**CITATION:** Barrie & District Association of Realtors v. Information Technology of Systems Ontario et al. 2025 ONSC 3388
**COURT FILE NO.:** CV-23-609
**DATE:** 2025-06-09



**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

| | |
|---|---|
| **BETWEEN:** | |
| BARRIE AND DISTRICT ASSOCIATION OF REALTORS<br><br>Applicant | |
| **– and –** | Gavin Tighe, Michael Citak and Dara Hirbod, counsel for the Applicant |
| INFORMATION TECHNOLOGY OF SYSTEMS ONTARIO, BRETT BARKER, MAT CLANCY, RAY FERRIS, RYAN GILMOUR, DEANNA GUNTER, GEOFF HALFORD, DON LEA, DOUG LYTLE, JEFF MAHANNAH, DON MCCOLL, SUSAN NOSKO, BOB PARSON, JIM SEXSMITH, DIANE SNELL, WENDY WEBB, CHARLOTTE ZAWANDA, WILLIAM CATTLE, BLAIR CAMPBELL, ALLISON MCLURE AND LYLE MCNAIR<br><br>Respondents | |
| | John Polyzogopoulos and Amelia Philips Robbins, counsel for the Respondents |
| | **HEARD:** March 25-27, 2025, and June 6, 2025 |

# REASONS FOR JUDGMENT

**THE HONOURABLE JUSTICE SUNIL S. MATHAI**

**Overview**

[1] In the real estate business, access to multiple listing service data ("MLS data") is imperative. To get access to larger pooled data, real estate brokers and agents join local real estate associations that serve specific geographical regions. One such local real estate association is the Applicant, the Barrie & District Association of Realtors ® ("BDAR").

[2] Membership in a local real estate association comes with rewards – brokers and agents gain access to the MLS listings of the association's members. With access to larger data, real estate brokers and agents can search more properties and thus better serve their clients. That said, accessing data from just one local association has its limitations.

[3] To address these limitations, several local real estate associations came together to form the Respondent corporation, Information Technology Systems Ontario ("ITSO"). Through ITSO, member associations including BDAR pool data into one large database and pay a fee to ITSO so that its members can access the pooled data.

[4] ITSO is not the only corporation that provides access to pooled MLS data. The Toronto Regional Real Estate Board ("TRREB") also provides this service. ITSO believes that it is in competition with TRREB for users and listings.

[5] This competition is at the heart of this application.

[6] In January 2023, BDAR announced an "integration" with TRREB. In March 2023, another ITSO member, Quinte and District Association of Realtors® ("QDAR"), announced its partnership with a TRREB related entity. ITSO's board viewed these developments as a threat: TRREB was the proverbial fox in the hen house.

[7] In response, the board amended ITSO's by-law concerning membership criteria. As a result of the amendment, ITSO members were required to maintain the same corporate structure and control as when the local association first became a member. Where there was a change in corporate structure or control, ITSO's board retained the right to decide whether the association would remain a member.

[8] BDAR viewed the amended by-law as a first step to its removal as a member association and feared that its members would lose access to ITSO's MLS data. To prevent this outcome, BDAR brought this application challenging the validity of the amendment, pursuant to s. 191 of the *Not-for-Profit Corporations Act, 2010,* S.O. 2010, c. 15 ("*ONCA*" or "*Act*").

[9] BDAR makes three arguments in support of its position. First, BDAR alleges that the amendment amounts to a retroactive breach of contract. Second, BDAR argues that the amendment is impermissibly vague and inconsistent with s. 48 of *ONCA*. Third, BDAR alleges that the amendment was initiated in bad faith to target BDAR. ITSO denies these assertions.

[10] For the reasons that follow, I dismiss the application. I find that the impugned amendment does not amount to a retroactive breach of ITSO's contractual obligations to BDAR and that the amendment is neither impermissibly vague nor inconsistent with *ONCA*. Finally, I find that the amendment was made to keep ITSO's perceived competitor, TRREB, from obtaining *de jure* control over its members associations and, as a result, play a governance role in ITSO's affairs. This is not an improper purpose. In making the amendment, the board was acting in the best interest of ITSO and some of its association members that raised concerns about TREBB's involvement with other member associations.

**Summary of Facts**

[11] What follows below is a summary of the facts relevant to the application. These facts are not contested. In the following sections of these reasons, I make specific findings of fact in relation to issues that are contested.

***(i) Context – Access to MLS Data***

[12] Access to MLS data is the lifeblood of Realtors®. Real estate brokers and agents use MLS data to compile listings for their clients and to derive educated estimates of the value of property being sold or being purchased. Without access to MLS data, Realtors® cannot satisfy their fiduciary duty to their clients.

[13] To get access to MLS data, Realtors® join local real estate associations. In 2023, there were 29 local real estate associations in Ontario. Voluntary membership with an association comes with several benefits, including access to pooled MLS data through an MLS system. To become a member of a local association, the Realtors® must meet the criteria set out by the local association and pay an association fee.

[14] MLS systems are member-to-member cooperative selling systems for the purchase, sale and leasing of real estate. The system is wholly owned and controlled by one or more real estate associations that are members of the Canadian Real Estate Association ("CREA"). MLS systems include an inventory of listings of participating Realtors®.

[15] For many years, local real estate associations across Ontario maintained their own MLS systems. These systems were inherently limited by the geographical areas where the local association's members conducted business.

[16] A fictional example helps demonstrate this limitation. A real estate association in Hamilton operates an MLS system that is populated with data from its members' listings.

Most of the members purchase and sell homes in the Hamilton area. As a result, members of the association have access to robust data for that geographical area. That data, however, would not be useful if the member wanted to sell a client's property in Niagara. To get access to quality data about the Niagara market, the real estate agent would also have to be a member of a local association that operates in Niagara. This would require the member to pay two association fees.

[17] As the above example demonstrates, there are limitations to an MLS system run by a single local association. To address this, real estate associations have come together to pool data into regional MLS systems. One such regional MLS system is operated by ITSO ("ITSO MLS System").

***(ii) The parties***

[18] BDAR is a local not-for-profit association of real estate agents and brokers in the Barrie & District area. It provides opportunities and professional development to the local real estate community and the public at large.

[19] ITSO is a not-for-profit, nonshared capital corporation under *ONCA*. In 2023, ITSO was made up of 18 local real estate associations and the ITSO MLS System had approximately 23,296 users. Use of the ITSO MLS System is governed by a services agreement to which ITSO and all ITSO members are parties ("ITSO MLS Agreement"). BDAR is a party to the ITSO MLS Agreement.

[20] The individually named respondents were either directors and/or officers of ITSO at the time of the impugned amendment.

[21] TRREB is a local real estate association. It is not a party to this application but its involvement with ITSO members is at the center of this application. TRREB is the largest local real estate association in Canada with nearly 73,000 members. TRREB is not a member of ITSO nor is it a party to the ITSO MLS Agreement. TRREB operates its own MLS system called PropTx through a for-profit wholly owned subsidiary.

***(ii) ITSO's By-laws***

[22] In 2020/2021, ITSO enacted by-law No. 1B which addresses, amongst other things, ITSO's operative and administrative functions, member requirements, voting rights, meeting requirements, the process to ratify amendments, and to pass resolutions.

[23] In accordance with article 2.1, ITSO has two classes of members. The first class consists of member associations (i.e., local real estate associations). This class is a voting member. The second class are ITSO's board of directors who are non-voting members.

[24] Article 2.2 contains the criteria to qualify for ITSO membership and the criteria to maintain membership. To maintain membership in ITSO, all members must:

(i) comply with ITSO's by-laws, rules and policies;

(ii)through their own by-laws and rules, require members of their association to comply with ITSO's by-laws, rules, and policies; and

(iii) pay all other fees required by the ITSO MLS Agreement or as established by ITSO's board from time to time.

