on Apollo's acquisition of GCG. Following a 15% increase to the cash purchase price, GL reversed its recommendation to FOR.

Skirting with Swaps

Case Study: Brookfield's Hostile Bid for Inter Pipeline

Background

In February 2021, Brookfield Infrastructure Partners L.P. launched a hostile bid for Inter Pipeline (IPL) and shocked the market when it revealed its 9.75% stake, plus another 9.9% of economic exposure through total return swaps (TRS).

Why it Matters

The TRS gave Brookfield economic exposure to IPL without actually beneficially owning the shares. This allowed Brookfield to suggest their toehold was larger than it was, with media stories frequently stating a 19.65% ownership without further details. As Brookfield's true ownership rights were below 10%, it was not required to file an early warning report, a move that many shareholders saw as deceptive. Brookfield's muted clarification of its true beneficial ownership simply shifted speculation as to whether the swap dealer that owned the 9.9% block would do the bidding of Brookfield.

The TRS posed a challenge for IPL's shareholder rights plan (SRP). The existing poison pill started at 20% of voting securities, leaving Brookfield ample room to increase their toehold. In response, IPL adopted a modified SRP with a pill that triggered at 20% of economic exposure.

Brookfield challenged the modified SRP to the Alberta Securities Commission (ASC). The ASC ruled the revised SRP could stand and found Brookfield's use of TRS, combined with their limited disclosure, as:

"clearly abusive to (IPL) shareholders, and the capital market, and as such contrary to the public interest."

The ASC also increased the bid's minimum statutory condition to 55%, up from the standard 50%.

On May 31, IPL entered into an agreement with Pembina Pipeline. Considering IPL's historically low voter turnout (~41%), Brookfield's shares and swaps served as a blocking position to the Pembina deal. However, the Pembina deal made the 55% threshold for the hostile bid extremely challenging to meet, and a unique dynamic emerged: as long as both deals were live, no deal was viable.

The Role of the Proxy Advisors

Two weeks before IPL's shareholder meeting to seek approval for the Pembina deal, Brookfield increased its offer to \$20 in cash per share, surpassing the value of the Pembina offer.

The outstanding hostile bid in the face of a new friendly deal created an interesting situation for ISS and GL who only opine on matters before a shareholder vote (which the hostile bid, as a tender, was not).

With the larger Brookfield offer in play, Pembina declined to increase its offer. Just a few hours later, ISS issued their recommendation that shareholders vote against the Pembina deal. Since a hostile bid doesn't require a shareholder "vote" ISS' recommendation against the Pembina deal became an implied endorsement of the Brookfield deal. On July 22, GL reached the same recommendation, and the Pembina arrangement vote was subsequently withdrawn by IPL.

In short, the proxy advisors' recommendations were based on the certainty of a cash offer over a more strategic combination with potentially more upside but that faced execution risks.

While applause-worthy, the ASC's order stemmed from the fact that they were unable to stop Brookfield from including the swaps in their position against the Pembina transaction. The use of swaps – while controversial – is legal and until full transparency is mandated by regulators, their use will likely continue.



Take-Private Scrutiny

The 2021 proxy season saw shareholders scrutinize take-private deals as many were seen as opportunistic amid the pandemic and investors' perceived need for liquidity. Activism can be a low-cost or free option to get a much higher price, and it's common now that anything that isn't labelled "best and final" is met with skepticism. As the market recovered from the worst impacts of COVID-19, shareholders sent a clear message:

A low offer will get you high opposition.

Great Canadian Gaming Corp. vs. Multiple Shareholders

Multiple institutional shareholders, including BloombergSen, CI, Burgundy, and Edgepoint vehemently opposed Apollo Global Management's take-private of Great Canadian Gaming.

They contested that the initial \$39 per share offer was opportunistic in timing and undervalued the company given that COVID-19 shuttered operations.

Both ISS and GL recommended shareholders vote AGAINST the initial deal, citing a lacking sales process and an inadequate premium.

Apollo subsequently increased the offer to \$45 per share and secured a favourable recommendation from GL and shareholder approval.



Dorel Industries Inc. vs. Multiple Shareholders

Several large shareholders, most notably Letko, Brosseau & Associates, publicly opposed Cerberus Capital Management's take-private of Dorel.

Interestingly, COVID-19 was used as a catalyst for a valuation thesis – in this case, Dorel's comeback was driven by the demand for bicycles and home furnishings. Letko argued the deal significantly undervalued the company and referenced valuation metrics never seen in the stock price.

Cerberus' increased offer (\$16 from \$14.50) failed to sway shareholders and ISS and GL, with both recommending AGAINST the deal based on valuation.

The take-private was terminated ahead of the special meeting.



In the fight for fair value, even deals that seemed guaranteed faced opposition



After EXFO Inc.'s chairman and controlling shareholder, Germain Lamonde (who held almost 94% of the voting rights), announced a US\$6.00 per share take-private, competitor and fellow shareholder VIAVI Solutions Inc. noted the offer was at the low end of a formal valuation and initially countered with US\$7.50. Despite Lamonde's rejection, VIAVI continued to fight, increasing their offer to US\$8.00.

After Lamonde repeatedly stated he would not give up control, ISS recommended FOR his deal on the basis that US\$6.00 was better than no deal at all. GL took the opposite view and recommended AGAINST the deal.

However, recognizing investor discontent, Lamonde eventually bumped his offer to US\$6.25, and the deal subsequently passed with minority shareholder approval.

The eventual bump proved that even with a majority shareholder in play, minority investor sentiment cannot be ignored.



Debentures vs. Defeasance

Case Study: Atlantic Power's Go-Private Transaction with I Squared Capital

Background

In January 2021, Atlantic Power Corporation (ATP) announced it had agreed to be acquired by private equity firm I Squared Capital. The acquisition covered ATP's common and preferred shares, medium-term notes, and convertible debentures.

The acquisition of four different securities was unusual in the Canadian market as was cross-conditionality of the four separate votes. Each group of securityholders applied pressure to maximize their outcome, relative to the other classes, with the greatest force coming from those holding preferred shares and convertible debentures. This was further complicated by shareholders with holdings across multiple classes.

Kingsdale represented Atlantic Power



Preferred Shares

Preferred shareholders largely opposed the \$22 offer, despite the fact that no preferred share had traded as high in over eight years. Preferred shares typically have a par value of \$25. While many brokers were wary of encouraging a trend to acquire preferred shares for below par value, this precedent had already been set when Lowe's acquired Rona's preferred shares in 2016 for \$24.

