

**THE ONTARIO NOT-FOR-PROFIT CORPORATIONS
ACT (ONCA) AND COMMUNITY ASSOCIATIONS:
PRACTICAL TIPS FOR DRAFTING YOUR BY-LAWS
AND FOR MAKING THE GOVERNANCE
TRANSITION**

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The Cautionary Tale of the Little Brown Suitcase



3 Decades of Governance Documents



TODAY'S TOPICS INCLUDE:

- ▶ What is ONCA?
- ▶ Why make the transition to ONCA from the OCA?
- ▶ The process of adapting and adopting
- ▶ The three types of rules
- ▶ Practical drafting tips

- ▶ Break

- ▶ Interactive Community Association Panel

- ▶ A practical example of how to draft a section
- ▶ Legal resources

- ▶ Your questions

WHAT IS THIS ONCA THING I HAVE BEEN HEARING SO MUCH ABOUT?





Not this!

WHAT IS AN ONCA?

- ▶ The Not-for-Profit Corporations Act (ONCA) was intended to be in force by 2013.
- ▶ Numerous changes delayed the proclamation until October 19, 2021.
- ▶ Community associations previously were governed by the same legislation (the Ontario Corporations Act) as various businesses and shareholder companies.
- ▶ Corporations have a 3 year transition period to become compliant with ONCA.
- ▶ This transition period ends on October 18, 2024.
- ▶ ONCA has 213 sections and 4 regulations.
- ▶ It contains new rules for nfps and charities that were not contained in the OCA. Documents can be filed electronically.

REASONS TO MAKE THE TRANSITION TO ONCA NOW

- ✓ **Confusion and uncertainty:** Having to check the Act. Looking disorganized.
- ✓ **Accountability:** To your membership to govern properly.
- ✓ **Good governance:** An opportunity to refresh your by-laws if they are outdated, not legally compliant or you no longer follow some sections.

MORE REASONS TO MAKE THE TRANSITION TO ONCA

- ✓ **Current law:** Every rule currently in ONCA but not currently in your by-laws, applies NOW.
- ✓ **Legal compliance:** Some of your current by-law provisions found under the OCA legislation may no longer apply. Failing to add some provisions may prevent you from being able to do them.
- ✓ **Time:** It takes time to make the transition. There are 213 sections in ONCA for you to review and assess.
- ✓ Your Board of Directors and your membership also need time to review and approve your proposed changes.

WHAT IS WRONG WITH THIS CLAUSE?

Article 4 of the Hampton Iona Community Group Constitution

Membership

1. Basic membership in HICG is open to all residents of the area. All members over the age of 18 years are entitled to hold office and have voting privileges.
- ▶ Constitution created in 1989. Last amended June 2019.

SOME IMPORTANT ONCA ISSUES TO CONSIDER: MEMBERSHIP

- ▶ Corporations have by-laws.
- ▶ Members must opt in. Geographic boundaries do not constitute membership.
- ▶ Corporations must keep an up to date membership list.
- ▶ Can the membership list be kept private?
- ▶ Membership fees are optional.

SOME OTHER IMPORTANT ONCA ISSUES TO CONSIDER

- ▶ Your members can remove your directors with a simple majority vote.
- ▶ Increased protections for your directors and officers.
- ▶ Directors must give written consent to serve on your board.
- ▶ Assuring quorum for annual and special members' meetings.
- ▶ Record keeping for your corporation.

WHAT ABOUT CHANGES TO ARTICLES?

- ▶ These are fundamental changes.
- ▶ Require a “special resolution” of members = a two-thirds vote of all members.

- ▶ Some of the reasons to change articles:
 - corporate name
 - purposes of the corporation
 - powers or activities of the corporation
 - increasing or decreasing the number of directors (use a range)
 - changing classes of members
 - changing a condition required for being a member
 - where property goes upon dissolution

CHANGES TO ARTICLES MUST BE FILED WITH THE PROVINCE

THE PROCESS OF ADAPTING AND ADOPTING BY-LAWS AND ARTICLES

- ▶ 1. Working group or governance committee established by Board to review by-laws.
- ▶ 2. Suggested amendments or repeals brought to Board to discuss and debate.
- ▶ 3. Revisions suggested by Board are completed by the committee.
- ▶ 4. Board votes on finalized changes.

