

Securities Insights:

Legal Insights into Rogers Family Power Struggle

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What began with a pocket dial has turned into one of the largest-scale family feuds in Canadian corporate history. This Friday, November 5, 2021, the B.C. Supreme Court is expected to issue a decision on whether Edward Rogers is the legitimate chair of the Board of Rogers Communications Inc. (“RCI”).

Despite striking a potential \$26 billion deal in March 2021 to acquire Shaw Communications Inc., all media attention is focused on the Rogers family’s internal struggle for control of RCI.

Background

RCI, a British Columbia company, was originally controlled by RCI’s founder, Edward S. Rogers (“Ted”), through his ownership of voting shares of a private holding company.

In 2008, following Ted’s death, the voting shares were passed to the Rogers Control Trust with Ted’s family as beneficiaries. Currently, Ted’s son, Edward Rogers (“Edward”), is the Rogers Control Trust Chair. As of February 2021, the Rogers Control Trust holds approximately 97.52% of the outstanding Class A Voting Shares and approximately 9.89% of the Class B Non-Voting Shares of RCI.

Recent Events

In September 2021, Edward was concerned with Chief Executive Officer Joe Natale’s performance. He plotted to replace him with RCI’s then Chief Financial Officer Tony Staffieri. However, after Natale caught wind of the plot through a pocket dial from Edward, the Board of RCI voted to affirm Natale’s position as Chief Executive Officer on September 26, 2021. Staffieri left RCI three days later.

After stopping Edward’s attempt to remove Natale as CEO, Edward’s mother, Loretta Rogers; his sisters, Martha Rogers and Melinda Rogers-Hixon; and the other directors of RCI voted to remove Edward as chair of the Board of RCI and replace him with John MacDonald on October 21, 2021.

With the voting control conferred upon Edward as the Rogers Control Trust Chair, Edward responded by replacing five of the 14 directors on RCI's Board with his allies with a written resolution. On October 24, 2021, this reconstituted Board re-instated Edward as chair. However, Edward's mother, his sisters, and RCI itself maintain that the newly-formed Board under Edward is illegitimate and that the previous Board, under MacDonald, remains in place.

The B.C. Supreme Court must now decide whether Edward had the power as the Rogers Control Trust Chair to appoint directors unilaterally without a shareholders meeting.

The Law

The British Columbia *Business Corporations Act* ("BCA") and RCI's Articles ("Articles") dictate how RCI may remove and replace its directors.

Section 128(3) of the BCA provides that a corporation may remove a director before the expiration of the director's term of office either by

- a. a special resolution (i.e., a special majority of at least 2/3 of votes cast by voting shareholders), or
- b. any resolution or method specified in the company's articles.

Section 3.4 of RCI's Articles provides that RCI shareholders may by ordinary resolution (i.e., a simple majority or 50%+1) remove any director from office. The vacancy created by such removal may be filled at the same meeting, failing which it may be filled by the directors.

Edward argued in the B.C. Supreme Court that, because he controls approximately 97.52% of RCI's outstanding Class A Voting Shares in his role as Rogers Control Trust Chair, his actions satisfied the conditions of an ordinary resolution to remove the directors of RCI in accordance with section 3.4 of RCI's Articles. Edward's mother, sisters, and RCI argued that an "ordinary resolution" within the meaning of RCI's Articles and the BCA requires a meeting where all shareholders holding voting shares have a right to participate.

Subsection 1(1) of the BCA defines "ordinary resolution" as a resolution

- a. passed at a general meeting by a simple majority of the votes cast by shareholders voting shares that carry the right to vote at general meetings, or
- b. passed, after being submitted to all of the shareholders holding shares that carry the right to vote at general meetings, by being consented to in writing by shareholders holding shares that carry the right to vote at general meetings who, in the aggregate, hold shares carrying at least a special majority of the votes entitled to be cast on the resolution.

Because Edward acted unilaterally without convening a shareholders meeting, his decision to replace the directors of RCI may only constitute an ordinary resolution under paragraph (b) of the

above definition, which requires that the resolution be submitted to all of the shareholders holding voting shares. The B.C. Supreme Court may consider that this criteria was not met because 2.48% of the voting shares of RCI are not held by the Rogers Control Trust and Edward's resolution to remove the directors was not submitted to these holders. Moreover, section 3.4 of RCI's Articles states that any vacancy in RCI's Board created by an ordinary resolution to remove a director should be filled "at the same meeting," which may indicate to the court that RCI intended its directors to only be removable at a meeting of shareholders.

All Eyes on Friday

There is no clear answer in RCI's Articles or the BCA as to whether Edward's resolution, as the Rogers Control Trust Chair, to appoint directors without a shareholders meeting was legitimate. The B.C. Supreme Court's decision will hinge on various contextual factors put forward by the parties to aid its interpretation of the BCA and RCI's Articles. Edward's authority is also subject to the obligations imposed on the Rogers Control Trust Chair under Ted's estate arrangements, which are not publicly available in full.

The B.C. Supreme Court will likely not make a decision in favour of Edward lightly. Legitimizing Edward's actions may be seen as circumventing the BCA's default mode of ordinary resolution and its emphasis on shareholder participation rights. It could have a weakening effect on Canadian corporate governance practices, particularly for public companies. On the other hand, voting shareholders control corporations, and with 97.52% of the voting shares of RCI, little is stopping Edward from exercising his control at shareholders meetings going forward. Nevertheless, shareholders meetings require notice and disclosure to shareholders, including sufficient detail concerning the proposed changes so that shareholders are given an opportunity to make an informed decision.

The irony behind the dispute is the heightened significance that the Rogers family has attached to the role of chair of RCI's Board. The chair of a board of directors generally takes a passive leadership role, with a focus on enforcing designated company rules and preserving and maintaining order at directors meetings.

As Friday approaches, public attention on the Rogers family feud will only heighten. In the meantime the Board of Canada's telecommunications giant remains without a clear chair.

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