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# SPECIAL CARTERS COVID-19 WEBINAR: LEGAL ISSUES FOR CHARITIES AND NFPS

April 9, 2020

## CORPORATE ISSUES FOR CHARITIES AND NFPS IN RESPONDING TO COVID-19, INCLUDING AGMs AND ANNUAL RETURNS

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Legal Issues for Charities and NFPs  
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**Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.** – A partner with Carters, Ms. Man practices in the area of charity and not-for-profit law and is recognized as a leading expert by Lexpert, Best Lawyers in Canada, and Chambers and Partners. In addition to being a frequent speaker, Ms. Man is co-author of Corporate and Practice Manual for Charitable and Not-for-Profit Corporations published by Thomson Reuters. She is chair of the CBA Charities and Not-for-Profit Law Section, a member of the Technical Issues Working Group of Canada Revenue Agency’s (CRA) Charities Directorate, and a member and past chair of the OBA Charities and Not-for-Profit Law Section. Ms. Man has also written on charity and taxation issues for various publications.

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## SETTING THE CONTEXT

- There are relief measures extending the deadline to file CRA and corporate returns because of COVID-19
- Charities and NFPs need to adjust how they hold board meetings and members' meetings during the COVID-19 pandemic because
  - Limit on how many people can gather
  - Physical distancing
  - Directors' fiduciary duties to act in the best interest of the organization by balancing the need to comply with legal requirements against the need to protect the health and well-being of directors and members and not subject them to risk of virus infection
- See Bulletin 466

<http://www.carters.ca/pub/bulletin/charity/2020/chylb466.pdf>

## I. CRA AND CORPORATE FILINGS

### A. CRA FILING DEADLINE

#### Registered charities – T3010 due within 6 months after their fiscal year end

For charities with T3010 due between March 18, 2020 and December 31, 2020	Relief – filing deadline extended to December 31, 2020
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#### NPOs have to file T2 (if incorporated) and T1044 (required for some NPOs) due 6 months after their fiscal year end

For NPOs that have a filing due date after March 18 and before June 1, 2020	Relief – filing deadline extended to June 1, 2020
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Note – NPOs whose fiscal year is Dec 31, 2019, their filing deadline is June 30, 2020, they have no relief

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## B. CORPORATE FILING DEADLINE

**CNCA Corporations – Annual Returns due within the 60 days after “anniversary date” (date the corporation incorporated, amalgamated or continued under CNCA)**

For corporations whose anniversary date is between February 1 and June 30, 2020	Relief – filing deadline extended September 30, 2020
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**Federal Special Act Corporations – Annual Returns due between April 1 - June 1**

All federal special act corporations (filing period April 1 to June 1, 2020)	Relief – filing period extended to the period of April 1 to September 30, 2020
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**OCA corporations - Annual Returns filed at same time as time required to file their tax/information returns with CRA (whether or not they are filed with the returns with CRA or filed separately with the ministry)**

All OCA corporations where CRA provides relief to file tax/information turns	Relief – Filing deadline for annual returns is also similarly delayed
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## II. HOLDING MEETINGS

### A. BOARD MEETINGS

- Generally not an issue for OCA and CNCA directors to hold meetings by telephonic or electronic means, but may not be the practice for some (e.g. small or local community or religious organizations)

**OCA**

- Directors and committee of directors may meet by telephonic or electronic means if certain conditions are met, and the by-laws do not otherwise provide
- Relief - Emergency Order (Reg 107/20) under ss. 7.1(2) of *Emergency Management And Civil Protection Act*
  - Provides flexibility to hold board meetings electronically during emergency
  - Made March 30, 2020, retroactive to March 17, 2020

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S. 283(3.1) suspended during emergency	S. 283(3.1) new temporary provision during emergency
Directors may meet “by such telephone, electronic or other communication facilities” provided that all of the following conditions are met:	Directors may meet “by such telephone, electronic or other communication facilities” provided that the following is met:
(1) all the directors present at or participating in the meeting consent	
(2) the facility used permits “all persons participating in the meeting to communicate with each other simultaneously and instantaneously”	The facility used permits “all persons participating in the meeting to communicate with each other simultaneously and instantaneously”
(3) the by-law does not otherwise provide	The above mechanism can be used despite any provision in the letters patent, supplementary letters patent or by-laws that provides otherwise

