Governance advice during COVID-19

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This bulletin addresses what the boards of charities and not-for-profit organizations incorporated federally, in Ontario or in Alberta should be doing during the COVID-19 crisis.

1. Consider re-defining board objectives

The Board's first priority should be to re-assess, in the context of COVID-19, what is critical to the success and sustainability of the organization and fulfillment of its mission. For some Boards, that may mean greater support from the Board and more frequent meetings. For others, it may mean reducing the number of meetings and finding other ways for the Board to play a meaningful, but not overly intrusive, role. Some organizations may be less active during this time while others, such as health care entities or other organizations that support those in need, may be operating with greater demands on the organization. In the latter case, management may have less time to support the regular meeting schedules of the Board and its committees.

In order to define its role as a Board at this time, some key questions the Board should be asking about the impact of COVID-19 on the organization include:

- How are the employees impacted? Have appropriate steps been taken to ensure the mental and physical wellbeing of the employees?
- How are we continuing to support those the organization serves? How are we staying in contact with key stakeholders?
- What assumptions are being used to assess the impact on the organization?
- How have organizational priorities been adjusted based on the assumptions?
- When will management re-assess the assumptions?
- What steps are planned to ensure the ongoing viability of the organization? What are the timelines for implementation of these steps and how will the impact of these steps be monitored?
- What key indicators should the Board be looking at and how often should the Board and its committees be meeting to support management and monitor the plans to address the impact of COVID-19?

Practical advice:

- *Each organization is different. While there will be shared challenges during this time, there will be many different circumstances. The Board should consider the specific situation of the organization, including available resources; immediate, medium and longer-term forecasts; what type of connectivity would be helpful; and what kind of legal obligations the organization should be considering.*
- *Depending on the nature of the organization, the Board work may feel weighted toward "business as usual" with reports on the impact of the pandemic from management. Other organizations will be impacted very differently. For some, it may be appropriate for the Board to meet less often while; for others, the impact of COVID-19 may require the Board to become more active. There really is no "one-size-fits-all" solution.*

2. Board and committee meetings

The Board and its committees may not be able to meet in person. Here are some considerations to take into account when it is not possible to get the full Board together:

- **Required board meetings:** While there is generally no prescribed number of Board meetings that must be held annually, confirm whether there are specific requirements for the number of Board meetings in the organization's by-laws, articles of association, and/or applicable special legislation. The Board may therefore be able to suspend its regular meeting schedule for the duration of the emergency if there is no mission critical decision or important Board oversight role required to be performed during the anticipated length of the emergency.
- **Resolutions in writing in lieu of a meeting:** If a decision is required and it is not possible to call a Board meeting, a resolution in writing may substitute for a Board meeting, but it must be unanimous. If Board members are not all immediately available, this is not a practical way to get a quick decision.
- **Electronic meetings:** An electronic meeting may be another option for Board meetings. Note that a regulation issued on March 30, 2020 under the *Emergency Management and Civil Protection Act* (Ontario) has enabled electronic meetings for directors of corporations to which the *Corporations Act* (Ontario) applies regardless of what the by-laws of the organization may require. In Alberta, a Ministerial Order issued April 9, 2020, under the *Public Health Act* (Alberta) suspends all obligations to convene an in-person meeting under the *Companies Act* (Alberta), and provides that nothing precludes an organization from holding a remote meeting. For organizations incorporated under the *Canada Not-for-profit Corporations Act*, the Board may hold meetings by electronic means, subject to the by-laws and with consent of all directors.
- **Executive Committee**: In this time of crisis, organizations may experience difficulty in achieving a quorum for a meeting of the entire Board in a timely manner. To address this, the Board could consider delegating some (or all) of its powers to on an Executive Committee. If the organization does not currently have an Executive Committee, the Board can create one if the by-laws or articles of association, as applicable, enable one to be formed. In considering an Executive Committee:
    - Consider what the appropriate terms of reference should be, including what powers should be delegated, and for what time period. It may be appropriate for the timeframe of the Executive Committee to be limited to the duration of the COVID-19 crisis.

- Consider the appropriate membership of the Executive Committee in terms of skill sets and availability. It may be necessary to get a quorum of the Executive Committee together on short notice.
- If the *Corporations Act* (Ontario) applies to the organization, the Board cannot establish an Executive Committee unless the by-laws authorise the Board to do so.
- Similarly, if the organization is incorporated under Part 9 of the *Companies Act* (Alberta), the Board may strike an Executive Committee where permitted by its articles of association.
- If the organization is incorporated under the *Canada Not-for-profit Corporations Act*, the limits on the authority of the Executive Committee in s. 138(2) must be taken into consideration.

