

CORONAVIRUS: HOW DO CANADIAN PUBLIC COMPANIES CONVENE SHAREHOLDER MEETINGS DURING A PANDEMIC?

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Coronavirus (COVID-19) has been declared a pandemic by the World Health Organization. With proxy season upon us, Canadian public companies are faced with the question of how to legally hold their shareholder meetings in a manner that minimizes health risks for participants.

Gowling WLG Focus

Traditionally, shareholder meetings have been held in a physical location with shareholders voting either in person or by proxy. COVID-19 is leading to public companies considering the use of electronic methods to hold shareholder meetings. These methods include a fully "virtual" alternative, where the meeting is held solely over a teleconference or internet platform, or a "hybrid" alternative, where the meeting is held electronically as well as in person at a physical location, with each shareholder choosing its preferred means of attendance. Given the options available for hosting a shareholder meeting, there are important considerations that should be discussed at every step of the planning process.

The Big Questions for Your Upcoming Shareholder Meeting

The most important consideration is whether the gathering of participants at a physical location is likely to put them at risk. An additional consideration is whether the anticipated size of the meeting can comply with existing or potential future limits on the size of public

gatherings. For example, you may not be able to proceed with a physical or hybrid meeting at all if your meeting location becomes subject to prohibitions on public gatherings. Given these concerns, companies may determine that a fully virtual meeting is the preferred approach where available.

Availability of Fully Virtual and Hybrid Shareholder Meetings

Under the Canada Business Corporations Act, if a company's by-laws allow, a meeting of the shareholders may be called and may be held entirely by means of a telephonic, electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting.^[1] A person participating in the meeting by such means is deemed present at the meeting.^[2]

Under the Ontario Business Corporations Act, unless the articles or the by-laws provide 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 is deemed to be present at the meeting.^[3]

Under the Alberta Business Corporations Act, if a company's by-laws allow, a meeting of the shareholders may be called and may be held entirely by electronic means, telephone or other communication facility that permits all participants to communicate adequately with each other during the meeting.^[4] A person participating in the meeting by such means is deemed present at the meeting.^[5]

By way of contrast, British Columbia companies are required to set a physical location for shareholder meetings. However, Section 174 of the British Columbia Business Corporations Act ("BCBCA") further provides that unless the memorandum or articles provide otherwise, a shareholder or proxy holder who is entitled to participate in, including voting at, a meeting of shareholders may do so by telephone or other communications medium if all shareholders and proxy holders participating in the meeting whether by telephone, by other communications medium or in person, are able to communicate with each other.^[6] If one or more shareholders or proxy holders of a B.C. company participate in a meeting of shareholders in the foregoing manner, then (i) each such shareholder or proxy holder is deemed, for the purposes of the BCBCA and the memorandum and articles of the company, to be present at the meeting, and (ii) the meeting is deemed to be held at the location specified in the notice of the meeting.^[7]

Planning Steps for Your Upcoming Shareholder Meeting?

If your company is considering a virtual or a hybrid shareholder meeting, there are several items to consider with legal counsel as early as possible:

1. Determine whether the company's incorporating statute allows for electronic participation at a shareholder meeting.
2. Confirm if the company's articles or by-laws (or equivalent) place any restrictions on electronic or virtual meetings.
3. Determine if your proposed means of holding a shareholder meeting would comply with all location and quorum requirements applicable to your company.
4. Work with counsel to amend your company's articles and by-laws (or equivalent) as required to permit a fully virtual or hybrid meeting.
5. Talk to your legal counsel and transfer agent to coordinate a fully virtual or hybrid meeting that can allow for voting and participation by shareholders.
6. Confirm that the technology to be utilized for your fully virtual or hybrid shareholder meeting will provide a suitable communications link that satisfies the requirements of your incorporating statute and constating documents.
7. Consider if your proposed means of holding a shareholder meeting will be appropriate in the circumstances. For example, a meeting conducted by electronic means may be less desirable where the meeting may involve consideration of contentious matters or disruptions.

Confirming these answers well in advance of your company's planned shareholder meeting will help to ensure the meeting is properly constituted for business and accessible for all shareholders.

What Should You Include In Your Meeting Materials?

Companies will need to consider how the adoption of a fully virtual or hybrid shareholder meeting should be addressed in their meeting materials. For example, with the shift to a virtual or hybrid method, companies will need to add detailed voting instructions and procedures for those persons who attend the meeting via electronic means. The company should also explain why an electronic meeting was selected to help shareholders understand the change in format and to dispel criticism around controlling the participation

of shareholders. Potential shareholder activism issues should also be considered.

In situations where a traditional or hybrid meeting method has been selected, companies may choose to encourage shareholder participation by proxy rather than in person.

Further, the implications of COVID-19 may need to be disclosed in the company's meeting materials. For example, companies holding traditional meetings or using the hybrid method may need to include a risk factor regarding the health risks associated with attendance at large public gatherings, assuming they aren't prohibited in the local jurisdiction at the relevant time. Companies should also consider including risks factors and/or updating their forward-looking cautionary language to account for various impacts due to COVID-19. See our MarketCaps on [Coronavirus disclosure considerations for Canadian public companies](#) for more information.

Updating Meeting Materials that Have Already Been Distributed

In cases where meeting materials have already been distributed for an in-person meeting, at a venue which may no longer be able to host the meeting in light of restrictions placed on the venue, alternative arrangements may still be possible depending on the specific circumstances of the company.

Finding the Best Path Forward for Your Company

With the large amount of uncertainty and challenges facing companies resulting from coronavirus, this article highlights some of the considerations and avenues available to your company when planning your upcoming shareholder meeting and to assist in mitigating some of the challenges. The path forward in planning for your shareholder meeting is not a one size fits all approach, and should be catered to your company based on a number of factors including, but not limited to, current and anticipated health risks associated with the pandemic, requirements of your incorporating statute and company specific factors. We recommend consulting with legal counsel and your transfer agent at an early stage to help find the approach that works best for your company while ensuring the safety of your directors, officers, employees and shareholders.

[1] Canada Business Corporations Act, RSC 1985, c C-44, Section 132(5)

[2] Canada Business Corporations Act, RSC 1985, c C-44, Section 132(4)

[3] Business Corporations Act, RSO 1990, c B.16, Section 94(2)

[4] Business Corporations Act, RSAC 2000, c B-9, Section 131(3.1)

[5] Business Corporations Act, RSAC 2000, c B-9, Section 131(3)

[6] Business Corporations Act, SBC 2002 Chapter 57, Section 174(1)

[7] Business Corporations Act, SBC 2002 Chapter 57, Section 174(3)

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