



**MEDIA ARTS NETWORK
OF ONTARIO
RÉSEAU DES ARTS
MÉDIATIQUES DE L'ONTARIO**

A BETTER PRACTICE GUIDE TO BOARD GOVERNANCE FOR MEDIA ARTS ORGANIZATIONS IN ONTARIO

2016

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Member organizations should consult the appropriate professional for advice relating to specific board governance, employment, financial and taxation issues.

CONSULTATION

- MANO/RAMO held in person consultations with member organizations via an open call for those in the GTA, and via teleconference for those outside of GTA
- In addition, consultants conducted workshops with those members organizations in the three subject areas:
 - Conflict Resolution
 - Equity, Diversity and Inclusion
 - Board Governance and Human Resources Management
- SAW Video, Independent Filmmakers Co-operative of Ottawa Inc., Images Film and Video Festival, Whitewater Gallery and Vtape participated in the Board Governance and Human Resources Workshops in fall 2015

LEGISLATION

- *NEW Ontario Not-for-Profit Corporations Act, 2010 (ONCA)
- Canada's Not-for-Profit Corporations Act came into effect on October 17, 2011 for those organizations that are federally incorporated
- Ministry of Government Services Consumer Services' Resources: <http://www.sse.gov.on.ca/mcs/en/Pages/onca7.aspx>
- The new ONCA, passed on October 25, 2010, is not yet proclaimed therefore it is not yet in force
- Existing Not-for-Profit Corporations will have a 3-year transition period to comply with ONCA, 2010 once proclaimed
- The modernization of ONCA is an excellent opportunity for organizations to review their Letters Patent/Articles of Incorporation, and bylaws (see Ministry Transition Checklist)
- Most profound changes include provisions that govern:
 - Rights and classes of members - solicitation of proxy voting is now MANDATORY
 - Directors
 - More flexible financial reporting rules for "Public Benefit Corporations", i.e. Not-for-profit corporations who receive public funding

BOARD ORGANIZATION

- Reflect and review your Board structure - is it a working Board or a supervisory Board? Is it clear which?
- Board structure should serve the organization's needs which may change over time and so require review periodically
- Does your Board structure reflect your organizational culture?
- Has your Board structure ever been reviewed since incorporation?

- A review of your Board structure may include:
 - Number of Directors - must be no less than three (3)
 - Terms of Directors - must be no more than four (4) years
 - Membership Types and Classes
 - Officers of the Board
 - Committees

BY-LAWS

- Unless the articles of incorporation or the by-laws provide otherwise, the Directors may with very few exceptions, by resolution make, amend or repeal any by-law that regulates the activities or affairs of the corporation (section 17 of ONCA, 2010)
- Therefore, by-laws should be reviewed from time to time, i.e. every 3-5 years, to ensure that they appropriately serve the needs of the organization
- It should be noted that section 17(6) of ONCA, 2010 provides that a “member entitled to vote at an annual general meeting of the members may make a proposal to make, amend or repeal a by-law ...”
- Caution: If a member organization still has no by-laws 60 days after incorporation, under ONCA, 2010 it will be deemed to have passed the standard organizational by-laws approved by the Ministry (section 18 of ONCA, 2010)

MEMBERS

- Organizations with members who are not also Directors should carefully review the relevant provisions on members in ONCA, 2010
- A member of a not-for-profit corporation is one who supports or benefits from the goals and objectives of the organization.
- The by-laws of the organization set out the membership conditions that determine which persons are eligible to become members. (section 48 of ONCA, 2010)
- Members’ Rights include the right to:
 - Attend annual meetings of members and vote if they have voting rights
 - Make or discuss suggestions (“proposals”) at members’ meetings which may be put into effect if passed
 - Call a meeting if at least 10% of the members request it (or a lower % if allowed by the by-laws)
 - Receive a proxy
 - Use alternate means of voting if allowed by the by-laws
 - Have greater access to financial statements
 - NOTE: Members do NOT have the right to attend Board meetings, but Directors have the right to attend and be heard at members’ meetings
 - Members can remove a Director from office at a special meeting

