

*Volume 54, Issue 2 (Winter 2017)*

*Special Issue: Introduction to the Law and Markets:  
Regulating Controversial Exchange*

Article 3

*Guest Editors: Kimberly Krawiec, Poonam Puri and  
Mitu Gulati*

# Coordination and Monitoring in Changes of Control: The Controversial Role of “Wolf Packs” in Capital Markets

Anita Anand  
*University of Toronto*

Andrew Mihalik  
*University of Toronto*

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>

 Part of the [Law Commons](#)  
Special Issue Article



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

## Citation Information

Anand, Anita and Mihalik, Andrew. "Coordination and Monitoring in Changes of Control: The Controversial Role of “Wolf Packs” in Capital Markets." *Osgoode Hall Law Journal* 54.2 (2017) : 377-396.  
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol54/iss2/3>

This Special Issue Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

---

# Coordination and Monitoring in Changes of Control: The Controversial Role of “Wolf Packs” in Capital Markets

## **Abstract**

Given recent empirical work suggesting that Canada is one of two countries in which outcomes favourable to shareholder activists are more likely than in the United States, one might wonder whether shareholders in Canadian public companies have become too empowered. This concern takes on particular significance in light of controversies arising from the emergence of “wolf packs”: loose networks of parallel-minded shareholders (typically hedge funds) that act together to effect change in a given corporation without disclosing their collective interest. This article analogizes the role of wolf packs in the corporation to that of a blockholder. It isolates certain conditions that facilitate the formation of wolf packs such that wolf packs are able to overcome the coordination costs that can ordinarily impede shareholders from forming de facto blocs to monitor a corporation’s directors and management. At the same time, however, they are able to circumvent the disclosure rules that typically apply to such groups. Because wolf packs are able to wield significant influence in corporate affairs without disclosing their collective interest to other investors, this article argues that the disclosure rules relating to wolf packs in Canada should, as a first step, be clarified.

## Special Issue

# Coordination and Monitoring in Changes of Control: The Controversial Role of “Wolf Packs” in Capital Markets\*

ANITA ANAND & ANDREW MIHALIK<sup>†</sup>

Given recent empirical work suggesting that Canada is one of two countries in which outcomes favourable to shareholder activists are more likely than in the United States, one might wonder whether shareholders in Canadian public companies have become too empowered. This concern takes on particular significance in light of controversies arising from the emergence of “wolf packs”: loose networks of parallel-minded shareholders (typically hedge funds) that act together to effect change in a given corporation without disclosing their collective interest. This article analogizes the role of wolf packs in the corporation to that of a blockholder. It isolates certain conditions that facilitate the formation of wolf packs such that wolf packs are able to overcome the coordination costs that can ordinarily impede shareholders from forming de facto blocs to monitor a corporation’s directors and management. At the same time, however, they are able to circumvent the disclosure rules that typically apply to such groups. Because wolf packs are able to wield significant influence in corporate affairs without disclosing their collective interest to other investors, this article argues that the disclosure rules relating to wolf packs in Canada should, as a first step, be clarified.

Les récentes études empiriques montrent que le Canada est l’un des deux seuls pays où les actionnaires activistes sont plus susceptibles d’obtenir des résultats favorables qu’aux États-Unis. Un tel constat amène à se demander si les actionnaires des entreprises publiques canadiennes ne se sont pas vu accorder trop de pouvoirs. Cette préoccupation

---

\* An earlier version of this article was presented at the Law & Markets: Regulating Controversial Exchange Symposium on 15 September 2015 at Osgoode Hall Law School, Toronto.

<sup>†</sup> Anita Anand is J.R. Kimber Chair in Investor Protection and Corporate Governance at the University of Toronto Faculty of Law. Andrew Mihalik is a graduate of the University of Toronto Faculty of Law (JD/MBA, 2017).

revêt une importance particulière à la lumière des controverses soulevées par l'émergence des « meutes de loups », ces réseaux informels d'actionnaires à la logique parallèle (généralement des fonds spéculatifs) qui agissent de concert pour produire des changements dans une entreprise donnée sans divulguer leur intérêt collectif. Le présent article compare le rôle d'une meute de loups au sein d'une entreprise à celui d'un actionnaire dominant. Il cerne certaines conditions qui contribuent à la formation des meutes de loups et les rendent capables de surmonter les coûts de coordination qui empêchent traditionnellement les actionnaires de former des alliances effectives pour surveiller les administrateurs et l'équipe dirigeante d'une entreprise. Dans le même temps, les meutes de loups peuvent contourner les règles de divulgation qui s'appliquent généralement à ce groupe d'actionnaires. Étant donné que les meutes de loups peuvent exercer une influence notable sur les affaires générales sans divulguer leur intérêt collectif aux autres investisseurs, cet article avance que les règles de divulgation applicables aux meutes de loups au Canada mériteraient avant tout d'être précisées.

---

I.	MONITORING, COORDINATION, AND BLOCKHOLDERS.....	381
II.	WOLF PACK BEHAVIOUR .....	385
III.	THE LEGAL REGIME APPLICABLE TO WOLF PACKS .....	390
	A. The Underlying Rationale of Securities Disclosure Rules.....	390
	B. Wolf Pack Formation and Disclosure Rules.....	392
IV.	CONCLUSION .....	396

---

**CORPORATE LAW IN CANADA SEEKS TO MEDIATE** the relationship between a corporation's directors and its shareholders by assigning each a distinct set of legal rights.<sup>1</sup> A recent empirical study found Canada to be one of only two countries in which outcomes favourable to activist shareholders are more likely than in the United States.<sup>2</sup> Have shareholders of public companies in the Canadian capital markets become too empowered, and if so, what legal rules should govern their

---

1. According to the Dickerson Report, balancing the tension between directors and shareholders is the normative underpinning of Canadian corporate law. Robert WV Dickerson et al, *Proposal for a New Business Corporations Law for Canada*, vol 1 (Ottawa: Information Canada, 1971) at 3 [Dickerson Report]. Dickerson and his co-authors write,

Nor can we see any practical way that, at least in the “public” corporation, shareholders could be involved in corporate administration. This is not to say, however, that directors should not be responsible for their actions and accountable to shareholders and others for what they do (*ibid* at 3).