THE PROCESS OF ADAPTING AND ADOPTING BY-LAWS AND ARTICLES continued

- ▶ 5. Amendments and repeals take effect until next Members' Meeting.
- ▶ 6. Notice sent out to Members prior to next Members' Meeting or Annual Meeting.
- ▶ Notice contains explanations of by-law revisions.
- ▶ 7. Changes discussed and approved by majority vote at Members' Meeting.

By-law changes **DO NOT** require filing with provincial ministry.

THREE RULES TO FOLLOW WHEN DRAFTING

▶ **1. MANDATORY RULES:**

- ▶ – Must be followed. Apply whether or not you include them in your by-laws.
- ▶ – Cannot be changed or altered by you.

▶ Example: A corporation must have at least three directors. ONCA s.22(1).

▶ Example: Removal of directors

▶ 26 (1) The members of a corporation may, by ordinary resolution at a special meeting, remove from office any director or directors, except persons who are directors by virtue of their office. 2010, c. 15, s. 26 (1).

▶ Director elected by class or group of members

▶ (2) A director elected by a class or group of members that has an exclusive right to elect the director may only be removed by an ordinary resolution of members of that class or group. 2010, c. 15, s. 26 (2).

▶ Filling vacancy

▶ (3) A vacancy created by the removal of a director may be filled at the meeting of the members at which the director is removed or under section 28. 2010, c. 15, s. 26 (3).

THE THREE RULES continued

➤ 2. DEFAULT RULES:

- ▶ – Apply if you do not address them in your by-laws or articles. Otherwise the ONCA rule applies.
- ▶ – Can often be identified by “Unless the articles or by-laws provide otherwise...”
- ▶ Example: Subject to the articles or by-laws, quorum for a directors’ meeting is a majority of the total number of directors. ONCA s.34(2).
- ▶ However, you can change that quorum number to something else (e.g. two-thirds)
- ▶ Example: **Quorum for a members’ meeting**
- ▶ 57 (1) Unless the by-laws provide otherwise, the quorum for a meeting of the members is a majority of the members entitled to vote at the meeting, whether present in person or by proxy. 2010, c. 15, s. 57 (1).
- ▶ However, you can change that quorum number to something less.

The THREE RULES continued

- ▶ **3. OPTIONAL RULES:**
- ▶ – Apply only if you wish to include them.
- ▶ – Example: Proxyholders attend, act and vote on a member's behalf at a members' meeting. ONCA s.64(1).
- ▶ Proxies are complicated to administer. Voting becomes complex.

TIPS FOR DRAFTING

- ▶ **Know your intention and purpose.**

Have a clear and definite purpose for each amendment. How does it instruct the reader?

- ▶ **Be precise and clear.**

Avoid vagueness or ambiguity. Define key terms if warranted. Will a future reader be confused?

- ▶ **Be realistic.**

Create practical and pragmatic rules that members and directors can realistically follow. Align them with your corporation's purposes.

For example: what is the threshold for your board quorum? A majority of directors might be easier to get attendance. Two-thirds of directors means more directors involved in decision making.

DRAFTING TIPS continued

- ▶ **Be consistent.** The amendment you draft should not contradict other provisions.

For example: The corporation's purposes must be listed in your articles. The purposes can also be listed in your by-laws but must not be different.

- ▶ **Be flexible.**

Do not draft too narrowly so as to constrict future operations.

For example: Some corporations choose a specific month in which to hold their annual meetings. They draft this into their by-laws. What happens if an emergency occurs and the meeting cannot happen or future boards wish to change the annual meeting month?

- ▶ **Be legally compliant.**

Check that proposed amendments comply with ONCA and other relevant legislation. Traditions and historical practices may be incorrect.

For example: Corporations may assume that by being elected or appointed, a director has given implicit consent to serve. However ONCA s. 24(8) makes it clear that a director must give written consent within 10 days after being selected.

