Let’s meet – just not in person: Taking your annual shareholder meeting online (in a coronavirus world)

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For further information on the changes below, please contact one of the authors above or any member of our Corporate Governance Group.

Increased concerns regarding the spread of the coronavirus are prompting companies to look at alternatives to their in-person annual meeting of shareholders, including holding the meeting partly or even wholly online with streamed audio and/or video content. This could potentially accelerate a recent trend in Canada towards considering alternatives to the traditional in-person shareholder meeting, including holding “virtual” shareholder meetings where the meeting is held wholly by electronic means or “hybrid” meetings where there is a physical location for the meeting but shareholders and proxyholders have an opportunity to choose whether to participate in person or electronically.

Holding virtual shareholder meetings is possible in several Canadian jurisdictions. In those jurisdictions where it is not possible to hold a fully virtual meeting, companies can hold a hybrid meeting. It is important to understand whether there are legal impediments to electronic participation at meetings and best practices in conducting such meetings.

GROWTH IN USE OF ELECTRONIC MEETINGS

While historically extremely rare in Canada until recent years, electronic meetings have been a growing feature of the U.S. proxy season since 2009. Broadridge Financial Solutions reported that in 2019 it conducted 326 electronic shareholder meetings in the U.S. over its platform, 92% of which were virtual only. The two service providers that have facilitated electronic meetings of Canadian issuers are Broadridge Financial Solutions and Lumi.

CAN I HOLD A VIRTUAL SHAREHOLDER MEETING?
The answer depends on the applicable corporate statutes and the corporation’s constating documents. A key issue is whether or not it is possible to establish quorum for the meeting electronically and without the need for a physical meeting to take place, since being able to count a shareholder or proxyholder as “present” at the meeting can be important for establishing whether or not the quorum requirements for the meeting have been met.

Corporations governed by the Ontario Business Corporations Act can take advantage of section 94.2 of that Act, which permits a shareholder meeting to be held partly or 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. This means that it is possible for such corporations to satisfy quorum requirements through electronic participation at the meeting without the need for a physical meeting to take place.

Other Canadian jurisdictions do not take as favourable an approach. The corporate statutes in most Canadian jurisdictions expressly address the possibility of electronic participation at a shareholder meeting, deeming persons participating in the meeting to be present. However, all of these statutes impose conditions on electronic participation with the result that, particularly for meetings with a relatively large number of attendees, participants in the meeting cannot generally be deemed to be present using current technology. This means that quorum cannot generally be established in a virtual-only meeting under these statutes.

For example, under subsection 132(5) of the Canada Business Corporations Act, a virtual shareholder meeting can only be held if (i) the bylaws expressly permit it and (ii) the facility being used permits “all participants to communicate adequately with each other during the meeting.” While existing technology permits participants to communicate with the Chair of the meeting and vice versa, if there are more than a handful of participants, enabling all participants to communicate “adequately” with each other becomes impractical. Other statutes also impose a requirement that the facility permit participants to be able to “communicate adequately with each other” (emphasis added) or, in some cases, “hear each other.” In a few of the jurisdictions, it is also necessary that the bylaws expressly permit such participation.

Canadian issuers that have held virtual shareholder meetings include Concordia International Corp. (now ADVANZ PHARMA Corp. Limited) in 2017, Canada Goose Holdings Inc. in 2018 and 2019, and Imperial Metals Corporation and Brookfield Property Partners, L.P. in 2019. On March 11, 2020, TELUS Corporation was granted a court order by the British Columbia Supreme Court permitting it to hold its 2020 annual general meeting of shareholders as a virtual-only shareholder meeting.

**WHAT ABOUT A HYBRID MEETING?**

In a hybrid meeting, there is a physical location for the meeting, but shareholders and proxyholders are afforded an opportunity to choose whether to participate at the meeting in person or electronically.

Having a physical location for the meeting can eliminate concerns about satisfying quorum requirements for holding a meeting. This is because, for an uncontested meeting, the management nominees who serve as the designated proxyholders in the company’s form of proxy will typically hold sufficient proxies to satisfy the quorum requirement. If the management nominees are physically in attendance, it will be unnecessary to rely on statutory provisions that deem a shareholder participating electronically to be present at the meeting in order to properly constitute the meeting.
A shareholder or proxyholder participating electronically in a hybrid meeting may be able to cast a vote at the meeting even if that shareholder or proxyholder is unable to be counted as being present for quorum purposes. Many of the corporate statutes facilitate electronic shareholder voting even where the shareholder is not “deemed” to be present at the meeting. For example, subsection 141(3) of the Canada Business Corporations Act provides that a vote at a meeting of shareholders may be held entirely by means of a telephonic, electronic or other communication facility that the corporation makes available. This subsection is not limited to voting by persons physically present or who are deemed to be present by virtue of participating through an electronic facility, although it does require that the vote be conducted entirely by means of the provided facility. If the facility provides assurance as to the identity of the person voting and the chain of authority by which the shareholder or proxyholder is voting, the vote can be counted.