The preferred share market attracts a large concentration of retail holders chasing yield. A major challenge was convincing these holders – who felt they could not replace the yield – of the merits of taking the premium offered for ATP shares and to reinvest in a vehicle with a similar yield and potentially less risk. Ultimately, preferred shareholders approved the transaction with over 74% approval.

Defeasances were a common strategy for state and local governments to clean up balance sheets, before being brought to Wall Street by Exxon in 1982. Before ATP, the tactic was rarely used in recent times in the Canadian capital markets. Its use here was another example of creditors going beyond protecting their rights to simply applying available leverage to get what they want. In ATP's case, defeasance eliminated the leverage and destroyed the arbitrage. It was explicitly provided for the indenture and may not be applicable in other bond consent or plan-of-arrangement situations.

Convertible Debentures

Strident opposition was encountered from debenture holders who cross-held preferred shares and sought to exert pressure through their convertible position. There were also those who felt the make-whole premium dictated by the indenture was insufficient compared to what other classes were receiving.

The voting debenture holders rejected the deal, with many hoping it would drive I Squared Capital to increase the consideration.

During securityholder outreach, there was speculation that arbs had placed trades to go long on the debentures and short the common or preferred shares. Although they stood to lose the premium being offered on the debentures, they stood to profit significantly more on the short leg by causing the deal to fail.

ATP cancelled the debenture holder meeting and moved forward with a defeasance that would set aside cash to meet the bond obligations and clear them from the balance sheet. This allowed the deal to close and the debenture holders to continue being paid under the terms of the bonds.

Rising Debt-Side Activism

Case Study: Bombardier Consent Solicitation for Proposed Amendments to its Outstanding Senior Notes and Debentures

Background

With activism generally viewed as a shareholder action, companies are often surprised and unprepared when their creditors deploy similar strategies.

One notable trend we've seen with debtholders is the formation of ad hoc groups, similar to wolf packs in activist shareholder situations. The objective of these ad hoc groups is simple and singular: negotiate more favourable terms.

With the potential risk of default, debtholders are often open to negotiation – but if an opportunity to exploit arises, sophisticated investors will take advantage for their economic benefit. Issuers can offer a consent consideration payment as a sweetener and should diligently monitor the market to identify holders who purchase additional bonds as it signals a potential holder looking to jeopardize the transaction.

Kingsdale represented Bombardier



Overview

Bombardier Inc. asked its bondholders for permission to change the terms of their debt after receiving notice from a hedge fund holding its 2034 Notes that claimed the company's sale of its train business (a non-core asset) breached a covenant in one of its debt agreements, and that it constituted the sale of substantially all of the assets of the corporation. The allegations were without merit. Bombardier believed the unnamed investor took a position in the 2034 Notes given its unique make-whole levels – an opportunistic action to extort other noteholders for their own economic benefit. The hedge fund's incentive was to buy the bonds below par and then by triggering a default, cause an acceleration of payment of principal and interest, crystallizing a significant short-term gain on a long-dated investment.

To protect the company from repeat frivolous default notifications or related litigation, and the obvious potential impact on bond values, Bombardier asked its bondholders to approve changes to their indenture to clarify that the asset sales did not constitute a default under the indenture ("Consent Solicitation"). After launching the Consent Solicitation, a bondholder group tried to form and encouraged others to join with the intent of extorting Bombardier for a higher consent fee. Kingsdale was brought in as the Canadian information and tabulation agent. Facilitating a consent event with consent consideration only payable to supporters through CDS Clearing and Depository Services Inc. (CDS) is one Kingsdale has undertaken on many occasions and first pioneered in 2016.

Result: 100% Support from Bondholders

Despite the initial challenges, Bombardier successfully completed its Consent Solicitation, with an incredible 100% support from bondholders holding the Canadian and U.S. Notes. All U.S. Notes consenting through CDS were tabulated correctly and were successfully sent to the DTC.

Challenges

Bombardier strategically planned for a short expiry of seven days, hoping to encourage brokers to inform their clients and act quickly, and to limit the activist's ability to interfere or influence the event. However, the short timeline constrained broker ability to cascade the information to clients and hindered Bombardier's visibility into its underlying holders, which was comprised of mostly small retail bondholders.

For the Canadian Notes, Kingsdale managed the event setup on CDS. Through this process, Kingsdale discovered additional U.S. Notes held within CDS – a development unknown prior to the launch.

Actions

Kingsdale conducted a comprehensive analysis and leveraged its existing front- and back-office relationships to identify which brokers and custodians held Canadian Notes and consistently followed up to encourage the consent instructions to be processed and for sales desks to continue to prioritize. The indenture change represented no change to economic or risk profile for holders, and Kingsdale emphasized that this was "money for nothing" to encourage participation and support.

For the U.S. Notes, Kingsdale connected with the appropriate teams at CDS, ensuring that consents received from Canadian brokers were further transmitted over to Depository Trust Company (DTC) correctly (the depository for the U.S.).

Shareholder Proposals

While shareholder proposals have shown little prospect of passing in Canada without the support of management, boards still need to be aware of and understand shareholder concerns.

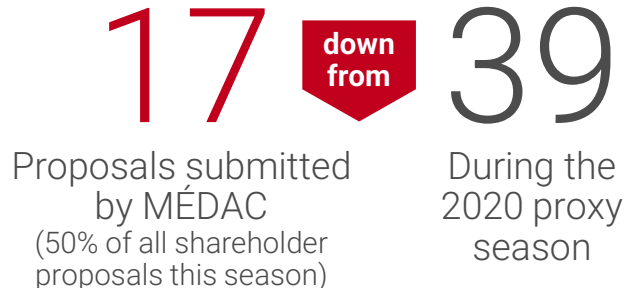
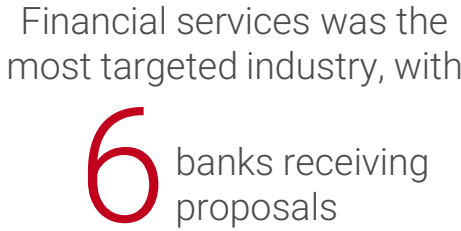
Proposals – particularly environmental, social and governance (ESG)–related ones at companies with high ESG risk – garner significant media attention. Negative publicity can have implications for a company’s stakeholder relations and ESG strategy. For instance, saying you are committed to a course of action on climate, only to rebuff the first investor who formally asks you to do something about it, could impact your perception among stakeholders.

