Ontario extends temporary suspension period to allow virtual AGMs for Corporations Act companies

October 23, 2020

On October 1, 2020, the Ontario government passed O. Reg. 544/20: *Extension Of Temporary Suspension Period* (Regulation 544) made under the *Corporations Act (Ontario)* (the OCA). Regulation 544 extends the application of some, but not all, of the temporary amendments (the Temporary Amendments) that were made to the OCA due to COVID-19. The Temporary Amendments are only in effect during the Temporary Suspension Period (defined below), which ends on November 21, 2020. Regulation 544 extends the Temporary Suspension Period to May 31, 2021 for some but not all of the Temporary Amendments related to the ability to hold director and member meetings electronically and the manner of voting at such meetings.

As of October 16, 2020, in-person member and director meetings held in jurisdictions considered to be in Stage 3 are limited to 50 people if held indoors and 100 people if held outdoors. In-person member and director meetings held in jurisdictions considered to be in Stage 2 are limited to 10 people if held indoors and 25 people if held outdoors. Businesses holding any such meetings must comply with the general restrictions on gatherings that have also been issued by the government.

Extensions of temporary amendments

On March 17, 2020, the Ontario government amended the OCA to add a Schedule providing additional flexibility with respect to member and director meetings. The Schedule contains Temporary Amendments for certain sections of the OCA, regarding:

- Timing of member meetings;
- Notice of member meetings;
- Voting at member meetings;
- Format at member and director meetings; and
- The information to be laid before the annual meeting.

The Temporary Amendments are only in effect during the Temporary Suspension Period. The Temporary Suspension Period is defined in the OCA as “the period of the emergency and a further period that ends on the 120th day after the day the declared

emergency is terminated and, if the regulations so provide for the section, a further prescribed period of time immediately following the end of the 120-day period."

The declared emergency was terminated on July 24, 2020, bringing the Temporary Suspension Period to an end as of and including November 21, 2020 absent any further prescribed extension. With Regulation 544 now in force, the Temporary Suspension Period has been extended to May 31, 2021 for certain Temporary Amendments.

May 31, 2021 extension applies

The following Temporary Amendments are affected by the May 31, 2021 extension:

(i) Member and director meetings by electronic means

Pursuant to Sections 125.1(1) and 283(3.1) of the OCA, member meetings and director meetings, respectively, may be held by telephonic or electronic means unless the by-laws or articles provide otherwise. The Temporary Amendments acknowledge that some corporations may have prohibited electronic or telephonic meetings in their by-laws or articles and therefore allow corporations to hold member and director meetings electronically regardless of whether their by-laws or articles provide otherwise. This Temporary Amendment has been extended to May 31, 2021.
Note that the requirements for electronic director meetings remain unchanged and are outlined in Section 283(3.1) of the OCA. Notably, all persons participating in the meeting should be able to "communicate with each other simultaneously and instantaneously". There are not equivalent requirements for member meetings under Section 125.1(1) of the OCA. Virtual meetings may be new to some corporations. Consideration must be given to meeting the obligations under the OCA and BLG has advised numerous corporations regarding successfully holding electronic meetings during COVID-19.

(ii) Manner of voting

Pursuant to Section 287(1) of the OCA, voting to elect the directors of a corporation shall be by ballot or in another manner as set out in the by-laws of the corporation. The Temporary Amendments with respect to Section 287(1) acknowledge that a ballot or other method specified in a corporation's by-laws may not be possible if the meeting is held by telephonic or electronic means. The Temporary Amendments provide that the chair of the meeting may direct voting by alternate means if a vote by ballot or by the method specified in the by-laws is not possible. This Temporary Amendment has been extended to May 31, 2021.

May 31, 2021 extension does not apply

The Temporary Suspension Period does not apply to the following Temporary Amendments:

(i) Extension of meeting dates

Pursuant to Section 293 of the OCA, corporations are required to hold a member meeting within 18 months of incorporation and within every 15-month period thereafter. The Temporary Amendments provided extended meeting deadlines, which remain

unaffected by the extension of the Temporary Extension Period to May 31, 2021. This is because the extended meeting deadlines are tied to the date that the declared state of emergency was lifted, which occurred on July 24, 2020.[2]

The extended meeting deadlines for member meetings vary depending on when the meeting was originally supposed to have been held and must comply with the following timeframes[3]:

- *If the meeting was required to be held within the period of the declared emergency* (i.e. between March 17, 2020 and July 24, 2020), corporations must now hold the member meeting within 90 days of the termination of the state of emergency, that is, up to and including October 22, 2020.
- *If the meeting was required to be held within the 30-day period following the termination of the declared emergency* (i.e. the period of July 25, 2020 to August 24, 2020), the meeting must be held within 120 days of the termination of the state of emergency, that is, up to and including November 21, 2020.
- *If the meeting was required to be held more than 30 days after the end of the declared emergency period* (i.e. after August 24, 2020), the deadline was not extended and the original deadline still applies.

