

CANADA / JUDGMENT

Rogers v. Rogers Communications Inc.

2021 BCSC 2184

COURT

Supreme Court of British Columbia

DECIDED

5 November 2021

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2021 BCSC 2184 Rogers v. Rogers Communications Inc.,

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rogers v. Rogers Communications Inc.,

2021 BCSC 2184

Date: 20211105

Docket: S219325

Registry: Vancouver

Between:

Edward Rogers

Petitioner

And

Rogers Communications Inc.

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 91 on November 10, 2021.

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioner:

J. K. McEwan, Q.C.

E. A. Kirkpatrick

W. E. Stransky

J. C. Lisus

C. Smith

M. R. Law

Counsel for the Respondent:

S. R. Schachter, Q.C.

J. K. Lockhart

D. D. Conklin

Place and Date of Hearing:

Vancouver, B.C.

November 1, 2021

Place and Date of Judgment:

Vancouver, B.C.

November 5, 2021

Table of Contents

I. INTRODUCTION.. 3

II. RELIEF SOUGHT. 4

III. THE EVIDENCE. 4

IV. BACKGROUND FACTS. 6

A. The Parties. 6

B. Shaw Communications Inc. 8

C. September 2021 Board Meetings. 10

D. October 2021 Events. 13

E. The Consent Resolution. 14

F. Post-Consent Resolution Reactions. 16

V. ISSUES. 17

VI. INTERPRETATION PRINCIPLES. 18

VII. "SURROUNDING CIRCUMSTANCES". 20

VIII. IS THE CONSENT RESOLUTION VALID AND EFFECTIVE?. 28

A. Background to the Act 29

B. What do the Articles Require to Remove/Replace Directors?. 30

C. Was the Consent Resolution "submitted" to Shareholders?. 43

1. Who is entitled to "submit" the notice to shareholders?. 46
2. Who is entitled to receive the Consent Resolution?. 47

D. Summary and Conclusions. 49

IX. RCI COMPLIANCE REgarding CORPORATE Records. 49

X. DISPOSITION.. 50

I. INTRODUCTION

- [1] The respondent, Rogers Communications Inc. ("RCI"), is a large public telecommunications and media company operating throughout Canada.
- [2] Although RCI is a public company, majority control is held by the Rogers family, formerly headed by Ted Rogers, who founded RCI.
- [3] Currently, factions within RCI's Board of Directors remain deadlocked in terms of the composition of the Board.
- [4] One faction is led by the petitioner, Edward Rogers, who asserts that he has successfully initiated the replacement of five RCI Board members with five new members. Another faction includes RCI itself, supported by the purportedly replaced Board members and other Board members, including Ted Rogers' widow/Edward Rogers' mother, Loretta Rogers, and Edward Rogers' sisters, Melinda Rogers-Hixon and Martha Rogers. They all assert that the five Board members were not validly removed and that the previously constituted Board remains in place. As one pundit put it, there are "duelling" Boards, both proclaiming that they are the "valid" Board.
- [5] Meaning no disrespect, I will refer to the Rogers family members in these reasons by their first names for ease of reference.
- [6] Having an internal power struggle that paralyzes the governance of a company is not what any public company needs or wants at the best of times. That has become the case for RCI, but even more so now as RCI proceeds toward a major business combination with Shaw Communications Inc. ("Shaw") that requires steady and proper governance to achieve that very important goal.

- [7] This internal fight as to who is on RCI's Board of Directors has not escaped the attention of all stakeholders and the broader Canadian public. It has become a very newsworthy event. Significant and negative consequences have already arisen in the public markets, including loss of RCI share value, no doubt driven at least in part by the uncertainty.
- [8] Neither faction disputes the urgency of the situation and the need for a timely resolution of the issues in the interests of RCI and all of its stakeholders. This petition must be decided urgently so as to provide clarity to RCI, its directors, its stakeholders and the public markets.

II. RELIEF SOUGHT

- [9] On October 26, 2021, Edward filed this Petition to decide only one narrow legal issue: namely, whether the consent resolution dated October 22, 2021 that he initiated to remove five of RCI's Board members and replace them with another five directors is valid and effective (the "Consent Resolution"). RCI disputes that contention.
- [10] The specific relief sought in the Petition is as follows:
- a) A declaration that the written consent resolution dated October 22, 2021, signed by the shareholders holding at least 2/3 of the Class A Voting Shares of RCI is valid and effective (the "Consent Resolution");
 - b) A declaration that John Clappison, David Peterson, Bonnie Brooks, Ellis Jacob, and John A. MacDonald were removed as directors of RCI pursuant to and as at the date and time of signing of the Consent Resolution; and
 - c) A declaration that Michael Cooper, Jack Cockwell, Jan Innes, Ivan Fecan, and John Kerr were validly appointed as directors of RCI pursuant to and as at the date and time of signing of the Consent Resolution.
- [11] Assuming Edward succeeds in obtaining an order granting the above relief, he also seeks various orders concerning RCI's register of directors, including:
- d) An order requiring RCI to correct its register of directors to remove the names of John Clappison, David Peterson, Bonnie Brooks, Ellis Jacob, and John A. MacDonald and enter the names of Michael Cooper, Jack Cockwell, Jan Innes, Ivan Fecan, and John Kerr as directors of RCI; and
 - e) An order directing RCI to complete and file with the BC Registrar of Companies a notice of change of directors.

III. THE EVIDENCE

- [12] I have reviewed the voluminous evidence filed at this hearing.

- [13] Edward filed his Affidavit #1 sworn October 26, 2021 outlining the course of events in fall 2021. In response, evidence has been filed through the Affidavits of Loretta and Mr. MacDonald, sworn October 28 and 29, 2021, respectively. Also filed are Affidavits of certain RCI employees, being Lisa Damiani, RCI's Chief Legal and Regulatory Officer, and David Fuller, RCI's President and Chief Operating Officer of Wireless.
- [14] Finally, I have the Affidavit #1 sworn October 29, 2021 of Garfield Emerson, Q.C., a lawyer who has expressed his opinion as to certain "best corporate practices" and also, the "efforts" of the RCT to remove and replace members of RCI's Board.
- [15] Given the urgency of the situation, I do not intend to review all of that voluminous evidence in detail in these reasons, although I will summarize and comment on it as necessary below.
- [16] It is apparent from the filed materials that the disputes within the Rogers family and between certain RCI directors are numerous and varied.
- [17] Within these Affidavits, certain deponents have spoken of various family relationships. Edward speaks of how his mother and Martha abruptly and without notice reversed course in supporting his efforts. Loretta speaks of her regret of having to oppose the actions of her son. After this dispute arose, Martha has seemingly engaged in a spirited, if not inflammatory, series of Twitter postings, as to the actions of her brother, Edward.
- [18] These family squabbles are an interesting backdrop to this dispute that would be more in keeping with a Shakespearean drama. They have no doubt added a voyeuristic element on the part of many into the lives of a very wealthy Canadian family and this aspect of the dispute has driven some media coverage. However, in my view, the family issues are of little assistance in determining the narrow legal issue raised and certainly do not need to be addressed or resolved in this Court. At best, they are a distraction.
- [19] The same can be said for other more corporate-related issues between the parties. For example, much of the controversy between the factions relates to Mr. Natale who was, in April 2017, appointed RCI's Chief Executive Officer (CEO) and President.
- [20] Edward states that he has grown increasingly concerned with Mr. Natale's performance over the last two years. Edward states that his concerns regarding Mr. Natale's performance have been raised with both RCI Board members and members of the RCT Advisory Committee (defined below) since 2019 and into early 2021.
- [21] To the contrary, Mr. Natale appears to have the full support of Loretta, Melinda, Martha, many members of the RCI Board of Directors, and others, including with respect to having Mr. Natale lead RCI toward the Shaw deal and, if approved, implement the integration of RCI/Shaw operations. This group includes Mr. MacDonald and Mr. Fuller.

[22] Whether there is any valid concern regarding Mr. Natale's past performance as CEO/President and any valid concern about his future performance is not something that this Court needs to or will address. I reach the same conclusion with respect to another apparent issue raised by certain of RCI's Board members and other family members, alleging that Edward is meddling in the RCI's C-level management.

IV. BACKGROUND FACTS

A. The Parties

[23] In 1987, RCI was incorporated under the laws of BC and has its registered office in Vancouver, BC.

[24] Since the 1980s, RCI has had a dual class share structure. 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.

[25] RCI has approximately 24,000 employees.

[26] RCI was founded by the Ted Rogers, who died in 2008.

[27] In 2007, Ted established the Rogers Control Trust (the "RCT") for the benefit of the Rogers family as the means by which control of RCI would be exercised. Since his father's passing, Edward has acted as the Control Trust Chair of the RCT; Melinda is the Control Trust Vice-Chair.

[28] RCT's governance structure is comprised of: a Control Trust Chair (Edward), a Control Trust Vice-Chair (Melinda) and a ten-person advisory committee (the "RCT Advisory Committee"). The RCT Advisory Committee includes five members of the Rogers family (Edward, Melinda, Loretta, Martha and Lisa Anne Rogers (another sister)) and five other persons, including Alan Horn and Phillip Lind, who are also RCI directors.

[29] As of the close of business on October 19, 2021, RCI had 111,153,411 Class A Shares and 393,771,907 Class B Non-Voting Shares issued and outstanding. As of October 19, 2021, there were 252 registered holders of Class A Shares and 2,857 registered holders of Class B Shares.

[30] The RCT is the controlling shareholder of RCI. Either directly or through private Rogers family companies controlled by the RCT, the RCT beneficially owns 97.5% of the issued and outstanding Class A Voting Shares and approximately 10% of the outstanding Class B Non-Voting shares of RCI.

