

Welcome to our 2020 AGM - Through our Virtual Gateway

Andrea FitzGerald

March 18, 2020

In the current environment of rapid change in response to COVID-19, including social distancing, the closing of non-essential public venues and prohibitions on public gatherings, many Canadian companies who traditionally have held in person annual shareholder meetings (AGMs) are suddenly finding themselves pivoting towards holding a virtual AGM. A virtual AGM is a meeting of shareholders conducted entirely through electronic means over the internet with no physical meeting location. Although many of the corporate statutes in Canada permit virtual shareholder meetings, such a forum has not been used as widely by Canadian companies to-date as they have in the United States; this trend is about to change. Given the limited number of service providers available to facilitate virtual meetings of Canadian issuers, and the sudden increased demand for virtual meetings as a result of COVID-19, now is the time to act.

Key Considerations

- As a first step, companies need to check their governing corporate statute, articles and by-laws to determine if they are permitted to hold a virtual meeting. The corporate statutes differ across provinces and companies are advised to consider the language in their particular statute.
- It is expected that any required court orders to permit companies to hold a virtual meeting would be granted given the current environment we are in, however the timing for obtaining such order may be impacted due to the recent court closures.
- An alternative to a virtual meeting, in the event that this is not a viable option for certain issuers at the present time, is to hold a "hybrid" meeting where there is still a physical location for the meeting but shareholders and proxyholders can choose whether to participate in person or electronically.
- Although a virtual AGM can be an effective way of communicating with a large number of shareholders globally, with the potential to increase shareholder engagement at potentially lower costs, it is not a recommended method for a contested or potentially contested meeting (e.g., a proxy battle or potentially contentious special business to be put before shareholders).
- Although proxy advisory firms, such as ISS and Glass Lewis, will likely relax policies surrounding virtual-only shareholder meetings for this proxy season, we can expect that they will continue to scrutinize the conduct and disclosure of companies in connection with such meetings.

Check your Governing Corporate Statute and Constating Documents

Many of the corporate statutes provide for the ability to hold a shareholder meeting by electronic means,

Cassels

subject to meeting certain requirements and subject to certain exceptions. One key consideration is whether a quorum can be established for the meeting if conducted entirely through electronic means, meaning whether a company can count a shareholder or proxyholder who votes or establishes a communication link through such electronic means as "present" at the meeting.

Under subsection 94(2) of the Ontario *Business Corporations Act* (the OBCA), unless the articles or the by-laws of the company provide otherwise, a meeting of 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 to be present at the meeting, thus satisfying any quorum requirement.

Under subsections 132(4) and 132(5) of the *Canada Business Corporations Act* (the CBCA), if the by-laws provide, a company may hold a shareholders meeting entirely by means of a telephonic, electronic or other communication facility, however, the facility must permit all participants to communicate adequately with each other during the meeting and, unless the by-laws otherwise provide, any person entitled to attend a meeting of shareholders may participate in the meeting by such means and such person is deemed to be present at the meeting. The statute does not provide guidance on what is meant by "*communicate adequately*" and the Canadian courts have not provided interpretation of these provisions to-date. Accordingly, companies should work with their electronic solutions provider to ensure that the technology platform they intend to use allows for what management and the board, using business judgement, determines to be adequate communication. The *Alberta Business Corporations Act* contains similar provisions to the CBCA.

Section 174 of the British Columbia *Business Corporations Act* (the BCBCA) has similar provisions to the OBCA regarding shareholder participation in a meeting by telephone or other communications medium, and further provides that a shareholder so participating is deemed to be present at that meeting for the purposes of determining quorum. Similar to the CBCA, Section 174 requires that the shareholders be able to "*communicate with each other.*" This requirement could be satisfied by a chat function or audio.

However the BCBCA specifically requires that a shareholder meeting be held at a determined physical "location." British Columbia companies should consider whether a "hybrid" meeting is a more practical alternative (see below), which would still require the meeting to be convened with shareholders being entitled to attend the meeting in person if they so choose. For a fully "virtual" meeting, section 186 of the BCBCA contemplates that a company may apply to the Court for an order that the meeting be called, held and conducted "*in any manner the Court considers appropriate.*" The Court may make such an order for any reason, including if it is "*impracticable for any reason*" to conduct the meeting in the manner required under the BCBCA. We know of at least one large British Columbia company that has recently obtained such an order, permitting it to hold a fully "virtual" meeting.