DRAFTING TIPS continued

- ▶ **Deciding between lengthy or short by-laws.**

Including mandatory ONCA rules lengthens your text but is less confusing. You are bound by the rules whether you include them or not.

ONCA s.23(1) lists 5 disqualifications for becoming a director.

- ▶ **Choosing between “may”, “must” and “shall”.**

Making something compulsory or not.

ONCA s.86 Subject to the articles and the by-laws, the directors may require members to make an annual contribution or pay annual dues ...

ONCA s.48 (1) The by-laws of a corporation must set out the conditions required for being a member of the corporation, ...

- ▶ **Be certain.**

Do not draft an amendment that you are unsure will stand the test of time. Neither by-laws nor articles are meant to be changed annually.

BREAK



HOW TO INTERPRET A TOPIC IN ONCA AND DRAFT IT INTO YOUR BY-LAWS?

- ▶ A PRACTICAL EXAMPLE:
 HOW TO REMOVE A DIRECTOR FROM YOUR BOARD
- ▶ ONCA Sections 23–28

STEP 1: FIND THE RELEVANT SECTIONS IN THE TABLE OF CONTENTS (Sections 23–28)

- ▶ There may be more than one section in ONCA relevant to what you want to do.
- ▶ With respect to Removing Directors, Section 26 is the key section but Sections 23–25, 27 and 28 are peripheral but also relevant.

Section 26 – Removal of directors

- ▶ **26 (1)** The members of a corporation may, by ordinary resolution at a special meeting, remove from office any director or directors, except persons who are directors by virtue of their office. 2010, c. 15, s. 26 (1).

STEP 1: Continued

Section 23

▶ Qualifications of directors

- ▶ 23 (1) The following persons are disqualified from being a director of a corporation:
 - 1. A person who is not an individual.
 - 2. A person who is under 18 years old.
 - 3. A person who has been found under the *Substitute Decisions Act, 1992* or under the *Mental Health Act* to be incapable of managing property.
 - 4. A person who has been found to be incapable by any court in Canada or elsewhere.
 - 5. A person who has the status of bankrupt. 2010, c. 15, s. 23 (1).

STEP 1: continued ...

Section 23 continued

- ▶ **Non-member directors**
- ▶ (2) A director of a corporation is not required to be a member of the corporation unless the by-laws provide otherwise. 2010, c. 15, s. 23 (2).
- ▶ **Restriction re public benefit corporation**
- ▶ (3) Not more than one-third of the directors of a public benefit corporation may be employees of the corporation or of any of its affiliates. 2010, c. 15, s. 23 (3).
- ▶ **Directors by virtue of office**
- ▶ (4) The by-laws of a corporation may provide for persons to be directors by virtue of their office. 2010, c. 15, s. 23 (4).
- ▶ **No alternate directors**
- ▶ (5) No person shall act for an absent director at a meeting of directors. 2010, c. 15, s. 23 (5).

STEP 1 continued ...

- ▶ **Election and appointment of directors**

- ▶ **Election and term**

- ▶ 24 (1) At the first meeting of the members and at each succeeding annual meeting at which an election of directors is required, the members shall, by ordinary resolution, elect directors to hold office for a term expiring not later than the close of the fourth annual meeting of the members after the election, as provided in the by-laws. 2010, c. 15, s. 24 (1).

- ▶ **Ceasing to hold office**

- ▶ 25 (1) A director ceases to hold office when the director dies, resigns, is removed in accordance with section 26 or becomes disqualified under section 23. 2010, c. 15, s. 25 (1).

- ▶ **Effective date of resignation**

- ▶ (2) A resignation of a director becomes effective at the time the resignation is received by the corporation or at the time specified in the resignation, whichever is later. 2010, c. 15, s. 25 (2).

- ▶ **Removal of directors**

- ▶ 26 (1) The members of a corporation may, by ordinary resolution at a special meeting, remove from office any director or directors, except persons who are directors by virtue of their office. 2010, c. 15, s. 26 (1).

