In the Court of Appeal of Alberta

Citation: Calgary Co-operative Association Limited v Federated Co-operatives Limited, 2025 ABCA 142

Date: 20250424
Docket: 2401-0018AC
Registry: Calgary

Between:

Calgary Co-operative Association Limited

Respondent

- and -

Federated Co-operatives Limited

Appellant

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice Jolaine Antonio
The Honourable Justice Kevin Feehan

Memorandum of Judgment of the Honourable Justice Antonio and the Honourable Justice Feehan

Dissenting Memorandum of Judgment of the Honourable Justice Slatter

Appeal from the Decision by
The Honourable Justice M.D. Slawinsky
Dated the 21st day of December, 2023
Filed the 22nd day of July, 2024
(2023 ABKB 735, Docket: 2001-02166)

Memorandum of Judgment

The Majority:

I. Overview

[1] Federated Co-operatives appeals portions only of a partial summary judgment in favour of Calgary Co-operative. The judgment was granted with respect to Federated Co-operatives' new Loyalty Program which replaced its Patronage Return Program to members, including Calgary Co-operative. The chambers judge awarded $35,351,440.12, plus pre-judgment and post-judgment interest, and costs to Calgary Co-operative.

[2] For the reasons below, the appeal is dismissed.

II. Facts

[3] For more than 60 years, Calgary Co-operative sourced the bulk of its food, fuel, and related retail products from Federated Co-operatives. That included the purchase of wholesale groceries and grocery-related products of approximately $250 to $350 million annually, and in excess of $400 million annually in fuel and fuel-related products. It was one of the largest of approximately 170 members of Federated Co-operatives in western Canada.

[4] In recent years, Federated Co-operatives has enjoyed approximately $1 billion net annual income, distributing almost 65% of that surplus income to its membership through equity and cash patronage returns pursuant to the provisions of the *Canada Cooperatives Act*, SC 1998, c 1, and its bylaws.

[5] Those annual patronage returns were calculated by the proportion of business done by the members with Federated Co-operatives in a fiscal year, subject to an annual savings retention, and calculated on percentage patronage returns at applicable rates, initially distributed as member shares and redeemed to generate cash payments, annually and with mid-year payments. For fuel-related products, patronage was typically calculated and paid on litres of product purchased.

[6] In the 20 years from 2000 to 2019, Calgary Co-operative received from Federated Co-operatives for all lines of business, total patronage returns of just over $720 million, approximately two-thirds of which came from fuel purchases, with the bulk of the remainder attributable to grocery and grocery-related product sales.

[7] Over the years, Calgary Co-operative began to become dissatisfied with its grocery business margins and cash flow shortages. On August 6, 2019 it gave formal notice to Federated Co-operatives that it was discontinuing its purchase of groceries and grocery-related products, effective April 13, 2020, but not withdrawing its membership in Federated Co-operatives, and

continuing to honour its fuel supply contracts. Calgary Co-operative offered to work on a transition agreement with Federated Co-operatives, but was not taken up on that offer. Of note, though the issue is not engaged in this appeal, Calgary Co-operative also stopped sourcing its fuel from Federated Co-operatives on January 31, 2023, the subject of other litigation.

[8] Federated Co-operatives acted quickly in response to this decision. On October 2, 2019, it eliminated Calgary Co-operative's seat on its executive management committee; on October 3, 2019, it revoked its invitations to Calgary Co-operative's CEO and directors to attend the Fall Co-op Leaders Conference; on April 6, 2020, it held its annual general managers' meeting without informing or inviting Calgary Co-operative; and on June 2, 2020, it suspended Calgary Co-operative's attendance at its June district meeting, Leaders Conference, and meetings held in conjunction with the annual meeting.

[9] Of importance to this appeal, at meetings of October 24 and November 16-17, 2019, the board of directors of Federated Co-operatives replaced its long-standing patronage distribution program with the new Loyalty Program, effective November 1, 2019, without consultation at that time with the membership. The new Loyalty Program included all members of Federated Co-operatives except Calgary Co-operative, because participation in the new program required that a co-operative purchase 90% of its total annual purchases from Federated Co-operatives, which Calgary Co-operative could not do, having switched its groceries and grocery-related product purchases to Save-On Foods.

[10] Federated Co-operatives submits that as a result of Calgary Co-operative's decision it is losing approximately $385 million annually in food revenue, incurred a one-time cost of $9.4 million to wind down the grocery supply to Calgary Co-operative, and terminated 200 employees as a result of closing its warehouse serving Calgary Co-operative and reworking the rest of its distribution network.

[11] Initially Calgary Co-operative sought summary judgment for the entirety of its claim, but before the chambers judge limited its application to the allegation that the new Loyalty Program was unfairly prejudicial to, and unfairly disregarded, its interests, and to the claim on related bylaw changes. It requested damages in the amount it would have received at the applicable new Loyalty Program rates from November 1, 2019 to January 31, 2023. It withheld its claims on this application only, for a declaration that the actions of Federated Co-operatives terminated Calgary Co-operative's membership, resulted in redemption of all membership shares held by Calgary Co-operative, and its claim for payment of approximately $167, 834,146.17 for redemption of shares.

[12] The chambers judge, on matters related only to the new Loyalty Program, determined those issues were appropriate for summary judgment. Calgary Co-operative had established that the switch by Federated Co-operatives from the patronage distribution program to the new Loyalty Program was unfairly prejudicial to, and unfairly disregarded, Calgary Co-operative's interests.

She dismissed the application for summary judgment relating to the bylaw change, as she was not satisfied that issue could be decided summarily.

III. Grounds of Appeal

[13] Federated Co-operatives says the chambers judge erred in:

i. finding Calgary Co-operative's application was appropriate for partial summary judgment and the test for granting such relief had been met;
ii. disregarding the business judgment rule;
iii. finding that, based on the factual record, Federated Co-operative's new Loyalty Program was unfairly prejudicial to, and unfairly disregarded, the interests of Calgary Co-operative, contrary to its reasonable expectations;
iv. failing to properly apply the law and principles specific to co-operatives; and
v. imposing a damages remedy, the amount and method of payment of which was inappropriate in the circumstances.

IV. Standard of Review

[14] The standard of review on questions of law is correctness, on questions of fact is palpable and overriding error, and on questions of mixed law and fact is palpable and overriding error unless there is an extricable error of law: ***Housen v Nikolaisen***, 2002 SCC 33, paras 7-37, [2002] 2 SCR 235; ***R v Ledesma***, 2021 ABCA 143, para 32, 403 CCC (3d) 268, leave to appeal denied, 2022 CanLII 26226; ***Schneider v Homenick***, 2024 ABCA 344, para 14.

[15] Palpable and overriding error is a highly deferential standard. "Palpable" means that an error is obvious. "Overriding" means an error that goes to the very core of the outcome of a case: ***Benhaim v St-Germain***, 2016 SCC 48, paras 38, 39, [2016] 2 SCR 352; ***R v Kruk***, 2024 SCC 7, paras 97, 98, 433 CCC (3d) 301.

[16] Decisions on summary dispositions are discretionary and, absent an error of law, are reviewed for reasonableness. Without palpable and overriding error, the chambers judge's assessment of the facts, the application of the law to those facts, and the ultimate determination as to whether summary judgment was appropriate is entitled to deference: ***Pyrrha Design Inc v Plum and Posey Inc***, 2016 ABCA 12, para 6. This standard of review applies equally to applications of partial summary judgment: see ***JBRO Holdings Inc v Dynasty Power Inc***, 2022 ABCA 140, para 43.

[17] The determination of whether a party's expectations of corporate actions are reasonably held is a question of fact reviewable on the standard of palpable and overriding error: ***1216808 Alberta Ltd (Prairie Bailiff Services) v Devtex Ltd***, 2014 ABCA 386, para 24, 35 BLR (5th) 1; ***JBRO***, para 44.

[18] The business judgment rule is a common law rule of deference to business decisions, applicable to the court's evaluation of the reasonableness of directors' decisions: ***Peoples Department Stores Inc (Trustee of) v Wise***, 2004 SCC 68, paras 64-65, [2004] 3 SCR 461, quoting ***Maple Leaf Foods Inc v Schneider Corp*** (1998), 113 OAC 253, para 36, 42 OR (3d) 177 (CA). When the rule is applicable, the failure to consider it or the misapplication of the doctrine is an error of law reviewable on the standard of correctness: ***JBRO***, para 46.

[19] Whether there is a genuine issue requiring a trial is a question of mixed fact and law and, absent an extricable error in principle, the decision should not be overturned: ***Geophysical Service Incorporated v Encana Corporation***, 2018 ABCA 384, para 15, 78 Alta LR (6th) 82, leave to appeal denied 2019 CanLII 45275 (SCC). The assessment and finding of facts, the application of the law to those facts, and the ultimate determination on whether summary resolution is appropriate are all entitled to deference: ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49, paras 9, 10, 442 DLR (4th) 9.

V. Analysis

a. Partial Summary Judgment

[20] Rule 7.3 of the *Alberta Rules of Court*, AR 124/2010, addresses summary judgment.

[21] Rule 7.3(1)(a) provides that a court may grant summary judgment "in respect of all or part of a claim" where there is no defence to a claim "or part of it". If the application is successful "with respect to all or part of a claim", the court may "give judgment for or in respect of all or part of the claim" and, if judgment is given "for part of the claim", refer the balance to trial, s 7.3(3)(a) and (c).

[22] The court has jurisdiction to address a claim on a summary basis, in whole or in part.

[23] In ***Hryniak v Mauldin***, 2014 SCC 7, paras 23-25, 28, 34, 49, [2014] 1 SCR 87, the Supreme Court called for a "shift in culture" in favour of "a fair process that results in a just adjudication of disputes", which permits "a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found" in a proceeding which is "accessible - proportionate, timely and affordable". One of those processes is summary judgment.

[24] ***Hryniak*** set out a three-part test on when summary judgment is appropriate, para 49:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

See also ***Windsor v Canadian Pacific Railway Ltd***, 2014 ABCA 108, para 14, 94 Alta (5th) 301; ***Weir-Jones***, paras 15-21.

[25] ***Weir-Jones*** set out the principles for the application of summary judgment. The Court said, para 47:

> a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record, or the law reveal a genuine issue requiring a trial?
>
> b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level, the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication. (emphasis in original)
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> c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
>
> d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

See also ***Hannam v Medicine Hat School District No. 76***, 2020 ABCA 343, paras 12, 13, 144-151, 454 DLR (4th) 202, leave to appeal denied 2021 CanLII 20326 (SCC).

[26] In ***JBRO***, paras 47-53, this Court applied those principles to partial summary judgment. Partial summary judgment is appropriate provided the issue can be decided discretely and fairly: ***Baim v North Country Catering Ltd***, 2017 ABCA 206, paras 10, 11; ***O'Chiese Energy Limited Partnership v Bellatrix Exploration Ltd***, 2019 ABQB 53, para 57, 83 Alta LR (6th) 300; ***Love v Parmar***, 2023 ABKB 30, para 133. The chambers judge must be aware of a risk of duplicative proceedings or inconsistent findings of fact, but resolution of an important claim against a key party could significantly advance access to justice and be the most proportionate, timely, and cost-effective approach, achieving a just result: ***Hryniak***, para 60; ***JBRO***, para 50; ***Stankovic v 1536679 Alberta Ltd***, 2019 ABCA 187, para 54, 88 Alta LR (6th) 1; ***Malik v Attia***, 2020 ONCA 787, paras 61, 62, 29 RPR (6th) 215; ***Canadian Natural Resources Limited v Harvest Operations Corp,***

2024 ABCA 3, para 17, leave to appeal denied 2024 CanLII 74739 (SCC). The overarching issue is whether the record allows the judge to make the necessary findings of fact and apply the law in a manner that is fair and achieves a just result: ***Weir-Jones***, para 25; ***Canadian Natural Resources Limited***, para 18.

[27] Here the chambers judge was careful to follow the law on partial summary judgment. She said in this matter there were only two parties involved in interrelated issues. Although the documentary material was extensive, it contained no expert reports or other technical data. She said there was little to no controversy in the law applicable to the issues before her. She concluded:

> It is apparent to me that the material facts necessary to determine the specific part of the litigation that I have been asked to decide are not significantly in dispute. I am confident I can find those facts, and apply the law to them, to arrive at a just result on the issues. I am also satisfied that by making certain findings and determinations on the issue of oppression, the parties will be able to narrow and streamline the remaining issues that require further litigation.

[28] Federated Co-operatives raises a concern that partial summary judgment on the new Loyalty Program will impact its counterclaim. The counterclaim seeks damages for an alleged disclosure of its confidential information, lack of reasonable notice of Calgary Co-operative's decision to discontinue its participation in the grocery and grocery-related products portion of the co-operative, and from its later termination of certain fuel agreements, effective January 31, 2023, subject to other litigation. Federated Co-operatives also submits this decision will have an impact on a bylaw change of September 20, 2018, expanding a redemption period of shares for a co-operative leaving the Federated Co-operatives family from five to 20 years.

[29] The chambers judge addressed each of these issues. She recognized that her decision would "not resolve all of the disputes between the parties, and that other issues need to be litigated further if they cannot be resolved collaboratively", but the matter of the new Loyalty Program was discrete, severable from the other matters, and there was "low risk of inconsistent findings with subsequent litigation on the remaining issues".

[30] For example, in ***Canadian Natural Resources Limited***, para 25, the Court concluded on the evidentiary record before it that it could not be said the 56 agreements sought to be determined by partial summary judgment "will have no possible impact on the remaining 114 agreements" between the parties and it had not been established partial summary judgment achieved a fair and just result in the circumstances.

[31] But it does not appear the court there intended to create a new general threshold test beyond that set out in ***JBRO***, ***Baim***, ***O'Chiese Energy***, or ***Love*** or the tests therein as to the risk of

inconsistent findings. We do not take the chambers judge's reference to a low risk of inconsistent findings to be an error of law, but merely a cautious approach to the issue before her.

[32] There is no reason this Court could or should assess the evidence afresh. The chambers judge's reasons are complete and sufficient when read in the context of the evidence and submissions before her. Her comment that she did not give weight to "hearsay on material points, opinion evidence where a properly qualified expert would be required, argumentative and conclusory statements, and assumptions arrived at by deponents in their own minds that are not grounded in other extrinsic evidence or that are contradicted by documentary evidence" was sufficiently clear and appropriate. We agree that some comments of some witnesses were plainly impermissible, as found by the chambers judge.

[33] The existence of some issues of credibility, which can be readily addressed by the chambers judge, is not a bar to summary judgment: ***Goodswimmer v Canada (Attorney General)***, 2017 ABCA 365, paras 38-41, 60 Alta LR (6th) 226, leave to appeal ref'd 2018 CanLII 61050 (SCC); ***Shefsky v California Gold Mining Inc***, 2016 ABCA 103, para 113, 31 Alta LR (6th) 1 (Slatter JA dissenting, but not on this point). An obvious contradiction between a statement in an affidavit and the attached exhibit or the record will not give rise to a credibility issue that would bar summary judgment: ***Guarantee Co of North America v Gordon Capital Corp***, [1999] 3 SCR 423, para 31, 178 DLR (4th) 1; ***Dagher v Glenn***, 2016 ABCA 38, paras 30-32; ***Pioneer Exploration Inc (Trustee of) v Euro-Am Pacific Enterprises Ltd***, 2003 ABCA 298, paras 25-26, 27 Alta LR (4th) 62; ***Leis v Leis***, 2014 ABCA 36, para 45. These are issues that may properly be addressed by the chambers judge on a summary judgment application.

[34] The chambers judge thoroughly assessed all the evidence together, rather than considering parts of the evidence in isolation. For example, while there could be no liability from what certain directors of Federated Co-operatives were thinking or feeling following Calgary Co-operative's announcement, it was appropriate for her to consider the statements reflected in the minutes of Federated Co-operatives' internal communications in the context of all the evidence.

[35] The chambers judge's findings of fact and her conclusions on the appropriateness of partial summary judgment are owed deference. There are no grounds upon which this Court should interfere with that exercise of discretion. Recourse to partial summary judgment was appropriate in the circumstances, balanced, and fair.

b. Oppression and Reasonable Expectations

[36] The *Canada Cooperatives Act*, s 340(1), (2), provides for an application to a court for an order under this section, where the court is "satisfied that an act or omission of a cooperative effects a result, that the business or affairs of the cooperative are or have been carried on or conducted in

a manner ... that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a member ...".

