

**COUNTDOWN TO THE  
CANADA NOT-FOR-PROFIT CORPORATIONS ACT  
PRACTICE TIP #6: DRAFTING BY-LAWS ON  
ABSENTEE VOTING BY MEMBERS**

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*By Jane Burke-Robertson and Theresa L.M. Man\**

*Charity Law Bulletin* No. 193, dated February 25, 2010,<sup>1</sup> explained the need of non-share capital corporations under the *Canada Corporations Act* (“CCA”) to update or replace their by-laws as part of the continuance process once the *Canada Not-For-Profit Corporations Act* (“CNCA”) is in force. Then *Charity Law Bulletin* No. 215, dated June 24, 2010,<sup>2</sup> explained that the CNCA is similar to most modern corporate statutes, in that it provides a clear set of procedural and other rules which will apply to federal not-for-profits. Relatively few matters are left to be addressed in the by-laws and even fewer matters still will be required to be in the by-laws. One of the matters that is left to be addressed in the by-laws is in relation to the choices for absentee voting by members.

The CNCA does not provide for a default manner of absentee voting, since the corporation is not *required* to allow absentee voting. Rather, the CNCA permits by-laws to provide for a manner of absentee voting chosen from a range of options in the regulations. This differs from the mandatory requirement to provide all members entitled to vote at a meeting with notice of that meeting. In this regard, subsection 171(1) of the CNCA provides as follows:

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<sup>1</sup> Available at <http://www.carters.ca/pub/bulletin/charity/2010/chylb193.pdf>.

<sup>2</sup> Available at <http://www.carters.ca/pub/bulletin/charity/2010/chylb215.pdf>.

The by-laws of a corporation may provide for any prescribed methods of voting by members not in attendance at a meeting of members. If the by-laws so provide, they shall set out procedures for collecting, counting and reporting the results of any vote.

“Prescribed” methods mean those methods prescribed by the regulations of CNCA.<sup>3</sup> The CNCA requires regulations in place before it can come into force because the CNCA specifies that certain details of its regime will be set out in regulations, including time periods, options for providing notice of members’ meetings and absentee voting, and user fees. On June 25, 2010, draft regulations and accompanying explanatory notes were released by Corporations Canada and posted on its website for consultation.<sup>4</sup> Comments on the draft regulations may be forwarded to Corporations Canada by October 1, 2010.

Section 74(1) of the proposed regulations released on June 25, 2010 set out three options for absentee voting. If a corporation would like to permit the power of absentee voting to its members, its by-law will need to set out the selected option or options to be used to allow members to vote. The by-law will also need to set out the procedures for collecting, counting and reporting the results of any vote. The options set out in section 74 of the proposed regulations are:

- voting by proxy;
- voting by mailed-in ballots; and
- voting by means of a telephonic, electronic or other communication facility.

1. Mail-in Ballots

Section 74(1)(b) of the proposed regulations provides that in order to permit mail-in ballots, the corporation must have a system to (a) allow votes to be subsequently verified and (b) permit the tallied votes to be presented to the corporation without it being possible for the corporation to identify how each member voted.

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<sup>3</sup> Definition for “prescribed” in subsection 2(1) of the CNCA.

<sup>4</sup> See Corporations Canada’s website at: <http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs04589.html>.

2. Telephonic, electronic or other communication facility

Under the CNCA, electronic voting is permitted, unless the by-law provides otherwise.<sup>5</sup> Similar to mail-in ballots, section 74(1)(c) of the proposed regulations provides that a corporation may permit voting by means of a telephonic, electronic or other communication facility, provided that the corporation has a system to (a) enable the votes to be gathered in a manner that permits their subsequent verification, and (b) permit the tallied votes to be presented to the corporation without it being possible for the corporation to identify how each member voted.

3. Proxy vote

Section 74(2) of the proposed regulations sets out very detailed requirements on how proxy votes may be exercised, for example:

- Members not in attendance at a meeting of members may vote by appointing in writing a proxyholder, and one or more alternate proxyholders, who are not required to be members, to attend and act at the meeting in the manner and to the extent authorized by the proxy and with the authority conferred by it.
- A proxy is valid only at the meeting in respect of which it is given or at a continuation of that meeting after an adjournment.

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<sup>5</sup> See subsections 159(4) and (5) and subsections 165(3) and (4) of the CNCA, which provides as follows:

159(4) Unless the by-laws otherwise provide, any person entitled to attend a meeting of members may participate in the meeting, in accordance with the regulations, if any, by means of a telephonic, an electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting, if the corporation makes available such a communication facility. A person so participating in a meeting is deemed for the purposes of this Act to be present at the meeting.

159(5) If the directors or members of a corporation call a meeting of members under this Act and if the by-laws so provide, those directors or members, as the case may be, may determine that the meeting shall be held, in accordance with the regulations, if any, entirely by means of a telephonic, an electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting.

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165(3) Despite subsection (1), unless the by-laws otherwise provide, any vote referred to in that subsection may be held, in accordance with the regulations, if any, entirely by means of a telephonic, an electronic or other communication facility, if the corporation makes available such a communication facility.

Voting while participating electronically

165(4) Unless the by-laws otherwise provide, any person participating in a meeting of members under subsection 159(4) or (5) and entitled to vote at that meeting may vote, and that vote may be held, in accordance with the regulations, if any, by means of the telephonic, electronic or other communication facility that the corporation has made available for that purpose.

- A member may revoke a proxy by depositing an instrument or act in writing executed or, in Quebec, signed by the member or by their agent or mandatary.
- A proxyholder or an alternate proxyholder has the same rights as the member by whom they were appointed.
- If a form of proxy is created by a person other than the member, the form of proxy must comply with the detailed requirements set out in the regulations, including requiring certain text to be in bold-face type.
- If a form of proxy is sent in electronic form, the requirements that certain information be set out in bold-face type are satisfied if the information in question is set out in some other manner so as to draw the addressee's attention to the information.
- A form of proxy that, if signed, has the effect of conferring a discretionary authority in respect of amendments to matters identified in the notice of meeting or other matters that may properly come before the meeting must contain a specific statement to that effect.

By application to the Director, a corporation may obtain authorization to use other methods of absentee voting where the Director reasonably believes that the members and the corporation will not be prejudiced. Subsection 171(2) the CNCA provides as follows:

171(2) On application of the corporation, the Director may authorize the corporation, on any terms that the Director thinks fit, to permit members to vote by any method if the Director reasonably believes that the members and the corporation will not be prejudiced.

It is also important to note that section 170(7) of the CNCA provides that members who are party to a unanimous member agreement may not vote in accordance with section 171 when exercising the authority delegated to them under the agreement.

In summary, the detailed requirements of the CNCA and its regulations on the permitted choices for absentee voting are helpful in providing a framework from which corporations may choose what mechanism, if any, to adopt. Since the regulations are still in draft form and are currently under consultation, much of the details

on the requirements for each absentee voting mechanism will depend on what will be included in the final form of the regulations.