[31] The remainder of the Class A and B shares are widely held. Ms. Damiani refers to their being over 35,000 "non-objecting beneficial owners" (i.e. beneficial owners that do not object to identifying themselves to RCI and certain other third parties) and an undisclosed number of "objecting beneficial owners" (these are beneficial owners that have confirmed they do not wish to be identified to RCI and certain other third parties).

[32] Effectively, the RCT owns or controls approximately 29% of RCI.

[33] As expected, for decades now, the RCT's level of control of RCI has been fully disclosed in RCI's public filings, including in relation to deciding the composition of the Board (and therefore voting by the Board) and voting at shareholder meetings. For example, the Management Discussion and Analysis found in RCI's 2020 Annual Report states:

As at December 31, 2020, private Rogers family holding companies controlled by the Trust owned approximately 98% of our outstanding Class A Shares (2019 - 98%) and approximately 10% of our Class B Non-Voting Shares (2019 - 10%), or in total approximately 29% of the total shares outstanding (2019 - 29%). Only Class A Shares carry the right to vote in most circumstances. As a result, the Trust is able to elect all members of the Board and to control the vote on most matters submitted to a shareholder vote.

[Emphasis added.]

[34] Edward states that one of the RCT's mandate is to exercise voting power over RCI by nominating and voting to elect its directors, and attending and voting at all shareholder meetings. Edward, as the RCT Control Trust Chair, is able to exercise that voting power at his discretion, unless the RCT Advisory Committee acts to constrain or replace him with a 2/3 vote by the members of the RCT Advisory Committee.

[35] Since Ted's death, Edward has also acted as chairman of RCI's Board of Directors.

[36] As of September 2021, and before this controversy began, RCI's Board of Directors consisted of: Edward (Chair), Melinda (Deputy Chair), Loretta, Martha, Robert Gemmell, Alan Horn, Philip Lind, Joe Natale and Robert Dépatie, and four other "independent directors", being David Peterson, Bonnie Brooks, Ellis Jacob and John A. MacDonald.

B. Shaw Communications Inc.

[37] In the spring 2021, RCI reached an agreement to purchase Shaw, another telecommunications company. The price of the acquisition is significant, being \$26 billion. That acquisition is currently subject to regulatory review and approval by the Canadian Radio-television and Telecommunications Commission, the Competition Bureau and the Ministry of Innovation, Science and Economic Development.

[38] The RCI/Shaw transaction is scheduled to close in spring 2022, subject to receiving the regulatory approval being sought.

[39] Edward describes that the Shaw deal is the largest single transaction in RCI's history and he expects that it will transform RCI into a national media and telecommunications company with significant operations across Canada. He states that the Shaw transaction is "critical" to RCI's future. No person or party disagrees with his assessment of the importance of the Shaw deal. To put it mildly, overseeing a transaction of that magnitude requires "all hands-on deck" at RCI, including all members of the Board and its CEO/President.

- [40] Over summer 2021, Edward's concerns about Mr. Natale continued but were heightened in light of the impending Shaw deal. Edward says that he discussed his continuing concerns about Mr. Natale with other Rogers family members (Loretta and Martha) and other RCI directors (Mr. Horn, Mr. Lind, Mr. Gemmell and Mr. Dépatie).
- [41] Edward was of the view that Tony Staffieri, RCI's Chief Financial Officer ("CFO"), was his preferred choice to replace Mr. Natale as CEO/President. He indicates that all of the individuals he spoke to supported the notion of replacing Mr. Natale and, also, that Mr. Staffieri was a suitable candidate to move on as CFO and into the CEO role.
- [42] On September 15, 2021, Edward spoke to both Mr. MacDonald and Melinda. They did not share Edward's concerns regarding Mr. Natale; Mr. MacDonald supported a review process of Mr. Natale; Melinda had no issues with Mr. Natale and was firmly opposed to any such review.
- [43] Word of these swirling issues got back to Mr. Natale. Mr. Natale's response was to indicate that he wanted to terminate Mr. Staffieri as CFO. By September 19, 2021, when Edward did not agree to that suggestion, Mr. Natale insisted the one of them - either him or Mr. Staffieri - would have to "go".

C. September 2021 Board Meetings

- [44] As a result of this discord regarding Mr. Natale, an RCI Board meeting was scheduled for Wednesday, September 22, 2021.
- [45] On September 22, 2021, the RCI Board of Directors held a meeting. Edward made a presentation to the Board raising the potential of replacing Mr. Natale with Mr. Staffieri, as RCI's new CEO. Both Loretta and Martha spoke in support of this proposal. The Board agreed that Edward and Mr. MacDonald were to continue their discussions about this possible change with Mr. Natale and, resolved to, afterward, reconvene later in the week.
- [46] In fact, Mr. Horn took over the conduct of discussions with Mr. Natale. Mr. Horn advised Edward that the terms of a resignation package had been successfully negotiated with Mr. Natale. Those proposed terms, along with a draft Board of Directors' resolution, were circulated to the RCI Board members.
- [47] On Friday, September 24, 2021, the RCI Board of Directors met to consider the matter. By a vote of 10-1, the Board resolved to accept Mr. Natale's resignation effective October 1, 2021. The Board also authorized the Chairman of the Board to enter into a severance agreement and transition and long-term support agreement with Mr. Natale. Mr. Peterson was the sole dissenter. The Board deferred the resolution appointing Mr. Staffieri as the new CEO in order to finalize his compensation package. A further Board meeting was scheduled for Sunday, September 26, 2021 for that purpose.

- [48] In advance of the Sunday meeting, efforts were made by many (including Edward, Mr. MacDonald and Ms. Brooks) to finalize the agreements with Mr. Natale and also finalize the proposed terms for Mr. Staffieri's compensation package. Earlier that day, the proposed terms relating to Mr. Staffieri new role were circulated to the Board in advance of the meeting.
- [49] On September 26, 2021, the course of the RCI Board meeting took an unexpected turn, from the perspective of Edward, Mr. Gemmell, Mr. Horn and Mr. Lind. All of them are said to have expressed shock at learning, at the start of the meeting and for the first time, that many Board members had completely reversed their position in relation to Mr. Natale and Mr. Staffieri.
- [50] At the September 26, 2021 meeting, Martha proposed, and Mr. MacDonald seconded, a new resolution to:
- a) rescind the Board resolutions adopted on September 24, 2021;
 - b) accept the withdrawal of Mr. Natale's resignation and amend his employment agreement with enhanced terms (intended to be part of the negotiated terms for him to assist with the transition to Mr. Staffieri);
 - c) terminate Mr. Staffieri as CFO effective September 29, 2021;
 - d) appoint John Clappison as a new director;
 - e) establish a new Board committee, known as the "Executive Oversight Committee", with the primary purpose of:
working with and advising the Chair of the Board of Directors [Edward at the time] and the President and Chief Executive Officer in discharging [their] duties and establishing clear protocols for the Chair of the Board of Directors including restricting engagement with other members of management;
- and,
- f) authorize RCI to undertake a corporate governance review under the supervision of the Executive Oversight Committee.
- [51] Ultimately, the Board deferred a vote on the new resolutions to a subsequent Board meeting on Wednesday, September 29, 2021.
- [52] Edward says that he then made several attempts to reach a compromise with other Board members, without success. By this time, Edward had formed the view that four of the independent directors (Mr. MacDonald, Mr. Peterson, Ms. Brooks and Mr. Jacob) had become aligned against him.

[53] On the morning of September 29, 2021, Edward advised Mr. MacDonald that he, as Chair, would be moving to have the RCI Board meeting (for later that day) re-scheduled to Friday, October 1, 2021. This delay was in part to allow Edward to consult with the RCT Advisory Committee, who were holding a meeting also later that day. Around 2:00 p.m., Mr. MacDonald advised Edward by email that the majority of the RCI Board disagreed with the delay and that the Board meeting would proceed as originally scheduled.

[54] As a result, two meetings took place in the late afternoon of September 29, 2021: first, a meeting of the RCI Board, without Edward, Mr. Horn and Mr. Lind (who were at the RCT Advisory Committee meeting); and, second, a meeting of the RCT Advisory Committee, without Loretta, Melinda and Martha (who were at the RCI Board meeting). Arising from those meetings:

- a) The RCT Advisory Committee members expressed "strong support" for Edward and condemned the way in which the RCI Board meeting on September 26, 2021 had been conducted; and
- b) The RCI Board (8 of the 14 - including Loretta, Melinda, Martha) voted in favour of the September 26, 2021 resolutions (Mr. Gemmell dissented). Accordingly, Mr. Natale was staying and Mr. Staffieri was the one to "go". Also, Mr. Clappison became a director of the Board.

(I will refer now in these Reasons to Mr. Clappison, Mr. MacDonald, Mr. Peterson, Ms. Brooks and Mr. Jacob collectively as the "Independent Directors".)

[55] Later that day, RCI issued a press release announcing the departure of Mr. Staffieri as CFO.

D. October 2021 Events

[56] In early October 2021, the RCT's counsel wrote to the Independent Directors, noting a breakdown of the relationship between them and the Control Trust Chair (Edward). The letter indicated that

The Control Trust Chair supported by the Advisory Committee has the power to deal with this untenable situation by unilaterally reconstituting the Board.

The letter stated that the RCT Advisory Committee hoped the situation could be resolved, and suggested a meeting between the Independent Directors, the Control Trust Chair and the RCT Advisory Committee. Finally, the letter stated that, if the Independent Directors did not think a resolution was possible, they should resign.

[57] On October 19, 2021, the respective factions met, attended by the Independent Directors and all members of the RCT Advisory Committee. No resolution was achieved at that meeting and a further meeting of the RCT Advisory Committee was scheduled for 8:00 a.m. on October 21, 2021.

