



## FHT/NPLC Governance During COVID-19 – Frequently Asked Questions

### *How do we govern during a pandemic emergency?*

April 6, 2020

- 1. Our AGM deadline is coming up. How can we hold an AGM during COVID-19 when the social distancing rules are in place?**

Recall that Ontario's *Corporations Act* requires every Ontario non-profit or charitable corporation to hold an annual general meeting (AGM) within 15 months of its last AGM.

Happily, the Ontario Government has amended the *Corporations Act* due to the COVID-19 pandemic emergency. The Ontario Government declared an emergency under the *Emergency Management and Civil Protection Act* on March 17, 2020. It is ongoing.

If your AGM would otherwise have to be held during the declared pandemic emergency, the amendments allow the corporation to extend the time for holding the AGM *up to 90 days* after the pandemic emergency is declared over by the Ontario Government.

Here's how the math works. If your corporation held its AGM on March 15, 2019, then the 15-month default would require the AGM to be held on or before June 14, 2020. Let's say for illustrative purposes the emergency order lasts from March 17 to June 30. The AGM must then be held between July 1 and September 28.

And there's an extra extension for any corporation whose AGM would fall within the 30-day period after the emergency is declared over (e.g., based on our example above, between July 1 and July 30). The amendments give those corporations a 120-day extension to hold the AGM.

Otherwise, if your AGM is required to be held during a period that is not covered by the pandemic emergency order or the 30-day period thereafter, it's business as usual to proceed.

## 2. What are the logistical options for holding our AGM?

Many Ontario non-profits that have a large, open membership traditionally structure the AGM as an in-person get-together of members. It is a corporate requirement, yes, but more of a social event. Often the AGM is a great excuse to invite a guest speaker, celebrate the corporation's achievements, and encourage the members to meet and network. Members may send a proxy but often attend in-person.

We may well see a general reluctance to attend large gatherings even after the pandemic emergency is declared over – there is a lot of speculation about a second wave of COVID-19 that may follow the ending of the social distancing restrictions.

As a result, you may want to consider encouraging members to attend the AGM virtually. You may not realize this, but since 2017, the *Corporations Act* has allowed non-profit and charitable corporations to allow members to attend AGMs electronically – by video or teleconference. The by-laws do not need to be amended to allow this – they or the letters patent just need not prohibit it.

During the declared pandemic emergency, the Ontario Government has gone even further and amended the *Corporations Act* to allow electronic attendance and voting at members' meetings, *even if the letters patent or by-laws prohibit it*.

But note that the corporation cannot require members to attend the AGM electronically – it can only allow and encourage this to happen.

## 3. Should we delay holding our AGM? What are the considerations? Who should approve a delay?

First, you absolutely can delay holding the AGM until the pandemic emergency is declared over.

Whether you choose to or not will likely depend on what purpose your AGM serves. If your corporation uses the AGM as an in-person, social networking event, then, yes, you must delay due to the social distancing rules against gatherings of more than five persons.

If, on the other hand, your corporation has a closed membership limited to your board members, there may be no need to delay if the board agrees to hold a virtual AGM in the same manner it continues to hold its virtual (electronic) board meetings.

In any event, the timing of holding the AGM is a board decision.

## 4. If we are going to delay our AGM, do we need to revise our by-laws?

No. This is a one-time emergency extension and we do not recommend that by-law amendments be made.

**5. If we are going to delay our AGM, what do we need to communicate?**

The board is responsible for setting and communicating the timing of the AGM. If there is a decision to extend it, we recommend that the corporation advise all members of the planned extension and the rationale for it (i.e., the Government-sanctioned extension period) using the same manner of notice that it would normally use to send an AGM notice.

**6. What does this mean for preparation of annual financial statements?**

The AGM serves as the venue for the presentation of the board-approved annual financial statements to the members. If the AGM is delayed, the audit may also be delayed. Approval of the financial statements is often driven by filing dates with Canada Revenue Agency. Please note that CRA has extended many filing deadlines due to COVID-19. See the CRA website for updates on income tax filing and payment dates:

<https://www.canada.ca/en/revenue-agency/campaigns/covid-19-update/covid-19-filing-payment-dates.html>

For charities, note that the filing of the annual T-3010 is also extended to December 31, 2020, for corporations that would have had a 2020 filing deadline starting on March 20<sup>th</sup>.