2. Marco Becht et al, “The Returns to Hedge Fund Activism: An International Study,” European Corporate Governance Institute Working Paper No 402 (March 2015) at 37-51, online: SSRN <papers.ssrn.com/sol3/papers.cfm?abstract\_id=2376271>. The Netherlands is the other country in which activist outcomes are significantly more likely than in the United States.

behaviour?<sup>3</sup> The topic's importance is unquestionable in light of controversies arising from the emergence of "wolf packs," which are loose networks of parallel-minded shareholders (typically hedge funds) that act together to effect change in a given corporation without disclosing their collective interest.<sup>4</sup> Wolf packs are able to circumvent the disclosure rules typically applied to shareholders that act together by deliberately avoiding being characterized as a "group" for the purposes of US securities laws or as "acting jointly or in concert" for the purposes of Canadian securities laws. As is the case with a group of prowling wolves, the lead wolf (shareholder) might be visible to its prey while the other wolves (shareholders) appear only when necessary.

Building on the theme of this special issue on controversial markets, this article probes the role of wolf packs in Canadian law and particularly in change of control transactions, including proxy contests. Changes of control, especially in a contested or hostile context, are controversial given that the target may have other strategic intentions that the board conceives to be in its long-term best interests. Wolf packs add another element of controversy to changes of control as they are typically designed to form before the share price appreciation that typically accompanies a change of control transaction. Further, they are able to overcome the coordination costs and other impediments that smaller shareholders experience in forming *de facto* blocks, thereby making the threat of a proxy contest or a push for a sale of the company more viable.

In particular, there are certain circumstances in which shareholder cooperation generally, and wolf pack behaviour specifically, are able to overcome these costs. This article identifies five conditions that facilitate the formation of wolf packs. Our model suggests that corporations characterized by large institutional shareholders facilitate wolf pack formation because these shareholders are generally sophisticated, rational actors that can coordinate with each other. As sophisticated actors, these shareholders may be motivated by the share price

- 
3. There is a significant amount of debate on this topic in the US literature. Some scholars have advocated for greater shareholder empowerment. See *e.g.* Lucian A. Bebchuk, "Letting Shareholders Set the Rules" (2006) 119 *Harv L Rev* 1784; Lucian Bebchuk, "The Case for Increasing Shareholder Power" (2005) 118 *Harv L Rev* 833. Others, by contrast, have advocated for corporate laws that place greater power in the board of directors. See *e.g.* Iman Anabtawi, "Some Skepticism About Increasing Shareholder Power" (2006) 53 *UCLA L Rev* 561; Stephen M. Bainbridge, "Director Primacy and Shareholder Disempowerment" (2006) 119 *Harv L Rev* 1735.
  4. John C. Coffee, Jr & Darius Palia, "The Impact of Hedge Fund Activism: Evidence and Implications" (2014) European Corporate Governance Institute Working Paper No 266, online: SSRN <[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2496518](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2496518)>.

increase that tends to follow the filing of mandated disclosures when shareholders pass prescribed thresholds of ownership in a corporation's shares. Coordination among wolf pack members is facilitated by corporate and securities laws, which explicitly allow coordination among a small group of shareholders and can drive the lead activist to focus its recruitment efforts on larger shareholders. This model is especially pertinent to Canadian capital markets, which are characterized by institutional shareholders that hold sizable positions in public corporations.<sup>5</sup>

Currently, two hypotheses explain wolf pack formation.<sup>6</sup> John C. Coffee and Darius Palia contemplate the possibility that a lead activist might recruit other investors to join a pack *before* filing disclosure regarding its holdings.<sup>7</sup> By contrast, Brav, Dasgupta, and Mathews assert that a coordination game drives wolf pack formation since individual shareholders are incentivized to join wolf packs without explicit coordination by a lead member.<sup>8</sup> The rational self-interest of the members of the wolf pack is sufficient for the wolf pack to form on the basis of implicit coordination. These two models—which we refer to as the “explicit coordination” and “implicit coordination” models respectively—are informative but insufficient. The explicit coordination model focuses primarily on the timing of a wolf pack's formation relative to the relevant legal rule relating to disclosure of the lead activist's shareholding. The implicit coordination model discounts the importance of a lead activist in coordinating the wolf pack.

Our argument endeavours to push the analysis of wolf pack formation beyond these two hypotheses by isolating conditions (in addition to timing) that might engender shareholder coordination. We focus on investor sophistication as a contributing element to wolf pack formation. We also highlight the benefits of wolf packs for smaller, less sophisticated shareholders who free-ride on the

- 
5. Richard Bozec et al find that 58 per cent of Canadian issuers feature at least one controlling shareholder that owns shares representing more than 10 per cent of the voting rights in respect of the issuer. Richard Bozec, Mohamed Dia & Yves Bozec, “Corporate Ownership and Governance Practices in Canada: A Longitudinal Study” (2015) 4:1 J Int'l Corp Gov 51 [“Corporate Ownership”]. See also Randall K Morck, David A Stangeland & Bernard Yeung, “Inherited Wealth Corporate Control and Economic Growth: The Canadian Disease?” in Randall K Morck, ed, *Concentrated Corporate Ownership* (Chicago: University of Chicago Press, 2000).
  6. For a more detailed explanation of these hypotheses, see Yu Ting Forester Wong, “Wolves at the Door: A Closer Look at Hedge Fund Activism” (2016) Columbia Business School Research Paper No 16-11, online: <papers.ssrn.com/sol3/papers.cfm?abstract\_id=2721413>.
  7. Coffee & Palia, *supra* note 4 at 23-24, 28-29.
  8. Alon Brav, Amil Dasgupta & Richmond D Mathews, “Wolf Pack Activism” (2016) Robert H Smith School Working Paper No RHS 2529230, online: <papers.ssrn.com/sol3/papers.cfm?abstract\_id=2529230>.

activism of the lead wolf or shareholder. Finally, we analogize the monitoring function performed by lead wolves to that performed by blockholders generally.

A further difference between our argument and the existing models referenced above is that the latter are predicated on US law and, in particular, the disclosure requirements triggered by shareholders that pass a 5 per cent ownership threshold in a corporation. By contrast, in Canada, shareholders are generally required only to disclose equity holdings in excess of 10 per cent.<sup>9</sup> Given that lead activists do not typically acquire a stake greater than 10 per cent in connection with their campaigns,<sup>10</sup> wolf packs can form more easily in Canada without disclosing their presence. A situation in which a wolf pack is able to influence the governance of a Canadian corporation without disclosing its collective interest is therefore more likely.

Part I examines the role of blockholders in reducing agency costs in the corporation through monitoring. Part II analogizes the behaviour of wolf packs to blockholders and analyzes the characteristics of Canadian capital markets that facilitate wolf pack formation. Part III considers and evaluates the corporate and securities regulatory regime applicable to wolf packs, understanding that, at present, wolf packs and their regulation are harbingers of controversy in capital market regulation. In particular, we argue that, for the purposes of disclosure rules, wolf packs should be treated in the same manner as blockholders (*i.e.*, shareholders that own a large amount of a corporation's shares, usually between 5 and 10 per cent, and can generally influence corporate direction by virtue of their share ownership). Because blockholders and wolf packs perform similar roles in the corporation, they should be treated as like entities in the eyes of the law. Part IV concludes.