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- Option to use written resolution in lieu of holding a board meeting if signed by all directors [s. 298(1)]
- CNCA**
- Directors may participate in a meeting of directors or of a committee of directors “by means of a telephonic, an electronic or other communication facility” if all of the following conditions are met: [s. 136(7)]
    - (1) If all the directors of the corporation consent
    - (2) The facility permits all participants to communicate adequately with each other during the meeting
    - (3) The by-law does not otherwise provide
  - No relief from Corporations Canada
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- Common law does not permit proxy vote at board meetings or alternate directors
- How to hold virtual board meetings?
  - Similar issues to address as those for members' meeting (see next section of presentation)
  - Generally easier to address meeting issues because of small number of participants, e.g., conference call, Skype, WhatsApp, Zoom

## B. MEMBERS' MEETINGS

- OCA and CNCA requirements for how AGMs can be held
- Special members' meeting can also be held during the COVID-19 pandemic, but unlikely will be held unless it is an absolute emergency
- The COVID-19 pandemic is especially a problem for corporations that normally hold their AGMs in the spring or early summer

## 1. Option – Postpone the AGM

### OCA

- AGM must be held not later than 18 months after its incorporation and subsequently not more than 15 months after the previous AGM [s. 293]
- Relief – Emergency Order (Reg 107/20) to delay the AGM for all OCA corporations
  - If AGM is required to be held during the emergency, then the AGM can be delayed to be held no later than the 90<sup>th</sup> day after the day the emergency is terminated
  - If AGM is required to be held within 30 days after emergency is terminated, then the AGM can be delayed to be held no later than the 120<sup>th</sup> day after the day the emergency is terminated

- Example - Last AGM was held on March 24, 2019 => 15 months after the last AGM is June 24, 2020
  - If emergency declaration ended more than 30 days before June 24, 2020 (e.g. May 15, 2020), then AGM will need to be held by June 24, 2020
  - If emergency declaration ended less than 30 days before June 24, 2020 (i.e. between May 25, 2020 and June 24, 2020), then AGM will need to be held within 120 days after the date when the declaration ended - this will give up to 4 months to prepare for the AGM
  - If emergency declaration ended after June 24, 2020, then AGM will need to be held within 90 days after the declaration ended – this will give 3 months to prepare for the AGM

## CNCA

- AGM must be held not later than 18 months after its incorporation and subsequently not more than 15 months after the previous AGM, but no later than 6 months after the financial year end [CNCA s. 160(1) and CNCR s. 61]
- No blanket relief from Corporations Canada
- May apply to Corporations Canada to extend the time for calling an AGM if Corporations Canada's policies are met (e.g. members will not be prejudiced, detrimental not to delay the AGM)

- Examples where desirable to delay the AGM
  - Not possible to adopt written resolutions in lieu of holding an AGM (option 3 is not available)
  - Hybrid or virtual meetings cannot or not suitable to be held (option 4 is not available)
  - Audited financial statements not ready because the audit is delayed due to COVID-19
- Creative DIY solutions and not to ask for order to delay AGM? – Cautions:
  - Directors and officers under the CNCA must comply with the CNCA and regulations under the CNCA, articles, by-laws, and unanimous member agreements
  - The date when the AGM is held has to be reported in the Annual Return



- Consequence of delaying the AGM

## OCA

- If an election of directors is not held at the proper time, the directors continue in office until their successors are elected [s. 287(4)]

## CNCA

- A director not elected for an expressly stated term ceases to hold office at the close of the first AGM following the director's election [s. 128(5)]
- Appointed directors hold office for a term expiring not later than the close of the next AGM [s. 128(8)]
- If directors are not elected at a meeting of members, the incumbent directors continue in office until their successors are elected [s. 128(6)]

## 2. Option – Absentee Votes

- Not really an “option” but needs to be considered
- Various issues to consider, for example are absentee votes permitted, are they included in quorum count ...?
- **OCA** – members are entitled to vote by proxy (s. 84)
- **CNCA**
  - Only 3 types of absentee voting permitted under the CNCA regulations: voting by proxy, by mailed-in ballots, and by means of a telephonic, electronic or other communication facility
  - Absentee voting may only be used if they are specifically permitted in the by-laws - If by-law does not permit absentee voting, by-law amendments to permit this are not effective until they are approved by special resolution of the members [ss. 197(1)(m)]

