

Cooperative Difference in Insolvency Proceedings: Pre-Pack Sales, Fiduciary Duty and the Oppression Remedy

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Résumé de l'article

Mountain Equipment Co-operative a eu recours à une procédure d'insolvabilité en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* pour vendre son entreprise à une société de capital-investissement. Un groupe de membres a contesté sans succès la vente devant les tribunaux, soulevant des arguments concernant le pouvoir du tribunal d'approuver la vente, les obligations fiduciaires des administrateurs de la coopérative et le recours en oppression. Cet article suggère que le tribunal aurait été en droit d'accorder une réparation aux membres dissidents s'il avait tenu compte des différences entre les coopératives et les sociétés ordinaires. Cet article met en évidence les distinctions importantes entre les coopératives et les sociétés de capitaux, et analyse ensuite la manière dont ces différences ont été prises en compte dans l'analyse par le tribunal de son pouvoir d'approuver la vente, des obligations fiduciaires des administrateurs et du recours en oppression. La vente de Mountain Equipment Co-operative souligne l'importance d'accorder une attention particulière à la forme juridique du débiteur en cas d'insolvabilité lorsque le débiteur n'est pas une société classique.

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COOPERATIVE DIFFERENCE IN INSOLVENCY PROCEEDINGS: PRE-PACK SALES, FIDUCIARY DUTY AND THE OPPRESSION REMEDY

*Anna Lund**

Mountain Equipment Co-operative used insolvency proceedings under the *Companies' Creditors Arrangement Act* to sell its business to a private equity firm. A group of members unsuccessfully challenged the sale in court, raising arguments about the court's power to approve the sale, the fiduciary obligations of the cooperative's directors and the oppression remedy. This article suggests that the court would have been justified in granting a remedy to the dissenting members if it had attended to how cooperatives differ from standard corporations. This article highlights salient differences between cooperatives and corporations and then analyzes how these differences were relevant to the court's analysis of its power to approve the sale, the director's fiduciary obligations, and the oppression remedy. The sale of Mountain Equipment Co-operative underlines the importance of paying careful attention to a debtor's legal form in insolvency when the debtor is not a standard corporation.

Mountain Equipment Co-operative a eu recours à une procédure d'insolvabilité en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* pour vendre son entreprise à une société de capital-investissement. Un groupe de membres a contesté sans succès la vente devant les tribunaux, soulevant des arguments concernant le pouvoir du tribunal d'approuver la vente, les obligations fiduciaires des administrateurs de la coopérative et le recours en oppression. Cet article suggère que le tribunal aurait été en droit d'accorder une réparation aux membres dissidents s'il avait tenu compte des différences entre les coopératives et les sociétés ordinaires. Cet article met en évidence les distinctions importantes entre les coopératives et les sociétés de capitaux, et analyse ensuite la manière dont ces différences ont été prises en compte dans l'analyse par le tribunal de son pouvoir d'approuver la vente, des obligations fiduciaires des administrateurs et du recours en oppression. La vente de Mountain Equipment Co-operative souligne l'importance d'accorder une attention particulière à la forme juridique du débiteur en cas d'insolvabilité lorsque le débiteur n'est pas une société classique.

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Introduction

In the fall of 2020, Mountain Equipment Cooperative (“MEC”) sold its business to a private equity firm from California.¹ MEC was a British Columbia-based, member-owned cooperative and had been selling outdoor gear in Canada for nearly 50 years. At the time of its sale, MEC had 5.8 million members.² Ordinarily, MEC could not have sold its business without first having its members vote to endorse the transaction; however, the court authorized the sale as part of an insolvency process under the *Companies’ Creditors Arrangement Act* (“CCAA”).³ A group of dissenting members asked the court to delay the sale to allow the members to explore alternative solutions. The court denied their request.