(ii) Financial statements

Pursuant to Section 97(1) of the OCA, the directors are required to deliver financial statements at an annual member meeting for the period ended not more than six months prior. This requirement was waived by the Temporary Amendments during the Temporary Suspension Period. The Temporary Amendments with respect to financial statements remain unaffected by the May 31, 2021 extension.

Therefore, for an annual meeting of members between now and November 21, 2020 (the 120th day following the end of the declared emergency), the financial statements tabled at the annual meeting must be for the period that began immediately after the end of the corporation's last completed financial year (or the date the corporation came into existence if it has not completed a financial year) and ended before the annual meeting.

Practically speaking, since the period of financial reporting can end at any time before the annual meeting, directors can now deliver financial statements that are older than six months at the annual meeting for member meetings that held until November 21, 2020.

For meetings held after November 21, 2020, the financial statements delivered at the annual meeting must be for the period ended not more than six months prior.

Restrictions on gatherings

As the number of COVID-19 cases continue to spike across the province, in an effort to keep as much of the economy open as possible the government moved certain areas from Stage 3 (meant to be the most lenient and the closest to the economy being re-opened) back to Stage 2. In parallel, the government also tightened restrictions for in-person gatherings with respect to both Stage 3 and Stage 2.

Stage 3

Recent amendments to *O. Regulation 364/20 – Rules for Areas in Stage 3* (the Stage 3 Regulation)[4], which was amended as recently as October 16, 2020 further restricts the size of gatherings across the Province that are in Stage 3. Pursuant to the Stage 3 Regulation, no person shall attend an "organized public event" of more than: (i) 50 people if the event is held indoors, or (ii) 100 people if the event is held outdoors.[5]

- Although the language "organized public event" is not defined in the Stage 3 Regulation, a member or director meeting is arguably an "organized public event" and therefore the above limits likely apply.
- While the Stage 3 Regulation also states that no person shall attend an organized public event held at the place of more than: (i) 10 people if the event is held indoors or (ii) 25 people if the event is held outdoors, it provides an exemption for "places that are operated in accordance with this Order by a business or organization."[6] Therefore, it is unlikely that the 10-person limit on indoor gatherings applies to member or director meetings held by a corporation that are located in a jurisdiction that is in Stage 3.

Stage 2

The Ontario government also amended *O. Regulation 263/20 – Rules for Areas in Stage 2* (the "Stage 2 Regulation") on October 16, 2020 to tighten the restrictions put in place for organized public events. The amended Stage 2 Regulation limits organized public events to 10 people if the event is held indoors and 25 people if the event is held outdoors, and applies for any area of the province that is in Stage 2.[7]

General compliance

Under each of the Stage 3 Regulation and Stage 2 Regulation, attendees of in-person member and director meetings have to, among other general compliance measures for businesses or organizations that are open to the public:

> (i) Follow the recommendations of public health officials on screening individuals, including the Chief Medical Officer;
>
> (ii) Subject to certain exceptions, ensure that any person in the indoor area of the business is wearing a mask; and
>
> (iii) Must limit the number of persons in the place of business to ensure that the two-meter distancing rule can be met.

Takeaway

The Ontario government has extended some of the temporary measures that allow OCA corporations to hold electronic meetings and voting thereat. However, by not extending the temporary measures that extend the date to hold annual member meetings and the tabling of financial statements aged less than six months, the government is signaling that businesses are expected to have adjusted to the new normal and should be prepared to meet legislative timelines.

Strict measures continue to be in place to regulate in-person gatherings. Corporations should continue to hold virtual meetings if possible. In doing so, the obligations outlined in Section 283(3.1)of the OCA with respect to virtual meetings need to be met. In determining whether to proceed with an electronic or in-person meeting, corporations should consider the likely reputation and litigation risks associated with holding an in-person meeting, even if ultimately they are found to be permitted. In addition, before holding any in-person meeting, corporations should also be aware of and ensure compliance with occupational health and safety and local public health requirements.

BLG can provide legal advice on this issue and others related to COVID-19. Reach out to your BLG lawyer or any of the key contacts listed below for assistance.

BLG has created a COVID-19 Resource Centre to assist businesses on a variety of topics, including investment management, labour and employment, contractual risks, public disclosure requirements, education, and criminal law.

[1] OCA, s. 335(2).

[2] On July 21, 2020, the province of Ontario gave Royal Assent to Bill 195, *Re-opening Ontario (A Flexible Response to COVID-19) Act*, 2020 (Bill 195). Bill 195 came into force on July 24, 2020, bringing an end to the declared State of Emergency in Ontario.

[3] All time periods above include the start and end dates.

[4] *O. Regulation 364/20 – Rules for Areas in Stage 3* made under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* (the Reopening Ontario Act)

[5] Stage 3 Regulation, Sched 3, s. 1.

[6] Regulation 364, Sched 3, s. 2 and 2.1.

[7] See O. Regulation 573/20, O. Regulation 572/20 and O. Regulation 574/20 made under the Reopening Ontario Act.

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