Court of King's Bench of Alberta

Citation: Calgary Co-op v Federated Co-op, 2023 ABKB 735

Date: 20231221
Docket: 2001-02166
Registry: Calgary

Between:

Calgary Co-operative Association Limited

Plaintiff/Applicant

- and -

Federated Co-operatives Limited

Defendant/Respondent

Reasons for Decision
of the
Honourable Justice M. D. Slawinsky

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[1] For more than sixty years, Calgary Co-operative Association Limited ("Calgary Co-op") sourced the bulk of its food, fuel and related retail products from Federated Co-operatives Limited ("FCL"), before giving notice in 2019 that it would begin purchasing its groceries from a different supplier. In this application for partial summary judgment, Calgary Co-op alleges that after giving this notice, FCL fundamentally changed its patronage return allocation practices and engaged in other objectionable conduct, all to the unfair detriment of Calgary Co-op, the largest member of FCL's cooperative association.

[2] Calgary Co-op seeks a finding of oppression and related remedies, including a timely return of its more than $160 million equity investment in FCL. While initially seeking summary judgment for the entirety of its claim, Calgary Co-op now asks the Court to find oppressive conduct only with respect to certain discrete issues, reserving others to be addressed in the ongoing litigation. In particular, issues raised in Calgary Co-op's claim that relate primarily to the operations of a store in High River are not part of this application, nor are matters relating to the termination of its fuel contracts with FCL, which occurred after this action was commenced but before this application was heard.

[3] FCL resists the application. Relying in part on the business judgment rule, FCL denies that it has engaged in oppressive conduct, and submits that Calgary Co-op created its own circumstances by choosing a different wholesale food supplier. FCL further argues that the issues before the Court are not appropriate for summary determination. FCL's counterclaim in this action, relating to alleged damages and losses resulting from Calgary Co-op's discontinuance of grocery purchases, also does not form part of this application.

[4] On the issues that are before the Court, I must determine whether the test for partial summary judgment has been met, whether FCL has acted in a manner that was oppressive, or unfairly prejudicial to Calgary Co-op, or unfairly disregarded Calgary Co-op's interests, and if so, what remedy is appropriate for FCL's conduct.

[5] For the reasons that follow, I find that:

1. The test for partial summary judgment has been met;
2. FCL has engaged in conduct with respect to the implementation of its Loyalty Program in 2019 that was unfairly prejudicial to, and unfairly disregarded, Calgary Co-op's interests and that cannot be excused by the business judgment rule; and
3. The appropriate remedy is the immediate payment, with interest, by FCL to Calgary Co-op of the amounts it would have received had it been paid under FCL's Loyalty Program at the applicable annual rates multiplied by Calgary Co-op's fuel purchases.

I. CONTEXTUAL FACTUAL BACKGROUND NOT MATERIALLY IN DISPUTE

[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.

[7] With that qualification, and unless specified to the contrary, the preliminary facts I find are as follows.

A. The parties and their pre-dispute relationship

[8] FCL is a body corporate, continued under and governed by the *Canada Cooperatives Act, SC* 1998, c 1 *("CCA").* FCL carries on business in Western Canada as a general wholesaler and fuel producer for the supply of groceries, liquor, home and building products, crop inputs and fuel to its approximately 170 co-operative association members for retail resale.

[9] Calgary Co-op is a body corporate, incorporated pursuant to the *Co-operatives Act,* SA 2001, c-28.1 ("*ACA")* and carries on business as a retailer of food, pharmaceuticals, fuel and other products in and around the city of Calgary. It has been a co-operative association member of FCL since the 1950's.

[10] The specific rights and responsibilities of the parties are set out in the *CCA.* In addition, by virtue of their structure as cooperatives, the parties commit to follow internationally

developed and accepted Cooperative Principles issued by the International Co-operative Alliance, as supplemented with explanatory and interpretive Guidance Notes. These cooperative principles can be summarized as follows:

1. Voluntary and open membership, meaning that membership is available to any who wish to join and are willing and able to assume the rights and responsibilities of membership;
2. Democratic member control, meaning that members actively participate in the decisions of the co-operative. With few exceptions, each member of a cooperative federation or association can have only one vote regardless of size or volume of business;
3. Member economic participation, meaning that members contribute equally, democratically control the capital, and equitably allocate the surpluses among the members for a variety of purposes;
4. Autonomy and independence, meaning that a federation or association is controlled by its members;
5. Education, training and information, meaning that support is provided to members to aid in sustainability and development;
6. Cooperation among cooperatives, meaning that they work together through local, regional, national, and international structures; and
7. Concern for community, meaning that cooperatives place importance on community building and support.

[11] A key requirement of a cooperative federation or association is the equal treatment of all its members. Another 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.

[12] In recent years, FCL has generated nearly $10 billion annually in sales, resulting in nearly $1 billion net annual income. Almost 65% of FCL's annual surplus income is routinely distributed to its membership through cash and equity patronage returns.

[13] Historically, FCL has distributed portions of its annual financial surpluses to its members in accordance with s. 155 of the *CCA* and Part 13 of FCL's bylaws as patronage returns in the following manner:

1. Within 60 days of FCL's October 31 fiscal year end, the FCL Board allocates an amount it deems necessary from their "savings arising from the operations of the co-operative for that financial year" for retention, and then allocates among and credits or pays to the members "the balance of the savings, in proportion to the business done by the Members with the co-operative in that financial year", at a percentage patronage return rate determined at the discretion of the Board, for each eligible commodity category of FCL's products.
2. Member cooperative associations are then paid annual patronage returns at the applicable rates, based on the amount of goods in each eligible category that they purchased from FCL over the course of that fiscal year. In the case of fuel and fuel related products, patronage typically has been calculated and paid on litres of

product purchased. Patronage typically has been calculated and paid on dollar value of most other lines of product purchased.

3. The patronage returns are distributed as member shares, a portion of which is redeemed by FCL to generate a cash payment.

4. More than half of the annual returns routinely have been redeemed and paid to the members in the form of cash each year.

5. The balance of the patronage returns not redeemed for cash remain as additional membership shares in FCL, which throughout these reasons I will refer to variously as "member shares" or "equity investment".

[14] Patronage returns traditionally have been a significant source of the profitability of the member cooperatives, who have relied on them heavily for the continued viability of their businesses. Because these returns are not received until after FCL's fiscal year end, cash flow during the fiscal year routinely has been a major source of concern for the members.

[15] Prior to 2020, FCL partially addressed this cash flow concern by effecting a "Mid Year Payment" to the members in approximately May of each year. FCL deposes that this payment represents an amount equal to 2% of a member's equity investment.

[16] Patronage return rates are discretionary, vary from year to year, and are not set until the end of FCL's fiscal year. In order to provide some guidance to members in their future financial planning and forecasting, the FCL Board advises members of a projected or estimated rate for patronage returns ("Patronage Rate Guidelines") for each upcoming year, which the members are required to use for their feasibility forecasting in their financial dealings with FCL. Because the membership structure of the cooperative limits members' ability to finance their operations from outside sources, FCL is a significant source of financial support for member programs and capital expenditures.