- A member ceases to be a member if they die, resign, is expelled, or their term expires or the organization is liquidated or dissolved.
- A member can be disciplined or have their membership terminated with proper notice as provided by the Articles or by-laws, BUT, the Articles or by-laws must set out a good faith process for termination so that any termination of membership is done in a fair and reasonable matter (section 51 of ONCA, 2010)

DIRECTORS

- If you are an individual who is over 18 years of age and is mentally competent under the law and is not bankrupt, then you can be a Director (section 23(1) of ONCA, 2010)
- STANDARD OF CARE REQUIRED: Every Director exercising their powers and carrying out their duties must act honestly and in good faith with a view to the best interests of the organization and exercise the care, due diligence, and skill that a reasonably prudent person would exercise in comparable circumstances (see section 43(1) of ONCA, 2010) and cannot be held liable if they have done so
- A Director has a legal duty to comply with the Act and its regulations and with the organization's articles and by-laws
- A Director cannot "contract out" of their statutory duties
- Alternate Directors are not allowed under section 23(5) of ONCA
- Member organizations should be in compliance with the provisions of the ONCA, 2010 with regard to Directors
- Directors shall manage or supervise the activities and affairs of the organization (section 21 of ONCA, 2010)
- Whether "managing" or "supervising", Directors, or Board members are, collectively, the "directing mind" of the organization so there is an expectation of professionalism at the Board level
- There should be a clear understanding of the ROLE, RESPONSIBILITIES, and EXPECTATIONS of a Director - these may be subject to change over time but MUST be clearly communicated to all Directors in the onboarding process and from time to time when necessary and appropriate
- The obligation of a Director extends past mere attendance at Board meetings and includes, but is not limited to: respectful communication, meaningful participation in Board and Committee meetings, consensus building in decision making and unwavering loyalty to the member organization

FINANCIAL REPORTING - PUBLIC BENEFIT CORPORATIONS

- A "public benefit corporation" is a charitable corporation, or a noncharitable corporation that receives more than \$10K in a financial

year in donations or gifts from persons who are not members, directors, officers, or employees, OR from government grants or financial assistance

- Organizations who are public benefit corporations with annual revenue of more than \$100,000 but less than \$500,000 can waive the audit requirement, but the organization still needs to conduct a review
- If the organization has annual revenue of \$500,000 or more, an audit is mandatory
- Organizations with annual revenue of \$100,000 or less can waive both the audit and the review
- NOTE: An extraordinary resolution (approval by at least 80% of the members present at a special members' meeting where there are enough members to take a vote or if all voting members agree in writing) is needed to waive an audit or review engagement requirement and applies until the next annual meeting of the members (section 76 of ONCA, 2010)

DISCLOSURE OF CONFLICT OF INTEREST

- A director who is a party to, or has a material interest in, a contract or transaction or a proposed contract or transaction with the organization must disclose a conflict of interest and have it entered into the minutes the nature and extent of the conflict
- A Director **MUST** disclose at a meeting at which a proposed contract or transaction is **FIRST** considered a conflict of interest and it is an ongoing duty of disclosure
- In the event of a declared conflict, that Director cannot attend any part of the meeting where the relevant transaction is being discussed and cannot vote on any resolution to approve with a few exceptions (see section 41(5) of ONCA, 2010)
- The risk is that if these rules are not diligently followed, a court may set aside the contract - when in doubt, **DISCLOSE**

RECRUITMENT OF DIRECTORS

- Recruitment is not replacement - know your Board's needs
- To be meaningful and valuable to the member organization, recruitment is a **PROCESS**
- Consider developing a strategy for recruitment of Directors to the Board - pay particular attention to the Secretary and Treasurer positions
- Any recruitment strategy **MUST INTEGRATE** the principles of equity and diversity (see Best Practices on Equity: A Guide for Members of the Media Arts Network of Ontario)
- Consider a mentor or sponsor program prior to the formal on-boarding process with an experienced Director (even of another member)