## I. MONITORING, COORDINATION, AND BLOCKHOLDERS

Following Adolf Berle and Gardiner Means, it is widely recognized that the separation of ownership and control in the corporation can lead to a divergence between the interests of shareholders and those of directors and managers.<sup>11</sup> While

---

9. *Securities Act*, RSO 1990, c S-5, s 143.1(7) [OSA]. Furthermore, shareholders in US corporations have a ten-day window in which to purchase additional shares after crossing the 5 per cent threshold, while shareholders in Canadian corporations must immediately cease the purchase of additional shares upon hitting the 10 per cent threshold.

10. Coffee & Palia, *supra* note 4 at 24-25, 28.

11. Adolf A Berle & Gardiner C Means, *The Modern Corporation and Private Property* (New York: MacMillan, 1933) at 6.

shareholders, whom Berle and Means refer to as owners,<sup>12</sup> seek to maximize the value of their residual claim, managers may shirk their duties or divert corporate resources for their own benefit at the expense of shareholders.<sup>13</sup> According to Jensen and Meckling, these divergent interests give rise to agency costs, which are costs that shareholders, as principals, incur to ensure that, as agents, directors and managers act in the corporation's best interests.<sup>14</sup> Shareholders may therefore be inclined to monitor these agents' actions.

An implication of this conception of the firm is that directors and managers, as rational actors, may seek to entrench themselves. They may make themselves so valuable to the corporation that they are too costly to replace.<sup>15</sup> They may also forego investments in profitable ventures by investing in specialized projects that require their unique expertise, even if these specialized alternatives will not be as profitable.<sup>16</sup> Some argue, contrary to empirical evidence,<sup>17</sup> that managers do not entrench themselves.<sup>18</sup> However, as long as it is *possible* for management to prioritize its own interests above those of the corporation, the concept of management entrenchment remains relevant.<sup>19</sup>

The presence of a shareholder who owns a sizable percentage of a corporation's equity—*i.e.*, a blockholder—can mitigate agency costs through two mechanisms

- 
12. Although it is not uncontroversial to refer to shareholders as the “owners” of the corporation, the theoretical concerns raised by Berle and Means remain relevant. See Lynn Stout, *The Shareholder Value Myth* (San Francisco: Berrett-Koehler, 2012).
  13. Michael C Jensen & William H Meckling, “Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure” (1976) 3 J Fin Econ 305 at 308. See also Frank H Easterbrook & Daniel R Fischel, *The Economic Structure of Corporate Law* (Cambridge, Mass: Harvard University Press, 1991).
  14. Jensen & Meckling, *supra* note 13. See also Lucian Bebchuk, “The Myth of the Shareholder Franchise” (November 2006) Harvard John M Olin Discussion Paper Series No 567.
  15. Andrei Shleifer & Robert W Vishny, “Management Entrenchment: The Case of Manager-Specific Investments” (1989) 25 J Fin Econ 123 at 125.
  16. *Ibid.*
  17. Lucian A Bebchuk & Ehud Kamar, “Bundling and Entrenchment” (2010) Harvard John M Olin Discussion Paper Series No 659; Paul Borochin & John D Knopf, “Do Managers Seek Control and Entrenchment?” (2015) [unpublished], online: SSRN <papers.ssrn.com/sol3/papers.cfm?abstract\_id=2670918>.
  18. See Alfred D Chandler, Jr, *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, Mass: Harvard University Press, 1977). On the role of the board in keeping managers from entrenching themselves, see Stephen M Bainbridge, “Director Primacy: The Means and Ends of Corporate Governance” (2003) 97:2 Nw U L Rev 547.
  19. Anita Anand, “The Future of Poison Pills in Canada: Are Takeover Bid Reforms Needed?” (2015) 61:1 McGill LJ 1 at 15.



that discipline management: “voice” and “exit.”<sup>20</sup> On the one hand, voice involves the blockholder’s direct intervention in the firm, such as through letters to management, shareholder proposals, or the exercise of control or voting rights. Managers are compelled to act in the interests of shareholders (or at least those of the blockholder) out of fear of replacement. On the other hand, exit involves the sale of the blockholder’s shares. The sale can have the effect of driving down the firm’s share price, thereby punishing management *ex post*.<sup>21</sup> The threat of exit imposes an *ex ante* discipline on managers.

The blockholder’s role in monitoring management and the board is central to its decision to exercise voice or exit. The larger the blockholder, the more readily it can absorb the cost of monitoring; its sizeable position in the corporation gives it added incentive to ensure that management is held accountable.<sup>22</sup> The blockholder will intervene only when the costs of intervention are outweighed by the private benefits of doing so. Empirical evidence suggests that there is a positive, or at least a neutral, relationship between blockholders and firm value.<sup>23</sup> The presence of blockholders is associated with improved outcomes for shareholders on matters ranging from executive compensation to the facilitation of takeover bids.<sup>24</sup> The benefits provided by the blockholder’s monitoring flow through to other shareholders, who are able to free-ride on the blockholder’s activism.

Of course, blockholders’ incentives to monitor (including their willingness to internalize the costs of free-riding by other shareholders) vary with the size of their block.<sup>25</sup> Small investors can absorb only a negligible share of the

- 
20. See Albert O Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, Mass: Harvard University Press, 1970); Alex Edmans, “Blockholders and Corporate Governance” (2014) European Corporate Governance Institute - Finance Working Paper No 385, online: SSRN <papers.ssrn.com/sol3/papers.cfm?abstract\_id=2285781>; Brav, Dasgupta & Mathews, *supra* note 8. For a seminal theoretical paper on the role of blockholders in reducing agency costs, see Andrei Shleifer & Robert W Vishny, “Large Shareholders and Corporate Control” (1986) 94:3 J Political Econ 461.
  21. See Edmans, *supra* note 20 at 2-3.
  22. Lucian A Bebchuk & Robert J Jackson, Jr, “The Law and Economics of Blockholder Disclosure” (2012) 2 Harv Bus L Rev 39 at 47 [“Blockholder Disclosure”].
  23. See especially Henrik Cronqvist & Rüdiger Fahlenbrach, “Large Shareholders and Corporate Policies” (2009) 22:10 Rev Fin Studies 3941. For a general summary of the empirical literature relating to firm performance, see Edmans, *supra* note 20 at 35-38; Clifford G Holderness, “A Survey of Blockholders and Corporate Control” (2003) 9:1 Econ Pol’y Rev 51.
  24. For a summary of this literature, see Bebchuk, “Blockholder Disclosure,” *supra* note 23 at 48.
  25. Andrew Winton, “Limitation of Liability and the Ownership Structure of the Firm” (1993) 48:2 J Fin 487 at 493.

