



TIPS FOR INTERPRETING SECTIONS OF ONCA AND DRAFTING RULES IN YOUR BY-LAWS: AN OVERVIEW FOR COMMUNITY ASSOCIATIONS

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HOW TO USE THIS MEMO

Once you have gathered your applicable documents, set up a committee to review your articles and by-laws and, decided what needs revising and amending, it is time to put pen to paper and begin drafting the actual words and sentences that will become your amended by-laws.

The following memo is a practical example instructing how to interpret related sections contained in the Ontario Not-for-Profit Act (ONCA) and subsequently how to draft corresponding provisions in your by-laws. The specific example used below involves the process of removing a director from the Board of Directors.

To maximize the usefulness of this memo, readers are advised to use it in tandem with the two previous memos written by LAC & Associates in the series on this subject. Please refer to memo #1 (“How To Prepare For The ONCA”, November 2021), in particular the suggestions regarding navigating the transition steps through your association. For assistance choosing drafting styles and tips, please refer to memo #2 (“Tips For Drafting Or Rewriting By-Laws”, March 2022).

THE THREE RULES TO FOLLOW

Remember that ONCA contains three types of rules which apply to your drafting:

Mandatory rules: Apply whether you decide to include them in your articles and by-laws or not. These must be adhered to 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 leave your by-laws silent on the issue. Usually identified in ONCA as: “Unless the articles or by-laws provide otherwise ...”.

If you do nothing the ONCA rule will apply. You need to actively choose to alter the ONCA rule. 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 the quorum should be two-thirds in order to maximize director participation.

Optional rules: Apply only if you wish to include them. It is your decision.

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)).

PART ONE: HOW TO READ THE RELEVANT SECTIONS IN ONCA

A. Find the appropriate section in ONCA by using the Table of Contents (s.26) or by searching for the section heading found in ONCA Part IV Directors and Officers (Removal of directors).

B. Read through the 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).

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).

C. Focus on the specific subsection that gives the instructions how to remove the director (s.26.1). Break down those instructions:

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).

It is the **members**, not the directors, who can remove a director. Thus, the power is in the hands of the membership.

“**May**” indicates it is the right of the members to do the removing. Members do not have to remove a director unless they believe it is necessary to do so.

Note there is nothing to indicate that a corporation can opt out of this rule and let the directors do the removing. If so, there likely would be wording to indicate an opt out such as “Subject to the by-laws...”.

What is the mechanism for removing a director? **By an ordinary resolution** means a 50% plus 1 of those members who are voting. There is no option to increase or decrease the number of votes. This is one of the new, enhanced rights that ONCA gives to members. Under the Ontario Corporations Act, members could remove a director by a two-thirds majority vote.

Where does the removal happen? **At a special meeting** of the membership which is called for this purpose. Remember that ONCA requires that all members must receive notice of all meetings. The text for this special meeting should include details regarding the potential removal of that director. Directors, of course, can also be removed at an annual meeting by simply not being voted back into office by the membership.

Look for conditions or qualifications. In this case, the membership cannot remove directors who are directors because of their office (for example, **ex officio directors** who are neither elected nor appointed such as government officials).

D. Do not read a section or subsection in isolation. Scan other relevant sections for context and background information. In this case, to be sure that you have a comprehensive knowledge regarding all conditions for removal, read upwards in the Act to s.25:

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).

E. Also read any section(s) referred to in that section so that you do not miss important related details. Note here that s.25 explains that a director stops being a director if: they die, resign, or is removed by the membership OR under the reasons listed in s. 23. To ensure that you are aware of all the reasons for disqualification and removal, it is necessary 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).

F. Read down in the Act to see if there are further, relevant directions with which you must comply. The final subsection in s.26 explains that after a director has been removed, the members may fill that newly created vacancy. Also read s.28 for detailed instructions how to fill that vacancy.

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).

G. Choices to be made when drafting your by-laws. Continue reading down for relevant instructions and choices. In this case s. 27 gives you the power to decide whether the director may be allowed to defend themselves through a statement opposing their possible dismissal.

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).

Being “subject to the by-laws” means that you have a choice when drafting this rule in your by-laws. It is a default rule. You can decide that a director facing possible removal from the board of directors does not have the right to make a written statement defending themselves prior to the members meeting.