[25] In accordance with article 2.4, ITSO's board can terminate membership of member associations and directors for various reasons, including when a member does not comply with the conditions for maintaining membership set out in article 2.2 (see article 2.4(a)(iii)). Article 2.4(a)(iv) permits ITSO's board to terminate a member association for any reason by way of a Special Resolution.

[26] Article 3.2 provides for the conduct of directors' board meetings, notice, quorum and procedure. Article 3.8 governs the procedure for amending by-laws. Article 4 governs the procedure for special general meetings, notice, quorum and the voting process.

***(iii) Relevant provisions of the ITSO MLS Agreement***

[27] Pursuant to s. 5.4 of the ITSO MLS Agreement, each member association is required to comply with ITSO's by-laws. If a member defaults under the agreement, ITSO can terminate the agreement with the member. Upon termination, the member association could lose use, access, and license to the ITSO MLS System; however, the member association is entitled to retain its own MLS data.

[28] Not all parties to the ITSO MLS Agreement are members of ITSO. For example, the Northumberland Hills Association of Realtors® ("NHAR") became a party to the agreement in 2019 but did not apply to become a member of ITSO. NHAR terminated the ITSO MLS Agreement in July 2020, but ITSO continued to provide NHAR with access to the ITSO MLS system until February 2021.

***(iv) Events leading to the impugned amendment***

[29] In the past, ITSO and TRREB explored ways to share data from their respective MLS systems. The parties could not come to an agreement and negotiations ended in June 2022.

[30] After negotiations between ITSO and TRREB ended, BDAR began discussing potential integration with TRREB. Those discussions began in July 2022. On January 6, 2023, BDAR issued a press release announcing that its board of directors was recommending "integration" with TRREB to become a "single MLS® database".

[31] After the public announcement, ITSO asked BDAR whether it intended to terminate its membership in ITSO and its participation in the ITSO MLS Agreement. BDAR

responded that it had no intention to cancel its membership or its participation in the ITSO MLS Agreement.

[32] ITSO obtained a copy of the notice of BDAR's special general meeting held on February 16, 2023. The notice sought approval from BDAR's members to create a new class of member who would receive 10,000 votes to every 1 vote that other BDAR members enjoyed. At that time, BDAR had 1,500 regular members. Appended to the notice of the special general meeting is a document detailing the proposed revisions to BDAR's by-law. The document indicates that the new class of membership was expected to be a "Class B Special member" and that TRREB would be the only Class B Special member. The document also suggests TRREB would select four of BDAR's seven board seats.

[33] ITSO also obtained the Articles of Amendment filed by BDAR with the (then) Ministry of Public and Business Service Delivery. The Articles of Amendment, dated March 31, 2023, confirms that a Special Class B member was created.

[34] BDAR concedes the authenticity of the notice of special general meeting, the documents appended to the notice and the Articles of Amendment.

[35] On March 29, 2023, QDAR announced its amalgamation with a partner board of TRREB, the Durham Regional Association of Relators®, now known as Central Lakes Association of Realtors® ("DRAR/CLAR"). DRAR/CLAR is not a member of ITSO.

[36] TRREB's "integration" with BDAR and QDAR's amalgamation with DRAR/CLAR caught the attention of ITSO's board and some of ITSO's member associations.

***(v) The impugned amendment***

[37] Concerned about TRREB's partnership with its member associations, ITSO's board called a meeting on April 11, 2023. There is no dispute that the board followed the procedures set out in ITSO's by-law in calling the April 11th meeting.

[38] Based on documents from the April 11th board meeting, it appears that the board discussed the concerns raised by member associations being controlled by a non-member. One such concern was the potential that the partnerships could offend the one-member, one-vote principle. If TRREB had *de jure* control over any ITSO members, then it would effectively have a vote in the governance of ITSO despite not being a member.

[39] Ultimately, the board voted to pass an amendment to by-law 1B. The amendment, underlined below, had the effect of changing the criteria for maintaining membership in ITSO:

> **2.2 Member Associations**
>
> a) To qualify for membership as a Member Association in ITSO an association must:

i) Be a real estate association that is a member of The Canadian Real Estate Association; and

ii) Have their head office in the Province of Ontario.

b) To become a Member Association an association must:

i) Enter into the MLS® Services Agreement with ITSO;

ii) File an application for membership with the Board; and

iii) Pay the applicable membership fee in such amount and by such method as established by the Board from time to time.

c) The Board will review the application and shall grant membership to the association unless any condition for approval has not been met.

d) In order to maintain membership in ITSO all Member Associations must:

i) Comply with the By-laws, rules and policies of ITSO and, through their by-laws and rules, require members of their association to comply with ITSO's By-laws, policies, and rules;

ii) Pay all other fees required by the MLS® Services Agreement or as established by the Board from time to time;

iii) Maintain the same corporate structure and control as when the Member Association first became a Member Association, unless notice of the proposed change is provided to the Board and approved by the Board. For the purposes of this section "control" means the right to cast more than 50 percent of the votes that may be cast by any class of members of shareholders at a meeting of the Member Association's members or shareholders.

[40] Pursuant to article 3.8(a) of by-law 1B, the amendment came into immediate effect but was subject to ratification or amendment by a two thirds majority of the members associations at a special general meeting.

[41] The board scheduled a special general meeting for April 26, 2023 ("SGM"). The purpose of the meeting was to call a vote on a Special Resolution that would ratify the amendment passed by ITSO's board. Again, there is no dispute that the board complied with the process set out in ITSO's by-law in scheduling the SGM.

***(vi) BDAR commences this application***

[42] On April 14, 2023, BDAR's counsel wrote to ITSO expressing concern over the amendment. BDAR suggested, amongst other things, that the amendment was, "hastily

proposed in bad faith" and was intended to target BDAR or any other member association that has experienced a change of control in their corporate history.

[43] ITSO's counsel (not counsel on this application), responded on April 17, 2023. In that correspondence, ITSO states that the amendment was not intended to target BDAR as it was passed shortly after QDAR's announcement and provided the following explanations for the amendment:

> (a) ITSO was concerned that TRREB's control over BDAR would offend the one-member, one-vote governance structure. Similarly, if other member associations integrated with TRREB or TRREB partner boards (e.g., QDAR), then TRREB could control more than one vote at ITSO member meetings, which is also contrary to the one-member-one vote foundational principle;
>
> (b) ITSO's members were demanding action as they were suffering a decline in their membership due to members departing for BDAR to take advantage of joint access to both PropTx and the ITSO MLS System; and
>
> (c) BDAR had breached its duty to perform its obligations under the ITSO MLS Service Agreement by, "effectively granting ITSO's primary competitor in the provision of MLS Services in Ontario access to ITSO membership."

[44] Given ITSO's position, BDAR commenced this application and moved for an interim injunction. At the injunction hearing, the parties agreed that the SGM could proceed but the proposed by-law amendment would be further amended to include a temporary exemption for BDAR. A consent order was issued by Lavine J. that permitted the SGM to proceed and a vote to be taken on a modified version of the amendment (edits included in Lavine J.s' order):

> Maintain the same corporate structure and control as when the Member Association first became a Member Association, unless notice of the ~~proposed~~ change is provided to the Board and approved by the Board. For the purpose of this section "control" means the right to cast more than 50 per cent [sic] of the votes that may be cast by any class of members or shareholders at a meeting of the Member Associations' members of or shareholder. <u>BDAR is temporarily exempted from the application of this By-law section pending determination of the injunction application filed in Court File No. CV-23-609.</u>

[45] Clause 3 of Lavine J.'s order makes it clear that the order is without prejudice to the rights of either party to raise any issues related to the application.

[46] At the SGM, the amendment was ratified by a two-thirds majority of ITSO's members. As a result, ITSO's by-law was amended to include the impugned article 2.2(d)(iii) (as reflected in Lavine J.'s order). The amendment is now included in ITSO By-law 1C (the "By-law").

