

ONTARIO NOT-FOR-PROFIT CORPORATIONS ACT

REPORT ON THE POSSIBLE EFFECTS OF ONCA LEGISLATION

Preamble:

After considering this document, should you have any questions or concerns, please contact Charles Freeman at charlesfreeman4537@gmail.com

The Ontario Not-For-Profit Corporations Act, in its entirety, is available at <https://www.ontario.ca/laws/statute/10n15>

This review has taken approximately 20 months to come to this point.

There is very little if any Case Law to guide anyone or any organization through the implementation process associated with ONCA.

There are many articles written by legal entities which speak to ONCA and its possible effects.

There are few, if any; actually published “legal opinions” related to perceived or actual effects of ONCA as the costs associated with “legal opinions” is extremely high – the legal opinions sought concerning the “audit” question and information listed at the end of this report cost Ontario Association of Basketball Officials approximately \$2700.

For a Society/Club wishing to have full legal opinion regarding their own Constitution/By-Laws/Rules of Governance, and the effects of ONCA I am advised that the cost would be large. It would also require the submission of a current and up-to-date copy of the ‘rules’ governing the Society/Club. Many “legal opinions” have a cost of approximately \$200 per hour as a starting point.

OMAFRA will not supply a “legal opinion” on the effects of ONCA for Societies/Clubs, Districts or the OHA.

This report should provide a good standard for all Societies/Clubs, Districts and the OHA for ONCA effects mitigation.

The use of the words Constitution, By-Laws and Rules of Governance are interchangeable as some Societies/Clubs and some Districts refer to the rules under which they operate as Constitution, By-Laws, Constitution & By-Laws and Operating Procedures (there may be other references used but all still refer to the rules that govern the organization).

ONCA:

Important dates: **19 Oct 2021 – ONCA comes into force and three (3) year clock starts**
 19 Oct 2024 - ALL rules/By-Laws MUST comply/follow with ONCA

Section 1:

Definitions:

Director: appointed by Minister - does not apply to OHA or Societies/Clubs

director: elected by the membership

Officers: Pres./VP/ etc. - elected

ordinary resolution: basically this is a normal motion or resolution at an AGM

special resolution: a motion or resolution at a Special Meeting

electronic signature: can now sign virtually and holds same force as hard copy

puts extra onus on the recipient of any document to keep records to show who
“signed” the document

telephonic & electronic meetings - virtual/hybrid are allowed

MUST be noted in the By-Laws to be allowed

Section 8 (1) - OHA and Societies/Clubs CAN NOT “lobby” unless “lobbying” is noted as a purpose in the Articles of Incorporation - for old Societies/Clubs, MUST amend Articles of Incorporation & OMAFRA will most likely NOT incorporate if this is there.

For a new Society/Club, OMAFRA will most likely NOT incorporate the organization if this ability is listed as a purpose Definition from Merriam Webster - “**lobby**” to conduct activities aimed at influencing public officials and especially members of a legislative body on legislation.

Section 21 - directors “manage” the Corporation. There is no reference to what role in “managing” the Corporation any person appointed by the directors plays in the “managing” process. Appointed persons may well still be able to be a part of the “managing” process however the ability to vote is questionable.

Section 22(3) - MUST have directors - By-Laws must indicate that there are directors and their Terms of Reference.

Section 24(1) - Term of Office - OHA states 1 year with other criteria
Societies/Clubs should also spell out the term associated with each office

24(4) - IF no term noted then default is 1 year

*** It should be noted that for appointed positions, the Term of Office is not always specifically required as the appointment runs from the time appointed until the time another person is appointed or until the position is filled by the election processes employed by the Society/Club, District or the OHA.

24(6) - IF do not elect full slate as per By-Laws, can still operate with less than full slate AND can also have MORE than the number noted in the By-Laws. If a Society/Club does not fill all positions, there are no consequences from the ONCA standpoint.

*** OMAFRA does not require a full slate. OMAFRA does require at least one (1) continual contact person. OMAFRA and the OHA recommend that the position of Treasurer be filled on a full time basis in order to keep the continuity of the financial dealings of the Society/Club or District.

Section 48(1) – MUST describe criteria for holding membership - OHA does this Societies/Clubs MUST do this Districts must do this

48(4) & (5) - IF 2 or more types of membership are identified, one of them MUST be 1 person = one person vote (each person is entitled to one vote)

***OHA has multiple types of membership noted

***Not an issue for Societies/Clubs unless they do not use the delegate voting system

48(6) - this section references the use of the delegate system

Relates to Districts and the OHA (unless a Society/Club currently uses the delegate system)

Section 50 (1) (b) - can terminate membership BUT process MUST be in the By-Laws (i.e.: Code of Conduct or as a Policy & Procedure)

Section 51 (1) & (2) & (3) – guidelines to follow for termination of membership

Section 52 (1) (b) - same as in the Ag Act

52 (2) - directors can a Special Meetings

If process to call Special Meetings is in the By-Laws, and it is not as stated in ONCA, then must amend By-Laws to comply with all options as to who can call Special meetings.

Section 53 (4) - attendance can be by virtual means - Must allow

IF By-laws say NO virtual meetings then cannot allow virtual attendance

Section 55 (1) - AGM notice 10 to 50 days - no guidance as to type/format of notice

AG Act then steps in as next level of legislated requirements.

Should be in Society/Club and District By-Laws as 10 to 50 days to avoid possible issues as this keeps Societies/Clubs, Districts and OHA all on same time schedule for notifications

Section 57 (1) – Society/Club Rules of Governance should reference quorum OR use of a simple majority of members present and proxies (if allowed in the By-Laws) to establish quorum

Section 58 (2) - show of hands for vote is OK

Ballot voting request can be made BEFORE OR AFTER vote. If before a vote, no issues BUT if after vote which vote counts if they are different? Suggestion is, if the results are different, conduct a second ballot vote. If the two ballot votes differ in numbers but the overall result is still the same (matter passes or fails) then move on.

