Court provides electronic meeting guidance under the B.C. Societies Act

July 20, 2021

Summary statement

In its recent decision, *Farrish v. Delta Hospice Society*, 2021 BCSC 1374, the Supreme Court of British Columbia granted discretionary relief to hold an "electronic meeting," as defined by the B.C. *Societies Act*, to consider a special resolution as to the conduct of the next annual general meeting (AGM) only. The court considered whether the bylaws of the Delta Hospice Society (the Society) allows for the Society's board of directors (the Board) to call electronic meetings. The court concluded that they do not, principally on the basis that the bylaws, when properly interpreted, denote a physical location, physical attendance, and call for voting by a "show of hands." Further, the bylaws do not presently authorize electronic voting nor do they set out the procedures for carrying out such voting as contemplated by sections 84(5) and 84(6) of the *Societies Act*. This decision is significant as it provides an interpretive framework for societies, and to some extent corporations – given analogous provisions under the *Business Corporations Act* (the BCBCA) (s. 174) – in respect to electronic participation in general meetings and the right to vote electronically.

Background

The application in question was further to a proceeding in June 2020 concerning the holding of an extraordinary general meeting (EGM) by the Society. Members of the Society objected to the manner in which the Board addressed applications for membership and the manner in which the Board proposed to hold the EGM. At such time, the court granted relief in favour of the members of the Society, cancelling the proposed EGM, rejecting the proposed method of voting by mail-in-ballot, and ordering a rectification of the register of members who had been rejected by the Board.

In June 2021, the Society brought an application for directions concerning the holding of an EGM in advance of its AGM, which presently must be held by November 1, 2021. Notably, the last AGM was held in November 2019, at which point the Society's membership was approximately 620 members. No AGM or EGM was held in 2020, arising from the court's previous order to cancel the proposed meeting in June 2020 and the extension of time to hold AGMs due to the COVID-19 pandemic. At the time of the

June 2021 application, the Society's membership had increased significantly to approximately 8,810 members, many of whom live outside the Lower Mainland and even British Columbia.

The Society sought declarations that they have:

1. substantially complied with the previous order in respect of admission of members;
2. a declaration concerning the interpretation of the bylaws as to whether electronic meetings and voting may be allowed; and
3. in the alternative, an order allowing for the Society to call, hold and conduct such a meeting.

Bylaw interpretation - ability of the Board to hold electronic meetings

The court considered the critical issue of whether the bylaws allow the Board to hold an electronic meeting.

First, the court held the Society's previous May 2020 meeting notice for its earlier, now cancelled, EGM bears some relevance. In the May 2020 meeting notice, the Board referred to its inability to hold the meeting "in person pursuant to its bylaws" and asserted it was entitled to do so in any event given the B.C. government's Ministerial Order M116 (MO116) which permitted attendance by telephone or electronic means during the COVID-19 pandemic even where a society's bylaws provided otherwise. This position was supported by an affidavit given by its current president in June 2020 indicating that an in-person meeting was not possible and that the Society's bylaws which require voting by show of hands would not be feasible.

The court noted that MO116 was no longer in force and various amendments to corporate statutes, including the *B.C. Societies Act*, have since been made prior to the Society filing its application. Notably among the changes, the default position as of May 2021 under the *Societies Act* (s. 83(1)) is that a member may participate in an electronic meeting called by a society "unless the bylaws of a society provide otherwise." An analogous amendment was also made to the BCBCA under section 174. Further, the method by which a society's members may vote is still governed by the bylaws and the means of any electronic voting must be authorized in the bylaws. This means any electronic voting by a participating member under section 83 must be conducted as specified.

The Society argued that nothing in the bylaws "provided otherwise"; however, the court disagreed. The court held that the recent amendments to the *B.C. Societies Act* did not overrule existing bylaws – they simply allowed for the option to hold electronic meetings.

Second, the court reaffirmed that the bylaws are to be interpreted in the context of the intentions of the members, as discerned by a reading of the bylaws as a whole. Accordingly, the contextual circumstances under which the bylaws were created (when membership was small and locally based) informed its interpretation. Despite current, widespread and prevailing digital modernization driven largely by the COVID-19 pandemic, the court clarified that these current circumstances do not necessarily inform

the intention of the members at the enactment of the bylaws. As such, a plain reading of the bylaws revealed that members' meetings are required to be in person, contemplate physical attendance, and a "show of hands" procedure is necessary to tally votes.

Moreover, the court further noted the bylaws do not presently authorize electronic voting nor do they set out the procedures for carrying out such voting as contemplated by sections 84(5) and 84(6) of the B.C. *Societies Act*. The court also rejected the assertion that electronic voting *during* a meeting does not require express authorization and is not considered "voting by mail or another means of communication, including by fax, email or other electronic means" as it occurs in real-time and not after a meeting. In dismissing this argument, the court pointed to the fact that votes by fax or email could also be received during a meeting.

Discretionary relief

In the alternative, the Society sought a court order allowing it to call, hold and conduct an electronic EGM. The *Societies Act* provides the court with considerable discretion in this regard; although, the court noted that such discretion must be exercised in a reasonable manner and consistent with the principles upon which societies are governed. Moreover, if court relief is granted, it must be with regard to the interests of all members toward allowing the continuation of the Society's affairs at a meeting in a manner that is fair and reasonable. Any departures from the requirements or procedures set out in the B.C. *Societies Act* or bylaws must be justified in all the circumstances.

The court was not persuaded that an in-person meeting would be "financially irresponsible" as asserted by the Society – the incumbent board had been opaque as to the Society's current financial situation and holding a meeting electronically would also entail some costs. However, the court was of the view that the circumstances surrounding the COVID-19 pandemic presented a compelling "other reason" on which it may exercise its discretion. Despite acknowledging the COVID-19 crisis as "receding," the court recognized that the Society was simply unable to hold an in-person meeting of its size at this time and that the current public health guidelines presented some uncertainty as to whether such a meeting would be feasible before November 1, 2021. Accordingly, the court held it would not be in the interests of justice, the interests of the members, or the interests of the Society to leave this matter in flux until such time that an in-person meeting could be held. The court granted discretionary relief to hold an electronic meeting to consider a special resolution as to the conduct of the next AGM only, and not to consider changes to the bylaws in respect of all future meetings.

Key takeaways

Bylaws are to be interpreted in the context of the intentions of the members, as discerned by a reading of the bylaws as a whole. Relatedly, the surrounding circumstances at the time the bylaws were created inform its interpretation, as do positions previously taken by societies. As of May 2021, the default position is that a member may participate in an electronic meeting called by a society "unless the bylaws of a society provide otherwise." The method by which a society's members may vote is still governed by the bylaws and the means of any electronic voting must be authorized in the bylaws. The fact that electronic voting occurs during the meeting versus after is

not relevant in avoiding such express authorization. Lastly, references made in the bylaws to a meeting “place,” being “present,” and voting by a “show of hands” were interpreted by the court to denote physical location and physical attendance.

For any questions relating to this decision, the B.C. *Societies Act* and how it may impact your business, contact our Corporate Commercial Group or any of the lawyers listed below.

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