

KEEPING CURRENT

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Court Finds Not-for-Profit Unfairly Terminated Co-President's Membership

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When the *Canada Not-for-Profit Corporations Act* (“**CNCA**”) and *Not-for-Profit Corporations Act, 2010* (Ontario) (“**ONCA**”) were being drafted in 2010, many lawyers who practice non-profit law wondered about the provisions for discipline and termination of members in both statutes. The CNCA was the first piece of legislation to come into force, with its discipline provision at section 158:

The articles or by-laws may provide that the directors, the members or any committee of directors or members have power to discipline a member or to terminate their membership. If the articles or by-laws provide for such a power, they must set out the circumstances and the manner in which that power may be exercised.

The ONCA came into force later, but went a step further. S.51(1) is identical to the CNCA provision, but the section goes on to provide in subsection (2) that the use of the power “must be done in

good faith and a fair and reasonable manner.” Subsection (3) then sets out the minimum standards for a fair and reasonable procedure, including appropriate notice and “an opportunity to be heard, orally, in writing or in another format permitted by the corporation’s articles or by-laws”.

Until recently, the courts had not ruled on how these provisions were to be applied. Earlier cases under the CNCA merely confirmed the power of a corporation to discipline or terminate a member, without considering the nature of the process.¹ Now *Dillon v. Carp Agricultural Society*,² has given us a first look at how the standard set out in the ONCA must be complied with.

Facts

The Applicant was the co-president of Carp Agricultural Society (the “Society”) when a former member left the Society an interest in a property in his will. The estate executor consulted a realtor – who happened to be the Applicant’s husband – about the value of the property. Despite the realtor’s advice, the executor did not list the property for sale in the

open market and instead sold the property to the Applicant's father for \$300,000. In this sale, a commission was paid to the real estate brokerage where both the Applicant and her husband worked. Two months later, the father resold the property for \$500,000.

At around the time the Applicant's father was selling the property for a profit, the directors of the Society passed a motion that a third party look into the matter. In the meantime, the Applicant was suspended from her role as the Society's co-president. After a six-month delay, the Society decided not to hire a third party to look into the matter and instead informed the Applicant that the Society's executive committee would investigate the circumstances surrounding the sale, purchase and resale of the property. The executive committee put a number of questions to the Applicant in writing, which the Applicant initially refused to answer as she thought that the investigation by the executive committee would not be a fair and unbiased process. Before she could respond, the Applicant received a letter from the board of the Society indicating that she had breached her fiduciary obligations to the Society; was in a conflict of interest and in breach of the Society's constitution, policies and procedures; and that discipline was warranted³.

The Applicant appealed the Society's decision, and the investigation was reopened. A series of questions was again posted to the Applicant, to be answered in writing. The Applicant provided documentation in support of her appeal. However, the Society maintained its original decision to revoke her membership, but without providing reasons or information about the findings that were relied upon or considered in reaching the decision. The Applicant therefore brought an application under section 191 of the ONCA to request the court make an order to reinstate her membership⁴.

The Court's findings

The court concluded that the process which led to the decision to terminate the Applicant's membership did not afford her natural justice⁵ and was not reasonable. The board of the Society did not follow the discipline process set out in its own constitution, which required that the executive committee (1) immediately and fully investigate a report of unacceptable behaviour by a member, (2) objectively analyze the relevant information, (3) identify facts, and (4) afford the member under review adequate notice and an opportunity to be heard. The executive committee's investigation did not happen immediately, but was only commenced several months after a resolution was passed to commence investigation. The Applicant had filed complaints with the real estate broker governing body against certain individuals who happened to be part of the investigative process, raising questions about whether all information had been analyzed objectively. These complaints formed part of the reasons that the board refused to reinstate the Applicant's membership, but were not brought to the Applicant's attention to provide her with an opportunity to respond. The court was particularly concerned that there was a lack of proper reasons setting out the facts that the board relied on to make its decision to terminate the Applicant's membership. Ultimately, the court was persuaded that the board failed to comply with its constitution and failed to follow a fair and reasonable process as required by section 51 of the ONCA. The court set aside the decision to terminate the Applicant's membership and declared the decision to be null and void.

Does termination of a member always require reasons?

In *Dillon*, three sources of requirements for member discipline are identified: the rules of natural justice, legislation (section 51 of the ONCA) and the language found in an

organization's own by-laws or constitution. The court said that it was unclear whether the rules of natural justice require an organization to give reasons after arriving at a decision to terminate a person's membership rights, but the Society's own constitution and section 51 of the ONCA did require meaningful written reasons after the final decision to terminate the Applicant's membership was made. It is not entirely clear how the court reached this decision based on the language in the ONCA, since subsection 51(3) of the ONCA, on its face, only requires that the initial notice of a disciplinary action or termination be accompanied by reasons. However, it is possible that the court may have added its own interpretation of what is a "fair and reasonable" process for termination of a membership by adding a requirement that such processes will include providing written reasons for the final decision to terminate a membership.

Lawyers should be aware of these three sources when advising clients about termination of memberships, and should be aware of the ambiguity regarding their application. For example, if a corporation is governed by the ONCA, but does not have detailed discipline provisions in its by-laws, will it still be necessary for it to provide reasons when the final decision to terminate a membership is made? As another example, if a corporation without share capital under the CNCA (which does not have the "fair and reasonable" member discipline provisions that are found in the ONCA) has by-laws that do not require the board to provide reasons to a disciplined member, would natural justice require that the corporation provide reasons to any members it terminates? Or would the court instead defer to the language found in the corporation's by-laws on the basis that courts will only intervene in decisions of voluntary associations where a legal right is affected⁶? It is hoped that future cases will begin to address this ambiguity and build on the analysis in *Dillon*

to provide guidance about how requirements for the discipline, suspension or termination of members will be applied.

For more information, please feel free to contact [Cliff Goldfarb](#) or another one of our [non-profit and charity law specialists](#).

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Endnotes

1 *Benito v Immigration Consultants of Canada Regulatory Council*, [2019 FC 1628](#); *Watto v Immigration Consultants of Canada Regulatory Council*, [2019 FC 1024](#).

2 [2024 ONSC 1858](#).

3 The conflict of interest and breach of fiduciary duty issues in the decision will be addressed in a subsequent article.

4 It should be noted that the Applicant brought her claim in the Ontario Superior Court of Justice, in accordance with section 191 of the ONCA. In a similar case about the suspension of a membership, an applicant was unsuccessful in seeking judicial review of their suspension at the Divisional Court. This is because the Divisional Court considered the matter to be outside of its jurisdiction, as the internal affairs of private corporations are not frequently subject to judicial review. See *Wabinski v Pickelball Ontario*, [2023 ONSC 7020](#).

5 The court in *Dillon* describes natural justice as a set of requirements created by the courts in the common law which are intended to protect the procedural rights of persons. It includes several elements, including that a person whose rights will be affected should receive notice of a hearing (if any), the notice should set out the reasons for the proposed change, the person should have the opportunity to make submissions, and the decision maker should have an open mind.

6 See *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021 SCC 22](#).