***(vii) Events After April 26, 2023***

[47] In May 2023, ITSO's board approved three separate amalgamations of member associations pursuant to s. 2.2(d)(iii) of the by-laws.

[48] In October 2023, ITSO's board terminated the membership of QDAR because QDAR chose not to submit their change of corporate structure and control to the board. Instead, QDAR terminated its membership under article 2.4(a)(ii).

[49] On July 16, 2024, ITSO's board approved the membership of the Cornerstone Association of Realtors® ("Cornerstone"). Cornerstone was created after three ITSO member associations amalgamated with a non-member association.

***(viii) Procedural issue – leave to file affidavits sworn after cross-examination***

[50] On this application, the parties relied upon evidence provided by two affiants. The timeline of relevant events prior to the swearing of the late affidavits is as follows:

(a) BDAR's CEO, Ms. Julia Price-Greig, swore an affidavit in support of the application on April 23, 2023.

(b) ITSO's president, Ms. Wendy Webb, swore an affidavit in response to the application on January 3, 2024.

(c) Ms. Price-Greig swore a reply affidavit on March 11, 2024.

(d) Ms. Webb was cross-examined on May 8, 2024,

(e) Ms. Price-Greig was cross-examined on May 9, 2024.

[51] On November 6, 2024, ITSO filed a short supplementary affidavit sworn by Ms. Webb. On November 26, 2024, the parties appeared before Sutherland J. to timetable the remaining steps in the litigation. From the correspondence filed on the application, it appears that the parties had contemplated that BDAR would file a second reply affidavit on or before December 6, 2024. Ms. Webb was to be cross-examined on her supplementary affidavit on December 17, 2024, and Ms. Price-Greig was to be cross-examined on her second reply affidavit on December 18, 2024.

[52] Ms. Price's second reply affidavit was executed on December 13, 2024, and was served on December 15, 2024. In oral argument, counsel for ITSO confirmed that given the contents of the second reply affidavit, it did not intend to cross-examine.

[53] ITSO argues that it should be granted leave to file Ms. Webb's supplementary affidavit and that I should refuse to admit Ms. Price-Greig's second reply affidavit. BDAR consents to the admissibility of Ms. Webb's supplementary affidavit which mostly relates to ITSO's membership following the impugned amendment.

[54] Unlike ITSO, BDAR did not bring a motion seeking leave to file the second reply affidavit. In oral argument, BDAR urged me to admit Ms. Price-Greig's supplementary affidavit. I do not believe that BDAR has been prejudiced by the failure to bring a formal motion. In the circumstances, I find that BDAR's failure to bring a formal motion is not fatal.

[55] Rule 39.02(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, prohibits a party who has cross-examined on an affidavit delivered by an adverse party from subsequently delivering an affidavit for use at a hearing without leave of the court. A court must grant leave where it is satisfied that the moving party ought to be permitted to respond to any matters raised on the cross-examination.

[56] BDAR argues that Ms. Price-Greig's supplementary affidavit is responsive to Ms. Webb's cross-examination and to undertakings produced by ITSO following Ms. Webb's May 9, 2024, cross-examination. I find that parts of Ms. Price-Greig's supplementary affidavit are responsive to Ms. Webb's cross-examination and to undertakings. That said, there are several paragraphs that should not be admitted. As such, I grant leave to admit the affidavit subject to the following caveats:

(a) Paragraph 12 describes ITSO's "super subscriber" fee. This is not relevant to the application.

(b) Paragraphs 17-18, 20 and 22 include inadmissible opinion evidence.

(c) Paragraphs 22-24, 25-27, 30, 32-34, 38-41 and 46-47 include impermissible argument.

(d) Paragraphs 42-45 include hearsay.

[57] Frankly, very little turns on the supplementary affidavit or second reply affidavit. Both affidavits primarily relate to events that occurred after the impugned amendment. As will be discussed in greater detail below, to the extent that BDAR challenges whether the amendment was made in good faith, the focus of the analysis is ITSO's concerns at the time of the amendment and whether those concerns were genuine or reflect some oblique improper motive.

**B. Issues**

[58] The overarching issue on this application is the validity of the amendment as reflected in Lavine J.'s order. In determining the validity of the amendment, I must answer three questions:

(1) Does the amendment amount to a retroactive breach of ITSO's contractual obligations to BDAR?;

(2) Is the amendment impermissibly vague and inconsistent with s. 48 of *ONCA*?; and

(3) Was the amendment initiated in bad faith to target BDAR?

## C. Governing Principles

[59] Before turning to BDAR's challenges to the amendment, I will review the relevant provisions of *ONCA* and some of the jurisprudence that informs my analysis.

### *(i) Not-for-Profit Corporations Act, 2010*

[60] Section 1 of *ONCA* defines a "corporation" as a body corporate without share capital. In this section of my reasons, I use the term corporation as it is defined in the *Act*.

[61] Subsections 17(1) and (2) and paragraph 103(1)(d) of *ONCA* provide that directors may by resolution amend any by-law that regulates the activities or affairs of the corporation, including to change a condition required for being a member. By-law amendments are subject to member ratification, with changes to conditions for membership requiring a two-thirds special members' resolution.

[62] Pursuant to s. 21 of *ONCA*, directors of a corporation shall manage or supervise the management of the activities and affairs of the corporation. Section 43 of the *Act* sets out the "standard of care" for directors and officers of a corporation. The section requires directors and officers to, "act honestly and in good faith with a view to the best interests of the corporation" and to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances".

[63] *ONCA* also includes provisions regarding membership, termination of membership and powers to discipline or terminate membership.

[64] Subsection 48(1) states that a by-law of a corporation must set out the conditions required for being a member. Pursuant to s. 49, the directors may issue memberships in accordance with the articles and any conditions set out in the by-laws. Section 50 sets out the events that lead to a termination of membership, which includes when the member is expelled, or the person's membership is otherwise terminated in accordance with the articles or by-laws.

[65] Section 51 provides a corporation with the power to discipline or terminate a member. The section requires that the discipline or termination of membership be conducted in good faith and be done in a fair and reasonable manner with at least at least 15 days notice and the opportunity to be heard at least 5 days before the discipline or termination comes into effect. A member subject to termination or discipline has recourse to s. 191.

[66] Section 191 permits a "complainant" to bring an application seeking compliance with the *Act*, regulations, articles or by-laws of the corporation or restraining a person from acting in breach of the same:

**Compliance or restraining order**

191 On the application of a complainant or a creditor of a corporation, the court may make an order directing the corporation or any director, officer, employee, agent, auditor, trustee, receiver, receiver-manager or liquidator of the corporation to comply with this Act, the regulations or the articles or by-laws of the corporation or restraining any such person from acting in breach of them and may make any further order that it thinks fit.

**Appeals**

192 An appeal lies to the Divisional Court from any order made by the court under this Act.

[67] The *Act* defines a "complainant" as including a member of the corporation (see s. 182).

[68] Section 191 is broadly worded and allows for a court to make any order that it thinks fit (*Dillon v. Carp Agricultural Society*, 2024 ONSC 1858, at para. 42). Section 191 or its equivalent in the *Canada Not-for-profit Corporation Act*, S.C. 2009, c. 23 (see s. 259) has been used by "complainants" to challenge, amongst other things:

(a) a refusal to grant membership (*Mississauga Majors v. Provincial Women's Softball Association*, 2024 ONSC 4986);

(b) a decision to revoke membership (*Dillon*);

(c) elections of directors (*Vietnamese Association, Toronto v. Duong*, 2023 ONSC 6203, 58 R.P.R. (6th) 159; and *Lewis v. Niagara Regional Native Centre*, 2024 ONSC 5196, 54 B.L.R. (6th) 123); and

(d) amendments to by-laws (*Bhadra v. Chatterjee*, 2016 ONSC 4845, 61 B.L.R. (5th) 113).