[37] In such a case, a court may issue, s 340(3), (h), and (o), any order that it considers appropriate to rectify the matters subject to complaint, including "determining any matter in regard to the relations between the cooperative and a member", or direct that the cooperative compensate an aggrieved party.

[38] Additionally, a court may, s 341(5), order the cooperative to pay to the complainant interim costs, including legal fees and disbursements. Such orders may be made on summary applications, "as the rules of court provide", s 347.

[39] Although the provisions of the *Canada Business Corporations Act*, RSC 1985, c C-44, s 241(2), are not applicable to co-operatives (see *Canada Cooperatives Act*, s 3(4)), the principles of interpretation and application are the same: ***Collins Barrow Vancouver v Collins Barrow National Cooperative Incorporated***, 2015 BCSC 510, paras 108, 109, 45 BLR (5th) 269, aff'd 2016 BCCA 16.

[40] Equally important are the accepted principles specific to co-operatives issued by the International Co-operative Alliance, including guidance notes, referenced by the chambers judge: voluntary and open membership, democratic member control, member economic participation, autonomy and independence, education, training, and information, co-operation among co-operatives, and concern for community. Overarching these principles is concern for fairness and equity between co-operative members.

[41] It was pointed out to us that on occasion, the chambers judge used the word "equal" rather than "equitable" in referring to these principles of treatment of members. That was merely misspeaking; she clearly recognized and emphasized the overarching principles of reasonableness, fairness, justice, and equity in her decision.

[42] The leading case on oppression remedies is ***BCE Inc v 1976 Debentureholders***, 2008 SCC 69, [2008] 3 SCR 560. Oppression is a fact-specific equitable remedy that seeks to ensure fairness, giving a court "broad, equitable jurisdiction", paras 58, 59. The Supreme Court defined "oppression" as conduct that is coercive, abusive, or in bad faith; "unfair prejudice" as a "less culpable state of mind" that nevertheless has unfair consequences; and "unfair disregard" of interests as extending to ignoring an interest as being unimportant, paras 67, 92-94.

[43] The chambers judge here found "unfair prejudice" and "unfair disregard" to and for the interests of Calgary Co-operative, and therefore did not determine, nor need to determine, whether the conduct of Federated Co-operatives was coercive, abusive, or in bad faith.

[44] In ***BCE***, the Supreme Court, paras 68, 95, set out a two-part test: "(1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms ... 'unfair prejudice' or 'unfair disregard' of a relevant interest?"

[45] To determine whether a stakeholder's expectation is reasonable, the Court may consider "general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders": ***BCE***, paras 68, 72, 89, 95; ***JBRO***, para 59. What is fair "is most fundamentally what stakeholders are entitled to 'reasonably expect'": ***BCE***, para 64.

[46] The burden of proof to establish that expectation, its reasonableness, and violation by conduct unfairly prejudicial to or unfairly disregarding the interests of the claimant, is on the claimant: ***BCE***, paras 56, 68, 70, 119, 137; ***1216808 Alberta Ltd***, para 39. Additionally, the claimant must show that the failure to meet the expectation "involved unfair conduct and prejudicial consequences": ***BCE***, paras 89, 90.

c. Business Judgment Rule

[47] ***BCE*** reviewed application of the business judgment rule, not as a defence to a finding of oppression but as part of the analysis of reasonable expectations. The Court said that under the business judgment rule, "deference should be accorded to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by the shareholders", as long as the decision lies within a range of reasonable alternatives and business judgment has been exercised in a responsible way, paras 40, 84, 87, 99, 140.

[48] This Court said in ***Shefsky*** at para 22 that courts must not second-guess the business judgment of directors of corporations. "Rather, the court must decide whether the directors made decisions which were reasonable in the circumstances and not whether, with the benefit of hindsight, the directors made perfect decisions". This Court determined that providing the directors acted honestly and reasonably, and made decisions in the range of reasonableness, the court would not substitute its own decision for that of the board. Deference would be accorded to the board's decision: ***Shefsky***, para 22; see also ***Noble v North Halton Golf and Country Club Limited***, 2018 ONSC 3565, para 137.

[49] Here the chambers judge acknowledged the business judgment rule is a common law rule of deference to business decisions, applicable to the court's evaluation of the reasonableness of directors' decisions, citing ***JBRO***, para 46. She said for those decisions to be reasonable, they must be made for a justifiable business purpose and organizations cannot hide behind this rule to excuse conduct that does not have a legitimate purpose and is inconsistent with reasonable expectations.

[50] To analyse whether the decisions made by Federated Co-operatives met that test, the chambers judge reviewed the reasons for its existence, the roles it serves, and the expectations of its members. She acknowledged Federated Co-operatives submitted that implementing the new Loyalty Program was a *bona fide* exercise of its discretionary right to allow it to distribute cash earlier in the fiscal year and to secure commitment to long-term investments. She recognized that the membership was concerned about cash flow but said that could easily have been addressed by interim payments or perhaps by maintaining the mid-year payment schedule. She also said Federated Co-operatives had no difficulty obtaining commitment to long-term investments on a project-by-project basis, as evidenced by the fuel supply contracts and the terms of the 2016 Investment Program for Retail Growth Agreement between the parties.

[51] However, the chambers judge said the structure of the new Loyalty Program could not be justified under the business judgment rule. The program required commitments to purchase at least 90% of all types of products from Federated Co-operatives but made advances only on the basis of number of litres of fuel purchased with no payment based on other product purchases. Even if Calgary Co-operative bought 100% of its fuel from Federated Co-operatives it would receive no distribution because it did not buy the bulk of its other products from them. Calgary Co-operative's ongoing contractual fuel commitments, resulting in purchases of around $400 million annually, created no entitlement to a loyalty payment under the program. Calgary Co-operative was, by design, the only member affected in this way. There was no attempt to treat Calgary Co-operative "equitably and fairly", as required in ***BCE***, para 82.

[52] As a result, the chambers judge found that the program was "unreasonable, not made for a justifiable business purpose, and was inconsistent with the reasonable expectations of Calgary Co-op".

[53] Federated Co-operatives says the chambers judge only addressed the business judgment rule after having concluded that implementing the new Loyalty Program unfairly disregarded and was unfairly prejudicial to Calgary Co-operative's interests. The order in which she addressed these issues is not determinative, as long as she understood and applied the principles set out in ***BCE*** in assessing reasonable expectations. She did. She addressed the rule in the context of the "expectations of its members", the discretionary right of the directors to act in a *bona fide* manner in the best interests of its members, "for a justifiable business purpose" measured against the "reasonable expectations of Calgary Co-op". She concluded the directors' decision to implement the new Loyalty Program was not within the range of reasonable choices they could have made.

d. Violation of reasonable expectations, unfair prejudice, unfair disregard

[54] The chambers judge said Calgary Co-operative's reasonable expectation was that it would be treated fairly and on the same footing as other members of the association, that Federated Co-operatives would act in good faith in its dealings with Calgary Co-operative and not undermine its

interests and expectations, would consult with Calgary Co-operative on decisions that directly and adversely impacted its financial and business interests, would not arbitrarily reduce or alter fuel patronage returns but would calculate them based on the quantity of Calgary Co-operative's purchases each year, would refrain from making decisions that adversely discriminated against Calgary Co-operative compared to other members, and that it would comply with the *Canada Cooperatives Act* and its own bylaws with respect to the allocation and payment of patronage returns.

[55] There is no contest that Calgary Co-operative was entitled to discontinue its grocery and grocery-related purchases from Federated Co-operatives on appropriate notice. There was no contract in place as there was for fuel and fuel-related purchases.

[56] It was a reasonable expectation of Calgary Co-operative that it would be treated fairly, equitably, and reasonably with respect to receipt of patronage returns for its fuel and fuel-related purchases, even though it was no longer purchasing grocery and grocery-related supplies from Federated Co-operatives, at the same rates as other members, and to be afforded the same membership participation as other members. As the chambers judge said: "These are undisputed fundamental cornerstones of the co-operative model". The question, therefore, is whether those reasonable expectations were violated by Federated Co-operatives' conduct in a manner unfairly prejudicial to, or which unfairly disregarded, Calgary Co-operative's interests.

[57] The *Canada Cooperatives Act*, s 2(1) defines *patronage return* as "an amount that the cooperative allocates among and credits or pays to its members ... based on the business done by them with or through the cooperative". Section 155 provides that a cooperative may allocate among its members as a patronage return "all or a part of the surplus arising from the operations of the cooperative in a financial year in proportion to the business done by the members with or through the cooperative in that financial year" calculated by taking into account "(a) the quantity, quality, kind and value of things bought, sold, handled, marketed or dealt in by the cooperative, (b) the services rendered (i) by the cooperative on behalf of or to the member, and (ii) by the member on behalf of or to the cooperative, and (c) differences that are ... appropriate for different classes, grades, or qualities of things and services".

[58] The chambers judge found the new Loyalty Program payments were merely those patronage returns "distributed under a different name or label", or "simply patronage in disguise". She also found the new program was created almost immediately after Calgary Co-operative made its decision to withdraw from purchasing grocery and grocery-related products from Federated Co-operatives, was created without consulting or obtaining input from member associations at that time and was implemented on a retroactive basis, with the knowledge that Calgary Co-operative could not participate in the program or receive any financial benefit from it unless it reversed its decision on the purchase of grocery and grocery-related products.

[59] The chambers judge found the new Loyalty Program resulted in a disproportionate distribution of profits to the members of Federated Co-operatives, directly disadvantaging Calgary Co-operative and unfairly disregarding its reasonable interests.

[60] In order to arrive at those conclusions, the chambers judge reviewed numerous records of Federated Co-operatives. She found the only reasonable conclusion from that review showed the new Loyalty Program payments were simply a distribution of profits that would normally have formed part of the patronage allocation, and they contributed to a disproportionate distribution of profits, specifically disadvantaging only Calgary Co-operative, and causing unfair prejudice to, and unfair disregard of, Calgary Co-operative. She concluded Federated Co-operatives "has ventured fairly far along the culpability spectrum".

[61] There is no error in principle or law in recitation of these facts, the application of the law to the facts, nor the reasonable interpretation of the motivation, effect, and result of the new Loyalty Program on Calgary Co-operative, resulting in unfair prejudice to, or unfair disregard of, its reasonable expectations. There is no reason to interfere with the chambers judge's decisions on these matters to which deference is owed.

e. Remedy

[62] On remedy, the court's broad discretion is not limitless; it must be exercised within legal bounds, and as a starting point, within the bounds expressly delineated by the statute. The purpose of the oppression remedy is corrective, and an order should go no further than necessary to correct the injustice or unfairness between the parties: ***Wilson v Alharayeri***, 2017 SCC 39, paras 26-27, 52, 53, [2017] 1 SCR 1037; ***JBRO***, para 60; see also ***Stromberg v Olafson***, 2023 SKCA 67, paras 128, 135, 136.

[63] As such, where oppressive conduct is made out, the court must intervene in as minimal a way as possible in the circumstances to address the imbalance or the conduct which is the subject of complaint. The ultimate test requires an assessment of the best interests of the corporation, its shareholders, directors, and officers. It involves a balancing of competing interests: ***Toor v 1176520 Alberta Ltd***, 2019 ABCA 334, para 32; ***Caron v Canadian Energy Inc***, 2017 ABQB 767, para 51, reconsideration allowed, 2017 ABQB 782; ***Connelly v Connelly McKinley Limited***, 2010 ABQB 515, para 12; ***UPM-Kymmene Corp v UPM-Kymmene Miramichi Inc*** (2002), 214 DLR (4th) 496, paras 155, 156, 27 BLR (3d) 53 (ONSC), aff'd 250 DLR (4th) 526, 183 OAC 310 (CA); ***Melin v Melin***, 2018 ABQB 1056, para 69, 81 Alta LR (6th) 194.

[64] The *Canada Cooperatives Act* provides a wide range of remedies, including "compensating an aggrieved person"; s 340(3)(o).

[65] The chambers judge found that other remedies set out in that section were "either ineffective, inapplicable or out of proportion to the unfairness created". She determined it would be appropriate to provide a remedy that would affect the separate litigation as little as possible, including on Calgary Co-operative's discontinuing its fuel purchases, its request for a declaration that Federated Co-operative had terminated its membership in the federation, and its request that Calgary Co-operative's equity investment in Federated Co-operative be paid out within one year or such other period as may be equitable.

[66] The chambers judge found it would be:

> … fair, equitable, and minimally intrusive to remedy [Federated Co-operative's] unfairly prejudicial conduct and unfair disregard for Calgary Co-op's interests by granting partial summary judgment against [Federated Co-operative] in [favour] of Calgary Co-op in an amount equal to the amounts that Calgary Co-op would have received at the applicable Loyalty Program rates for all of its fuel purchases from November 1, 2019 to the date it discontinued all fuel purchases …. in addition to any patronage returns received by Calgary Co-op for that time period and [bearing] pre-judgment interest from each notional quarterly payment as if Calgary Co-op had participated in the Loyalty Program.

[67] That amount was calculated by the parties to be $35,351,440.12 plus pre-judgment and post-judgment interest.

[68] Despite agreeing on the damages quantum, Federated Co-operatives says there was no evidence as to the actual amount of damages suffered by Calgary Co-operative "which were attributable to the ... Loyalty Program", because the decision whether or not to allocate patronage in any given year, and if so in what amount, was a decision made in the sole discretion of its board of directors. It submits the proper remedy was for the chambers judge to direct it to "abolish the program and re-allocate patronage among its members for the affected years".

[69] The chambers judge did not order damages based on the patronage Calgary Co-operative would have received before implementation of the new Loyalty Program, but in the form of payments it would have received "had it been allowed to participate in the New Loyalty Program". In doing so, she was alive to the principles set out above in ***Wilson***, ***Toor***, ***Melin***, and ***JBRO.***

[70] An award of damages should only be interfered with where the trial judge applied a wrong principle of law or the overall amount is a wholly erroneous estimate: ***Andrews v Grand & Toy Alberta Ltd***, [1978] 2 SCR 229, 235, 83 DLR (3d) 452; ***644036 Alberta Ltd v Kay McVey Smith & Carlstrom LLP***, 2018 ABCA 236, para 24, leave to appeal denied 2019 CanLII 35228 (SCC).

[71] The chambers judge's decision on remedy does not evidence a wrong principle of law nor is the overall amount, a dollar figure which was agreed to by the parties, a wholly erroneous estimate.

VI. Conclusion

[72] This Court should not interfere with the chambers judge's exercise of discretion in which she determined that the implementation of Federated Co-operative's new Loyalty Program was a discrete issue that could be determined summarily on the evidence, allowing her to make factual findings, and applying the law to those facts to find unfair prejudice to, and unfair disregard for, the reasonable expectations of Calgary Co-operative, and to fashion an appropriate remedy.

[73] This Court should not interfere with that discretion by finding those issues required a full trial, as the decision of the chambers judge was a proportionate, more expeditious, and less expensive method than a full trial on this discrete issue, and a just result could be and has been achieved. This Court agrees with the chambers judge that her partial summary judgment did not create a significant risk of inconsistent fact findings on the many other issues that remain in this litigation and in other litigation between the parties.

[74] Therefore, the appeal is dismissed.

Appeal heard on February 13, 2025

Memorandum filed at Calgary, Alberta
this 24th day of April, 2025

Authorized to sign for: Antonio J.A.

Feehan J.A.

Slatter, JA (dissenting):

[75] For approximately 60 years the respondent Calgary Co-operative Association Limited purchased the bulk of its products, including groceries and fuel, from the appellant Federated Co-operatives Limited. When in 2019 Calgary Co-op stated its intention to purchase its groceries from a third-party wholesaler, Federated Co-op instituted a Loyalty Program which rewarded its members who continued to purchase at least 90% of their products from Federated Co-op. The chambers judge agreed with Calgary Co-op that the Loyalty Program was not made for a justifiable business purpose, was inconsistent with the reasonable expectations of Calgary Co-op, and accordingly was oppressive: ***Calgary Co-operative Assn Ltd. v Federated Co-operative Ltd.***, 2023 ABKB 735 at para. 124.