However, if you decide to allow that director to make a written statement then the organization has no choice but to immediately give all members a copy of that statement. (The “**shall immediately**” makes this a mandatory rule.)

PART TWO: GENERAL CONSIDERATIONS BEFORE DRAFTING

Compliance with the law. S. 26 (1) is a mandatory rule. It cannot be overridden by drafting something contrary in your by-laws. Directors cannot remove a director. Only members can. It requires calling a membership meeting (or under certain conditions the members can call the meeting themselves without the board’s approval). It only takes the smallest threshold of majorities to remove a director. You cannot change this, for example, to a two-thirds majority of those voting as was the case under the Ontario Corporations Act which previously was the law followed by community associations.

Watch out for the distinct types of rules. S. 27 (b) is not a mandatory rule. A director can only give a statement of defense if the by-laws allow it. However, if you decide that in the interests of fairness, the by-laws should allow a director to defend themselves then that statement must be distributed immediately to the membership. This means consulting your membership list and sending out the statement to every member (s 27 (2)).

To include or not in your by-laws? The rule concerning how to remove a director (S.26 (1)) does not have to be drafted into your by-laws. However, the rule applies, nonetheless. The absence of this rule in your by-laws may lead to uncertainty and confusion should circumstances arise where the membership wishes to remove a director. The situation will then require checking the Act to follow the process prescribed by law (sections 23, 25, 26 and 27).

PART THREE: WORDING THE SECTION IN YOUR BY-LAWS

There are several variations on the possible wording depending on how much information and detail you wish to include in your rule for removing a director. Watch that the words you choose convey the precise meaning you intend. The examples here are shown in *italics*.

You can be comprehensive by putting in all the prescribed reasons for removing a director:

A director ceases to hold office when that director dies, resigns, is removed by the members or is disqualified by bankruptcy (List all the reasons given in s.23).

Or you can be concise and skip these reasons, knowing that you can check the Act for the prescribed list if you need it. Move then directly to the rule:

A director may be removed from office by a simple majority vote of members at a special meeting.

As community associations do not generally have persons who are directors by virtue of their office, it may be unnecessary to add in this exception. Unless your community association has another class or group of members who have the exclusive right to remove that director, you may also leave out that exception.

If you are planning to allow directors to make written statements defending their reasons to stay on the board (remember that this is optional), you may wish to include this:

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.

When drafting, consider another way to remove a director by using a deemed resignation: For example, draft a new rule stating when a director misses (is absent from) three consecutive board meetings then they are deemed to have resigned from the board. This utilizes an objective standard of measurement regarding the affected director's absence or conduct. To soften the rule, there could be conditions or qualifications added such as the rule does not apply if there are emergency or health reasons which prevent the director from attending. You might list other causes or reasons for a deemed resignation.

Alternatively, you could choose to remove the person as a member. This will bypass the need to remove them as a director. You will need to draft a rule into your by-laws that fulfills this function. This option will only work if the director is a member. Remember that ONCA says that a director does not have to be a member.

PART FOUR: GOVERNANCE CONSIDERATIONS

When you are deciding what to include in your ONCA compliant by-laws, you also need to consider what is best for your governance practices as a community association. ONCA provides a legal remedy or mechanism to remove a potentially problematic director. Prevention may be a better solution than a members meeting that may prove tense with accusations, confrontations and pitting members and directors against each other.

To be preventative and proactive, a community association might prefer to use the ONCA remedy as a last resort. Having a code of conduct to regulate directors' standards of behaviour would be an example of a proactive step.

In addition, consider having a policy or strategy on hand to deal with this disruptive situation should it ever occur. This strategy might include the following stages:

1. Have the Chair meet with the potentially offending director in an effort to understand the reasons behind the difficult behaviour. Also, to examine whether that behaviour may be altered or improved.
2. Consider informal mediation between the offending director and the affected parties.
3. If there can be no mutually acceptable resolution then the Board formally asks the offending director to resign.
4. As a last resort, follow the legal procedures laid out in ss. 25 – 28 to remove the director and fill the consequent vacancy.

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.