STEP 1 continued

- ▶ **Director elected by class or group of members**
- ▶ 26 (2) A director elected by a class or group of members that has an exclusive right to elect the director may only be removed by an ordinary resolution of members of that class or group. 2010, c. 15, s. 26 (2).
- ▶ **Filling vacancy**
- ▶ 26 (3) A vacancy created by the removal of a director may be filled at the meeting of the members at which the director is removed or under section 28. 2010, c. 15, s. 26 (3).

- ▶ **Statement of director**
- ▶ 27 (1) Subject to the by-laws, a director is entitled to give the corporation a statement giving reasons,
 - ▶ (a) for resigning; or
 - ▶ (b) for opposing his or her removal as a director if a meeting is called for the purpose of removing him or her. 2010, c. 15, s. 27 (1).
- ▶ **Circulating director's statement**
- ▶ (2) A corporation shall immediately give the members a copy of the statement. 2010, c. 15, s. 27 (2).
- ▶ **Immunity from liability**
- ▶ (3) No corporation or person acting on its behalf incurs any liability by reason only of complying with this section. 2010, c. 15, s. 27 (3).

- ▶ **Filling vacancy**
- ▶ 28 (1) Except as provided in this section, a quorum of directors may fill a vacancy among the directors. 2010, c. 15, s. 28 (1).

STEP 2: BREAK DOWN THE KEY SECTION

Removal of directors

- ▶ 26 (1) The members of a corporation may, by ordinary resolution at a special meeting, remove from office any director or directors, except persons who are directors by virtue of their office. 2010, c. 15, s. 26 (1).
- ▶ This is a mandatory rule.
- ▶ It will still apply even if your by-laws are silent. You do not have to include it in your by-laws.
- ▶ Since this topic is relevant for all groups, it is recommended you include this Section in your by-laws for clarity

STEP 3: DO NOT READ SECTIONS IN ISOLATION.

- ▶ **24 – Election and appointment of directors**
- ▶ This section is not relevant for removal of directors.

- ▶ **25 – Ceasing to hold office**
- ▶ Deal with this section later

- ▶ **This is the most important section. It is a mandatory rule.**

- ▶ **Removal of directors**
- ▶ **26 (1)** The members of a corporation may, by ordinary resolution at a special meeting, remove from office any director or directors, except persons who are directors by virtue of their office. 2010, c. 15, s. 26 (1).

STEP 4: READ ANY SECTION REFERRED TO IN THE RELEVANT SECTIONS

▶ **Ceasing to hold office**

- ▶ 25 (1) A director ceases to hold office when the director dies, resigns, is removed in accordance with section 26 or becomes disqualified under section 23. 2010, c. 15, s. 25 (1).
- ▶ The above section says to read s.23.

▶ **Qualifications of directors**

- ▶ 23 (1) The following persons are disqualified from being a director of a corporation:
 - ▶ 1. A person who is not an individual.
 - ▶ 2. A person who is under 18 years old.
 - ▶ 3. A person who has been found under the *Substitute Decisions Act, 1992* or under the *Mental Health Act* to be incapable of managing property.
 - ▶ 4. A person who has been found to be incapable by any court in Canada or elsewhere.
 - ▶ 5. A person who has the status of bankrupt. 2010, c. 15, s. 23 (1).

STEP 5: READ FURTHER TO CHECK FOR ADDITIONAL DETAILS

- ▶ **Filling vacancy**
- ▶ **26 (3)** A vacancy created by the removal of a director **may be filled at the meeting of the members at which the director is removed** or under section 28. 2010, c. 15, s. 26 (3).

- ▶ **Filling vacancy**
- ▶ **28 (1)** Except as provided in this section, a quorum of directors may fill a vacancy among the directors. 2010, c. 15, s. 28 (1).

- ▶ You decide whether the directors or members fill the vacancy.

STEP 6: MAKE CHOICES WHERE CHOICES ARE OFFERED

- ▶ **Statement of director**
- ▶ **27 (1) Subject to the by-laws, a director is entitled to give the corporation a statement giving reasons,**
 - (a) **for resigning;** or
 - (b) **for opposing his or her removal as a director** if a meeting is called for the purpose of removing him or her. 2010, c. 15, s. 27 (1).
- ▶ **Circulating director's statement**
- ▶ **(2) A corporation shall immediately give the members a copy of the statement.** 2010, c. 15, s. 27 (2).
- ▶ Do you want to allow a director to make a written statement? This is a default rule.