[76] Federated Co-op appeals, arguing that the issue was not suitable for summary judgment, particularly partial summary judgment on this one issue, and that the analysis is tainted by errors of fact and law in assessing the reasonable expectations of Calgary Co-op, the legitimacy of the business decision behind the Loyalty Program, and its overall fairness.

Facts

[77] The appellant Federated Co-op is a co-operative incorporated under the federal *Canada Cooperatives Act*, SC 1998, c. 1. It is a "co-operative of co-operatives"; all of its approximately 170 members across Western Canada are themselves retail co-operatives, known as the Co-operative Retailing System (sometimes referred to in the record as the "CRS"). Federated Co-op operates at a wholesale level, providing groceries, pharmaceuticals, fuel, crop inputs such as fertilizer, and home and building products to its retail members. Of particular importance to this appeal is Federated Co-op's fuel supply chain, which is especially attractive to both Federated Co-op and its retail members because Federated Co-op owns and operates its own large petrochemical refinery in Regina.

[78] The respondent Calgary Co-op is a co-operative incorporated under the provincial *Co-operatives Act*, SA 2001, c-28.1. It is the largest and a long time member of Federated Co-op. It operates at a retail level in and around the city of Calgary through over two dozen retail locations. As noted, for over 60 years it purchased the bulk of its groceries and fuel from Federated Co-op. Federated Co-op operated a wholesale distribution centre in Calgary, with over 200 unionized employees, dedicated to servicing Calgary Co-op's needs.

[79] For decades the members of Federated Co-op operated on the understanding that the Co-operative Retailing System would purchase the bulk of its products, especially groceries, from Federated Co-op. There was, however, no written agreement to that effect. It was simply an expectation arising from the philosophical principles behind the co-operative movement. The

uncontradicted evidence was that written agreements were not considered to be an essential requirement of the co-operative movement.

[80] For many years Federated Co-op supplied fuel to its members, also without written agreements. However, in the years leading up to the present dispute some members entered into written fuel contracts, often including financial assistance from Federated Co-op in developing retail petroleum facilities. Calgary Co-op was a party to a number of these fuel agreements. As noted, the integrated fuel supply chain was lucrative for all parties.

[81] Starting as early as 2016, Calgary Co-op expressed dissatisfaction with the grocery side of Federated Co-op's business. Calgary Co-op thought that Federated Co-op's wholesale grocery business was not always competitive, and that it was not nimble enough to respond to changing market conditions: reasons at paras. 26-27. It is clear that tensions existed between the parties over the grocery business. There was, unfortunately, a personal side to the disagreement: reasons at para. 28. The uncontradicted evidence of Mr. Banda, the longtime Chief Executive Officer of Federated Co-op, was that there was a philosophical difference underlying this disagreement. Mr. Keeley, the Chief Executive Officer of Calgary Co-op, wanted to treat Federated Co-op as just one of several potential wholesalers. Mr. Banda perceived this was inconsistent with the spirit and philosophy of the co-operative movement and undermined the ability of Federated Co-op to make bulk purchases at the wholesale level. The chambers judge concluded at para. 29 that both parties were responsible for this environment of distrust.

[82] Calgary Co-op began actively exploring alternatives. In about 2016 it retained KPMG to assist in assessing the pros and cons of using alternative wholesale food suppliers. Calgary Co-op did not disclose these investigations and inquiries to Federated Co-op, keeping their research and discussions highly confidential: reasons at para. 30. Federated Co-op did not find out about these initiatives until after this litigation had commenced. While Federated Co-op was aware that there were issues, the secrecy meant that Federated Co-op was not consulted, never had an opportunity to provide input to KPMG, and never had an opportunity to attempt to address Calgary Co-op's concerns, which had obviously risen to a new level.

[83] On August 6, 2019, Calgary Co-op notified Federated Co-op that it intended to purchase its groceries from another wholesaler, Overwaitea Food Group. The intended change was implemented 8 months later on April 13, 2020. Mr. Banda testified that this presented an existential threat to Federated Co-op. Calgary Co-op represented a significant part of the Co-operative Retailing System. Its departure necessitated the closure of Federated Co-op's Calgary distribution centre and the termination of the approximately 200 unionized employees. If other retail members of Federated Co-op followed suit, the wholesale system could collapse, as had happened in Atlantic Canada about four years earlier.

[84] The Board of Federated Co-op obviously considered how it should respond to Calgary Co-op's decision. There was some personal and emotional response: reasons at paras. 35, discussed *infra* paras. 143-44. Because of Calgary Co-op's size it had an enhanced involvement in the affairs of Federated Co-op. When it withdrew its grocery business there were some changes implemented: reasons at para. 36, discussed *infra* paras. 145-48. The Board considered a number of options open to it: reasons at paras. 121-22, discussed *infra* paras. 172-73. In the end, the Board settled on the Loyalty Program which is said by Calgary Co-op to be oppressive, and which underlies this appeal. The details of that program are discussed *infra* paras. 124-29, but in general terms it provided rebates, based on fuel sales, to members of the Co-operative Retailing System that purchased at least 90% of their products from Federated Co-op.

[85] Calgary Co-op launched this suit based primarily on the perceived oppressive nature of the Loyalty Program, but also covering other claims it had, including with respect to its fuel contracts. It applied for partial summary judgment on two components of its claim: the alleged oppressive nature of the Loyalty Program, and of an amendment to Federated Co-op's equity investment return bylaw. The chambers judge concluded that these two issues were suitable for partial summary disposition: reasons at paras. 55-69. The chambers judge concluded that Calgary Co-op had met the burden of proving its claim with respect to the Loyalty Program: reasons at para. 124. On the other hand, Calgary Co-op had not met that burden with respect to the equity investment return bylaw: reasons at paras. 125-26.

[86] The chambers judge recognized at para. 66 that the parties were faced with "the complex unraveling of a decades-old commitment to a cooperative, significantly entwined economic relationship". Whether the challenged decision to implement the Loyalty Program was reasonably justified, and whether it was fair, must be decided in that context. The chambers judge reviewed the law of oppression as set out in ***BCE Inc. v 1976 Debentureholders***, 2008 SCC 69, [2008] 3 SCR 560. The complainant must establish its expectations, show the reasonableness of those expectations, and show a violation of those expectations in a way that was oppressive, unfairly prejudicial, or that unfairly disregarded its interests.

[87] The reasons under appeal state Calgary Co-op's claimed reasonable expectations as follows:

> 78 In its claim, supporting evidence and oral and written submissions, Calgary Co-op enumerates a multitude of alleged reasonable expectations. These include:
>
> > 1. Expecting FCL to treat it fairly and on the same footing as other member associations;

> 2. Expecting FCL to act in good faith in its dealings with Calgary Co-op and to not undermine legitimate Calgary Co-op interests and expectations;
>
> 3. Expecting FCL to consult Calgary Co-op on decisions that directly and adversely impact its financial and business interests;
>
> 4. Expecting FCL to not arbitrarily reduce or alter Fuel Patronage returns and to calculate them based on the quantity of Calgary Co-op's purchases each year;
>
> 5. Expecting FCL to refrain from making decisions that adversely discriminate against Calgary Co-op, compared to other FCL members; and
>
> 6. Expecting FCL to comply with the CCA [*Canada Cooperatives Act*] and its own bylaws with respect to the allocation and payment of patronage returns.
>
> 79 Despite FCL's position that Calgary Co-op could not reasonably hold certain expectations, I find it unnecessary to go through each and every allegation in a detailed fashion. There can be no doubt that Calgary Co-op was reasonably entitled at a minimum to expect that FCL would comply with the CCA and its own bylaws and that it would act in good faith to treat all members of the federation equally, including in respect of the allocation of patronage. . . .
>
> 88 I find it was reasonable for Calgary Co-op to expect FCL to continue to distribute profits through patronage returns to Calgary Co-op, based on whatever amount of business it did with FCL, at the same rates set for the various lines of products as for the other members, and to afford it the same membership participation as other members. These are undisputed fundamental cornerstones of the co-operative model.

In summary, the chambers judge found that Calgary Co-op's reasonable expectations were that Federated Co-op would:

> (a) comply with the *Canada Cooperatives Act* and its Bylaws, and
> (b) treat all members of the federation equally, including in respect of the allocation of patronage, which meant patronage would be based on the amount of business, using the "same rates as other members" for "various lines of business", and to afford it the same membership participation.

As will be seen, *infra* paras. 131-134, assessing reasonable expectations is a key component of the oppression analysis.

[88] The parties disputed whether the Loyalty Program was an expense to be deducted before the calculation of profits (i.e. surpluses), or whether it was a disguised form of patronage returns. The reasons summarized key findings and inferences as follows:

> 93 For reasons I will explain, I have no difficulty finding on the evidence before me that:
>
> > 1. The Loyalty Program was conceived, created and implemented almost immediately after FCL was given notice of the Discontinuance Decision.
> >
> > 2. The Loyalty Program was created without consulting or obtaining input from member associations and was implemented on a retroactive basis.
> >
> > 3. When it implemented the Loyalty Program, FCL knew that Calgary Co-op could not participate in the program or receive any financial benefit from it, unless it abandoned its new grocery supply arrangement and continued to purchase groceries from FCL.
> >
> > 4. Loyalty Program payments to members are simply FCL profits distributed under a different name or label than patronage.
> >
> > 5. The Loyalty Program contributes to a disproportionate distribution of FCL profits to its members, to the knowledge of FCL.
> >
> > 6. Calgary Co-op was directly disadvantaged by the disproportionate distribution of FCL profits, to the knowledge of FCL.
> >
> > 7. The Loyalty Program is not saved by the business judgment rule.
> >
> > 8. FCL unfairly disregarded Calgary Co-op's interests in implementing the Loyalty Program, which program was also unfairly prejudicial to Calgary Co-op.

The reasons expand on these findings at paras. 94-109.

[89] While Mr. Banda testified that some form of loyalty program had been considered for some time, the reasons observed at paras. 95-97 that there was no express mention in the minutes of the Federated Co-op Board of a loyalty program similar to the one eventually implemented until Calgary Co-op announced its decision to withdraw its grocery business. The reasons concluded:

> 98 In short, the evidence strongly supports a finding that the Loyalty Program was conceived, created and implemented directly after Calgary Co-op's communication of its Discontinuance Decision, and I find that as a fact.

This fact was not in dispute, because Federated Co-op acknowledged that it implemented the Loyalty Program in direct response to Calgary Co-op's decision to direct its grocery business to a competitor. The reasons also found at para. 99 that the Loyalty Program was implemented "without consulting or obtaining input from member associations and was implemented on a retroactive basis".

[90] The reasons note at paras. 100-101 that Federated Co-op knew the Loyalty Program was inconsistent with the decision by Calgary Co-op to purchase its groceries from a different wholesaler. In other words, Calgary Co-op could not participate in the Loyalty Program without reversing its decision about its grocery purchases. This, however, was not seriously in dispute, because the purposes of the Loyalty Program were to discourage further withdrawal by members of the Co-operative Retailing System, and possibly to entice Calgary Co-op to reverse its decision.

[91] The reasons also concluded at para. 102: "I further find that the Loyalty Payments are simply patronage in disguise". Cooperatives do not operate on a strictly business model, and record "surpluses" rather than "profits". Under s. 155 of the *Canada Cooperatives Act* a board has a wide discretion on how to calculate surpluses, and how to distribute them:

> 155 (1) A cooperative may allocate among and credit or pay to the members, as a patronage return, all or a part of the surplus arising from the operations of the cooperative in a financial year in proportion to the business done by the members with or through the cooperative in that financial year, calculated in the manner described in subsection (2) at a rate set by the directors.

Federated Co-op argued that the payments under the Loyalty Program had to be deducted from its revenues before it could calculate a "surplus". Patronage returns did not occur until after the surplus had been calculated. Calgary Co-op argued that the payments under the Loyalty Program were not true expenses of Federated Co-op and were really a disguised way of distributing patronage returns. The reasons examined the Bylaws of Federated Co-op, its pleadings, its internal documentation, and the accounting treatment of the Loyalty Program payments, and concluded:

> 108 The only reasonable conclusion to be drawn from the totality of this evidence is that the Loyalty Program payments were a distribution of the profits of FCL that normally would form part of the patronage allocation, and I make that finding. It is noteworthy that in its submissions in direct response to the Court's question on this point, FCL was unable to point to any evidence of any other FCL program that distributes cash broadly to members but is not a distribution of profits.

The reasons also concluded that the Loyalty Program distributed a disproportionate amount of Federated Co-op's surplus: reasons at para. 109.

[92] Federated Co-op knew that the impact of the Loyalty Program would be uniquely felt by Calgary Co-op:

> 110 Consequently, I am satisfied and find on a balance of probabilities that FCL unfairly disregarded Calgary Co-op's interests in implementing the Loyalty Program, which program was also unfairly prejudicial to Calgary Co-op. Given that finding, it is unnecessary for me to also consider whether FCL was deliberately oppressive in its conduct by acting in a coercive or abusive manner or in bad faith. While there are many more examples tending to suggest a more deliberate intention, such as references to removing services, imposing consequences and punishment, and putting Calgary Co-op in a "time out" until they came out on FCL's terms, I would simply say that in my view, FCL has ventured fairly far along the culpability spectrum.

This passage sums up the central findings in the oppression analysis.

[93] Having found oppressive conduct, the reasons then examined whether the Loyalty Program could be justified under the business judgment rule:

> 112 As noted at para 46 of ***JBRO*** [*Holdings Inc v Dynasty Power Inc*, 2022 ABCA 140, 45 Alta LR (7th) 252], "The business judgment rule is a common law rule of deference to business decisions, applicable to the court's evaluation of the reasonableness of directors' decisions." (citations omitted). For business decisions to be reasonable, they must be made for a justifiable business purpose. Organizations cannot hide behind this rule to excuse conduct that does not have a legitimate purpose and is inconsistent with reasonable expectations.

Federated Co-op asserted that the Loyalty Program was a legitimate business decision that served two purposes: (a) distributing cash earlier to its members, and (b) securing commitments to long-term investments by Federated Co-op, in order to provide system stability and to avoid a repeat of

the events in Atlantic Canada where the co-operative system collapsed when eight members withdrew their purchasing of food products: reasons at paras. 113-15.

[94] The reasons under appeal rejected this rationale for the Loyalty Program. Firstly, there were many other ways to distribute cash flow to members: reasons at para. 117. Secondly, Federated Co-op had not taken any meaningful remedial steps when the Atlantic Canada co-operative system failed four years earlier: reasons at para. 118. Thirdly, Federated Co-op had addressed commitment for long term investments in the past using other techniques, and had not identified or defined any such investments: reasons at paras. 119-20. Fourthly, there were other ways in which loyalty payments could be distributed, disconnected from fuel purchases, and more sensitive to volumes of business: reasons at paras. 121-22. The reasons concluded:

> 124 I find on the totality of the evidence that the decision to create and impose the Loyalty Program in its current form was unreasonable, not made for a justifiable business purpose and was inconsistent with the reasonable expectations of Calgary Co-op. The business judgment rule does not save FCL from the finding of oppression I have made regarding the Loyalty Program.

The remedy granted was to award Calgary Co-op an amount equal to what it would have received if it had qualified under the Loyalty Program: reasons at para. 132.

Standard of Review and Evidentiary Issues

[95] The standard of review is correctness for questions of law, and palpable and overriding error for questions of fact.

[96] The oppression analysis depends heavily on the application of the law to the facts, and inferences drawn from the record. Errors on this type of question of mixed fact and law are reviewed for palpable and overriding error. Such reviewable errors can arise when the law is misapplied to the facts, or where inferences are drawn that are simply unreasonable and cannot be supported by the record. Palpable and overriding error can also arise from illogical or otherwise unreasonable lines of analysis.

