



COVID-19 and AGMs for Ontario non-profit corporation under the Ontario Corporations Act (“OCA”)

By Mark Blumberg, Lize-Mari Swanepoel and Ron Segal (April 23, 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.

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. This article is dealing with OCA corporations and we have posted [another article dealing with Federal CNCA corporations](#). For other provincial jurisdictions, it is best to consult your local companies branch for further information or obtain legal advice.

1. The OCA and required time frame for holding AGM

An OCA corporation must hold an annual meeting of members every year. Under the OCA, prior to the COVID-19 pandemic, a corporation without share capital was required to hold an annual meeting of members not later than 18 months after its incorporation and subsequently not more than 15 months after the holding of the previous annual meeting and no later than 6 months after the corporation’s last completed financial year.

In some organizations the AGM is important from an accountability point of view. It is important that a corporation hold 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.

However, more importantly from a public health perspective, organizations must not do anything that may unnecessarily expose their members to risk.

The Ontario government has passed an **Emergency Order** that extends the time frame by which corporations under the OCA must hold AGMs and this might be a solution for some OCA non-profits.

The Emergency Order provides with respect to extensions:

Annual meetings

293. (1) A corporation shall hold an annual meeting of its shareholders or members not later than eighteen months after its incorporation and subsequently not more than fifteen months after the holding of the last preceding annual meeting.

Annual meetings, time extension

(2) Despite subsection (1), if the last day on which a meeting is required to be held under subsection (1) is a day that falls within the period of the declared emergency, the last day on which the meeting is instead required to be held is no later than the 90th day after the day the emergency is terminated.

Same

(3) Despite subsection (1), if the last day on which a meeting is required to be held under subsection (1) is a day that falls within the 30-day period that begins on the day after the day the emergency is terminated, the last day on which the meeting is instead required to be held is no later than the 120th day after the day the emergency is terminated.

In other words, the Emergency Order extends the deadline for holding an AGM under the OCA until:

- 120 days after the declared emergency has been terminated (we don't know that date yet) if the deadline for holding the meeting would otherwise have fallen within 30 days after that termination date; and
- in all other cases, 90 days after the declared emergency has been terminated.

Also, as further discussed below, the Emergency Order allows corporations under the OCA to hold meetings of directors and members virtually (i.e. electronically or by telephone).

For OCA corporations that have identified barriers to holding a semi-virtual or entirely virtual meeting within the normal time frame under the OCA, or for practical or other reasons want to have a physical, in-person AGM but cannot do so due to the COVID-19 pandemic, the Emergency Order is very useful.

We point out that the Emergency Order does not apply to federal not-for-profit corporations governed by the *Canada Not-for-profit Corporations Act* (the “CNCA”) even if such a corporation has its registered or head office in Ontario or operates in Ontario. Such corporations must apply to Corporations Canada for an exemption if they require an extension of time for calling an annual meeting of members. Please refer to our other [article](#) dealing with federal CNCA corporations and AGMs.

2. AGM by Telephonic or Electronic Means and Voting

Prior to the COVID-19 crisis and as of November 14, 2017 it has been permissible for organizations under the OCA to hold members’ meetings by telephonic or electronic means:

Members’ meetings

125.1 (1) 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. 2017, c. 20, Sched. 7, s. 31 (1). [Emphasis added]

If a corporation’s by-laws are silent on the issue, then it is optional to hold a meeting of the members by telephonic or electronic means. If a corporation’s by-laws prohibit a meeting of the members by telephonic or electronic means, then in normal circumstances a members’ meeting by such means would not be an option. However, section 125.1 of the OCA has been temporarily suspended by the Emergency Order. The Emergency Order allows OCA 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 their letters patent, supplementary letters patent and by-laws.

Here is an excerpt from the Emergency Order:

1. The operation of section 125.1 of the *Corporations Act* is temporarily suspended and the following replacement provisions are in effect during the temporary suspension period only:

Meeting by electronic means, all corporations

125.1 (1) Despite any provision in the letters patent, supplementary letters patent or by-laws of a corporation that provides otherwise, a meeting of the members or shareholders of a corporation may be held by telephonic or electronic means and a member or shareholder 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.