[17] At least 20 years of patronage percentage rate data for all commodity categories supplied by FCL to its members was in evidence in this application. For illustrative purposes, patronage percentages with respect to food and fuel for the five years from 2015- 2019 were as follows:

Year	Food	Fuel
2019	3.462	10.34
2018	4.346	12.286
2017	4.185	5.193
2016	4.316	4.666
2015	4.345	4.671

[18] In the 20 years from 2000-2019, Calgary Co-op received from FCL for all lines of business total patronage returns of just over $720 Million. Approximately two-thirds of this total came from fuel purchases, and the bulk of the remainder was attributable to groceries.

[19] From time to time, FCL has also instituted various targeted programs for particular members, to address different discrete circumstances as they occurred. While not an exhaustive list, these included initiatives such as subsidizing fuel prices during local gas wars, providing services and managerial support during operational challenges, and addressing disparities in regional delivery charges. FCL maintains that such programs were often implemented because

they were necessary or desirable to address particular issues of members of its diverse demographic group, and that assisting with their sustainability ultimately was desirable to maintain the health of the collective co-operative federation.

[20] Initially, FCL sold fuel and groceries to its members without requiring any specific contracts or firm purchasing commitments. Over time, FCL moved to a model of requiring fuel supply contracts, to secure longer term investments in member projects that it financially supports. It generally did not make a similar move with respect to grocery purchases. FCL advises that it found it unnecessary to do so, despite recognizing the risk of members discontinuing purchases from FCL without a contractual commitment.

[21] Calgary Co-op is the largest member of FCL. In the most recent years prior to this dispute arising, Calgary Co-op:

1. held approximately 10% of the total equity membership collectively held by all cooperative association members in FCL;
2. purchased between $250 million and $350 million annually in grocery-related products prior to its withdrawal from food, representing somewhat less than 20% of FCL's food business, and approximately 3.5% of its total revenues; and
3. purchased in excess of $400 million annually in fuel products through annually renewed Petroleum Fuels Supply Agreements, until they were ultimately cancelled by Calgary Co-op after the commencement of this lawsuit. As of January 31, 2023, Calgary Co-op no longer sources its fuel from FCL.

[22] Prior to this dispute, Calgary Co-op was involved in a variety of events, consultations and decision-making processes with FCL, over and above the annual and special meetings it was entitled to attend. These included at least the following:

1. Holding a seat on FCL's Executive Management Team;
2. Attending FCL's June District 5 Meetings;
3. Attending FCL's General Managers Meetings;
4. Attending the annual Fall Leaders Conference; and
5. Attending meetings held in conjunction with the annual meeting.

B. The Bylaw Amendment

[23] Prior to March 4, 2019, FCL's bylaws provided that if a cooperative association member chose to withdraw from FCL, they were entitled to a return of their equity investment within five years of withdrawal, on a schedule to be determined by FCL, subject to certain solvency tests set out in the *CCA* and the FCL bylaws.

[24] In 2018, FCL began to take steps to amend its equity investment payout bylaw to increase the timeline for payout from five years to twenty years. According to FCL's evidence, the specific steps were as follows:

1. The Board of Directors approved the proposed amendment on September 20, 2018;

2. The amendment was discussed at the various FCL Fall Leaders Conferences in the fall of 2018, including a meeting between the FCL board chair and Calgary Co-op's board on September 28, 2018;

3. On February 4, 2019, FCL distributed to its members notice of this proposed bylaw change and its intention to call for a vote from the membership at the upcoming annual meeting;

4. The amendment was voted on by the membership at FCL's annual meeting on March 4, 2019;

5. At the meeting, a change to the amendment was proposed to decrease the 20 year period to a term of 10 years, but this change was defeated;

6. The amendment to expand the redemption period to 20 years was ultimately carried by 81% of the voting members, satisfying the special resolution requirement for bylaw amendments; and

7. Calgary Co-op was represented at the annual meeting, and no objection to the amendment by Calgary Co-op was noted in the Minutes.

[25] No evidence was presented in this proceeding to contradict this evidence from FCL. To the contrary, Calgary Co-op's internal documents confirm that they were aware of the bylaw amendment prior to making their decision to discontinue grocery purchases from FCL, and the first time they voiced concern to FCL about the amendment was in correspondence dated August 6, 2019, the same day they gave notice to FCL of their decision.

C. The dispute giving rise to the litigation

[26] It is undisputed that the relationship between FCL and Calgary Co-op had become strained for a number of years prior to Calgary Co-op's withdrawal from food purchasing. While I make no specific findings with respect to the cause of this friction, some of the reasons offered by the parties in their voluminous affidavit materials include:

1. On behalf of Calgary Co-op:

    a. FCL was not nimble enough in its decision-making processes, failing to respond in a timely manner to market, competition and other pressures;

    b. FCL was not competitive enough in its grocery pricing, causing significant financial pressures to Calgary Co-op's food business;

    c. FCL was too controlling concerning its supply chain contracts, and failed to involve Calgary Co-op sufficiently in information sharing and negotiations;

    d. FCL's rural cooperative model did not adequately represent the market needs of higher volume urban markets such as Calgary Co-op; and

    e. FCL did not fairly appreciate, recognize or support that Calgary Co-op was entitled to make business decisions based on its responsibility to its own membership.

2. On behalf of FCL:

a. Calgary Co-op was not truly interested in the cooperative model and working together with the larger federation for the collective good of all member associations;

b. Calgary Co-op was focused solely on its own needs and fiscal bottom line;

c. Calgary Co-op was reactive to immediate business concerns and continuously looked for short-term solutions, rather than taking a long-term, holistic "give and take" view of the benefits of the co-operative federation;

d. Calgary Co-op viewed FCL as nothing more than another vendor in a menu-based approach to procurement; and

e. Calgary Co-op had its own agenda, and simply told FCL what it thought FCL wanted to hear, thereby undermining trust.

[27] Many of the more recent communications between FCL and Calgary Co-op document their disagreements and challenges concerning a wide variety of topics, such as the content of flyers, supply and marketing of Alberta Beef, floral supplies, foam tray purchases, direct solicitation of vendors outside the FCL procurement process, and commitment to various other federation initiatives.

[28] Additionally, the disclosure of internal business records from each organization in the course of this litigation has revealed an even deeper, more personal layer of conflict in the parties' relationship. Essentially, Calgary Co-op perceived the FCL Board and organization as too paternalistic, pedantic and secretive. FCL felt that Calgary Co-op was scheming, demanding and underhanded and that its CEO was egomaniacal, manipulative, condescending and arrogant.