firm's risk, leaving them with insufficient incentives to monitor.<sup>26</sup> Put another way, only large blockholders will monitor firms with high monitoring costs.<sup>27</sup> Evidence further suggests that multiple small blockholders are not as effective in influencing corporate decision making as is a single large blockholder, partly because coordination costs between the small blockholders impede their ability to monitor the firm.<sup>28</sup> As such, a group of small shareholders that collectively owns a block of shares equivalent in size and rights to a block owned by a single large blockholder will likely produce less effective monitoring.<sup>29</sup> It is simply more difficult to organize behaviour among a group of dispersed shareholders,<sup>30</sup> especially when shareholders have heterogeneous preferences.<sup>31</sup>

In short, the presence of a single large blockholder can have a beneficial effect on the firm's governance by reducing agency costs through monitoring. At the same time, however, blocks of multiple small shareholders are less effective at fulfilling the role of the blockholder in a corporation. As will be discussed in Part II, below, under certain conditions wolf packs are able to overcome the coordination costs that impede blocks of small shareholders. In this way, they operate in a manner analogous to that of a single large blockholder.

---

26. *Ibid.*

27. Amrita Dhillon & Silvia Rossetto, "Corporate Control and Multiple Large Shareholders" (2009) University of Warwick Working Paper No 891 at 30-32.

28. See Winton, *supra* note 25.

29. John Armour, Henry Hansmann & Reinier Kraakman, "Agency Problems, Legal Strategies and Enforcement" (2009) Harvard John M Olin Discussion Paper Series No 644 at 3, online: <[www.law.harvard.edu/programs/olin\\_center/papers/pdf/Kraakman\\_644.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_644.pdf)>. Although the presence of a single, large blockholder tends to increase shareholder monitoring of management, it is worth bearing in mind the possibility that the blockholder will seek to extract private benefits of control to the detriment of other shareholders (as discussed more fully below, in Part II).

30. Andrew Kulpa, "The Wolf in Shareholder's Clothing: Hedge Fund Use of Cooperative Game Theory and Voting Structures to Exploit Corporate Control and Governance" (2005) 6 UC Davis Bus LJ 4.

31. Armour, Hansmann & Kraakman, *supra* note 29 at 3. It is worth noting, however, that the coordination issues that hinder shareholder intervention strategies actually make the threat of exit stronger, thereby allowing many small blockholders to have a positive impact on managerial discipline. See Alex Edmans & Gustavo Manso, "Governance Through Trading and Intervention: A Theory of Multiple Blockholders" (2011) 24:7 Rev Fin Stud 2395 (arguing that the threat of trading activity by multiple blockholders in the face of poor managerial performance disciplines management). Even so, wolf packs ostensibly form to intervene and agitate for change, not to passively invest and then exit.

## II. WOLF PACK BEHAVIOUR

In Part I, we argued that blockholders perform an important monitoring function when they are incentivized to do so (*i.e.*, when the private benefits of such monitoring outweigh its costs). In this Part, we argue that wolf packs are a type of blockholder and that they, too, perform an important monitoring function. We note that reliable empirical data on the incidence of wolf packs is challenging to obtain since ungrouped shareholders are not obliged to make disclosures in connection with their collective position.<sup>32</sup> We postulate, however, that a wolf pack will form only when it is able to overcome the monitoring costs and the coordination costs identified in Part I, above.

Two hypotheses explaining wolf pack formation dominate the nascent academic literature.<sup>33</sup> Under what we term an “explicit coordination model,” Coffee and Palia argue that a lead activist will recruit other investors to join the pack *before* filing the required disclosure (a Schedule 13D in the United States, equivalent to an early warning report in Canada).<sup>34</sup> Subsequent members of the pack are rewarded with a riskless arbitrage opportunity in return for their support of the lead activist’s agenda: The lead activist tips off the pack’s other members before filing its Schedule 13D, which is generally associated with a jump in the share price.<sup>35</sup> As such, before disclosure is made, the wolf pack is formed through the explicit coordination efforts of the lead activist. Bratton notes that although the purchase activity of subsequent members of the pack makes it more expensive for the lead activist to make further purchases in the target corporation, the fact that the lead activist is required to share its gains with other members of the pack does not inhibit the activist from assuming a lead position.<sup>36</sup> It is important to note that just as members of the wolf pack are careful to avoid “acting jointly or in concert” for the purposes of disclosure rules, they are also careful not to breach insider trading and tipping laws.<sup>37</sup>

Under an alternative hypothesis, which we term the “implicit coordination model,” Brav and others assert that wolf pack formation is driven by a coordination

---

32. Becht, *supra* note 2 at 9-10.

33. See also Wong, *supra* note 6.

34. Coffee & Palia, *supra* note 4 at 24-25, 28.

35. *Ibid* at 27-29.

36. William Bratton, “Hedge Funds and Governance Targets: Long-Term Results” (2010) University of Pennsylvania Institute for Law and Economics Research Paper No 10-17 at 1384, online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1677517](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677517)>.

37. In particular, each member of the wolf pack would be careful to avoid being classified as an “insider” or as in a “special relationship with the reporting issuer.”

game in which individual shareholders are incentivized to join without explicit coordination by a lead member.<sup>38</sup> Wolf packs arise spontaneously because investors generally monitor the same corporations at the same times. Each small independent investor on its own lacks sufficient incentive to monitor and intervene because the probability of a successful campaign is low and the expected benefits do not outweigh the costs. However, the entry of a large investor, whose position is conveyed to the other small investors through the filing of disclosure when it passes the 5 per cent ownership threshold, operates as a catalytic event that increases the expected probability of a successful intervention and in turn compels small investors to join the intervention and thus form a wolf pack. The rational self-interest of the members of the wolf pack is sufficient for the wolf pack to form on the basis of implicit coordination *after* the lead activist discloses its position to the market.