Shareholders who are ready to table proposals should socialize the idea with companies ahead of time. Most company by-laws require proposals to be submitted months in advance and failing to do so may be seen as a hostile move.

Rather than appearing defensive, boards should take the opportunity to work with shareholders to shape the proposal to complement the company’s existing strategy or demonstrate how the goals of the proposal can be addressed through other channels.



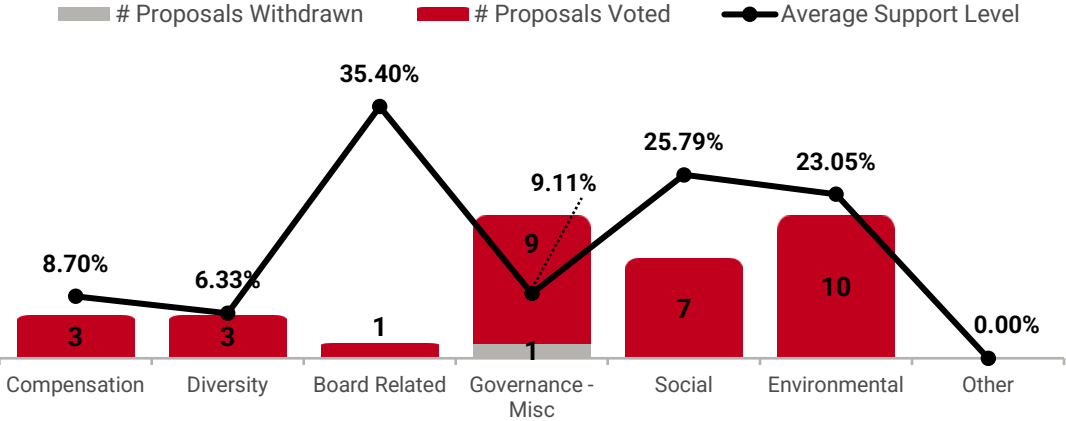
Most proposals are withdrawn prior to public filing. Companies have worked with shareholders by making certain commitments to implementing changes, enhancing transparency and engaging in a higher level of shareholder engagement.



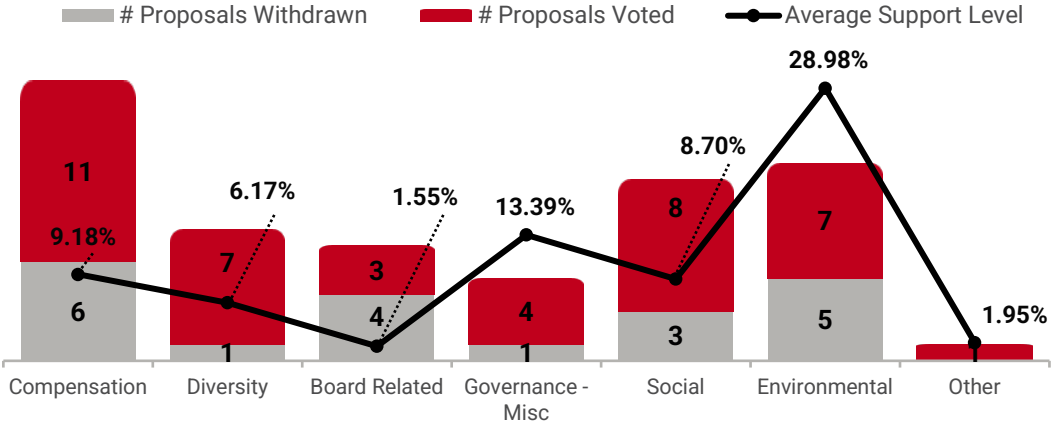
Shareholder Proposals



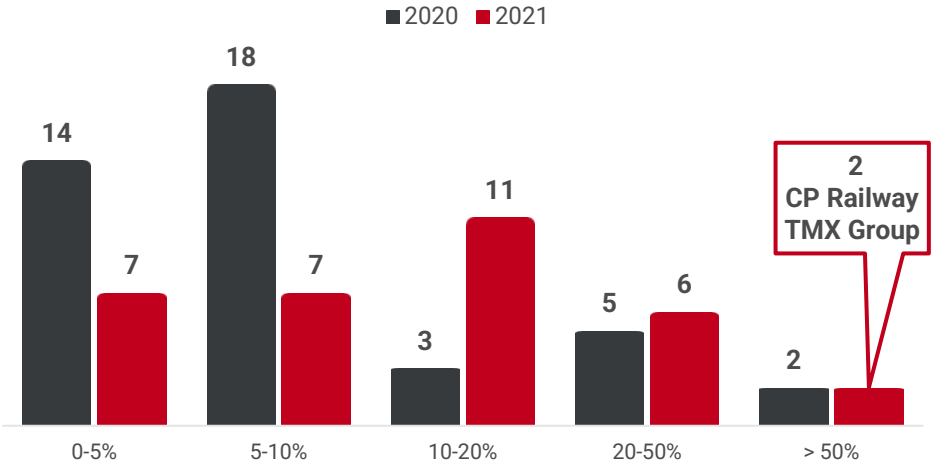
2021 Shareholder Proposals by Categories



2020 Shareholder Proposals by Categories



Shareholder Proposal Support Level



Notable Shareholder Proposals

In April, the TMX Group agreed to support a proposal from the Shareholder Association for Reach and Education (SHARE) and report to shareholders on its work on Indigenous inclusion.