***(ii) The Court's role when reviewing the affairs of a not-for-profit corporation***

[69] Courts are generally reluctant to interfere in the internal affairs of a voluntary club or organization. Nordheimer J. (as he then was) in *Lee v. Lee's Benevolent Assn. of Ontario*, [2004] O.J. No. 6232 (Ont. S.C.), aff'd [2005] O.J. No. 194 (Div. Ct.), cautioned against judicial intervention in the internal affairs of non-profit organizations:

[12] Absent some demonstrated evidence that any irregularities went to the heart of the electoral process or lead to a result which does not reflect the wishes of the

majority, the court should be loathe to interfere in the internal workings of such groups.

*(*See also: *Wang v. Pritchard*, [2007] O.J. No. 798 (Ont. S.C.), at para. 9; *Pal et al v. Chatterjee et al*, 2013 ONSC 1329, at para. 30; *Scharafanowicz v. Hamilton Regional Indian Centre*, 2011 ONSC 6953, at paras. 18-19; *Bala v. Scarborough Muslim Association*, 2010 ONSC 6834, at paras. 21-22).

[70] The above noted cases do not immunize corporations from judicial oversight. Rather, the jurisprudence recognizes that judicial intervention is warranted in narrow circumstances including the following:

(1) when the corporation has failed to comply with the rules of the corporation as set out in its articles, by-law and any statutory requirements;

(2) when the corporation failed to comply with rules of natural justice; and

(3) when the corporation's actions were taken in bad faith.

(*Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, at para. 161; *Pal v. Chatterjee*, 2013 ONSC 1329, at paras. 30-35; *Sahaydakivski v. YMCA of Greater Toronto*, [2006] O.J. No. 1368 (Ont. S.C.); and *Hellenic Congress of Quebec v. Canadian Hellenic Congress*, 2020 ONSC 2224, 2 B.L.R. (6th) 245, at para. 66).

[71] Even in these narrow circumstances, courts will only intervene when a legal right of sufficient importance, such as a property or contractual right, are at stake (*Hellenic Congress of Quebec*, at para. 66; and *Pal*, at paras. 30-31). In determining whether a "property or contractual right" is at issue, the court will focus on whether the party seeking relief has a right that is sufficiently important to deserve the intervention of the court (*Pal*, at para. 31, quoting Gonthier J. in *Hofer*, at pg. 175).

[72] A voluntary association's by-laws constitute a contract that sets out the rights and obligations of members and the organization, and an expectation of procedural fairness may attach as a way of enforcing the terms of a contract (*Senez v. Montreal Real Estate Board*, [1980] 2 S.C.R. 555; *Aga v. Ethiopian Orthodox Tewahedo Church of Canada*, 2020 ONCA 10, rev'd on other grounds, 2021 SCC 22; and *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750).

[73] Even when it is appropriate to analyze the decisions of not-for-profit corporations, the court will pay significant deference to the corporation's decision. This deference is consistent with the business judgment rule that dictates that a court should refrain from conducting a "microscopic examination" of a board's decision (*Dillon*, at para. 68; see also *Hadjor v. Homes First Society*, 2010 ONSC 1589, 70 B.L.R. (4th) 101, at para. 49, quoting *CW Shareholdings Inc. v. WIC Western International Communications Ltd.*, 39 O.R. (3d) 755 (Gen. Div), at p. 774). Board decisions, including those of not-for-profit corporations, are owed deference by the court because the directors are in a far better

position to make decisions in the best interest of the corporation (*3716724 Canada Inc. v. Carleton Condominium Corporation No. 375*, 2016 ONCA 650, 61 B.L.R. (5th) 173, at paras. 47, 48, and 50; and *Dhaliwal v. Singh*, 2020 ONSC 6116, 11 B.L.R. (6th) 263, at para. 48).

## D. Application of Governing Principles

### *(i) Threshold Issues*

[74] There are two threshold issues. First, does BDAR have standing to bring this application? Second, does BDAR's application raise a legal right of sufficient importance to warrant this court's review of the impugned by-law?

[75] With respect to the first question, there is no doubt that BDAR has standing to bring this application. BDAR is a member of ITSO and is a "complainant" under s. 182 of the *Act*.

[76] With respect to the second question, I find that BDAR's application does raise issues relating to a legal right of sufficient importance. Specifically, the application raises issues that may impact BDAR's membership in ITSO and its legal right to use and access the ITSO MLS System. These contractual rights are significant to BDAR and any other member that undergoes a change in corporate structure and control after obtaining membership with ITSO.

[77] ITSO did not explicitly address this issue in its factum or oral argument. ITSO does, however, argue that the application is premature because BDAR's membership has not been terminated and there is no certainty that it will be terminated. Even if BDAR's membership is terminated, ITSO argues, BDAR will have access to s. 191 of *ONCA* to challenge its termination (see s. 51(5)). Along the same lines, ITSO argues that there is no certainty that BDAR's participation in the ITSO MLS Agreement will be terminated. ITSO points to the fact that NHAR was a party to the ITSO MLS Agreement and had access to the ITSO MLS System despite not being a member of ITSO. I note that in cross-examination, counsel for ITSO advised that his client could not commit to renewing BDAR's participation in the ITSO MLS Agreement.

[78] ITSO's arguments are not persuasive. If the BDAR exemption is removed from article 2.2(d)(iii), then ITSO's board will have to determine whether to "approve" BDAR's change in corporate structure and control. In this way, BDAR's membership with ITSO is in jeopardy. If the change is not approved, BDAR's membership will be terminated and its access to the ITSO MLS System will be put in jeopardy. This dual barrelled jeopardy is sufficiently important to justify examining the amendment. Put simply, BDAR should not have to wait for the board's decision before having access to the court.

***(ii) Is article 2.2(d)(iii) a retroactive breach of contract?***

[79] BDAR argues that the by-law amendment retroactively breaches BDAR's contractual relationship with ITSO as it changes the membership rules that were applicable when BDAR became a member.

[80] In making this argument, BDAR relies on Ross J.'s decision *Bector v. Vedic Hindu Cultural Society*, 2014 BCSC 230. In that case, Ross J. granted an application pursuant to s. 85 of the *Society Act*, R.S.B.C. 1996, c. 433, in circumstances where a not-for-profit corporation amended its by-laws to increase the fee that must be paid by a "life members".

[81] In *Bector*, the corporation's by-law provided for three classes of membership, one of which was a life membership. Where a member had a life membership, they were required to pay a one time $250.00 fee and were not required to pay an annual membership fee. The by-law was subsequently amended to require life members to pay an additional $100 fee by a specific date failing which the membership would be terminated. Ross J. found that the corporation could not require existing life members to pay an additional membership fee where the original lifetime membership was based on a one-time fee (para. 36). Allowing the increased fee would have the effect of breaching the contract entered by the lifetime member and the corporation at the time membership was granted.

[82] In coming to this conclusion, Ross J. relied upon Tait A.C.J.'s decision in *Beaudry v. Le Club St. Antoine* (1901), CarswellQue 142 (Que. Ct. Rev.). In *Beaudry*, Tait A.C.J. found that increasing the fee imposed on a lifetime member had the effect of breaching the contract that was formed upon the lifetime member paying the required fee at the time membership was granted. Importantly, Tait A.C.J. recognized that a club can make by-laws and regulations that will be effective in the future where it does not effectively violate past contracts (pg. 465-456). This same point was made in *Whittall v. Vancouver Lawn Tennis and Badminton Club*, 2005 BCCA 439, 258 D.L.R. (4th) 370, where Ryan J.A. held:

> [49] The respondent submitted that while the modern relationship between a society and its members is contractual, the contract must be given an interpretation which allows for the exercise by the members of their right to govern themselves according to democratic principles. The members have entered into their contractual relationship with one another on the understanding that the relationship will be regulated by the constitution and by-laws as agreed upon from time to time by a majority of the voting members. This understanding is essential for the proper operation of the society. It is, therefore, an overriding term of every contract between a society and its members that the terms of the relationship are subject to amendment in accordance with any future by-laws adopted by the members. In the case at bar, that term is expressly set out in the Club by-laws.