Neither of these models is entirely applicable to the study of wolf packs in Canada because both are predicated on US law and, in particular, the filing of a Schedule 13D, which is triggered at a 5 per cent ownership threshold. In Canada, shareholders are generally only required to disclose equity holdings in excess of 10 per cent.<sup>39</sup> Given that lead activists do not typically acquire a stake greater than 10 per cent in connection with their campaigns,<sup>40</sup> wolf packs in Canada can generally form without the disclosure of a lead activist's presence. Furthermore, there are additional reasons for a lead activist to remain below a 10 per cent ownership threshold in respect of a Canadian issuer.<sup>41</sup>

We believe that five unique conditions (either separately or together) can give rise to shareholder coordination in the form of a wolf pack and that in some sense these conditions undermine the formation of wolf packs in Canada because of the nature of capital markets in this country. The first condition, notable for its rarity in Canada, relates to the nature of the target corporation's shareholder base. If a corporation's shares are widely held, the formation of a wolf pack is more likely. In Canada, however, many public corporations are dominated by

---

38. Brav, Dasgupta & Mathews *supra* note 8.

39. *OSA*, *supra* note 9, s 143.1(7).

40. Coffee & Palia, *supra* note 4 at 24-25, 28.

41. For instance, crossing the 10 per cent ownership threshold requires the shareholder to immediately cease subsequent purchases in the issuer for a full business day and immediately file a disclosure report, and it will implicate insider trading and tipping laws based on the shareholder's "special relationship" with the issuer.

a controlling shareholder<sup>42</sup> who is often the founder or the founder's family.<sup>43</sup> Wolf packs, and activist interventions generally, are unlikely to be effective in controlled corporations since voting control of the corporation resides with the founder: Regardless of the size of the wolf pack's position, it will always be out-voted by the controlling shareholder (unless the controlling shareholder forms part of the wolf pack).<sup>44</sup> As a result, a proxy contest or the threat thereof may be an ineffective means of agitating for change in the corporation.

Second, in addition to a widely held corporation without a controlling shareholder, the presence of an institutional shareholder can facilitate wolf pack formation. The institution may or may not take on the role of lead activist. Regardless, it is sophisticated and will fulfill a monitoring function, a by-product of which is to allow subsequent members of the wolf pack to free-ride on its efforts. This is especially important in the context of the Canadian capital markets, where corporations' share ownership tends to be dominated by large institutional holders.<sup>45</sup> In some cases, pensions funds—which are not typically activists<sup>46</sup>—may join together with investors that are willing to take on an activist role within the corporation.<sup>47</sup>

Third, wolf packs, by definition, will have a lead that must bear the up-front costs of monitoring before convincing other shareholders to join. It is unlikely that the lead activist will begin a campaign for governance reform where any gains are likely to be modest; rather, it will likely act only when the promised gains are substantial, as in the case of a change of control. The lead activist is willing to bear these monitoring costs up front because the likelihood of a wolf pack's achieving at least one of its intended outcomes is significantly higher than

42. Bozec, Dia & Bozec, "Corporate Ownership," *supra* note 5 at 56.

43. Walid Ben-Amar & Paul André, "Separation of Ownership from Control and Acquiring Firm Performance: The Case of Family Ownership in Canada" (2006) 33:3 J Bus Fin & Accting 517 at 518.

44. For example, Pershing square's 2006 activist campaign in respect of Canadian Tire Corporation was halted in its tracks by the daughter of a co-founder of the company, who controlled 61 per cent of the company's voting shares through a dual-class structure. See Lori McLeod, "US Hedge Fund Kicks the Tire," *Financial Post* (4 July 2006) online: <[www.canadianhedgewatch.com/content/news/general/?id=817](http://www.canadianhedgewatch.com/content/news/general/?id=817)>.

45. For recent statistics on pension fund ownership of Canadian equities, see Vijay Jog & Jack Mintz, "Sovereign Wealth and Pension Funds Controlling Canadian Businesses: Tax-Policy Implications" (2013) 6:5 SPP Research Papers 1, online: University of Calgary School of Public Policy <<http://www.policyschool.ucalgary.ca/sites/default/files/research/jogmintz-pensionwealth.pdf>>.

46. John A Doukas, Chansong Kim & Christos Pantzalis, "Security Analysis, Agency Costs, and Company Characteristics" (2000) 56:6 Financial Analysts Journal 54.

47. *Re Magna International Inc* (2011), 34 OSCB 1290, 72 BLR (4th) 235.

that of an individual activist.<sup>48</sup> As a result, the expected benefits of monitoring rise relative to the costs.

We must remember that the lead activist's position will likely send a signal to other investors. By the time the leader contacts other shareholders, it will have fulfilled at least a portion of its self-imposed monitoring function, thereby allowing subsequent members of the wolf pack to free ride on its efforts. Because the institutional investors that tend to hold sizable positions in Canadian corporations are not generally activists, they may benefit from a lead activist who has borne the costs of monitoring up front.

As a result, wolf packs might be more likely to feature alliances between a hedge fund, as lead activist, and one or more institutional investors. For example, the Canadian Pension Plan Investment Board publicly supported William Ackman's activist campaign at CP Rail in 2012.<sup>49</sup> These alliances are understandable given the empirical research on wolf packs that suggests that lead activists may tip off other funds with which they have existing relationships.<sup>50</sup> In other words, and as a fourth condition, wolf packs will typically comprise repeat groups of shareholders, or at least the presence of a given member of the wolf pack will be associated with a particular group of shareholders that comprises the pack.

The alliances between members of the wolf pack are facilitated by a fifth condition, namely the current legal regime relating to shareholder coordination in respect of Canadian corporations. Shareholders can be incentivized to join a wolf pack because of the opportunity for riskless profit provided by the spike in share

---

48. Becht, *supra* note 2 at 23-24 (finding a 78 per cent success rate for wolf packs compared with a 46 per cent success rate for other activists).

49. Brent Jang & Jacquie McNish, "CPPIB backs Pershing Square in CP proxy row," *The Globe and Mail* (18 June 2012) online: <[www.theglobeandmail.com/globe-investor/cppib-backs-pershing-square-in-cp-proxy-row/article4106482](http://www.theglobeandmail.com/globe-investor/cppib-backs-pershing-square-in-cp-proxy-row/article4106482)>.