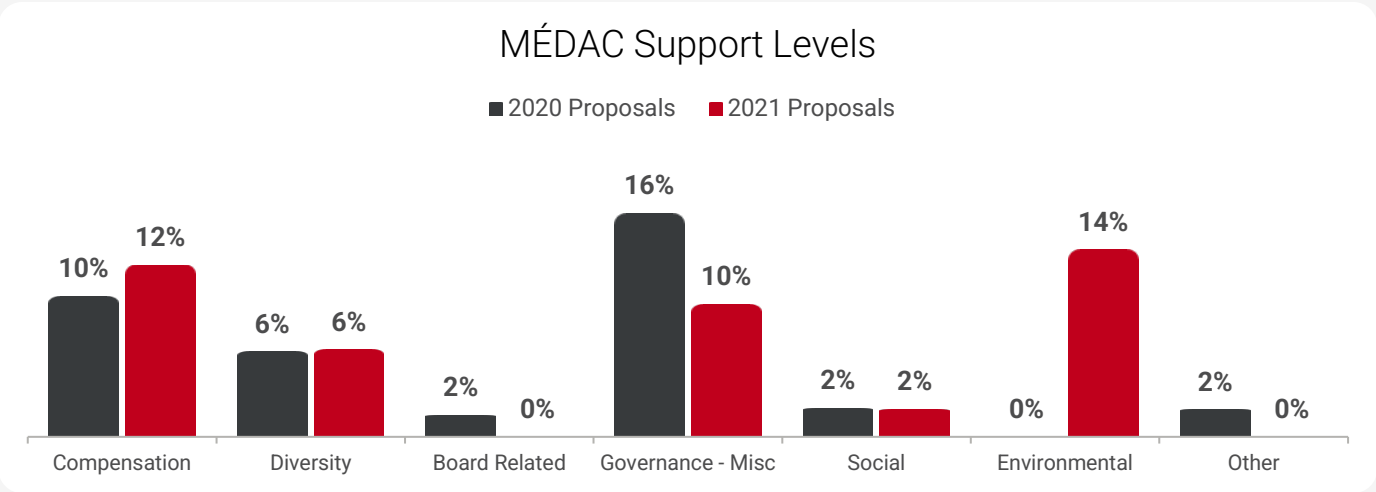
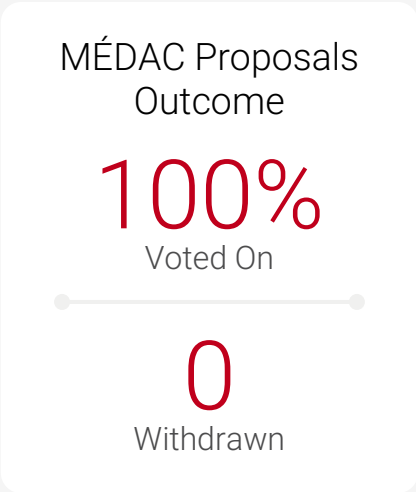
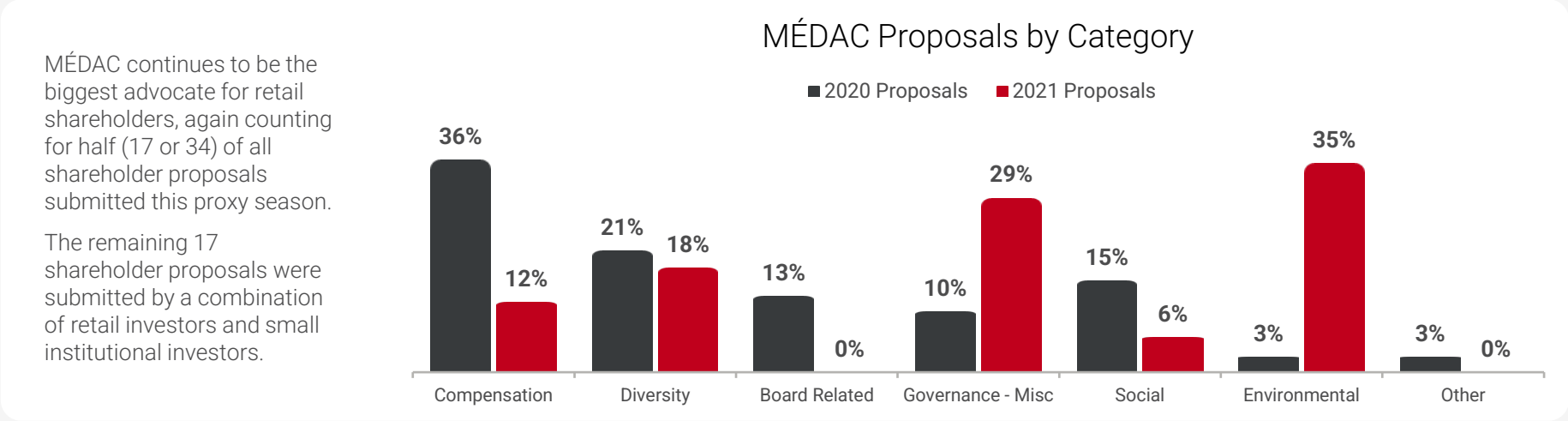
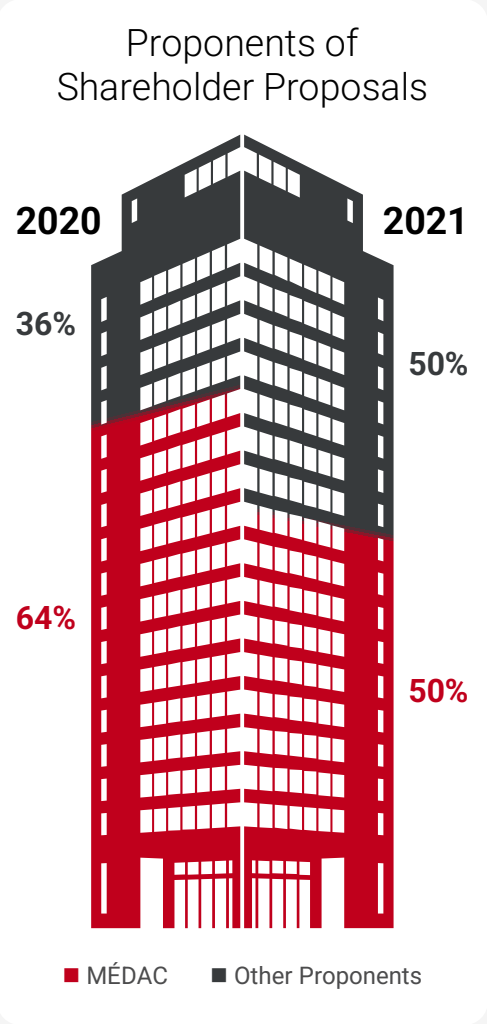
We expect this agreement to create a ripple effect in capital markets. It's rare for publicly traded companies to recommend that investors approve shareholder proposals, but the agreement is also believed to be a first-of-its-kind endorsement by a board of directors of a Canadian company to support an investor resolution about Indigenous inclusion. We also expect that the TMX Group's decision has the potential to directly and indirectly influence other listed issuers to consider and support similar proposals.

Both ISS and GL, as well as management, recommended shareholders to vote FOR the proposal, which passed with 98% shareholder support.

At Canadian Pacific Railway Ltd.'s 2021 meeting, TCI Fund Management submitted a first-of-its-kind proposal requesting a non-binding advisory vote on climate change. Both ISS and management recommended shareholders to vote FOR the proposal, which later received 85% support.

For more on Say-on-Climate, see page 30.