- [58] The next day, Wednesday, October 20, 2021, the RCI Board members met to review and approve RCI's third quarter financial statements. Some discussions took place concerning providing Edward with an RCI shareholder list (ultimately, that list was provided to Edward's counsel later that day). As part of these discussions, Mr. MacDonald referred to a future consideration of certain corporate governance items to be raised at the end of the meeting, which Edward took as a reference to removing him as Chair of the Board. The Board meeting proceeded and the financial statements were approved; however, the Independent Directors insisted on adjourning the meeting so that it could be continued the next day, following the meeting of the RCT Advisory Committee. Edward suspected that the Independent Directors were planning to remove him as Chair of the RCI Board if they did not like the outcome of the RCT Advisory Committee meeting.
- [59] Edward says that he formed the view that the Independent Directors were operating without transparency with the other members of the Board; refusing any further discussion toward reaching a resolution; ignoring the views of the RCT as the controlling shareholder; and, was using veiled threats and obstruction to try to entrench themselves. He considered that the situation had become "untenable".

E. The Consent Resolution

- [60] On October 21, 2021, at the RCT Advisory Committee meeting, Edward announced his intention to act as Control Trust Chair to remove and replace the Independent Directors on the RCI Board. The members of the RCT Advisory Committee voted on the matter and did not resolve to constrain Edward in that proposed course of action or replace him as Control Trust Chair (in dissent, Loretta, Melinda and Martha voted to constrain Edward in doing so).
- [61] Also, on October 21, 2021, immediately after the RCT Advisory Committee meeting, the RCI Board resumed the meeting from the previous day. Edward, Mr. Lind and Mr. Horn were not present. As Edward had suspected, the RCI Board resolved to remove Edward as Chair.
- [62] On October 21, 2021, in a press release published to SEDAR, Edward announced his intention to make changes to RCI's Board of Directors.
- [63] Thereafter, Edward, as Control Trust Chair of the RCT, took the following steps to replace the Independent Directors by means of the Consent Resolution. In particular, the steps taken included:
- a) on October 21, 2021, he obtained consents to act as a director from Michael Cooper, Jack Cockwell, Jan Innes, Ivan Fecan, and John Kerr;

- b) on October 21, 2021, he instructed Computershare Investor Services Inc. to mail to all the registered holders of Class A Voting Shares of RCI: (a) a written consent resolution dated October 22, 2021, removing the Independent Directors as directors of RCI and filling the vacancies created by such removals by appointing Michael Cooper, Jack Cockwell, Jan Innes, Ivan Fecan, and John Kerr as directors of RCI; and, (b) biographies of the proposed directors and a statement that they were not disqualified from that position;
 - c) on October 22, 2021, the RCT, through its trustee, the Bank of Nova Scotia Trust Company, executed the Consent Resolution in respect of the 4,800 Class A shares, of which it is the registered holder. CDS & Co., as the registered holder of 108,398,598 Class A shares of RCI held by certain private Rogers family holding companies controlled by RCT (Rogers Enterprises (2015) Inc., RRBL Holdings (2015 Inc.) and RTHL (2015) Inc.) executed the Consent Resolution on behalf of those entities; and
 - d) after the RCT's mailing to all Class A shareholders and the subsequent execution of the Consent Resolution, Edward's counsel forwarded the Consent Resolution to RCI and its registered and records office, together with the executed consents to act as director. The letter enclosing those materials demanded that RCI's registered and records office deposit the Consent Resolution and consents to act in the records of RCI and arrange for the necessary filings with the BC Registrar of Companies (the "Registrar") to be made as soon as possible showing the effective date of these changes as October 22, 2021. The letter also outlined the process under which the Consent Resolution was submitted.
- [64] Accordingly, if the Consent Resolution was valid and effective, as of October 22, 2021, the RCI board was comprised of members of the Rogers family (Edward, Loretta, Melinda and Martha), Mr. Gemmell, Mr. Horn, Mr. Lind, Mr. Dépatie, Mr. Natale and the five new Board members just then added.
- [65] On October 22, 2021 at 6:45 p.m. ET, Edward sent to the RCI Board, as newly reconstituted, a Notice of Directors Meeting on Sunday, October 24, 2021, at 7:00 p.m. ET. The purpose of the meeting, as described in the notice, included approval of the appointment of a Chairperson of the Board of Directors, and approval of the appointment of the members of each committee of the Board.

F. Post-Consent Resolution Reactions

- [66] On or about October 21, 2021, the public war of words between the two factions began.
- [67] On October 22, 2021 at 7:34 p.m. ET, Mr. MacDonald, purportedly as Chair of RCI's Board of Directors, published to SEDAR a statement of RCI stating that: (i) RCI had received the Consent Resolution; (ii) RCI had "reviewed the resolution with its external legal counsel and has determined the resolution is invalid"; and (iii) the "Board of Directors of [RCI] ... remain [sic] unchanged".

[68] In response to that press release, Edward issued a statement re-asserting the validity of the Consent Resolution and advising of the upcoming RCI Board meeting on October 24, 2021.

[69] On October 23, 2021, Goodmans LLP, RCI's counsel, sent a letter to Edward, copied to each member of the newly constituted RCI Board. Goodmans LLP advised that it was RCI's position that the Consent Resolution did not comply with the provisions of the Business Corporations Act, S.B.C. 2002, c. 57 (the "Act"), that the Board remained unchanged and that proceedings at the meeting of the newly constituted Board would be invalid. The author stated:

Anyone purporting to conduct Rogers' business relying on the [Consent] Resolution and the Notice [for the October 24, 2021 purported RCI Board meeting] will be accountable for all damages caused to Rogers and its shareholders.

[70] On October 24, 2021, RCI's "new" Board of Directors met. Mr. Natale, Loretta, Melinda and Martha were not in attendance. The Board resolved to appoint Edward as Chair.

[71] On October 24, 2021 at 7:06 p.m. ET, while the RCI board meeting was underway, Loretta, Melinda, Martha, Mr. MacDonald, Mr. Clappison, Mr. Peterson, Ms. Brooks and Mr. Jacob published a statement. They all stated that they supported Mr. Natale as CEO. They also stated:

... We remain as duly elected members of the Rogers Communications Inc. Board and represent the majority of the Board members of the company. No other group of individuals has any authority to purport to act as the Board of Directors of Rogers Communications Inc.

[72] Immediately after the "new" RCI Board meeting on October 24, 2021, that Board issued a competing press release confirming its meeting that day and confirming the new composition of the Board. The statement referred to the Board's:

disappointment that some within [RCI] have resisted recognizing the change of Directors that took effect on Friday morning in accordance with section 180 of the Business Corporations Act (British Columbia) and the articles of RCI.

[73] It is well taken and not disputed that this public controversy has been the subject of significant media attention and speculation.

[74] Mr. MacDonald in his Affidavit disagrees with a number of statements or characterizations found in Edward's Affidavit as to the course of the events in fall 2021, as does Loretta.

[75] Having said that, the above abbreviated history of RCI's Board dealings in fall 2021 only explains the "why" as to how this issue arose; it does not assist in resolving the central issue.

V. ISSUES

- [76] Again, no party or participant disagrees that a resolution is urgently required for RCI and its stakeholders. It is necessary to determine who are the validly elected members of RCI's Board of Directors in order to ensure that RCI can be governed properly into the future.
- [77] Edward frames this legal proceeding as necessary to compel RCI to comply with its obligations under the Act. The provisions of the Act said to apply include ss. 1, 7, 45, 126, 127, 128, 131, 180, 228, 229, and 230.
- [78] The significant and important question therefore is this: who exactly is on the RCI Board? Do the Independent Directors remain as Directors or were they validly removed and replaced by the new directors on October 22, 2021 as a result of the Consent Resolution?
- [79] Accordingly, the singular legal issue to be decided is whether the Consent Resolution is valid and effective in accordance with the Act. If the answer to that question is "yes", there is no dispute concerning the consequential relief that Edward requests to ensure RCI properly records the consequences in the corporate records and files with the Registrar a notice of change of directors.

VI. INTERPRETATION PRINCIPLES

- [80] The parties agree as to the relevant legal principles.
- [81] A company and its shareholders are "bound by" the company's articles: Act, s. 19. Accordingly, the articles represent a contract in law between the company and its shareholders and the principles of contractual interpretation apply to the interpretation of those articles: *Boffo Family Holdings Ltd. v. Moutainview Developments Ltd.*, 2010 BCSC 560 at para. 36, citing *Minister of National Revenue v. Dworkin Furs (Pembroke) Ltd.*, [1967] S.C.R. 223; and, *Dusanjh v. Appleton*, 2017 BCSC 340 at para. 37.
- [82] The seminal decision relating to interpretation of contracts is found in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53. Justice Rothstein summarized those principles as follows:
- [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" [citations omitted]. To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(Reardon Smith Line, at p. 574, per Lord Wilberforce)

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement [citations omitted]. As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[64] I accept that a fundamental principle of contractual interpretation is that a contract must be construed as a whole (McCamus, at pp. 761-62; and Hall, at p. 15).

[Emphasis added.]

[83] In addition, the same "common sense" approach is made with respect to statutory interpretation, where the principles are similarly well-settled. In *British Columbia v. Philip Morris International, Inc.*, 2017 BCCA 69, rev'd on a separate point 2018 SCC 36, the court summarized those principles:

[23] This is a case of statutory interpretation. The correct approach to statutory interpretation is long settled. It was recently expressed in *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2017 SCC 6:

[21] This follows from the application of our long-accepted approach to statutory interpretation, namely that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, quoting both E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

[24] In *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, the Court said at para. 10:

[10] The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a

harmonious whole.

[Emphasis added.]

[84] Accordingly, the provisions of the Act are to be read in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature. The ordinary meaning of the words is a "dominant" consideration.