Cassels

If a company is considering switching to a virtual meeting but has already filed its proxy materials contemplating a physical meeting, it must take steps to provide notice of such change as soon as possible. The company should also make clear in its notice of change that an in-person meeting will no longer be held due to the COVID-19 outbreak and provide clear instruction and information to its shareholders (for example, in addition to any corporate law requirements, see "Consider Proxy Advisory Firm Expectations" below).

The United States Securities and Exchange Commission recently announced certain exceptions to its proxy rules in light of COVID-19, permitting issuers to notify shareholders of a change in the date, time or location of annual meetings via press release without mailing additional materials or amending proxy materials, subject to certain additional requirements. Neither Canadian regulators nor government agencies have issued any comparable guidance to-date regarding such changes to meetings by Canadian issuers. Under most Canadian corporate statutes, notice of the meeting must be sent to shareholders at least 21 days prior to the meeting date, and the notice must be delivered by mail or personal delivery (unless, depending on the statute, an issuer has obtained the consent of the shareholder to receive communications electronically, or it is implied if a shareholder does not object). If a company cannot meet the 21-day notice requirement, it may choose to apply to court for an order permitting a shorter notice period and delivery of such notice in a different manner (e.g., via press release and posting on its website).

Consider the Hybrid Meeting Alternative

As an alternative to holding a virtual AGM, companies may consider holding a hybrid meeting where there is still a physical location for the meeting but shareholders and proxyholders have the choice to participate either in person or electronically. This may be a viable alternative for companies that (i) are not able to currently secure a virtual platform given the current demand on service providers, (ii) are not permitted, by reason of their corporate governing statute and constating documents, to hold a virtual AGM (e.g., required to hold a shareholder meeting in a specific location such as under the BCBCA) or (iii) have typically had very few shareholders attend in person at their AGMs.

In most cases, a hybrid meeting will ensure that the company's quorum requirement is met if the management nominees who serve as proxyholders are physically in attendance, as they commonly hold a sufficient number of proxies to satisfy such quorum requirement. Most corporate statutes permit, and most companies have traditionally provided for, electronic voting at their shareholder meetings even where the statutes or by-laws do not automatically deem a shareholder to be present at the meeting for the purposes of establishing quorum.

It should be pointed out that many Canadian companies provide a webcast of their shareholder meetings online for shareholders to watch or listen to, which is not the same as a virtual or hybrid meeting that requires the ability of shareholders to participate, communicate and vote at the meeting.

Cassels

Consider Proxy Advisory Firm Expectations

Proxy advisory firms, such as Institutional Shareholder Services, Inc. (ISS) and Glass Lewis & Co. (Glass Lewis), have historically frowned upon virtual only shareholder meetings. Glass Lewis will generally recommend voting against members of the governance committee where the board is planning to hold a virtual-only shareholder meeting and the company does not include robust disclosure in its information circular which assures shareholders that they will be afforded the same rights and opportunities to participate as they would at an in-person meeting.

Given the COVID-19 environment, it is expected that the proxy advisory firms will relax their policies on the basis that full and transparent disclosure in connection with conducting virtual meetings is provided to shareholders in the proxy materials. Examples of effective disclosure in this regard include: (i) addressing the ability of shareholders to ask questions during the meeting, including time guidelines for shareholder questions, rules around what types of questions are allowed, and rules for how questions and comments will be recognized and disclosed to meeting participants; (ii) procedures, if any, for posting appropriate questions received during the meeting, and the company's answers, on the investor page of their website as soon as is practical after the meeting; (iii) addressing technical and logistical issues related to accessing the virtual meeting platform; and (iv) procedures for accessing technical support to assist in the event of any difficulties accessing the virtual meeting.

[Additional resources related to the impact of the COVID-19 pandemic can be found here.](#)

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.