> [50] I agree with that analysis. This does not leave the appellant at the whim of the majority — the oppression remedies found in s. 200 of the *Company Act* are available to all members.[1]

[83] *Bector* does not assist BDAR. To state the obvious, ITSO did not grant a lifetime membership to BDAR such that the amendment could be viewed as a breach of contract. ITSO's by-law has always allowed for the amendment of "any section" of the by-law (see article 3.8(a)). "Any section" includes articles 2.2(a)-(d). When BDAR became an ITSO member, there was no explicit or implicit agreement that the criteria for continued membership would remain static.

[84] As *Bector*, *Beaudry*, and *Whittall* all recognize, members enter a contractual relationship with an association on the understanding that the relationship will be regulated by the by-laws, which can be amended. In this case, the by-law explicitly codifies this understanding. As such, I find that the amendment is not a breach of contract in the same way that increasing lifetime membership fees was found to be a breach of contract in *Bector* and *Beaudry*.

[85] At paragraphs 69-70 of its factum, BDAR also argues that the amendment retroactively terminated its membership with ITSO because BDAR's change in corporate structure and control was completed prior to the amendment. BDAR argues that this retroactive loss of membership violates the principles of natural justice. This argument would be more persuasive had the wording of the amendment not been changed at the injunction hearing and ratified at the SGM.

[86] The prior version of the amendment required ITSO's board to approve or reject a *proposed* change. This version of the amendment required the board to approve any change in corporate structure and control *prior* to the change occurring. If this version was in effect, then BDAR would be "offside" the membership criteria before the amendment was put in place.

[87] As noted above, the version of article 2.2(d)(iii) that was approved at the SGM is different from the version voted on by ITSO's board. The word "proposed" was removed. The edit is significant as it changed the meaning of article 2.2(d)(iii).

[88] Based on the current wording of article 2.2(d)(iii) (with the BDAR exception removed), BDAR will only be "offside" the membership criteria if it had a change of corporate structure and control (which it has) and ITSO's board does not approve the change. Based on the wording of the amendment, the board can approve a change in corporate structure and control *after* the change has occurred.

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1 Subsequent decisions from the British Columbia Court of Appeal have casted doubt on whether the oppression remedy is available when challenging a decision of a "society" under the *Society Act* – see *Wang v. British Columbia Medical Association*, 2010 BCCA 43, 1 B.C.L.R. (5th) 268.

[89] At this stage, ITSO's board has not decided whether to approve BDAR's change in corporate structure and control. As a result, BDAR's membership has not been retroactively terminated. If the board does not approve BDAR's change of corporate structure and control, then it will have to comply with article 2 of the by-law and s. 50 of *ONCA*. Both provide specific procedural protections that are consistent with natural justice. As a result, I find that the amendment does not offend the principles of natural justice.

***(iii) Is article 2.2(d)(iii) impermissibly vague or inconsistent with s. 48(1) of ONCA?***

[90] With respect to this challenge, BDAR makes two arguments. First, BDAR argues that the wording of the amendment is impermissibly vague. Second, BDAR argues that article 2.2(d)(iii) conflicts with s. 48(1) of *ONCA*.

[91] With respect to the first argument, BDAR does not cite any decisions where the doctrine of vagueness has been applied to a private corporation's by-laws. In the context of challenges to municipal by-laws, the doctrine of vagueness ensures that delegated authority is exercised in a manner consistent with the legislative grant of authority to a municipality. In *2312460 Ontario Ltd. et al. v. Toronto (City)*, 2013 ONSC 1279, 115 O.R. (3d) 206, Himel J. explains at para. 35:

> Municipalities are creatures of statute which have been delegated authority to exercise legislative, administrative and quasi-judicial powers. A municipality must act within its defined jurisdictional sphere and the courts will apply doctrines such as unreasonableness, discrimination, bad faith and uncertainty to determine whether a municipality has exceeded its jurisdiction. With respect to uncertainty and vagueness, the court will intervene to ensure that municipal by-laws are such that what is required for compliance is clear: see S. Makuch, N. Craik and S. Leisk, Canadian Municipal and Planning Law, 2nd ed. (Toronto: Thomson Carswell, 2004), at p. 94. At p. 102, the authors write:
>
> > A municipal by-law may also be found invalid on the basis of vagueness or uncertainty, the test for which is where a reasonably intelligent reader (or well-intentioned citizen) cannot ascertain the meaning or application of the by-law. There is a duty on the municipal council to express the meaning of a by-law with certainty so that every citizen may understand the by-law in order to comply with it.

[92] In my view, the vagueness doctrine does not apply to a private corporation's by-laws. I come this this conclusion for five reasons.

[93] First, a private corporation is not a state actor.

[94] Second, a private corporation does not have delegated authority to exercise legislative, administrative and quasi-judicial powers.

[95] Third, a private corporation's by-laws are not of general application. The by-law only applies to the corporation, its officers and directors, and its members.

[96] Fourth, the officers and directors of a corporation receive the benefit of the business judgment rule. The court gives deference to corporate actors because it is presumed that they, and not the court, know what is in the best interest of the corporation. Applying the vagueness doctrine appears at odds with a deferential approach to reviewing the actions of corporate officers or directors.

[97] Fifth, violations of a corporate by-law may lead to a termination of membership (which is reviewable under s. 191 of *ONCA*) but cannot lead to prosecution under the *Provincial Offences Act*, R.S.O. 1990, c. P.33, or the *Municipal Act, 2001*, S.O. 2001, c. 25, and, as a result, does not engage the rule of law justification that is one of the animating principles of the vagueness doctrine (*R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606).

[98] I note that similar but not identical questions on the applicability of the vagueness doctrine were recently expressed by the Ontario Court of Appeal in *Covant v. College of Veterinarians of Ontario*, 2023 ONCA 564, 539 C.R.R. (2d) 161. In that case, a veterinarian subject to discipline by the College argued that the vagueness doctrine should apply to regulatory legislation even in the absence of s. 7 of the *Canadian Charter of Rights and Freedoms*, being engaged. The Court of Appeal did not rule on the "juristic footing" of the doctrine, preferring to dispose of the argument on the assumption that the doctrine applied (paras. 42-44).

[99] Even if the doctrine applies, I find that article 2.2(d)(iii) is not impermissibly vague.

[100] The threshold for finding that a law is impermissibly vague is relatively high. Vagueness requires unintelligibility, not simply uncertainty (*Nova Scotia Pharmaceutical Society*). A law will be impermissibly vague if it so lacks precision as not to give sufficient guidance for legal debate (*Nova Scotia Pharmaceutical Society*; *Covant*, at para. 44; *The Adult Entertainment Association of Canada v. Ottawa (City)*, 2007 ONCA 389, 283 D.L.R. (4th) 704, at para. 55; *Covant*, at para. 44; *Mussani v. College of Physicians and Surgeons of Ontario*, 74 O.R. (3d) 1 (C.A.), at para. 63). The fact that a law requires interpretation in the context of a specific factual matrix does not suffice for a finding of vagueness (*Covant*, at para. 45).

[101] Applying this standard to the amendment, I find that it sets out a clear threshold for ongoing membership – the member must maintain the same corporate structure and control as when it first became a member.

[102] BDAR argues that "corporate structure" is too vague of a term because members in a local association come and go with the passage of time. During Ms. Webb's cross-examination, the following example was used:

Q. Right. So, the people – the control of the Lakelands Association has changed over 36 years because there are different people voting now than there were 36 years ago.

A. Other than it's one member, one vote, yes.

Q. I'm sorry?

A. It's one member, one vote.

Q. But the people who voted have changed.

A. Yes.

Q. Right. So, the control of the Lakelands Association has, by definition, changed because the voters have changed, right?