MÉDAC Proposals



Institutional Support for ESG and Diversity, Equity and Inclusion (DEI) Shareholder Proposals Gaining Traction



BlackRock's Trailblazing Path

In its Investment Stewardship report for 2020–2021, BlackRock, Inc.:

- Rejected 255 directors vs. only 55 a year earlier for climate-related concerns
- Supported 35% of shareholder proposals it voted on vs. 17% a year earlier
- Supported nearly two-thirds of environmental related proposals vs. 11% a year earlier
- Supported Canadian Pacific Railway's shareholder vote on climate change, stating in the proposal expectations, *"that companies have clear policies and action plans to manage climate risk and provide roadmaps towards their stated climate ambitions and targets."*

Other Heavy-Hitting U.S. Investors Taking a Stance

The Vanguard Group, Inc. has published numerous perspectives and commentaries regarding investment stewardship in 2021, with a notable increase in publications compared to prior years.

In 2021, Vanguard supported:

- Emission reduction targets at ConocoPhillips
- Engine No. 1 in its fight against Exxon Mobil Corp.
- Four shareholder proposals at Charter Communications, Inc.'s annual meeting, requesting enhanced reporting on political activity, diversity strategy, workforce diversity data, and greenhouse gas emissions and climate strategy
- A shareholder proposal to American Express Co., requesting annual reports on the board's oversight of DEI efforts

Pension Funds Leading the Way in Canada

Though trailing in the quantity of ESG commentary as compared to their global counterparts, most Canadian asset managers and pension funds have publicized guidelines that are clear on how they approach ESG through the lens of proxy voting. Notably, Canada's leading pension funds have taken an open stance on their expectations for fulsome ESG disclosure from portfolio companies.

In November 2020, Canada's eight leading pension plans (AIMCo, BCI, Caisse de dépôt et placement du Québec, CPP Investments, HOOPP, OMERS, Ontario Teachers' Pension Plan, and PSP Investments) called on companies and investors to, *"provide consistent and complete [ESG] information to strengthen investment decision-making and better assess and manage their collective ESG risk exposures."*

The trend of increased scrutiny on ESG-related issues globally is evident – and irreversible. It's only a matter of time before Canadian investment managers follow in the footsteps of their U.S. and global counterparts in their disclosed support of, and advocacy for, ESG-related shareholder proposals.

Say-on-Climate at Canadian Companies

Say-on-Climate (SOC) was launched by the British hedge fund activist investor Sir Chris Hohn through The Children's Investment Fund Foundation. Its creation comes amid an increasing global push to limit greenhouse gas emissions and avoid the looming human-caused climate catastrophe.

Modelled on Say-on-Pay, SOC is a non-binding advisory vote on a company's climate action transition plans that requires simple majority of shareholder support to pass. The first company to be subject to an SOC vote was Spanish airport group Aena in 2020.

The SOC movement calls on companies to:

- 1 Disclose their emissions,
- 2 Present a strategy to reduce their emissions, and
- 3 Seek non-binding shareholder approval of progress against plans on an annual basis.

More than two dozen companies have been subject to the vote so far. Canadian Pacific Railway was the first Canadian issuer to receive an SOC proposal from Mr. Hohn's fund at its 2021 AGM. Management endorsed and voted for the shareholder proposal, and it was supported by 85.4% of shareholders.

Companies are now starting to consider whether they should put forth an SOC resolution for shareholder vote at their next AGM, like CN Railway did this past year. CN received 92.1% support from its shareholders.

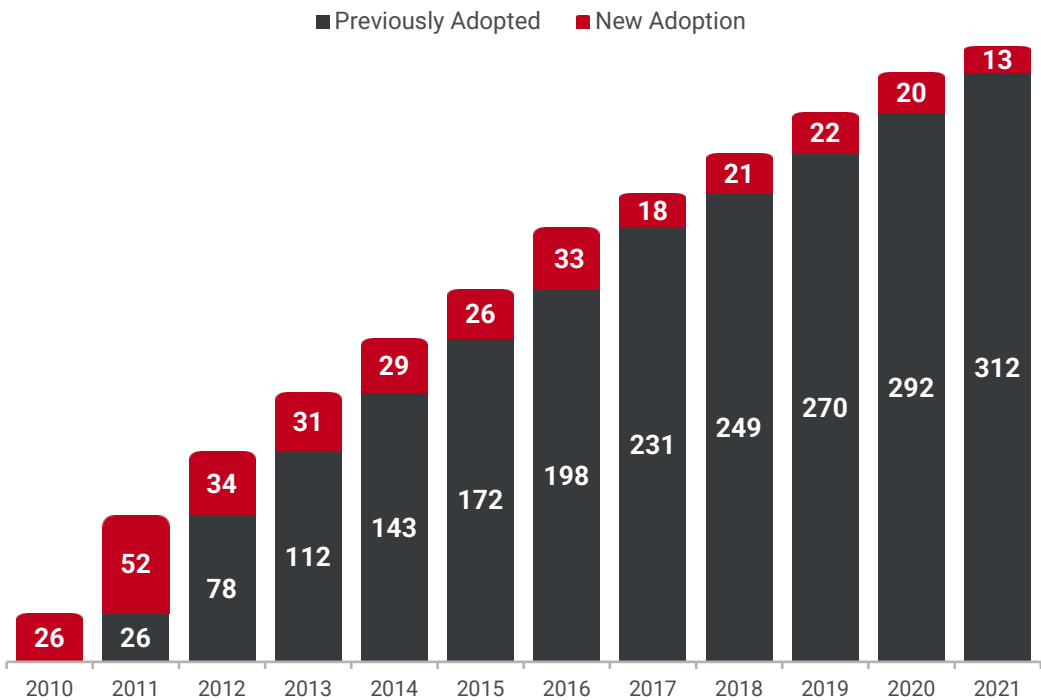
Given that climate change-related risks are at the forefront of many issues corporations face, it has become increasingly important to many investors, including all five of the largest institutional investors who supported 100% of climate transition plans that companies put up to vote. We recommend that corporations be prepared to address the pressure for an SOC vote.

GL says it will generally recommend AGAINST management and shareholder proposals requesting that companies adopt a policy that provides shareholders with an annual vote on a climate-related plan or strategy on the basis that such a structure puts shareholders into the management scope. ISS often takes a case-by-case approach.