[85] The interplay between the Act and RCI's current articles (the "Articles") is a necessary part of the interpretation exercise with respect to both. The Articles are subject to the Act and, unless a contrary provision is found, the Articles are intended to be interpreted and applied in conjunction with the statutory provisions. The Articles provide for this expressly in stating:

1.2 The meaning of any words or phrases defined in the Business Corporations Act shall, if not inconsistent with the subject or context, bear the same meaning in these Articles.

1.4 To the extent that there is a conflict between a provision of these Articles and a provision of the Act, the provision of the Act will prevail, but only to the extent necessary to cure the conflict.

VII. "SURROUNDING CIRCUMSTANCES"

[86] Much of the evidence filed by both parties at this hearing has been advanced as relevant "surrounding circumstances", as described in *Sattva* at paras. 47-48.

[87] However, Rothstein J. in *Sattva* was careful to outline the limits in a court's consideration of surrounding circumstances. He stated:

[57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement [citations omitted].

[58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (King, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of

execution of the contract is a question of fact.

[Emphasis added.]

- [88] Finally, the Court in *Sattva* at paras. 59-61 discussed the role of parol evidence in the interpretation exercise. While subjective intentions of the parties are not admissible, the surrounding circumstances may aid in the court's interpretation, so long as such evidence does not seek to change or overrule the plain meaning of words. In addition, such evidence must be "facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting" (para. 60).
- [89] Both parties rely to some extent on what has been described as Ted's "wishes" in terms of RCI's corporate governance, including relating to shareholder meetings, as relevant surrounding circumstances.
- [90] Loretta's evidence includes what she and Ted "expected" by way of the process to elect and replace directors, namely that it be done through a shareholder meeting with the full process that procedure entails. This assertion has unfortunately resulted in the disclosure of very private family documents into the public sphere, including Ted's Control Trust Will (by which the RCT was established) and a "personal and confidential" "Memorandum of Wishes" (MOW), both executed in September 2008. The MOW was not addressed to the RCI Board, but to the RCT Advisory Committee and the RCT's trustees.
- [91] I do not intend to refer in detail to the specific provisions in the MOW. It will suffice to generally describe that Ted envisioned that the Control Trust Chair would consult with the family and the RCT Advisory Committee. Edward has done that. Somewhat presciently, Ted refers to a potential situation where the "majority" of the RCI Board is in conflict with the interests of the Rogers family, as represented by the Control Trust Chair. In the event of a "bed-rock" and serious issue, Ted stated that it was his expectation that the Control Trust Chair would run through the "public gauntlet" of calling a shareholder meeting to replace the RCI directors who were opposed.
- [92] RCI asserts that the interpretation of the Articles, including Article 3.4, is consistent with Ted's words as explaining what was intended by Article 3.4.
- [93] This difficulty with the above evidence, including the MOW, is that it runs afoul of the exclusionary rules discussed in *Sattva*, as above. It is a statement of subjective intention on the part of Loretta and Ted and also, post-dates the time (2004) when the Articles were adopted by RCI.
- [94] Mr. Emerson also moves into this very personal territory. He refers to relying on a media report quoting Melinda who was referring to the MOW. Mr. Emerson also refers to a late October 2021 newspaper article by an author who interviewed Ted in June 2007 while preparing to write Ted's autobiography and who purported to quote Ted on the issue at hand. Edward could also not resist referring to his father's thoughts in Ted's published autobiography, although on different points that supported his narrative. (I have not read

the book.)

- [95] This further evidence as to Ted's personal thoughts suffer from the same difficulty as with the MOW. While providing a colourful backdrop to this dispute, it is simply of no assistance in interpreting the intentions of RCI in May 2004 when the Articles were adopted.
- [96] Here, RCI also contends that relevant circumstances include RCI's status as a widely held, publicly-traded controlled company with a dual class share structure, as well as RCI's publicly disclosed governance practices.
- [97] RCI has filed a number of Affidavits that address the more general corporate circumstances of RCI that are also said to be relevant surrounding circumstances.
- [98] Mr. MacDonald states that the only motivation of the Independent Directors to remain and fight this issue is "proper governance for a significant Canadian publicly traded company". He offers his unsupported opinion that it is "unacceptable" that RCI would be governed in the manner proposed by Edward. He notes that the RCT has never proceeded in this fashion (i.e. by way of consent resolution), which is true. He expresses the view that "good governance" is in the best interests of RCI and its stakeholders, although he attaches no real meaning to that phrase.
- [99] Unquestionably, and understandably, RCI has publicly proclaimed its commitment to, and adherence to "good" or "sound" corporate governance. Such statements are found in the numerous Management Discussion and Analysis documents issued over the years, including most recently, as found in the 2019-2021 Annual Reports. Those Reports also refer to the Nominating Committee (a standing committee of the RCI Board) whose mandate is to identify candidates to serve on the Board and who may be "either elected by shareholders at a meeting or appointed by the Board".
- [100] It is also readily apparent that RCI has sought to enhance the investing public's perception of its governance by nominating and electing a number of "independent directors", which I take to mean independent of the Rogers Family. Such "independent directors" have important roles in various Board committees, including the Corporate Governance Committee, the Nominating Committee and the Human Resources Committee.
- [101] At first blush, these recent pronouncements in RCI's public filings do not fit within what are proper and relevant surrounding circumstances. First, they are statements of intention to some degree; second, they were made years, if not decades, after RCI's adoption of the Articles in 2004. Sattva confirms that only those facts and circumstances present at the time of contracting (here 2004) are of relevance: paras. 58 and 60.

- [102] Ms. Damiani's Affidavit includes reference to the public disclosure made to RCI stakeholders in spring 2004, which is arguably more temporally related (ie. relevant) to when the Articles became effective and can be more accurately described as "surrounding circumstances". It was this disclosure that led to RCI's adoption of the Articles in May 2004, after the BC legislation was changed in March 2004 (The Articles include later amendments in 2011 that are not relevant here).
- [103] To a large degree, statements as to RCI's endorsement of "good" corporate governance made in spring 2004, including by reference to the mandate and composition of the committees as including independent directors, were repeated in RCI's later reporting. It is also uncontroversial that, in its corporate and regulatory filings, RCI asserts that it has "corporate governance practices" and that it complies with "relevant corporate governance guidelines".
- [104] I also accept that many public statements by RCI refer to directors as having been "elected". Ms. Damiani refers to RCI's "Majority Voting Policy", said by her to comply with the TSX's requirements. However, that policy is elective when a controlling shareholder holds more than 50% of the voting rights, such as with RCI. Ms. Damiani also refers to a myriad of other reporting requirements, including relating to governance. In any event, Ms. Damiani fails to assert that RCI would be in contravention of any such regulatory requirement if the Consent Resolution process is invoked.
- [105] In my view, while the statements of intentions toward "good corporate governance" in 2004 are relevant as surrounding circumstances, they do not answer the fundamental issue here, which is the proper interpretation of the Articles. Also, RCI's reliance on these statements certainly contribute to a result that effectively overrides the Articles or, in the words of Sattva, "overwhelms" the words found in the Articles.
- [106] Furthermore, even if these statements were relevant or did not override the Articles, what RCI argues is effectively a confusion or conflation of how RCI intended to and did proceed with its corporate governance after 2004 with what shareholder rights exist under the Articles.
- [107] This backward attempt at interpretation is effectively saying that, since RCI governed itself in a particular manner from 2004-2021, that is what the Articles mean or what they do not mean. I do not accept this argument as contrary to logic and common sense. If nothing else, if RCI's view of what was "proper" or "good corporate governance" changed over time, the inevitable result would be that the meaning of the Articles would in turn shift and reshape themselves over time, an absurd result.
- [108] RCI also refers to Mr. Emerson's opinion on this "good governance" point. Mr. Emerson is undoubtedly a very experienced corporate securities lawyer. He has advised numerous major Canadian corporations, both as counsel and as a director. He has also published extensively in the area of corporate law, including corporate governance.

- [109] Unfortunately, Mr. Emerson's evidence as an "expert" corporate securities lawyer raises more issues than provides answers in assisting the Court.
- [110] A preliminary question arises as to whether Mr. Emerson is an independent expert. He has provided his certification as required by the Supreme Court Civil Rules, R. 11-2(2). It is well-settled that a threshold requirement before such an opinion is tendered in evidence is that the court find the expert to be truly fair, objective and impartial: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 46. Once the certification is given by the expert, the onus shifts to the opposing party to show that the expert is not able or willing to comply with that duty: para. 48.
- [111] Here, questions are raised because, in spring 2004, when the Articles were adopted, Mr. Emerson was wearing two very relevant hats: he was a partner at RCI's corporate counsel and also Chairman of RCI's Board of Directors. In both respects, Mr. Emerson can only be described as very much involved in the creation of the Articles and, undoubtedly, fully aware of the provisions in the Act in terms of RCI's governance.
- [112] In any event, Edward's counsel does not press the above issue to the extent it need be determined by the Court. Rather, the issue is whether Mr. Emerson's opinion is of sufficient relevance or that it meets the "necessity" test, both threshold requirements: *White Burgess* at paras. 19 and 54.
- [113] Lawyers giving opinions intended to be relied upon by a court often walk a fine line. At times, an opinion can stray into the objectionable territory of recommending to the judge, with the force of "expertise", how the issue should be decided (commonly described as addressing the "ultimate issue"): *Walsh v. BDO Dunwoody LLP*, 2013 BCSC 1463 at paras. 58-62.
- [114] Here, Mr. Emerson goes to great lengths to describe how the process under the Consent Resolution does not conform to "best corporate practices". He refers to the lack of transparency, lack of accountability and failure to disclose corporate information arising from a process by which a meeting would not be called to decide the issue. He describes the Consent Resolution as in "open and direct conflict" with those "best corporate governance practices". Finally, he describes the use of the Consent Resolution as "unique and unparalleled" in relation to the governance of other large Canadian public companies.
- [115] Mr. Emerson does, however, skate close to, if not over, the line where he suggests that the process of the Consent Resolution denies "rights" to the Class B shareholders (para. 59) and also, that the Class A shareholders did not consent, presumably arising from some right to consent (para. 63). Those issues are addressed within my discussion below when interpreting the Articles and the Act. No doubt respecting that the line does exist, Mr. Emerson does not wade into the issue as to what the Articles mean; nor does he even mention the Articles at all, despite the Articles having been adopted on Mr. Emerson's "watch".