Please consult with your auditor about deadline extensions applicable to you.

**7. What are the impacts of a delay on recruitment of board members?**

Existing board members typically remain in place until replaced at the AGM. For continuity and to ensure quorum can be met, we encourage retiring board members to stay in place until the AGM is held.

While the AGM may be delayed, this need not delay your ongoing efforts to recruit new candidates to fill pending vacancies on the board. For some corporations, this delay may afford you some additional time to seek new candidates.

Please keep any potential candidates apprised of any delay in holding the AGM, as this will impact the start of their term as a board member.

**8. During the pandemic, should we hold board meetings? Any recommendations?**

Yes, you can and should hold board meetings during the declared emergency. If your by-laws do not permit the holding of electronic board meetings, the Ontario Government's amendments now allow this to happen. (And please make sure to update your by-laws once the pandemic emergency is over – it's critical for boards to be able to meet electronically at any time during a crisis, pandemic or otherwise.)

Recall that a board can meet electronically (phone, video or "other communication facilities") as long as it permits *all persons participating in the meeting to communicate with each other simultaneously and instantaneously*. This means that everyone needs to be able to hear each other and anyone can raise objections or comments during the discussion.

Remember that any visual aids (PowerPoint decks, charts, etc.) need to be circulated in advance of the meeting so that everyone can see them during the virtual meeting.

Don't forget to confirm attendance and quorum by taking a roll call at the outset of the meeting.

Voting during an electronic board meeting can be very formal – i.e., a roll call where everyone in attendance is asked to voice their vote (yes or no) – or more informal – "does anyone object to the board proceeding as discussed?". The complexity of the matter will usually dictate the manner of voting.

## **9. Can boards vote on matters by email during crisis?**

We know this happens in practice all the time. But, to be legally binding, if the board is going to take a vote over email, every single director must respond and agree to the matter. The decisions must be unanimous and in writing (email qualifies as *writing*).

The board needs to make sure that sufficient information is circulated via email for the board members to make an informed decision.

Email votes on complex matters – such as economic and HR matters – are tricky. These types of matters demand discussion, with questions to and follow-up answers from management. This is almost impossible to do effectively via email.

If a question is circulated via email for a board vote, and there is a flurry of questions resulting from the email, it is far better to convene a focused, one-topic electronic board meeting to engage the board in a frank and open discussion. This is something the Board Chair needs to monitor and call as required.

## **10. What priorities should the board be considering during this time of crisis?**

The board should remember that one of its key duties is to identify principal risks to the corporation and to identify plans to mitigate those risks. Given this current crisis, those risks may relate to the corporation's finances or retention and recruitment of staff resources, amongst other things.

One of our key concerns is to ensure continuity of leadership. Succession planning is always a board priority – both for itself and senior management. During the COVID-19 pandemic emergency, it is absolutely possible that the senior manager (CEO or ED) and many of the senior leadership team could be affected by the virus. It is critical right now for the board to ensure that the CEO/ED has a clear, written succession plan for short- and long-term absences, and that every member of the senior leadership team do the same. There needs to be a plan in place to transition roles, including access to password-protected documents and websites, on a nimble basis.

The board should ensure that it has access to all key documents that it requires should there be a short-term or long-term absence of the senior manager – specifically the CEO/ED's human resources file including employment contract. These documents should be immediately accessible by the Board Chair or designate through a board portal or VPN that does not require access to be granted by in-house administrative staff.

**11. We have a number of clinicians serving on committees. Their time is extremely limited. How do we continue with committee work?**

In reality, some committee work may have to be delayed. The board needs to assess what is time-sensitive and must continue and what can be delayed until less chaotic times.

If work is time-sensitive, consider seeking clinician input through less time-intensive means, such as sending specific questions via email for input and sharing responses with the entire committee.

Kathy O'Brien  
Partner  
DDO Health Law  
416.967.7100 x1227  
[kobrien@ddohealthlaw.com](mailto:kobrien@ddohealthlaw.com)