

BY AYANNA FERDINAND CATLYN

# HOME RULE

## HOW TO MIX CORPORATE GOVERNANCE AND SOCIAL DISTANCE

The idea of gathering around a boardroom table in the era of COVID-19 seems off, given current public health advice. Still, corporate directors must continue to do their jobs—even if they must do them from their dining room tables. These five tips may help you work through the challenges.



**AS THE COVID-19 PANDEMIC RESTRICTIONS** remain in place, directors of corporations must continue to comply with their duties. Every director of a corporation must, in exercising his or her powers and discharging his or her duties, act honestly and in good faith with a view of the best interests of the corporation. They must also exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances.

A director cannot contract out of these duties. If a director fails to meet these duties, even during a pandemic, they may be guilty of an offence under the *Business Corporations Act* (“Act”). With that in mind, here are five best practices found under the Act for you to adopt:

### WHERE SHALL WE MEET?

Or maybe the better question is, how? When gathering in groups is being discouraged, directors might want to turn to their phones or Zoom to make the big decisions.

**Meetings and Decision-making.** You don't have to meet in person. The Act allows directors and shareholders to have electronic meetings, whether by phone or video conference. Check your bylaws. If they don't allow you to participate by telephone or other means, the directors may consent to meet using Zoom, Teams, or simply by telephone and then document the agreement in the minutes. Under the Act, a director participating in a meeting by

any of these means is present at the meeting. If you can't arrange a meeting, consider written resolutions. Even major decisions, such as the approval of financial statements, the election of directors or the appointment of officers, can be made in writing. All shareholders or directors must sign written resolutions and it may be in counterpart, where each director signs copies of the resolutions and taken together consists of one signed resolution and a


copy kept with the meeting minutes.

**Financial Assistance.** Your corporation may be considering applying for loans during the pandemic. The Act allows your corporation to have bylaws or a Unanimous Shareholder Agreement (USA) to allow the corporation to borrow money, whether as a borrower or as a guarantor. If you do not have these borrowing powers in the bylaws or USA, you must pass a resolution approving the loan application. The Act requires a resolution passed by the majority of directors and shareholders. As discussed above, these resolutions may be passed in written or electronic form.

**Solvency Test for Dividends.** Suppose you are considering issuing a dividend to your shareholders. Your corporation must be able to pay its liabilities when due, and the value of your assets should remain more than the total liability and stated capital of the shareholdings. Given the challenging financial times we are experiencing, this analysis must be done very carefully and likely in consultation with your accountant and bookkeeper.

**Disclosure of Interest in a Contract.** If you have an interest in a contract being considered by the board, you must disclose your interest to the board of directors in writing or have it entered into the minutes. The rules require you to abstain from the vote unless the contract relates to a business entity affiliated to the corporation, a contract of indemnity for the director, remuneration as a director or security, for obligations undertaken by the director for the benefit of the corporation or affiliate.

**General Risk Management Strategies.** You may want to take the time to review your director and officer insurance policies and indemnity agreements. You should review the scope of coverage, renewal terms and whether they continue to align with the corporation's strategic goals and the practical challenges of the pandemic.

As a director, you do not need to go far to find ways to balance meeting COVID-19 restrictions and complying with the Act and your duties as a director. The Act itself contains practical practices you can easily adopt during these times. 

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