[29] As in many long term relationship breakups, there likely are elements of truth to both parties' perceptions of the causes and contributors to the friction and eventual demise of their relationship. Ultimately however, it is not necessary to resolve the various complaints that FCL and Calgary Co-op harboured against each other. What is potentially relevant is that conflict existed between the parties for a number of years prior to Calgary Co-op's decision to discontinue purchasing food, and that conflict appears not to have been resolved through direct efforts between the parties. This created an environment of distrust that interfered with the parties' efforts to address their business concerns.

D. The Grocery Discontinuance Decision

[30] Being dissatisfied with its grocery business margins and cash flow losses, and what it perceived to be FCL's lack of effective response to those concerns, Calgary Co-op began internally exploring the prospect of alternative wholesale sources for food in approximately 2016. Ultimately, it engaged the services of KPMG to assist in assessing the pros and cons of making such a major shift in their business operations. Calgary Co-op did not disclose these investigations and inquiries to FCL, keeping their research and discussions highly confidential. Calgary Co-op wished to keep this internal while they explored the feasibility of such an option, explaining that they did not want to jeopardize their relationship and other business dealings with FCL if, in the end, they decided to continue to work fully within the existing model.

[31] FCL became informed of these preliminary actions by Calgary Co-op only in the course of this lawsuit, after obtaining an order for Calgary Co-op to produce certain documents it initially had withheld from production. FCL expressed shock and dismay that Calgary Co-op had

been exploring this option for a significant time, while continuing to do business with FCL and continuing to make demands on FCL's services. FCL feels betrayed by Calgary Co-op, especially because FCL had provided critical management services some twenty years earlier when Calgary Co-op was in operational difficulty. FCL characterizes Calgary Co-op's steps to explore alternative grocery product supply from direct competitors of FCL as secretive, underhanded and in bad faith.

[32] On August 6, 2019, Calgary Co-op gave formal notice that it was discontinuing its purchase of groceries from FCL, effective April 13, 2020 (the "Discontinuance Decision"). The notice specified that Calgary Co-op was not withdrawing its membership with FCL and that it would continue to honor its fuel supply contracts. Calgary Co-op promised to protect FCL's confidential information from competitor grocery suppliers and sought a cooperative transition period to move from FCL's supply chain to its new grocery source, Save-On Foods.

[33] Despite Calgary Co-op's clear written intention to remain a member and continue to purchase fuel, FCL's CEO, Scott Banda, speculates the opposite in his Affidavit. Partially relying on disclosure of Calgary Co-op's internal documents obtained two years later in 2021, Mr. Banda deposes that he believed in 2019 Calgary Co-op also intended to discontinue purchasing fuel from FCL in 2020. I can find no support for this theory in Calgary Co-op's internal documentation or in the communications between the parties. Calgary Co-op clearly undertook contingency planning for an alternate fuel supply, in the event that FCL chose to stop supplying fuel in retaliation for the discontinuance of food purchasing, but a decision to leave fuel purchasing voluntarily is not in evidence.

[34] FCL was extremely unhappy with Calgary Co-op's decision to discontinue purchasing food products, and many urgent discussions and meetings were held both internally and with other member cooperatives. Calgary Co-op's CFO, Paul Harrison, tables and summarizes in his Affidavit a long list of information strongly suggesting that FCL wanted to punish Calgary Co-op for this decision. I will review that information in more detail later in these reasons.

[35] FCL does not deny that these communications and discussions occurred, nor does it assert that the documentation does not accurately depict the knee jerk sentiments of many of FCL's representatives. However, FCL submits that initially, individuals were mad and upset, but that cooler heads eventually prevailed and reasonable business decisions were made to navigate the transition and carry the federation forward.

[36] In addition to making specific program delivery and transition decisions, FCL also took certain actions with respect to Calgary Co-op's ongoing member engagement:

1. On October 2, 2019, Calgary Co-op's seat on FCL's Executive Management Committee was eliminated.
2. On October 3, 2019, FCL's Board of Directors revoked its previous invitation to Calgary Co-op's CEO and directors to attend the Fall Co-op Leaders Conference.
3. On April 6, 2020, FCL held an Online General Managers Meeting, without informing or inviting Calgary Co-op. At this meeting, fuel sales and fuel patronage forecasting were discussed.
4. On June 2, 2020, FCL informed Calgary Co-op that their attendance at FCL hosted meetings was suspended until the within litigation was resolved. These hosted meetings included the June District Meeting, the Leaders Conference and the

meetings held in conjunction with the annual meeting. Some months later, FCL reinstated Calgary Co-op's participation in these events.

E. The Loyalty Program

[37] Shortly after receiving notice of the Discontinuance Decision, FCL instituted a new Loyalty Program. Prior to implementation, there was no consultation with or approval by FCL members regarding this new program. The Loyalty Program applied retroactively commencing November 1, 2019 for FCL's 2019-2020 fiscal year.

[38] Details of the Loyalty Program are as follows:

1. Members who wished to participate were required to sign a Letter of Commitment and Loyalty Payment Agreement.
2. Participating members were required to have a fuel supply agreement in place and were required to purchase over the course of FCL's fiscal year at least 90% of their total products for resale that could be provided by FCL or FCL-approved suppliers.
3. Participating members who met these criteria were paid quarterly cash payments, calculated by multiplying a rate set by FCL each year by the number of litres of fuel purchased by the member for that quarter.

[39] For the 2019/2020 fiscal year, the Loyalty Program rate was set at $.04/litre.

[40] All FCL members except Calgary Co-op were informed of the program at the FCL's Co-op Leaders Conference held November 16 & 17, 2019. Calgary Co-op's invitation to this meeting had been extended and then withdrawn. FCL informed the members that this program would replace the Mid Year Payment.

[41] Calgary Co-op was informed of the Loyalty Program on November 21, 2019, by FCL representatives who travelled to Calgary to deliver a Loyalty Payment Agreement, already signed by FCL.

[42] Calgary Co-op was not informed by FCL until May 11, 2020 that there would be no Mid Year Payment.

[43] Calgary Co-op did not participate in the Loyalty Program. Because it had committed to withdraw from grocery purchases as of April 13, 2020 and to source them elsewhere, it would have been impossible for Calgary Co-op to meet the 90% total purchase target without abandoning its new commitments, reversing its decision to stop purchasing groceries from FCL, and continuing to purchase food from FCL. FCL was aware of this.

[44] FCL made other decisions regarding its services to Calgary Co-op during the notice/transition period between August 6, 2019 and April 13, 2020. It is not necessary to detail those decisions in order to decide this application.

F. The Initial Litigation

[45] Calgary Co-op commenced this action and applied for summary judgment of its entire claim on the basis of oppression. During submissions, it modified its position to seek partial summary judgment only, primarily focussed on the implementation of the Loyalty Program and on the amendment of the equity investment return bylaw.

[46] As noted above, FCL counterclaimed for damages and losses in respect of the Discontinuance Decision, although it concedes that there was no contractual or legislative requirement for Calgary Co-op to source these products from FCL. The Counterclaim originally claimed damages of approximately $10 Million, but has since been amended to seek approximately $40 Million. That Counterclaim is not part of this application.

