Good Advice

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Finally! The emergency order you've been waiting for!

On April 24, 2020 – more than a month after the COVID-19 pandemic Declaration of Emergency (Ont. Reg. 50/20), and weeks after many of Ontario's condominium lawyers and other stakeholders were clamouring for it – the Ontario government has revised its order issued on March 30 (Ont. Reg. 107/20) under the *Emergency Management and Civil Protection Act* granting leeway to corporations in relation to annual general meetings and other meeting related requirements, to include **condominium corporations**.

Keeping in mind that these changes are only in effect until the emergency period has ended, here's what has changed.

Directors' meetings

Sub-section 35(2) of the *Condominium Act, 1998* (hereafter, the "Act") requires notice of board meetings to be given at least 10 days before the meeting (subject to the corporation's by-laws, which can set out a different, including a shorter, time-period for notice) and requires that the notice be delivered personally or by mail, courier or "electronic communication" to the latest addresses for directors shown in the records of the corporation (unless, again, the by-laws of the corporation provide otherwise).

The new order changes… nothing. Well, that's not entirely true. It changes one very minor thing.

- Notice of directors' meetings are still required to be given at least 10 days before the meeting, unless the corporation's by-laws specify otherwise.
- Notice is still to be delivered,
    - personally, unless the by-laws specify otherwise,
    - by mail or courier, unless the by-laws specify otherwise, or
    - by electronic communication.

What is changed is that while personal, mail and courier deliveries are all subject to any other instructions in the by-laws of the corporation, **email delivery of a notice of meeting is permitted regardless of what the by-laws might say about it.** So, on the very odd chance that there is a condominium out there has a by-law that prohibits notice of board meetings to be sent by email, that prohibition is suspended.

Note, however, that the email address used must still be "the latest address as shown on the records of the corporation," which means that even if the director *uses* email, and even if the director *is willing to receive notice by email*, if the email is not in the records of the corporation, then notice of the meeting must be delivered personally or by mail or courier (subject to the restrictions in the by-laws, if any). So, it seems the action item that arises from this part of the order is that each director makes sure their email addresses are on record with the corporation.

In addition, under this heading, a further minor change is made to **sub-section 35(5)** of the Act, the section that permits board meetings by teleconference or similar means. Ordinarily, this is only permitted if all the directors consent. Under the emergency order, **directors' meetings can be held by teleconference, web-conference, or similar means, whether or not all of the directors consent to do it**.

While the purpose here is obvious and reflects positive intentions, there is a risk that directors who are in circumstances where they lack at-home (or otherwise readily available) means of connecting to the meeting (depending on the technology being used) might end up being excluded from the meeting. For some directors, accessing the selected technology might require visiting the local library (if open) or other space where public access to technology is provided. This could cause concern for directors with mobility concerns, other disabilities, health issues, or who are otherwise just plain concerned about maintaining strict social/physical distancing. Based on our experience, it is not outside the realm of possibility that some directors will take advantage of such circumstances to deliberately exclude one or another director from board meetings. These circumstances are undoubtedly rare, and while we hope honour and integrity will prevent it from happening at all, we know that in some cases the risk is reasonably real.

Owners' meetings

It is under this heading that some of the most desired and anticipated changes arise.

First, one of the two "biggies": ***Electronic Owners Meetings***.

Amending **sub-section 50(2.1)** of the Act, **meetings of owners can now be held by telephonic or electronic means, regardless of what the by-laws of the corporation provide**. (The order also purports to amend sub-section 50(2) of the Act but, in fact, doesn't. It's okay, though, as no amendment was needed anyway.)

The order also amends **sub-section 52(1)(b)(iii)** of the Act (this is also a "biggie" but not the other "biggie" mentioned above) to **allow telephonic or electronic voting at meetings, "whether or not the by-laws so permit."**

The new sub-section 50(2.1) raises a couple interesting points:

- First, it means that means that if the technology permits, **a person can merely cast their votes for the meeting without otherwise participating, and is still to be counted as attending** the meeting.

Some electronic meeting and voting systems will allow for advance polls, or perhaps even for voting after the meeting has technically ended. Allowing voting after the meeting ends is not recommended, since it leaves uncertain the effectiveness of the meeting as to (at least) both quorum and the outcome of votes. Advance polls are not as problematic, since their impact on both quorum and the outcome of votes can be determined prior to scheduled end of the meeting.

