

Virtual Shareholders' Meetings: Navigating Social Distancing During Proxy Season in Light of COVID-19

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Amid the increasing global spread of COVID-19, corporations approaching proxy season are considering alternative means for holding their annual general meetings (AGMs). This is in an effort to meet their legal obligations while maintaining appropriate social distance. Recently, two large Canadian public companies, TELUS and Enbridge, announced that their AGMs would be held completely online. The adoption of virtual AGMs is a relatively new concept in Canada, with only four Canadian public companies having held virtual shareholders' meetings to date.

In light of public health guidance urging Canadians to maintain social distance during this pandemic and, in particular, to avoid large gatherings, virtual meetings may present a viable and responsible alternative to in-person meetings this proxy season. Corporate authorities in many Canadian jurisdictions have already considered the legal requirements regarding virtual shareholders' meetings. If your company is considering holding a virtual meeting this proxy season, it is important to understand both the legal requirements and the practical steps to be taken in preparation for the meeting.

What is considered a virtual meeting?

As the name implies, virtual meetings are shareholders' meetings that occur via technology platforms, such as phones, tablets or personal computers. Virtual meetings should allow shareholders to ask questions, comment on proceedings, vote and participate electronically in real time. A virtual meeting may be "virtual-only," meaning it is held wholly by electronic means without any physical meeting place, or may be a "hybrid meeting" whereby shareholders are given the option to attend a physical location for the meeting or participate virtually.

How do we determine if our company can hold virtual-only meetings?

This will depend both on your company's governing corporate statute and its constating documents. For federally incorporated companies, the *Canadian Business Corporations Act* allows shareholders' meetings to be held entirely by electronic means with two conditions: (i) the company's by-laws or articles allow it; and (ii) shareholder participants are able to "communicate adequately" with each other.¹

The interpretation of "communicate adequately" is not clear, and given that virtual-only meetings remain relatively new in Canada, courts have not yet been called upon to address such meaning. However, various provincial corporate statutes may provide some helpful guidance. For example, Québec's corporate statute states that participants at a shareholders' meeting must be able to "communicate directly with one another."² This requirement becomes increasingly challenging to meet as the number of participants increases and therefore finding technology that can facilitate suitable communications between multiple shareholders without difficulties is paramount.

Provinces like Alberta, Manitoba and Québec have adopted identical provisions in their corporate statutes.³ However, other provincial statutes are less clear or specific on virtual-only meetings. For example, the British Columbia corporate statute only permits participation of shareholders in meetings through telephone or other communication medium, but it remains silent on whether the meeting can be held entirely by electronic means. However, companies incorporated in British Columbia do have the option of seeking a court order to hold virtual-only meetings since the province's statute permits courts to order that meetings be held in any manner they find appropriate.

The *Business Corporations Act* (Ontario) contains one of the most favourable provisions as it allows shareholders' meetings to be held entirely electronically, and deems shareholders who vote through such means or who establish a communications link to the meeting to be present at the meeting, thereby enabling companies to satisfy quorum requirements through electronic participation.⁴ Ontario's statute also has the added benefit of not including the requirement that shareholders be able to "communicate adequately."

In summary, the first consideration when contemplating a virtual-only meeting is to review the relevant provisions of your company's governing statute, by-laws and articles and, in the case of a private company, any shareholders' agreement.

Who should we involve in the meeting?

There are a number of essential parties that should be immediately notified of the plan to conduct a virtual-only meeting in order to ensure a quick and seamless transition. Internally, the Board, executive management team, counsel and investor relations officers should be included and notified immediately. Externally, auditors, transfer agents, outside counsel, proxy distribution vendors and the virtual meeting vendor(s) should be notified as soon as possible after the decision is made to conduct a virtual meeting.

Some transfer agents may also offer virtual meeting platforms or have partnerships with vendors of such technologies. It may be worthwhile to consider these services, as such platforms may have benefits that a third party vendor will not have. For example, a transfer agent's platform might be better suited to ensure that all shareholders are provided access to the meeting and that through the provision of proper login credentials, only shareholders attend. Real-time attendance reports and voting results may also be more easily processed and audited through a transfer agent's platform.

How should we disclose the meeting to shareholders?

Leading proxy advisory services firm, Glass Lewis, strongly advocates for robust proxy disclosure in a company's proxy statement, which should confirm to shareholders that they will continue to have equivalent rights and opportunities to participate in a virtual meeting as they would at an in-person meeting.

They also provide guidelines on the contents of effective disclosure, which they suggest should: (i) address 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) outline procedures, if any, for posting appropriate questions received during the meeting and the company's answers on the investor page of the company's website as soon as it is practical after the meeting; (iii) address technical and logistical issues related to accessing the virtual meeting platform; and (iv) outline procedures for accessing technical support to assist in the event of any difficulties accessing the virtual meeting.