G. The Aftermath

[47] Effective November 1, 2019, FCL began making quarterly Loyalty Program payments to participating members on a rate per litre of fuel purchased. FCL advises that 164 member co-operatives were eligible to participate, and that only Calgary Co-op did not do so.

[48] No patronage return was declared by FCL for the 2019-2020 fiscal year, and no MidYear Payment was made in May 2020. I pause here to acknowledge that the Covid-19 pandemic descended on the world at almost the same time that the Discontinuance Decision took effect. There is some evidence in the materials that there was downward demand for fuel products, but upward demand for food products. However, neither party has raised the pandemic as being material to the issues in this application.

[49] Calgary Co-op continued to purchase both fuel and groceries from FCL after November 1, 2019 until April 13, 2020, following which it continued to purchase fuel but stopped purchasing groceries.

[50] For the 2020-2021 fiscal year, the Loyalty Program rate was set at $0.04 cents per litre, and no fuel patronage was paid to any member. Loyalty Program rates were also subsequently set for the 2021-2022 fiscal year and for the 2022-2023 fiscal year. Fuel patronage was paid in those years, over and above the Loyalty Program payments.

[51] Calgary Co-op has received no payments from the Loyalty Program at any time. It did receive fuel patronage payments for the 2021-2022 and 2022-2023 fiscal years.

[52] Calgary Co-op eventually cancelled all of its fuel contracts with FCL and has commenced a separate lawsuit with respect to them. That lawsuit is not part of this application.

[53] This summary judgment application took approximately 2 ½ years to be heard from the time it was first filed. The parties had numerous appearances before Applications Judges in both regular and special chambers, conducted extensive questioning on affidavits, and pursued additional document disclosure. These various steps have culminated in the submission of over 8000 pages of Affidavits, exhibits, briefs and jurisprudence for this application. Oral submissions by multiple counsel on both sides took place over three full days.

II. ISSUES

[54] The issues I must decide are:

1. Is this application appropriate for summary judgment?
2. If so, has Calgary Co-op established oppressive conduct?
3. If so, what relief should be granted?

III. IS THIS APPLICATION APPROPRIATE FOR PARTIAL SUMMARY JUDGMENT?

A. The Test for Summary Judgment

[55] The *Alberta Rules of Court* expressly provide for the summary determination of claims in Rule 7.3(1):

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> (a) there is no defence to a claim or part of it;
>
> (b) there is no merit to a claim or part of it;
>
> (c) the only real issue is the amount to be awarded.

[56] In ***Hyrniak v Mauldin***, 2014 SCC 7, the Supreme Court of Canada called for a shift in culture towards more proportionate, timely and affordable justice system procedures. The Court of Appeal in ***Weir-Jones Technical Services Inc v Purolator Courier Ltd***, 2019 ABCA 49 at paras 21 and 25, subsequently settled the test in Alberta to determine whether there is no merit or defence to a claim: the court must be able to make the necessary findings of facts, apply the law to the facts, and be satisfied that summary judgment is a proportionate, more expeditious and less expensive means than a trial, to achieve a just result.

[57] The burden of proof remains on the moving party to show on a balance of probabilities that there is no genuine issue requiring a trial, in the sense that the use of the summary judgement process is procedurally fair, as opposed to a measurement of the merits or strength of the moving party's case; see ***Hannam v Medicine Hat School District no. 76***, 2020 ABCA 343.

[58] To defeat the plaintiff's application, the defendant has an evidentiary burden of persuading the judge that there is still a genuine issue requiring a trial. The defendant must meet that burden based on the record; it may not resort to speculation, and it is presumed to have put its best foot forward in presenting its evidence.

[59] Volume of materials alone is likely not itself a reason to reject a summary judgment application without careful consideration of the application (***Parks v McAvoy***, 2022 ABQB 294 at para 26). Neither is complexity with an extensive record and significant time and expense expended (***Hryniak*** at para 33).

[60] The standard of proof of a fact is a balance of probabilities. Summary judgment may be available where facts are in dispute because the judge is entitled to make findings of fact, including the drawing of inferences, based upon the totality of the record. Disputes about material facts do not necessarily disqualify a matter from being summarily decided. The outcome does not have be obvious.

[61] Summary judgment is particularly suited to cases in which the facts are not in serious dispute and the real question is how the law applies to the facts. Conversely, disputes where there are material differences in facts that are difficult to resolve on the existing record, where the record is materially incomplete, or where there are credibility issues that bear on the material issues for the court to decide, may preclude a just result in a summary process.

[62] There is an added dimension in the case of an application for partial summary judgment, when considering whether it is more expeditious than trial. In ***JBRO Holdings Inc v Dynasty***

Power Inc, 2022 ABCA 140, the Alberta Court of Appeal confirmed at para 49 that if an issue can be decided "discretely and fairly, partial summary judgment may be granted", and at para 50 that "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". The court must consider the consequences of the motion in the context of the litigation as a whole, as there exists the risk of inconsistent findings of fact or duplicative proceedings (***Hyrniak*** at para 60). Partial summary judgment must achieve a just result.

[63] In considering partial summary judgment, the Ontario Court of Appeal in ***Malik v Attia***, 2020 ONCA 787 at paras 61-62 found that the court should be satisfied that:

1. dividing the determination of the case into several parts will prove cheaper for the parties;
2. partial summary judgment will get the parties' case in and out of the court system more quickly; and
3. partial summary judgment will not result in inconsistent findings by the multiple judges who will touch the divided case.

[64] In the lower court decision in ***JBRO***, my colleague Justice Romaine found that deciding the issues in the application would better equip the parties to proceed to resolve the remaining issues and found that oppression had occurred. I find that to be the case here as well.

[65] No doubt the materials in this case are voluminous – at least 8000 pages. There is also no doubt that the multitude of issues between the parties gives an initial first impression that the matter is too complex for summary judgment, and particularly for partial summary judgment. The pleadings have been amended multiple times. It has taken the parties more than two years to bring the application to a hearing, following multiple appearances before Applications Judges to settle preliminary challenges such as document production. Arguments were heard over the course of three days. Each side had no less than three lawyers participating in submissions and presenting caselaw.

[66] It is not hard to see why each has expended significant resources, as the various disputes involve tens of millions of dollars and relate to the complex unravelling of a decades-old commitment to a cooperative, significantly entwined economic relationship. Equally, it is clear that the issues ultimately argued and advanced in this application will not resolve all of the disputes between the parties, and that other issues need to be litigated further if they cannot be resolved collaboratively.

[67] However, there are only two parties involved in these various interrelated issues. The parties have produced volumes of documentary material that form part of the record, and there are no expert reports or other technical data. Essentially, there is one principal Affidavit filed by each party in support of its position, with less substantial ancillary Affidavit evidence to provide additional clarification and corrective information.

[68] There also appears to be little to no controversy in the law applicable to the issues before me. This is not a situation where the law is unsettled, contradictory, or novel. If the serious dispute is not about the facts, but about how to apply the law to them, it is essentially a legal contest *(**Weir-Jones*** at para 21).

