Cassels

Critics Call for Regulation of Dual-Class Shares in the Wake of the Recent Rogers Family Saga

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On Friday, November 5, 2021, the British Columbia Supreme Court released its decision in *Rogers v. Rogers Communications Inc.*, the hotly contested and highly public dispute between members of the Rogers family for control over the public telecommunications and media giant, Rogers Communications Inc. (RCI).[1] The high-profile dispute has reinvigorated the debate over dual-class share structures in Canadian public companies where, as is the case with RCI, publicly traded shares maintain no voting rights. Investor groups, academics, and journalists have since raised questions about shareholder rights, good corporate governance, and the need for further regulation in Canadian capital markets.

Background and Decision

Edward Rogers (Edward) was chair of the board of RCI until October 21, 2021, when other members of the board resolved to remove him as chair in the midst of a dispute between Edward and the company's CEO and President, Joe Natale. In the days that followed, Edward used his power as chair of the Rogers Control Trust – a voting trust controlling 97.5% of the company's voting shares, which was established by his father in 2007 for the benefit of the Rogers family and as a means to maintain control of RCI – to reinstate himself as chair and remove five members of the board, replacing them by way of a consent resolution initiated without a shareholder vote. A public "war of words" between the Rogers family and the two "duelling" boards followed, resulting in significant media attention and speculation.

Edward subsequently brought a petition before the BC Supreme Court under the BC *Business Corporations Act*, seeking a declaration that the consent resolution that he initiated was valid and effective and confirming his new composition of the RCI board.

The Court granted Edward's petition, finding that BC's corporate statute clearly provides that anyone with two-thirds control of voting shares can add or remove directors through a simple consent resolution, without the need for a full shareholder meeting or vote. The company argued that Edward did not follow proper protocol by replacing members of the board unilaterally and had silenced the wishes of non-voting shareholders. The company further argued that this was not in keeping with "proper governance for a significant Canadian publicly traded company". Nevertheless, the Court concluded that it was not necessary for the non-voting shareholders to participate in the process and that they were not entitled to attend a meeting of shareholders to vote on the resolution. Although the Court acknowledged that the "family squabbles" of the Rogers family provided an "interesting backdrop" to the dispute, the Court declined to comment further on the in-fighting, noting that it was of little assistance in determining the narrow legal issue before the Court.

The members of the Rogers family who opposed the petition denounced the ruling, stating that it "…represents a black eye for good governance and shareholder rights and sets a dangerous new precedent for Canada's capital markets by allowing the independent directors of a public company to be removed with the stroke of a pen." RCI has since announced that it will not appeal the decision to the BC Court of Appeal.

Looking Ahead

The dispute among the Rogers family has renewed calls for regulatory changes to, or even the elimination entirely of, dual-class shares from Canadian capital markets. As the Court in *Rogers* acknowledged, the internal power struggle that resulted from the unilateral changes to the RCI board paralyzed the governance of the public company and resulted in significant and negative consequences in the public markets – including the loss of RCI share value, driven at least in part by uncertainty over the corporate control and direction of the company.

Critics of dual-class share structures argue that the governance structure is no longer in keeping with modern Canadian best corporate governance practises for large public companies and violates principles of fairness and accountability, on which capital markets depend. Critics further argue that the creation of sustainable long-term value for public companies requires factoring the interests of all corporate stakeholders, particularly where non-voting class shares make up a substantial percentage of a company's publicly traded shares. Advocates for change have suggested various reforms, include requiring a vote of all classes of shareholders to approve corporate fundamental changes, or providing for sunset provisions on dual-class share structures, either making the separation in share classes dissolve after a certain period of time or after certain key events, such as the death of a company's founder. Alternatively, companies could be required to subject the dual-class structure itself to shareholder approval by way of a periodic vote by shareholders of all classes.

Any such change could have significant implications for Canadian capital markets, as many large Canadian public companies continue to use dual-class share structures, including Shaw Communications Inc., Fairfax Financial Holdings Ltd., Bombardier Inc., Canadian Tire Corp. Ltd., and others. Changes in regulation of the share structure could also have significant implications for new public companies, as capital markets may not be as supportive of IPOs for companies with dual-class share structures, and those companies may not be as successful as a result of the problems exposed by the recent Rogers family saga.

[1] *Rogers v. Rogers Communications Inc.*, 2021 BCSC 2184 [*Rogers*].