STEP 7 :DRAFTING YOUR SECTION

- ▶ Decision 1: Whether to include the mandatory rule ?
 - Choice A: Leave out of your bylaws as mandatory ONCA rule will apply anyways – may be confusing otherwise
 - Choice B: Include in your bylaws – more certainty and clarity

STEP 7 :DRAFTING YOUR SECTION continued...

Decision 2 – How to Draft Your Bylaws to Include

- ▶ **Choice 1: Keeping it concise and simple.** Include the mandatory rule.
 - *A director may be removed from office by a simple majority vote of the members at a special meeting.*

- ▶ **Choice 2: Be comprehensive.** Include everything. Add in the prescribed reasons for removing a director.
 - *A director ceases to hold office when that director dies, resigns, is removed by members, is bankrupt, etc.*

- ▶ **Choice 3: Make a choice.** A default rule. Are you planning to let a director make a statement in their defence?
 - *A director may make a written statement to the members opposing their removal. This statement will be sent out to all members in advance of the special meeting.*

STEP 8: THINKING OF OTHER WAYS TO REMOVE A DIRECTOR

- ▶ Voting out a director can be unpleasant. It's a mandatory rule you cannot change.
- ▶ How else could you do it?
- ▶ **1. Remove the member.** If this director is a member of your corporation then your membership could vote the person out as a member. This bypasses the need to remove them as a director.
- ▶ **2. Deemed resignation.** Draft a rule whereby if a director misses 3 consecutive meetings they are deemed to have resigned from the board. Soften the rule by putting in conditions (e.g. ill health).
- ▶ **3. Develop a governance policy.** Create a code of conduct. Have a defined strategy ready to use.

LEGAL RESOURCES

Legal Advice:

- Lawyers can completely rewrite your by-laws and articles.
- Lawyers can make your by-laws and articles ONCA compliant.
- Some lawyers offer a 15 to 30 minute free consultation.
- There are some litigation firms in Ottawa and Toronto that have lawyers who specialize in not-for-profit law.
- Lawyers charge by the hour. Develop an efficient plan.

Legal Information:

- Lawyers cannot give legal advice or opinions.
- They can offer legal information, legal guidance, resources and support.
- LAC & Associates Consulting offers this service.

MORE LEGAL RESOURCES

- The ONCA legislation:

Not-for-Profit Corporations Act, 2010, S.O. 2010, c. 15

www.ontario.ca/laws/statute/10n15

Regulation (3)

O. Reg. 395/21 GENERAL

<https://www.ontario.ca/laws/regulation/210395>

- Ministry of Government and Consumer Services – User’s Guide:

<http://www.ontario.ca/page/guide-not-profit-corporations-act-2010>

- Ministry’s Standard Organizational By-law:

<https://www.ontario.ca/page/not-profit-corporations-act-2010-standard-organizational-law>

EVEN MORE LEGAL RESOURCES

- Ontario Business Registry: to check documents on file
<http://www.ontario.ca/page/ontario-business-registry>
- Service Ontario: to find out how to file articles, etc. and filing fees
<https://www.ontario.ca/page/serviceontario>
- Law Society (of Ontario) Referral Service: to find a lawyer
www.findlegalhelp.ca
- Community Legal Education Ontario (CLEO): “Transition to ONCA” offers many free resources including a workbook and by-law builder
<https://nonprofitlaw.cleo.on.ca>

YET EVEN MORE LEGAL RESOURCES

- Blumbergs law firm “suitcase”: over 1500 pages of consolidated documents
www.canadiancharitylaw.ca/blog/blumbergs-launches-updatedontario-not-for-profit-corporations-act-onca-suitcase
- Carters law firm: presentation to FCA January 19, 2022
<http://fca-fac.ca>
- LAC & Associates Consulting:
November 2021, March 2022 and May 2023 memos on ONCA.
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Thank You for attending!

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