Despite these provisions allowing participation by vote alone, owners should keep in mind that participation in meetings is an important part of exercising and enjoying their rights of ownership and protecting their interests. Participation is always the preferred and recommended approach, where it is possible.

- Second, **the person who votes or connects can be the individual or the individual's proxy**.

This is interesting to the extent that, typically, electronic voting or attendance is touted as an alternative to the use of proxies; in fact, it has been said to eliminate the need for proxies. Yet, according to this provision, electronic voting could be used in conjunction with proxy voting. Although such circumstances might be rare, this seems to be merely a sensible provision. To help maintain integrity in the meeting process, owners and mortgagees relying on proxies to attend the meeting on their behalf should still be required to properly submit their proxy forms in advance of the meeting (or, at least, prior to any relevant vote occurring at the meeting, though this requires someone to be monitoring electronic proxy submissions during the meeting).

A third point of interest is that the new provisions state that owners and mortgagees (if voting or attending by telephonic or electronic means) are deemed to be attending directly or by their proxies *for the purposes of the Act*. In this context, "the purposes of the Act," seems to refer to things affecting the validity and effectiveness of the meeting, such as counting toward quorum and voting. But does this indirectly suggest either that other parties cannot attend the meeting electronically, or that where the Act requires the attendance of someone other than an owner or mortgagee, that purpose is *not* satisfied by electronic or telephonic attendance? We think the answer in both cases is 'no'.

Attendance by third parties such as the condominium manager or attendees' lawyers or other experts who are sometimes permitted to attend meetings without needing to hold valid proxies in order to help discuss issues of serious concern, has always been allowed at the discretion of the chair of the meeting (subject to applicable provisions in the corporation's by-laws or meeting/procedural rules). The new sub-section 50 (2.1) does not prohibit this, and we think it makes sense to continue this practice.

The one third party for whom it might have made sense for the order to expressly state remote (telephonic or electronic) attendance is permitted, is the corporation's auditor. The auditor is a required attendee at certain meetings under the Act, as opposed to at the discretion of the meeting chair. However, if the possibility of this technicality ever became a serious issue of contention (and, frankly, who, other than a lawyer being overly nitpicky, would bother to raise it?), it should be able to be easily addressed by shifting the "location" of the meeting to wherever the auditor is located for the at least the period of time that the auditor must be present. (As a related aside: The order does not say anything about the location of an electronic or telephonic owners' meeting for condominiums. This is different from how the order deals with meetings of co-operative corporations, which it states are deemed to be held at the corporation's head office.)

Service of notices

Section 54 of the Act, in its entirety, ordinarily reads as follows:

> Unless this Act indicates otherwise, anything required to be given to an owner or a mortgagee under this Act is sufficiently served if it is given in accordance with subsection 47 (4) or (5), as the case may be.

What the order does is change this clause into **sub-section 54(1)** and then enacts (again, temporarily) five additional new sub-sections that "indicate otherwise".

The new sub-sections **54(2)**, **54(3)** and **54(4)** provide that **electronic delivery of a preliminary notice of meeting or a notice of meeting, and all accompanying and related materials, is sufficient** regardless of what the Act or the corporation's declaration or by-laws may state, and regardless of whether or not the owner or mortgagee receiving the notice that way has requested or agreed to it.

New sub-section **54(6)** indicates that "electronic means" means "any means that uses any electronic or other technological means to transmit information or data, including fax, e-mail, computer or computer networks," not only email.

The new sub-section **54(5)** provides that the **forms under the Act may be modified as needed** to reflect the changes set out in the order. (The phrase "as needed" is instructive here. There are some changes that it might make some sense to make to a notice of meeting, for example, such as disregarding the sections that require an indication as to whether electronic voting is permitted by a by-law, or the section requiring the "place" of the meeting to be specified. However, as much as such changes would not be unreasonable, they are likely not actually needed.) The other aspect of this provision, is that, whether or not such modifications are needed, **the forms specified under the Act are still to be used**.

Timing of meetings

The second owners-meeting related "biggie" referred to above comes under this general heading: Many **annual general meetings are legitimately able to be postponed**. In addition, the order states that **notice of *any* meeting of owners that has already been delivered may be changed** if:

(a) the date of the proposed for the meeting falls any time within the period of the declared emergency;

(b) the change is made for the purpose of holding the meeting by telephonic or electronic means.