[116] For the same reasons stated above, Mr. Emerson's opinion does not, at best, meet the threshold requirement of being relevant and or assistance to the Court. His opinion simply does not assist in answering the narrow issue raised in this proceeding.

[117] It must be emphasized that an important part of RCI's disclosure in 2004 and in later years has been the Articles themselves. In the April 21, 2004 Information Circular, RCI discussed that the amendments are principally being made to reflect the new and modern provisions of the Act. Significantly, in that Circular, specific attention was drawn to the new provisions in the Articles relating to replacement of directors (at 15):

The new Articles provide that directors may be removed by ordinary resolution, as opposed to a special resolution required under the existing Articles (Article 3.4)

[118] It is well taken that no shareholder has attempted to use a consent resolution in the manner now sought to be advanced by Edward. It is also well taken that there has never been an explicit public statement by RCI that the controlling shareholder is able to remove and replace directors by a consent resolution and without convening a shareholder meeting.

[119] However, that does not inexorably lead to the conclusion that no such right existed in the first place in the Articles.

[120] RCI effectively describes the procedure of a Consent Resolution as extreme in the circumstances. For the sake of argument, I acknowledge that characterization although it is perhaps more accurate to be described as "unique", as does Mr. Emerson. In any event, the extreme nature or uniqueness of the process does not detract from the possibility that the Articles indeed allow for replacement of directors in that manner.

[121] In my view, it is difficult for RCI to state that, by following available provisions in its publicly disclosed Articles, RCI is not following its avowed "corporate principles" or that it is acting in an "unacceptable" manner. Indeed, acting contrary to the Articles would be against those same principles and "unacceptable".

[122] It is entirely possible - if not likely - that RCI, its directors and its corporate counsel lost sight of the particular provisions in the Articles and the Act in terms of replacing directors, in light of the apparent consensus as to what procedures would be adopted and adhered to by RCI in later years. The same can be said for Edward specifically, who may only have discerned this argument when seeking to find a solution to what he considered to be an intractable problem in late September 2021.

[123] Whatever might have been the case, the Articles remain the governing document here as representing the rights of the parties, particularly on the removal and replacement of directors.

[124] I conclude that the circumstances of RCI's governance after 2004 are not particularly helpful in the interpretation exercise here. All roads still lead back to the Articles themselves, to be considered within the statutory framework found in the Act.

VIII. IS THE CONSENT RESOLUTION VALID AND EFFECTIVE?

- [125] As above, it is necessary to consider the requirements of the Articles as to what corporate procedures are required to remove and replace directors, while also considering the provisions in the Act that are not inconsistent with those requirements (Article 1.4).
- [126] The Articles include provisions relating to all aspects of RCI, as required by s. 12 of the Act. It is an extensive document, running to some 48 pages, no doubt arising from the complexities of being a public company that has a complicated share structure.

A. Background to the Act

- [127] When RCI was incorporated, it did so in accordance with the Company Act, R.S.B.C. 1996, c. 62. Under s. 130(3) of the Company Act, directors could be removed and replaced despite anything in the company memorandum or articles (a special resolution was required for removal and an ordinary resolution was required for appointment of a replacement).
- [128] In March 2004, the Company Act was repealed and replaced with the Act. Specifically, the Act allowed a company some flexibility in tailoring its articles in any manner it chose, in order to meet its individual requirements. Linda I. Parsons and Kate Bake-Paterson in "Six Months of the B.C. Business Corporations Act: Changes and Challenges" (2006) 43:3 Can Bus LJ 455 at 465 describe that:

Under the [Act], the parties to the "contract", being the company and its shareholders, may decide how they wish to conduct their corporate affairs, unless the matter in question is specifically regulated by the Act.

- [129] I am advised by counsel that the provisions of the Act concerning the removal and replacement of directors are unique in Canada, in contrast to other corporate legislation, both federal (Canada Business Corporations Act, R.S.C. 1985, c. C-44) and in other provinces. (See Parsons and Bake-Paterson at 455).
- [130] Neither party referred me to any case authority discussing the particular provisions of the Act or the Articles in issue here. Accordingly, the matter appears to be one of first impression, aided only by the provisions of the Act and Articles themselves and, of course, relevant surrounding circumstances.
- [131] Both parties assert that a plain reading of the Articles supports their respective positions. Both accuse the other of following a winding and tortuous interpretative path to the wrong conclusion.
- [132] The nub of the issue is the disagreement of the parties as to whether or not the Articles require a meeting of shareholders to remove and replace directors, rather than the abbreviated process of a consent resolution.

[133] It is not disputed that the removal and replacement of directors is a matter of significance to a company and its stakeholders, particularly when it results in a change of control at the Board level. RCI refers to the need to find clear language in the Articles to change control at the board level, a proposition that Edward does not dispute.

[134] This sentiment is found in the comments of this Court in *Western Mines Ltd. v. Shield Development Co.* (1975), 65 D.L.R. (3d) 307 (Anderson J. in B.C.S.C. Chambers), where the issue was whether an increase in the number of directors and the filling of those positions (resulting in a change of control of the board) could take place at an extraordinary meeting, as opposed to a general meeting. Justice Anderson stated, at 312:

the consequences of changing control of the board of directors by means of an ordinary resolution (except at the annual general meeting) are so serious and so contrary to the normal standards by which corporate life is governed that the right to change control in the manner suggested should be clearly apparent and not dependent on an intricate and strained interpretation of the articles, the Companies Act or the doctrine of "inherent powers".

[Emphasis added.]

B. What do the Articles Require to Remove/Replace Directors?

[135] Part 1 of the Articles (Interpretation) include Article 1.1 that includes certain definitions and Articles 1.2 and 1.4 referred to above. Section 3 of the Articles addresses the matter of "Directors" and Section 9 addresses the matter of "Meetings of Shareholders".

[136] The most relevant provisions in the Act (aside from definitions) addressing the matter of directors is found in "Part 5 - Management", "Division 1 - Directors" (ss. 128 and 130-131). The relevant provisions in the Act addressing the matter of shareholder meetings is found in "Part 5 - Management", "Division 6 - Meetings of Shareholders" (ss. 180).

[137] Article 3.3 provides that directors shall be elected at each annual general meeting (AGM) by the shareholders entitle to vote. The term of any elected director is only until the next AGM when all directors must retire and may stand, if eligible, for re-election to continue in that position.

[138] A central provision at issue here is Article 3.4 which expressly allows for the removal of directors:

3.4 Removal of Directors - Subject to the provisions of the Act, the shareholders may by ordinary resolution remove any Director from office and the vacancy created by such removal may be filled at the same meeting failing which it may be filled by the Directors.

[Emphasis added.]

[139] Article 3.5 also refers to a director ceasing to hold office when an ordinary resolution is passed by the shareholders:

the Director is removed from office by the shareholders by ordinary resolution

[140] Similarly, s. 128(3) of the Act provides for the process by which a director may be removed before the expiration of his or her term:

- (3) a company may remove a director before the expiration of the director's term of office
- (a) by a special resolution, or
- (b) if the memorandum or articles provide that a director may be removed by a resolution of the shareholders entitled to vote at general meetings passed by less than a special majority or may be removed by some other method, by the resolution or method specified.

[Emphasis added.]

[141] "Shareholder" is defined in s. 1(1) of the Act to mean "a person whose name is entered in a securities register of a company as a registered owner of a share of the company ...", a definition that is adopted into the Articles (Article 1.2). It is not disputed that the RCT, exercising its power through the Control Trust Chair, is a "shareholder" of the vast majority of the Class A Shares (97.5%) within the meaning of both Article 3.4 and s. 128(3)(b) of the Act.

[142] Edward therefore argues that Article 3.4 meets the requirements of s. 128(3)(b) in specifically providing for a "resolution or method specified" to remove directors - namely, that a director may be removed by an ordinary resolution by the shareholders.

[143] What then is required for an "ordinary resolution" under Article 3.4?

[144] "Ordinary resolution" is not defined in the Articles, leading to the importation of the definition found in the Act, pursuant again to Article 1.2.

[145] Under s. 1(1) of the Act, "ordinary resolution" means as follows:

"ordinary resolution" means 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.

[Emphasis added.]

[146] In light of that definition, Edward then argues that both the Articles and the Act provide that directors of RCI may be removed by way of an ordinary resolution passed by the Class A shareholders. This arises because the Class A shareholders are the only shareholders that "carry the right to vote at general meetings".

[147] The next step in Edward's analysis is to determine what level of voting shares is needed to reach at least the "special majority" of the Class A shares entitled to vote on the "ordinary resolution". Both the Act and the Articles define "special majority".

[148] Section 1(1) of the Act defines "special majority" as follows:

"special majority" means, in respect of a company,

- (a) the majority of votes that the articles specify is required for the company to pass a special resolution at a general meeting, if that specified majority is at least 2/3 and not more than 3/4 of the votes cast on the resolution, or
- (b) if the articles do not contain a provision contemplated by paragraph (a), 2/3 of the votes cast on the resolution or, if the company is a pre-existing company that has not complied with section 370 (1) (a) or 436 (1) (a) or that has a notice of articles that reflects that the Pre-existing Company Provisions apply to the company, 3/4 of the votes cast on the resolution;

[149] Article 1.1 defines "special majority":

"special majority" means, in order for the Corporation to pass a special resolution at a general meeting, at least 2/3 of the votes cast on the resolution.