Canadian companies that have held hybrid meetings in recent years include Goldcorp Inc. (now Newmont Corporation) in 2017 and 2018, Barrick Gold Corporation in 2019, TMX Group Limited in 2018 and 2019, and OceanaGold Corporation in 2018 and 2019.

WEBCASTING

It has become a common practice for corporations to webcast their shareholder meetings. Although this webcasting provides a valuable window into the proceedings for shareholders who are not able to attend the meeting in person, this arrangement does not satisfy the requirements for shareholders to be deemed to be attending the meeting. Webcasts also provide a more limited opportunity to those viewing the webcast to participate in the business of the meeting by asking questions or otherwise engaging with other attendees, nor is there any mechanism for shareholders viewing the meeting in this way to vote. Webcasting is easier to implement than a virtual-only or hybrid meeting — which require more specialized technology and are offered by a more limited number of providers.

WHAT SHOULD I CHECK?

- Check your incorporating statute:
  - Does it contain restrictions on electronic participation at a meeting?
  - Does it require that a meeting be held in a specified location (such as a specified province or country) and does it permit exceptions to that provision? For example, under section 166 of the British Columbia Business Corporations Act, a general meeting must be held in British Columbia or at a location outside British Columbia if (i) the location is set out in the articles, (ii) there is no restriction in the articles and the location is approved by shareholders or (iii) the registrar approves the location.
- Check your constating documents (i.e., articles and bylaws/articles of association).
- Do the constating documents expressly permit electronic participation?
- Do they contain provisions that would prohibit or impede a virtual shareholder meeting, such as a requirement that all participants be able to communicate adequately with each other?

BEST PRACTICES

- Avoid using electronic meetings when there is a risk of a proxy contest — electronic meetings require considerable planning and are not well-suited to handle the disruptions of a proxy contest.
- Provide plenty of advance notice on how to participate electronically at the meeting.
- Provide detailed disclosure in the proxy circular of how to access the meeting electronically, any
minimum technology requirements to do so, and a method of seeking help in the event shareholders are having difficulty logging in to the meeting.

- The disclosure in the proxy circular should also outline how shareholders and proxyholders can vote electronically at the meeting and provide cautions about any limitations on their ability to ask questions at the meeting.
- Consider the Principles and Best Practices for Virtual Shareholder Meetings issued in 2018 by the Best Practices Committee for Shareowner Participation in Virtual Annual Meetings.[3]

While the use of virtual shareholder meetings is occasionally subject to criticism, handled correctly electronic meetings overcome the obstacles of travel to offer a greater opportunity for shareholder participation at a reduced cost. And as a tried and tested tool, they also offer a solution to minimize or eliminate in-person attendance at shareholder meetings at a time when large gatherings may create a health risk.


[2] The exceptions are Newfoundland and Nova Scotia, where the applicable corporate statutes do not impose any constraints on holding electronic shareholder meetings, but also do not expressly permit them.

[3] The same requirements exist under the Alberta Business Corporations Act, s.131(3.1), the Manitoba Business Corporations Act, s.126.1, the Quebec Business Corporations Act, s.175 and the Prince Edward Island Business Corporations Act, s.101(4).


The two service providers that have facilitated electronic meetings of Canadian issuers are

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Let's meet – just not in person: Taking your annual shareholder meeting virtually...

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WHAT SHOULDN'T I CHECK?

The answers to the questions above will depend on the applicable corporate statutes and the corporation's constating documents. A corporation must provide detailed disclosure in the proxy circular of how to participate electronically, any minimum technology requirements to do so, and a method of seeking help in the event shareholders do not have sufficient access to such technology.

WHAT CAN I DO TO FACILITATE A VIRTUAL MEETING?

For further information on the changes below, please contact one of the authors above or any member of our Corporate Governance Group.

WHAT ABOUT A HYBRID MEETING?

Holding virtual shareholder meetings is possible in several Canadian jurisdictions. In those jurisdictions where it is not possible to hold a fully virtual meeting, companies can hold a hybrid meeting. It is unnecessary to rely on statutory provisions that deem a shareholder participating electronically to be present only if the corporation provides sufficient technology to permit such participation.

WHAT ABOUT THE QUORUM REQUIREMENT?

In a hybrid meeting, there is a physical location for the meeting, but shareholders and proxyholders are deemed to be ending the meeting. Webcasts also provide a more limited opportunity to those viewing the meeting in person, this arrangement does not satisfy the requirements for shareholders to be deemed to be present.

A shareholder or proxyholder participating in a hybrid meeting may be able to cast a vote with each other during the meeting.

It has become a common practice for corporations to webcast their shareholder meetings. Although this can be counted, a corporation was granted a court order to facilitate electronic participation by asking questions or otherwise engaging with the webcast to participate in the business of the meeting by asking questions or otherwise engaging with the webcast.

While the use of virtual shareholder meetings is occasionally subject to criticism, handled correctly, they can be a more efficient alternative to in-person meetings. However, there are also a few considerations to keep in mind.

WHAT SHOULDN'T I CHECK?

Check your incorporation statute: