

## **COVID-19 and AGMs for Federal non-profit corporation under the Canada Not-for-profit Corporations Act (“CNCA”)**

By Mark Blumberg and Lize-Mari Swanepoel (April 13, 2020)

The COVID-19 crisis is forcing some non-profit organizations and registered charities to rethink the timing and manner of conducting their annual general meeting of members (AGM). Every organization is different, and a one-size-fits-all approach does not apply.

We are assisting organizations with numerous challenges in dealing with COVID-19 and if your organization requires assistance let us know. As the situation is evolving on an almost daily basis, we may update this article.

This article is dealing with CNCA corporations and we will post another article dealing with Ontario corporations.

In order to understand the requirements of an organization you need to have access to the governing documents of your non-profit or charity. Some groups have all their governing documents in a minute book that may not be accessible at the moment. Luckily since January 15, 2020 obtaining copies of these documents is now much easier (and free) for federal non-profits under the CNCA. See: [Corporations Canada Changes to Fees + Service Standard Times and improves transparency.](#)

Here is a list of some of the factors to be considered in determining whether your organization is required to hold an AGM during the COVID-19 crisis and the timing, manner and format of the AGM and whether requesting an extension makes sense.

### **1. The applicable corporate legislation and required time frame for holding AGM**

Whether an organization is required to hold an AGM during the COVID-19 crisis depends on whether it is an incorporated organization and, if so, by which corporate legislation (federal or the different provincial acts) it is governed and whether the relevant companies

branch maintaining the act has allowed for extensions. Extension of the time for calling an AGM will be discussed in section 8 below.

This article will focus on corporations that are governed by the *Canada Not-for-profit Corporations Act* (the “CNCA”). For provincial jurisdictions, it is best to consult your local companies branch for further information or obtain legal advice.

Pursuant to the CNCA, a corporation must call an annual meeting of members every year. A corporation is required to call an annual meeting within 18 months of the date the corporation comes into existence. After that, an annual meeting must be called no later than 15 months after the previous annual meeting and no later than 6 months after the corporation’s preceding financial year-end. The AGM must be held within 6 months from the end of the last completed fiscal year.

As noted on Corporations Canada’s website, it is important that a corporation call an annual meeting every year and in a timely manner because it will ensure that members can make governance decisions based on current information, ensure transparency and disclosure, and give members the confidence to continue to support the corporation.

## **2. Relevant provisions contained in the articles and by-laws of a CNCA corporation**

A CNCA corporation should review its articles and by-laws to determine if they contain any restrictions on having electronic meetings of members and whether they contain provisions permitting entirely virtual meetings of members. Further details on virtual meetings of members will follow below in section 7. The articles of some organizations also contain provisions on the specific place where the AGM may be held if meetings are to be held outside Canada.

## **3. Size and composition of the organization’s membership**

Some organizations have hundreds or thousands of members whereas other organizations have a small membership. There are even some organizations with as few as one or three members. For some organizations the composition of their membership may be of such a nature that an electronic meeting would not be practical or preferable, such as where a significant number of their members do not have access to appropriate technology to be able to participate in an electronic meeting.

Where the size of an organization’s membership is very small, for example one to ten members, an alternative option to having a meeting of members is to do written consent resolutions approving the business items, in lieu of having a meeting of members, provided each member signs such written resolutions. This is permissible under the CNCA and the written consent resolutions could even be signed in counterparts by all of the members.

As a side note, it is important for non-profits and charities to review their governance structure and to consider the appropriateness of their membership structure and the role of their members.

#### **4. Accuracy of membership list and communication with members**

Organizations should review their by-laws and the applicable provisions of the CNCA to determine the permitted methods of giving notice of an AGM to their members. Most organizations should be able to communicate with, and give notice of their AGM to, their members by email. Some organizations may find that they do not have an email address for some of their members or the organization's by-laws may require that notice of an AGM must be sent to members by mail.

Having to send out notices by mail during the COVID-19 crisis when office premises are closed, staff are working from home or there are reduced staff due to layoffs, may turn out to be very burdensome, especially if the organization has a large membership. Other groups may find that they have not kept their membership list up-to-date or they are uncertain of who their members are. And for certain groups they may have been doing things in a more informal way, for instance, a small church group who would make an announcement of the upcoming AGM to their congregation at a few Sunday worship services in advance of the AGM or in the church bulletin handed out before the service. Some of the aforesaid groups may now be facing added challenges in trying to communicate with their members to give notice of the AGM or of a delay in calling their AGM. Now may not be the greatest time to deal with it, but all CNCA corporations should think carefully about how they structure membership and whether changes are needed in the future.

Organizations that realize that in light of the COVID-19 situation they are unable to give notice of the AGM to their members in the manner required under their by-laws should consider making use of section 162(5) of the CNCA whereby a corporation may apply to the Director appointed under the CNCA for authorization to give notice of the meeting of members in a different manner.

