



**TIPS FOR DRAFTING OR REWRITING BY-LAWS:
AN OVERVIEW FOR COMMUNITY AND OTHER ASSOCIATIONS**

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INTRODUCTION

The proclaiming of the Ontario Not-for-Profit Corporations Act (ONCA) on October 19, 2021 presents an excellent opportunity for a governance review. Community associations (CAs) or other provincially incorporated not-for-profit associations (nfps) may need to adjust their by-laws to become compliant with this new legislation. You have until October 18, 2024 to do so.

How does your association govern itself? When was the last time you read your by-laws? Have you strayed from your original intents and purposes? Does your board ignore certain provisions because they no longer seem relevant? Regardless of ONCA compliancy, it might be useful to determine whether your by-laws need updating.

Drafting new provisions, revising old ones, or completely rewriting by-laws is both challenging and thought-provoking. The choices you make, and the words used, have consequences for the present and future operations of your association.

Here are some basic tips to assist with your drafting and amendment approval process.

TO WHOM DOES THIS MEMO APPLY?

To any not-for-profit (nfp) Ontario based association registered in Ontario. Unincorporated associations may also find many of the drafting tips useful. However, if an unincorporated association decides to incorporate, it will first need to create a by-law. Simply duplicating an existing constitution will not suffice as nfp corporations must follow specific and different legislation.

WHAT IS A BY-LAW?

A by-law is your association's general operating tool. Along with your Articles of Incorporation (formerly called Letters Patent), it lays out your governance conditions and rules.

A by-law is a vital, forward- looking document. It represents what you want the association to be in the present and in the future. It is a living device that should change over time as your organization grows and evolves.

DO YOU NEED TO AMEND YOUR BY-LAWS?

There are several reasons to amend or rewrite. These include (but are not limited to):

1. To become ONCA compliant. Wherever your by-laws are silent, ONCA now applies. Previously, nfps were governed by the Ontario Corporations Act. This is no longer the case. By October 18, 2024, your by-laws should be synchronized for consistency with the relevant ONCA provisions. Otherwise, your association may find it confusing in determining how to operate and govern.
2. To remain compliant and consistent with other evolving legal requirements in Ontario.
3. To keep your by-laws relevant. If your association is operating mostly by custom and tradition or your governance behaviours have recently changed, some updating may be required. Growth and change are inevitable.

MAKING THE APPROVAL PROCESS RUN SMOOTHLY

How The Approval Process Works:

1. A working group or committee is created by the board of directors to review the by-laws and suggest draft amendments or repeals.
2. At a board meeting the directors discuss, debate, and approve the finalized version. (ONCA s.17 (1)).
3. The amendments are in operation until the next members meeting (typically the annual meeting of the membership). (ONCA s.17 (2) and (3)).
4. The permanency of the amendments (or new by-laws) is achieved through a majority vote at the next membership meeting. A voting member at a members meeting may propose an amendment or a repeal. (ONCA s.17 (4) and (6)).

5. A revised or new by-law does not have to be filed with the provincial government. Articles of Incorporation do.

Tips For Smooth Passage:

- Maintain effective communication with the membership. Prior to the annual meeting (formerly known as the annual general meeting), proper and timely notice regarding the amendments is essential. Insufficient notice may spur members to deem the meeting invalid and the amendments will not pass. Notice should include an explanation and rationale of the proposed amendments or repeals.
- Make the approval process transparent and trustworthy. This will help avoid disputes or delays. Members have the power to reject the amendments approved by the directors. Therefore, the approval process should not be rushed, biased, or manipulated or in any way perceived to be.
- Remember to sign and date the amended (or new) by-law on the day that membership approval has been received. Keep a signed and dated copy of the by-law in your corporate minute book for historical records.
- Avoid frequent amendments. A periodic review is useful but yearly revisions become confusing. Predictability and consistency are lost. Valuable personnel resources become tied up unnecessarily.
- Seek legal assistance when your association is faltering or unfamiliar with drafting. ONCA is complex. A lawyer experienced in nfp law may be helpful in providing legal advice when major amendments or a complete by-law rewrite is required. The Law Society of Ontario offers a Referral Service to match you with a lawyer who will provide a free thirty-minute consultation.

Alternatively, there are others knowledgeable in this area who can provide support and legal information. There are tools and resources to assist you.