[150] Accordingly, Edward submits that an ordinary resolution may be passed by the registered Class A shareholders holding at least a "special majority" (i.e. 2/3) of the votes entitled to be cast on the resolution and submitted to the other registered Class A shareholders entitled to vote.

[151] The next issue is to determine the means by which the "ordinary resolution", with the heightened level of voting (2/3) by the Class A shareholders, is to be addressed by those shareholders. In that respect, Edward relies on two key provisions found in the Act.

[152] The first key provision is the Act's definition of "consent resolution" in s. 1(1):

"consent resolution" means,

- (a) in the case of a resolution of shareholders that may be passed as an ordinary resolution, a resolution referred to in paragraph (b) of the definition of "ordinary resolution",
- (b) in the case of any other resolution of shareholders, a unanimous resolution, or
- (c) in the case of a resolution of directors or a committee of directors, a resolution passed in accordance with section 140 (3) (a);

[Emphasis added.]

[153] Accordingly, the definition of "consent resolution" in (a) leads back to the definition of "ordinary resolution" in (b) such that a "consent resolution" here means a resolution that is consented to in writing by shareholders holding at least 2/3 of the shares that carry the right to vote at general meetings, provided that it is "submitted" to all of the shareholder holding shares that carry the right to vote at general meetings.

[154] The second key provision is s. 180 of the Act that addresses the process by which a consent resolution may become effective:

A consent resolution of shareholders is deemed

- (a) to be a proceeding at a meeting of those shareholders, and
- (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.

[155] Accordingly, Edward submits that an ordinary resolution here is a "consent resolution", defined as a written resolution consented to in writing by registered Class A shareholders holding at least a "special majority" (i.e. 2/3) of the votes entitled to be cast on the resolution and submitted to the other shareholders entitled to vote. Once completed, Edward argues that s. 180 of the Act "deems" that process to be as if a meeting had been held and that the resolution is "valid and effective".

[156] Leaving aside the issue as to whether the Consent Resolution was "submitted" to all the Class A shareholders here, the evidence establishes that the other Class A shareholders received the Consent Resolution in the mail.

[157] Edward argues that the filling of vacancies follows the same process, namely through a consent resolution. He argues that the Act provides two mechanisms for the filling the vacancies caused by the removal of directors, either of which is sufficient, and both of which are satisfied by the Consent Resolution.

[158] Section 130 of the Act provides that:

A vacancy that occurs among the directors is to be filled in accordance with sections 131 to 135 unless the memorandum or articles provide otherwise.

[159] Section 131 of the Act provides that any directors removed pursuant to s. 128(3) - that is, a shareholder resolution with a special majority of the overall votes - can be replaced by the shareholders, either at the meeting at which the removal occurred, or otherwise:

Subject to sections 132 and 133, a vacancy that occurs among the directors

- (a) may, if the vacancy occurs as a result of the removal of a director under section 128(3), be filled
- (i) by the shareholders at the shareholders' meeting, if any, at which the director is removed, or

(ii) if not filled in the manner contemplated by subparagraph (i) of this paragraph, by the shareholders or by the remaining directors, or

(b) may, in the case of a casual vacancy, be filled by the remaining directors.

[Emphasis added.]

[160] Therefore, s. 131(a)(i) allows the vacancy to be filled at the same "shareholders' meeting" at which the director was removed. Edward then argues that, pursuant to s. 180(a), the Consent Resolution is "deemed to be a proceeding at a meeting of shareholders" within the meaning of s. 131(a)(i) for the filling of those director positions, such that both the removal and replacement are valid and effective in accordance with s. 180(b).

[161] Again, this is said to be in accordance with Article 3.4 that allows for vacancies to be filled "at the same meeting".

[162] Edward argues that a second process for filling vacancies is found in s. 131(a)(ii). It provides that if vacancies are created by the removal of directors that are not filled in accordance with s. 131(a)(i), they can be filled "by the shareholders".

[163] Pursuant to Article 3.3, RCI's shareholders have the power to elect directors, and pursuant to Article 9.20, such election is by "ordinary resolution":

3.3 Election and Term - Directors shall be elected at each annual general meeting by the shareholders entitled to vote thereat to hold office until the next annual general meeting of shareholders.

9.20 Ordinary Resolution as the Default Mode - Unless otherwise provided in the Act, these Articles or other provisions of applicable law or the rules of any stock exchange on the which any shares of the Corporation are listed, any action to be taken by a resolution of the shareholders may be taken by an ordinary resolution.

[164] As a result, Edward argues that directors may be appointed in the same manner as they were removed, namely, a written resolution submitted to the voting shareholders and passed by a "special majority" of the voting shares or, as Edward asserts, the Consent Resolution.

[165] Edward has usefully summarized the arguments advanced by RCI against his interpretation of the Act and Articles, as above:

- a) Under [Article] 3.4, directors can only be removed by ordinary resolution passed at a duly constituted general meeting of shareholders;
- b) RCI's shareholders can only fill vacancies under [Article] 3.4 through an election, which must occur at a duly convened general meeting and cannot be effected by written resolution; and

- c) Any ambiguity concerning [Article 3.4] of the Articles should be resolved in favor of "minority shareholder protections and other applicable legal and regulatory requirements to which RCI is subject or that it voluntarily follows."
- [166] Fundamentally, on the first two points, RCI says that the Articles require a meeting to remove and replace directors and that the process of a consent resolution is not a valid means by which to do so.
- [167] RCI places great emphasis on the words found in Article 3.4 that removal and replacement may be take place "at the same meeting".
- [168] Firstly, RCI argues that Article 3.4 contains a "complete code" for how shareholders can remove directors. I do not agree. This argument ignores the clear effect of Article 1.4 that signals an intention that the Articles will operate within the provisions of the Act, save for any conflict where the Act prevails. Moreover, Article 3.4 itself provides that it is "subject to the provisions of the Act", contrary to any suggestion that the provisions of the Act were chosen by RCI to be specifically excluded in respect of the removal and replacement of directors.
- [169] Secondly, what RCI effectively attempts to do is rewrite Article 3.4 to the extent that it refers to the removal and replacement as being done pursuant to an "ordinary resolution". Strangely, although recognizing the clear importation of that definition into the Articles, RCI argues that Article 3.4 must be read as importing only a part of the definition of "ordinary resolution" - namely, (a) - that refers to a resolution "passed at a general meeting".
- [170] I see no logic or common sense in this approach by which one could discern that Article 3.4 meant that the (b) part of the definition of "ordinary resolution" was simply to be ignored. This same full definition must apply consistently to all provisions in the Articles where there is reference to "ordinary resolution", including Articles 3.4, 3.5 and 9.20. This is also the same phrase used in RCI's 2004 Information Circular, presumably with the intention of referencing this same definition.
- [171] I also reject RCI's argument that the use of "meeting" in Article 3.4 precludes the importation of (b) of the definition of "ordinary resolution", as being "inconsistent" with the same meaning in the Articles per Article 1.2. In the first place, the Articles do not include any reference to the meaning of "ordinary resolution" so no inconsistency could arise. In the second place, as I will discuss below, the use of the word "meeting" in Article 3.4 must also be considered in the context of s. 180 of the Act as to how a meeting may be "deemed" to take place, a provision that is consistent when read together with the Articles and the Act (s. 1(1) "consent resolution" and "ordinary resolution", ss. 128(3) and 130-131).
- [172] Further, as Edward argues, the reference to the filling of vacancies in Article 3.4 at the "same meeting" is clearly permissive, not mandatory. This is also recognized in s. 131(a)(i) which refers to a vacancy being filled at that same shareholders meeting, "if any".

- [173] I accept that RCI has prescribed in its Articles the process by which it has chosen to remove and replace directors. Having said that, the clear import of both the Articles and the Act is the intention that they dovetail with each other and that they be read and applied in harmonious fashion, save for conflicts (resolved in favour of the Act) and save for provisions in the Articles where the Legislature has allowed a company to develop its own procedures.
- [174] This approach to considering the interplay between the Act and the Articles is consistent with the practical, common sense and non-technical approach to contract interpretation (Sattva) while also discerning the object of the Act, and the intention of the Legislature in the statutory interpretation exercise (Phillip Morris).
- [175] Finally, RCI's argument that an actual meeting is necessary also requires that one ignore another clearly applicable provision found in the Act, namely, s. 180. Edward refers to this as being a unique provision in Canadian law although he has referred me to authorities that discuss the process of effecting corporate changes (including a change of control) via a written resolution without a meeting as being allowed in other jurisdictions.
- [176] I disagree with RCI's suggestion that the express provisions of the Articles preclude the application of s. 180. Accepting that there is a clear reference to a "meeting" in Article 3.4, again the preamble - "subject to the provisions of the Act" -bring the analysis back to the Act.
- [177] There is nothing in the Act to support the interpretation that "meeting" can only mean an actual meeting of the shareholders. To the contrary, s. 180 expressly provides that an "actual" meeting is not necessary provided certain prerequisites are met.
- [178] The intention behind such deeming provisions is to create a "legal fiction" as noted by Ruth Sullivan in Sullivan on the Construction of Statutes, 6th ed (Markham: LexisNexis, 2014):

§4.106 Use of "deem" (or "consider" or "is") to create legal fictions.