#### **5. Fiscal year end of the organization and financial statements**

COVID-19 will hopefully have been beaten by October 2020 and for organizations with a fiscal year end of April 30 or later, they may be able to conduct their AGM in the way they have done it in previous years.

Some organizations with an earlier fiscal year end may not be able to have their financial statements ready in time to comply with the financial disclosure obligations under the CNCA, including sending a copy of the financial statements, or a summary thereof, to their members 21 to 60 days before the AGM. For organizations who are having difficulty accessing their books and records during the COVID-19 crisis because physical offices

are closed and staff may be working from home, the accountant/auditor may not be able to prepare or finalize the financial statements within the normal required timelines. Such organizations should consider applying to Corporations Canada for an order to extend the time for calling their AGM. Refer to section 8 below.

## **6. Annual Conference or convention, keynote speaker, awards gala, etc.**

Some organizations, such as professional member organizations, have a tradition of integrating their AGM with their annual conference or convention. Other organizations make the AGM into the highlight of the year and invite a keynote speaker or host an awards gala after the AGM to attract members to attend the AGM every year. Some organizations have a preconceived idea of an AGM and believe that it must be a big, full-day or multiple-day event. In reality, an AGM can be a very short meeting with the standard AGM agenda items, namely, presentation of the financial statements and report of the public accountant to the members, election of directors, if applicable, and appointment of public accountant for ensuing year and fixing remuneration of public accountant or delegating such power to the board of directors of the corporation. Of course, some AGMs will be longer if there are special business to be conducted such as approval of amendments to the articles or by-laws of the corporation, or if there are contentious matters to be discussed.

With the challenges that organizations face during the COVID-19 pandemic, organizations should rethink how they conduct their AGM and it may be necessary to separate out the AGM and not lump it together with the organization's annual convention or gala dinner. For organizations who have an annual conference or convention or awards ceremony, etc. combined with their AGM, the AGM should be held within the required timeframe set by the CNCA or within the extension period granted by Corporations Canada for those organizations who successfully apply to Corporations Canada for an extension to call their AGM. An organization could always delay its annual conference or gala dinner until later in the year when things settle down after COVID-19.

## **7. Electronic participation in AGM or entirely virtual AGM**

For many organizations who traditionally have had face-to-face meetings, it may seem daunting to have to think about adjusting the way they hold their AGM in light of the COVID-19 crisis.

With respect to corporations under the Ontario *Corporations Act*, the Ontario government has passed an Emergency Order that allows such corporations to hold meetings of members by telephone or electronic means and to have members vote through such means, notwithstanding any provisions to the contrary contained in the letters patent, supplementary letters patent and by-laws of such corporations.

With respect to CNCA corporations, the CNCA allows for an AGM to be held partially or entirely through a telephonic, electronic or other communication facility. The CNCA sets certain requirements that must be met, as discussed below. The default rule under the CNCA is that a meeting of members may be held in-person at a physical location with members having the option to participate remotely by electronic means if the corporation makes available such a facility. On the other hand, an organization can only hold an entirely virtual meeting of members if expressly permitted by the organization's by-laws. We encourage organizations to review their articles and by-laws to determine if their governing documents contain any restrictions or express provisions concerning meetings of members by electronic means.

With a semi-virtual meeting it is an "in-person meeting" and there may be one or two people (such as the chair of the meeting and another member) in attendance at the physical location of the meeting and the rest of the members have the option of accessing the meeting by electronic means such as videoconference or teleconference. One would think that during the COVID-19 crisis it would not be that hard to convince people to attend from home or their workplace and not show up at the official place of meeting. The corporation can select a communication's facility, which could be by video-conference, such as Zoom or Skype, or another platform or facility that permits people to communicate adequately with each other during the meeting. Note that exchange of emails would not meet the adequacy standard under the CNCA.

If expressly permitted by the organization's by-laws, an organization may hold its AGM as a virtual-only AGM with the members attending the AGM remotely and there being no physical meeting place.

Members participating in a semi-virtual or entirely virtual meeting are entitled to vote at such a meeting by means of the telephonic, electronic or other communication facility that the corporation has made available for that purpose. The voting facility must meet the following requirements of the CNCA:

- (a) the facility must enable the vote to be gathered in a manner that permits its subsequent verification; and
- (b) the facility must permit the tallied vote to be presented to the corporation without it being possible for the corporation to identify how the person voted.

The above requirements mean that the electronic voting facility must create the functional equivalent of a secret ballot. Accordingly, the organization should not directly receive the votes. Rather, a third-party contractor or, for example, the organization's auditor or lawyer, could gather and tally the votes and let the corporation know the results without identifying to the corporation how each member voted.

