Dual-class share structure issues in the spotlight in Rogers battle

November 30, 2021

Introduction

Rogers Communications Inc. (RCI) is a public telecommunications and media company with a dual-class share structure comprised of Class A voting shares and Class B non-voting shares. RCI's Class A and B shares are traded on the Toronto Stock Exchange (TSX) and its Class B shares are traded on the New York Stock Exchange.

On November 5, 2021, the Supreme Court of British Columbia upheld the validity of a written shareholder consent resolution (the Consent Resolution) to remove and replace five independent directors of RCI in the absence of a shareholder meeting. Rogers v. Rogers Communications Inc. 2021 BCSC 2184 demonstrates that British Columbia courts will give effect to a consent resolution executed by a holder or holders of sufficient voting shares to replace directors of a public company, even if doing so would seem inconsistent with current corporate governance trends and concepts of shareholder democracy.

Background

The Rogers Control Trust (the RCT) is the controlling shareholder of RCI and, either directly or through private Rogers family companies controlled by the RCT, beneficially owns 97.5 per cent of the issued and outstanding Class A voting shares. Pursuant to the governing documents of the RCT, Edward Rogers, as the Control Trust Chair, is able to direct the voting of the RCT's Class A voting shares at his discretion, unless the RCT advisory committee acts to constrain or replace him with a two-thirds vote by the members of the RCT advisory committee.

In October 2021, a fundamental disagreement arose between the board of directors of RCI (the Board) and Edward Rogers, the Chair of the Board, over the potential termination of RCI's CEO, Joe Natale. As a result of this disagreement, on October 21, 2021, Edward Rogers was removed as chair by the Board – the composition of which included Mr. Rogers' mother, Loretta Rogers, and his sisters, Martha Rogers and Melinda Rogers-Hixon. The next day, Edward Rogers sought to unilaterally remove and replace five independent directors of the Board via the Consent Resolution, using the

voting power afforded to him as the Control Trust Chair. RCI took the position that the Consent Resolution was invalid and the composition of the Board remained unchanged. Edward Rogers then filed a petition with the court seeking a declaration that the Consent Resolution was valid and effective.

Decision

In determining the validity and effectiveness of the Consent Resolution, the court considered the provisions of both the articles of RCI (the Articles) and the Business Corporations Act (British Columbia) (the Act). The court adopted a largely black-letter analysis, approaching the wording of the Articles and Act as a whole in their grammatical and ordinary sense harmoniously with the scheme and objects of the Act and the intention of the legislature. The ordinary meaning of the words was a dominant consideration. In particular, the court placed considerable emphasis on a unique provision of the Act, s. 180, which does not appear in other federal or provincial corporate statutes. Section 180 of the Act deems a consent resolution:

> "(a) to be a proceeding at a meeting of … shareholders, and
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> (b) to be as valid and effective as if it had been passed at a meeting of shareholders that satisfies all the requirements of this Act and the regulations, and all the requirements of the memorandum and articles of the company, relating to meetings of shareholders."

Applying these principles, the court concluded that both the Articles and the Act expressly permitted the removal and replacement of directors by the Consent Resolution, since it was:

> (i) consented to in writing by shareholders holding at least two-thirds of the Class A shares that carried the right to vote; and
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> (ii) properly submitted to all Class A shareholders carrying the right to vote. Therefore, the court concluded that the five independent directors were validly removed and replaced, despite the lack of a formal shareholder meeting.

The court reached its decision, notwithstanding considerable evidence introduced by RCI that "surrounding circumstances" required the court to resolve any minor ambiguities in the Articles and the Act in favour of minority shareholder protection – in this case, requiring a shareholders' meeting. Such evidence included:

- a personal and confidential "Memorandum of Wishes" (MOW) to the RTC advisory committee, executed in September 2008 by RCI's founder, the late Ted Rogers, which "somewhat presciently" in the words of the court, contemplated a potential situation where the majority of the Board is in conflict with the interests of the Rogers family, as represented by the Control Trust Chair. In those circumstances, the MOW stated that it was Ted Rogers' expectation that the Control Trust Chair would run the "public gauntlet" of calling a shareholder meeting to replace the RCI directors who were opposed;
- expert opinion that the process under the Consent Resolution did not conform to "best corporate practices," due to a lack of transparency and accountability and

the failure to disclosure corporate information which otherwise would be provided in connection with a shareholders' meeting;
- RCI's many public statements proclaiming its commitment and adherence to "good" or "sound" corporate governance, including reference to its nominating committee (a standing committee of the Board) whose mandate is to identify candidates to serve on the Board who may be "either elected by shareholders at a meeting or appointed by the Board";
- RCI's many public statements referring to its directors as being "elected" and that its board includes "independent directors";
- RCI's adoption of a "majority voting" policy, in accordance with TSX requirements;
- the absence of any explicit public statement by RCI that its controlling shareholder is able to remove and replace directors by a Consent Resolution and without convening a shareholder meeting;
- expert opinion that the use of the Consent Resolution was "unique and unparalleled" in relation to the governance of other large Canadian public companies; and
- RTC having never previously exercised its right to vote by way of a Consent Resolution.

In reaching its decision, the court determined that evidence related to the "surrounding circumstances" was not helpful to the fundamental issue before it, as much of this evidence post-dated the making of RCI's Articles in 2004. The court stressed that evidence respecting "surrounding circumstances" must never be allowed to change or overrule the plain meaning of the words being judicially interpreted.

Comment

The Supreme Court of British Columbia's decision in *Rogers v. Rogers Communications Inc*. provides a valuable lesson for investors in public companies with dual-class or similar share ownership structures. Notwithstanding an issuer's public statements committing to good corporate governance, British Columbia courts are likely to interpret the rights associated with classes of voting (or multiple-voting) shares on a black-letter basis, even if it would seemingly go against current corporate governance trends and concepts of shareholder democracy (or, indeed, even the explicit wishes of the founder who established the dual-class share structure in the first place). Ultimately, the holder or holders of voting control will be able to unilaterally determine the make-up of the board.

The decision also re-affirms that British Columbia and the Act remain the most controlling shareholder-friendly jurisdiction and corporate legislation for dual-class and similar ownership structures in Canada.

It is important to note that the use of written Consent Resolutions to remove and replace directors in the absence of a shareholders' meeting is, in practice, limited to closely controlled private corporations or public companies with dual-class or similar share structures where voting control is not widely held. Obtaining written consent resolutions from a super-majority of shareholders in a widely-held public enterprise is generally impractical, as a logistical matter. The ability to rely upon consent resolutions may also be different in jurisdictions other than British Columbia, where the governing corporate

statutes do not have the unique provisions of the Act concerning the validity and effectiveness of consent resolutions.

Overall, investors should approach and price their investment in companies with dual-class or similar share ownership structures with full awareness that governance and the process for electing directors under such structures are fundamentally different than in most public companies in which voting shares are widely held. The decision in *Rogers v. Rogers Communications Inc.* serves as a reminder that independent directors and senior officers of these issuers effectively serve at the discretion of the controlling shareholder.

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