



## Novel Coronavirus (COVID-19)

Not-for-Profit & Charities

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# Meetings of Federal and Ontario Not-For-Profit Corporations During the COVID-19 Pandemic

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In recent weeks, many of our clients have been asking how they can hold their directors' and members' meetings, particularly their annual general members' meetings (**AGMs**), given the restrictions on public gatherings and requirements for social distancing during the COVID-19 pandemic. The Ontario and Federal governments have responded to these concerns to assist not-for-profit corporations, both charitable and non-charitable, in connection with their meeting requirements.

### *Ontario*

In Ontario, the government issued a new regulation under the *Emergency Management and Civil Protection Act* (**Emergency Order**), retroactive to March 17, 2020, to temporarily suspend and replace various provisions of the Ontario *Corporations Act* (**OCA**) that relate to members' and directors' meetings. The OCA governs most not-for-profit corporations incorporated in Ontario. While the OCA addresses the holding of members' and directors' meetings electronically subject to a corporation's governing documents, the Emergency Order provides that meetings may be held virtually even if the letters patent or by-laws of a corporation provide otherwise.

In the case of members' meetings, a member will be considered to be present at a meeting if the member establishes a communication link to, or votes at, the meeting. In the case of directors' meetings, a meeting may be held electronically if all participants can communicate with each other "simultaneously and instantaneously" and a director will be considered present at a meeting if the director participates electronically. (The difference in the requirements for members' and directors' meetings is consistent with the wording of the OCA that has been suspended.)

The Emergency Order also addresses the time frame in which AGMs must be held. Under the OCA, a not-for-profit corporation must hold its AGM within 18 months of incorporation or within 15 months of its last AGM, and within 6 months of its last financial year end. The Emergency Order provides a 90 day extension for the holding of an AGM which would otherwise be required to be held during the "period of the declared emergency" - the AGM must instead be held within 90 days of the termination of the emergency.

Further, if an AGM is required to be held within 30 days of the termination of the emergency, a 120 day extension for the holding of the AGM is granted.

### ***Federally***

The *Canada Not-for-Profit Corporations Act (CNCA)*, which governs most federal not-for-profit corporations, addresses the holding of electronic meetings and the possibility of delaying the holding of an AGM. Corporations Canada recently issued a notice (**Notice**) outlining the options under the CNCA for holding AGMs virtually in light of the current restrictions on public gatherings or applying to postpone an AGM due to the pandemic.

The CNCA requires corporations to call an AGM within 18 months of incorporation or within 15 months of its previous AGM, and not longer than 6 months after its last financial year end. The CNCA allows members' meetings (including AGMs) to be held entirely by electronic means if it is explicitly permitted under a corporation's by-laws. The CNCA also allows any person who is entitled to attend a members' meeting to participate electronically so long as the by-laws of the corporation do not prohibit it. In either case, all participants (present in-person or electronically) must be able to communicate adequately with one another. For quorum purposes, a person participating electronically is deemed to be present. A partially virtual members' meeting with a small number of participants present in person could be an option for a corporation with by-laws that do not explicitly permit completely virtual members' meetings.

For members' meetings held completely or partially virtually, voting can be done electronically, so long as:

- it is not prohibited under the corporation's by-laws; and
- the corporation can collect the votes in a way that allows them to be verified, tallied, and presented without the corporation being able to know how any person voted.

The Notice suggests that if a corporation's by-laws are silent on electronic members' meetings or prohibit them all together, the by-laws could be amended by the corporation's directors to permit virtual meetings, so that the AGM can be held electronically in whole or in part. The changes to the by-laws would remain in effect until the next meeting of the members (at which point they can be confirmed or rejected). This option would not be available for corporations with by-laws which provide that any changes require member approval to be effective.

The Notice also points out that, under the CNCA, a corporation can apply to Corporations Canada to delay the calling of its AGM where it would be "detrimental" to call it within the normal timeframe. Application would need to be made at least 30 business days before the notice for the AGM must be sent out. These requests are considered on a case-by-case basis, but presumably there would be flexibility such as where a corporation does not have the resources to hold an electronic meeting in compliance with the CNCA requirements, where a corporation has a very large membership which would make a virtual meeting extremely difficult and cumbersome, or where a corporation's by-laws prohibit electronic members' meetings and it is not feasible or possible to amend them in time for the AGM notice to be sent out.

The Notice does not address the holding of virtual directors' meetings. However, the CNCA provides that a director may participate in a directors' meeting electronically with the consent of all of the directors and if all participants can communicate adequately with one another during the meeting. A director participating electronically is deemed to be present for quorum purposes.

The Emergency Order provides welcome relief for Ontario not-for-profit corporations and the Notice contains useful information for federal not-for-profit corporations. All corporations should, however, carefully consult their by-laws before making any decisions about the manner in which their meetings are held, particularly their AGMs.

We would be happy to answer any questions that you may have about holding members' or directors' meetings during the pandemic, or any other matters involving COVID-19.

***For legal advice on issues arising from COVID-19, please contact your Torkin Manes lawyer. For more information about dealing with COVID-19, please visit our COVID-19 Resource Center.***

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