Principles of Interpretation as Applied to Corporate Articles: A Comment on *Rogers v Rogers Communications Inc.*

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Last fall, public attention was captured by a contentious boardroom battle among members of the Rogers family for control of Rogers Communications Inc. ("RCI"). In a corporate showdown that drew comparisons to HBO's *Succession*, Edward Rogers attempted to replace RCI's chief executive officer and several independent directors against the wishes of his mother and two sisters. When the board of directors refused Edward's demands, he petitioned the British Columbia Supreme Court to validate his changes to RCI's board. The resulting judgement,[1] which validated Edward's actions, serves as a forceful affirmation that articles of a British Columbia company should be interpreted according to their plain meaning.

RCI is a publicly-listed telecommunications firm founded by the late Ted Rogers. Although based in Ontario, the company is incorporated in British Columbia and has two classes of shares: Class A voting shares (held primarily by the Rogers family) and Class B non-voting shares (held by public investors). The Rogers family's Class A shares are held, directly or indirectly, by the Rogers Control Trust (the "RCT"), a holding entity established by Ted and currently controlled by his son Edward.[2] Other members of the Rogers family include Edward's mother (and Ted's widow) Loretta, and Edward's sisters Martha and Melinda. Edward, Loretta, Martha, and Melinda each serve as directors of RCI and members of the

1 *Rogers v Rogers Communications Inc*, 2021 BCSC 2184, *per* Fitzpatrick J.

2 Edward is the Chair of the RCT and holds the power to vote its Class A shares (with the approval of the RCT Advisory Committee).

RCT Advisory Committee.[3] Edward serves as the chair of both RCI's board of directors and—more significantly—the RCT, a position which grants him the legal power to vote the RCT's Class A shares. These shares comprise 97.5% of the voting power of RCI, granting Edward effective control of the company.

The dispute among the family members began when, in anticipation of RCI's acquisition of Shaw Communications Inc., Edward attempted to replace RCI's CEO, Joe Natale, with the company's CFO, Tony Staffieri.[4] This decision was initially supported by Loretta, Martha, and a majority of RCI's board, who voted to accept Mr. Natale's resignation on September 24, 2021.[5] However, in an unexpected reversal (possibly following discussions among Melinda and certain independent directors), the board rescinded its resolution to replace Mr. Natale and established an "Executive Oversight Committee" designed to limit Edward's influence.[6] The board (including Melinda, Loretta, and Martha) had seemingly turned against Edward. The RCT Advisory Committee, on the other hand (with the exception of Melinda, Loretta, and Martha), expressed "strong support" for his leadership as Chair.[7]

Facing a now-hostile board,[8] Edward announced his intention to use his authority as the RCT Chair to remove and replace the opposing independent directors, a decision supported by a majority of the RCT Advisory Committee.[9] On October 22, 2021, Edward caused the RCT (as direct or indirect holder of Class A shares) to execute a written consent resolution removing five directors from RCI's board and replacing them

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3 A third sister, Lisa, serves on the RCT Advisory Committee, but not the RCI board.

4 *Ibid* at paras 37–43.

5 *Ibid* at paras 45–47.

6 *Ibid* at para 50.

7 *Ibid* at para 54. Melinda, Loretta, and Martha were absent from the RCT Advisory Committee meeting, which occurred at the same time as the RCI board meeting establishing the Executive Oversight Committee.

8 Discussions between the RCI board and the RCT Advisory Committee held on October 19, 2021 could not resolve the situation.

9 Voting decisions of the RCT Chair may be overruled by a supermajority vote of the RCT Advisory Committee. On October 21, 2021, the members of the RCT Advisory Committee voted on the matter and did not resolve to constrain Edward from removing and replacing the independent directors (in dissent, Loretta, Martha, and Melinda voted against Edward).

with new directors of Edward's choosing. In response, RCI issued a statement that the company had "reviewed the resolution with its external legal counsel" and "determined the resolution is invalid."[10] In light of this determination, the independent directors purportedly removed by the resolution refused to step down. At the same time, the "new" board as reconstituted by Edward affirmed his position as chair.[11] Thus, RCI faced an unusual situation of "dueling" boards of directors, each claiming the other was illegitimate. Following this breakdown in governance, Edward filed the petition that was the subject of this case.

As framed by Fitzpatrick J., the narrow issue to be decided was whether a controlling shareholder can remove and replace directors through a written consent resolution, if that process is provided for in the company's articles.[12] Beyond this narrow question, however, the judgement also speaks to broader issues of contractual interpretation, specifically as applied to the articles of a British Columbia company. The most important of these issues is whether "surrounding circumstances"—in this case, the subjective wishes of a founding shareholder and the company's commitment to "good governance" principles—can modify or overrule the plain meaning of the articles themselves. The Court answers this question in the negative, interpreting RCI's articles according to the ordinary meaning of their words and declining the invitation to consider broader contextual factors.