This change (being inserted as the new **sub-section 47(1.1)**) does not require a new notice of meeting, but that the owners, mortgagees and any others who are entitled to notice of the meeting, must be informed in a way and within a time "that is reasonable in the circumstances". (As with every legislative provision that refers to what is "reasonable in the circumstances," we can't tell you what that means without knowing your particular circumstances. To be sure things are handled properly, you should consult with your legal counsel.)

One caveat about these provisions is that corporations should not too quickly jump the gun. If the meeting that is scheduled will occur after the end of the declared emergency, these provisions would not be available. Of course, it is not clear how anyone could know this with any certainty, since the emergency period has already been extended twice by the government and there is no absolutely certainty as to when it will actually end. At the time of this memo being published, the end-date of the declaration of emergency is May 12, 2020. The declaration could be extended at any time up to that date and for as long a period as the government deems appropriate. (Note that most emergency orders have so far had their end-dates extended to only May 6, although the government has recently stated parks would remain closed until May 31.)

In regard to **annual general meetings** in particular, the order temporarily adds sub-sections **45(2.1)** and **45(2.2)** to the Act. These complement and vary the instructions in sub-section 45(2) of the Act, which is unchanged and provides that,

> The board shall hold a general meeting of owners not more than three months after the registration of the declaration and description and subsequently within six months of the end of each fiscal year of the corporation.

Sub-section 45(2.1) provides that if the last day on which the meeting described in sub-section 45(2) is to happen is within the period of the declared emergency, the meeting date can be postponed for up to 90 days after the emergency is terminated.

Sub-section 45(2.2) provides that if the last day on which the meeting described in sub-section 45(2) is to happen is a day that falls within the thirty (30) days that immediately follow the termination date of the declared emergency (not counting the termination date), the meeting date can be postponed for up to 120 days after the date on which the emergency is terminated.

The following scenarios help to show how these provisions might work in different circumstances:

A. Condo Corp A's annual general meeting has to take place by April 30, 2020. This is the easiest situation. In this case, the board simply has to wait until the declaration actually ends and would have 90 days in which to prepare for, call and hold the meeting. This could be, virtually, any time.

B. Condo Corp B is in the same position as A. Its annual general meeting was to take place by March 31, 2020. Its board delayed the meeting once the COVID-19 pandemic started, and hoped to be forgiven for missing the last possible date of the meeting. Since this emergency order is effective retroactively to March 17, it applies to their situation and, as with Condo Corp A, the board now simply has to wait until the declaration actually ends and would have 90 days in which to prepare for, call and hold the meeting.

C. The last day for Condo Corp C's annual general meeting is May 31, 2020. Given that the current projected end-date for the declaration of emergency is May 12, 2020, but also given that this is uncertain, the board would likely wait to see whether the emergency declaration gets extended to May 31 or later before doing anything. Then:

- If the date is extended, the board would be able to wait until the declaration actually ends and would have 90 days in which to prepare for, call and hold the meeting; but
- if the declaration of emergency ends on the currently scheduled date of May 12, and since May 31 falls within the thirty days following that date, and the corporation would have until September 9, 2020 (120 days after May 12) to call and hold the meeting.

D. Condo Corp D's situation is similar to C's, but different enough that it ultimately gives rise to the most complex array of choices. The last date for its annual general meeting is June 30, 2020. In this case, the board should probably prepare for the meeting to occur on that date, rather than simply hope that the emergency declaration will be extended to a date that is on, after, or no more than 30 days before June 30. This preparation should include ensuring the necessary financial reports are being prepared, picking a suitable date for the meeting (June 30 itself might not be the most suitable date) and being ready to issue the required pre-notice of meeting by whatever date in May is at least 35 days before the proposed meeting date. Then:

- If the declaration ends on any date that is at least 31 days ahead of the scheduled date of the meeting (such as the currently scheduled end date of May 12), the meeting is to go ahead as scheduled; or
- if the declaration is extended and is to end on May 31 or any other date before June 29, the board could cancel the scheduled date of the meeting and then be prepared to rely on the new sub-section 45(2.2), which would give it 120 days to call and hold the meeting once the declaration of emergency ends, if it is not extended past June 29;
- if the declaration actually ends on June 30 or later, the board would then be able to wait until the declaration actually ends after which it would have 90 days in which to prepare for, call and hold the meeting.

