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## **NFP BOARD AND MEMBERS' MEETINGS AMIDST COVID-19 PANDEMIC**

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*By Theresa L.M. Man\**

### **A. INTRODUCTION**

Not only has the spread of the unprecedented COVID-19 pandemic affected many aspects of our lives, the operations of many not-for-profit organizations (“NFPs”), including registered charities, are also affected. In particular, many NFPs are considering how to adjust their way of holding board meetings and members’ meetings without holding in-person meetings. While it is generally an easy switch from holding in-person board meetings to electronic board meetings by conference calls or video calls, the impact of COVID-19 on how to hold members’ meetings often involves complicated considerations.

Some NFPs may still be technically able to hold in-person meetings if the number of directors or members is below the restrictions imposed by provinces on the maximum number of persons who can gather. For example, at the time of writing, many provinces are limiting the number of persons who can gather, such as British Columbia is restricting gatherings to under 50 persons, and Ontario is limiting social gatherings to no more than 5 people. However, even if the number of directors or members is within the permissible number for gatherings under provincial law, directors may still wish to avoid in-person meetings for social distancing reasons, and thereby wish to opt for meeting electronically. In this regard, directors of NFPs have the fiduciary duties to act in the best interest of the corporation. This would involve balancing the need to comply with legal requirements when holding board and members’ meetings against the need to protect the health and well-being of its directors and members and not subject them to any risk of being infected by the virus should in-person meetings be held.

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This *Bulletin* reviews factors that would need to be considered by NFPs when determining alternative mechanisms to holding board meetings and members' meetings, in particular annual general meetings ("AGMs"), when it is no longer possible to hold in-person meetings.

## B. BOARD MEETINGS

While many NFPs are accustomed to holding board meetings by electronic means (including conference calls), this may not be the case for all NFPs, such as the board of a religious or community organization where directors reside close by in the neighbourhood. In this regard, when considering whether to hold board meetings in person as opposed to electronically, there are a number of factors to consider.

First, NFPs that are corporations would need to check whether the incorporating legislation permits boards to meet electronically and, if so, whether there are any prescribed requirements. In some jurisdictions, the legislation contains specific statutory authorization for directors to meet in person or by teleconference, electronic or other communication facilities.

For example, there is specific statutory authorization under the *Corporations Act* ("OCA") for directors to meet in person or by teleconference, electronic or other communication facilities that permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously, as long as all of the directors present or participating in the meeting can communicate with each other. On March 30, 2020, the Ontario Government adopted an Emergency Order (Ontario Regulation 107/20) ("Emergency Order") under subsection 7.1(2) of *Emergency Management and Civil Protection Act* to provide corporations with the flexibility to hold board meetings electronically during the COVID-19 pandemic. The Emergency Order is retroactive to March 17, 2020. The relief allows directors to meet in person or by teleconference, electronic or other communication facilities that permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously, without the need for consent of the directors, and despite any provision in the letters patent, supplementary letters patent or by-laws that provides otherwise.

Other jurisdictions such as *Canada Not-for-profit Corporations Act* ("CNCA"), New Brunswick and Manitoba also provide statutory authorization for the directors to meet by electronic or other communication facilities. The British Columbia *Societies Act* and the Yukon's new *Societies Act* (which, at the time of writing, had received Royal Assent but was not yet brought into force) provide flexibility

with meetings by allowing directors to meet “at any location, on any notice and in any manner convenient to the directors” unless the by-laws provide otherwise.

Where matters are not contentious, directors may consider adopting written resolutions in lieu of meetings if this mode of decision making is permitted by the applicable incorporating legislation. For example, the OCA provides that a written resolution of directors is valid if signed by all directors, while the CNCA permits that a written resolution be signed by all directors entitled to vote on that resolution. The British Columbia *Societies Act* and the Yukon’s new *Societies Act* permit written resolutions to be signed by all directors, and also provides further flexibility to allow the by-law to provide for “a lesser number of those directors, consent to the resolution in writing or in any other manner provided for in the by-laws.”

It should be noted that voting by proxy votes and alternate directors are not permitted at board meetings.

In addition to what is permitted by the incorporating legislation, NFPs should also consider provisions in their by-laws and governance policies. For example, some by-laws may require regular board meetings be held by a certain time or within a certain month. Depending on how long the pandemic may last, it may not be possible to follow the meeting schedule required by the by-laws unless the meetings are held electronically.

## C. MEMBERS’ MEETINGS

While holding board meetings by electronic means or written resolutions may be an easy workaround in avoiding in-person board meetings because of the COVID-19 pandemic, considering how to hold membership meetings when dealing with the pandemic is more challenging, in particular for those with large membership.

There could be many reasons where members’ meetings need to be held and decisions made. All NFPs are required to hold AGMs. There could be many other reasons where membership decisions may be required, such as making emergency issues, approving the budget, dealing with urgent key staffing changes, approving real estate transactions, and amalgamations.

