Lessons from the Rogers and Roy Family Rivalries: A Succession Lawyer Weighs In

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The term **Succession** has been a mainstream media fixture over the past few weeks due to the ongoing Rogers family saga and the timely return of HBO's smash-hit series of the same name. The firestorm that comes with a family fighting over the legacy of an empire makes for scene-stealing drama both on-screen and in real life, but it's something that happens very regularly with family businesses of all sizes when the proper safeguards are not in place. The good news? There are measures that can be implemented to help ensure that these types of feuds are only of the fictitious variety.

Both *Succession* and the Rogers family sagas portray the hand-off of a family business going or gone awry, one set in the land of HBO and the other playing out before our very eyes. For those who don't watch *Succession*, the series sees siblings and key employees fight over the future - and control - of a business run by the Roy family while the first generation is still actively involved in the company. In contrast, the Rogers scenario has entailed family members fighting over control of the business following the first generation's death, pitting siblings against each other and their surviving mother. (The latest ruling in the media giant saga has confirmed Edward Rogers as the legitimate chair of Rogers Communications Inc., which has, potentially, settled the legal dispute for the time being.) Either way, both are stark reminders of the importance of a comprehensive succession plan.

It is often said that only 10% of family-owned businesses continue to thrive by the time the third generation has taken over. While a succession plan is typically intertwined with tax and estate planning, it isn't often that a proper tax and estate plan can prevent the failure to properly succeed a business to the next generation and beyond (other than ensuring there is sufficient liquidity in the estate to avoid having to sell the business to satisfy obligations upon death (primarily tax)). It is more likely that the failure to properly address certain non-tax considerations will lead to the inevitable downfall of a succession strategy.

For the Roy and Rogers families, the focus is largely on corporate governance – how the affairs of the business are conducted – and the relationships between family members with varying goals, objectives, and involvement in the family business. In my experience, corporate governance for a family business once the first generation is no longer active in the business (or sometimes while they still are) is most commonly achieved via a shareholder's agreement – or as I like to call it, the family constitution. In addition to corporate governance matters, family constitutions typically deal with a number of other matters, including who can become shareholders of the company and how shareholders can deal with their shares (not only during their lifetime but also upon disability or death).

Corporate Governance

In respect of corporate governance, a family constitution typically dictates how the board of directors will be constituted – whether immediately or upon the first generation no longer being active in the business.

When one family member will be taking over the day-to-day operations of the business, it is typical to provide for him/her to be the sole director so that he/she may carry on the affairs of the business without interference, although it is common to couple this type of provision with certain decisions requiring shareholder consent (on a majority or unanimous basis) when such decision would otherwise have only required director approval. Examples of this include expenditures above a certain threshold, the sale of major assets, and the issuance of shares.

When more than one or all of the family members are involved in the business, provisions will often be included to allow each of such family members to elect one person to the board so that all such family members have an ongoing say in the management of the business' affairs.

Who can be a shareholder and what are a shareholder's rights?

In respect of shareholder rights, the family constitution typically provides that, subject to certain exceptions, nobody can become a shareholder of the corporation without the prior consent of the shareholders. Succeeding a family business to the next generation is hard enough as it is; imagine if arm's-length people were able to become shareholders, as a right, and have a say in the ongoing affairs of the business. What is already a complicated situation to navigate can only become increasingly difficult to manage.

Exceptions to the general rule are often made to accommodate family members' own tax and estate planning initiatives, including how a shareholder's interests in the business can be dealt with upon death. It is typical to limit these transfers not otherwise requiring consent to issue (children, grandchildren, etc.) and corporations or trusts of which the shareholder and his/her issue are shareholders or beneficiaries, as the case may be. The right for a spouse to become a shareholder

is typically limited to an interest in a spousal trust with multiple trustees (many agreements of which require other family members to be trustees). These restrictions help keep the business in the family – and the constitution typically provides for consequences if the terms of the agreement are not honoured. A shareholder might find himself/herself in default if he/she contravenes the terms of the agreement – and, among other consequences of default, there may be a right given to the other shareholders to purchase the defaulting shareholder's shares at a discount.

On the topic of the sale of shares, it is common for a family constitution to provide for various provisions relating to the sale of a shareholder's shares – within the family or to a third party.

Provisions for the sale of shares within the family are most commonly included to deal with the death of a shareholder and the possibility of a shareholder wanting to monetize his/her interest in the business (often applicable when not all family members are actively involved in the business). A family constitution can provide for the terms by which a shareholder can exit the business in these circumstances – whether he/she is bought out by the other shareholders or by the company itself. In this regard, it is common to include terms for a buyout over time since, in most circumstances, there isn't sufficient liquidity available at either the shareholder or corporate level to pay out the departing shareholder immediately.

In respect of sales to third parties, a family constitution typically includes a variety of provisions to help facilitate the sale of shares by one or more shareholders to third parties including tag-along rights (where controlling shareholders sell all or a portion of their shares they must allow the other shareholders to participate in the sale on a pro rata basis on the same terms), drag-along rights (where controlling shareholders sell all of their shares to a third party, they can also force the minority shareholders to sell their shares on the same terms), rights of first offer (requiring shareholders to offer its shares to the other shareholders before offering to sell to third parties), rights of first refusal (requiring selling shareholders to offer to sell their shares to the other shareholders after receiving a bona fide third party offer), and/or buy-sell provisions (situations and related procedures in which the shareholders either may or must purchase or sell shares from or to each other).

Other Considerations

Provisions typically included in a family constitution go well beyond those discussed above. Other examples include setting the company's dividend policy, dealing with corporately owned insurance, replacement/retention of key employees (including family members), and a host of other provisions.

In respect of timing, it's never too early to create a family constitution. In fact, the first generation business owner can create a family constitution on his/her own (if he/she is the company's sole shareholder) and automatically bind successor shareholders by the terms of such agreement. Notwithstanding the prospect of being able to dictate exactly what the terms will be, creating a family constitution without input from the parties that will ultimately be bound by it may be of limited

value. Open communication and involving children in the makeup of the constitution (even if their input isn't needed) can have a meaningful impact and help provide for the seamless transition of the business when the time comes.

Final Thought

Like every family, each constitution is unique and tailored to the particular situation. While a family constitution won't necessarily prevent the failed transition of a business to the next generation, it will certainly go a long way to increasing the probability of its *success*.

If you have any questions or would like information on tax, estate, or succession planning, contact Matthew Getzler in our Tax and Wills and Estates Groups at mgetzler@mindengross.com.