[69] 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. Last, I am of the view that there is low risk of inconsistent findings with subsequent litigation on the remaining issues. This will become clearer through the course of these reasons, as I work through the substance of the application and make additional findings of fact.

IV. HAS THE APPLICANT ESTABLISHED OPPRESSION?

A. The Law of Oppression

[70] The relevant provision of the *CCA* reads as follows:

> **Application to court re oppression**
>
> **340 (1)** A complainant may apply to the court for an order, including an alternate order, under this section.
>
> **Grounds**
>
> **(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.

[71] The leading case on the law of oppression in the general corporate commercial context is ***BCE Inc v 1976 Debentureholders***, 2008 SCC 69. The Supreme Court of Canada at para 67 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 ignoring an interest as being unimportant.

[72] There is limited jurisprudence in Canada on the law of oppression in the context of cooperative associations. Counsel could refer me to only one relevant case: ***Collins Barrow Vancouver v Collins Barrow National Cooperative Inc***, 2015 BCSC 510, which involved a co-operative association of member accounting firms. The parties in ***Collins Barrow*** agreed, and the British Columbia Supreme Court held at paras 108-109, that the principles in the caselaw relevant to oppression in the corporate context are equally applicable to cooperatives.

[73] FCL and Calgary Co-op take the same position in this case. Substantially for the reasons outlined in ***Collins Barrow***, I agree that in determining this oppression application, I am guided by ***BCE*** and the jurisprudence that follows it.

[74] In ***BCE***, the Supreme Court at para 68 set out a two-part test for oppression:

1. Does the evidence support the reasonable expectation asserted by the claimant?

2. Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms “oppression”, “unfair prejudice” or “unfair disregard” of a relevant interest?

[75] The claimant carries the burden to establish the asserted expectation, reasonableness of the expectation, and the violation of the expectation by conduct that was oppressive, unfairly prejudicial, or unfairly disregarding of the claimant (***BCE*** at paras 56, 68, 119, 137).

[76] The case law is clear that the question of whether oppression has occurred is inherently contextual and fact-specific, but it is nevertheless available on application for summary judgment and even partial summary judgment (***JBRO*** at paras 47-51).

[77] Numerous cases discuss oppression claims with wide variations in outcomes. The conduct complained of can be legal technically or procedurally, but still oppressive. Oppressive conduct can occur without a remedy being necessary. What is a reasonable expectation in one context may not be in another. What is fair in one situation may not be fair in others. As the Supreme Court observed at para 64 of ***BCE****:* “Fair treatment - the central theme running through the oppression jurisprudence - is most fundamentally what stakeholders are entitled to ‘reasonably expect’”.

B. What were Calgary Co-op’s Reasonable Expectations?

[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* 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.

[80] Sections 79 and 80 of the *CCA* set out the functions and duties of the directors of the federation:

Functions of directors

79 Subject to this Act and to the articles and any unanimous agreement, the directors manage or supervise the management of the business and affairs of the cooperative.

Duties

80 (1) Every director and officer must, in exercising the powers and performing the duties of office,

(a) act honestly and in good faith with a view to the best interests of the cooperative; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Duty of compliance

(2) Every director and officer must comply with this Act, the articles, the by-laws and any unanimous agreement.

No exculpation

(3) Subject to subsection 115(5), no provision in a contract, the articles, the by-laws, a unanimous agreement or a resolution relieves a director or officer from complying with this Act and the regulations or from liability for non-compliance.

[81] It is clear from Calgary Co-op's internal documentation that, concurrently with evaluating its grocery business options, it also explored the possibility of withdrawing its entire business from FCL. However, Calgary Co-op did not choose to withdraw, expressly communicating to FCL that it intended to remain a member and to continue purchasing fuel, even though it no longer would source its food from FCL.

[82] No doubt, Calgary Co-op expected FCL would be upset with its decision regarding grocery purchases and that there would be impacts on FCL despite giving eight months advance notice. Its internal documents reveal it is precisely for that reason that Calgary Co-op investigated and planned for contingent alternate fuel sourcing, in case FCL decided to stop supplying it with fuel. It is also entirely possible, even likely, that Calgary Co-op would not have been unhappy for FCL to terminate its membership. Despite losing its profitable fuel sourcing, termination would have required FCL to pay out Calgary Co-op's equity investment within a year.

[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.

[84] FCL submits that it was not reasonable for Calgary Co-op to expect things not to change after communicating the Discontinuance Decision. FCL argues that Calgary Co-op owes a duty to FCL and the other member associations, that it reasonably should have expected fallout from its decision, and that it is the author of its own misfortune.

[85] 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.

[86] FCL concedes that Calgary Co-op was entitled to make the Discontinuance Decision, and that it was not contractually or legally bound to continue to source its food products from FCL, in contrast to its obligations under the fuel agreements. FCL knew there was a risk in not requiring such commitments, but for whatever reason, it did not insist on contracts for food like it did for fuel. FCL also acknowledges that members are autonomous and financially independent, that neither FCL nor the other members can dictate any member's business decisions, and that FCL exists for the benefit of its members and to support their common interests.

[87] FCL underscores that patronage rates are discretionary, not guaranteed, and vary from year to year, and that the Mid Year Payment is also discretionary and not guaranteed. All of this is accurate. Consequently, FCL takes the position that Calgary Co-op cannot reasonably expect any particular rate or amount of patronage in any given year, any advance payment or any set apportionment of cash and member shares. I agree. However, that is not the issue, and is not an accurate characterization of the reasonable expectations identified by Calgary Co-op.

[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.

C. Were Calgary Co-op's reasonable expectations violated by oppressive, unfairly prejudicial or unfairly disregarding conduct by FCL?

[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.

[90] On the other hand, FCL is a large, sophisticated and experienced business entity, with substantial financial and management resources. FCL advises that it is consistently in the top 75 performing companies in this country. It was certainly aware of risks of this nature in its business model and it had the ability to objectively analyze its position and response options.

[91] Creation and implementation of the Loyalty Program was one of the most consequential decisions made by FCL in the aftermath of Calgary Co-op's food purchasing withdrawal. Calgary Co-op asserts that the Loyalty Program is simply a distribution of profits under another name, in a manner that treats Calgary Co-op unfairly and unequally, and that it was undertaken without consultation or input by members.

[92] FCL disagrees, taking the position that the Loyalty Program is an expense incurred prior to calculation of profit, and that it was a necessary step to protect the federation and all members from a possible collapse of its cooperative retailing system, should other members make similar decisions. FCL further argues that the Loyalty Program was a reasonable business decision made

by the Board in all of the circumstances, that member consultation and input was not required, and that the court cannot second guess such operational decisions.

[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.