Practical advice:

- *Consider the need for the Board's regular meeting schedule to continue in light of the impact of the pandemic on the organization. Determine if more or fewer meetings are required. If Board decisions are required, consider using resolutions in writing or holding electronic meetings.*
- *If a Board meeting is called on short notice to deal with a specific matter, consider limiting the agenda to critical business.*
- *When a Board decision is required on short notice and there are concerns that the Board may not be able to easily achieve quorum given other demands on directors at this time, consider if Board decisions can be made by an Executive Committee.*
- *Some Boards have a concern that Executive Committees lead to a "Board within a Board". To address this concern, consider calling an electronic meeting of the full Board and notifying the Board that, if quorum is not achieved, but there is a quorum on the phone for an Executive Committee, the meeting will proceed as an Executive Committee meeting with the other directors who are on the call participating, but only Executive Committee members voting. This will give management the benefit of a wider range of Board views while allowing prompt and timely decisions.*

3. Deciding what to decide

Determining what requires a Board decision is generally an art rather than a science. Boards tend to receive information for three main purposes:

- To exercise their **oversight** role. This information includes committee reports, management reports and performance indicators. No decision is required to receive this oversight information.
- To **educate and inform** the Board, often with a view to the Board making a future specific decision or setting strategic priorities. No decision is required to receive this information.
- To make a **decision**.

Certain matters require a Board decision. In addition to specific matters that might be set out in the by-laws, articles of association, or Board policy, the matters that would typically require a Board decision include:

- Approvals above management's delegated authority (which are usually required for a contract or transaction above a dollar threshold).
- Matters where a third party wants evidence of the Board's approval. For example, banks will require a Board resolution to establish signing authorities.
- Hiring the CEO, Executive Director or similar management positions.
- Appointing Board officers.
- Establishing committees, unless the by-laws or articles of association, as applicable, have permitted the Chair to establish an *ad hoc* committee.
- Approving the organization's by-laws or articles of association (also subject to member or shareholder approval, respectively).
- Approving the annual audited financial statements. The Board does not need to approve the quarterly statements.
- Approving the strategic plan.
- Any fundamental changes to governance such as the name of the corporation or the size of the Board (also subject to member or shareholder approval, as applicable).
- Any additional matters set out in the organization's governing documents.

In other cases, a Board decision may not be legally required, but would be prudent. This is a harder question to answer for most Board and management teams, but would typically involve an analysis of factors such as:

- Are there any unusual risks to the organization including reputational risk?
- Does it conflict with prior decisions of the Board?
- Does it put other strategic priorities at risk?

The Board may also be asked to become involved in some COVID-19 specific issues such as human resource issues.

Practical advice:

- ***Annual meeting planning***
    - *It is unlikely that in person annual meetings of more than 5 people can be legally held in Ontario during the COVID-19 emergency.*
    - *Alberta has prohibited workplace gatherings of 15 or more people in a single space, but ordered organizations to find alternate ways to organize group meetings and observe all public health guidelines, including physical distancing, if such meetings are necessary.*
    - *If the organization is governed by the Corporations Act (Ontario), the Emergency Order referred to above authorizes corporations to (a) hold an annual meeting through electronic means despite anything to the contrary in the organization's by-laws or other applicable legislation; and (b) delay the annual meeting for up to 90 days or potentially 120 days after the last day of the declared emergency in Ontario. As far as we can tell, the Emergency Order does not expressly deal with the requirement in the Corporations Act (s. 97(1)) that financial statements for the fiscal year ended no more than 6 months before the annual meeting be laid before the members at such meeting. We have brought this concern to the government's attention.*
    - *In Alberta, the Ministerial Order referred to above suspends the requirement for not-for-profit organizations to host in-person annual*

general meetings. Instead, the Order permits organizations under Part 9 of the Companies Act (Alberta) to hold general meetings through electronic means regardless of any provision to the contrary in the organization's articles of association.