- organization)
- NOTE - Alternate Directors are not allowed under section 23(5) of ONCA, 2010
- Consider opening up committee membership to non Directors to BUILD YOUR POOL
- Have a separate strategy for recruiting a Chair
- Your organization deserves the right people with the appropriate EXPERTISE and EXPERIENCE

INSURANCE AND INDEMNITY

- Section 46 of ONCA, 2010 provides for the ability of the organization to indemnify a Director acting at the organization's request against all costs, charges, expenses, etc. in respect of any civil, criminal, administrative, investigative or other action or proceeding in which the Director is involved because of that association with the organization.
- But, the organization cannot indemnify a Director if they have not acted honestly and in good faith with a view to the best interests of the organization; and if the matter is a criminal or administrative proceeding enforced by a monetary penalty
- Directors' insurance against liability (civil claims, claims under the Ontario Human Rights Code, wrongful dismissal) is highly recommended

ON BOARDING OF DIRECTORS

- On-boarding of new Directors is one of the most important processes for the organization
- Once recruitment is successful, the communication of the roles, responsibilities, expectations, organizational culture and modus operandi of the organization is of vital importance
- Boards should devote time, care, and resources to this endeavor
- Today's "Board Binder" should be revisited
- Use enhanced interactive tools such as online presentation tools, video or mobile applications
- Not only should new Directors affirm that they have reviewed the material, but that they actually understand their duties
- Consider assigning an experienced Board member to review the material with the new Director and/or answer any questions relating to the material

CONFIDENTIALITY AND PRIVACY

- Directors, in the course of managing or supervising the activities and affairs of an organization, become privy to sensitive, confidential

personal information of other individuals and the financial statements of the organization

- Directors should sign a “confidentiality agreement” ideally annually, but at least once during their term; this documentation should be retained in the organization’s records
- Directors should be explicitly educated on these duties in the on-boarding process and this information should be revisited every time a new agreement is signed and at any Board development sessions
- NOTE: In the event of a willful and/or malicious breach of confidentiality or individual privacy, there may be a liability issue

TERMS/TERM LIMITS OF DIRECTORS

- Organizations should review their by-laws so they are in compliance with ONCA, 2010 (see section 24)
- The minimum term for a Director is one (1) year and if an organization’s by-laws do not specify any term for Directors, the default is one (1) year
- The maximum term for a Director is four (4) years but renewals are unlimited
- Directors should have staggered terms so Boards are not presented with all its Directors’ terms potentially expiring at once

OFF BOARDING OF DIRECTORS

- “Off-boarding” is an important process that should not be overlooked
- A Director ceases to be a Director if they die, resign, is removed in accordance with section 26 of ONCA, 2010 or becomes disqualified
- Upon resignation, or more unusually a Director becoming disqualified, there should be an established process to meet with the outgoing Director to discuss their experience, any future involvement with the organization, and to ensure that any confidentiality obligations that continue are explained
- In the event of a removal of a Director from the Board, there should be a much more rigorous process, reflected clearly in the minutes of the special meeting and meeting to debrief witnessed by another Director and documented

COMMITTEES

- The purpose of a committee is to explore more finely, matters referred to it by the Board and report its findings back to Board for resolution, specifically when such exploration would unduly hinder the other work of the Board at a Board meeting
- Committee work is optimized where the Committee has a clear

mandate, established process (agendas, minutes, written reports with recommendations to the Board), strong chair, optimal number of members, and a clear path to the Board

- Consider establishing at least an Executive Committee, an HR Committee, and a Finance Committee
- Consider passing by-laws to make non-Board members, specifically those with specific expertise, members of Committees, but be careful when considering confidential or sensitive personal (HR/Staff matters) or financial information*

**Non-Board members who sit on Committee may also be required to either sign confidentiality agreements but enforcement may be an issue*