Insufficient Reasons

[97] There are sound reasons for extending deference on appeal to the trial court's findings of fact, and the inferences drawn from those facts, but appellate deference depends on the appeal court being able to understand the analytical process used. This case raised several issues about the admissibility, weight, and importance of various pieces of evidence. The chambers judge stated:

> 6 In addition to further findings of fact that I will make throughout these reasons, I find a number of preliminary facts that are either conceded, clear from the documentary materials, or not materially in dispute. For clarification, in arriving at these and other factual findings to come, I have given essentially no weight to hearsay on material points, opinion evidence where a properly qualified expert would be required, argumentative and conclusory statements, and assumptions arrived at by deponents in their own minds that are not grounded in other extrinsic evidence or that are contradicted by documentary evidence.

While reasons for decision need not grapple with every piece of contested evidence, this type of boilerplate, generic assessment of the evidence is "no reasons at all": ***R. v Sheppard***, 2002 SCC 26 at paras. 59-60, [2002] 1 SCR 869.

The Evidence of Mr. Banda

[98] The chambers judge noted at para. 67 that there were essentially two principal affidavits filed. The appellant filed the affidavit of Mr. Banda, its long time Chief Executive Officer. The respondent relied on the affidavit of Mr. Harrison, its Vice President. The respondent Calgary Co-op argues that the chambers judge disregarded, and was entitled to disregard, virtually all of Mr. Banda's evidence. But why? If there was a concern about credibility, that would suggest there was a triable issue. The respondent, however, conceded in oral argument that Mr. Banda was a credible witness.

[99] To illustrate, Mr. Harrison relied on selective extracts from the Federated Co-op records to argue that the Loyalty Program was implemented to target and punish Calgary Co-op. Mr. Banda's evidence was that the suggestion the "Loyalty Program was implemented to target and punish [Calgary Co-op] is categorically false", providing extracts from the records to support his view. If the chambers judge was not inclined to believe Mr. Banda that would raise a triable issue. However, the reasons do not provide any analysis of this area of disputed evidence on a key issue.

[100] If there was a concern about the reliability of Mr. Banda's evidence, it is unexplained. Since no affidavit was filed by Mr. Keelor, said by Mr. Banda to be the driving force of Calgary Co-op, Mr. Banda's evidence about their interrelationship was essentially uncontradicted. The absence of evidence from Mr. Keelor raises the specter of an adverse inference, and also suggests that there could be triable issues on the record.

Opinion Evidence

[101] If the chambers judge rejected the evidence of Mr. Banda because it was inadmissible opinion evidence, that was not expressed or explained. Mr. Banda was a witness with expertise, but not an "expert witness". The distinction is explained in ***Kon Construction Ltd v Terranova***

Developments Ltd, 2015 ABCA 249 at paras. 30-40, 20 Alta LR (6th) 85 which summarize the law:

> 35 Thus, there would appear to be at least three categories of "witnesses with expertise", who in some respects are witnesses of fact, and in other respects opinion witnesses:
>
> > (a) Independent experts who are retained to provide opinions about issues in the litigation, but were not otherwise involved in the underlying events. This is the category of expert witness contemplated by *White Burgess* and *Mohan*.
> >
> > (b) Witnesses with expertise who were involved in the events underlying the litigation, but are not themselves litigants. An example is the family physician in a personal injury case who is called upon to testify about his or her observations of the plaintiff, and the treatment provided.
> >
> > (c) Litigants (including the officers and employees of corporate litigants) who have expertise, and who were actually involved in the events underlying the litigation. Marinus Scheffer and Klaver fall into this category.
>
> The rules of evidence and civil procedure relating to expert witnesses are primarily designed to deal with the first category of expert witness.

This body of law was cited to the chambers judge, but not mentioned anywhere in the reasons. It is an error of law to reject admissible evidence, or to reject evidence just because it is only admissible on some issues and not others. The failure to provide reasons on this topic precludes appellate review and undermines appellate deference.

[102] In this litigation Mr. Banda was in the third ***Kon Construction*** category. He was a witness with expertise who actually participated in the events underlying this litigation. Mr. Banda was trained as a lawyer, but had spent the majority of his academic and working years in the co-operative industry, many of them with Federated Co-op. He was entitled to testify as to what he had observed and experienced during his long career and was entitled to testify as to the inferences he drew from that experience: ***Bourbonnais v Gauvreau***, 2005 ABCA 154 at para. 13, 44 Alta LR (4th) 37. This evidence could not simply be dismissed as "assumptions arrived at by deponents in their own minds", if that comment in the reasons was directed at his evidence.

[103] Mr. Banda was also entitled to rely on his expertise and experience in explaining and justifying various decisions he made on behalf of Federated Co-op. This was critical evidence with

respect to the applicability of the business judgment rule. The trial judge's conclusory statement that she had disregarded "opinion evidence where a properly qualified expert would be required" provides no insight as to how she treated Mr. Banda's evidence. While the weight that should be given to this evidence was open to her, it reflects legal error if the chambers judge ruled that it was inadmissible.

[104] For example, Mr. Banda deposed that Calgary Co-op's withdrawal of its grocery business presented an existential threat to Federated Co-op, and that the Loyalty Program was "absolutely necessary for the survival of FCL":

> [Calgary Co-op's decision] came as a surprise to me and to FCL as an organization, causing significant damage and reputational risk to FCL, with a serious risk of undermining FCL's role in the CRS and putting the long-term viability of FCL and the CRS in jeopardy. The implementation of the Letter of Commitment and Loyalty Program was absolutely necessary for the survival of FCL following the Discontinuance Decision and has, in fact, been instrumental in keeping FCL and the CRS operational and profitable during some of the most challenging times in our history.

This evidence was uncontradicted and well within the permissible scope of his evidence. There is nothing facially implausible about Mr. Banda's conclusion, and indeed it is consistent with the record when it is read as a whole. Disregarding this evidence on the basis that it was "opinion" would be an error of law.

[105] As another example, Mr. Banda expressed the opinion that the long-term objective of Calgary Co-op might be to withdraw completely from membership in Federated Co-op, even though Calgary Co-op disclaimed any such intention. Mr. Banda's impression was not without substance, because the president of Calgary Co-op had written, shortly after the amendment to the equity investment return bylaw, complaining about that bylaw. Why would that letter be written if there was no intention to withdraw? Mr. Banda was of the view that Calgary Co-op's long-term objective might be to withdraw voluntarily, or to manoeuvre itself into a position where it could claim that Federated Co-op's conduct had constructively expelled it: see reasons at para. 123.

[106] The respondent argues that this is merely "speculation" by Mr. Banda, because he could not possibly know Calgary Co-op's intentions. That, however, misses the point. The issue is not whether Mr. Banda was correct or incorrect about Calgary Co-op's long-term intentions. The point was that he honestly held this opinion, based on some evidence about Calgary Co-op's conduct. That belief on his part guided his decision-making, and his recommendations to the Board about how it should respond to Calgary Co-op's decision to withdraw its grocery business. This was admissible evidence on the issue of whether the Loyalty Program was a justified business decision, and whether it was unfair.

[107] Further, much of Mr. Banda's evidence of the relevant history and background would rely on his understanding of the records of Federated Co-op kept in the ordinary course of its business. That evidence is admissible even though no person can claim personal knowledge of the contents of those records: ***Sturgeon Lake Indian Band v Canada (Attorney General)***, 2017 ABCA 365 at paras. 31-34, 60 Alta LR (6th) 226; ***Guillevin International Co v Barry***, 2022 ABCA 144 at para. 57, 43 Alta LR (7th) 222. The Harrison affidavit relied on similar sources.

[108] Mr. Banda, like Mr. Harrison, was also entitled to give his interpretation of some of the records produced by Calgary Co-op, and how they fit into the overall context. His interpretation could not prevail over the plain wording of these records, but some of them were cryptic and capable of interpretation. The chambers judge was not required to give any or significant weight to this evidence, but it was admissible.

[109] Mr. Banda also gave largely or entirely uncontradicted evidence on a number of relevant points:

- the differences between a cooperative and more conventional forms of business corporation, and the history of the Federated Co-op;
- the co-operative movement relied on "trust and not formal agreements";
- the purpose of the Loyalty Program was "to strengthen the relationships and commitment between FCL and its member retail co-operatives, to reduce the likelihood of further Calgary Co-op-type departures from the federation, and to ensure the future viability and survival of FCL";
- despite some initial emotional reaction to Calgary Co-op's decision by some persons, cooler heads soon prevailed;
- in light of Calgary Co-op's decision to withdraw its grocery business, Federated Co-op faced the same threat as led to the failure of the Atlantic Canada Co-op.
- Federated Co-op's "philosophy of operations" was to offer a "whole package of goods and services to our members. FCL services are not a menu where you only take what is in your interest and leave the rest behind".

Given the issues in this litigation, this was all uncontradicted, admissible and highly relevant evidence.

[110] Admittedly some of Mr. Banda's affidavit was problematic, for example because it was argumentative on outstanding issues such as record production. In places it strayed into providing a legal opinion. The Harrison affidavit suffers from similar limitations. However, as noted, it is unclear how the chambers judge dealt with this evidence. The weight to be given to it was obviously up to the chambers judge, but it could not simply be disregarded. It may only have been partly admissible, or admissible for limited purposes, but that does not justify its complete exclusion, and it does not justify mischaracterizing all of Mr. Banda's evidence as "assumptions

arrived at by deponents in their own minds". Uncontradicted evidence should not be disregarded unless it is totally improbable. For example, the reasons at para. 118 say that "on the totality of the evidence" the chambers judge did not accept Mr. Banda's evidence about the Atlantic Canada Co-op. But that evidence was uncontradicted and was the "totality of the evidence".

Summary

[111] This Court is unable to extend the usual deference to the findings of fact and inferences drawn by the chambers judge for several reasons. First of all, the reasons under appeal do not explain whether some key evidence was rejected, and if so why. Secondly, the apparent treatment of key components of Mr. Banda's evidence as inadmissible opinion evidence reflects reviewable error.

The Cooperative Model

[112] While Federated Co-op is not a business corporation, the parties agreed that the oppression analysis in this appeal would follow the analysis set out in ***BCE Inc. v 1976 Debentureholders***, outlined *infra*, paras. 130-38. That being said, the various components of the analysis (reasonable expectations, valid business purpose, fairness, etc.) are significantly affected by the co-operative context.

[113] The preamble to the federal *Canada Cooperatives Act* recites that "cooperatives in Canada carry on business in accordance with internationally recognized cooperative principles". Section 2 of the provincial *Cooperatives Act* recites the same principles. The International Co-operative Alliance, founded in England in 1895, has identified co-operative values and seven principles of co-operative practice. It publishes *Guidance Notes to the Co-operative Principles*. While the *Guidance Notes* are not legally binding, both parties agreed they are helpful in identifying the reasonable expectations of members of co-operatives.

[114] The co-operative values and principles are outlined in the introduction to the *Guidance Notes*:

> Cooperatives are based on the values of **self-help, self-responsibility, democracy, equality, equity**, and **solidarity**. In the tradition of their founders, cooperative members believe in the ethical values of honesty, openness, social responsibility and caring for others.
>
> The seven co-operative principles are guidelines by which co-operatives put their values into practice:
>
> 1. Voluntary and Open Membership

2. Democratic Member Control
3. Member Economic Participation
4. Autonomy and Independence
5. Education, Training, and Information
6. Cooperation among Cooperatives
7. Concern for community

The *Guidance Notes* include a lengthy discussion of the appropriate interpretation and application of these principles.

[115] The *Guidance Notes* confirm at p. 33 that "Co-operatives are more than just an economic entity: they also encompass social and cultural needs and aspirations".

> In the Alliance's definition of co-operative identity, it is important to note that although the economic dimension of co-operatives is mentioned first, shared social and cultural "aspirations and needs" are listed on an equal footing. This reflects the agenda of the founders of the modern co-operative movement who sought to transform society and saw their co-operative as more than just an economic enterprise. Social and cultural needs and aspirations stand alongside the economic dimension of all co-operatives. It affirms the idea that a co-operative is an enterprise of human commitment by and of the people who are members of it and who make a co-operative an economic, social and cultural reality.

This observation emphasizes the difference between a co-operative and a business corporation. It informs the expectations that members may have of their co-operative, and the expectations that the co-operative may have of its members. A co-operative is not just a business, but operates in a collective way to provide benefits to the co-operative and therefore to the individual members.

[116] The first principle, Voluntary and Open Membership, includes openness to membership for all persons "willing to accept the responsibilities of membership". Which "reminds members that while membership is open to them, members must also be willing to accept the duties that come with being a member".

[117] The commentary on principle #3, Member Economic Participation, emphasizes that a co-operative is not like a business corporation. Members contribute equitably to the capital of the co-operative, but do not receive a direct return on that capital through interest or a fixed rate of return. In other words, the value of capital, and a return of capital is not the central focus of a co-operative.

Co-operatives distribute their surpluses (not described as "profits") for a number of legitimate objectives, including distribution of surpluses "in proportion to [member's] transactions with the co-operative".

[118] Specifically, the *Guidance Notes* state at pp. 9, 29:

> Membership responsibilities require constant emphasis, but they should be borne by members freely and willingly. For example, an agricultural co-operative may require that members enter into exclusive use contracts in which members are obliged to market crops, to buy inputs from the co-operative and to use its farming machinery. These user responsibilities strengthen competitiveness of co-operatives by generating market power. . . .
>
> Some co-operatives have experience of members who want to be members and share the benefits of membership when market conditions are bad, but who are not willing to accept the responsibilities of participating as members when the market for their goods and services is good. fn3 Such members may reasonably be excluded or expelled from membership because, by their actions, they have shown that they are not willing to accept the responsibilities of membership.
>
> > fn3 Some agricultural co-operatives in the United States of America in particular have had this experience of what have been described as 'freeloading, helicopter, or opportunistic members' who want to be members in bad economic times but not in good.

This commentary confirms that the reasonable expectations of a member of a co-operative include a) the possibility of exclusive use contracts, b) a requirement that the stated value of solidarity creates an expectation that members will patronize the co-operative on a long-term basis, and c) that surpluses might be distributed in proportion to the members' transactions with the co-operative. This principle is particularly relevant to assessing the fairness of the Loyalty Program.

[119] Calgary Co-op places emphasis on principle #4, Autonomy and Independence. The *Guidance Notes* clarify at p. 45 that this principle is entirely focused on the relationship between the co-operative and governments, commercial entities, lenders, and other third parties. It is focused on the independence of the co-operative from external entities. It is not aimed at the relationship between the co-operative and its members, which is governed by the bylaws of the co-operative, the terms of membership, and the programs instituted by its board. The concept that a co-operative is autonomous and "controlled by its members" does not mean that the members can insist on changes to the membership relationship to accommodate their own priorities.

[120] Calgary Co-op asserts an expectation that Federated Co-op would not "undermine legitimate Calgary Co-op interests and expectations": reasons at para. 78.2. However, principle #4 is a two-way street. Federated Co-op has an equal entitlement to autonomy and independence. It is entitled to adopt a particular business model, and is not obliged to depart from that business model to accommodate the needs or demands of third parties, or to accommodate inconsistent business models preferred by some of its members. Calgary Co-op may have perceived it was in its best interest to purchase its groceries from a competitor of Federated Co-op, but Federated Co-op had no obligation to support or facilitate that decision.

[121] In any event, no one disputes that Calgary Co-op is entitled to make its own business decisions, purchase its groceries wherever it wishes, and even withdraw from Federated Co-op. It does not follow, however, that its decisions are without consequences. Calgary Co-op cannot make decisions that are inconsistent with the co-operative model as reasonably interpreted by the Board of Federated Co-op having regard to the 60 year pattern of conduct by both parties, and still expect to participate fully in the benefits of membership. Specifically, Calgary Co-op cannot adopt a business model that is fundamentally incompatible with that of Federated Co-op's model, and then expect the latter to adjust its business model to be compatible with the one adopted by Calgary Co-op. The underlying decision may be consistent with the "autonomy" of Calgary Co-op to run its own business, but it does not enable Calgary Co-op to change the terms of its membership with Federated Co-op.

[122] Overall, principle #4 lends no weight to Calgary Co-op's argument that the Loyalty Program was unfair or oppressive. In short, Calgary Co-op was entitled to adopt a business model under which it would purchase its groceries from whichever wholesaler offered the best terms on any particular day. It does not follow that Federated Co-op had to simply carry on with "business as usual" as if nothing had happened. Calgary Co-op could not have had any reasonable expectation inconsistent with that.

