

# IS THE SUN SETTING ON DUAL CLASS SHARE STRUCTURES?

Posted on May 16, 2023

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## **Teck's Dual Class Amendment**

Teck Resources Limited (“**Teck**”) recently announced that it will be collapsing its dual class share structure (“**DCSS**”) by introducing a six-year sunset for the multiple voting rights attached to its Class A common shares (the “**Dual Class Amendment**”). An overwhelming majority of Teck’s shareholders voted in favour of the Dual Class Amendment at the annual and special meeting of shareholders on April 26, 2023.

Prior to the Dual Class Amendment, Teck’s Class A common shares each had 100 votes per share, whereas the Class B common subordinate voting shares each had one. On Friday, May 12, 2023, the effective date, each outstanding Class A common share was exchanged for one new Class A common share and 0.67 of a Class B subordinate voting share. The terms of the new Class A common shares are identical to the terms of old Class A common shares, but provide that six years from the effective date, all new Class A common shares will automatically be exchanged for Class B subordinate voting shares, all of which will be renamed “common shares.” In effect, the Dual Class Amendment will collapse Teck’s DCSS by May 12, 2029.

While not common among publicly traded corporations in Canada, DCSS have long been a part of the Canadian securities market and continue to be employed by many corporations.<sup>[1]</sup> This bulletin will discuss the basic components of a DCSS, its advantages and disadvantages, as well as common measures implemented alongside DCSS to increase shareholder protection.

## **DCSS – What are they and why?**

A DCSS or multi-class share structure exists when a corporation’s share capital consists of two (or more) classes of common shares with different voting rights. By having a greater number of votes per share, the superior voting class shareholders can exercise disproportionately more control over the company. These types of shares are typically held by founders and high-level executives, who are thus able to retain decision-making authority. This provides founders and executives with greater freedom to pursue long-term goals, without having their power challenged by shareholders who are more interested in short-term tactics and gains. Moreover, DCSS also provide protection against proxy battles and hostile takeovers by making it more difficult to win a shareholder majority and overthrow existing management.

## **Concerns with DCSS**

Conversely, DCSS can give rise to corporate governance concerns. By their nature, DCSS result in a misalignment between voting rights and economic interest within a company. For example, in Teck's case, the holders of approximately 1.5% of the total number of outstanding Teck shares are entitled to exercise approximately 60.5% of the votes attached to all Teck shares. Critics of DCSS claim that these structures allow company executives to "have their cake and eat it too" because they permit executives to raise capital without giving up control.<sup>[2]</sup> Further, because DCSS can allow executives to hold relatively small equity stakes within their companies, they can be insulated from the financial repercussions of poor decision-making and corresponding share price decreases.

Simultaneously, DCSS expose minority shareholders to significant risks and potential undesirable outcomes. In addition to restricting the control that the subordinate voting shareholders have over board composition and company strategy, DCSS can also result in executive compensation for the holders of the superior voting class shares, leadership transition issues, and payment of significant premiums to collapse the DCSS. In 2021, the battle for control of Rogers Communications revealed that DCSS can also result in a unilateral determination of a board's makeup, which may or may not be in the best interest of all shareholders.<sup>[3]</sup>

## **Shareholder Protection in DCSS**

The concerns notwithstanding, there are ways to reduce risks for shareholders of subordinate voting shares, while allowing all shareholders to reap the benefits of DCSS. By enacting certain shareholder protections, such as coattail provisions and sunset clauses, companies can create DCSS that provide for greater alignment of interests between all common shareholders.

### (1) Coattail Provisions

Canadian DCSS companies have almost universally adopted a coattail provisions.<sup>[4]</sup> Coattail provisions ensure that holders of subordinate voting shares can convert their holdings to superior voting shares in the event of a takeover offer, thus allowing them to participate in the offer on the same terms. Coattail provisions have been a TSX listing requirement since 1987 and have removed most of the potential "private benefits of control" through a DCSS.

### (2) Sunset Clauses

Sunset clauses impose a pre-determined end date for DCSS. These sunsets limit the relative freedom given to the shareholders of the superior voting right shares. Sunsets come in a variety of forms, including:

- **Time-based sunsets:** whereby the superior voting rights cease after a specified time period (e.g., Teck's

Sunset).

- **Dilution sunsets:** whereby the multiple voting shares return to single votes when the controlling shareholder's voting power falls below a given threshold.
- **Event-driven sunsets:** where the DCSS collapse follows a certain event, usually the death or disability of founder/controlling shareholder.

Certain proxy advisory services have started to recommend against voting in favour of multi-class share structures and unequal voting rights amongst shareholders, unless the company provides for a reasonable sunset of its multi-class share structure. Glass Lewis and the Institutional Shareholder Services consider sunsets of seven years or less to be reasonable, according to their 2023 proxy voting guidelines.<sup>[5]</sup>

### **Conclusion**

While Teck's Dual Class Amendment marks another step in the growing trend towards the disappearance of DCSS in Canada, it might be too soon to say that the sun is *setting* on them entirely. Where shareholder concerns can be properly alleviated, these structures are a great way for founders to raise capital and confidently pursue their business goals. For the time being however, it does appear that the sun is *rising* on shareholder rights and protections in DCSS. The team at McMillan will continue to report on these developments.

[1] The David and Sharon Johnston Centre for Corporate Governance Innovation, "[How are publicly-traded corporations controlled?](#)" (2021).

[2] Finra, "[Supervoters and Stocks: What Investors Should Know About Dual-Class Voting Structures.](#)" (June 6, 2022).

[3] Rogers v. Rogers Communications Inc. 2021 BCSC 2184.

[4] Institute for Governance of Private and Public Organizations, "[The Case for Dual-Class of Shares – Policy Paper Number 11](#)" (2019), page 8.

[5] Glass Lewis, "[2023 Policy Guidelines – Canada](#)" (November 2022), page 55; Institutional Shareholder Services, "[Proxy Voting Guidelines – Benchmark Policy Changes for 2023: U.S., Canada, Brazil, and Americas Regional](#)" (November 30, 2022), page 7.

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### **A Cautionary Note**

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