Say-on-Pay



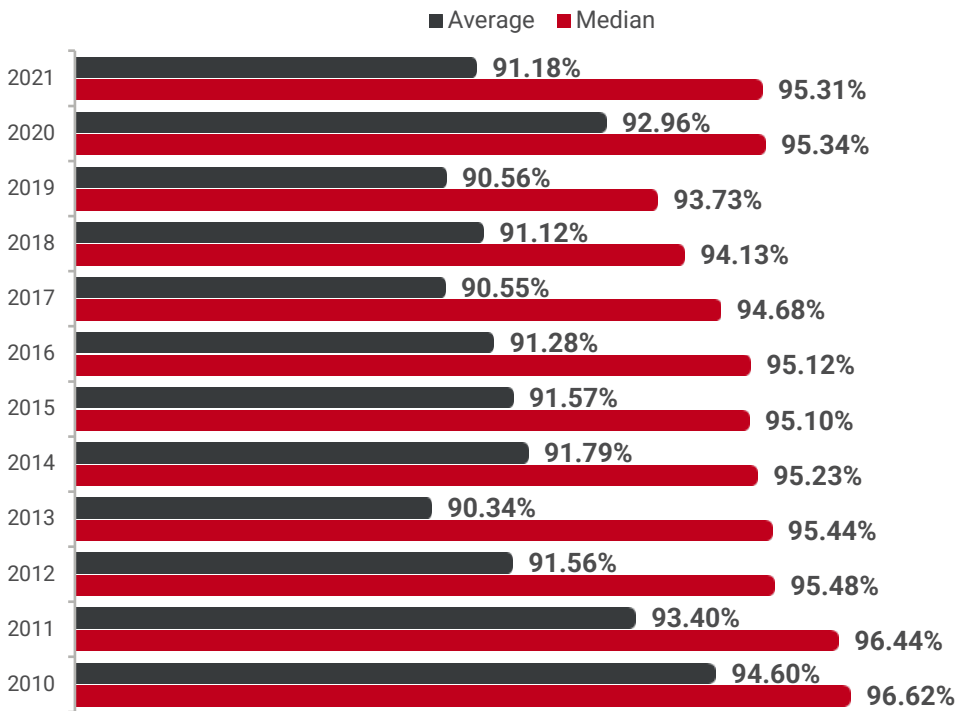
Say-on-Pay Adoption



During the 2021 proxy season, 13 companies voluntarily adopted a Say-on-Pay (SOP) vote, a significant decrease from 2020 and 2019, which had 20 and 22, respectively.

This decrease isn't surprising as the overall rate of adoption had been levelling off in the last few years. The majority of large issuers, and S&P/TSX Composite issuers in particular, have already adopted SOP so we expect to see numbers continue to slow.

Say-on-Pay Support Level



The average support level across the 229 companies that have reported their SOP voting results to date is approximately 91%, similar to prior years.

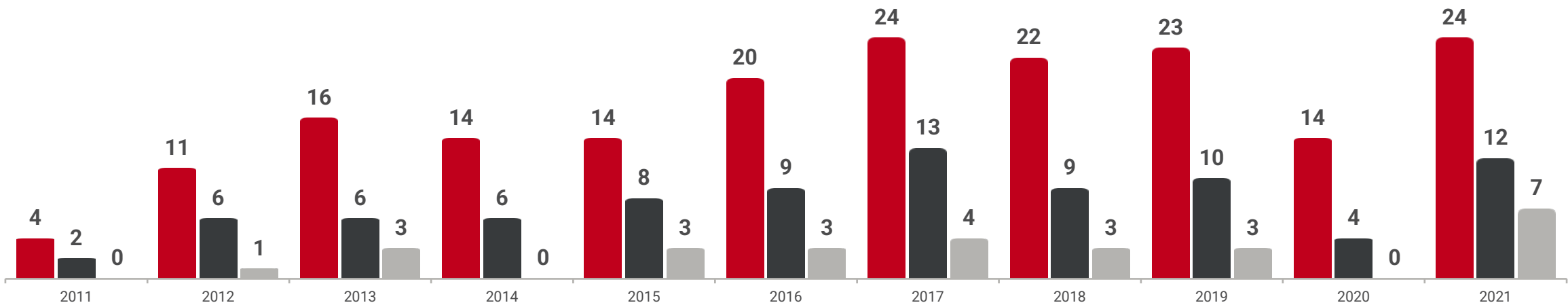
Although SOP remains voluntary in Canada, we continue to advise companies to adopt SOP votes, both as a best practice and as an added protection for compensation committee members who might otherwise receive withhold recommendations from proxy advisors and withhold votes from displeased shareholders.

Say-on-Pay



Companies with Say-on-Pay Votes Receiving Less than 80% (GL), 70% (ISS) and 50% Support

■ Less than 80% support ■ Less than 70% support ■ Less than 50% support



The 2021 proxy season saw **24 companies** receive sub-80% support levels on their SOP votes – nearly double from 2020.

This stark increase highlighted the strong shift in tone from proxy advisors, shareholders, and the public at large; despite the lingering economic impacts from COVID-19, leniency is done.

7 failed in 2021;
none failed in 2020

- 1. RioCan Real Estate Investment Trust
- 2. CI Financial Corp.
- 3. Chemtrade Logistics Income Fund
- 4. Gildan Activewear Inc.
- 5. Vermilion Energy Inc.
- 6. Precision Drilling Corp.
- 7. **Copper Mountain Mining Corp.**

Where are they now?

2020

Six (out of 14) companies that fell below the 80% threshold in 2020 improved and passed in 2021.