Section 64 (1) (1.) - proxy voting MUST be referenced in the By-Laws to be allowed

(1.2) - anyone can hold proxy unless By-Laws indicate who can hold them

***proxy MUST be signed - see definitions for electronic versus hard copy of proxy – any Society/Club, District or the OHA using proxy voting MUST have GOOD records to verify proxy authority and proxy votes cast/recorded

Section 66 (1) - proxy holder MUST do as directed

*** see Section 193 <https://www.ontario.ca/laws/statute/10n15#BK208> for penalty (summary conviction - \$5,000 OR 6-month jail maximum)

***proxy holders at Societies/Clubs and Districts are covered by 66 (1) if proxy voting is allowed by the By-Laws.

Section 67 (1) - Societies/Clubs, Districts and the OHA MAY provide for mail-in or telephonic or electronic voting. MUST be in the Rules of Governance.

(2) (b) - corporation MUST not be able to see how anyone voted if use mail-in or virtual voting mail - impossible to comply unless hire an outside agency
virtual - this can be done using WebEx and may be available in other virtual platforms such as Zoom, Teams and Google forms.

***May require outside agency to run elections/voting if cannot guarantee that the corporation can fully comply.

Section 68 – this section in its entirety references ‘audit’ or ‘review’ HOWEVER, the ‘review’ process is not clear with respect to the level of qualification of the person performing the ‘review’.

***Section 76 does give proper process to allow for a “review” See

<https://www.ontario.ca/laws/statute/10n15#BK83>

Section 89 (1) - IF Society/Club closes or is closed by OMAFRA it CAN NOT give ANYTHING to members directly or indirectly.

Section 103 (1) (a) – Society/Club changes name – MUST be voted upon at Special Meeting - see definition Special Meeting and special resolution.

Carter’s Law Seminars:

Nov 4th, 2021 - Theresa Man

- i) slide 7 & 8 & 9 - ONCA trumps the By-Laws - as per Carters Law
***OMAFRA legal department will not give any legal opinion on this.
IF this is the case then By-Laws MUST follow ONCA - amending may be needed to ensure that By-Laws follow ONCA IN ALL ASPECTS
*** This may be confusing for Societies/Clubs, Districts and the OHA
- ii) slide 12 - OMAFRA incorporated OHA and Societies/Clubs under “special circumstance” and under AG Act (or whatever the legislation was called before the Ag Act)
*** how does 4 (1) (a) &(b) & (c) affect OMAFRA being the incorporating entity? OMAFRA legal department will not give any legal opinion.
- iii) slide 15 - MUST follow ONCA – if conflict with LEGISLATION see 5 (1)

Feb 17th, 2022 – Theresa Man

- i) slide 6 - MUST comply with ONCA – By-Laws can not offend ONCA
- ii) slide 19 - this slide referenced different methods of incorporation under both provincial and federal legislation and guidelines.

Legal opinion regarding auditing of books:

- Ontario Association of Basketball Officials sought legal opinion regarding the requirement for Not-For-Profits books be “audited” as per ONCA.
- The Ontario Provincial Police Veterans Association also sought legal opinion regarding the requirement for Not-For-Profits books be “audited” as per ONCA.
- Societies/Clubs and the OHA are all incorporated by OMAFRA as Not-For-Profit organizations.
- Two legal opinions were received by Ontario Provincial Police Veterans Association on the question of “audit” versus “review” of the books.
- These opinions would also apply to Societies/Clubs (which are not registered as a registered Charity) as each group is an incorporated Not-For-Profit.

ONCA indicates that all books must be “audited”

- Does not affect OHA as it is a Registered Charity and books must be ‘audited’
- Affects all Districts
- Affects all Societies /Clubs that are NOT Registered Charities (Societies/Clubs are Not-for-Profit and are NOT Registered Charities unless they went through the process to register)

*** Following conflicting legal opinions to address this very expensive requirement that the books be “audited” – best suggested process is....

ALL Societies/Clubs that are not registered as a Registered Charity and Districts should:

- a) Insert in their By-Laws (Rules of Governance) that the books may be “audited or reviewed” (this is most likely already present in the Rules of Governance but check to be sure).
AND THEN
- b) At the AGM pass a motion directing the Executive body to only have the books “reviewed”

Wordings for the By-Laws should be similar to:

- a) At the Annual General Meeting of _____ (Society/Club name or District and number), the membership shall appoint an auditor or shall elect two individuals, not currently members of the Society/Club District (insert which applies) Executive and who are not related to or living with any member of the Society/Club District (insert which applies) Executive to review the books of the Society/Club District (inset which applies) for the next fiscal year.
At the AGM, PRIOR to the Financial report being given, the Treasurer (or whoever is giving the Financial report) advises that after the Financial report is given, there will be a Motion regarding the “reviewing” of the books the following year.
After the Financial report and before the motion to accept the Financial report, the following Motion is made
- b) I move that the books of _____ (Society/Club name or District and number) be reviewed by two individuals not currently members of the Society/Club District (insert which applies) Executive and who are not related to or living with any member of the Society/Club District (insert which applies) Executive to review the books of the Society/Club District (inset which applies) for the next fiscal year that being _____ (insert fiscal year start and end).

Moved by:

Seconded by:

If this motion passes, then do the Motion to approve the Financial report.

THEN, do the Motion process to elect the ‘reviewers’.

THIS PROCESS MUST BE FOLLOWED EVERY YEAR IN ORDER TO COMPLY WITH ONCA