50. Wong, *supra* note 6. See also Anita Anand, "Proxy Battles in Canada: Can shareholder activists be long-term thinkers?" (25 March 2015), online: Canadian Investment Review <[www.investmentreview.com/analysis-research/proxy-battles-in-canada-6829](http://www.investmentreview.com/analysis-research/proxy-battles-in-canada-6829)>; Anita Anand, "Shareholder Activism," in PM Vasudev & Susan Watson, eds, *Global Capital Markets* [forthcoming in August 2017].

price that tends to follow the filing of an early warning report.<sup>51</sup> Even without filing the report, the lead activist can manufacture a comparable share price appreciation by notifying potential members of the wolf pack of its intentions to initiate a proxy contest or to agitate for a sale of the target.<sup>52</sup> Indeed, the threat of a proxy contest is perhaps more credible under Canadian securities laws than in other jurisdictions because the public broadcast exemption in Canadian laws allows a dissident shareholder to wage a proxy contest relatively inexpensively without the need to prepare and mail a proxy circular to other shareholders.<sup>53</sup> In addition, under the fifteen-shareholder proxy solicitation exemption, a dissident shareholder is permitted to solicit proxies from a limited number of shareholders without having to prepare and mail a dissident proxy circular.<sup>54</sup>

In the absence of the foregoing conditions, it may be too costly or impractical for a wolf pack to form. The first condition (or “non-condition”) relates to the nature of a corporation’s shareholder base: Corporations with controlling shareholders are not likely to be targeted by wolf packs. The second condition relates to the presence of large institutional shareholders, which can team with or support a lead activist’s agenda. The third condition relates to the lead activist: The leader will assume a monitoring function and will enable other institutions or smaller investors to free-ride, thereby potentially broadening the scope of

- 
51. In the United States, empirical studies have indicated that Schedule 13D disclosure results in a positive abnormal share price appreciation (even if only in the short term). As such, in respect of US companies, members of wolf packs that purchase shares before the lead member of the pack files its disclosure obtain a riskless profit. See Coffee & Palia, *supra* note 4 at 3, 28, 65. For other empirical effects of shareholder activism, see Lucian A Bebcuk, Alon Brav & Wei Jiang, “The Long-Term Effects of Hedge Fund Activism” (2015) 115 *Columbia L Rev* 1085. To the extent that public knowledge of an activist involvement with an issuer would result in a similar share price appreciation in Canada with the filing of an early warning report, members of a wolf pack have a similar opportunity at riskless profit when the lead member of the pack announces its position.
  52. Empirical work has shown that the announcement of a proxy contest is associated with positive abnormal share price appreciation. See Lisa F Borstadt & Thomas J Zwirlein, “The Efficient Monitoring Role of Proxy Contests: An Empirical Analysis of Post-Contest Control Changes and Firm Performance” (1992) 21:3 *Fin Mgmt* 22 at 23.
  53. This exemption allows a dissident shareholder to communicate with other shareholders through a website, press release, public broadcast, or public speech without having to prepare and mail a proxy circular. See Ontario Securities Commission, *National Instrument 51-102: Continuous Disclosure Obligation* (31 May 2013), 36 OSCB 2619, s 9.2 [NI 51-102].
  54. *Ibid*, s 9.2. This exemption contrasts with the relatively stricter shareholder communication and proxy rules in the United States. For a discussion of these rules, see Stephen Choi, “Proxy Issue Proposals: Impact of the 1992 SEC Proxy Reforms” (2010) UC Berkeley Public Law and Legal Theory Working Paper Series No 7, online: SSRN <papers.ssrn.com/sol3/papers.cfm?abstract\_id=219933>.

support for the wolf pack's intervention. Fourth, wolf packs are likely to feature alliances between repeat players. The final condition relates to the legal regime. Rules that lessen disclosure and alleviate the burden of filing proxy materials facilitate wolf pack formation. We now turn to the current legal regime and its necessary reforms.

### III. THE LEGAL REGIME APPLICABLE TO WOLF PACKS

There are no formal rules relating to wolf packs per se, but their coordinated nature implicates rules relating to proxy solicitation, early warning reporting and, possibly, insider trading. While wolf packs form loose networks of investors, they generally seek to accumulate a base of support without triggering the shareholder disclosure obligations that would arise if the group's aggregate position exceeded certain ownership thresholds. In this section, we examine competing considerations—including wolf packs' likely preferences—regarding the prevailing legal regime and consider whether changes to this regime are warranted.

#### A. THE UNDERLYING RATIONALE OF SECURITIES DISCLOSURE RULES

Generally speaking, wolf packs prefer less disclosure to more, likely because of the constraints that disclosure places on their behaviour.<sup>55</sup> A loose disclosure regime allows wolf packs to outflank corporate defences such as poison pills that are triggered when a shareholder or group of shareholders passes a prescribed ownership threshold. It is impossible to trigger a poison pill when the size of the wolf pack's position remains unknown. In addition, activists can leverage their superior information regarding the size of the pack when engaging the target board.<sup>56</sup> Furthermore, empirical studies have shown that Schedule 13D disclosure is associated with positive abnormal share price appreciation.<sup>57</sup> As such, it becomes more expensive for a shareholder to purchase shares in a corporation after filing this disclosure; efficient markets force large shareholders to buy at prices that reflect their own price impact after any disclosure is filed, which eats into their returns.<sup>58</sup>

---

55. See Wong, *supra* note 6 at 31 (“...timely and reliable disclosures constrain the ability of block holders to secure private benefits...”).

56. *Ibid* at 23-32.

57. Coffee & Palia, *supra* note 4 at 27, 30-31; Bebchuk, Brav & Jiang, “Long-Term Effects of Hedge Fund Activism,” *supra* note 51.

58. Coffee & Palia, *supra* note 4 at 27-28, 30-31.



On the one hand, a legal regime that makes it easier for wolf packs to form and requires less disclosure regarding their investments renders it more likely that the monitoring benefits engendered by large blockholders, discussed above in Part I, will materialize. On the other hand, many investors may find the mere presence or identity of a wolf pack to be material in making investment decisions. A lenient disclosure regime for wolf packs may allow them to accumulate de facto control blocks without paying other shareholders a control premium and may facilitate “creeping control” acquisitions. These concerns are relevant to (but distinct from) the so-called “short-termism” that hedge funds may exhibit when they are more committed to short-term value maximization than to managers’ long-term strategies for the corporation.

In the face of these competing arguments, is more or less disclosure regarding wolf pack formation appropriate? One rationale for securities disclosure laws relates to price efficiency:<sup>59</sup> Public issuers are mandated to disclose material information so that investors can determine prices for securities that accurately reflect all such information.<sup>60</sup> There is also a strand of literature that calls for mandatory disclosure on the basis that such disclosure reduces agency costs between managers and shareholders: Disclosure makes monitoring easier and decreases the likelihood that managers can use corporate assets for self-interested purposes at the expense of the corporation.<sup>61</sup>

The rationale for blockholder disclosure follows a similar logic. It is well-recognized that blockholders can extract private benefits of control, which can impose costs on other shareholders.<sup>62</sup> Blockholder non-disclosure can also facilitate “creeping control” acquisitions, as discussed above.<sup>63</sup> A regime requiring blockholders to disclose their respective positions protects against these risks and allows investors to take into account the presence of a wolf pack as a blockholder in valuing securities. It would also reduce the potential

---

59. For a discussion of the efficient markets hypothesis, see Eugene F Fama, “Efficient Capital Markets: A Review of Theory and Empirical Work” (1970) 25:2 J Fin 383.

