

May 18, 2020

Charities and Not-for-profit Corporations – AGM Challenges and Solutions During COVID-19 Outbreak

The purpose of this Bulletin is to help provide guidance to non-share capital (not-for-profit) corporations and charitable corporations on how to address upcoming membership meetings in light of COVID-19 social distancing restrictions. For the purposes of this Bulletin, we refer to the *Corporations Act* (Ontario) as "**CA**" and the *Canada Not-for-profit Corporations Act* as "**CNCA**".

Corporations Act (Ontario)

The provincial government has provided some relief/flexibility for charitable and not-for-profit corporations governed by the CA to address meeting issues in Emergency Order (O. Reg 107/20) under the *Emergency Management and Civil Protection Act*.

Topic	Status Prior to Emergency Order	Status After Emergency Order
Timing of annual meeting of members	An AGM must be held not later than 18 months after its incorporation and subsequently not more than 15 months after the previous AGM. ¹	The Emergency Order provides that 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 th day after the day the emergency is terminated. This will give the corporation three months to prepare for the AGM once the emergency is terminated. ² If the AGM is required to be held within 30 days after the

¹ *Corporations Act*, RSO 1990, c 38, s.293.

² O Reg 107/20, s 4.

Topic	Status Prior to Emergency Order	Status After Emergency Order
		<p>emergency is terminated, then the AGM can be delayed to be held no later than the 120th day after the emergency is terminated. This will give the corporation about four months to prepare for the AGM once the emergency is terminated.³</p>
<p>Can a members' meeting be held virtually?</p>	<p>Unless the by-laws of a corporation provide otherwise, a meeting of the members may be held by telephonic or electronic means and a member who, through those means, votes at the meeting or establishes a communications link to the meeting is deemed for the purposes of this Act to be present at the meeting.⁴</p>	<p>Despite any provision in the letters patent, supplementary letters patent or by-laws of a corporation that provides otherwise, a meeting of the members may be held by telephonic or electronic means and a member who, through those means, votes at the meeting or establishes a communications link to the meeting is deemed for the purposes of this Act to be present at the meeting.⁵</p> <p>Notwithstanding the availability of a virtual meeting, the first question is whether a virtual meeting is appropriate for your members? Issues to think about include access to technology, ability to use technology and purpose of meeting.</p> <p>In addition, like any other members' meeting, additional</p>

³ Ibid.

⁴ *Supra* note 1, s 125.1(1).

⁵ *Supra* note 2, s 1.

Topic	Status Prior to Emergency Order	Status After Emergency Order
		meeting requirements have to be addressed, such as: <ul style="list-style-type: none"> • Notice of meeting; • Absentee voting (proxies) • Meeting procedures (Chair, be organized to bring motions and second motions) • Counting voting; • Privacy and security (login in identifications); • Minutes

Canada Not-for-Profit Corporations Act

On May 11, 2020 Corporations Canada provided a simple way for non-profits and charities governed by the CNCA to request an extension of the six-month timeframe for holding AGM’s.

Topic	Current Status	COVID-19 Adjustments
Timing of annual meeting of members	An 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. ^{6 7}	On May 11, 2020 Corporations Canada provided a simple way for federal not-for-profit corporations and charities governed by the <i>Canada Not-for-profit Corporations Act</i> to apply to delay an annual meeting due to COVID-19. An application must be made to get permission.
What do I have to do to postpone meeting?	A corporation 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, it would be	Corporations Canada’s website has been updated to simplify the process for corporations governed by the CNCA to apply to delay an annual meeting due to COVID-19.

⁶ *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 160(1).

⁷ *Canada Not-for-profit Corporations Regulations*, SOR/2011-223, s 61.

Topic	Current Status	COVID-19 Adjustments
	<p>detrimental not to delay the AGM).</p>	<p>A simple on-line application form can be found at: https://corporationscanada.ic.gc.ca/eic/site/cd-dgc.nsf/frm-eng/JCRE-BNGKQY</p> <p>The Corporations Canada website advises eligible corporations to apply at least 30 business days before the date the not-for-profit would send the notice calling its AGM under normal circumstances. Once approved, the corporation must call its AGM before October 31, 2020 and hold it before December 31, 2020.</p>
<p>Can a members’ meeting be held virtually?</p>	<p>The default rule is the members are entitled to participate in members’ meetings in person.</p> <p>Under the CNCA, unless the by-laws otherwise provide, members are also entitled to participate by a “telephonic, an electronic or other communication facility” if the corporation provides such means (i.e., a hybrid meeting where the corporation holds an in-person meeting and members may participate in the meeting by electronic means). If a corporation does not wish to allow members to participate in meetings electronically, it should opt out of such rights in its by-laws.⁸</p>	<p>None. However, depending on the facts, a corporation might be able to amend a by-law to permit hybrid or virtual meetings.¹⁰</p> <p>The CNCA permits directors to make, amend or repeal any by-laws (except for matters referred to in s.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.</p> <p>However, the existing articles or by-laws of a corporation might alternatively provide that all by-law amendments are not be effective until approved by special resolution of the members. Consequently, it is important for corporations to check whether the directors can effect a by-law</p>

⁸ *Supra* note 6, s 159(4).

¹⁰ *Ibid* at s 152.

Topic	Current Status	COVID-19 Adjustments
	<p>If corporations want to permit a virtual meeting (i.e. where all members join by electronic means) by “an electronic or other communication facility”, it must include a specific permission to do so in their by-laws.⁹</p> <p>Therefore, the corporation will have to look to its by-laws to determine where virtual meetings are permitted.</p>	<p>change to allow a hybrid or virtual meeting.</p>

The above information is meant to provide general information for corporations who are looking at alternatives to holding their AGMs in person, in line with social distancing requirements. In addition to the above considerations, corporations need to consider voting requirements and capabilities, privacy and security issues surrounding holding hybrid or virtual meetings and meeting logistics like valid notice and absentee votes.

by Christopher J. Garrah and Rupin Sawhney

For more information on this topic, please contact:

Toronto	Christopher J. Garrah	416.307.4211	christopher.garrah@mcmillan.ca
Toronto	Rupin Sawhney	416.865.7073	rupin.sawhney@mcmillan.ca

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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⁹ *Ibid* at s 159(5).