THE ROLE OF THE CHAIR

- Directors may appoint officers and specify their duties, and delegate powers to them to manage the activities and affairs of the organization with some exceptions (section 42(1)(a) of ONCA, 2010)
- A Director shall be appointed chair of the Board of Directors and carry out the duties of the chair in accordance with the by-laws (section 42(2) of ONCA, 2010)
- The Chair conducts effective meetings, inspires Board discussion, builds consensus, and facilitates the collective creation of and passing of Board motions and action plans
- The Chair keeps the Board connected to the organization's mandate, vision and role in the community as well as keeps the Board focused on strategic planning issues, special projects, committee work and the realization of the organizations goals and objectives
- The Chair should be intimately familiar with the organization's financial business and HR practices
- This position is 100% leadership
- The Chair should be prepared to be the org's spokesperson and its public face in times of recognition or crisis and present in the community as a strong, strategic and informed advocate

THE RELATIONSHIP BETWEEN BOARD AND STAFF

- There is a mutual obligation in keeping this PUBLIC relationship healthy, accountable, respectful, and in the best interests of the organization
- The leaders of the organization, i.e. Board Chair/ED or Senior Staff directs this relationship (see next slide) and it is an ongoing process informed by the organization's established policies and practices with respect to the respective roles, responsibilities and expectations
- Consider whether there should be a separate Code of Conduct for Directors

- Consider whether your HR Committee may have a role to play in the healthy maintenance of the relationship
- Everyone benefits including the public, from a functional relationship

THE BOARD AND THE EXECUTIVE DIRECTOR

- The Board is responsible for the hiring, termination and performance management of the ED (in a non-hierarchical organizational structure)
- The principles of equity and diversity must be integrated into the recruitment of the ED
- If there is a conflict, consider taking the matter to a third party who is acceptable to both who is on the ready to assist in coming to resolution
- Positive intervention by employing the existing tools of facilitation, mediation and conflict resolution (see MANO's Best Practices for Conflict Resolution) will assist in dealing with issues openly in a timely fashion as to mitigate potential escalation

BOARD MEETINGS

- Directors must be present at regular, usually monthly, Board meetings
- The Board meeting is the forum to consider and make decisions concerning the activities and affairs of the organization
- The key documents relevant to a Board meeting are the agenda, the reports to the Board (and any Board resolutions to be voted on), and the minutes of the meeting
- Consider agenda review with the Chair and the ED/Senior Staff prior to circulating the agenda
- Decisions made at Board meetings should facilitate and not hinder the legitimate business of the organization
- There is specific provision in ONCA, 2010 permitting the holding of electronic meetings

DECISION MAKING

- Consensus building prior to passing resolutions is recommended as a Board practice where possible and practicable
- Unless a Director files a "dissent", they are deemed to have consented to any resolution passed or action taken at a meeting " (see section 45 of ONCA, 2010)
- Organizations should review their by-laws with regard to passing resolutions and the creation and retention of the record of all Board resolutions for compliance with ONCA, 2010
- NOTE: A resolution, a copy of which must be kept by the organization with the minutes, that is signed by all the Directors entitled to vote on that resolution at a Board or Committee meeting is as valid as if it had

been passed at a meeting (section 35 of ONCA, 2010)

RECORD KEEPING

- Organizations should review their policies and practices relating to record keeping for compliance with ONCA, 2010 (Part X of ONCA, 2010)
- Highlights include:
 - Records such as articles and by-laws, minutes, resolutions, registers and accounting records **MUST** be kept and be open to inspection by the Directors during business hours and extracts be made available to Directors free of charge
 - Members are entitled to a free copy of the articles and by-laws and examine financial statements
 - Organizations must keep the consents of Directors
 - Organizations must keep, at its registered office, a copy of the consolidated financial statements and accounting records
 - Organization must take reasonable precautions to protect records for loss, destruction or falsification and to facilitated detection and correction of inaccuracies

STRATEGIC PLANNING

- Strategic Planning is a skill and requires expertise to facilitate a meaningful process
- The process of strategic planning is as important as the end result
- Does the one-day strategic planning session work?
- There is no point in committing precious resources to this process if the plan will sit on a shelf for the next 4-5 years
- How do you generate fresh ideas that are innovative and inspiring? Critically assess the traditional notion of strategic planning within the sector and seek out new thinking to engage Board and Staff

Resources:

- *Ten Keys to Successful Strategic Planning for Nonprofit and Foundation Leaders* by Richard A. Mittenenthal
http://www.tccgrp.com/pdfs/per_brief_tenkeys.pdf

BOARD DEVELOPMENT

- Critically assess the Board's strengths and needs and engage in meaningful capacity building
- Play to individual Directors' strengths and interests by building capacity for leadership, expertise and experience
- Integrate with Board succession planning; make every term for every Director meaningful

- Consider a mentorship program between Directors and even between Directors of different organizations within the sector
- Disseminate information in interactive and accessible formats where possible
- MUST integrate principles of equity and diversity and conflict resolution when capacity building with Directors

WHY IS THIS IMPORTANT?