The heart of the Court's analysis is a straightforward interpretation of the interplay between RCI's articles and the *Business Corporations Act*.[13] According to the Court, Edward's use of the consent resolution process was authorized by Article 3.4 of the company's articles, which provides that "subject to the provisions of the [*BCA*], shareholders may by ordinary resolution remove any Director from office."[14] This process for removing directors is itself authorized by s. 128(3) of the *BCA*, which provides that a company may remove a director before the expiration of their term "by the

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10 *Ibid* at para 67.

11 Mr. Natale, Loretta, Martha, and Melinda were not in attendance at the board meeting approving Edward's authority.

12 *Ibid* at para 9.

13 *Business Corporations Act*, SBC 2002, c 5 [*BCA*].

14 Similarly, Article 3.5 provides that a director ceases to hold office when "the Director is removed from office by the shareholders by ordinary resolution."

resolution or method specified" in the company's articles.[15] The term "ordinary resolution" (as used in Article 3.4)[16] is defined in the *BCA* as either (1) a simple majority of the votes cast by shareholders at a shareholder meeting or (2) a resolution passed "by being consented to in writing by shareholders holding . . . shares carrying at least a special majority of the votes entitled to be cast on the resolution."[17] Article 1.1 defines "special majority" to mean "at least 2/3 of the votes cast on the resolution." Thus, according to the plain meaning of the articles and the *BCA*, the RCT, as the dominant voting shareholder, was empowered to replace directors by executing a consent resolution representing at least 2/3 of the Class A shares.

Despite the language of the articles, RCI argued that a written consent resolution was an improper method of replacing directors. RCI's position was that the totality of the "surrounding circumstances" required a full shareholder meeting to reconstitute the board. In particular, RCI argued that the consent resolution process (1) contravened the subjective wishes of the company's founder and (2) was inconsistent with the company's "good governance" practices.[18] Much of the Court's discussion focuses on why these contextual factors are an inappropriate source for interpreting the company's articles.[19]

RCI's contextual argument has two aspects. First, regarding Ted's wishes, the company relied on evidence that Ted and Loretta "expected" that any replacement of directors would be effected through a full shareholder meeting.[20] This evidence was submitted in the form of private family documents, including Ted's Control Trust Will (by which the RCT was established) and a "personal and confidential" "Memorandum of Wishes" (addressed to the RCT Advisory Committee), both executed in 2008.[21] Among other things, the Memorandum of Wishes states that if a

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15 The default rule is that directors may be removed by special resolution. *BCA* s 128(3)(a).

16 According to Article 1.2, any words or phrases defined in the *BCA* have the same meaning in the articles.

17 *BCA* s 1.

18 *Rogers* at paras 86–124.

19 Note that in the Court's reasons, the discussion of these contextual factors precedes analysis of the articles themselves.

20 *Ibid* at para 90.

21 The date of these documents is significant, given that RCI's articles were adopted in

irresolvable conflict arises between the RCI board and the RCT, the RCT Chair should run the "public gauntlet" of a shareholder meeting to replace any directors. RCI argued that the language of its articles—particularly the provisions for removing and replacing directors—should be interpreted according to Ted's expectations, as evidenced by the Memorandum of Wishes and other contextual factors.[22]

The Court addresses this argument by framing the articles in contractual terms, stating that "the articles represent a contract in law between the company and its shareholders," and that ordinary "principles of contractual interpretation apply."[23] Citing the Supreme Court of Canada case *Sattva Capital Corp. v Creston Moly Corp.*,[24] the court further states that "surrounding circumstances" are of limited use when interpreting contractual language, particularly when the grammatical meaning of the language itself is unambiguous.[25] Quoting *Sattva*, the court emphasizes that evidence of surrounding circumstances "must never be allowed to overwhelm the words of [the] agreement" and that "interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract."[26] Furthermore, surrounding circumstances are only relevant to interpreting contractual language if they speak to the factual context *at the time the language was agreed to*.[27] Thus, evidence of subjective intent that postdates the contract itself is of little aid in interpreting the objective meaning of its language.[28]

In this case, both the Control Trust Will and the Memorandum of Wishes postdated RCI's articles, which had been adopted in 2004.

2004.

22 In addition to the Control Trust Will and the Memorandum of Wishes, RCI also cited an interview with Ted's biographer.

23 *Ibid* at para 81. The Court's contractual approach is supported by *BCA* s 19(3), which takes an explicitly contractarian approach to corporate law. Note that other Canadian corporate statutes, including the *Canada Business Corporations Act*, lack this explicit contractarian nature.

24 *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 [*Sattva*].

25 *Ibid* at para 82–84.

26 *Ibid* at para 87.

27 *Ibid* at paras 82, 87, 101.

28 Query, however, whether the strict approach of *Sattva* is entirely consistent with the oppression remedy, which allows equitable relief based on "reasonable expectations" (possibly including expectations formed *after* a company's formation).

