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ONE-ON-ONE INTERVIEW

SHAREHOLDER ACTIVISM IN CANADA

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Jonathan Feldman is a partner at Goodmans, where he heads one of the firm's business law groups. His practice focuses on corporate and securities law with an emphasis on mergers and acquisitions. He has extensive experience acting for buyers and sellers in a wide range of industries for private and public companies. He has been involved in a number of contested shareholder matters, including proxy contests representing both dissident shareholders and boards of directors.

R&C: What do you consider to be some of the key trends defining shareholder activism in Canada over the last 12 months or so?

Feldman: The Canadian market has seen a bit of a decline in 'all out proxy battles' as compared to previous years. This trend can, at least in part, be attributed to the strong M&A market that we have experienced during this period. We have also seen rising activism in the M&A space, both in terms of instigating transactions and in the use of 'bumpitrage' strategies, most recently by Catalyst in connection with the Hudsons Bay go-private transaction. Another key trend is the growing movement among boards, including blue chip boards, to be 'activist ready'. As a result, boards are assembling teams of experts in advance of any actual activist threat in order to ensure they are ready if and when an activist does show up. We have seen exponential growth in activist preparedness strategies over the last 12 months, which is a function of boards recognising the power and prevalence of these players in the Canadian market.

R&C: What factors are driving activist campaigns in Canada?

Feldman: There continues to be interest in the mining space generally, particularly the gold sector. Much of what drives this activity is the view of shareholders that these companies continue to underperform, in large part as a result of incompetent management and disengaged boards.

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R&C: Could you highlight any particular examples of shareholder activism which have resulted in board-level resignations or strategy changes? What lessons can companies in Canada learn from the way these scenarios played out?

Feldman: One of the most contentious situations over the last 12 months was between Aimia Inc., a Montreal-based, TSX-listed loyalty management services company and its shareholders. In January

2019, Aimia completed its sale of its signature Aeroplan loyalty programme to Air Canada. Some of the reasons for shareholder discontent was that Aimia had lost significant value over the past five years – about 80 percent of its value since 2014, with 50 percent of this decline occurring since the end of 2016 – and its share price had fallen from approximately $17.40 in November 2014 to around $3.40 as of September 2019. The business had not been profitable for 15 years. As a result of this discontent, in September 2019, a group of Aimia shareholders, including Charles Frischer, requisitioned a special meeting of shareholders to replace four members of the Aimia board. Specifically, the requisitioning shareholders requested that the four longest-serving Aimia board members – Thomas Gardner, Robert Kreidler, William McEwan and Jeremy Rabe, who had overseen significant losses since 2016 – be replaced with four new independent directors with significant capital allocation, public company, financial and legal experience. The requisitioning shareholders also sought a mandate that the new board revisit the capital allocation of the company, to address the issue regarding inconsistent profit generation from loyalty assets over the past 15 years. In the end, the parties settled, agreeing to establish an ad hoc nominating committee to facilitate the removal and replacement of the board at the 2020 AGM. At this moment we are waiting to see how the implementation of this plan materialises following the AGM.

R&C: To what extent do shareholder laws in Canada serve to facilitate activism and make activist campaigns more likely to succeed? Are any notable changes on the horizon?

Feldman: Canada continues to be the most activist-friendly jurisdiction in the world. The ability of a 5 percent shareholder to requisition a special meeting, the absence of staggered boards on TSX-listed companies and the 10 percent disclosure threshold under our early warning system, as opposed to 5 percent under 13D, are just some key examples. Case law has also evolved over the last few years as innovations in the marketplace arise. For example, five years ago virtually no companies had advance notice by-laws in place. Now it is rare that a company does not. One of the key developments in this area is the clarification from courts that advance notice bylaws are used to avoid ambushes by shareholders at shareholder meetings and should be used as a 'shield not a sword'. So, unlike in Delaware, for instance, where companies have been successful in thwarting activists from nominating directors as a result of them imposing unreasonable supplementary information requests – that have been upheld by Delaware courts – this

approach would likely fail as an improper defence tactic if tried in Canada.

R&C: Do you believe continuing shareholder activism is likely to transform Canadian corporate culture, enhance corporate governance and promote minority shareholder rights?

Feldman: There is no question that shareholder activism has already changed the landscape in a significant way. The most important activist defence that a board can undertake is gaining a thorough understanding of its shareholder base. This knowledge refers to both the composition of the base itself and more importantly, in what has become a cliché, ensuring proper shareholder engagement is happening. The rise of activism has led to a rise of shareholder engagement, which can only enhance governance. Generally speaking, boards have become much more aware of what their shareholders are thinking and developing strategies to incorporate this input. In the landmark 2008 *BCE* decision, the Supreme Court of Canada made it very clear that in exercising their fiduciary duties, directors must always do what is in the best interest of the corporation but in doing so must consider the interests of all of the corporation's stakeholders. The rise of shareholder engagement is a reflection of this fundamental requirement of directors in Canadian companies.

R&C: What essential advice would you offer to Canadian companies on priming their defences against potential shareholder actions?

Feldman: It is fair to say that no company, no matter what size, is immune from an activist threat. For example, even dual class share companies, such as controlled companies where there is no possibility that the founder and its team can be removed, are aware that shareholders can make noise through shareholder proposals, 'vote no' campaigns and the use of various solicitation techniques. As such, all companies need to continue taking the activist threat seriously and need to 'think like activists' in this process. It means devoting time and resources to understanding vulnerabilities and taking proactive steps to address them before someone else does it for them. R&C