INFORMATION FOR DRAFTING

Remember that ONCA contains three types of rules:

Mandatory rules: Apply whether you decide to include them in your articles and by-laws or not. These must be followed and cannot be altered by your association.

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

Default rules: Apply if you have not included a rule in your by-law concerning that issue. Leaving an important item out of your by-laws will have functional consequences.

For example: at a directors meeting, quorum is a simple majority of directors if your by-laws are silent on the matter (ONCA s.34(2)). Your association might, however, decide that quorum should be two-thirds in order to maximize director participation.

Alternate rules: Apply if you wish to include them. They are optional.

For example: Some associations allow proxies. A proxyholder attends, acts and votes on the member's behalf at a members' meeting. If an association wishes to permit proxies, it must include this option in the association's articles or by-laws. (ONCA s.64 (1)).

BEFORE YOU START DRAFTING

Drafting is all about making choices. Remember that the words you select and the ideas you choose will significantly impact your association's governance for years to come. What will be the character and tone of your by-laws?

Which are your preferences:

- Greater accountability to the membership OR faster decision making?
- More participation involving more people OR more efficient procedures?
- Flexible ranges OR predetermined dates and numbers?
- Broader and wider scope OR narrower and more defined objectives?
- Simple and direct OR complex and comprehensive?
- Short and easy to read OR longer and more detailed?

TIPS FOR DRAFTING

- **Know your intention and purpose.** Prior to drafting, have a clear and definite purpose in mind regarding what an amendment should say and how it instructs readers.
- **Be precise and clear.** Avoid vagueness or ambiguity. The provision should be self-explanatory to anyone reading it now or in the future. Add a glossary or define key terms at the outset to avoid misinterpretation over meanings.
- **Be realistic.** Develop practical, pragmatic rules that members and directors can realistically follow, and which are reflective of your association's purposes.

For example: The larger the size of a board quorum (e.g., two-thirds), the greater the number of directors involved in key decision making. This reduces the possibility of power vesting in a smaller number of people. However, a high quorum threshold may result in board meetings being postponed due to poor attendance thereby causing operational problems.

- **Be consistent.** The drafted amendment should not contradict other provisions in your by-laws or articles.

For example: if the association's purposes are listed in the by-laws (optional), they must be consistent with the purposes listed in the articles. If inconsistent, the articles prevail.

- **Be flexible.** Do not draft too narrowly. This may impede, limit, or restrain future association operations, functions, or purposes.

For example: Some associations choose a specific month in which to hold their annual meetings (e.g., every September). However, unforeseen circumstances do occur (emergencies, pandemics, etc.). Postponement may be necessary. Annual meetings may be held up to fifteen months after the last one (ONCA s.52 (1) (b)). You can still hold the meeting in September but without a specifically defined month in your by-laws, you are not obliged to do so.

- **Be legally compliant.** Check that proposed amendments comply with the corresponding provisions in ONCA and other relevant legislation. Even if mandatory rules are overlooked by drafters, your association is nonetheless still bound by them.

For example: It has often been the custom for CAs to assume that when a director is elected or appointed to the board, the director has implicitly or verbally given their consent to serve. Under ONCA, written consent is required. ONCA s.24 (8) states that a person is not deemed appointed or elected to the board until they have given written consent to hold the position before or within ten days after being selected.

- **Deciding between lengthy or short by-laws.** Including mandatory ONCA provisions in your by-laws saves time having to cross-check the legislation when you are uncertain about a rule. It is less confusing and more comprehensive. Stylistically some drafters might prefer a shorter, less cumbersome document. This will require searching the legislation when you are unsure about whether a provision is mandatory to follow.

For example: ONCA s.23 (1) lists five disqualifications for becoming a director (i.e., bankruptcy). Some drafters may deem it important to list these disqualifications in their by-laws. Others may decide it is unnecessary. Either way, an association is bound by these requirements and cannot alter them.

- **Choosing between “may” and “must” or “shall”.** “Must” and “shall” require a mandatory or compulsory action. “May” suggests an action but does not make it obligatory.

For example: ONCA s.48 (1) states that by-laws “must” set out the conditions required for persons to become members. There is no latitude. There is latitude regarding whether an association “may” charge members to pay annual dues. ONCA s.86 allows the articles or by-laws to make member dues optional.

To learn more about our ONCA support, guidance, and legal information services, please contact LAC & Associates Consulting at lacutler@magma.ca .

Disclaimer: This guide is for legal information purposes only. It is not intended as legal advice.