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With social distancing and “flattening the curve” becoming the new normal and perhaps even a civic duty of average Canadians, it is critically important to avoid large gatherings of individuals. Depending upon the province, authorities have stressed avoiding congregating in groups of as small as 10. For many private for-profit and non-profit entities, they consist of a large number of shareholders or members. Those stakeholders look forward each year to participation in the company’s annual general meeting. But how can this be accomplished in the age of social distancing? This blog provides some advice in that regard.

Which organizations does this apply to?

In many cases, closely-held for-profit and non-profit entities will simply pass written resolutions in lieu of a formal (in-person) annual shareholders’ or members’ meeting (what we’ll refer to in this blog post as an “AGM”). However, where it is impossible or highly inconvenient to gather signatures from a broad swath of stakeholders, an in-person meeting becomes the norm. In our experience, any for-profit or non-profit entity with a diverse group of stakeholders will typically hold an in-person AGM. We note at the outset that the comments in this blog post only apply to private for-profit and non-profit entities. Public companies (so-called “reporting issuers”) have additional regulatory and legal requirements as far as holding virtual AGMs, which are beyond the scope of this post.

Can I hold a virtual AGM?

This depends upon the company’s bylaws and articles, as well as its’ jurisdiction of incorporation (i.e., federally or provincially). Non-profit and for-profit laws themselves provide the possibility for holding virtual AGMs. Most recently and in light of COVID-19, the Government of Saskatchewan has passed regulatory amendments that authorize non-profit corporations, condominium corporations, co-operatives and new generation co-operatives to hold annual general meetings by telephone, video conference or other electronic means subject to a company’s articles or bylaws. If a company’s bylaws or corporate articles restrict that ability (e.g., meetings must occur in a specific location), then it is unlikely that a virtual AGM is a possibility. If that is the company’s situation, thankfully, both non-profit and for-profit laws give the directors of a company the purview to make, amend, or repeal bylaws with immediate effect (subject to any unique restrictions in the company’s articles or bylaws). Consequently, a board could modify the company’s bylaws immediately to provide for a virtual AGM (if one was not previously possible). Critically, the shareholders/members of the company must approve those revised bylaws at the next AGM (which will likely be the virtual AGM).

For Saskatchewan and Canada-incorporated entities, there is the potential for holding a virtual AGM. However, the bylaws and articles of the entities must not preclude the potential for a virtual AGM. We note as well that if a company is unable (due to both its’ governing legislation and its’ corporate articles and bylaws) to hold a virtual AGM, there is the potential for seeking an order from a court of competent jurisdiction.

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Unfortunately, most Canadian courts (as a result of COVID-19) are currently only hearing matters on an urgent or emergent basis. Whether the holding of a virtual AGM would be considered “urgent or emergent” is still an open question.

What if Notice has already been provided that indicates an in-person AGM location?

Most corporate statutes in most Canadian jurisdictions have restrictions on notice periods (i.e., how far in advance of the AGM do members need to be notified of the time and place of the AGM) and methods of delivery. If notice has already been provided to shareholders and members with an in-person AGM location and the company intends to shift to a virtual AGM, notice should be provided again outlining the change to a virtual meeting. If a company can no longer meet the minimum notice periods with the new notice (e.g., the meeting is occurring in the next 15 or 21 days), the company may have to consider either postponing or adjourning the AGM, if possible or seeking an abridgment or waiver of notice. This is a possibility for both Saskatchewan and Canada-incorporated entities. Regardless of how a company addresses meeting their notice requirements, shareholders and members should be given as much notice of the change as is practical prior to the meeting date. Failure to give sufficient notice may result in complaints, poor attendance, or, in the worst case, failure to make quorum for the meeting. Additionally, as discussed below, the company will need time to satisfy the technological requirements for holding a virtual AGM.

What do I need to have in place for a virtual AGM?

