

COVID-19 PANDEMIC PROMPTS CANADIAN COMPANIES TO CONSIDER VIRTUAL SHAREHOLDER MEETINGS

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In light of increasing concerns regarding the spread of COVID-19, many companies worldwide are considering alternatives to holding in-person shareholder meetings. Notably, companies have expressed an increased interest in holding shareholder meetings either entirely or partially through electronic or virtual means.

While virtual shareholder meetings are permitted under a number of Canadian corporate statutes,^[1] they have yet to be widely adopted by companies in Canada. Conversely, Broadridge Financial Services has reported that, in 2019 alone, it facilitated 326 virtual shareholders meetings in the United States, the vast majority of which were held by virtual means entirely.^[2] Canadian companies' experiences conducting virtual shareholder meetings in the upcoming proxy season will likely have significant implications on the adoption of virtual meetings more generally in future years.

What is a virtual shareholder meeting?

A virtual shareholder meeting is a shareholder meeting that is held either entirely or partially through electronic means. Companies may hold a "virtual-only" shareholder meeting, in which the meeting is conducted online with no physical component. Alternatively, companies may hold a "hybrid" shareholder meeting, in which the meeting is held at a physical location and technology is used to allow shareholders to participate remotely.

While not technically a type of virtual shareholder meeting, a third option for companies to consider is providing shareholders with electronic access to a webcast of a shareholder meeting that is held by traditional means.

Virtual-only shareholder meetings

A company's ability to hold a virtual-only shareholder meeting depends on both that company's constating documents and governing statute. Key considerations are whether holding a virtual-only shareholder meeting will impair a company's ability to meet quorum requirements, conflict with a company's obligation to hold a shareholder meeting at a specific location, or enable shareholders to communicate effectively with one

another.

The statutory regime under Ontario's *Business Corporations Act* (the "**OBCA**") is the friendliest to virtual-only shareholder meetings. Provided there are no statements to the contrary in a company's constating documents, the OBCA expressly allows companies to hold shareholder meetings by electronic means and deems shareholders who vote electronically or who establish a communication link to such meetings to be present for the purposes of establishing quorum.

Other Canadian corporate statutes are less accommodating and impose conditions that must be satisfied before a company can hold a virtual-only shareholder meeting. For example, section 132(4) of the *Canada Business Corporations Act* (the "**CBCA**") provides that shareholders participating in a virtual-only meeting will only be deemed present if the technology being used to facilitate the meeting permits all meeting participants to communicate "adequately" with each other. Similarly, section 174(3) of British Columbia's *Business Corporations Act* (the "**BCBCA**") does not allow shareholders to participate in a meeting electronically unless such shareholders can "communicate with each other". Some corporate statutes also require that electronic participation by shareholders be explicitly permitted in a company's constating documents.^[3]

Companies should also note that provisions in their constating documents or governing corporate statute requiring that shareholder meetings be held at a specific location could implicitly prohibit the holding of a virtual shareholder meeting that has no physical location.

While some corporate statutes impose restrictions on companies' ability to hold virtual-only meetings, courts generally have jurisdiction to grant relief. Most Canadian corporate statutes contain provisions permitting companies to hold shareholder meetings in accordance with directions given by a court.^[4] On March 11, 2020, Telus received an order from the British Columbia Supreme Court, pursuant to such a provision, allowing Telus to hold its 2020 annual general meeting of shareholders entirely by electronic means.

Hybrid shareholder meetings

Hybrid shareholder meetings can alleviate many of the challenges posed by virtual-only meetings. In most uncontested hybrid shareholder meetings, companies will be able to ensure that quorum is met by having the management nominees who serve as proxyholders physically in attendance. This is because these management nominees will generally hold a sufficient number of proxies to satisfy quorum requirements. Consequently, companies will often not need to rely on statutory provisions deeming shareholders participating by electronic means to be present in these circumstances.

Companies should be aware that a number of corporate statutes allow electronic shareholder voting, even in circumstances where shareholders participating electronically are not deemed to be present for the purposes

of establishing quorum. For example, section 141(3) of the CBCA states that, unless a company's by-laws provide otherwise, any vote at a meeting of shareholders may be held entirely by means of a telephonic, electronic or other communication facility that the corporation makes available. The CBCA does not require that such shareholders be "present".^[5]

Because hybrid shareholder meetings have a physical location, they can also be used to allow electronic shareholder participation in meetings that are required to be held at a specific place.