60. For a general discussion of the relationship between disclosure and price efficiency, see Anita Anand, “Fairness at What Price? An Analysis of the Regulation of Going-Private Transactions in OSC Policy 9.1” (1998) 43 McGill LJ 115. For insight into the importance of price efficiency in public markets, see *ibid.*

61. Paul G Mahoney, “Mandatory Disclosure as a Solution to Agency Problems” (1995) 62:3 U Chicago L Rev 1047 at 1048.

62. Michael J Barclay & Clifford G Holderness, “Private Benefits from Control of Public Corporations” (1989) 25 J Fin Econ 371.

63. Coffee & Palia, *supra* note 4 at 31-36, 72.

costs associated with significant shareholders who exert undue influence on the corporation for private gain.

## B. WOLF PACK FORMATION AND DISCLOSURE RULES

Under Canadian securities law, disclosure rules affecting the formation and disclosure of wolf packs generally fall under the early warning reporting system, which prescribes disclosure rules for blockholders that may influence corporate control or direction.<sup>64</sup> As the Canadian Securities Administrators (CSA) explain:

Accumulations may be material information to the market even when not made to change or influence control of the issuer ... . Market participants may also be concerned about who has the ability to vote significant blocks, as these can affect the outcome of control transactions, the constitution of the issuer's board of directors and the approval of significant proposals or transactions. The mere identity and presence of an institutional shareholder may be material to some investors.<sup>65</sup>

Recently, the CSA have confirmed that the objectives of the early warning reporting system apply to proxy-related matters.<sup>66</sup> As such, the rationale for the early warning reporting system is tied to the perceived need to alert the market of impending or potential change of control transactions, including proxy contests.

Under the early warning system, shareholders who acquire more than 10 per cent of an issuer's outstanding securities must disclose their positions to the market in a promptly filed news release and early warning report, and must file additional disclosures upon any additional 2 per cent purchase of the issuer's securities.<sup>67</sup> Unlike the insider reporting regime, the early warning reporting system deems shares purchased by those who act jointly or in concert with the acquiror to have also been purchased by the acquiror, such that their collective ownership is aggregated for the purposes of determining whether the 10 per cent threshold has been crossed.<sup>68</sup> For instance, an acquiror with a 7 per cent stake

---

64. *Continental Precious Metals Inc v Singh*, 2012 ONSC 7122 at para 12 [*Commercial List*].

65. Canadian Securities Administrators, "CSA Notice and Request for Comment: Proposed Amendments" (13 July 2013), online: Ontario Securities Commission <[www.osc.gov.on.ca/en/SecuritiesLaw\\_mi\\_20130313\\_62-104\\_take-over-bids.htm](http://www.osc.gov.on.ca/en/SecuritiesLaw_mi_20130313_62-104_take-over-bids.htm)>.

66. Canadian Securities Administrators, "CSA Notice and Request for Comment: Proposed Amendments" (10 October 2014), online: Ontario Securities Commission <[www.osc.gov.on.ca/en/SecuritiesLaw\\_mi\\_20130313\\_62-104\\_take-over-bids.htm](http://www.osc.gov.on.ca/en/SecuritiesLaw_mi_20130313_62-104_take-over-bids.htm)> [ "2014 Notice" ].

67. Ontario Securities Commission, *National Instrument 62-103: The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (9 May 2016), ss 2.1-4.8, online: <[www.osc.gov.on.ca/documents/en/Securities-Category6/ni\\_20160509\\_62-103\\_early-warning-system-take-over-bids.pdf](http://www.osc.gov.on.ca/documents/en/Securities-Category6/ni_20160509_62-103_early-warning-system-take-over-bids.pdf)> [NI 62-103].

68. *Ibid.*

in a given issuer would be required to file an early warning report if it were acting jointly or in concert with another shareholder holding a 4 per cent stake. Determining whether parties are acting jointly or in concert is a question of fact,<sup>69</sup> and there is limited case law addressing the issue.<sup>70</sup> Of course, how courts (or the regulator, in the form of tribunal decisions and policy directives) interpret the breadth of this statutory language will have a significant impact on how wolf packs form and on the nature and timing of their disclosure obligations.

The rules relating to shareholder disclosure set out above expose a tension at the heart of wolf packs and related regulation. On the one hand, blockholder formation is valuable in imposing managerial discipline and reducing agency costs, the benefits of which flow to all shareholders. In this regard, rules that facilitate the formation of wolf packs—such as a higher 10 per cent disclosure threshold and a narrow reading of what it means “to act jointly and in concert” with another shareholder—are desirable. On the other hand, rules that permit wolf packs to organize without comprehensive disclosure can be unfair to shareholders who are unable to obtain and analyze material information about who exercises effective control of the companies in which they have chosen to invest. In light of the foregoing, what is the optimal regulatory regime to balance these competing aims?

Any response to this question likely begins with the mandate of the regulator, which has a legal duty to protect investors on a prospective and preventative basis

---

69. OSA, *supra* note 9, s 90.

70. See *e.g. Re Sears Canada* (2006), 35 OSCB 8781, 22 BLR (4th) 145; *Re Sterling Centrecorp Inc* (2007), 30 OSCB 6683, 39 BLR (4th) 263 [*Re Sterling Centrecorp*]. These decisions, and the others that interpret this statutory language, do so in the context of take-over bids, insider bids, and related party transactions. The OSC’s decision in *Re Sterling Centrecorp* is exemplary of the fact-specific nature of these decisions and the difficulty in applying them to wolf packs. The committee writes that:

[The] policy underlying the concept of identifying who is a “joint actor” ... is to ensure that all persons or companies who are effectively engaged in a common investment or purchase program are required to abide by the requirements of Ontario securities laws ... [and, further, that] determination of a joint actor relationship can be made if the facts establish that the parties in question played an integral role in planning, promoting and structuring the transaction to ensure its success beyond their customary role (*ibid* at para 102).