2021

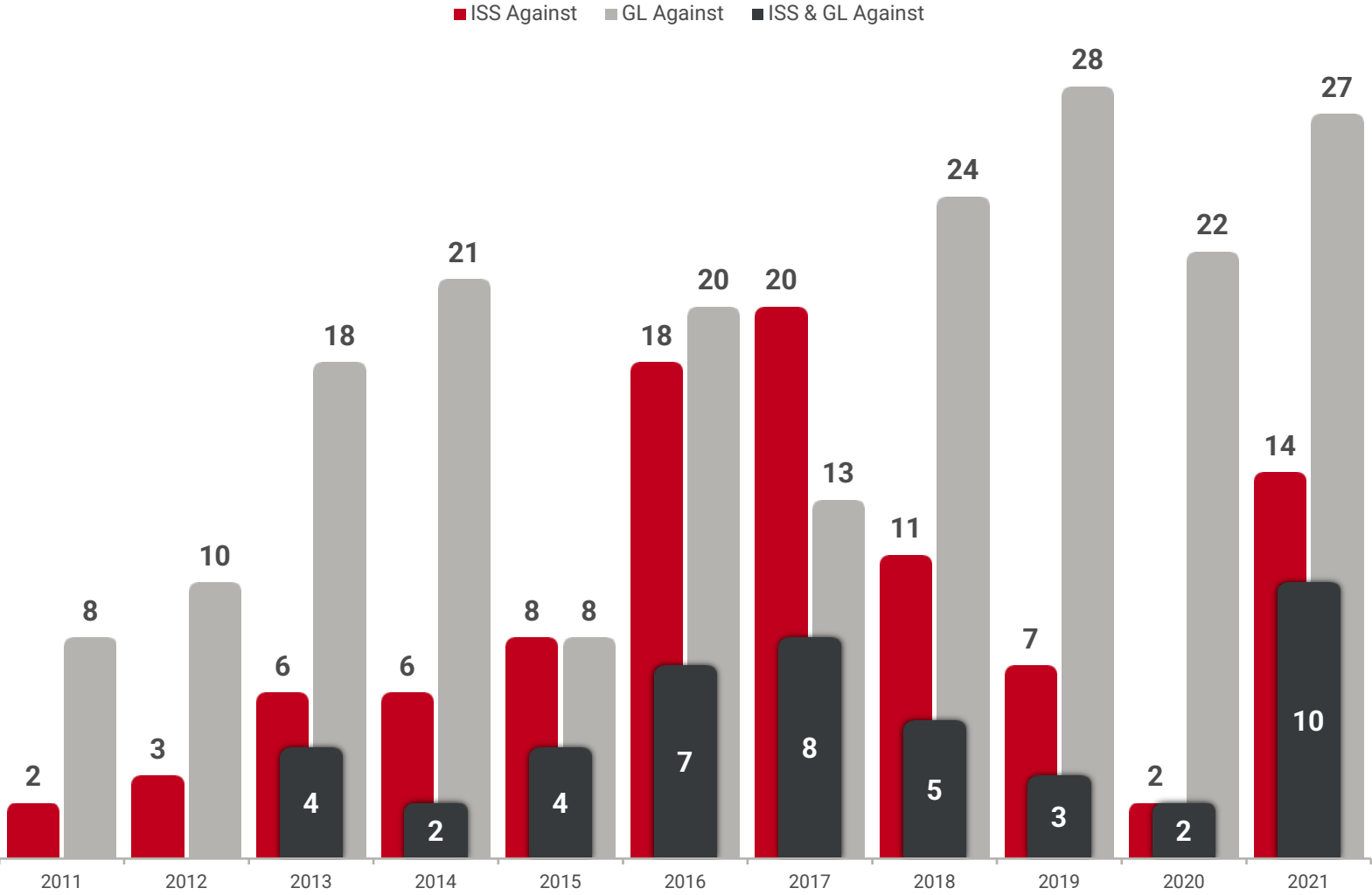
Copper Mountain’s 2020 AGM was held on September 9, 2020, and their 2021 AGM was held on June 10, 2021, meaning both fell into the 2021 proxy season timeframe. Copper Mountain failed its 2020 SOP vote (46.3%) but passed in 2021 with 77.9%.

Proxy advisors were generally unsupportive of discretionary changes to executive compensation and saw such actions as improperly trying to retain executives at the expense of shareholders and employees, and in the face of drastic financial and operational underperformance.

Additionally, many institutional shareholders are increasingly adopting their own internal voting guidelines with more specific – and sometimes more stringent – requirements on executive compensation. Such investors have become more engaged and, in some instances, skeptical of some compensation committees’ philosophies on executive compensation during the pandemic.



2021 – Proxy Advisor AGAINST Recommendations



ISS' most common reasons for making AGAINST recommendations were:

- One-time cash payments or equity awards that are considered excessive, lack reasonable rationale, or are not aligned with company performance;
- High pay for performance concerns, usually due to high Relative Degree of Alignment concern, indicating a higher-than-peer pay and a weak total shareholder return (TSR) performance over the preceding three years; and
- Misalignment of pay and performance compared to self-disclosed peers in terms of TSR performance and operational performance

GL gave even less leniency. GL's most common reasons for making consistent AGAINST recommendations were:

- Upward discretion on short-term incentives and long-term incentives;
- Significant one-off special awards to executives;
- Insufficient disclosure of short-term or long-term incentive plan goals; and
- Grade "F" per GL's proprietary pay-for-performance model, indicating a poor alignment of pay and performance.



Looking Ahead

Changes to Disclosures

National Instrument 51-112

New rules forcing Canadian companies to comply with non-GAAP disclosures came into effect on August 25 and will apply to reporting issuers in their fiscal years ending on or after October 15.

National Instrument 51-112 addresses how companies use and present non-GAAP financial measures that deviate from generally accepted accounting principles. It replaces guidance from the Canadian Securities Administrators set out in CSA Staff Notice 52-306 that issuers should have followed but sometimes didn't. With NI 51-112 in place, companies will likely be subject to increased regulatory scrutiny and possible regulatory actions if they do not comply with these new requirements.

The new requirements come after years of mounting pressure from the investment community to address the widespread use of non-GAAP measures among issuers. Critics of non-GAAP metrics argue they could paint a misleading picture about a company's financial health and raise questions about the quality, usability and consistency of such information.

Companies need to be mindful of how they use these measures in their public disclosures.

ESG Reporting

On November 3, 2021, the IFRS Foundation announced the formation of the new International Sustainability Standards Board (ISSB) to develop a comprehensive global baseline of high-quality sustainability disclosure standards to meet investors' information needs. The board and the office of the chair will be based in Frankfurt, with an office in Montreal responsible for key functions supporting the new board and deeper co-operation with regional stakeholders.

Another recent and significant Canadian development was the October 18, 2021, publication by members of the Canadian Securities Administrators of a consultation paper and proposed rule 51-107 Disclosure of Climate-related Matters, which, if implemented, would require an issuer to disclose certain climate-related information in compliance with the Task Force on Climate-Related Financial Disclosures' recommendations. Regulators globally are taking steps to govern the disclosures and data related to climate, as money floods the market for "green" investments. Comments are due January 17, 2022.