- Good governance is the sign of a healthy organization and build confidence and credibility with directors, members, staff, funders and the public
- It is imperative that “public benefit corporations” demonstrate good governance practices to justify the allocation of public monies to their budgets
- Artist-run organizations that demonstrate good governance practices adds value to the notion of the “artist in society”
- Good governance practices is crucial to managing risk and ensure compliance with governing legislation

Don't be afraid to be professional, to show that we know what we are doing. These are tools that empower organizations; these are tools to be proud of

RESOURCES

- Grassroots Governance: Governance and the Non-Profit Sector
http://www.cga-ontario.org/assets/file/publication_grassroots_governance.pdf

DRAFT TEMPLATES

The following draft templates are intended to complement the suggestions in the Guide:

- Director's Consent to Act
- Code of Conduct for Directors
- Director's Confidentiality Agreement
- Director Disclosure of Conflict of Interest

[Organization Name]

DIRECTOR CONSENT TO ACT

I, **[NAME OF APPOINTED OR ELECTED DIRECTOR]**, knowingly and willingly accept my election/appointment and consent and agree to hold the office of DIRECTOR of **[NAME OF ORGANIZATION]** for the term **[insert TERM OF OFFICE]**¹.

In consenting to hold the office of DIRECTOR, I understand that I agree to carry out duties as a DIRECTOR of **[NAME OF ORGANIZATION]** with honesty and in good faith with a view to the best interests of **[NAME OF ORGANIZATION]** and exercise reasonable care, due diligence, and skill in doing so including but not limited to complying with any applicable legislation, and the articles, by-laws, and policies of **[NAME OF ORGANIZATION]**.

NAME

SIGNATURE

DATE

¹ This term should not exceed four (4) years (see s. 24 of ONCA).

[Organization Letterhead]

CODE OF CONDUCT FOR DIRECTORS

[INSERT DATE e.g. Spring 2016]

Review Date: [INSERT DATE e.g. Spring 2018]

The [**NAME OF ORGANIZATION**] *Code of Conduct* (the “Code”) is based on the principles of integrity and dignity, equity and diversity,¹ respect, trust and civility.

Maintaining honesty, professionalism and exhibiting appropriate conduct during meetings of the Board of Directors (BOD) and your commitment to resolving conflict², large or small, between members of the BOD and/or staff is essential.

Your careful holding of confidential, sensitive financial, personal and other information that you receive in the course of your duties as a Director and your ability to uphold organizational policies and act in the spirit of the Code is key to organizational success and effective leadership.

As a Director, you agree to abide by the principles set out in this Code, including the following:

1. INTEGRITY AND HONESTY, CIVILITY AND RESPECT FOR ALL VOICES

Honor peers and colleagues with your openness, truthfulness and trust.

Honor all contractual obligations and organizational commitments of the organization.

Never engage in practices that seek to reduce openness or fairness.

2. CULTURE OF DIVERSITY, EQUITY, AND INCLUSION

Comply with the letter and spirit of the Ontario *Human Rights Code* and actively support an organizational culture of discrimination and harassment prevention

Support a workforce and programming that reflects the diverse social and cultural fabric of artistic communities in which we operate.

Treat other directors, staff, members and the public with respect, compassion and dignity valuing diversity.

3. AVOIDANCE OF CONFLICT OF INTEREST

1 See *Best Practices on Equity: A Guide for Members of the Media Arts Network of Ontario (MANO)*

2 See *MANO's Best Practice for Conflict Resolution Guide*

Base your decisions in the best interest of the organization.