[94] To begin, FCL contends that the concept of a loyalty program has long been on its radar. FCL's CEO, Scott Banda, references a number of his internal handwritten notes going back to 2015 as support for FCL's position. However by contrast, FCL also noted in a January 21, 2016 document that nobody else had an ownership program like theirs, that they needed to explain that they did not give points or move the reward, and that their model was their promise to share their profits with their members.

[95] Additionally, there appears to be no reference whatsoever to any proposed loyalty program in any of FLC's Executive Management Committee meeting minutes, from regular meetings held three times per year between the spring of 2016 to the spring of 2019. Those minutes reflect numerous discussions about non-aligned retails, unity topics, federation challenges, and challenges with Calgary Co-op's food business, but contain no reference to discussions about loyalty programs. Notably, the April 2019 meeting discussed a specific program called "Customer Experience" and the possibility of retailers committing to that program in exchange for advance payments to them from FCL to cover the increased costs of implementing that program. This is a far cry from a general loyalty program in exchange for near-exclusive purchasing commitments across all lines of business.

[96] The first reference to the proposed Loyalty Program in these meetings comes from the October 21, 2019 meeting minutes, after Calgary Co-op gave notice of its Discontinuance Decision, and after its seat on the Executive Management Committee was eliminated by FCL.

[97] Mr. Banda circulated an email about the proposed Loyalty Program on September 28, 2019, referring to it as "this concept", and an "idea" whose details were "fluid". In an October

16, 2019 FCL email to the Executive Management Committee, FCL added the Loyalty Program as a new agenda item, and described it as a new concept that was not yet finalized.

[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.

[99] Next, it is clear from the evidence and from FCL's concessions during oral submissions that the Loyalty Program was created without consulting or obtaining input from member associations and was implemented on a retroactive basis. In fact, FCL contends that no member input was required, and it acknowledges that the program was effective November 1, 2019, after being presented to the members in mid-November. These facts are not in dispute.

[100] It is also clear, and I find based on FCL's own documents, that when FCL implemented the Loyalty Program, it knew Calgary Co-op could not participate in it or receive any financial benefit from it, unless it abandoned its plans to purchase groceries elsewhere. Calgary Co-op's CFO, Paul Harrison, references and summarizes a number of FCL internal communications in paragraph 108 of his Affidavit. These include:

1. August 13, 2019 – a notation to cut back overall patronage and to launch the loyalty program as soon as possible, observing that everyone above 70% would get payments in the Loyalty program while others would not.
2. August 23, 2019 - an internal email indicating that with the loyalty program, the negative impact on the cents per litre petroleum patronage that Calgary Co-op and other retails receive from FCL would be very visible, with the expectation that Calgary Co-op would not be eligible for the petroleum discount/rebate provided by the loyalty program.
3. November 9, 2019 – a notation that FCL will assume Calgary Co-op is the only retailer that would not meet the 90% threshold for loyalty program eligibility.
4. December 2, 2019 – a notation to "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".

[101] It is clear from these references that FCL was well aware Calgary Co-op would not be able to participate and receive loyalty payments. FCL submitted that Calgary Co-op was eligible for the program and could have participated in it, at least up until the time they started to source their food products from Save-On Foods. That argument flies in the face of the actual program commitment document, which requires a 90% purchasing commitment throughout FCL's fiscal year. Regardless of what Calgary Co-op purchased from November 1, 2019 to April 13, 2020, it would not be able to meet that commitment level from April 13 to October 31, 2020 if it was not purchasing groceries from FCL.

[102] I further find that the Loyalty Payments are simply patronage in disguise. Again, this finding comes primarily from the contents of FCL's own documentation, when viewed in context with the applicable legislation and its own bylaws. Sections 2, 7, 15 and 155 of the *CCA* define patronage returns, direct how cooperative entities are to distribute them, and mandate related bylaw provisions:

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.

. . .

Cooperative basis

7 (1) For the purposes of this Act, a cooperative is organized and operated, and carries on business, on a cooperative basis if

. . .

(g) surplus funds arising from the cooperative's operations are used

(i) to develop its business,

(ii) to provide or improve common services to members,

(iii) to provide for reserves or the payment of interest on member loans or dividends on membership shares and investment shares,

(iv) for community welfare or the propagation of cooperative enterprises, or

(v) as a distribution among its members as a patronage return;

. . .

By-laws — mandatory provisions

15 (1) The by-laws of a cooperative must provide for

(g) the distribution of any surplus earnings arising from the operations of 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.

Calculation of patronage

(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.

[103] According to Part 13 of FCL's Bylaws, the FCL Board allocates an amount it deems necessary from FCL's "savings arising from the operations of the co-operative for that financial year" for retained savings [Bylaw 13.01(a)], and then allocates among and credits or pays to the members "the balance of the savings, in proportion to the business done by the Members with the co-operative in that financial year", at a percentage patronage return rate determined by discretion of the Board, for each eligible commodity category of FCL's products [Bylaw 13.01(b)].

[104] Bylaw 13.03 refers to the allocation to members set out in Bylaw 13.02(b) as patronage returns, and according to Bylaw 1.16, "'patronage return' means the amount allocated, credited or paid to Members or non-members in each financial year as contemplated by Part 13". Taken full circle, patronage returns are thus the balance of the savings from FCL's operations that are not reserved by the Board for future operational needs. "Savings" does not appear to be defined. Given its ordinary meaning, I interpret this to mean the surplus of revenues remaining after payment of expenses.

[105] FCL argues that the Loyalty Program is not patronage, contending that it is no different than one of its targeted programs for which there is a cost, which comes off FCL's revenues as an operational expense before its profit is determined and distributed as patronage. With respect, placing a label on something does not determine its inherent or actual nature, and this position is not supported by FCL's own pleadings, records or evidence.

[106] For example, paragraph 29 of FCL's Third Amended Statement of Defence (which remains throughout the pleadings in its original unamended form), states that as a result of the Loyalty Program, "FCL would no longer be in a position to have the benefit of the use of a significant amount of funds throughout each Fiscal Year and of significant year end **profits,** having now planned to distribute a **significant portion of those profits** to member retail co-operatives throughout the year, for the members' benefit" (emphasis added).