[123] The *Guidance Notes* confirm in several places (e.g. pp. 31, 40) that members are to be treated "equitably", but that does not mean they are to be treated "equally". Equitable treatment means that like members will be treated in a like way. It does not mean that members who make different contributions to the co-operative will receive an equal distribution of surpluses. For example, as previously noted, the *Guidance Notes* recognize that surpluses may be distributed to members in accordance with the volume of business they do with the co-operative. This is equitable, even if it is not equal.

The Loyalty Program

[124] Prior to the events giving rise to this litigation, all members of the Co-operative Retailing System, including Calgary Co-op, purchased the bulk of their groceries and fuel from Federated Co-op. This was simply a 60 year, long-standing practice that was consistent with the expectations

of the parties arising from the co-operative values and principles they all embraced. There were no written agreements governing the expected level of patronage, which Mr. Banda testified was consistent with the co-operative approach. In para. 41 of his affidavit Mr. Banda lists numerous earlier records in which a loyalty program was discussed. For example, the Federated Co-op Board meeting minutes of October 24, 2019 noted ten years of discussions about how to get the Co-operative Retailing System "to lock arms and operate as one co-op".

[125] There were some exceptions in the fuel business. In recent years, Federated Co-op and Calgary Co-op had entered into a number of Petroleum Facility Upgrading Agreements. Under those agreements Federated Co-op provided financial assistance for the construction or renovation of retail petroleum facilities, and related support services. In exchange, Calgary Co-op agreed to purchase all its petroleum products from Federated Co-op for 10 years. The parties also entered into a one year renewable Fuel Supply Agreement.

[126] As noted, Federated Co-op's business model was based on co-operative values and principles. The concept and expectation were that the Co-operative Retailing System would not just treat Federated Co-op as one of many possible wholesale suppliers, extending their grocery patronage on an *à la carte* basis depending on short-term supply and pricing advantages. Federated Co-op also depended on the competitive advantage it obtained from bulk buying at the wholesale level. That bulk buying depended on the volume of groceries it sold to the Co-operative Retailing System. The withdrawal of Calgary Co-op's $385 million per year of purchases had a significant impact. Of particular concern was the impact if other members of the Co-operative Retailing System withdrew their grocery business.

[127] The Federated Co-op Board concluded that it had to respond to Calgary Co-op's decision to withdraw its grocery business. It required changes to stay successful: ***BCE*** at para. 112. The key feature of its new approach had to be that "loyalty" to Federated Co-op would be rewarded. Those members who chose to treat Federated Co-op as merely one of many potential wholesalers would not share those rewards. Any new business model adopted by the Federated Co-op Board that did not reward loyalty would be ineffective. The threshold for eligibility to benefit in the program was that the member had to purchase 90% of its inventory from Federated Co-op. This was consistent with the past volume of business between Federated Co-op and the Co-operative Retailing System, including Calgary Co-op. The Federated Co-op Board meeting minutes of October 24, 2019 report "overwhelming support by retails of the concept".

[128] The particular model of reward for loyalty that was chosen by the Federated Co-op Board was to provide a rebate on fuel purchases to those members of the Co-operative Retailing System that met the 90% threshold: reasons at para. 38. Eligible members would receive a rebate based on the litres of fuel purchased from Federated Co-op. The rebate was to be paid quarterly to respond to the members' request that cash flow be smoothed out over the year, and not be overly dependent on the year end distribution of patronage returns. Calgary Co-op argues that this solution was

oppressive. It argues that any rebate based on the litres of fuel purchased had to be extended to all purchasers of fuel, whether or not they had committed to purchasing 90% of their inventory from Federated Co-op. However, any program adopted by the Federated Co-op Board that would achieve its fundamental objective of discouraging withdrawals by members of the Co-operative Retailing System from the grocery business would have the same effect. Calgary Co-op would not see those rewards no matter how they were structured.

[129] A threshold issue then is whether the Loyalty Program as adopted, or any other program that rewarded loyalty, was oppressive because it unfairly disregarded the interests of Calgary Co-op.

The Test for Oppression

[130] Section 340(2) of the *Canada Cooperatives Act* provides a remedy for oppression:

> 340(2) If the court receives an application under subsection (1) and is satisfied that an act or omission of a cooperative effects a result, that the business or affairs of the cooperative are or have been carried on or conducted in a manner, or that the powers of the director are or have been exercised in a manner, that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a member or other security holder, creditor, director or officer of the cooperative, the court may order the rectification of the matters complained of.

The wording of this section is similar to the provision considered in ***BCE***, the leading case on business corporate oppression.

[131] ***BCE*** at paras. 58, 71 confirms that oppression is an equitable remedy, aimed at "fairness" not just legality. It is a flexible concept that depends on the "reasonable expectations of the stakeholders in the context and in regard to the relationships at play": at para. 59. Here the most important element of "context" is that this appeal deals with a co-operative, not a business corporation: ***Sedgwick v Edmonton Real Estate Board Co-Operative Listing Bureau Ltd***, 2022 ABCA 264 at paras. 91-92, 47 Alta LR (7th) 29. As noted *supra*, paras. 112-23, co-operatives operate based on particular values and principles. The legitimate expectations of its member stakeholders, and the fairness of its Board's decisions must be examined in that context.

[132] The threshold element of the test for oppression is the "reasonable expectations of the complainant". The actual expectations of the stakeholder are not determinative, because "the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations": ***BCE*** at paras. 62, 99.

[133] The complainant must particularize its reasonable expectations and demonstrate that they are reasonable. Asserting an expectation of "fair treatment" is insufficient: ***BCE*** at para. 70.

[134] Once the reasonable expectations of the complainant are established, the oppression analysis turns to whether the challenged decision is oppressive, unfairly prejudicial to, or unfairly disregards the relevant interests. Not every unmet expectation amounts to oppression, even if harm results: ***BCE*** at paras. 67, 71. ***BCE*** summarized:

> 72 Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

These factors will not all be relevant in any every case. Some are more relevant to the business corporation context, and others are reflective of the facts in ***BCE***.

[135] In this appeal "general co-operative practice", the "nature of the co-operative corporation", and "past practice" are all in play. However, practices and expectations can vary over time, particularly where there are valid commercial reasons for a change: ***BCE*** at para. 72.

[136] The oppression analysis incorporates the "business judgment rule" by which the courts extend deference to the business decisions of the directors so long as they are within a range of reasonable alternatives: ***BCE*** at para. 40. The directors, after all, are charged with pursuing the best interests of the corporation: ***BCE*** at para. 66. The court will not displace a reasonable business decision by the directors just because the court may perceive another alternative would have been more or equally advantageous to the corporation or some stakeholders. Further, the business judgment rule allows the board to make decisions that are consistent with the best interests of the corporation, even though competing interests might be undermined: ***BCE*** at paras. 81, 99, 104.

[137] ***BCE*** acknowledges that a corporation must treat it stakeholders "fairly and equitably". This does not, however, mean that all stakeholders must be treated "equally". There are situations where interests conflict and the interests of some stakeholders will be subordinated to others by a corporate decision: ***BCE*** at paras. 81-84, 99, 104. In those circumstances the board must act in accordance with its fiduciary duties towards the corporation. Where the challenged decision is within the range of reasonable choices that the Board could have made in weighing conflicting interests, the court will not go on to determine whether their decision was the perfect one: ***BCE*** at para. 112. The fact that some stakeholders might be disadvantaged by a corporate decision does not necessarily mean that the decision is oppressive.

[138] The second part of the oppression analysis examines whether the challenged corporate decision is inconsistent with the reasonable expectations of the complainant. Those reasonable expectations must be violated in a way that can be described as falling within the terms "oppression", "unfair prejudice", or "unfair disregard": ***BCE*** at para. 95. The adjectives used by the statute carry an inference of coercive, abusive, bad faith, or unfair conduct: ***BCE*** at para. 67.

What Is Not Oppression

[139] The respondents rely on a number of things that are said to be oppressive or indicia of oppressiveness. Some of these are simply not an indication of oppressiveness, and others, while they may have some relevance to components of the oppressiveness analysis (e.g. reasonable expectations, business judgment, fairness) have been unreasonably over emphasized by the respondents.

Thinking Is Not Oppression

[140] As the record discloses, the Federated Co-op Board considered a number of options before settling on the Loyalty Program as being the appropriate response to Calgary Co-op's decision to withdraw its grocery business: Banda affidavit at para. 53. But oppressive conduct can only result from what the Board did, not what it thought about.

[141] To illustrate, on August 7, 2019, the day after Calgary Co-op's surprise announcement it was withdrawing its grocery business, an internal Federated Co-op document was prepared exploring possible responses. It discussed a number of collateral decisions that would have to be made, including investments in food store projects, insurance and bank cards, advising the membership at large of the decision, and advising the union. It asked a number of rhetorical questions such as "Is Petroleum supply or patronage allocation restrictions for Calgary Co-op alone an option?"; "I do not understand the implications of fuel supply being terminated, but I do think it should be investigated."; "Do we continue to supply to their C-Stores? Fuel to their Gas Bars? Does this put our entire relationship at risk?". The raising of these types of rhetorical questions was to be expected, and there is nothing about considering alternatives that is oppressive. The business judgment rule requires it.

[142] The various options considered by the Federated Co-op Board have common themes. They were all designed to address the fundamental problem, which was to ensure that in the long term the Co-operative Retailing System would purchase the bulk of its groceries from Federated Co-op, and would not just treat it as one of a number of wholesalers to patronize depending on short-term advantages. However, whether there was any oppression here depends entirely on the solution that was ultimately selected: the Loyalty Program. The objectives, features, justification for, and fairness of that program are discussed *supra*, paras. 124-29. There was nothing secret about those objectives. The fact that the Board considered other options with similar features and objectives

adds nothing to the analysis unless the option chosen was so unreasonable as to fall outside the business judgment rule.

The Personal Response

[143] As noted in the reasons at paras. 34-35, some were disappointed by Calgary Co-op's decision to withdraw its grocery business. It seems that some members of Federated Co-op or the Co-operative Retailing System took Calgary Co-op's decision somewhat personally and regarded it as a betrayal of the spirit of the co-operative movement. As Mr. Banda deposed:

> I should add that much of the negative reaction from the CRS and FCL's internal management on being advised of the Discontinuance Decision was as a result of a sense of betrayal, as many recalled the efforts made to save Calgary Co-op from financial ruin not many years before, the cost of which was borne by all across the CRS and took a heavy toll on FCL's management.

The atmosphere was not assisted by the secretive way that Calgary Co-op went about making its decision. This disappointed group did not regard the other retail co-op members as being business partners or competitors, but rather as persons with a common philosophical approach to life and economics. When their fellow travellers took a different path, they were surprised, hurt, and disappointed, and some were no doubt angry. One can see that as a legitimate point of view (see #3 and #6 of the principles, *supra* paras. 114-18). This reaction is good evidence that loyalty, and a loyalty program, are consistent with the fundamental values, and therefore the reasonable expectations, of the cooperative movement.

[144] Again, being upset is not oppressive; the only thing that could be oppressive is the Loyalty Program itself. There was clearly some failed or weak communication at the time, but weakness in communication is not oppression. There is no reasonable expectation that everybody will always get along or even be polite when disagreeing. This personal reaction might be marginally relevant to the question of whether the Loyalty Program unfairly "targeted" the Calgary Co-op, an issue discussed *infra*, paras. 210-18. However, statements by one upset and potentially hotheaded person aligned with Federated Co-op do not amount to a decision of the Board, nor do they reflect the corporate attitude of Federated Co-op. Further, as Mr. Banda pointed out cooler heads soon prevailed, and the parties thereafter focused their attention on responding to the changed environment from a business perspective: reasons at para. 35. Overall, the personal reactions of some individuals are unreasonably over emphasized by the respondent.

Adjustments to the Managerial Structure

[145] As noted *supra*, para. 84, when Calgary Co-op withdrew its grocery business there were some changes implemented to the management structure of Federated Co-op. Since Calgary Co-

op had been one of the largest members of the Co-operative Retailing System it had been given an enhanced role in the management structure of Federated Co-op. When Calgary Co-op announced that it was withdrawing its grocery business, its involvement was reduced. In the circumstances this was neither unexpected nor unreasonable, and it does not signify an unfair disregard of Calgary Co-op's interests.

[146] First of all, once Calgary Co-op withdrew its grocery business it could have had no reasonable expectation that it would continue to play an enhanced role in the management of Federated Co-op. Calgary Co-op had clearly shown that it was operating under a different business model than Federated Co-op, and its continuing involvement in the management of the latter would have been philosophically and economically inconsistent. Further, Calgary Co-op was no longer one of the largest participants in the business of Federated Co-op.

[147] In addition, once Calgary Co-op made its announcement, the Board of Federated Co-op had to make strategic business decisions about how it would react. For obvious tactical and business reasons these discussions would have to be kept in-house and not shared with Calgary Co-op, particularly given the secretive way that Calgary Co-op had developed and announced its paradigm shifting decision to withdraw from the grocery business.

[148] In short, the changes to the management structure of Federated Co-op following Calgary Co-op's announcement were not inconsistent with any reasonable expectation of the latter, did not amount to oppression, and are not an indicia of unfair treatment.

The Implementation of the Loyalty Program

[149] The reasons under appeal rely on a number of factors that relate not directly to the Loyalty Program, but to the way it was implemented. These factors cannot reasonably be said to signal oppression. Many of them are summarized in para. 120 of the reasons:

> 120 Mr. Banda also deposes that after Calgary Co-op gave notice of its Discontinuance Decision, he determined that FCL would have to add more formalized agreements to protect the cooperative. FCL's evidence confirms that it has chosen in the past to secure commitment to long term investments with these types of contracts, and in the wake of Calgary Co-op's withdrawal from food, it identified that more such contracts would be prudent. Inexplicably, it then suddenly and retroactively, and without advance membership consultation or input, imposed a program that requires almost complete product sourcing across all lines of business, purportedly to generally secure future long term investments by FCL that are neither identified nor defined. (Emphasis added)

The inferences drawn in the last sentence of inexplicableness, suddenness, retroactivity, lack of consultation, and lack of identity and definition of the objectives of the Loyalty Program are not reasonably available on this record.

[150] The conclusory statement in para. 120 of the reasons is in fact inconsistent with earlier findings of fact:

> 89 Despite the tensions between the parties over a number of years, Calgary Co-op's Discontinuance Decision still appears to have taken FCL somewhat by surprise, which is understandable. The revenue loss was not insignificant, the logistics of managing the transition would be complex, and the ongoing relationship was compromised. Emotions were no doubt initially high, and FCL did not have the luxury of time to process the decision and plan for the transition process in the same way as Calgary Co-op did.

This passage, which is entirely consistent with the record, undermines the inferences drawn in para. 120 of inexplicableness, suddenness, lack of consultation, and lack of identity of the objectives of the Loyalty Program.

[151] First of all, as the first two sentences of para. 120 recognize, the decision to implement the Loyalty Program was far from "inexplicable". It was a direct response to Calgary Co-op's decision to depart from a 60 year practice and withdraw its grocery business, and the impact that had on Federated Co-op's overall business and long-term viability. The legitimacy of this business decision is discussed *infra*, paras. 165-79.

[152] With respect to the suggestion that it "imposed a program", it must be remembered that the 60 year practice of Federated Co-op and the Co-operative Retailing System, including Calgary Co-op, had been that members would by the bulk of their inventory from Federated Co-op. The "program" had existed in an informal sense for decades. At most what the Loyalty Program did was formalize a long-term expectation, and provide rewards for compliance with what previously had been a program operating purely by consensus. In any event, the Loyalty Program did not "impose it" on anyone, because members (including Calgary Co-op) were free not to join.