For organizations with a large membership or organizations who have members in more than one province or across Canada or even outside Canada, semi-virtual or virtual meetings have the benefits of making it easier for members to attend the AGM, saving on travel expenses and/or accommodation costs connected with an in-person meeting,

reducing members' carbon footprint and attracting participation by the members of the organization.

An organization may wish to test a number of technology platforms before deciding which platform is the best choice for their organization. For many groups it could be as simple as video conferencing through Zoom with a program like Survey Monkey to tally the votes but the organization should not know how each member voted. Some systems don't show you how people voted initially but it is in a report that is available to the organization which would not work in this case. You can have an outside advisor such as accountant or lawyer control the system and therefore it will not be "possible for the corporation to identify how the person voted".

Here are some ideas on practical matters to think through ahead of the semi-virtual or entirely virtual meeting:

- Identify a few volunteers or staff who will have assigned roles on the day of the AGM. For example:
  - Tech support (depending on the size of the membership, there may need to be multiple tech assistants to handle incoming emails, phone calls and questions through the platform question box from members having technical difficulties accessing the meeting or during the meeting;
  - Person responsible for tracking attendance of members and establishing quorum;
  - Person responsible for advancing slides during presentation(s) of speakers (it may be less stressful in some cases for the speaker (especially if there are only 1 or 2 slides for them) and more streamlined if the speaker is not also responsible for advancing slides);
  - Person assigned to review/organize incoming questions from participants and to flow them through to the moderator/chair of the meeting, if a platform with a chat box for typing questions will be used.
- Make it as easy as possible for members to join the meeting. For example, sending a link by email which members can just click on to join the meeting and clearly identifying in the email any password or code that the member will need to access the meeting. Also have a back-up plan. For instance, if a participant's computer audio is not working on the day of the meeting, consider if the platform your organization plans to use also provides an alternative call-in number so that participants can call in by telephone for audio.
- Prepare a script template that the speaker/moderator/chair of the meeting can use.
- Have a mock AGM with the speaker/moderator/chair and a few other volunteers/staff in advance of the AGM to ensure things will run as smoothly as possible on the day of the real-time AGM.

## **8. Delay of AGM**

For CNCA corporations that have identified barriers to holding a semi-virtual or entirely virtual meeting as discussed above, or for practical or other reasons want to have a physical, in-person AGM, applying for an extension of the time for calling the AGM may be the best solution while the COVID-19 crisis is ongoing.

We understand from Corporations Canada that, unlike the Ontario government, Corporations Canada does not have the power under the CNCA to grant a blanket extension to CNCA corporations with respect to the specific time frames set by the CNCA for calling an AGM.

Under the CNCA a corporation may apply to the Director appointed under the CNCA to seek an extension of time for calling its AGM and Corporations Canada will review and approve applications on a case-by-case basis. Our team has been working with Corporations Canada to develop a standard form that organizations may fill out and submit to Corporations Canada to apply for such an extension, if required. As soon as the form is available, we will put up a link to the form. More information on applying for an extension is also available on Corporations Canada's website at the following link: <http://corporationscanada.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs06828.html> .

For corporations under the Ontario *Corporations Act* there is not a similar avenue of applying for an extension order. However, corporations under the Ontario *Corporations Act* should note that the Ontario government has passed an Emergency Order to extend the timeframe by which such corporations must hold AGMs. The Emergency Order is in effect province-wide and is retroactive to March 17, 2020. Details of the Emergency Order can be located at the following link:

<https://www.canadiancharitylaw.ca/blog/ontario-government-allows-all-oca-corporations-to-have-virtual-meetings-and-extends-deadlines-for-agms/>

## **9. Standard agenda items for AGM or potentially contentious matters to be dealt with as part of AGM**

As mentioned above, if the AGM will deal with the normal business to be conducted at an AGM, the AGM does not need to be a very long meeting and can be uneventful. If there will also be potentially contentious matters or complex items on the agenda for the AGM, an organization should properly think through the appropriate manner and format for conducting the AGM and should consider seeking legal advice on the matter.

In the long run some organizations may find that having an electronic or entirely virtual annual meeting of members every year could be much easier and more efficient from a logistical and cost perspective. However, as mentioned earlier in this article, there is no one-size-fits-all solution and when the COVID-19 crisis is over some groups may find that

for future years a physical, in-person meeting still works best for their specific organization and membership.

**Note: Other reporting obligations under the CNCA**

CNCA corporations should keep in mind that calling and holding an AGM is not the only requirement they must comply with under the CNCA. A list of the reporting obligations of corporations under the CNCA can be found on Corporations Canada's website at the following link:

<https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs04956.html>

We have many groups contacting us about the AGM and very worried about complying with the CNCA but yet they are in non-compliance with other CNCA requirements such as soliciting corporations filing financial statements with Corporations Canada!

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