An added issue is that many decisions that address the concept of “acting jointly or in concert” do so with reference to the definition of “joint actor” under certain national and multilateral instruments relating to takeover bids. It is an open question whether decisions determining a “joint actor” characterization under takeover bid rules would apply to the determination of whether shareholders are “acting jointly or in concert” for the purposes of early warning reporting.

and can act in the public interest to do so.<sup>71</sup> Although the “public interest” is undefined in the *Ontario Securities Act (OSA)*, regulations, or regulatory policies, the Ontario Securities Commission (OSC) has suggested that it can apply the public interest power “where market conduct engages the animating principles” of the *OSA*.<sup>72</sup> These principles include timely, accurate, and efficient disclosure of information; restrictions on fraudulent and unfair market practices and procedures; and maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.<sup>73</sup> As the OSC has noted in prior decisions, a “sound financial disclosure system is fundamental to the operation of our capital markets.”<sup>74</sup> Even if no harm results from misleading disclosure, a finding of abuse can result if the public *could* have “made investment decisions based on [a false] impression.”<sup>75</sup> <sup>76 (find a better place for 75)</sup>

Wolf packs are effectively blockholders. Shareholders in wolf packs form de facto blocks to exert influence in the corporation, in much the same manner as a blockholder, but are able to avoid disclosure rules simply by preventing characterization of their behaviour as joint action. Thus, we believe that wolf packs should be regulated like blockholders. That is, they should be subject to early warning reporting when their collective interest rises above 10 per cent, just as a blockholder is subject to early warning reporting when its individual interest crosses that threshold. As the CSA has noted, “the mere identity and presence of an institutional shareholder may be material to some investors.”<sup>77</sup> Investors should not need to make decisions in the absence of material information such as the existence of a wolf pack. Although blockholders fulfill an important monitoring role in the corporation, the regulator has presumably already weighed this benefit against the need for investors to make investment decisions with access to material information regarding blockholders. If this policy choice has been made in respect of blockholders, the law’s treatment of wolf packs should be no different.

As is clear from the foregoing analysis, central to the analogy between blockholders and wolf packs is the concept of “acting jointly and in concert.” Interpretation of this statutory language dictates whether wolf packs will be

---

71. *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 SCR 132; *OSA*, *supra* note 9, s 127.

72. *Re Biovail Corp* (2010), 33 OCSB 8914 at para 382.

73. *OSA*, *supra* note 9, s 2.1(2).

74. *Re Standard Trustco* (1992), 15 OSCB 4322, 6 BLR (2d) 241.

75. *Ibid* [emphasis added].

76. *Ibid*.

77. Canadian Securities Administrators, “2014 Notice,” *supra* note 66.

subject to the same disclosure rules as blockholders: A narrow understanding of what qualifies as joint action allows individual members of the wolf pack to consider only their respective interests for the purposes of passing disclosure thresholds. For instance, in the US context, the Second Circuit held that three shareholders were not acting as a “group,” even though one shareholder “was a well-known raider and all three discussed amongst themselves how to improve the value of the target company.”<sup>78</sup> Narrow applications of disclosure rules, like the one favoured by the Second Circuit, highlight the risk that wolf packs might extract private benefits of control, as is open to a block holder, but without the attendant disclosure obligations to which blockholders are subject. For this reason, we believe that the concept of “acting jointly and in concert” should be interpreted broadly to cover a wide range of communication and behaviours associated with wolf pack formation. In particular, tipping by the lead member of the wolf pack to other investors regarding its plans in relation to the target should qualify as joint conduct. Securities regulators should at a minimum issue a policy statement clarifying the statutory language to specify this point.

Although courts and tribunals are afforded broad latitude with respect to the remedies they may impose upon a breach of securities regulation, the judicial and regulatory posture on this point has traditionally been one of restraint. As one court recently stated, “the surgery should be done with a scalpel and not a battle axe.”<sup>79</sup> In *Genesis v Smoothwater*, one of the few cases dealing with the scope of behaviour that qualifies as “acting jointly or in concert” in the context of a proposed proxy contest, the court refused to bar the wolf pack’s members from voting their shares despite holding that the wolf pack breached its disclosure obligations; instead, the court ordered the wolf pack to make appropriate disclosures regarding its joint action and delayed the annual general meeting of the shareholders until the shareholders had adequate time to review such disclosures.<sup>80</sup> Future decisions should not accord wolf packs special status in the “acting jointly or in concert” analysis, especially in light of the potentially weak remedies imposed on them for non-compliance.<sup>81</sup>

Of course, underlying the foregoing discussion of the relationship between disclosure and wolf packs is a potential relationship between wolf pack formation

---

78. See *Hallwood Realty Partners LP v Gotham Partners, LP*, 286 F.3d 613 (2d Cir 2002) and Coffee & Palia, *supra* note 4 at 39.

79. *820099 Ontario Inc v Harold E Ballard Ltd* (1992), 3 BLR (2d) 113 (Ont Gen Div), 25 ACWS (3d) 853, cited in *Genesis Land Development Corp v Smoothwater Capital Corp*, 2013 ABQB 509 at para 69, 233 ACWS (3d) 70 [*Genesis v Smoothwater*].

80. *Ibid* at paras 70-71.

81. Coffee & Palia, *supra* note 4 at 42.

and insider trading and tipping. The chance for riskless profit engendered by wolf packs—based on the relationships among specific institutional shareholders—seems to run contrary to the policy animating insider trading and tipping laws, which is to protect “investor confidence in the marketplace as a level playing field.”<sup>82</sup> If the rules make tipping illegal by persons or companies contemplating takeover bids<sup>83</sup> because of the premium such bids typically command, and the announcement of proxy contests usually results in a similar share price appreciation,<sup>84</sup> then we can legitimately question why one type of behaviour is captured by tipping rules while the other is not. Securities regulators should consider whether tipping rules should apply to persons or companies contemplating proxy contests, which are just another form of change of control.

#### IV. CONCLUSION

It is challenging to ascertain precise figures on the incidence of wolf packs.<sup>85</sup> Nevertheless, this article represents a first step towards understanding the circumstances that engender their formation and the motivations that drive the behaviour of their members. As the law currently stands, wolf packs assume the role of blockholders in the corporation but without the disclosure obligations that blockholders are required to observe. While a legal regime that facilitates wolf pack formation (*e.g.*, via a narrow conception of “acting jointly or in concert”) may make it easier for shareholders to monitor management and thus reduce agency costs in changes of control, these benefits should not come at the price of deficient disclosure. If a sound disclosure system is the cornerstone of securities regulation, then novel tactics aimed at circumventing that system should be more comprehensively regulated, especially when the system already captures analogous behaviour.

---

82. *Disclosure Standards*, OSC NP 51-201, (2013) 25 OSCB 4492 (31 May 2013).

83. See *OSA*, *supra* note 9, s 76(3).

84. And, in any event, both would be expected to have significant impacts on the value of a given company's securities.

85. Thomas W Briggs, “Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis” (2007) 32 *J Corp L* 681 at 698.