The most important use of "deems" is to create a legal fiction: a given fact 'x' is declared to be 'y' or is to be dealt with as if it were 'y' for some or all purposes. A person is deemed to be single even though they may be married; a notice is deemed to have arrived on a certain day regardless of when it actually arrived; a provision is deemed to have come into force on a certain day even though the legislation was not in fact in force that day. Although a sovereign legislature cannot change reality, it can declare that for legal purposes reality is to be considered different from what it was or is.

§4.108 When "deems" is used to create a legal fiction, the fiction cannot be contradicted or "rebutted". The facts as declared by the legislature govern, even in the face of irrefutable evidence to the contrary.

- [179] There is no rational reason why, considering the clear statutory intention found in s. 180, a "meeting" could not include either an actual meeting or a "deemed" meeting. In that respect, the Act provides for a "legal fiction" in that the effect of the Consent Resolution is as if an actual meeting had taken place to both remove and replace directors, just as contemplated by Article 3.4.
- [180] RCI argues that that deeming something to be a "proceeding at a meeting" (s. 180) of shareholders is different than deeming it to be a "meeting of shareholders" under the definition in s. 1(1) of the Act. I see no merit in this argument. In my view, the clear import of s. 180 of the Act is that the process of a consent resolution can, under s. 180, be "deemed" as valid and effective as if passed at a meeting, signalling that the process is intended to obviate the need for a meeting at all.
- [181] RCI also refers to the need for a meeting at which time an "election" is required. However, "election" is a word used in Article 3.3 where directors are elected at the AGM. In addition, Article 3.6 permits directors to fill a vacancy in the Board if shareholders fail to "elect" the number of directors pursuant to the Articles.
- [182] However, the word "election" is not found in the other relevant Articles discussed above, particularly Article 3.4.
- [183] That brings me to the more general arguments advanced by RCI as to why the process of a consent resolution could not have been contemplated by the Articles.
- [184] RCI refers to its spring 2004 Circular - referring to removal by ordinary resolution as opposed to special resolution (quoted above). RCI emphasizes that this makes no reference to Article 3.4 as having the effect of changing the process through which directors can be removed or replaced. RCI then argues that, as a result, RCI's shareholders would reasonably have understood that Article 3.4 was only changing the voting threshold for removing directors from a two-thirds majority to a simple majority.
- [185] I also reject this argument. By the Circular expressly referring to an "ordinary resolution" then being required under the new Articles, any person needing to understand that phrase would then have been directed to the Act, where the only definition is found. That definition clearly refers to (b) of "ordinary resolution" as being a "consent resolution" with the consequential potential application of ss. 128(3) and 180.
- [186] RCI argues that the removal and election of directors is a process of fundamental importance in which all shareholders have a right to participate (either through voting or notice and attendance). Further, RCI says that it is a widely held company with a dual class share structure that is listed for trading in both Canada and the US and that it is subject to extensive disclosure and governance requirements in both countries. Finally, RCI says that it would be inconsistent with RCI's longstanding public commitment to strong corporate governance practice to allow such a procedure.

- [187] I have already discussed - and rejected - such arguments as to the post-2004 disclosures and RCI's governance practices as largely irrelevant in the "Surrounding Circumstances" section, as above.
- [188] Edward argues that the exercise of shareholder rights is not a matter of "corporate governance", which is concerned with the manner in which management and the board of directors carry out their mandates as granted by shareholders. Clearly, RCI takes a broader view of the concept of "corporate governance", including that the process of selecting directors is part of "shareholder democracy".
- [189] This is an interesting debate but, in my view, it is not one that I need wade into. Even taking RCI's broader view of the concept, RCI's repetition of its current governance regime and its commitment toward "good" governance unduly shifts the focus of the enquiry away from shareholder rights, which is a central focus here.
- [190] Edward's answer to RCI's argument that this process is "unacceptable" is found in the comments of the court found in *TELUS Corporation v. Mason Capital Management LLC*, 2012 BCCA 403, where a proponent was suggesting the application of broader equitable concepts to override the provisions of the Act. Such an approach was rejected by the court and is apt here:
- [81] The fact that Mason has hedged its position to the extent that it has is cause for concern. There is, at the very least, a strong concern that its interests are not aligned with the economic well-being of the company. That said, there is no indication that it is violating any laws, nor is there any statutory provision that would allow the court to intervene on broad equitable grounds. To the extent that cases of "empty voting" are subverting the goals of shareholder democracy, the remedy must lie in legislative and regulatory change.
- [191] As Edward argues, the Act contemplates a variety of ways and circumstances in which a shareholder may exercise its right to vote depending on the nature of the resolution, how it is presented and what thresholds are required to pass that resolution:
- a) Most resolutions presented at a meeting of shareholders can be passed by a simple majority, and it is a simple majority of those present at the meeting, not all voting shares (i.e., by "ordinary resolution");
 - b) Some resolutions presented at a meeting require a "special majority" (2/3 or 3/4) but only for those present at the meeting (i.e., by "special resolution");
 - c) "Ordinary resolutions" ((b) of the definition in s. 1(1)), if presented in writing, require a special majority to be passed, and it must be a special majority of all voting shares, not just of those that vote on the resolution; and
 - d) Special resolutions ((b) of the definition in s. 1(1)), if presented in writing, requires unanimity to be passed, and it again must be unanimity of all voting shares.

- [192] This hierarchy of voting methods and thresholds is plain and apparent in the Act as describing how shareholders exercise their power to vote. Importantly, it is plain from the above potential processes by which a shareholder may vote that a clear option is a written resolution provided the appropriate threshold is achieved and the proper process is followed.
- [193] It is within this framework that Edward has presented the Consent Resolution as having achieved the requisite majority (2/3), after having it presented to all shareholders entitled to vote. He asserts that this was all done in accordance with the provisions of the Act.
- [194] RCI argues strenuously that Edward is "thumbing his nose" at the proper process and that he improperly seeks to exert rights "with the stroke of pen". However, as I see it, Edward has closely followed the strictures of the Articles, as informed by the Act where appropriate. This can only be described as respecting the process, not disregarding it.
- [195] It was RCI that expressly adopted the definition of "ordinary resolution" in its Articles that leads to the analytical framework employed by Edward. RCI chose not to adopt another process for removal, such as the provisions of the Act requiring a "special resolution" which, if in writing, required unanimous consent of all shareholders holding share that carry the right to vote at general meetings.
- [196] As Edward argues:
- The Act recognizes and gives legal effect to the principle that if a sufficient majority of shareholders support a course of action, they should be able to act quickly and decisively without the expense and delay of a meeting. Neither the Board nor management should be able to interfere with the will of an overwhelming majority of a company's shareholders.
- [197] I appreciate RCI's concerns about this process being subject to the "whim" of the RCT. However, the substantial majority of voting control held by the RCT is not a secret and I find it difficult to understand that any stakeholder could think otherwise and not appreciate that the RCT could, if it chose, exercise that voting control, if it saw fit.
- [198] I have considered the provisions of the Articles as a whole, as Sattva requires. I have considered all of those provisions in the Articles (including the ones discussed above) in the context of the statutory regime set out in the Act. In my view, the conflicts that RCI contends arise do not exist. I conclude that the provisions of the Articles can be read in conjunction with the Act so as to fashion a cohesive and coherent regime, particularly as to a shareholders' right to remove and replace directors. Edward's arguments, as set out above, are coherent and logical and, in my view, are consistent with a plain reading of both the Articles and the Act.
- [199] Both parties have addressed arguments as to whether there is any ambiguity in the Articles, specifically Article 3.4. As stated above, I have not found any ambiguity that is required to be resolved and I need not address those arguments.

C. Was the Consent Resolution "submitted" to Shareholders?

[200] Even if Edward was entitled to employ the process to remove/replace RCI directors via the Consent Resolution, as I have found, RCI argues that the Consent Resolution was not "submitted" to its shareholders, as required under the (b) portion of the definition of "ordinary resolution" found in s. 1(1) of the Act.

[201] Section 7(1) of the Act addresses the requirements for sending a record under the Act:

Unless this Act provides otherwise, a record required or permitted under this Act or the memorandum or articles of a company to be sent by or to a person may be sent

- (a) in the manner agreed to by the sender and the intended recipient,
- (b) in any manner required by the memorandum or articles if
 - (i) paragraph (a) does not apply, and
 - (ii) the record is being sent by one of the following to any of the following:
 - (D) a shareholder of the company

...

[202] Following from s. 7(1)(b)(ii)(D), the Articles provide for the manner in which "notices" are to be given to shareholders. Article 11.1 provides that it may be mailed:

Method of Giving Notice - Subject to the requirements of any other applicable law, any notice (which term includes any communication or record) or other document required or permitted to be given (which term includes sent, delivered or served) pursuant to the Act, the Articles or otherwise to a shareholder shall be sufficiently given if delivered personally to the person to whom it is to be given or if mailed to the person at his recorded address by prepaid ordinary or registered mail. A notice so mailed shall be deemed to have been given when deposited in a post office or public letter box and received on the day, Saturdays and holidays excepted, following the date of mailing.

[Emphasis added.]

[203] There is no dispute concerning Edward having mailed the Consent Resolution to all of the Class A shareholders on October 21, 2021. In his letter, Edward enclosed the Consent Resolution (then unsigned), biographies of each of the newly proposed directors and his (the Control Trust Chair's) assertion that each of the proposed directors was "independent" and not disqualified from being an RCI director for any other reason.

[204] The reference to "notice" in Article 11.1 admits of a broad interpretation, particularly by its further reference to any "communication", "record" or other "document".