Same

(2) Despite section 117, subsection (1) applies to all corporations to which the *Corporations Act*, or any provision thereof, applies.

Accordingly, during the temporary suspension period an OCA corporation may hold an entirely virtual members' meeting or a partially virtual members' meeting even if the corporation's letters patent, supplementary letters patent or by-laws prohibit members' meetings by such means.

With an entirely virtual meeting it is all virtual/electronic and there is no place of meeting. With a partially virtual meeting there is a meeting place, perhaps only a couple of people attend in person (keeping a safe physical distance), and everyone else attends electronically. In either case, people participating virtually count towards the quorum.

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.

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 or GoToWebinar.

Here are some ideas on practical matters to consider ahead of the virtual or partially 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.
 - Also have a short test session for members to attend to check their computer and audio. We just had a 7 hour Boot Camp with 117 attendees. Only one person could not get on and it was because they were a bank employee and their firewall did not allow it! Many AGMs can be as short as 10-20 minutes for the business portion.

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. It can also encourage greater participation especially for national organizations with members who cannot afford to travel to the AGM. 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.

3. Other Issues to Consider in the Context of AGMs

We have set out below certain other issues to also consider in the context of AGMs.

a) Relevant provisions contained in the letters patent and by-laws of an OCA corporation

An OCA corporation should review its letters patent, any supplementary letters patent, and its by-laws to determine if they contain any specific requirements with respect to AGMs. Some organizations may have fixed nomination periods for nominating candidates for election as directors or other requirements that should be considered along with the time frame for holding an AGM as discussed above.

In order to understand the requirements of an organization you need to have access to the governing documents of the non-profit or charity. Some of our clients are using online board management portals and have easy access to all their documents. Some groups have all their governing documents in a minute book that may not be easily accessible during the COVID-19 crisis and they may not have access to electronic copies. Ask around as others in the group may have access to copies, including the organization's lawyer or accountant.

If that does not work, some documents are kept by the Ontario Ministry of Government and Consumer Services such as letters patent, supplementary patents, letters patent of amalgamation, etc. You can purchase from the Ontario government microfiche containing those documents or there are service providers who can order it for you. The Ontario Ministry of Government and Consumer Services does not keep copies of by-laws of corporations under the OCA. This is unlike federal not-for-profit corporations who can easily obtain copies of their documents free of charge from Corporations Canada as of January 15, 2020. See: [Corporations Canada Changes to Fees + Service Standard Times and improves transparency.](#)

b) Size and composition of the organization's membership

Some organizations have hundreds or thousands of members whereas other organizations have a small membership such as only the directors are members. There are even some organizations with as few as one or three 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.

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. For such organizations the Emergency Order is very helpful as they will be able to postpone their AGM and hold a traditional in-person meeting after COVID-19 within the time frames stipulated in the Emergency Order.

Remember that as long as the quorum requirement under the organization's by-laws is satisfied, the meeting can proceed; not all members of the organization need to attend the meeting.

Members who are unable to attend a meeting of members may appoint a proxy holder to attend and vote at the meeting on their behalf. The OCA provides that every member, including a member that is a corporation, entitled to vote at a meeting of members may by means of a proxy appoint a person as the member's nominee to attend and act at the meeting in the manner, to the extent and with the power conferred by the proxy.

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 OCA and the written consent resolutions could even be signed in counterparts by all of the members.

c) Notice to members

Organizations should review their by-laws and the applicable provisions of the OCA to determine the notice requirements for meetings of members. If a corporation's by-laws so provide, a corporation may give notice of the AGM to their members by email. Some organizations may find that they do not have an email address for some of their members. Other organizations may find that their by-laws require that notice of an AGM must be sent to members by mail.