A. Sure.

[103] I do not find this argument compelling. The phrase used in article 2.2(d)(iii) is, "[m]aintain the same corporate structure and control". The terms "corporate structure" and "control" are linked. The amendment applies where the structure of the corporation has changed such that control over the local association has changed. Changing membership over time impacts who votes, but it does not change control over the local association. Recall that the amendment includes a definition for "control". "Control" means the right to cast more than 50 percent of the votes that may be cast by any class of members or shareholders.

[104] Article 2.2(d)(iii) applies to member associations that, since gaining membership in ITSO, have undergo a change in corporate structure that leads to any class of members having more than 50 percent of the votes that may be cast. Where such change occurs, ITSO's board must review the change to determine if membership is still warranted.

[105] In my view, the above interpretation is clear from both the language of the amendment and the context in which the amendment was made (i.e. the concern over TRREB's integration with BDAR and QDAR's amalgamation with DRAR/CLAR). Even if there is some ambiguity in the term "corporate structure", I do not find that the term is so vague that it does not give sufficient guidance for legal debate.

[106] In oral argument and in its factum, BDAR argues that its membership will likely be terminated if the BDAR exemption is removed from the amendment. BDAR's position undermines their vagueness argument. Both parties agree that BDAR has had a change of corporate structure and control as those terms are used in the amendment and that ITSO's board will have to determine whether to approve the change. This common understanding demonstrates that the amendment is sufficiently clear.

[107] BDAR also argues that article 2.2(d)(iii) does not include the factors that will be considered by ITSO's board when determining whether to approve a change in corporate structure and control. BDAR argues that this omission makes article 2.2(d)(iii) inconsistent with s. 48 of *ONCA*. In response, ITSO argues that the board will consider several factors including:

(a) Does the change involve only ITSO Member Associations or are non-member entities involved?

(b) Does the purpose of the resulting entity (e.g., the amalgamated association) align with or interfere with the Mission, Vision and Principles of ITSO?

(c) Does the corporate change affect the Member Association's corporate status (e.g., non-profit or for-profit)?

(d) Does the corporate change affect the voting rights of the Member Association's members (e.g. loss of control over the association)?

(e) Does the corporate change give a non-member entity influence over votes at ITSO Member Meetings?

(f) Does the corporate change affect whether or not the Member Association is in compliance with CREA and OREA's By-laws, rules and policies?

(g) Does the corporate change affect ITSO's ability to operate in compliance with its Mission, Vision, and Principles?

[108] These factors are not included in article 2.2(d)(iii). Rather, these are factors that were considered by ITSO's board when it approved Cornerstone's membership. In cross-examination, Ms. Webb confirmed that: (a) there is no policy relating to the factors that should be considered by the board; and (b) that ITSO's board has unfettered discretion to approve or reject a change in corporate structure and control.

[109] In support of its argument, BDAR relies on Chozik J.'s decision in *Mississauga Majors v. Provincial Women's Softball Association*, 2024 ONSC 4986. In that case, the Provincial Women's Softball Association ("PWSA") rejected an application for membership brought by the Mississauga Majors. PWSA rejected the application because it was concerned that the applicant would poach players from neighbouring softball associations. PWSA's by-laws included membership criteria and made membership mandatory if the criteria were satisfied. After finding that the applicant satisfied the membership criteria, Chozik J. found that the PWSA could not deny membership on a basis that was not included in its by-law:

> [76] Article 2.1 of the PWSA by-laws does not confer any discretion on the PWSA to reject associations who apply for membership and who otherwise meet the membership conditions set out in those by-laws.

> [77] No authorities were brought to my attention to the effect that a corporation could exercise discretion to deny membership where its by-laws state that membership must be granted when certain conditions are met. Section 48(1) of the *ONCA* requires all and any membership criteria to be contained in the by-laws of a non-for-profit corporation like the PWSA.
>
> [78] The case law before me establishes that "unless the criteria for membership are set out in the by-laws, the directors do not have the discretion to deny membership on some other basis that they themselves determine.": *Farrish v. Delta Hospice Society*, 2020 BCSC 968, at para. 52; *De Guzman et al. v. Philippine Community Centre Society et al.*, 2007 BCSC 591, at paras. 7-8.
>
> [79] To change the membership criteria, and address the legitimate concerns the PWSA may have about the poaching of players from the neighbouring associations or teams, the PWSA can – through special resolution – change its membership conditions. But it cannot apply an operational rule or policy to deny membership selectively to associations that otherwise meet its membership criteria as set out in its by-laws.

[110] *Mississauga Majors* does not assist BDAR. *Mississauga Majors* and the cases cited by Chozik J. are distinguishable. The central ratio of *Mississauga Majors*, *Farrish*, and *De Guzman*, is that a corporation cannot deny membership based on criteria that are not set out in the corporation's by-laws (see *Mississauga Majors*, at para. 78; *Farrish* at para. 53; and *De Guzman*, at para. 8). More recently, the British Columbia Court of Appeal in *Sidhu v. Kalgidhar Darbar Sahib Society*, 2024 BCCA 402, described this line of authority as follows:

> [42] Where bylaw criteria exist, a society does not have the authority to create additional qualifications beyond those explicitly stated: *Farrish*, at para. 90, citing *De Guzman v. Philippine Community Centre Society*, 2007 BCSC 591, at para. 8. Similarly, a society may not exercise discretion to exclude certain candidates beyond that granted to it in its bylaws: *Peel (Regional Municipality) v. Greater Toronto Airports Authority*, 5 M.P.L.R. (3rd) 101 at para. 60, 1999 CarswellOnt 3022 (ONSC), aff'd. 130 O.A.C. 68, 2000 CanLII 5648 (ONCA). This is the case even where the society fears the candidate would cause future harm to the Society and believes it is acting in good faith to protect its interests: *Peel* at para. 67; see also *Farrish* at paras. 75–76, citing *Yukon Government (Registrar of Societies) v. Humane Society of Yukon*, 2013 YKSC 8 at paras. 8–15. Courts therefore have an important role to play in scrutinizing decisions made by societies—discretionary or otherwise—to ensure they stay within the bounds of what their constitution and bylaws allow.
>
> (see also *Farrish v. Delta Hospice Society*, 2020 BCCA 312, 454 D.L.R. (4th) 417, at paras. 75-76, 81 and 85)

[111] Unlike *Mississauga Majors* or the cases cited within that decision, there is no allegation that ITSO's board is terminating membership for reason that are not included in article 2.2(d).

[112] Section 48 of *ONCA* states that the "by-law of a corporation must set out the conditions for being a member of the corporation…". I interpret the phrase "conditions required for being a member" as including both conditions for membership and conditions for ongoing membership. This interpretation best accords with a purposive interpretation of the statute and gives ordinary and grammatical effect to the term "being a member".

[113] Consistent with s. 48 of *ONCA*, the conditions for membership are set out in articles 2.2(a) and (b) of the by-law. Similarly, article 2.2(d) sets out an exhaustive list of conditions required for maintaining membership.

[114] Article 2.2(d)(iii) provides explicit authority to ITSO's board to consider whether to "approve" a change in corporate structure and control that occurs after a member was granted membership. The fact that a two-thirds majority of ITSO's members provided the board with this discretion distinguishes this case from other decisions which have found that a corporate board exceeded its jurisdiction by screening applications for membership where the by-law does not explicitly or by necessary implication permit such screening (see *Kaila v. Khalsa Diwan Society*, et al., 2003 BCSC 1223, 17 B.C.L.R. (4th) 283, at para. 13 and 24; *Yukon Government (Registrar of Societies) v. Humane Society of Yukon*, 2013 YKSC 8, at para. 24; and *Peel (Regional Municipality) v. Greater Toronto Airports Authority* (1999), 5 M.P.L.R. (3rd) 101 (Ont. S.C.), aff'd (2000), 12 M.P.L.R. (3d) 107 (C.A.)).