[153] As far as the decision being "sudden", that must be measured in the temporal context. Following at least three years of secret investigations, Calgary Co-op announced on August 6, 2019 that it intended to purchase its groceries from another wholesaler effective April 13, 2020. This gave Federated only eight months notice, during which it had to arrange for closure of the Calgary distribution centre, lay off 200 unionized workers, and adjust its forecasts for that fiscal year to recognize the loss of $385 million of business. In para. 34 of his affidavit Mr. Banda listed the numerous collateral implications of Calgary Co-op's decision that had to be dealt with, estimated at paras. 89-91 of his affidavit to have resulted in costs of over $9 million. As the reasons

observe at para. 89, Calgary Co-op's decision took Federated Co-op "somewhat by surprise", and it "did not have the luxury of time to process the decision and plan for the transition process". Federated Co-op could not wait forever in anticipation of this fundamental change. Whatever "suddenness" was being referred to in para. 120 of the reasons was explained in the analysis set out in para. 89 of the reasons.

[154] As far as retroactivity goes, Federated Co-op's year end was October 31. The Loyalty Program was announced in the third week of November, effective for the current fiscal year. At most, it was retroactive for only three weeks. However, there can be no reasonable expectation that changes will not be made in the middle of a fiscal year, especially given the surprise announcement by Calgary Co-op of the diversion of its grocery business which was also to be effective in the middle of the fiscal year. Obviously adjustments were going to have to be made to Federated Co-op's budgeting, projections, and business model starting in that very fiscal year. Calgary could not have had a reasonable expectation that once it withdrew its grocery business in April, the midyear patronage distribution would nevertheless take place in May as it had in previous years. As the reasons recognize at paras. 16, 87: "Patronage return rates are discretionary, vary from year to year, and are not set until the end of FCL's fiscal year". In any event, this argument assumes that if the Loyalty Program had been announced on October 31 it would have been acceptable; three weeks do not turn a legitimate business decision into oppressive conduct. In summary, on this record there is no reasonable argument about retroactivity contributing to oppression.

[155] As far as consultation goes, there is no obligation in the Bylaws for the Board of Federated Co-op to consult before making decisions. The Board might find that to be sound managerial practice, but the Board is the body charged with managing the business of Federated Co-op. As noted, the timeline did not leave much room for consultation. In any event, there is no indication on this record that the "membership" complained about a lack of consultation; to the extent that the Co-operative Retailing System was not consulted that is not any legitimate concern of Calgary Co-op. On the contrary, the record discloses that the other members overwhelmingly supported the Loyalty Program.

[156] It is also somewhat ironic that Calgary Co-op complains about not being consulted when it kept its decision making process secret for three years, and never consulted with Federated Co-op about its paradigm shifting decision to withdraw its grocery business. Further, there is little point in consulting with any particular stakeholder when the views of that stakeholder are well known. Calgary Co-op had clearly decided to withdraw its grocery business, it must reasonably have expected that Federated Co-op would be forced to change its business model accordingly, and no amount of consultation would have changed the ultimate direction that Federated Co-op took. In short, an absence of consultation has no effect on the oppression analysis.

[157] Finally, this record does not support any "lack of identity and definition of the objectives of the Loyalty Program". As discussed *supra*, paras. 124-29, the objectives of the Loyalty Program were clear and overt: it was designed to prevent future withdrawals of the grocery business of other members of the Co-operative Retailing System, and potentially to entice Calgary Co-op back into the fold.

Withdrawal of Calgary Co-op from Federated Co-op

[158] One distracting red herring in the arguments was speculation about the intentions of both parties regarding Calgary Co-op's long-term membership in Federated Co-op. The fact is that Calgary Co-op never withdrew its membership, and Federated Co-op never purported to expel it. Federated Co-op recognized throughout that Calgary Co-op had the right to withdraw its membership if it wished. However, as Mr. Banda pointed out, the withdrawal of Calgary Co-op was contrary to the interests of Federated Co-op. Calgary Co-op represented $385 million of grocery business that Federated Co-op would love to have. There were also undoubtedly advantages to the Co-operative Retailing System having a presence in a major city like Calgary.

[159] There was speculation by some, including Mr. Banda, that Calgary's long-term strategy was to withdraw from Federated Co-op. There was some evidence in support of this, because after the bylaw amendments had been passed the chair of Calgary Co-op's Board wrote objecting to them: see also the reasons at paras. 81-82, 123. This objection would only make sense if Calgary Co-op perceived it might withdraw from Federated Co-op. Calgary Co-op had recently withdrawn from a number of programs that it had initiated. There had been "odd communications" from third parties about Calgary Co-op's actions. There were numerous references in its produced records confirming Calgary Co-op did in fact consider withdrawal: reasons at para. 81. There was speculation by others that Federated Co-op was manoeuvring or making decisions to force Calgary Co-op to give up its membership. Some speculated that Calgary Co-op was attempting to set up an argument that it had been "constructively expelled". Mr. Keelor had made a comment to that effect in 2018. However, the point is not (as assumed at para. 33 of the reasons) whether these impressions were accurate. Rather, the point is that the perceptions of the parties about the other's intentions informed the decisions they made at the time. Specifically, because Mr. Banda believed Calgary Co-op would also withdraw its fuel patronage in the short term, whether or not the loyalty payments were calculated based on fuel sales or some other mechanism would not make any difference to Calgary Co-op.

[160] While one can see how those involved in the turmoil of the moment might have speculated about such things, none of it ever happened. None of it can reasonably amount to oppression, evidence of oppression, or evidence in support of any component of the oppression analysis. This appears to be a red herring, fuelled almost entirely by the corporate and personal animosity surrounding the events underlying this appeal. However, if the intentions and commitments of

Calgary Co-op to the co-operative system were considered relevant to the oppression issue, this raised a triable issue.

Summary

[161] In summary, the oppression analysis in this appeal must be conducted based on the adoption by Federated Co-op of the Loyalty Program itself. The factors mentioned in this part of these reasons are certainly part of the overall context, but they are largely irrelevant to the oppression analysis. They are primarily distracting, and invite an analysis of who is the "good guy", and the "bad guy" in this situation. That, however, is not a helpful way to approach the oppression analysis.

Was the Adoption of the Loyalty Program Oppressive?

[162] Calgary Co-op's claim is based on the allegation that the Loyalty Program was oppressive, or unfairly prejudicial to, or unfairly disregarded its interests. As ***BCE*** states at para. 59, oppression is fact specific and must be analysed in the particular context and having regard to the relationships at play.

[163] The components of the oppression analysis are referred to at several points in the reasons under appeal:

> 79 Despite FCL's position that Calgary Co-op could not reasonably hold certain expectations, I find it unnecessary to go through each and every allegation in a detailed fashion. There can be no doubt that Calgary Co-op was reasonably entitled at a minimum to expect that FCL would comply with the CCA and its own Bylaws and that it would act in good faith to treat all members of the federation equally, including in respect of the allocation of patronage. . . .
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> 83 But that is not what occurred. The failure of either entity to terminate Calgary Co-op's membership interest entitled Calgary Co-op to expect FCL to continue to follow its bylaws and governing legislation going forward, and to treat Calgary Co-op the same as any other member with respect to distribution of profits and participation in membership activities. . . .
>
> 88 I find it was reasonable for Calgary Co-op to expect FCL to continue to distribute profits through patronage returns to Calgary Co-op, based on whatever amount of business it did with FCL, at the same rates set for the various lines of products as for the other members, and to afford it the same membership participation as other members. These are undisputed fundamental cornerstones of the co-operative model. . . .

> 124 I find on the totality of the evidence that the decision to create and impose the Loyalty Program in its current form was unreasonable, not made for a justifiable business purpose and was inconsistent with the reasonable expectations of Calgary Co-op. The business judgment rule does not save FCL from the finding of oppression I have made regarding the Loyalty Program.

These passages flag a number of key issues in this appeal.

[164] The following approach is helpful:

(a) Why did the Federated Board adopt the Loyalty Program? Did it serve a legitimate business purpose, and was it a good faith exercise of the Board's business judgment?
(b) What were Calgary Co-op's expectations? Where those expectations "reasonable" and were they supported by the factual record?
(c) Did the Loyalty Program breach the *Canada Cooperatives Act*, or the Federated Co-op Bylaws?
(d) Since the interests of the various stakeholders conflicted, was the Board's decision to implement the Loyalty Program "fair" in the context? To what extent was Calgary Co-op entitled to be treated "equally" or "the same as any other member"? Was it "targeted"?

The Business Purpose of the Loyalty Program

[165] The business purpose of a decision challenged in an oppression action is a threshold issue, to be analysed in combination with the reasonable expectations of the complainant. As the appellant points out, in this case the reasons treated the business judgment rule as a "defence" to be considered following a finding of oppression. This amounts to more than a problem with dealing with the issues in the wrong order, and distorts the underlying analysis. The business purpose of the impugned decision must be examined at an earlier stage.

[166] The reasons acknowledge the objectives of Federated Co-op as defined by its Board:

> 114 To properly consider this argument, it is helpful to review the reason for the existence of FCL, the role that it serves, and the expectations of its members. The stated purpose of a federal cooperative association is to serve its members. FCL maintains that second tier organizations such as FCL, where all of its members are cooperatives, exist to maximize the power of wholesale buying, consolidate collective manufacturing and services, overcome supply challenges, and improve efficiencies to save costs for its locally owned cooperative association members, in turn for their own cooperative members.

The Federated Co-op Board adopted the Loyalty Program in furtherance of these broad objectives.

[167] The reasons recognize at para. 112 that the business judgment rule extends deference to business decisions made by the Board for a justifiable business purpose. Where the challenged decision is within the range of reasonable choices that the Board could have made in weighing conflicting interests, the court will not go on to determine whether the Board's decision was the perfect one: ***BCE*** at paras. 99, 112. The business judgment rule does not allow the court to second-guess the Board's interpretation of how its objectives can be achieved, and which of various options was preferable. It is up to the Board, not the court, to choose between alternative methods of achieving a business objective, and to conclude whether a particular strategy will be wholly or partly successful in achieving that objective.

[168] The objectives of the Loyalty Program were clear on this record: (a) to discourage any other members of the Co-operative Retailing System from withdrawing their grocery business from Federated Co-op, and (b) to entice Calgary Co-op to reverse its decision and resume its patronage of Federated Co-op. With hindsight, it seems that the latter objective was likely unattainable, but it nevertheless motivated the decisions of the Federated Co-op Board. In context, these were clearly legitimate objectives for Federated Co-op to pursue. The uncontradicted evidence of Mr. Banda was that Calgary Co-op's decision exposed Federated Co-op to an existential threat, leading to the same risks that resulted in the demise of the Atlantic Canada co-operative system.

[169] The conclusory finding at para. 124 of the reasons that the Loyalty Program was "not made for a justifiable business purpose" is unexplained. The only possible rationale that can be discerned from the reasons is that the chambers judge thought there were other, preferable, formats for a loyalty program. The reasons state the Loyalty Program "in its current form was unreasonable". This analysis violates the "business judgment rule", because the reasons second-guess the decision of the Federated Co-op Board, something that is not permitted by the business judgment rule: ***BCE*** at para. 40. Further, as ***BCE*** notes at para. 83 the existence of alternative solutions is irrelevant to the oppression analysis unless it can be shown that those alternatives were more clearly beneficial to the complainant. If the amount of money that was distributed to reward loyalty based on fuel sales had been distributed in some other way, Calgary Co-op still would not have seen the benefits.

[170] The reasons under appeal found that there was no duty on any member to exclusively patronize the cooperative:

> 5 I was provided with no caselaw to support FCL's contention that members of a cooperative association or federation owe a duty to other members or to the federation itself. By analogy, no one holding a Calgary Co-op membership could ever shop at Safeway or fuel up at Esso, because buying from competitors arguably reduces the profits to their own co-op and the distribution of those profits to their fellow members. I do not accept that that is the law.

That is true. Any member, like Calgary Co-op, can buy its groceries wherever it wants. There is indeed no such "legal duty". However, as the *Guideline Notes* confirm, membership should be open to all persons "willing to accept the responsibilities of membership", which "reminds members that while membership is open to them, members must also be willing to accept the duties that come with being a member". This passage does not use "duties" in the legal sense, but rather reflects the commitment of cooperation, solidarity, and cooperative action that underlines the cooperative movement.

[171] But that is not the point. The Loyalty Program is not based on any "duty" to buy exclusively from the cooperative. The point is that even absent any "legal duty" the members of the cooperative cannot complain if the cooperative puts in place a program that rewards those members who do buy substantially all their groceries from it. Rewarding repeat patronage is a standard industry practice. By focusing on the nonexistence of a "duty", this analysis fails to recognize the objectives and legitimacy of a loyalty program.

[172] Notwithstanding the correct articulation of the business judgment rule, the reasons at paras. 121-22 put forward other possible structures for a loyalty program which are said to be preferable to the one chosen by the Board. It is suggested that the loyalty rebates could have been based on all products, not just litres of fuel purchased. In other words, the loyalty rebate could have been tied directly to the volume of groceries purchased, or a combination of groceries and fuel. However, no matter how the rebates were calculated, Calgary Co-op was not going to benefit unless it purchased 90% of its products from Federated Co-op. For example, if the Loyalty Program had been directly tied to the volume of grocery business, Calgary Co-op would still have qualified for nothing. The fact that it continued to purchase fuel would not have qualified it for loyalty payments unless it met the 90% threshold. The fact that the loyalty rebates were made through the mechanism of litres of fuel purchased is accordingly irrelevant to the overall analysis. Absent a finding that any loyalty program would be oppressive, the Board was entitled to select the most convenient method of calculating the rebates, which it ascertained was based on litres of fuel purchased by those members of the Co-operative Retailing System that qualified: Banda affidavit at para. 42.

[173] The reasons continue at para. 122 by observing that the loyalty payments were not sensitive to the total volume or value of product purchased. So a small member of the Co-operative Retailing System that purchased 90% of its products from Federated Co-op would qualify for rebates, at an equivalent rate to large members (like Calgary Co-op). There is, however, no reason why the Federated Co-op Board could not decide "loyalty is loyalty", and small members of the Co-operative Retailing System should not be disadvantaged just because they were small. Mr. Banda deposed that in the co-operative movement use of the co-operative is more important than size; whether that is "true" is immaterial, because it nevertheless reflects a legitimate approach. Undoubtedly the Loyalty Program could have set the threshold for qualification at a certain dollar value of purchases (e.g. $100 million per year) but the selection of the 90% threshold does not

make it an unjustifiable business decision. Further, there was nothing unreasonable about setting the threshold at 90%, because that represented the 60 year historical practice of the members of Federated Co-op and enjoyed "overwhelming support by retails".

[174] The reasons also point out at para. 122 that the Board retained the right to revoke or amend the Loyalty Program at any time. That is an entirely predictable and reasonable feature of the program, because later Boards must have the flexibility to change direction to respond to the changing business environment. The reasons do not explain why the obvious ability to vary or cancel the Loyalty Program, whether expressly stated or not, renders it an unjustifiable business decision.

[175] In short, the Loyalty Program was clearly a justifiable business decision. The conclusory statement in para. 124 to the contrary reflects reviewable error, because it arises from a second-guessing of the Board's decision on how to implement the program. Unless any loyalty program would be unreasonable, the mechanisms of the program are not subject to second-guessing by the court.

[176] The respondent argues that the Federated Co-op Board had other alternatives open to it. That may be so, but the selection among reasonable alternatives is for the Board. In any event, the options proposed by the respondent were not viable. For example, it argued that Federated Co-op could have retained its market share by becoming more efficient, competitive, and responsive to market conditions. This, however, would be completely inconsistent with the whole purpose of the Loyalty Program, which was to ensure that the Co-operative Retailing System did not just treat Federated Co-op as another wholesaler, to be patronized on an *à la carte*, opportunistic basis. This option would amount to a subordination of Federated Co-op's legitimate business model to accommodate an inconsistent business model selected by Calgary Co-op. It was this new business model that led to the problem in the first case, and the Federated Co-op Board reasonably decided that a new approach was required.