The OCA provides that, in the absence of other provisions in the by-laws of the corporation, notice of the time and place for holding a member's meeting must be given by sending it to each member entitled to notice of the meeting by prepaid mail to the member's last address as shown on the books of the corporation and the corporation's by-laws cannot provide for fewer than 10 days' notice of a meeting of members. Under the OCA there is an exception for corporations with objects exclusively for charitable purposes. Such corporations may give notice of a meeting of members by publication at least once a week for 2 consecutive weeks next preceding the meeting in a newspaper or newspapers circulated in the municipality or municipalities in which the majority of the members of the corporation reside as shown by their addresses on the books of the corporation.

d) Fiscal year end of the organization and financial statements

With the COVID-19 crisis some organizations may not be able to have their financial statements ready in time for their 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 timelines. For such organizations the Emergency Order is very helpful as they will be able to postpone their

AGM in accordance with the time frames stipulated in the Emergency Order and have more time to complete their financial statements to have them ready for the AGM.

e) Annual Conference or convention, keynote speaker, awards gala, etc.

Some non-profits and charities 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. Of course, some AGMs will be longer if there are special business to be conducted such as approval of amendments to the letters patent or by-laws of the corporation, or if there are contentious matters on the agenda.

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.

f) Standard agenda items for AGM or potentially contentious matters to be dealt with as part of AGM

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 or perhaps a written resolution signed by all members can be done in lieu of a meeting if there is a small membership. 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.

The normal business to be conducted at an AGM includes presentation of the financial statements and report of the auditor to the members, election of directors, if applicable, and appointment of auditor for the ensuing year and fixing remuneration of the auditor or authorizing the directors to do so. Note that the OCA further requires that the report of the auditor to the members be read at the annual meeting and be open to inspection by any member.

The following may only be of assistance to smaller corporations: As of January 13, 2018 the OCA allows that the members of a corporation may pass an extraordinary resolution to not appoint an auditor and to not have an audit in respect of the corporation's financial year if the corporation had annual revenue in that financial year of no more than \$100,000. The OCA defines "extraordinary resolution" as a resolution that is:

(a) passed by at least 80 per cent of the votes cast at a general meeting of which notice specifying the intention to pass the resolution has been given, or

(b) consented to in writing by each member of the corporation entitled to vote at a general meeting of the members.

4. Reporting Changes to Office Address, Director / Officer Information

OCA corporations should remember to report changes to the corporation's registered or head office address, mailing address and the director / officer information to the Ministry of Government and Consumer Services within 15 days of such change by filing a Form 1, Notice of Change. We have found that many OCA corporations have very out of date information with the Ministry and unfortunately it is not easy to update the information by filing paper forms.

5. ONCA

Unfortunately the implementation of the legislation which is to replace the OCA, namely, the Ontario *Not-for-Profit Corporations Act, 2010*, has been delayed and we do not have any further information on when or if it will be brought into force.

For many Ontario corporations who have been waiting since 2010 they would be better off moving to federal jurisdiction under the *Canada Not-for-profit Corporations Act*. We have posted some resources that may be helpful and that can be accessed here:

<https://www.canadiancharitylaw.ca/blog/category/onca/>

We have pasted below the Emergency Order from the Ontario Government:

<https://www.ontario.ca/laws/regulation/r20107>

ONTARIO REGULATION 107/20

made under the

EMERGENCY MANAGEMENT AND CIVIL PROTECTION ACT

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ORDER UNDER SUBSECTION 7.1 (2) OF THE ACT - MEETINGS FOR CORPORATIONS

Whereas an emergency was declared pursuant to Order in Council 518/2020 (Ontario Regulation 50/20) on March 17, 2020 at 7:30 a.m. Toronto time pursuant to section 7.0.1 of the *Emergency Management and Civil Protection Act* (the "Act");

And Whereas the criteria set out in subsection 7.1 (2) of the Act have been satisfied;

Now Therefore, this Order is made pursuant to subsection 7.1 (2) of the Act, the terms of which are set out in Schedules 1 and 2;

And Further, this Order applies generally throughout Ontario;

And Further, this Order is retroactive to March 17, 2020.

SCHEDULE 1 CORPORATIONS ACT

MEETING BY ELECTRONIC MEANS, MEMBERS' AND SHAREHOLDERS' MEETINGS

1. The operation of section 125.1 of the *Corporations Act* is temporarily suspended and the following replacement provisions are in effect during the temporary suspension period only:

Meeting by electronic means, all corporations

125.1 (1) Despite any provision in the letters patent, supplementary letters patent or by-laws of a corporation that provides otherwise, a meeting of the members or shareholders of a corporation may be held by telephonic or electronic means and a member or shareholder 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.