[107] FCL's internal documentation also reveals the following (all emphasis added):

1. August, 2019 internal emails between Tony Van Burgsteden and Daniel Burke – "we would just classify it as **other income** and have it as a separate line item right before our "Patronage refund" line item. **Essentially this program would just transfer patronage to the loyalty program**, so our net savings would not be impacted", and "There would be no impact to taxable income **as this gain and FCL patronage are both taxable income"**, and "the loyalty program would be cash, recurring and a true earnings item. **I would distribute the loyalty program to each location in the same way that I distribute the FCL patronage allocation to each department…"**
2. August 23, 2019 internal email – **loyalty program – would be very visible, negatively impacting the cents per litre petroleum patronage** that they and other retails receive from FCL, with the expectation that Calgary Co-op would not be

eligible for the petroleum discount/rebate provided by this program. There is a recommendation not to implement the loyalty program, referencing initial legal guidance on changes to pricing program, stating that FCL cannot unilaterally and without reasonable notice, change a term or practice. It is observed in the email that FCL must act in good faith and cannot take any punitive or capricious action, that oppression remedies and good faith requirements are not overcome with notice, and that **"if we change a program for everyone but the only impact is Calgary, we will be in trouble".**

3. September 23, 2019 – notation re**: "loyalty program…get paid up front versus @end in patronage".**

4. October 23, 2019 – draft Commitment to the CRS and Loyalty Program document presented for an Executive Management Committee meeting – "Fuel purchases are the simplest way to build a formula that can be administered quickly and easily, **and is also where the most profitability exists that could be shared".**

5. October 24, 2019 - Minutes of FCL Board of Directors meeting (page 3) – "any such cash payment would be an expense to FCL and would result in significantly lower total profit numbers for FCL but there was felt to be a need to move the lever **to transfer more profits from FCL to retails".**

6. November 9, 2019 communication – A statement that "The Loyalty program is not patronage – **there are implications should we relate this to patronage**… **For now, we just assume Calgary Co-op is the only retail we feel would not meet the 90% threshold**."

7. December 19, 2019 – a notation suggesting that the patronage guidelines for planning purposes would have to be reduced to account for the Loyalty Program rates: "**what is the patronage rate for feasibilities? It needs to be our recommended rate less 4 cents per litre** and adjusting the cash percentage to reflect the amount of year end patronage that will be paid in cash"… and the author observes that new Calgary Co-op gas bar developments will not be feasible under this approach.

8. January 2020 communication – advising that members cannot put loyalty payments into their fuel margins for accounting purposes, and that they need to record it in **"other income"…otherwise retails may think patronage has dropped. . .but has not been replaced by anything else**…

9. January 30-31, 2020 communications – FCL is still working through the **"integration of the Loyalty Program into our patronage model"….for the cash portion of the model, participating retails get more cash than normal, because "these retails get to share the foregone cash payout from the non-participating retails."**…with an observation that there is a "double whammy" with the loyalty payment…participating members get more, and non-participating get less.

10. Note 28 to the 2019 financial statements of FCL – "a loyalty program which will provide its retail members more timely cash flows...**as a result, the Co-operative's expenses are expected to increase and its patronage allocation and share redemption is expected to decrease starting in the year the loyalty program is**

> **implemented”**, clearly indicating these payments would have a negative impact on patronage returns.

[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.

[109] It is also undeniable that the Loyalty Program contributes to a disproportionate distribution of FCL profits to its members, to the knowledge of FCL, and that Calgary Co-op was directly disadvantaged by this disproportionate distribution of FCL profits, also to the knowledge of FCL. This is openly discussed and acknowledged in many of the communications I have already referred to above and does not require further discussion. FCL knew the impact of the Loyalty Program would be uniquely felt by Calgary Co-op, and that it would provide preferential payments to those members who signed on to the program.

[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.

D. Can the Loyalty Program be justified under the business judgment rule?

[111] The short answer is no.

[112] As noted at para 46 of ***JBRO***, “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.

[113] FCL contends that the Loyalty Program was implemented for a valid business purpose, and that securing loyalty from the member associations was critical to sustain its federation and the health of its membership. It submits that the court cannot second guess the reasonable business and operational decisions of FCL’s 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.

[115] FCL acknowledges that its retail member co-ops are businesses and that they must be competitive with other non-cooperative businesses regarding quality and price to remain viable for sustainability of their operations. FCL also acknowledges that the food business is highly competitive with many challenges. However, FCL argues that implementing the Loyalty Program was a *bona fide* exercise of its discretionary right to create programs for essentially two main reasons:

1. To distribute cash earlier in the fiscal year to its members, a long-standing issue for the member co-operatives; and
2. To secure commitment to long term investments by FCL, in order to provide system stability and avoid a repeat of the disastrous events in Atlantic Canada, where a withdrawal by eight members from the purchase of food products ultimately led to the collapse of the entire co-operative system.

[116] In addition to the evidence I have already mentioned about FCL's desire to impose consequences on Calgary Co-op, other evidence discloses many additional reasons to question FCL's intention in creating the Loyalty Program.

[117] It is true that the membership was concerned about cashflow, but that is an issue that can and has previously been addressed in ways other than by disproportionately distributing available funds to the members. For example, interim payments could easily be made based strictly on members' total purchases, without tying it to a commitment to source their products solely from FCL. Alternatively, the Mid Year Payment could have been maintained, or been made more frequently throughout the year. Neither of these approaches would create an unequal and therefore unfair impact on only certain members.

[118] Mr. Banda discusses in his affidavit the Atlantic Canada cooperative collapse, which occurred in 2015. I note that for four years following that event, FCL took no meaningful steps to institute a program to ensure loyalty, despite having assessed its own risks of that nature. On the totality of the evidence in this application, it is difficult to conclude that the Atlantic Canada experience was a compelling factor in FCL's decision to create its Loyalty Program in 2019.

[119] With respect to FCL's stated desire for commitment to long term investments, FCL appears to have had no difficulty addressing this issue on a project-by-project basis in the past. Indeed, Mr. Banda acknowledges that where there are formal agreements in place with members, they are tied to significant financial long term outlays by FCL. This has been the approach taken by FCL when it determined that such financing projects required a purchasing commitment by the borrower. This is illustrated not only by the fuel supply contracts, but also for example by the terms of the 2016 FCL Investment Program for Retail Growth Agreement between FCL and Calgary Co-op for the construction and supply of products for the Auburn Bay Food Store & Gas Bar. That contract required a purchasing commitment for products over certain time frames as a condition of investment.

[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.

[121] The structure of the Loyalty Program also appears to be only partly related to its intended purpose. The program requires commitment to purchase at least 90% of all types of products, yet advances payment only on the basis of number of litres of fuel purchased, with no advance based on the other product purchases. FCL explains this by asserting that it wanted something simple, and that everyone knows how much fuel they purchase from FCL. Respectfully, I expect that FCL and each of its members also know how much of the other products they purchase from FCL, and that it would be just as simple to calculate a payment on the dollar value of all products purchased. The program structure sends a message that even if a member buys 100% of its fuel from FCL, as is the case for Calgary Co-op, it will receive no advance distribution of cash because it does not also buy the bulk of its other products from FCL.

[122] Further, total volume or value of product purchases seems to be irrelevant to the program. Small rural co-ops that might purchase only $1 Million of goods from FCL annually would still be entitled to a loyalty payment so long as 90% of those goods were sourced through FCL, while Calgary Co-op's ongoing contractual fuel commitments resulting in purchases of around $400 Million annually creates no entitlement to a loyalty payment. The Loyalty Program commitment is also only an annual, year by year agreement, with FCL retaining the right to terminate it at any time in its sole discretion. It is hard to reconcile all of this with FCL's stated objective of providing security for its long term financial investments.