## 1. Comply with Legal Requirements

NFPs need to ensure that they comply with the requirements regarding how and when AGMs must be held. Failure to do so may result in the validity of decisions made at members' meetings being subject to challenge. There are generally two major sources where these requirements may be found:

- Incorporating legislation often sets out requirements regarding AGMs, including when and where AGMs must be held, whether they can be held by electronic means, whether absentee voting is permitted, how notice of meetings is to be given, what business must be transacted at the meeting, and the ability to make decisions by adopting written resolutions in lieu of holding meetings.
- Often, by-laws and governance policies may have additional timing or other requirements regarding members' meetings. Some of these requirements may reflect choices permitted by the incorporating legislation. For example, members of CNCA corporations may vote by proxy provided that this is specifically permitted under its by-laws. In other situations, by-laws and policies may impose requirements on top of the requirements in the incorporating legislation to reflect a governance structure that is unique to the NFP in question. For example, even though the CNCA provides that AGMs can be held up to six months after year-end, an NFP may nevertheless desire to have its AGM be held within the third month in order to also have the members approve the budget at the same time, even though this is not required in the CNCA.

## 2. Option of Holding Electronic Members' Meeting

If an in-person members' meeting cannot be held on schedule as a result of COVID-19, the first option that often comes to mind is whether a members' meeting may be held by electronic means.

In general, there are two ways to hold a members' meeting electronically: (i) hold an entire meeting by electronic means (this is sometimes referred to as a virtual meeting) where all members join the meeting by electronic means, such as conference call or web conference; or (ii) hold an in-person meeting and members may participate in the meeting by electronic means (this is sometimes referred to as a hybrid meeting). 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.

If the membership is small, switching an in-person members' meeting to an electronic meeting may be easy by simply arranging a conference call or a web conference, *e.g.* meeting through Skype or Zoom.

However, sometimes, it may not be possible or preferable to hold electronic members' meetings. The following are some factors to consider.

a) Requirements in Incorporating Legislation

Some corporate legislation contains detailed requirements on how members' meetings may be held, including whether it is possible for members to meet by electronic means. Therefore, the most important factor to consider is whether electronic members' meetings are permitted by the incorporating legislation. For example, the default rule in the CNCA is that members are entitled to participate at members' meetings in person. However, members are entitled to participate electronically (*e.g.*, by telephone conference calls) if the corporation provides such means. This means that a meeting will still be held at a physical location and members can attend the meeting in person, but those who cannot attend in person may attend the meeting electronically (*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. The CNCA also allows corporations to opt into holding members' meetings entirely by telephonic or other electronic means (*i.e.*, a virtual meeting, with no method for anyone to attend such a meeting in person at a location) by including specific permission to do so in their by-laws.

Another example is that the OCA used to require that membership meetings could only be attended in person. On November 14, 2017, the OCA was amended to allow members' meetings be held electronically, such as by telephonic or electronic means, unless the by-laws provide otherwise. The Emergency Order, however, provides relief for holding members' meetings during the COVID-19 pandemic by allowing members' meetings be held electronically despite any provision in the letters patent, supplementary letters patent or by-laws that provides otherwise.

b) Requirements of By-laws and Governance Policies

Even if electronic members' meetings are permitted by the incorporating legislation, the by-laws and governance policies will also need to be reviewed to determine if this is otherwise prohibited or restricted. For example, under the CNCA, as explained above, the ability to hold a hybrid meeting may be prohibited by by-laws and the ability to hold a virtual meeting must be specifically permitted by by-laws. As well, it is not uncommon that some NFPs specifically require membership meetings be held in person and thereby prohibit hybrid and virtual meetings. This is especially common in religious organizations, such as churches where membership meetings are normally held after worship services.

## c) Technical Capabilities of Electronic Platform

When determining a suitable electronic platform for the meeting, considerations will need to be given to the technical capabilities of the electronic platform. Although there are many platforms in the market, the platform being contemplated must meet the unique needs of each NFP. For example, to have a valid meeting, the platform must be able to allow participants to communicate adequately with each other during the meeting so that they can have a meaningful discussion and therefore a platform that provides one-way live streaming would not be a suitable platform (such as those used by religious organizations to live stream their Sunday worship services).

Examples of issues to consider may include: 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, can the meeting be recorded, how would attendee registrations be tracked, how would attendees participate and speak at the meeting, how would attendees vote and how would the votes be tracked, is the platform secure and is privacy of the attendees addressed, and are there costs involved in utilizing the platform.

## d) Other Considerations

Last but not least, even if there are no legal prohibitions to hold a members' meeting electronically and if there is a suitable electronic platform for such a meeting, the board will also need to consider whether an electronic meeting is suitable for its constituency. For example, consideration would need to be given to whether members who are elderly would have access to the necessary electronic device to connect and log into the meeting, whether notice of meeting and meeting materials would be provided to them electronically, whether they would be intimidated to speak or participate at such a meeting, and whether there may be a high possibility for voting errors because elderly members may not be familiar with the technology. Examples of additional considerations may include whether an electronic meeting would be suitable for NFPs with a large membership (such as those with a few thousand members); if non-voting members are also entitled to attend and speak (but not vote) at an AGM, how would the tracking of the non-voting members differ from the voting members; whether it would be suitable to meet electronically if there are contentious matters to be decided involving heated debates with complex proceedings (such as multiple amendments from the floor on motions being decided); and whether there is past practice of the NFP requires the AGM be held in conjunction with an in-person convention or conference.