Same

(2) Despite section 117, subsection (1) applies to all corporations to which the *Corporations Act*, or any provision thereof, applies.

TIME EXTENSION FOR ANNUAL MEETINGS, INSURANCE CORPORATIONS

2. The operation of subsection 159 (1) of the *Corporations Act* is temporarily suspended and the following replacement provisions are in effect during the temporary suspension period only:

Annual meeting

(1) A meeting of the shareholders and members for the election of directors shall be held within the first three months of every year at such time and place as the by-laws of the corporation prescribe.

Annual meeting, time extension

(1.1) Despite subsection (1), the meeting of the shareholders and members for the election of directors required to be held in 2020 shall be held no later than the 90th day after the day the emergency is terminated.

MEETING BY ELECTRONIC MEANS, DIRECTORS' MEETINGS

3. The operation of subsection 283 (3.1) of the *Corporations Act* is temporarily suspended and the following replacement provision is in effect during the temporary suspension period only:

Meeting by electronic means

(3.1) Despite any provision in the letters patent, supplementary letters patent or by-laws of a corporation that provides otherwise, a meeting of directors or of a committee of directors may be held by such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously, and a director participating in the meeting by those means is deemed for the purposes of this Act to be present at the meeting.

TIME EXTENSION FOR ANNUAL MEETINGS, GENERAL

4. The operation of section 293 of the *Corporations Act* is temporarily suspended and the following replacement provisions are in effect during the temporary suspension period only:

Annual meetings

293. (1) A corporation shall hold an annual meeting of its shareholders or members not later than eighteen months after its incorporation and subsequently not more than fifteen months after the holding of the last preceding annual meeting.

Annual meetings, time extension

(2) Despite subsection (1), if the last day on which a meeting is required to be held under subsection (1) is a day that falls within the period of the declared emergency, the last day on which the meeting is instead required to be held is no later than the 90th day after the day the emergency is terminated.

Same

(3) Despite subsection (1), if the last day on which a meeting is required to be held under subsection (1) is a day that falls within the 30-day period that begins on the day after the day the emergency is terminated, the last day on which the meeting is instead required to be held is no later than the 120th day after the day the emergency is terminated.

SCHEDULE 2
BUSINESS CORPORATIONS ACT

SHAREHOLDERS' MEETINGS, TIME EXTENSION AND MEANS OF MEETING

1. The operation of section 94 of the *Business Corporations Act* is temporarily suspended and the following replacement provisions are in effect during the temporary suspension period only:

Shareholders' meetings

94. (1) Subject to subsection 104 (1), the directors of a corporation,

- (a) shall call an annual meeting of shareholders not later than eighteen months after the corporation comes into existence and subsequently not later than fifteen months after holding the last preceding annual meeting; and
- (b) may at any time call a special meeting of shareholders.

Shareholders' meetings, time extension

(1.1) Despite clause (1) (a), if the last day on which a meeting is required to be held under subsection (1) is a day that falls within the period of the declared emergency, the last day on which the meeting is instead required to be held is no later than the 90th day after the day the emergency is terminated.

Same

(1.2) Despite clause (1) (a), if the last day on which a meeting is required to be held under subsection (1) is a day that falls within the 30-day period that begins on the day after the day the emergency is terminated, the last day on which the meeting is instead required to be held is no later than the 120th day after the day the emergency is terminated.

Meeting by electronic means

(2) Despite any provision in the articles or the by-laws of a corporation that provides otherwise, a meeting of the shareholders may be held by telephonic or electronic means and a shareholder who, through those means, votes at the meeting or establishes a communications link to the meeting shall be deemed for the purposes of this Act to be present at the meeting.

MEETING BY ELECTRONIC MEANS, DIRECTORS' MEETINGS

2. The operation of subsection 126 (13) of the *Business Corporations Act* is temporarily suspended and the following replacement provision is in effect during the temporary suspension period only:

Meeting by electronic means

(13) Despite any provision in the articles or by-laws of a corporation that provides otherwise, a meeting of directors or of a committee of directors may be held by means of such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously, and a director participating in such a meeting by such means is deemed for the purposes of this Act to be present at that meeting.

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