Webcasts

It is not uncommon for companies to "webcast" their shareholder meetings, giving shareholders access to a live or on-demand audio or video stream of the meeting. Webcasts do not provide shareholders with the ability to vote electronically at the meeting and shareholders viewing a webcast are not counted as present for the purposes of establishing quorum. Accordingly, shareholders electing to view a webcast of a meeting are encouraged to vote on the matters before the meeting by proxy. While webcasts do not provide the same level of shareholder engagement as virtual shareholder meetings, companies may also offer a forum in which shareholders can send in their questions. Webcasts provide a useful alternative in situations where holding a virtual meeting is not a viable or desirable alternative. In the context of the current COVID-19 pandemic, this may prove to be a popular option for companies that do not have sufficient time or resources to implement a virtual meeting but wish to limit in-person attendance. On March 13, 2020, Teck Resources Limited announced that, in light of the risks posed by COVID-19, it would be taking this approach.

Proxy advisory considerations

Historically, proxy advisory firms, including Institutional Shareholders Services, Inc. ("**ISS**") and Glass Lewis & Co. ("**Glass Lewis**"), opposed virtual-only shareholder meetings. Given the extraordinary concerns raised by the global outbreak of COVID-19, however, both ISS and Glass Lewis have indicated that they will relax their virtual-only shareholder meeting policies during the 2020 proxy season.

While ISS and Glass Lewis' policies will be relaxed, Issuer's should be aware that ISS and Glass Lewis continue to have expectations as to the conduct of and disclosure surrounding virtual-only shareholder meetings. ISS has indicated that it expects virtual-only meetings to be transparent and include two-way communication, allowing shareholders to ask questions, criticize companies' performance and governance and present shareholder proposals. Similarly, Glass Lewis has indicated that it will scrutinize the disclosure in companies' proxy materials regarding the logistics of accessing a virtual-only meeting and shareholders' ability to ask questions. If a company decides to switch from an in-person meeting to a virtual-only meeting after filing its proxy materials, Glass Lewis expects companies to: (i) disclose that an in-person meeting will no longer be held due to the COVID-19 outbreak; (ii) provide information about accessing the virtual-only meeting; and

(iii) confirm that shareholders will have the ability to ask questions.

The conduct of companies in virtual-only shareholder meetings this proxy season will likely have a significant impact on the positions taken by ISS and Glass Lewis with respect to such meetings in future years.

Summary and best practices

Virtual shareholder meetings offer companies an opportunity to minimize the health risks posed by COVID-19 while simultaneously having the potential to increase shareholder engagement and minimize costs.

When determining whether to hold a virtual-only or hybrid shareholder meeting, companies should first:

1. Check their governing corporate statute for restrictions on electronic participation in shareholder meetings or requirements that shareholder meetings be held at a specific location; and
2. Check their constating documents for provisions expressly permitting electronic participation in shareholder meetings or provisions that would impede or prohibit any electronic component of a shareholder meeting.

If a company decides to conduct either a virtual-only or a hybrid shareholder meeting, the following best practices should be considered:

- Contact legal counsel to confirm whether the company's governing statute and constating documents permit conducting a shareholder meeting by electronic means;
- Contact technology service providers and transfer agents to discuss logistical issues;
- Clearly disclose to shareholders why the meeting is not being held in person;
- Provide shareholders with advanced notice and detailed disclosure of how to participate in the meeting electronically;
- Provide shareholders with a method of seeking support if they are having difficulty accessing the meeting electronically;
- Create and disclose formal rules of conduct regarding asking questions and making comments, specifically cautioning shareholders about any limitations or restrictions that they will be subject to;
- Consider offering shareholders an opportunity to submit questions in advance; and
- Consider the risk that the meeting will be contentious (virtual meetings should generally be avoided when there is a risk of a proxy contest).

Additional best practices can be found in *Principles and Best Practices for Virtual Shareholder Meetings*, issued in 2018 by the Best Practices Committee for Shareowner Participation in Virtual Annual Meetings.^[6]

If conducted properly, virtual shareholder meetings can effectively minimize the health risks currently posed by

large gatherings while maintaining the forum for shareholder discourse that traditional shareholder meetings provide. Companies that find it prohibitively difficult to hold a virtual shareholder meeting should strongly consider providing their shareholders with access to a webcast and encouraging their shareholders to participate in their meeting by proxy.

by Mark Neighbor, Jeffrey Gebert and Christopher Tworzyanski

[1] Note that the corporate statutes of Newfoundland and Nova Scotia are silent on this topic, not expressly permitting or prohibiting electronic participation in shareholder meetings.

[2] Broadridge: [Virtual Shareholder Meetings-2019 Facts and Figures.pdf](#)

[3] Express language permitting electronic shareholder meetings is required under the CBCA and the corporate statutes of Alberta, New Brunswick, Nunavut and the Northwest Territories.

[4] Provisions to this effect exist under the CBCA and the corporate statutes of every province and territory of Canada other than Nova Scotia.

[5] Note, however, that section 141(3) of the CBCA requires that the vote be conducted entirely through the means of the provided electronic facility.

[6] Broadridge: [Principles and Best Practices for Virtual Annual Shareowner Meetings](#)

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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