Glass Lewis will take into account the current circumstances relating to the COVID-19 pandemic in applying its policies on a case-by-case basis. For those companies wishing to hold a virtual-only shareholders' meeting for the 2020 proxy season, Glass Lewis will also refrain from recommending to vote against members of the governance committee on this basis, provided that the company discloses, at a minimum, its rationale for doing so, including citing COVID-19.

How should voting be handled?

When selecting a virtual meeting technology platform, companies should consider what features are in place to support virtual voting, including real-time balloting, and the system for quorum counting and registration closures. Such features will be necessary to ensure that shareholders are given equal opportunities to participate during the virtual meeting. The corporation's registrar and transfer agent should also work closely with the technology vendor to ensure that all online votes are included with the proxy votes in the final results.

As mentioned above, a company's transfer agent may also provide virtual meeting services, and using

such services may facilitate shareholder voting, as well as ensure that only the eligible shareholders are permitted to vote.

Will investors be resistant to a virtual-only meeting?

The primary concern for shareholders is the ability to participate actively and fully in the meeting. Some investor groups and institutional investors have indicated that virtual-only meetings that fail to provide full participation for shareholders will be faced with opposition.

In its 2020 model proxy voting guidelines (intended for Canadian Pension Funds), the Canadian Shareholder Association for Research and Education stated that virtual meetings must give shareholders the same opportunities to participate as if they were physically present. They then go on to recommend the following:

- [The fund] will vote against proposals to hold shareholders' meetings entirely by electronic means, unless those electronic meetings give shareholders the same opportunities to participate, including asking questions and engaging in dialogue, as if they were physically present; and
- If a company adopts virtual shareholders' meetings without shareholder approval, and if the virtual meetings do not give shareholders the same opportunities for participation as if they were physically present, [the fund] will vote against the entire board.

Glass Lewis has also recommended voting against members of the governance committee where the board is planning to hold a virtual-only shareholders' meeting and the company fails to provide "robust disclosure" (explained above).

Large institutional investors are also echoing similar sentiments. The large Canadian pension fund, OMERS, stated in its proxy voting guidelines that the fund may vote against or withhold votes from members of an issuer's governance committee if a board intends to hold a virtual-only meeting without demonstrating that shareholders would have the same rights as they would be entitled to at an in-person meeting. Similarly, RBC's global asset management's current proxy voting guidelines state that shareholders should be given the opportunity to vote on the adoption of virtual-only meetings, and that they may withhold support from members of the board if the company adopts a virtual-only meeting format and the resulting meeting format negatively impacts shareholder rights.

These investor concerns solidify the need to ensure that shareholder rights and participation are prioritized when contemplating a virtual-only meeting.

What other practices should we adopt for a successful virtual-only meeting?

In addition to our recommendations above, best practices and principles for issuers considering holding a virtual-only meeting this proxy season 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. Key best practices outlined in this publication include:

- Provide abundant notice and detail to shareholders on how to access and participate electronically at the meeting, including technology requirements and options for addressing any technical difficulties or challenges.
- Consider the nature of the business to be considered at the meeting before choosing a virtual-only meeting. A contentious meeting where there may be shareholder proposals, proxy contests or other disputatious items may not be suitable for virtual-only meetings.
- Ensure shareholders have access to the company's board members. It is important for virtual participants to have the opportunity to see, hear and ask questions of board members and, particularly, independent board leadership.
- Ensure that the technology platform you select can accommodate communication among shareholders and between shareholders and company management. As mentioned above, a number of jurisdictions require companies to ensure adequate communication between shareholders at these meetings, and

therefore we recommend choosing a technology vendor who can ensure that such communication is possible in real time.

- Create formal rules of conduct and reasonable time guidelines. The rules of conduct should be available before the meeting begins, and should be available to the virtual attendees before and during the meeting. The rules should promote transparency about how questions will be recognized and allow sufficient opportunities for shareholders to ask questions or make brief comments about each matter being considered at the meeting, while being respectful of all meeting participants. The rules should clearly explain when questions will be ruled out of order, such as when they are not related to the proposal under discussion or use blatantly offensive language.
- Have a process in place and clear instructions for the submission of questions by shareholders, both before and during the meeting.
- Have a toll-free number for shareholders to call in during the meeting where calls are placed in queue and taken in turn to ensure that shareholder questions are taken on a first-come-first-served basis.
- Have a technical support line available for shareholders before and during the meeting.
- Post questions received online during the meeting, as well as the company's responses, on the investor page of the company's website as soon as is practical after the meeting.
- Archive the meeting on a publicly-available website for a specific and reasonable period of time (ideally one year).

The Capital Markets Group at Aird & Berlis has the expertise to assist you in navigating proxy season during this challenging time. If you have any questions, please reach out to Melanie Cole or Adria Leung Lim.

¹ Section 132(5), *Canada Business Corporations Act*

² Section 175, *Business Corporations Act* (Québec)

³ Section 131(3.1), *Business Corporations Act* (Alberta); Section 126.1, *Business Corporations Act* (Manitoba); Section 175, *Business Corporations Act* (Québec)

⁴ Section 94.2, *Business Corporations Act* (Ontario)

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