[115] The only aspect of "being a member" that is not included in article 2.2(d)(iii) are the factors the board considers in determining whether to "approve" the change of corporate structure and control. To find that this omission violates s. 48 of *ONCA* would mean that any condition for ongoing membership that includes an element of discretion would conflict with s. 48. For example, ongoing membership in ITSO requires member associations to pay all fees established by ITSO's board (article 2.2(d)(ii)). The by-law does not set out the specific fee amount nor does it provide any guidance on how ITSO's board will exercise its discretion in determining the quantum of the fees. Surely this omission does not make article 2.2(d)(ii) inconsistent with s. 48 of *ONCA*.

[116] Similarly, the By-law permits ITSO's board to terminate a member for "any reason" subject to the approval of a two-thirds majority of the members. Again, the by-law does to provide any guidance on how the board will exercise its discretion to terminate for "any reason". Surely, this "any reason" article does not violate s. 48 in circumstances where a two-thirds majority of members voted to provide the board with such discretion.

[117] Article 2.2(d) exhaustively sets out the conditions for ongoing membership and explicitly provides ITSO's board with the power to approve a member that does not meet the

condition to maintain the same corporate structure and control as it had upon first becoming a member. This is sufficient to comply with s. 48 of *ONCA*.

[118] Even if I am wrong on this issue, the practical reality is that this does not provide BDAR with any meaningful relief. ITSO could simply amend article 2.2(d)(iii) to include the factors to be considered in determining whether to approve the change in corporate structure and control. In this way, successfully challenging article 2.2(d)(iii) on this ground would amount to a pyrrhic victory.

***(iii) Was the amendment made in bad faith?***

[119] BDAR alleges that ITSO acted in bad faith because: (i) the amendment was meant to target BDAR; (2) the rationales for the amendment were "conjured" up as an after the fact justification and, in any event, those rationales were not born out by subsequent events; and (3) ITSO is treating BDAR differently from other member associations that have experienced a change in corporate structure and control.

[120] As noted above, there is no allegation that ITSO did not comply with its internal rules when amending its by-law. However, compliance with ITSO's internal rules is not a complete answer to BDAR's challenge. A court can review decisions made by not-for-profit corporations *in accordance with its by-laws* when officers or directors of a corporation have acted in bad faith (*Chu v. The Scarborough Hospital Corporation* (2007), 35 B.L.R. (4th) 254 (Ont. Div. Ct.) at para. 22; *London Humane Society* (Re), 2010 ONSC 5775, 77 B.L.R. (4th) 119, at para. 29; *Dillon*, at para. 63; and *Bhadra*, at para. 105).

[121] What then is "bad faith", and the flip side of the coin, "good faith" in the context of *ONCA*?

[122] In *Jennings v. Bernstein* (2000), 11 B.L.R. (3d) 259 (Ont. S.C.), Whitten J. provided a useful framework for evaluating "good faith" (paras. 38-41)[2]:

> [38] Black's Law Dictionary defines "good faith" as:
>
> > an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, amongst other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is a concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone.

2 Whitten J. defined "good faith" in the context of a derivative action. I see no reason for why the definition would not equally apply to the term good faith as it is used in s. 43 of *ONCA*.

> [39] The concept of good faith is founded on honesty. It is not equivalent to saintliness. It is not devoid of self interest. …
>
> […]
>
> [41] Good faith has to have an objectively reasonable component especially in light of the practical objective. To not have such a component would in extreme situations erode the good faith. It is with the objective scrutiny, that the good faith requirement overlaps with the requirement that the derivative action be in the interests of the corporation.
>
> (see also *London Humane Society (Re)*, 2010 ONSC 5775, 77 B.L.R. (4th) 119, at para. 31)

[123] In the context of not-for-profit corporations, "bad faith" has been interpreted as acting in the absence of good faith or acting with an oblique, illegitimate or collateral purpose. In *Pal*, Gray J. described the "hallmarks" of bad faith as follows:

> [46] One of the hallmarks of bad faith is where a process is put in place, ostensibly for a legitimate purpose, but really for another oblique, illegitimate or collateral purpose: [citations omitted].

[124] It is with these principles in mind that I evaluate whether the Respondents acted in good faith in amending ITSO's by-law to include article 2.2(d)(iii).

[125] I begin my analysis by examining the purpose of the amendment. As noted above, the driving force for the amendment was TRREB's integration with BDAR and QDAR's amalgamation with DRAR/CLAR. After these events, ITSO's board and some of its member associations became concerned.

[126] From March to April 2023, at least two member associations wrote to ITSO's board requesting a reduction in the ITSO MLS System subscriber fee. In one of the requests, the member association explicitly linked the "ask" to a concern that the member association would not be able to remain competitive with BDAR and TRREB who were offering a reduced fee to access MLS data, including the ITSO MLS System (see Exhibit 28 to Webb affidavit). Similarly, member associations sent correspondence to ITSO requesting urgent action be taken because TRREB's partnerships with member associations was causing declining membership and subscribers for the ITSO MLS System.

[127] The materials prepared for the April 11th board meeting describe the concerns raised by TRREB's partnership with ITSO's members, including:

> (a) TRREB had essentially gained membership in ITSO since it controls BDAR;

(b) TRREB did not apply for ITSO membership or agree to the terms of the ITSO MLS Services Agreement;

(c) TRREB's partnership with BDAR offends the one-member-one vote principle. TRREB controlled BDAR's vote without being a member of ITSO. In addition, if TRREB has *de jure* control over BDAR or other member associations (e.g. QDAR's partnership DRAR/CLAR), then it could gain control over ITSO;

(d) ITSO could not have an open dialogue with BDAR or QDAR because that information would have to be shared with TRREB and DRAR/CLAR;

(e) Member associations were complaining about the loss of membership; and

(f) Other member associations were having discussions with TRREB or its partner boards. The consequence of member associations leaving ITSO for TRREB or its partner boards is that ITSO will have less users for the ITSO MLS System and, as a result, less data to populate the system.

[128] Some of these concerns were also included in ITSO's April 17, 2023, correspondence to BDAR and were discussed at the SGM (see video of the April 26, 2023, SGM meeting).

[129] Based on the record before me, I find that the purpose of the amendment was to ensure that member associations did not become controlled by an ITSO competitor. In this case, that competitor is TRREB. I make this finding even though article 2.2(d)(iii) applies generally to any change of corporate structure and control irrespective of whether TRREB or another competitor is involved.

[130] While BDAR's membership has not yet been terminated, the record before me establishes that the amendment intended to provide the board with authority to terminate BDAR and QDAR's membership *if* a non-member competitor had *de jure* control over either member. I come to this conclusion for the following reasons:

(a) The events that triggered the amendment were TRREB's partnership with BDAR and QDAR's amalgamation with a partner board of TREBB (i.e., DRAR/CLAR);

(b) Prior to the board vote, member associations wrote to ITSO to express their concerns regarding TRREB's partnerships with BDAR;

(c) The materials that were before ITSO's board on April 11, 2023, demonstrate that the board's primary concern was TREBB's involvement with BDAR and QDAR's involvement with TREBB's partner board;

(d) Much of the debate at the SGM related to the concerns raised by TRREB's "integration" with BDAR and the problems that such integration might cause ITSO; and

(e) Ms. Webb's affidavit provides four rationales for the by-law amendment. All four rationales relate specifically to the concern of TRREB interloping in ITSO's affairs:

(i) member associations will lose memberships to BDAR or TRREB who were offering reduced fees for membership;

(ii) TRREB had effectively gained membership in ITSO without being an ITSO member and would have a vote in ITSO's governance;

(iii) TRREB's members could obtain access to ITSO MLS System without being a member of ITSO and being a party to the MLS Service Agreement; and

(iv) ITSO might lose independence if TRREB was to gain too much influence over its affairs. In support of this rationale, Ms. Webb described what she believed were the negative impacts of TRREB's influence over the Ontario Real Estate Association.