- [205] RCI's submissions, to a degree, suggest that the content of the "notice" is not defined but must include more than the bare materials forwarded, being the Consent Resolution and the biographies.
- [206] This preliminary argument is met by a plain reading of the definition of "ordinary resolution" that, in (b), provides that it is the consent resolution that is "submitted". The Act does not indicate any further requirements in terms of what needs to be sent to shareholders. There is no basis upon which I would "read-in" other requirements into this statutory provision, which is clear on its face.
- [207] Another preliminary issue raised by RCI is that allowing Edward to "submit" the Consent Resolution through the mail in accordance with Article 11.1 (admittedly a brief process) would make a "mockery of shareholders' rights under the Act and the Articles". Essentially, RCI argues that the brief amount of time that elapsed between the "submission" of the Consent Resolution (assuming it was) and the execution of the Consent Resolution is insufficient to allow any shareholder to have a meaningful chance to review the materials.
- [208] As with many of its arguments, RCI points to various "contextual factors" including the fundamental change being proposed, RCI's share structure, RCI being a public issuer in a highly regulated environment and, again, RCI's commitment to "best corporate practices".
- [209] This argument must also fail for the simple reason that it is contrary to the Articles and the Act. RCI's suggestion that the "process required to 'submit' a resolution depends on the relevant circumstances" is antithetical to the clear provisions found in Article 11.1. To adopt RCI's argument would create confusion and uncertainty where any stakeholder would wonder what process needs to be followed under any provision of the Articles where a "notice" is to be sent.
- [210] If RCI wished to invoke a more rigorous process for notice to shareholders in the circumstances of this case, it could have done so. It did not and it must be taken to have done so deliberately.
- [211] As Rothstein J. commented in para. 57 of *Sattva*, it is not for the Court to rewrite the provisions of a contract or create a new agreement, now with the benefit of hindsight (at least from RCI's perspective).
- [212] I find that the materials forwarded by Edward, including the Consent Resolution, is a "notice" or "communication" or "document" that comes within those terms. Article 11.1 applies.

- [213] There is no evidence that any other Class A shareholder responded at all to the Consent Resolution, either objecting or consenting. RCI's counsel refers to Loretta as objecting to the Consent Resolution, which is certainly evident from her Affidavit. As Edward notes, this is an odd circumstance in that no issue arising between shareholders has been engaged; rather, the dispute is between a shareholder and the company itself, who purports to defend others in the face of Edward's actions.
- [214] However, there is no evidence, and Loretta does not suggest, that she is the direct holder of either Class A or B shares. I can only presume that any shareholdings she has arises indirectly through the RCT, in which case any objection she has is more appropriately addressed to the RCT. In fact, Loretta states in her Affidavit that she intends to challenge Edward's decision as Control Trust Chair to replace the RCI directors.
- [215] In any event, with the RCT having 97.5% of the votes, the Consent Resolution was easily passed by a "special majority" of all Class A shareholders.
- [216] RCI says two issues arise resulting in Edward not having complied with the Act. The issues that arise relate to who is entitled to "submit" the Consent Resolution to shareholders and who is entitled to receive that "submission" of the Consent Resolution.
1. Who is entitled to "submit" the notice to shareholders?
- [217] RCI says that only the company can "submit" a resolution to shareholders.
- [218] RCI refers to the definition of "submit" (as relevant here) from the Shorter Oxford English Dictionary on Historical Principles, 5th ed (Oxford University Press, 2002) as: "refer or present to another for judgment, consideration, or approval".
- [219] RCI argues that the word "submit" (or grammatical variations) is used a number of times throughout the Act in relation to resolutions of shareholders. In each case, the Act provides that it is the corporation that submits the resolution to shareholder and, in doing so, the corporation is subject to prescribed delivery, disclosure, and timing obligations with respect to all of its shareholders - voting and non-voting, registered and beneficial.
- [220] I have reviewed these other sections of the Act that refer to the word "submit" (ss. 167, 173 and 187-189). These provisions relate to materials to be considered at meetings of shareholders, including general meetings, and voting.
- [221] In fact, s. 187(1) of the Act, referred to by RCI, refers to the "submitter" as the "qualified shareholder" who submits a proposal to a company, which leads me to conclude that the context is important as to who may "submit" a "notice" (i.e. a document or resolution) in any particular circumstance. In my view, the other provisions of the Act cited by RCI have no relevance to the expedited process here contemplated by the sections of the Act by which a consent resolution may be sent to other shareholders.

[222] There is nothing in para. (b) of the definition of "ordinary resolution" or in any other provision of the Act that suggests that a shareholder who wishes to advance a written consent resolution is required to send that document firstly to the company and then rely on the company to take steps on its own to "submit" it to shareholders.

[223] This result does not, as RCI suggests, have a "profound impact on the balance of responsibility between boards of directors and shareholders". This is not a re-balancing of the interests of relevant stakeholders with directors being one of them. This is simply a matter between shareholders who are entitled to elect or remove or replace directors in accordance with whatever rights are available to them under the Act and the Articles. It is only a balance between shareholders that takes place by giving those shareholders notice as required by the Articles and the Act and having those shareholders exercise their voting rights at that time.

[224] I conclude that it was open to Edward to "submit" the Consent Resolution directly to the other Class A shareholders on his own and without the involvement of RCI.

2. Who is entitled to receive the Consent Resolution?

[225] RCI argues that Edward was required to send the Consent Resolution to both the Class A shareholders and the Class B shareholders.

[226] Under Article 26.4, holders of Class B Shares are entitled to receive notice of and to attend meetings of the shareholders, although they are not entitled to vote at the meeting. Class B shareholders do not have rights to nominate, or vote for, the election of directors, or weigh in on the removal or replacement of directors, such as was proposed by the Consent Resolution. If Class B shareholders attend a meeting of the Class A shareholders, they do so as "guests".

[227] In practice, RCI gives Class B shareholders notice of the AGM at which time an election of directors takes place.

[228] As noted above, Mr. Emerson takes up the cause of the Class B shareholders (and others) at paras. 59-64 of his opinion. He suggests that, if the Consent Resolution results in a meeting of all shareholders not being called (and thus not properly constituted and held in accordance with the usual disclosure and regulatory requirements):

.. both the Class B non-voting stakeholders and the non-Rogers Class A voting shareholders are denied their right to receive, in an effective manner, timely, proper, full and accurate disclosure of material information with respect to such a significant change in the affairs of RCI.

[Emphasis added.]

[229] Further, Mr. Emerson refers to the failure to convene a meeting, at which time Class B shareholders might attend, as denying such persons the "right" to ask questions of others, including the RCI directors and the RCT Control Trust Chair, and voice any concerns they may have.

[230] In para. 16 of her Affidavit, Loretta expresses these same concerns. As discussed above, Loretta says that the "gauntlet" of a meeting with all shareholders is an important part of the process that she and Ted envisioned for RCI and the Control Trust Chair, even though the Rogers family held such a substantial voting majority stake.

[231] These concerns are largely rooted in RCI's past practices in dealing with shareholders, including those holding Class B shares.

[232] The answer again lies in the plain words found in the Act.

[233] Under the definition of "ordinary resolution", (b), and therefore within the definition of "consent resolution", the submission of the consent resolution need only be made to the "shareholder holding shares that carry the right to vote at general meetings". That is the Class A shareholders only. Contrary to what Mr. Emerson suggests, no "consent" of the Class A shareholders is required or necessary to invoke that process.

[234] Further, accepting that Class B shareholders are entitled to attend a "meeting" of shareholders, the provisions that I have addressed in detail above, including s. 180, give rise the conclusion that the Class A shareholders are "deemed" to have met at a meeting (see s. 180(a)). In addition, s. 180(b) provides that it is valid and effective:

as if it had been passed at a meeting of shareholders that satisfies all the requirements of this Act and all the requirements of the articles of the company, relating to meetings of shareholders.

[235] By the plain reading of s. 180, the meeting of all shareholders is deemed to have taken place, including Class B shareholders, in satisfaction of any requirement that they be allowed to attend meetings in accordance with Article 26.4.

[236] I conclude that it was not necessary for the Class B shareholders to participate in the process leading to the Consent Resolution or that they attend an actual meeting of shareholders to consider that Consent Resolution.

D. Summary and Conclusions

[237] I have concluded that the process by which Edward obtained the Consent Resolution was available him under the Articles and the Act. In accordance with the Articles and the Act, the Consent Resolution is deemed to be valid and enforceable.

IX. RCI COMPLIANCE REgarding CORPORATE Records

- [238] As I indicated above, assuming that Edward succeeded in obtaining a declaration that the Consent Resolution is valid and effective, he sought certain orders to compel RCI's corporate counsel to complete and file the documents required by the Act, including under ss. 126 and 127, with the Registrar.
- [239] To date, RCI's corporate counsel has refused to record the change of directors under the Consent Resolution, no doubt in light of the ensuing controversy.
- [240] RCI does not advance any argument contesting this relief.
- [241] The statutory basis for granting relief is found in ss. 228-230 of the Act.
- [242] I am satisfied that the circumstances here provide justification for the Court to exercise its discretion to grant this relief. As Edward notes, the purpose of these provisions are to provide the court with a broad discretion to expediently resolve disputes in connection with a company's records, including ensuring that the corporate records are correct in noting the removal of directors and the valid appointment of directors.

X. DISPOSITION

- [243] I grant the relief sought by Edward in his Petition, as set out in the "Relief Sought" section in these Reasons.
- [244] Given Edward's success in bringing this proceeding, I also grant costs in his favour as party and party costs under Appendix B.
- [245] As a postscript, I wish to acknowledge the hard work of counsel to prepare and file the necessary materials that allowed this hearing to take place on a very expedited basis. In that respect at least, the parties were united in their goal. The Court extends its appreciation for those efforts, and also for counsels' assistance with their very helpful submissions, both written and oral.

"Fitzpatrick J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/21/21/2021BCSC2184cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/rogers-v-rogers-communications-inc-2021>

Prepared on 29 October 2026 · Esheria