### 3. Option – Written Resolutions in Lieu of AGM

- **OCA** – in lieu of holding a members’ meeting, a resolution in writing may be passed if signed by all members [s. 298(2)]
- **CNCA** - in lieu of holding a members’ meeting, a resolution in writing may be passed if signed by all members entitled to vote on that resolution and the requirements under the CNCA are met [s.166]
- This method is only of use where the membership is small and the matters to be decided are not contentious

### 4. Option – Electronic AGM

- In general, 2 types of electronic meetings
  - Virtual meeting - all members join the meeting by electronic means, such as conference call or web conference
  - Hybrid meeting - hold an in-person meeting and members may participate in the meeting by electronic means
- In light of the COVID-19 pandemic, a hybrid meeting would likely involve only a few persons attending in person, with the vast majority of the members attending by electronic means
- Lots of considerations, no one-size-fits-all solution
- May not be suitable for some circumstances

## (a) Consideration – Legislation and By-laws OCA

- Relief by Emergency Order (Reg 107/20) to allow electronic members' meetings

S. 125.1(1) suspended during emergency	S. 125.1(1) new temporary provision during emergency
Members' meetings be held by "telephonic or electronic means" and members may "through those means, votes at the meeting or establishes a communications link to the meeting"	Members' meetings be held by "telephonic or electronic means" and members may "through those means, votes at the meeting or establishes a communications link to the meeting"
unless the by-laws provide otherwise	The above mechanism can be used despite any provision in the letters patent, supplementary letters patent or by-laws that provides otherwise

## CNCA

- Default rule is that members are entitled to participate at members' meetings in person
- Hybrid meeting – Under the CNCA, members are also entitled to participate by "telephonic, an electronic or other communication facility" *if* the corporation provides such means, i.e., a hybrid meeting. If a corporation does not wish to allow members to participate in meetings electronically, it should opt out of such right in its by-laws [s. 159(4)]
- Virtual meeting - Corporations that want to permit virtual meetings by "an electronic or other communication facility" must include specific permission to do so in their by-laws [s. 159(5)]
- Need to review by-laws to determine what types of meetings are permitted

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- For both hybrid and virtual meetings, members may vote by means of a telephonic, electronic or other communication facility provided that the facility meets both of the following requirements:
  - enables the vote to be gathered in a manner that permits its subsequent verification
  - permits the tallied vote to be presented to the corporation without it being possible for the corporation to identify how the person voted [CNCA s. 159(4)&(5),165(4); CNCR s. 71(2)]
- Note that the same requirements apply to electronic voting at in-person meetings [CNCA s.165(3); CNCR s. 71(1)]

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- Can by-law be amended to permit hybrid meeting or virtual meeting [s. 152]?
  - CNCA permits directors to make, amend or repeal any by-laws (except matters referred to in ss. 197(1)) and such by-law will become effective immediately until the next meeting of members, at which time the members may confirm, reject or amend the by-law, amendment or repeal by ordinary resolution
  - However, corporations may opt out of this by-law amendment mechanism, but to require all by-law amendments not be effective until approved by special resolution of the members

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- Note that the by-laws of many CNCA corporations may not permit by-law amendments under s. 152 for different reasons, for example:
  - Not reflect practice of the organization (especially pre-CNCA practice)
  - Not appropriate for the directors to make unilateral changes to the by-laws and to act on them before they have been approved by the members
  - Confusing to decide what by-law changes could be amended by the board to take immediate effect, and which by-law changes fall within ss. 197(1) of the CNCA which require approval by special resolution of the members before becoming effective

### **(b) Consideration – IT platform capabilities and meeting issues**

- When determining a suitable electronic platform for the meeting, considerations will need to be given to the technical capabilities of the platform
- There are many platforms in the market, the platform being contemplated must meet the unique needs of each organization
- Decide if you want to look for a short-term solution just for the COVID-19 pandemic or plan for the long-term to hold electronic members' meetings in future

