Goodmans LLP Update

Corporate Securities Law

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Ontario Court Provides Guidance on Advance Notice Policies

A recent decision of the Ontario Superior Court of Justice (the "**Court**") provides important guidance on the drafting and interpretation of advance notice policies and by-laws, which have become widely used by public companies and have featured prominently in recent proxy contests.

Background

In *Orange Capital, LLC v. Partners Real Estate Investment Trust*, Orange Capital, LLC ("**Orange**"), a New York-based investment firm owning units in Partners REIT (the "**REIT**"), an issuer listed on the Toronto Stock Exchange, challenged the REIT's decision not to accept Orange's nominees for election to the board of trustees at a regularly scheduled meeting of unitholders. In the REIT's view, Orange had not complied with the requirements of the REIT's advance notice policy (the "**Policy**").

The key facts were as follows:

- Since November 2013, Orange had been attempting, unsuccessfully, to acquire control of, or influence over, the REIT.
- On April 21, 2014, the REIT provided notice of its annual and special meeting of unitholders to be held on June 26, 2014.
- Pursuant to the Policy, nominations for trustees were required to be made not less than 30 and not more than 65 days before the annual meeting (i.e. between April 22, 2014 and May 27, 2014).
- On May 28, 2014, Orange announced that it intended to nominate trustees for election at the upcoming unitholder meeting.
- On May 29, 2014, the REIT postponed the unitholder meeting - for reasons unrelated to Orange's announcement - from June 26, 2014 until July 15, 2014.
- On June 6, 2014, Orange provided formal notice of its nominees to the REIT's board.
- On June 10, 2014, the REIT issued a press release announcing that, among other things, Orange had failed to meet the deadline under the Policy to nominate trustees and therefore could not nominate trustees at the upcoming unitholder meeting.

Issue

The Court's analysis of the issues focused primarily on a provision in the Policy stating that "in no event shall any adjournment or postponement of a meeting of unit holders or the announcement thereof commence a new time period for the giving of [notice]" (the "**Adjournment Provision**").

The REIT argued that the nomination window should be established based on the originally scheduled meeting date, and a new nomination window should not be opened if the originally scheduled meeting was adjourned or postponed.

Orange argued that, among other things, the nomination window under the Policy should be established based on the *postponed meeting date*, not the *originally scheduled meeting date*. Orange asserted that the purpose of the Adjournment Provision was to ensure that once a unitholder provided notice of its nominees in compliance with the Policy, it would not be required to provide a further notice if the meeting was postponed or adjourned.

Court Decision

In finding that Orange's nominations were made in a timely manner in compliance with the Policy, the Court noted that:

i. the language of the Policy defined the nomination window relative to the "date of the annual meeting" (not the *originally scheduled meeting date*); and
ii. this interpretation was most consistent with the framework of the Policy, and consistent with the Policy's purpose, which is to provide management and unitholders with sufficient notice of a potential proxy contest in advance of the meeting.

The Court approached the interpretation of the Policy applying generally accepted principles of contractual interpretation that, among other things, accord "with sound commercial principles and good business sense, and that avoid a commercial absurdity." The Court also adopted a principle article in the Delaware courts that "if the language of a corporate by-law is found to be ambiguous, 'doubt is resolved in favor of the stockholders' electoral rights'."

Implications

While Canadian courts generally have upheld advance notice policies and by-laws as a means of enhancing informed securityholder choice and facilitating orderly and efficient meetings, the *Orange* decision suggests that the Court will look at the language and use of such policies and by-laws critically when they may impact securityholder voting rights. Significantly, the Court noted in its decision that advance notice policies and by-laws are not to be used as a sword by management to exclude nominations in proxy contests. Rather, they should be used as a shield to protect securityholders (and management) from ambush.

In light of the Court's conclusions, we would expect that:

- companies may re-examine the terms of their advance notice policies or by-laws to address any potential ambiguities, and will consider carefully the consequences under such policies or by-laws of any steps proposed to be taken in connection with shareholder meetings (including, but not limited to, adjournments and postponements); and
- activist investors may attempt to use some of the Court's themes - as to the resolution of doubt in favour of securityholder voting rights and the use of advance notice policies and by-laws as "shields" and not as "swords" - in formulating and implementing their strategies.

Please contact any member of our Corporate Securities Group should you wish to discuss the implications of this decision.

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