- *No similar emergency legislation has been issued for federally incorporated organizations. Nevertheless, the Board of a federally incorporated organization may be able to revise by-laws to enable the members' meeting to be held entirely by electronic meetings (if not already permitted) and an application may be made to Corporations Canada to allow a deferral of the annual meeting of members (this application must be made at least 30 business days before sending the notice calling the meeting).*
- *It is important to note the minimum requirements for an annual meeting are to place the financial statements before the members, appoint the auditors (or approve the exemption from audit if applicable), and elect directors (election of directors may be delayed in certain circumstances).*
- *Where the annual meeting is deferred, incumbent directors remain in office.*

- ***Annual audit***
  - *Consider if the annual audit can be deferred, particularly if the annual meeting is deferred, or if it can be conducted remotely. This is normally a labour intensive matter. External auditors should not be on the organization's premises in any event.*
  - *Some factors that may affect the deferral of the audit include: (a) for organizations incorporated under the Corporations Act (Ontario) or Companies Act (Alberta), whether there is more clarity or relief with respect to the requirement that financial statements for the fiscal year ended no more than 6 months before the annual meeting be laid before the members or shareholders at such meeting; and (b) whether there are any contractual obligations to stakeholders who rely on the audit (such as bankers) that would be breached or triggered if the audit timing changes.*
- ***Charities***
  - *If the organization is a registered charity, please note that the Charities Directorate has temporarily suspended its operations. It has also extended the filing deadline for all T3010 annual returns due after March 18, 2020 to December 31, 2020.*
  - *The Ministerial Order referred to above has extended the expiry date for the registrations and fundraising licenses of all Alberta charities, to three months beyond the date of expiration. This applies only to those registrations or licenses that expire while the Order is in effect.*

4. Board stability and continuity

Management should have access to Board leaders when needed. Some Board members may themselves have less time available given the increased demands in their professional and personal lives. Some might need to step back from a Board leadership role and allow someone else to step in.

Practical advice:

- ***Board availability****: The Chair should ask all Board members what their availability is to support the work of the Board when needed and consider sharing roles between Board members for continuity purposes. For example, if there is no Vice-Chair of a committee, the Chair may ask a committee member to "shadow" the Chair of the committee.*
- ***Board Chair availability:*** *The Chair needs to assess whether they have the time to support the Board and management and consider either greater Vice-Chair involvement or asking another Board member to be involved.*
- ***Management succession plans:*** *The Chair and Vice-Chair or another Board member should understand the management succession plan in the event key senior team members become ill and cannot work.*
- ***Board leadership succession plans:*** *Typically, by-laws provide for the Vice-Chair to perform the role of the Chair in the absence of the Chair. The Board should have a contingency plan for replacing both the Chair and Vice-Chair on short notice.*
- ***Being available to management:*** *Where possible, and without delaying management's access to the Board Chair, both the Chair and Vice-Chair should be involved in key discussions with the senior team so there is continuity should one become unavailable. However, both must be able to promptly respond to management and, if both cannot be available at the same time, the meeting with management needs to go forward on management's timetable and availability. The Chair or Vice-Chair should brief the other as required after such meeting to stay current.*
- ***Board succession:*** *Consider extending the terms of the current directors, decreasing the size of the Board or tolerating some vacancies. This would avoid distracting management with supporting the Board recruiting new directors and this is probably not the best time to "on board" a new director.*

5. Communication and director due diligence

Is there a role for Board leaders in managing the information flow to and from management and the Board?

If the Board suspends its Board and committee meetings, directors will feel a responsibility to ensure they are exercising their own personal due diligence at this time. Directors may want more frequent reporting from management as the situation rapidly changes yet this is a time when management has less time to prepare such reports.

Consider if Board leaders can take responsibility to prepare weekly briefing notes to update the Board. Similarly, directors need to know that they can raise their questions and concerns but these could be directed through the Chair to management.

If an Executive Committee is established, there should be reports prepared by the Chair to the Board from the Executive Committee following each meeting. If the Chair and Vice-Chair are having regular sessions with management, there should also be reports from the Chair to the Board.

6. Stakeholder relations

The Board should turn its mind to key stakeholder relationships and what role the Board can do to support those relationships. For example, is there a role for the Board in staff and volunteer appreciation?

There may be a role for Board members with fundraising efforts at this time.

7. An eye to the future

COVID-19 has intervened in Board work plans and shifted priorities. In the short term, the Board needs to evaluate how to reframe its work while being mindful that individual Board members may also be personally and professionally impacted by COVID-19. Board members and Board leadership must have tolerance for the different approaches and reactions of individual Board members.

In the long term, the Board, as part of its fiduciary duties, needs to ensure organizational sustainability and adjust strategic and operational plans to reflect the new 'normal' that will emerge following COVID-19.

By

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