Any corporation with a last meeting date later than June 30 (call this "Condo Corp E") could end up in Condo Corp D's situation, but should, for now, anticipate the emergency declaration will end soon enough for the meeting to proceed by its proper final date. (We are all aware that it might not, but this is likely the best recommendation at this time.)

Any corporation for which the last date of its annual general meeting was before March 17, 2020, and it was not held, (call this one "Condo Corp X") is in violation of the Act and the emergency order does not save it. Such a condominium should still hold its meeting, and may be able to rely on the provisions of this order to do so electronically during the emergency period, but it will still remain the fact that the meeting is late and if there are liabilities, damages or other negative consequences arising from that, they are not rectified by this order.

Closing Considerations

ELECTRONIC AGMS

Much of the discussion above about annual general meetings presumes that a corporation does not choose to go ahead hold its AGM by telephonic or electronic means during the period of emergency (relying on the other provisions of this order). Is there any reason that it shouldn't? We can think of one.

The annual general meeting is not like other owners' meetings. In some condominiums, it might, in fact, be the only owners meeting that occurs; but even where it isn't, it is the only meeting under the Act where any owner can raise any topic for discussion, even if those issues are not included on the meeting agenda. (In every other owners' meeting, conversation in the meeting is to be restricted to just the topics outlined in the agenda for the meeting.) This means it is not only the meeting where owners usually get to hear "annual reports" from the board and condominium manager, and get to review the financial statements as a group with the auditor present to answer questions, but it is also the only meeting where owners can hear one another's concerns about virtually anything, and contribute their own comments about them. For some owners who might be more timid or silent than others about issues that disturb or worry them, they benefit from hearing other owners voice those concerns, and from hearing the board's, manager's or even other owners' responses to them. In short, the annual general meeting is most often the meeting at which the condominium corporation acts most like a condominium *community*. This is an effect that is much more difficult to replicate through teleconference, web-conference or other means, particularly if the condominium includes more than, say, a dozen or so units.

So, even though the temporary provisions of this emergency order would allow a condominium corporation to proceed with its annual general meeting by telephonic or electronic means, it might be more advisable to rely, instead (and where you can), on the provisions that permit that meeting to be delayed till an in-person meeting can be fully accommodated.

TAKING ADVANTAGE

A meeting that many condominium corporations might not want to delay holding, however, is one at which by-laws permitting electronic voting and attendance at owners meetings are enacted. Corporations that already have these in place don't need to rush to do this; but others that do not might find it advisable to speak with their legal counsel and take advantage of the opportunity this order creates to hold such a meeting, to pass such a by-law, so that these kinds of options for how to hold meetings are permanently available even after the period of emergency has ended.

NOT TAKING ADVANTAGE

Another thing that corporations whose annual general meetings would ordinarily happen around this time of year, and who can benefit from the delays permitted by this order, should probably not hesitate to do, is to proceed to get done the kind of work that would ordinarily be done in preparation for that meeting, and communicate that to your owners. A significant item in this regard is preparation of the annual financial statements that would normally be required to be provided to owners with the notice of the annual general meeting.

Accounting firms are among the businesses declared "essential" under Ont. Reg. 82/20 (the emergency order closing "non-essential" businesses) and, therefore, are permitted to operate and provide services. What might inhibit this activity are considerations of social distancing and sanitization (if, for example, the documents or information required to prepare the statements are not available electronically) as well as the fact that, although condominium managers are also considered "essential", their services are to be restricted to what is "strictly necessary to manage and maintain the safety, security, sanitation and essential operation" of the condominium. It is arguable to that preparation of annual financial statements is not a part of the essential operation of the condominium, and so the manager might justifiably not be willing or able to do whatever might be needed to help prepare documents or information needed to complete the financial statements. If the corporation is dependent on their work, then a delay might be inevitable. However, barring such legitimate excuses relating to social distancing and permitted work, if the financial statements can be prepared without delay, they likely should be, and they should also be provided to the owners even if the meeting at which they will be able to be discussed is postponed to a later time.

This and other voluntary, pro-active and thoughtful communication with owners can help mitigate the disruption to community connectivity that the lack of meetings and other social- and physical-distancing may create, and helps demonstrate to owners that the interest of the corporation and its board is in strengthening that community, rather than relying on the pandemic for an excuse to let it be ignored.