Derive no personal benefit whether direct or indirect from your position as a Director, and where practicable, avoid any situation that may create, or appear to create, a conflict of interest between your personal interest(s) and those of the organization.

If conflict of interest is not avoidable, disclose the nature and extent of the conflict of interest in a timely and meaningful manner so as not to put the organization at risk.

4. COMPLIANCE WITH LEGISLATION, BY-LAWS AND POLICIES

Be fully aware of in the new legislation (e.g. Ontario Not-for-Profit Corporations Act) applicable to media arts organizations.

Be educated and empowered by the rules that govern your organization

Directors have a positive duty to have knowledge and comprehension of the applicable rules and exercise due diligence to follow them.

The duty to cooperate with any investigations.

5. RESPECT FOR CONFIDENTIALITY

Create a culture of confidentiality within the organization and comply with the rules that govern disclosure. This should be a high priority.

Confidentiality means keeping all sensitive (financial, personal, etc.) information in your custody or control by virtue of your position as a Director, between you and your fellow Directors. This builds and develops trust with stakeholders.

Treat all your confidential conversations as an organizational asset that is to be guarded and used in the best interests of the organization.

6. UPHOLDING DECISIONS

Directors have a duty of loyalty and commitment to upholding the decisions made, whether by consensus or by vote, by the BOD.

Speak with one voice.

DIRECTOR'S CONFIDENTIALITY AGREEMENT

I **[NAME OF DIRECTOR]** acknowledge that I will have access to confidential information in the course of my term as a member of the Board of Directors of the **[NAME OF ORGANIZATION]**, and that I will obtain information from, have access to information, or have information disclosed to me by staff or other Board members relating to past, present or future activities of **[NAME OF ORGANIZATION]**.

In particular:

1. I will at all times respect the confidentiality and privacy of individuals, including employees, and the confidential nature of the business of **[NAME OF ORGANIZATION]** including information shared at in-camera Board meetings.
2. I agree not to disclose or allow the disclosure of any confidential information, data or materials in my custody or under my control as a Director of **[NAME OF ORGANIZATION]**, irrespective of the manner in which such information is provided to me except to other Directors and/or to the Executive Director and staff of **[NAME OF ORGANIZATION]**.
3. I will closely protect confidential information to prevent it being inappropriately accessed, used or disclosed either directly, or by virtue of a password to systems, or by breaches in physical security. If I become aware of any violation of confidentiality, or lose any record containing confidential information that could be used to violate confidentiality, I will notify the Executive Director at the first reasonable opportunity.
4. I agree to dispose of any and all written material in such a manner as to prevent its loss or inappropriate disclosure that would not be in the best interests of **[NAME OF ORGANIZATION]**.
5. Upon ceasing to be a Director by any means (e.g. resignation, removal, ineligibility), I will destroy or return all confidential materials previously provided to me in the course of my duties as a Director. I will only access, use, transfer or disclose private and confidential information as required by the duties as a Director
6. I will not use any confidential information for personal benefit or for any improper purpose.

I understand and agree to abide by the conditions outlined in this agreement that will remain in force even if I cease to have an association with **[NAME OF ORGANIZATION]**.

NAME OF DIRECTOR

SIGNATURE OF DIRECTOR

DATE

[ORGANIZATION LETTERHEAD]

DIRECTOR'S DISCLOSURE OF CONFLICT OF INTEREST

NAME OF DIRECTOR _____

DATE _____

The Director's Duty to Disclose a Conflict of Interest or Potential Conflict of Interest

A director who is a party to, or has a material interest in, a contract or transaction or a proposed contract or transaction with the organization must disclose a conflict of interest and have it entered into the minutes as to the nature and extent of the conflict. The duty to disclose is ongoing.

Nature of the Conflict of Interest or Potential Conflict of Interest

- 1) A direct or indirect conflict with my duty as a Director of [Name of Organization] may arise because:

- 2) I or any trustee or nominee on my behalf own or possess, directly or indirectly, the following interests:

- 3) The nature and extent of the conflict of interest is:

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