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- Must meet requirements for a valid meeting
  - An electronic meeting must still meet all of the elements required to have a valid meeting, the platform must be able to meet all these requirements
  - Notice of meeting – e.g., proper information to be included in notice, timely delivery of notice, proper notice delivery method
  - Absentee votes – e.g., how to notify members of their right to cast absentee votes, how will they be cast, how will the votes be collected and tallied

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- Meeting procedure, for example:
  - How would the chair have control of the meeting?
  - How would attendees participate and speak at the meeting and what protocol to follow?
  - How would moving, seconding, amending, and discussion of motions be handled?
  - How to ensure only one person has the floor at one time? How would the chair control who has the floor?

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- Collect and tally votes
  - Does the platform allow participants to communicate adequately with each other during the meeting so that they can have a meaningful discussion ? [one-way live streaming is not a suitable platform]
  - Can the CNCA requirements on how votes are to be gathered be met [See above slides, CNCA s. 159(4)&(5),165(4); CNCR s. 71(2)]?
  - Is it necessary to use the meeting platform with a voting platform?
  - How would attendees vote and how would the votes be tracked?
  - How to track the voter only votes once? Can the voter change his vote?

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- Other meeting and IT logistics issues
  - Is there a limit on how many persons can participate at the same time?
  - Is there a limitation on the maximum length of the meeting?
  - Are there special hardware and internet requirements?
  - Is software download required?
  - Will each voter have a dedicated log in & voting ID?
  - Is test run supported?
  - Is live technical support available?
  - Can the meeting be recorded and if so, how long will the recording be maintained?
  - How would attendee registrations be tracked?

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- Are there costs involved in utilizing the platform?
- Will the platform be available after COVID-19 in case if the organization would like to continue holding electronic meetings?
  
- Privacy and security issues, for example
  - Is log in secure? How to ensure the person who logged in is the “right” person? How to ensure others are not logged in or “listen in”?
  - If materials are distributed through the platform, is it secure?
  - Are the voting and tallying functions secure?
  - How is the privacy of the attendees maintained?

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- Minutes
  - Minutes must still be kept by a real person of the proceedings
  - Not good practice to treat a video/audio “recording” of an electronic meeting as the “minutes”

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- Examples of common IT platforms available, pros and cons for each one
  - GetQuorum
  - GoToMeeting
  - Zoom
  - Onstream Meetings
  - Broadbridge
  - ClickMeeting
  - Pragmatic
- May couple with voting platform, e.g.,
  - Election Buddy
  - Simple Survey
  - Simply Voting
  - Secured Voting

**(c) Consideration – Situations where electronic meeting may not be suitable**

- Even if a suitable IT platform is available, it may still not be suitable to hold an electronic members’ meeting for various reasons
- Example - organizations with a large membership of constituents who are elderly or have disability issues
  - Would they have access to the necessary electronic device to connect and log into the meeting?
  - Would notice of meeting and meeting materials be provided to them electronically and how would they have access?
  - Would they be intimidated to speak or participate at such a meeting?

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- Would there be a high possibility for voting errors because elderly members may not be familiar with the technology?
- Other examples of practical issues
  - Organizations that are not accustomed to holding electronic meetings, e.g., local church or mosque
  - Organizations with a large membership (such as those with a few thousand members) and they have never held an electronic AGM before
  - If non-voting members are entitled to attend and speak (but not vote) at an AGM, how would they be tracked?
  - How to deal with members who want to nominate from the floor directors for election?

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- Are there contentious matters to be decided involving heated debates with complex proceedings (such as multiple amendments from the floor on motions being decided)?
- How to hold the AGM outside of annual conference if they are usually held together?

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## Tips to ensure a successful electronic meeting

- Know the legal requirements
- Do due diligence to find an appropriate IT platform
- Adopt electronic meeting policy and workflow
- Ensure sufficient time to complete the logistics
- Have plenty of preparation
- Give clear instructions to attendees
- Chair of meeting
  - Plays a key role, calm and be in control of the meeting, be knowledgeable of the requirements
  - Helpful for a script be prepared ahead of time
  - Have a technical person nearby to help if necessary
- Do rehearsals and test run

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