### 3. Option to Use Absentee Voting

Sometimes, absentee voting may be permitted to be used in conjunction with an in-person meeting or electronic members' meeting. Absentee voting is a mechanism by which members who cannot attend a member's meeting are given the right to vote. Depending on the incorporating legislation, different means of absentee voting may be permissible for use. It would be necessary to review the requirements in the incorporating legislation, by-laws and governance policies and ensure that these rules are complied with. Non-compliance may risk the validity of decisions made at these meetings subject to challenge.

For example, absentee voting may only be used by a CNCA corporation if its by-laws specifically provide for a manner of absentee voting chosen from three options set out in the regulations under the CNCA: voting by proxy, voting by mailed-in ballots, and voting by means of a telephonic, electronic or other communication facility. However, it is important to be aware that there are detailed rules in the CNCA regulations on how each of these voting methods must be conducted in the event that a corporation chooses to adopt such methods.

In relation to proxy votes, the OCA explicitly states that every member has the right to vote by proxy at a members' meeting. Provincial legislation in Manitoba, British Columbia and Newfoundland and Labrador, provide that a proxy vote is an option and that the by-laws may provide for a proxy vote, and, in Saskatchewan, *The Non-profit Corporations Act, 1995*, specifically states that, unless the articles provide for voting by proxy, it is not permitted. The only reference in the Nova Scotia *Societies Act* to proxies states that proxies entitling any person or member of a society to vote at other than one meeting or any adjournment thereof are void.

### 4. Option to Adopt Written Resolutions

It is important to note that some jurisdictions permit written resolutions be passed in lieu of holding an AGM. For example, under the CNCA, it is generally possible for members to adopt written resolutions without holding an AGM if the resolutions are signed by all of the voting members. Many other provinces also have similar requirements, such as Manitoba, New Brunswick, and Saskatchewan. Some jurisdictions, however, do not permit members to adopt written resolutions in lieu of holding an AGM, such as the Alberta *Societies Act*, Quebec *Companies Act*, and Nova Scotia *Societies Act*. Because the signing of all members is generally required in jurisdictions that permit written resolutions in lieu of

holding AGMs, this method is only of use where the membership is small and the matters to be decided are not contentious.

## 5. Option of Postponing the AGM

If the pandemic was to last an extended period and it is not possible or practical for an NFP to hold a members' meeting electronically (either by holding a virtual meeting or a hybrid meeting), then the board may need to consider postponing the AGM until such time as the pandemic is over.

It is important to note that most corporate legislation has specific requirements on when AGMs must be held. For example, the OCA and CNCA require an AGM must be held within 18 months after incorporation and, after that, no later than 15 months from the date of the previous meeting. The CNCA further requires that the AGM must not be held later than six months after the end of the corporation's preceding financial year. In comparison, the British Columbia *Societies Act* provides much more flexibility by stating that a society is not required to hold an AGM in the calendar year in which the society is incorporated and going forward, simply requires an AGM be held in each calendar year.

As such, if the pandemic was to last an extended period, it is possible that an AGM may have to be postponed beyond the time frame required by the incorporating legislation. Fortunately, the Emergency Order, provides relief for OCA corporations to delay holding their AGMs during the COVID-19 pandemic so that (a) if an 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; and (b) if an 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.

Under the CNCA, if it is not possible to call an AGM of members within the required timeframe in the CNCA, a corporation may apply to Corporations Canada to extend the time for calling an AGM if members will not be prejudiced.<sup>1</sup> If an exemption is not obtained, and in jurisdictions where exemption orders are not available, it would be reasonable to anticipate that members would understand the impossibility to hold the AGM within the required time as a result of this unprecedented pandemic. It would be prudent for the board to keep the members informed and hopeful obtain an understanding that

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<sup>1</sup> See Corporations Canada policy "Extending the time for calling an AGM of members", online <<http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs06828.html>>.



the need to postpone the AGM could not be avoided in this unusual time. Nevertheless, it is still important for directors to be aware that if the AGM is not held within the required timeframe, it might give rise to certain members requisitioning the directors to call the meeting and the members themselves calling the meeting.

## D. LESSONS LEARNED

Since each NFP is unique, there is no one-size fits all solution to holding a board meeting or AGM during the COVID-19 pandemic. With such an unprecedented event, the board would need to do the necessary due diligence to determine the best course of action in deciding alternative methods and timing to hold board meetings and AGMs that are in the best interest of the corporation. This might include exploring other creative solutions, such as directors of an OCA corporation amending the by-laws (which would take effect immediately after the board meeting) to allow a more flexible way to hold the 2020 AGM during the COVID-19 pandemic, with the by-law amendments be revoked afterwards. For NFPs whose by-laws are very restrictive on how board meetings and members' meetings may be held (such as by-laws requiring AGMs must only be held in person), the board may wish to consider amending the by-laws to provide more flexibility as a long term good governance solution when the pandemic is over.