ISS 2021 Policy Survey Results

The key takeaways from investor respondents

Global Benchmark Policy Survey

- Use of non-financial ESG metrics is an appropriate way to incentivize executives, but it should be specific, measurable and properly disclosed.
- Companies would benefit from racial equity audits
- Top three concerning practices related to virtual-only company meetings are:
 1. Unreasonable curation of questions to avoid difficult ones,
 2. Inability to ask live questions or submit questions in advance, and
 3. No Q&A opportunity provided

Climate Policy Survey

- A company that is a “strong contributor to climate change” should provide clear and detailed disclosure on its emissions, governance, strategy, risk mitigation efforts, and metrics and targets
- The number one dealbreaker for shareholder support for approval of a management-proposed climate transition plan is a lack of clear and detailed disclosure.
- High-polluting companies should be subject to a more stringent evaluation under ISS’ Specialty Climate Change Policy and that this policy should assess a company’s alignment with Net Zero goals to offset emissions by 2050.

Read Kingsdale’s full update on the ISS policy results [here](#).



Capital Markets Modernization: Small Change in Ontario Government’s Budget

In its 2021 Budget, the Ontario government committed to implementing just

4 of the 74

recommendations proposed by the Ontario Capital Markets Modernization Taskforce (which includes Kingsdale’s Executive Chairman and Founder, Wes Hall), namely:

1

Expanding the mandate of the Ontario Securities Commission (OSC) to include competition and capital formation

2

Separating the OSC chair and chief executive officer position into two distinct roles

3

Splitting the regulatory and adjudicative responsibilities of the OSC, and

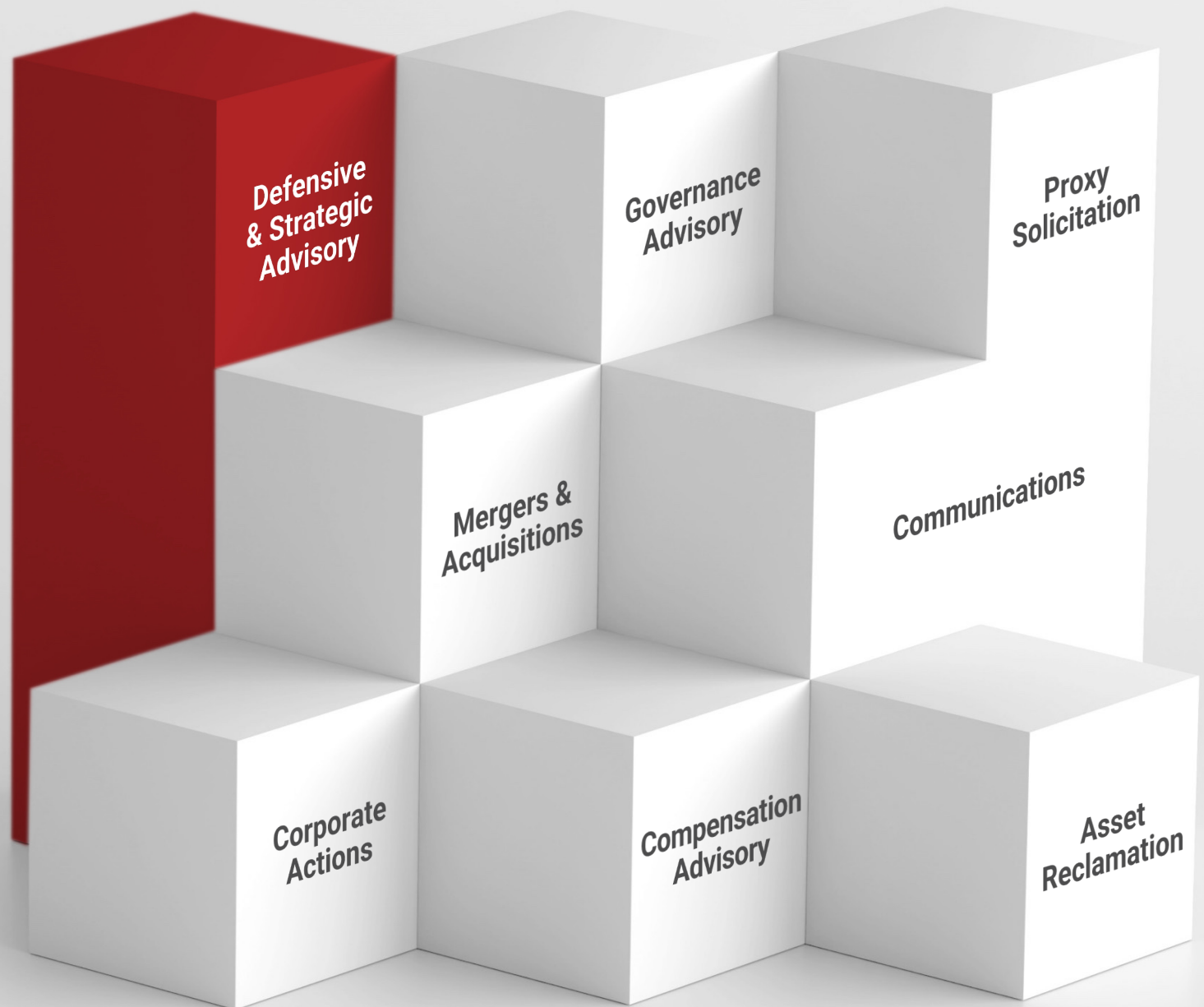
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Publishing the draft Capital Markets Act for stakeholder consultation in the coming months

Being the best in our field means reliably delivering the results our clients want – no matter the challenge.

There's a reason why we're engaged on more proxy contests than all others combined:

We win.





Toronto

Wes Hall, ICD.D

Executive Chairman & Founder
whall@kingsdaleadvisors.com
416.867.2342

Kelly Gorman

EVP, Governance Advisory
kgorman@kingsdaleadvisors.com
416.867.4554

Amy Freedman

Chief Executive Officer
afreedman@kingsdaleadvisors.com
416.867.4557

Himesh S. Ghai

Executive Vice President
hghai@kingsdaleadvisors.com
416.894.4424

Ian Robertson

President, Canada
irobertson@kingsdaleadvisors.com
416.867.2333

Tom Graham

Executive Vice President,
Western Canada
tgraham@kingsdaleadvisors.com
587.330.1924

Grant Hughes

Chief Operating Officer
ghughes@kingsdaleadvisors.com
416.867.2341

New York

Michael Fein

President, U.S.
mfein@kingsdaleadvisors.com
646.651.1641

Kevin Auten

Vice President, Operations
kauten@kingsdaleadvisors.com
646.651.1646

Sylvia Hermina

Senior Vice President
shermina@kingsdaleadvisors.com
646.651.1642

Lydia Mulyk

Vice President
lmulyk@kingsdaleadvisors.com
646.651.1644