[177] The reasons under appeal found significance in the fact that Federated Co-op did not immediately move to protect its position when the Atlantic Canada Co-op failed: reasons at para. 118. The Atlantic Canada Co-op had apparently failed about four years before Calgary Co-op's decision to withdraw its grocery business, directly as a result of some of Atlantic Canada Co-op's members beginning to purchase from other wholesalers. Mr. Banda deposed that the Atlantic Canada Co-op experience was talked about regularly, and was one reason for the implementation of the Loyalty Program. The reason why the Federated Co-op Board did not immediately respond when Atlantic Canada Co-op failed is unclear from the record. Perhaps the Federated Co-op Board thought circumstances in Western Canada were different. Perhaps there was an overreliance on the 60 year pattern of business between Federated Co-op and the Co-operative Retailing System. Perhaps the Federated Co-op Board was simply naïve. In any event, the issue is not how the Federated Co-op Board reacted four years earlier when the Atlantic Canada Co-op collapsed. The

issue is how the Federated Co-op Board reacted when Calgary Co-op withdrew its grocery business. In face of that game-changing decision, it would have been doubly naïve for the Federated Co-op Board to simply ignore what had happened to the Atlantic Canada Co-op. The analysis of this issue in the reasons under appeal is illogical and discloses reviewable error.

[178] The reasons also imply that a Loyalty Program was inconsistent with "fundamental cornerstones of the co-operative model": reasons at para. 88. That is not the case. For over 60 years all members of the Co-operative Retailing System purchased the bulk of their inventory from Federated Co-op. That long-standing pattern of business cannot possibly be "inconsistent with the co-operative model", at least as it was understood by the members of Federated Co-op. As the reasons note at para. 11, a "key component of the cooperative model is the distribution of financial surpluses to its members through patronage returns based upon their use of the cooperative". Distributing loyalty payments based on patronage is in fact the epitome of cooperative values and principles, which promote strength through collective action and solidarity: *supra* paras. 114-18.

[179] In summary, the implementation of the Loyalty Program was a legitimate business decision of Federal Co-op's Board. As Mr. Banda deposed, Calgary Co-op's decision to withdraw its grocery business "pointed out the glaring vulnerability to FCL of not having formal agreements in place for all aspects of our business". In the face of that realization Federated Co-op pursued a valid business objective within the range of reasonable alternatives. The reasons under appeal disclose reviewable error in coming to the contrary conclusion. As outlined subsequently in these reasons, the oppression analysis then turns to an examination of the reasonable expectations of Calgary Co-op, and whether its interests were unfairly disregarded by what was facially a valid business decision.

The Reasonable Expectations of Calgary Co-op

[180] The next stage of the analysis is to ascertain the expectation of Calgary Co-op, and whether those expectations were reasonable. That sets the threshold of deciding whether the Loyalty Program was unfairly prejudicial to or unfairly disregarded Calgary Co-op's interests.

[181] As ***BCE*** confirms at para. 70 it is not sufficient for Calgary Co-op to say that it expected to be "treated fairly". That is essentially a circular form of analysis. The complainant in an oppression action must prove its particular expectations, and also prove that they were reasonable ***BCE*** at paras. 68, 70.

[182] The reasons discuss the reasonable expectations of Calgary Co-op:

> 79 Despite FCL's position that Calgary Co-op could not reasonably hold certain expectations, I find it unnecessary to go through each and every allegation in a detailed fashion. There can be no doubt that Calgary Co-op was reasonably entitled

> at a minimum to expect that FCL would comply with the CCA and its own bylaws and that it would act in good faith to treat all members of the federation equally, including in respect of the allocation of patronage. . . .
>
> 83 But that is not what occurred. The failure of either entity to terminate Calgary Co-op's membership interest entitled Calgary Co-op to expect FCL to continue to follow its bylaws and governing legislation going forward, and to treat Calgary Co-op the same as any other member with respect to distribution of profits and participation in membership activities. . . .
>
> 88 I find it was reasonable for Calgary Co-op to expect FCL to continue to distribute profits through patronage returns to Calgary Co-op, based on whatever amount of business it did with FCL, at the same rates set for the various lines of products as for the other members, and to afford it the same membership participation as other members. These are undisputed fundamental cornerstones of the co-operative model. . . .
>
> 124 I find on the totality of the evidence that the decision to create and impose the Loyalty Program in its current form was unreasonable, not made for a justifiable business purpose and was inconsistent with the reasonable expectations of Calgary Co-op. The business judgment rule does not save FCL from the finding of oppression I have made regarding the Loyalty Program.

It appears, then, that the chambers judge found that Calgary Co-op's reasonable expectations were that Federated Co-op would:

> (a) comply with the *Canada Cooperatives Act* and its Bylaws, and
> (b) treat all members of the Co-operative Retailing System equally, including in respect of the allocation of patronage, which meant patronage would be based on the amount of business, using the "same rates as other members" for "various lines of business", and to afford it the same membership participation.

The expectations of compliance with the statute and Bylaws, and the related argument that the loyalty payments were "patronage in disguise" is dealt with next. The issue of "equal treatment" and expectations about the allocation of patronage is dealt with in the following section, more specifically *infra* paras. 207-209.

[183] The chambers judge outlined what were found to be Calgary Co-op's reasonable expectations, but what is equally interesting is that she did not find certain other key expectations to exist or be reasonable.

[184] First, Calgary Co-op had no reasonable expectation that Federated Co-op would not make any changes to its business practices in the face of Calgary Co-op's game-changing decision to withdraw its grocery business. No such expectation existed, and if it had existed it would have been unreasonable. Calgary Co-op did not have any expectation that it would be "business as usual", and that Federated Co-op would disregard Calgary Co-op's decision to withdraw its grocery business: reasons at para. 82. As noted in ***BCE*** at para. 110 past practices are not immutable and may change to "reflect changing economic and market realities". Federated Co-op faced such changed realities, it would have been unreasonable for the Federated Co-op Board to fail to respond, and Calgary Co-op could not have expected anything else.

[185] Secondly, there was no reasonable expectation that Federated Co-op would not institute some changes to its business operations to discourage other members of the Co-operative Retailing System from withdrawing their grocery patronage. Specifically, there was no reasonable expectation that Federated Co-op would not institute some sort of loyalty program which would reward those members of the Co-operative Retailing System who directed substantially all of their patronage to Federated Co-op. In short, some type of loyalty program was directly responsive to the existential threat faced by Federated Co-op as a result of Calgary Co-op's decision. Rewarding repeat patronage is a standard industry practice, which is relevant to the oppression analysis: ***BCE*** at para. 73. The reasons actually stated at para. 124 that the Loyalty Program "in its current form" was not reasonable, implying that some different loyalty program would have been consistent with Calgary Co-op's expectations. As noted, *supra* paras. 172-75, the selection of the loyalty program was up to the Board.

[186] Calgary Co-op's objection to the Loyalty Program begs the question of what the Federated Co-op Board could have done to reward members of the Co-operative Retailing System who purchased the bulk of their groceries from it. Again, Calgary Co-op could not have had a reasonable expectation that "nothing would change" and that "business would continue as usual" after it withdrew its grocery business. Calgary Co-op had no reasonable expectation that no form of loyalty program would be implemented. Rewarding loyalty was a legitimate and reasonable business objective. Because of the business model it had chosen, Calgary Co-op would have been excluded from any meaningful loyalty program. That does not make every loyalty program oppressive, because Federated Co-op was entitled to protect its long-term viability and the interests of the Co-operative Retailing System.

[187] Calgary Co-op points out that there had never been any written obligation on the Co-operative Retailing System to purchase any proportion of its groceries from Federated Co-op. That is true, but Mr. Banda's uncontradicted evidence was that the co-operative model relied more on trust and solidarity, without the same emphasis on written agreements as found with a business corporation. In any event, once the implications of the decision by Calgary Co-op to source its groceries elsewhere became apparent, it would have been remarkable if the Board of Federated Co-op did not change its practices. As noted, "business as usual" was not a reasonable expectation.

Further, it had been the long-standing practice of the Co-operative Retailing System to purchase virtually all of their groceries from Federated Co-op, and all the Federated Co-op Board decided was to reduce that established practice to written form, and add an incentive to comply with it. This was not a fundamental change in the way that Federated Co-op and the Co-operative Retailing System did business. What was a fundamental change was Calgary Co-op's decision to outsource its grocery business.

[188] The ultimate point is that Calgary Co-op cannot have had any reasonable expectation that the Federated Co-op Board would not adopt any program to reward loyalty. Even if such a loyalty program rewarded some stakeholders to the detriment of others, that does not make the decision oppressive: ***BCE*** paras. 81, 99, 104. Calgary Co-op must argue that the particular way of distributing the loyalty rewards by tying them to fuel purchases was oppressive. That argument is unsustainable. Whichever method of distributing loyalty payments was adopted, Calgary Co-op would not benefit, because Calgary Co-op would not adjust its business model to meet the threshold requirement of "loyalty".

Legality of the Loyalty Program

[189] The reasons under appeal concluded at paras. 79, 83 that Calgary Co-op had a reasonable expectation that Federated Co-op would comply with its Bylaws and the *Canada Cooperatives Act*. As reasonable expectations go, that seems unobjectionable. What is missing, however, is any finding that the Loyalty Program involves a breach of either.

[190] The argument about noncompliance with the statute or Bylaws partly relates to the assertion of a reasonable expectation that fuel rebates would be to tied only to fuel purchases, and that neither grocery purchases or a minimal level of purchases would be a factor. This is a component of the nonexistent and unreasonable "business as usual" expectation. It also mis-labels the "loyalty rebates" as "fuel rebates"; the fact that the Board found it most efficient to calculate the loyalty rebates based on litres of fuel sold does not change their fundamental nature.

[191] Calgary Co-op bases this asserted expectation in part on the wording of the *Canada Cooperatives Act*:

> 2(1) *patronage return* means an amount that the cooperative allocates among and credits or pays to its members or to its member and non-member patrons based on the business done by them with or through the cooperative.
>
> Patronage returns
>
> 155 (1) A cooperative may allocate among and credit or pay to the members, as a patronage return, all or a part of the surplus arising from the operations of the cooperative in a financial year in proportion to the business done by the members

> with or through the cooperative in that financial year, calculated in the manner described in subsection (2) at a rate set by the directors.
>
> (2) For the purpose of subsection (1), the directors may calculate the amount of the business done by each member with or through a cooperative in a financial year by taking into account
>
> > (a) the quantity, quality, kind and value of things bought, sold, handled, marketed or dealt in by the cooperative;
> >
> > (b) the services rendered
> >
> > > (i) by the cooperative on behalf of or to the member, and
> > >
> > > (ii) by the member on behalf of or to the cooperative; and
> >
> > (c) differences that are, in the opinion of the directors, appropriate for different classes, grades or qualities of things and services.

The Federated Co-op Bylaws are to the same effect. Of note, it is conceded that setting patronage returns is a highly discretionary matter. The Board has control of the timing, quantity, and method of calculation of patronage returns, subject of course to the absence of any oppressive decision.

[192] Calgary Co-op argues that the references to "business done" in these sections mean that the Board must consider the fuel business as a discrete form of "business done", and not tie fuel rebates to other lines of business. In other words, if the Board allocates a rebate per litre of fuel, it must apply that rebate uniformly to all fuel purchases, and cannot make such rebates conditional on, for example, grocery purchases. That is not the proper interpretation of the statute.

[193] As s. 155(2) specifies, the "amount of business done" can be calculated by "quantity, quality, kind and value" and the Directors may differentiate between "different classes, grades or qualities of things and services" that are in its opinion appropriate. The Board can clearly tie patronage returns to fuel sales, grocery sales, volume of business, "loyalty", or a combination of them. As previously noted, the Board had a wide discretion over the mechanism it would use to distribute the loyalty payments, and there was nothing in the statute or Bylaws that precluded distributing loyalty payments based on litres of fuel purchased, even if eligibility for those rebates was based in part of the volume of groceries purchased.

Categorization of the Loyalty Rebates

[194] The parties engaged in a spirited debate on whether the fuel rebates were really a form of "patronage in disguise", an argument adopted by the reasons under appeal at paras. 93.4, 102. Since the oppression analysis is concerned with fairness, not legal formality, this issue is at best of secondary importance: see ***BCE*** at paras. 58, 71. In particular, the way that the accountants dealt with the rebates in order to comply with Generally Accepted Accounting Principles is collateral to the true issue. Money can only be distributed once. Whether Federated Co-op distributed the funds dedicated to promoting loyalty as fuel rebates, or grocery rebates, or developed some different formula for rewarding loyalty, or allowed those amounts to fall into its annual surplus to be distributed as patronage returns makes no difference. Under s. 155 of the statute the Board can allocate patronage returns "on the amount of business done", having regard to differences in "quantity, quality and kind" of patronage that the Board in its discretion finds appropriate, and can reward loyalty in substantively the same way.

[195] Further, not only are patronage returns discretionary and variable, they depend on the surpluses arising from operations. Money spent by Federated Co-op on any program, including a loyalty program, will inevitably reduce the surplus available for distribution as patronage returns. But Calgary Co-op could not have had any reasonable expectation that Federated Co-op would never spend money on programs to assist some or all of the members of the Co-operative Retailing System. In fact, such programs had been routine over the years; a number of them are listed in para. 19 of the reasons. Responding to "gas wars" faced by individual members is a good example. And as previously discussed, having a loyalty program was not *per se* contrary to Calgary Co-op's reasonable expectations.

[196] Calgary Co-op had no expectation or legal right to have fuel sales treated as a distinct line of business. The Federated Co-op Board could have allowed the loyalty money to fall into its surplus, and then declared patronage returns based on a member's volume of grocery business. To illustrate, the Federated Board could have elected to set aside $35 million from its budget, and used it to pay patronage returns to members of the Co-operative Retailing System who purchased 90% of their groceries from Federated Co-op in proportion to the volume of their purchases. Unless Calgary Co-op can argue that <u>any</u> loyalty program at all would be oppressive (on which see *supra* paras. 185-88 the exact method of distributing the loyalty money, whether through rebates or patronage returns, does not change the oppression analysis.

[197] Payments under the Loyalty Program are not patronage returns; they are loyalty payments. They are loyalty rebates, and not fuel rebates. They are payments made to promote a particular policy found by the Federated Co-op Board to be essential to its long-term viability: incentivizing all members of the Co-operative Retailing System to purchase substantially all of their inventory from Federated Co-op. There is nothing in the statute or Bylaws that precludes the Board from making such payments, however they might be characterized.

Summary

[198] In summary, while the reasons under appeal categorized the payments under the Loyalty Program as "simply patronage in disguise", this is a red herring. Even if those payments were "patronage in disguise", the fact remains that under the *Canada Cooperatives Act* and the Bylaws of Federated Co-op the Board has a wide discretion as to how it would distribute its surpluses. At the end of the day the argument about "patronage returns in disguise" comes down to an argument that any loyalty program would be inconsistent with the expectations of Calgary Co-op and would unfairly disregard its interests. The record and the law do not support those conclusions. The reasons disclose reviewable error in relying on the "patronage in disguise" rationale advanced by Calgary Co-op.

[199] Further, there is no provision that requires the Board to allocate surpluses evenly across all product lines. There is also no provision that prohibits the Board from implementing programs that provide assistance to members of the Co-operative Retailing System facing particular challenges, or providing incentives for its members to act in a certain way. Calgary Co-op could have had no reasonable expectation that surpluses would always be maximized and only be distributed through patronage returns, or that Federated Co-op would not adopt any programs, even for valid business reasons, that would have the effect of reducing the ultimate surplus available to fund patronage returns.

[200] While Calgary Co-op had a reasonable expectation that Federated Co-op would comply with its Bylaws and the *Canada Cooperatives Act*, the record does not disclose anything inconsistent with that expectation.

The Expectation of Equal Treatment

[201] As noted, *supra* para. 182, the second posited reasonable expectation of Calgary Co-op was that Federated Co-op would treat all members of the Co-operative Retailing System equally, including in respect of the allocation of patronage, which meant patronage would be based on the amount of business, using the "same rates as other members" for "various lines of business", and to afford it the same membership participation.

[202] The expectations surrounding "allocation of patronage" and basing patronage on the "amount of business" at the "same rates as other members" for "various lines of business", were dealt with in the previous section of these reasons. In short, the loyalty payments were not patronage returns, and in any event the Board was not obliged to treat fuel sales as a distinct line of business, without basing loyalty payments or patronage returns on other factors, such as the volume of grocery business.