[123] Mr. Banda also makes a telling observation at paragraph 42 of his Affidavit, where he states "At the time the Letter of Commitment and Loyalty Program was first being considered, I concluded that there were two possible outcomes relating to our ongoing relationship with Calgary Co-op: one, **Calgary Co-op would come back into the fold** as its exit on food supply wasn't effective until April of 2020 **and would sign on and make the necessary commitment to FCL**; two, that **Calgary Co-op would leave the FCL fuel supply** by providing notice of the exit from our fuel agreement…If that was to occur, **it…would likely withdraw its membership**." (emphasis added). However, Calgary Co-op had already formally advised that it intended to stay in the federation and continue to purchase fuel. This strongly suggests that by implementing the Loyalty Program, FCL intended to either cause Calgary Co-op to reverse its Discontinuance Decision, or voluntarily withdraw altogether and be subject to the 20 year equity investment payout rule.

[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.

[125] Calgary Co-op has also asked that I make a finding of oppression on the basis of FCL's change to its bylaw regarding the time period for equity investment payout to a member following a voluntary withdrawal. On the evidence before me, Calgary Co-op has failed to discharge its burden to show that summary judgment is warranted on that issue. The bylaw change appears to have been properly approved by the FCL members by special resolution. Not only did Calgary Co-op know about the change by at least early 2019, it seemed to be unconcerned about it.

[126] In fact, Calgary Co-op appears to have specifically decided that the bylaw amendment would not matter to it and would not change its Discontinuance Decision. This is evidenced in Calgary Co-op CEO Ken Keelor's internal email dated Sept 28, 2019 (exhibit 75 to Mr. Banda's affidavit). Mr. Keelor wrote that the bylaw amendment "does not appear to be a cause to change our plan".

[127] It is highly possible that FCL was emboldened to implement the Loyalty Program, because it knew Calgary Co-op could not voluntarily withdraw without risking a 20 year payout, but that is different than determining that the bylaw change itself was oppressive. I am not satisfied that this issue can be decided summarily in Calgary Co-op's favor. It will have to be pursued at trial.

V. WHAT IS THE APPROPRIATE REMEDY FOR FCL'S OPPRESSIVE CONDUCT?

A. Powers of the Court

[128] The Court has broad equitable discretion to fashion an appropriate remedy for oppression. However, as the Court of Appeal observed in ***JBRO*** at paras 60-61, that discretion is bounded by the law and by the applicable legislation and should be restricted to the minimum intervention required to remedy the injustice or unfairness caused by a party's conduct. The court must also balance the competing interests of all involved.

[129] Section 340(3) of the *CCA* provides the scope of the court's remedial powers:

> **Types of order**
>
> **(3)** For the purpose of subsection (2), the court may make any order that it considers appropriate, including an order
>
> (a) restraining the conduct complained of;
>
> (b) appointing a receiver or receiver-manager;
>
> (c) requiring the cooperative to amend an agreement with members generally or with a member;
>
> (d) regulating the affairs of the cooperative by amending its articles or by-laws or creating or amending a unanimous agreement;
>
> (e) directing an issue or exchange of securities;
>
> (f) directing changes in the directors;
>
> (g) determining whether a person is or is [not] qualified to be a member;
>
> (h) determining any matter in regard to the relations between the cooperative and a member;
>
> (i) subject to subsection (6), directing the cooperative or any other person to purchase securities of a security holder;

(j) subject to subsection (6), directing the cooperative or any other person to pay to a security holder any part of the money paid by the security holder for securities;

(k) subject to subsection (6), directing the cooperative to redeem membership shares, repay member loans or to pay to a member any other amount standing to the member's credit in the records of the cooperative;

(l) varying or setting aside a transaction or contract to which the cooperative is a party and compensating the cooperative or any other party to the transaction or contract;

(m) directing the production and delivery within a specified time of financial statements of the cooperative;

(n) directing an accounting;

(o) compensating an aggrieved person;

(p) directing rectification of the registers or other records of the cooperative under section 342;

(q) liquidating and dissolving the cooperative;

(r) directing a special audit or an investigation under section 329; or

(s) requiring the trial of an issue.

[130] I am mindful that since this application was commenced, Calgary Co-op has ceased to purchase any products from FCL. Given that fact, and the specific nature of the oppressive conduct I have found, many of the available remedies are either ineffective, inapplicable or out of proportion to the unfairness created by FCL that requires correction.

[131] I am also aware that in subsequently discontinuing its fuel purchases, Calgary Co-op alleges in a separate action that additional conduct of FCL essentially made it impossible to continue that relationship. Of course, there remain unresolved issues in this lawsuit against FCL, as well as FCL's counterclaim against Calgary Co-op.

[132] Calgary Co-op seeks a declaration that FCL has terminated its membership in the federation, and a direction that Calgary Co-op's equity investment in FCL be paid out within one year or such other time period as may be equitable. I am not satisfied that such a remedy constitutes the surgical, precise and limited response required by the jurisprudence. I find it would be fair, equitable and minimally intrusive to remedy FCL's unfairly prejudicial conduct and unfair disregard for Calgary Co-op's interests by granting partial summary judgment against FCL in favor 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. This payment shall be in addition to any patronage returns received by Calgary Co-op for that time period and shall bear pre-judgment interest from each notional quarterly payment as if Calgary Co-op had participated in the Loyalty Program.

[133] I will leave it to the parties to calculate the correct amounts to place in the Partial Judgment Roll, but I give them leave to speak to the calculation issues in the event they cannot agree. If that appearance is necessary, they should schedule a case conference with me to occur within 90 days of release of this decision to set filing requirements.

[134] For clarity, this remedy applies specifically to my finding of oppression with respect to the Loyalty Program only and does not preclude Calgary Co-op from pursuing further claims of oppressive conduct at trial or further remedies related to any such conduct.

VI. CONCLUSION:

[135] I find that the implementation of FCL's Loyalty Program is a discrete issue that can be determined summarily on the evidence before me. I am confident that evidence allows me to make the factual findings I have arrived at in this decision, and I am satisfied that the application of the law to those facts to find oppression and to fashion an appropriate remedy can occur without the necessity of determining those issues at a full trial. I am also of the view that this is a proportionate, more expeditious and less expensive method than a full trial, and that a just result has been achieved. Finally, I conclude that this partial judgment creates low risk of inconsistent fact findings on the other issues that remain between the parties and is likely to assist them in narrowing those issues and bringing them to a conclusion.

[136] The parties also have leave to speak to costs within 90 days of release of this decision if they cannot agree.

Heard on the 19th – 21st day of April, 2023
Dated at the City of Calgary, Alberta this 21st day of December, 2023.

M. D. Slawinsky
J.C.K.B.A.

Appearances:

Norton Rose Fulbright Canada LLP
Per: Steven H. Leitl, KC; Lara Mason; Sunny Mann
for the Plaintiff/applicant

MLT Aikins LLP
Per: Shaunt Parthev, K.C.; Jonathan J. Bourchier; Brian Catalano
for the Defendant/Respondent