According to the Court, neither of these documents could override the preexisting language of the articles. The Memorandum of Wishes was not a legally binding document, as it merely addresses the subjective expectations of the company's (former) controlling shareholder. Although Edward may have disappointed his father's expectations,[29] his actions to reconstitute the board were consistent with RCI's governing documents. Simply put, Ted's wishes are "of no assistance in interpreting the intentions of RCI in May 2004 when the Articles were adopted."[30]

RCI's second argument was that Edward's actions were inconsistent with the "good governance" practices of the company.[31] According to John MacDonald, one of RCI's independent directors, electing directors at a full shareholder meeting represents "proper governance for a significant Canadian publicly traded company."[32] In light of this governance principle, replacing directors by unilateral shareholder action was "unacceptable."[33] Mr. MacDonald emphasized that RCI's directors were historically elected at meetings of shareholders and that the RCT had never before acted by written shareholder consent.[34]

This argument was supported by an "expert"[35] affidavit from Garfield Emerson, Q.C., a prominent corporate and securities lawyer and former chairman of RCI's board. According to Mr. Emerson's submission, the written consent process used by the RCT did not satisfy Canadian "best corporate governance practices."[36] Mr. Emerson argued that executing a consent resolution to remove and replace directors failed to provide the fairness, transparency, and accountability of a public shareholder meeting, and that it represented an exceptional practice relative to the governance of

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29 It was Ted's expectation that in the event of an intractable conflict between the RCT and a majority of RCI's board, the RCT Chair would "run through the 'public gauntlet' of calling a shareholder meeting to replace the RCI directors who were opposed." *Ibid* at para 91.

30 *Ibid* at para 95.

31 *Ibid* at paras 96–123.

32 *Ibid* at para 98.

33 *Ibid*.

34 *Ibid*.

35 Given the nature of his testimony and his past connection to RCI, the Court raises doubts as to whether Mr. Emerson qualifies as an independent expert.

36 *Ibid* at para 114.

other public companies.[37] Unfortunately for RCI, Fitzpatrick J. dismisses this argument as irrelevant to the narrow issue before the Court, which was whether the written consent process was permissible under the articles and the *BCA*.

In answering this narrower question, the Court focuses on the language of the articles itself. Just as it rejects *ex post* evidence of Ted's wishes, the Court also rejects the governance practices of RCI since 2004. The Court emphasizes that RCI's discretionary practices as to the election of directors do not affect the meaning of its articles, nor are rights of a controlling shareholder extinguished by their disuse. In a passage worth quoting in full, Fitzpatrick J. underscores that a contractual party's conduct does not alter its legal obligations.

> 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.[38]

In rejecting this retrospective argument, the Court specifies that the legal content of a company's articles remains fixed in time, and cannot be changed by discretionary practices that depart from the original meaning. Contextual evidence is relevant only if contemporaneous with the contract itself—and then only if the contractual language would otherwise be ambiguous.

Based on these principles of interpretation, the Court applies the plain meaning of the language of Article 3.4, which allows the replacement of directors by ordinary resolution. Given the statutory definition of "ordinary resolution" provided in the *BCA*, and the RCT's voting control of 97.5% of RCI's Class A shares, the Court finds that Edward was fully empowered to replace directors by written consent, even in contravention of his father's wishes and RCI's corporate governance practices.

This interpretative approach—adhering to the ordinary meaning of the language of the articles, and disregarding the subsequent conduct of the

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37 *Ibid*.

38 *Ibid* at para 107.

company and its shareholders—is entirely correct. Not only does it reinforce the basic interpretative principle that words should be given their "ordinary and grammatical" meaning,[39] it also prevents parties' conduct from changing the terms of their legal agreement. Contractual parties, business partners, and corporate stakeholders often voluntarily depart from the terms of written agreements and refrain from strict enforcement of their contractual rights.[40] Flexibility and accommodation are the lifeblood of successful business relationships and strictly enforcing contractual terms can be a counterproductive relational strategy. Contractual rights often serve as a form of "safety net," in that they are only enforced in circumstances where the business relationship has broken down (e.g., litigation). If a party's forbearance in enforcing its rights could undermine its legal position, the give-and-take so essential to business dealings would be eroded.

Allowing "surrounding circumstances" to influence the meaning of legal text would be particularly inappropriate in this case, given the tenuous relationship of those circumstances to the original drafting of the articles. The Memorandum of Wishes was just that—a nonbinding expression of Ted's wishes for the future governance of the company. Although Ted's expectations could influence his family's decision-making, they could not control RCI from beyond the grave. Similarly, RCI's historical commitment to "good governance" principles was entirely discretionary, and in no way altered the company's articles. *Sattva* states that while contextual factors can inform contractual interpretation, they must be contemporaneous with the underlying agreement.

Ultimately, this case clarifies that company articles are subject to the same principles of interpretation as contractual language, and that the role of broader contextual factors should be narrowly circumscribed. Neither discretionary corporate governance principles nor the wishes of founding shareholders can override the plain meaning of corporate documents. Per *Sattva*, contextual evidence is *only* relevant if the contractual text is unclear, and then only if the evidence existed *at the time the articles were adopted*. By

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39 See *Sattva* at para 47.

40 For a description of this phenomenon in the mergers and acquisitions context, see Robert Anderson & Jeffrey Manns, "The Merger Agreement Myth" (2013) 98:5 Cornell L Rev 1143 at 1177–78.

limiting the role of extra-textual factors, *Rogers v Rogers Communications Inc.* affirms that shareholders may rely on the plain meaning of company articles.