[203] Calgary Co-op posits a reasonable expectation based on past practices. It points to the history of Federated Co-op distributing its surpluses by patronage returns in a certain pattern: reasons at paras. 13-17. Calgary Co-op implies that based on this past practice it had a reasonable expectation that rebates on fuel purchasers would not be tied to grocery purchases, and that minimum patronage levels would not be imposed. As ***BCE*** confirms at para. 76: "Past practice may create reasonable expectations". However, Federated Co-op had a superior expectation that Calgary Co-op's past practice of purchasing all its groceries from it would continue. As the reasons point out para. 66 the parties had jointly participated in "a decades-old commitment to a cooperative, significantly entwined economic relationship". Based on that past practice Federated Co-op had constructed a large warehouse facility just to service Calgary Co-op's needs. Overall, Federated Co-op has the better argument on the importance of "past practices", entitling the Federated Board to implement programs responsive to the new reality created by Calgary Co-op, which merely formalized and incentivized the long-standing existing practice. If any "reasonable expectations" here were broken they were broken by Calgary Co-op. As repeatedly noted, Calgary Co-op could not have had an expectation of "business as usual". Changes to the historical pattern of business, including patronage returns, was inevitable and reasonable.

[204] An important factor in this appeal is the trigger of the decision (implementation of the Loyalty Program) that is said to be oppressive. In ***BCE*** the Board had invited takeover bids, generating offers that were detrimental to the pre-existing interests of the bondholders. In that context those bondholders asserted an expectation that their rights would not be adversely affected in the resulting reorganization. In this appeal the opposite occurred. It was Calgary Co-op's decision to start buying its groceries elsewhere that created the paradigm shift in the co-operative business environment. Calgary Co-op, having concluded that it was in its interests to disturb the 60 year *status quo*, could not expect that the aspects of the *status quo* that were advantageous to it would simply continue. As noted, Calgary Co-op knew that Federated Co-op would have to change its business model in response. What is fundamentally "fair" in this context is significantly influenced by which party pushed over the first domino.

[205] In short, Calgary Co-op had no reasonable expectation that past patterns of distributing funds available to Federated Co-op would simply continue despite its game-changing decision to purchase its groceries elsewhere.

[206] As previously noted, the oppression analysis cannot be founded on generalized "expectations of fairness": ***BCE*** at para. 70. The proffered expectation of equal treatment and equal "member participation" do not rise above that. It is unclear whether any such expectation is even established on this record. However, assuming that some type of loyalty program would not have been inconsistent with its reasonable expectations, Calgary Co-op argues that the Loyalty Program adopted by the Federated Co-op Board was oppressive because it "did not treat Calgary Co-op equally," and "targeted" Calgary Co-op. Neither of these arguments for oppression can be supported on this record.

Equality

[207] Calgary Co-op argues that any program that does not treat it "equally" unfairly disregards its interests, but as the appellant points out, both the *Guidance Notes* and ***BCE*** state that the test is that stakeholders be treated "equitably" not "equally". The difference is subtle but important. The reasons under appeal recognize at paras. 10.3, 11, 16 that surpluses are to be distributed "equitably", often based on "use of the cooperative", and that patronage returns are highly discretionary. However, they inconsistently go on to find the Loyalty Program oppressive because it did not treat all members "equally" and the "same as" other members: see paras. 79, 83. And as previously noted, *supra* paras. 191-96, the statute permits the Board to recognize differences in classes, grades or qualities of business that it finds are appropriate.

[208] The fundamental flaw in Calgary Co-op's "equality" analysis is that it uses the wrong comparator. It argues that it should be compared to other fuel purchasers and be treated "equally" with them. The Loyalty Program, however, is not based on fuel purchases, but rather on the volume of total purchases, including groceries. All members who purchase 90% of their product are treated equally and equitably under the Loyalty Program. Calgary Co-op cannot be compared with the benefiting group simply because it still purchases fuel from Federated Co-op, because the defining quality of those who benefit from the program is total purchases, not fuel purchases. "Equitable" treatment recognizes legitimate distinctions between different groups. Non-participants in the Loyalty Program are not "the same" as participants.

[209] In any event, it has never been the practice that Federated Co-op would treat all members "the same" regardless of their particular circumstances or challenges: reasons at para. 19. For example, Federated Co-op has come to the aid of members of the Co-operative Retailing System that ran into financial or administrative difficulties, including the Calgary Co-op when it was having serious financial difficulties in the 1990s. Federated Co-op would support individual members who were exposed to "gas wars" with competitors. Federated Co-op has entered into arrangements with single members that benefit only that member to the exclusion of other members. An example is The Produce People venture entered into by Calgary Co-op and Federated Co-op which provided no benefits to other members of the Co-operative Retailing System. While the reasons under appeal recognize at para. 11 that a co-operative's returns are traditionally distributed based on the members' "use of the cooperative", that does not mean that the Board had to treat all kinds or levels of uses as being equivalent.

Targeting

[210] Calgary Co-op makes a related argument that its interests were unfairly disregarded because it was "targeted" by the Loyalty Program, but that allegation is not supported on the uncontradicted record. The reason why Calgary Co-op was the only member of the Co-operative Retailing System that did not benefit from the Loyalty Program was because it did not meet the

90% threshold test for eligibility. That was a result of a business decision by Calgary Co-op. As previously noted, it was entitled to make that decision, but it could not thereafter assume that "nothing would change".

[211] The reasons under appeal repeatedly refer to the fact that it was known that Calgary Co-op would not benefit from the Loyalty Program: reasons at paras. 100, 101, 109. That was obvious. A loyalty program that did not reward loyalty would be ineffective. If those who did not participate nevertheless received the benefits of the loyalty program, it would be pointless. Since the whole objective of implementing the Loyalty Program was to forestall any further withdrawals of grocery business by members of the Co-operative Retailing System, it is circular to find it (or any) loyalty program oppressive because it rewards loyalty.

[212] At a factual level, it is undisputed that Calgary Co-op was not singled out or "targeted". Every member of the Co-operative Retailing System who was prepared to sign on for the Loyalty Program was entitled to participate, and all members who followed a different business model were excluded. Calgary Co-op was invited to join the Loyalty Program and declined, as it was entitled to do. The fact that Calgary Co-op was the only member of the Co-operative Retailing System who did not receive rebates under the Loyalty Program was because Calgary Co-op was the only one who did not sign up. The fact that Calgary Co-op was an anomaly was not "targeting".

[213] Calgary Co-op argues that the "targeting" occurred because Federated Co-op implemented a loyalty program which it knew was inconsistent with the business model chosen by Calgary Co-op. Calgary Co-op's decision to withdraw its grocery business prompted the entire discussion about loyalty programs, a fact that was undisputed and obvious. In that sense the Loyalty Program was a "response" to Calgary Co-op's decision, but it is unreasonable to describe that as "targeting".

[214] The uncontradicted evidence of Mr. Banda was that Federated Co-op assumed that in the short term Calgary Co-op would withdraw its fuel patronage as well as its grocery patronage: Banda affidavit at paras. 42-44. As a result, it would not make any particular difference to Calgary Co-op that the loyalty payments were based on fuel sales, because Calgary Co-op would not be making any fuel purchases either. On this assumption by Federated Co-op, the format of the Loyalty Program did not target Calgary Co-op.

[215] It is critical to the analysis that it was Calgary Co-op that unilaterally changed its grocery purchasing following the 60 year practice and expectations of Federated Co-op. By making that business decision Calgary Co-op essentially targeted itself; it chose a business model under which it would not receive payments under any loyalty program adopted by Federated Co-op. Just as Calgary Co-op was entitled to select its business model, so was Federated Co-op; Federated Co-op was entitled to select a business model that was consistent with 60 years of practice, and reward and incentivize its members accordingly. One important objective of the Loyalty Program was to prevent withdrawals of grocery patronage by other members of the Co-operative Retailing System.

The Loyalty Program potentially "targeted" all 160 other members of the Co-operative Retailing System who might adopt a business model similar to that of Calgary Co-op.

[216] In the end, the "targeting" argument comes down to an assertion that any loyalty program would be "oppressive". That is not the result of the proper application of the test for oppression. Calgary Co-op would not have been able to participate in any loyalty program that rewarded a 90% level of patronage. So long as Calgary Co-op was the only member of the Co-operative Retailing System which would not commit to that level of patronage, it would be the only member that did not qualify for loyalty incentive payments. In the face of Calgary Co-op's decision to withdraw its grocery business, and having regard to what happened to the Atlantic Canada Co-op, implementing some form of loyalty program was a justified and likely inevitable business decision. Setting reasonable qualifications for participation in a reward program is not "targeting" just because some members do not satisfy those qualifications due to their own business decisions.

[217] The fundamental objective of the Loyalty Program was to provide a disincentive to other members of the Co-operative Retailing System who might have been tempted to shop around. Any effective loyalty program would have to provide incentives to those who were loyal, and disincentives to those who exercised their right to purchase their groceries elsewhere. When Federated Co-op was considering the options open to it, it was recognized that some would get loyalty payments while others would not, this would have a "negative impact" on non-participants, which would "cause some pain. Show that there is pain here. Can't let someone leave without punishment. Has to be consequences . . . CC pain points . . . loyalty program": reasons at para. 100. This colourful language merely confirms that the Loyalty Program would not work unless there were incentives and disincentives built into it. The language used is not indicative of targeting, because it was universally applicable to every member of the Co-operative Retailing System that chose to outsource its groceries.

[218] The overriding point is that "targeting", even to the extent the record might create that impression, was not oppressive. Obviously, any program by the Federated Co-op Board that rewarded loyalty was not going to have any benefit for Calgary Co-op. There could have been no reasonable expectation by Calgary Co-op that the Federated Co-op Board would never reward loyalty. The particular method chosen was fair and reasonable. As ***BCE*** notes at paras. 81, 99, 104 sometimes a board must make decisions that will be detrimental to the interests of some stakeholders but that does not make such decisions oppressive.

Conclusion on Oppression

[219] The final stage of the oppression analysis is to determine whether, in light of Calgary Co-op's reasonable expectations, the Loyalty Program was unfairly prejudicial to it, or unfairly disregarded the interests of Calgary Co-op. As explained by ***BCE*** at para. 67, not every unmet expectation justifies a remedy.

[220] The analysis proceeds from this point on the basis that (a) Calgary Co-op had no reasonable expectation that it would be "business as usual" if it withdrew its grocery business; (b) Calgary Co-op had no reasonable expectation that no loyalty program of any kind would be implemented; (c) it was a reasonable business decision for the Federated Co-op Board to implement some form of loyalty program, and to establish the mechanisms by which it would work; (d) there was nothing unreasonable about distributing loyalty payments based on fuel purchases; (e) the Loyalty Program did not violate any provision of the Federated Co-op Bylaws or the *Canada Cooperatives Act*, (f) the Loyalty Program was consistent with co-operative values and principles and did not unfairly target Calgary Co-op or treat it inequitably.

[221] It follows that there is no identified reasonable expectation of Calgary Co-op that has been breached. The foundation for a finding of oppression is not present.

The Equity Investment Return Bylaw

[222] Calgary Co-op argued that amendments to Federated Co-op's equity investment return bylaw were oppressive. The trial judge found that the respondent had not met the burden of proof and dismissed that portion of the application for partial summary judgment: reasons at paras. 125-26. No cross-appeal was filed on that issue, and the appellant did not seek reverse or "boomerang" summary judgment on it: see ***McDiarmaid Estate v Alberta (Minister of Infrastructure)***, 2021 ABCA 53 at para. 14, 458 DLR (4th) 545 and ***1062484 Ontario Inc v Williams McEnery***, 2021 ONCA 129 at paras. 36-37. Accordingly, nothing further needs to be said on that issue.

Partial Summary Judgment

[223] The appellant argues that summary judgment, and particularly partial summary judgment was not appropriate on this record. It argues there are a number of other overlapping aspects to the dispute, including termination of the fuel contracts, operation of the High Level store, and the fairness of the equity investment return bylaw. It argues all these other matters are intertwined, and there is a significant risk of inconsistent findings of fact.

[224] The respondent argues that the litigation over the fuel supply contracts relates to breaches of contract, and not oppression. It is true that the fuel claim does not use the word "oppression". The claim, however, is primarily framed as a breach of the duty of honest and good faith performance of the contracts. It also pleads "fundamental breach", a concept unrecognized in Canadian contract law: ***Tercon Contractors Ltd. v British Columbia (Transportation and Highways)***, 2010 SCC 4 at paras. 62, 82, 106, [2010] 1 SCR 69. The claims respecting the fuel contracts are very widely pleaded, and although they are not tied directly to the Loyalty Program there is a considerable risk that the allegations of dishonest and bad faith performance will overlap with the allegations in this action.

[225] On this record the appellant is correct that there is a significant risk of inconsistent findings of fact at trial, and granting partial summary judgment was a risky procedure. However, since the respondent has not met the standard of proof for summary judgment anyway, and since the appellant did not ask for reverse summary judgment, the issue of the suitability of partial summary judgment is moot.

Conclusion

[226] An appellate court must respect the standard of review, but there are numerous reviewable errors shown on this record.

- An error in failing to identify the findings of fact made, and an apparent palpable and overriding error in excluding significant uncontradicted evidence on the mistaken view that it was inadmissible: *supra* paras. 97-110.
- An analytical error in concluding that the Loyalty Program was based on a "duty" on members of the Co-operative Retailing System to purchase their groceries from Federated Co-op: *supra* paras. 170-71.
- A palpable and overriding error in concluding that the Loyalty Program did not serve a valid business purpose (*supra* paras. 168-79) compounded by a related error in second guessing the Board's decision: *supra* paras. 167, 175.
- An analytical error when considering the significance of Federated Co-op's reaction to the collapse of Atlantic Canada Co-op: *supra* para. 177.
- A palpable and overriding error in failing to give full effect of the fact that Calgary Co-op had no reasonable expectation it would be "business as usual" follow its game-changing decision: reasons at para. 88, and see *supra* paras. 184-86. This compounded a reviewable error in assuming that "past practices" favoured the position of Calgary Co-op: *supra* para. 203.
- Reviewable error in treating irrelevant matters as relevant to the oppression analysis, and overemphasizing other marginally relevant matters (considering options, personal reactions, managerial changes, lack of consultation, retroactivity, etc.): *supra* paras. 139-61.
- A palpable and overriding error in emphasizing that it was known throughout that Calgary Co-op would not receive any benefits from the Loyalty Program: reasons at paras. 109, 107. Since the whole point of the program was to incentivize patronage, this was obvious, and would be a feature of any loyalty program. Calgary Co-op could not have had any expectation that Federated Co-op would not implement any sort of loyalty program, or that Calgary Co-op could benefit from such a loyalty program without meeting its criteria: *supra* at paras. 184-86, 210-18.
- A related analytical error in concluding that the Loyalty Program, which was admittedly designed to discourage other members of the Co-operative Retailing System

from withdrawing their business, was somehow "punitive", when it was in pursuit of a legitimate business objective, or that a loyalty program was inconsistent with co-operative values: reasons at paras. 94-95, 104, 143.

- A palpable and overriding error in treating loyalty payments as "patronage returns in disguise", compounded by a further error in implying this was unauthorized by the Bylaws or the statute, or that any expenditure which reduced the surplus available for distribution was somehow suspect, or that it was relevant to the oppression analysis how loyalty was rewarded: *supra* paras. 189-98. This error was manifested by a related reviewable analytical error in apparently assuming that no loyalty program was justified, and that any expenditures on such a program (which would obviously reduce the surpluses available for distribution as patronage returns) was unjustified and unfair: reasons at paras. 177, 182-84.
- An overriding analytical error in assuming that Calgary Co-op was the "same" as the other members of the Co-operative Retailing System and could reasonably expect "equal" treatment: reasons at paras. 79, 83, 88, 93, 132 and see *supra* paras. 207-209. This led to a further reviewable error in concluding that Calgary Co-op was unfairly "targeted": *supra* paras. 210-18.

[227] In conclusion, and having regard to the standard of review, the respondent did not meet the burden of proving oppression on a balance of probabilities. The respondent did not prove any reasonable expectations that were not met, or any unlawful, unreasonable, inequitable, or unfair conduct that could amount to oppression. The appeal should be allowed, and the application for partial summary judgment dismissed.

Appeal heard on February 13, 2025

Memorandum filed at Calgary, Alberta
this 24th day of April, 2025

Slatter J.A.

Appearances:

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