[131] Based on the above, I find that the amendment was intended to target BDAR and QDAR because ITSO believed that a competitor had control over the two member associations. That said, I do not believe that this finding compels me to rule that the amendment was made in bad faith.

[132] In making the amendment, ITSO's board was attempting to address the concerns of its member associations and to keep a competitor, TRREB, from having a role in ITSO's governance. These are legitimate concerns that ITSO sought to address.

[133] A not-for-profit corporation can amend its membership criteria to address legitimate concerns raised by a specific application for membership. In arguing to the contrary, BDAR relies on Gray J.'s decision in *Pal*. In that case, Gray J. found that the board of a religious corporation had acted in bad faith by using the termination of membership procedure in the by-laws as an indirect method to remove the applicants as trustees (paras. 44-47). The corporation's by-law required trustees to be members and only permitted a trustee to be removed for lack of attendance. On the other hand, the by-law included broad powers relating to the removal of a member for "any reason".

[134] In determining that the board acted in bad faith, Gray J. found that it was open to the corporation to amend its by-laws to permit the removal of trustees for additional reasons unrelated to attendance:

> [47] In this case, as noted, the bylaws permit only one reason, lack of attendance, as a ground for termination of a trustee. There is no suggestion of that here. The respondents have proceeded against the applicants as members on the ground that they signed the petition. They have taken action against none of the other members who did so. It is clear, in my view, that the respondents are proceeding as they are to secure the applicants' removal as trustees. They have no right to do so.

> [48] It is always open to the Corporation to amend its bylaws to provide for the removal of trustees on grounds that go beyond lack of attendance. However, unless and until the Corporation does so, the respondents cannot be permitted to secure the removal of the applicants as trustees by indirect means.

[135] Gray J. found bad faith because the board used a process available under the by-law for a purpose that was not authorized by the by-law. This was an oblique motive and is not analogous to the facts of this case.

[136] In this case, the amendment was made for a legitimate purpose that was in the best interests of ITSO, as evidenced by the fact that two-thirds of the members voted in favour of the amendment. ITSO's Letters Patent mandate that ITSO serve not only its interests, but those of its membership. As noted above, some of ITSO's member associations were concerned about the TRREB partnerships. ITSO acted on those concerns. There is nothing improper in having done so.

[137] In my view this case is similar to *Mississauga Majors*, where Chozik J. found that a not-for-profit corporation could not reject an application for membership for reasons that were not included in the by-law. As noted above, Chozik J. went on to find that it was open to the corporation to amend its by-laws to include legitimate conditions of membership that would have the effect of denying membership to the applicant (para. 79). This is precisely what ITSO did – it had a legitimate concern about TRREB's involvement with BDAR and QDAR amalgamating with a partner board with TRREB. Some of these concerns were shared by member associations and ITSO's board acted to address these concerns. This is not bad faith.

[138] At paragraph 43 of its factum, BDAR argues:

> Only after being subject to the interim injunction for a year did the Respondents conjure four main reasons for its objections to the Integration and its implementation of the Retroactive By-Law, which are either entirely fictional, non-existent or unsupported by any evidence. These stated reasons were:
>
> a. An alleged risk to membership numbers and fees;
>
> b. An alleged risk to the one-member-one-vote governance structure of ITSO;
>
> c. An alleged risk of conferring benefits under the MLS® Agreement to non-members; and
>
> d. An alleged effect of TRREB control over ITSO.

[139] BDAR goes on to argue that the evidence establishes that ITSO's "stated reasons" were not borne out by the events that occurred after the SGM. BDAR argues that this demonstrates that ITSO acted in bad faith in making the amendment.

[140] I reject these arguments for three reasons.

[141] First, ITSO provided its rationale for the amendment on April 17, 2023, before BDAR brought a motion for an interlocutory injunction. Some of these rationales were also presented at the April 11th board meeting. There is no merit to BDAR's suggestion that all ITSO's concerns were "conjured up" in response to the injunction application.

[142] Second, some of ITSO's concerns played out as ITSO believed. For example, as of December 31, 2024, ten ITSO members gave notice of termination of the ITSO MLS Agreement and migrated their data to PropTx. Those members also terminated their membership in ITSO. The ITSO MLS System went from having 23,296 users in October 2023 to 10,200 users in January 2025.

[143] Third, BDAR's argument rests on a flawed premise: that bad faith must be inferred because some of ITSO's concerns were not born out over time. The fact that some of the concerns were not borne out with the passage of time does not necessarily mean that the concerns were not genuinely held by ITSO's board or member associations at the time of the amendment. To be sure, some of ITSO's concerns did not materialize as the board believed; however, this is a far cry from finding that the concerns were disingenuous or illegitimate.

[144] Evidence that the concerns did not "play out" as believed could be used to inferentially establish that the concerns were not genuinely held at the time of the impugned decisions. That said, a court cannot jump to such a conclusion simply with the benefit of hindsight. To do so would be inconsistent with the deferential approach a court must take in evaluating the actions of corporate officers and directors. In this case, there is no evidence that ITSO's board acted for an ulterior motive or improper purpose. The amendment was made to address a concern about a competitor getting too close to ITSO. If you accept that this is a proper purpose, as I have, then the fact that some of the concerns did not materialize as expected is largely irrelevant.

[145] BDAR also argues that ITSO's subsequent approval of Cornerstone's membership demonstrates unequal treatment and bad faith. Again, I disagree.

[146] The amalgamation that led to the formation of Cornerstone does not raise the same concerns as TRREB's partnership with BDAR and QDAR's amalgamation with a TREBB partner board. Upon the four-associations merging, the associations ceased to exist. As a result, there is no concern that a non-member association could have *de jure* control over Cornerstone and its vote at ITSO meetings.

[147] Finally, ITSO urged me to find that BDAR is now "controlled" by TRREB. ITSO argues that this can be inferred from the Notice of a Special General Meeting and the Articles of Amendment described above. ITSO also argues that BDAR's steadfast refusal to answer any questions relating to its change of corporate structure should lead to an adverse inference that TRREB does have *de jure* control over BDAR.

[148] I decline ITSO's invitation for two reasons. First, during Ms. Price-Greig's cross-examination, BDAR refused to answer questions relating to its current corporate structure and control. Those refusals were upheld by Woodley J. in her order dated October 2, 2024. Leave to appeal was not sought. In the circumstances, it would not be appropriate to make the adverse inference sought by ITSO.

[149] Second, a finding that TRREB has *de jure* control over BDAR is not relevant to my analysis. At the time of making the amendment, ITSO's board genuinely believed that TRREB had (and continues to have) *de jure* control over BDAR. The board acted in response to this belief and the concerns raised. That is the only finding I need to make on this issue.

**F. Conclusion**

[150] For the reasons above, I dismiss the application.

[151] In oral argument, ITSO sought an order dismissing the application and declaring that article 2.2(d)(iii), without the BDAR exemption, is of force and effect. I do not believe it appropriate to make that declaration.

[152] As things stand, by-law 1C includes article 2.2(d)(iii) with the BDAR exemption. If I were to grant ITSO's request, I would effectively be amending article 2.2(d)(iii). This would run afoul of the democratic process mandated by ITSO's by-law and *ONCA (Bhadra,* at paras. 147-149). If ITSO's board believes it wise to move forward with an amendment to article 2.2(d)(iii), then it should follow its own processes in accordance with *ONCA*. The current member associations can vote on the proposed amendment.

[153] The Respondents were successful and are entitled to costs. The costs outlines filed by the parties are remarkably similar. The partial indemnity costs sought by the Applicant is $123,172.47, while the partial indemnity costs sought by the Respondents is $120,202.96. I award partial indemnity costs to the Respondents in the amount of $120,202.96. This amount is consistent with the reasonable expectation of the parties, the legal and factual complexity of the application and the seriousness of the issues.