There will be a large number of considerations and planning required for a virtual AGM. At a high level, the following must be in place:

Sufficient Explanation of Access – When providing a notice to participants of the virtual AGM, the method of accessing the virtual AGM must be laid out in great detail. For example, it is generally advisable to include disclosures around: (i) how to access the meeting electronically, including any device, web browser or internet connectivity requirements, (ii) when and how participants can submit their questions to the chair of the meeting, (iii) whether any time or content limits will be imposed on questions and if so, when and how to access the information on these limits at or prior to the meeting, (iv) when and how participants can vote electronically at the meetings, (v) who to contact if the participants require technical assistance, and (vi) what information will be available to participants after the meeting, including any video of the AGM or answers to the participants’ questions. The notice should make it clear that participants are not being denied an opportunity to communicate with the company’s leadership or to ask questions simply because the AGM is held electronically

Means of Communication – All participants (i.e., shareholders or members) must be able to communicate adequately with each other during the virtual AGM. This can likely be accomplished through services such as Skype®, Webex®, or Zoom®. There are also commercial options available through entities such as Broadridge, Get Quorum, and TSX Trust (for larger meetings). Notably, participants must be offered both videoconference and teleconference options. Companies should also be aware of any service limitations on participant’s ability to join the virtual AGM (e.g., residence in a service area with limited/restricted internet connectivity or telephone services).

Means of Voting – The communication facility chosen for the virtual AGM must both (i) enable votes to be gathered in a manner that permits subsequent verification, and (ii) permit the tallied votes to be presented to the company without it being possible for the company to identify how the

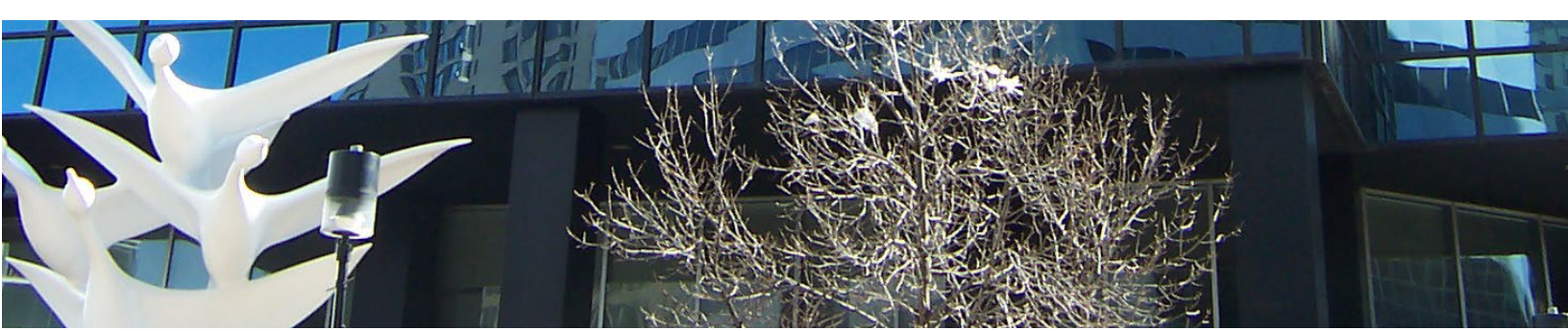
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person voted. This generally means that electronic ballots must be made available to participants and that those ballots may have to be gathered by a third party (such as the company's auditors or lawyers). The need for a third-party scrutineer hinges upon whether the chosen communication facility permits the corporation to directly gather the tallied votes. If it does, then the third-party is required.

These and other best practices are expanded upon by Broadridge (an entity which largely assists public entities with proxy statements, annual reports, and shareholder communications) in their publication [Principles and Best Practices for Virtual Shareholder Meetings](#). While the publication is geared towards public entities, it is nonetheless instructive to private for-profit and non-profit companies.

In addition to these items, the board of the company should meet to ratify proceeding with a virtual AGM and the communication facility by which it will occur. Where possible, that board meeting should involve the attendance of both legal and technical experts to speak to the nuances of holding the virtual AGM.

If I need or want a virtual AGM, what should I do next?

The board and executive of the company should meet as soon as possible to determine the possibility and feasibility of a virtual AGM. The lawyers here at McKercher are available to assist companies with planning for any potential virtual AGM they may wish to hold for their stakeholder group. We can leverage both legal and technological expertise to best facilitate a virtual AGM in these difficult times.

About the Authors:

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About McKercher LLP:

McKercher LLP is one of Saskatchewan's largest, most established law firms, with offices in Saskatoon and Regina. Our deep roots and client-first philosophy have helped our firm to rank in the top 5 in Saskatchewan by Canadian Lawyer magazine (2019/20). Integrity, experience, and capacity provide innovative solutions for our clients' diverse legal issues and complex business transactions.



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