The sale of MEC illustrates larger trends in insolvency law and the cooperative sector, which makes it a rich case study for exploring the legal and policy questions that arise when cooperatives turn to insolvency law. MEC sold its business assets in a pre-pack sale. A pre-pack sale is when a debtor makes arrangements to sell its asset before starting formal insolvency proceedings. Pre-pack sales are growing in popularity but raise concerns about fairness because the court is commonly presented with a “fait accompli” transaction that must be approved on short timelines.⁴ Parties opposed to the transaction have difficulty mounting a credible challenge to the transaction in the short time between when the insolvency proceedings start and when approval is sought. MEC fits into another trend, namely the demutualization of cooperatives. Demutualization is when the ownership, benefit and control of the business is transitioned from cooperative members to shareholder investors.⁵ MEC’s sale of its bu-

¹ See *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586 (First Report of the Monitor, Alvarez & Marsal Canada Inc) at para 9.1 [First Report of the Monitor].

² See *ibid* at para 4.1.

³ RSC 1985, c C-36 [CCAA].

⁴ See Alfonso Nocilla & Vern W DaRe, “The Trouble with Pre-Packs” in Janis P Sarra et al, eds, *Annual Review of Insolvency Law, 2018* (Toronto: Thomson Reuters, 2019) 621 at 622, n 3; Matthew Nied & Natalie Levine, “Pre-Packaged Sales Transactions Under the CCAA: Where are These Packages from? What Did they Look Like? And Where are they Going?” in Janis P Sarra, ed, *Annual Review of Insolvency Law 2016*, (Toronto: Thomson Carswell, 2017) at Introduction. Cf Tushara Weerasooriya et al, “Pre-Packs under the Companies’ Creditors Arrangement Act: Has the Push for Efficiency Undermined Fairness?” in Janis P Sarra, ed, *Annual Review of Insolvency Law 2016* (Toronto: Carswell, 2016) at Introduction (noting pre-packaged sales have a long history in Canada); Janis Sarra, “The Oscillating Pendulum: Canada’s Sesquicentennial & Finding the Equilibrium for Insolvency Law” in Janis Sarra et al, eds, *Annual Review of Insolvency Law 2016* (Toronto: Thomson, 2017) at n 64 (“Oscillating Pendulum”).

⁵ See Jorge Sousa & Roger Herman, “Converting Organizational Form: An Introductory Discussion” in Jorge Sousa & Roger Herman, eds, *A Co-operative Dilemma: Converting*

siness assets to a private company demutualized the cooperative. Cooperative members may be concerned about how a demutualization will impact a business' ability to fulfill its purpose and how it can be used to transfer value from cooperative members to other stakeholders.⁶ The MEC sale raises additional concerns because the CCAA proceeding was used to circumvent the democratic control at the heart of cooperative governance.

Cooperatives serve important ends. Cooperatives gives workers, consumers, and producers the option of organizing their economic lives according to democratic principles. The legal system protects the autonomy of individuals when it respects their choice to carry out economic activity through the cooperative model. Legal support for the cooperative model also promotes economic activity because cooperatives contribute to the Canadian economy and enable marginalized communities to improve their economic well-being. In 2019, non-financial cooperatives (e.g., excluding credit unions, "caisses populaires", and insurance mutuals) generated \$53 billion in revenue and employed almost 105,000 people across Canada.⁷ Cooperatives help rural communities develop resilient economies.⁸ Racialized communities have turned to cooperatives to build wealth.⁹ Indigenous communities have used cooperatives to promote cultural resurgence and economic independence.¹⁰

Insolvency law can undermine the cooperative model if it is implemented without sufficient regard for how cooperatives differ from standard corporations. Cooperatives must "live within the legal, financial, tax and regulatory frameworks designed to protect and support the dominant

Organizational Form (Saskatoon: Centre for the Study of Co-operatives, 2012) 1 at 12–13.

⁶ See *ibid.*

⁷ See Statistics Canada, *Study: Co-operatives in Canada*, (Ottawa: Statistics Canada, 3 March 2021), online: <www150.statcan.gc.ca> [perma.cc/EL92-TUZI].

⁸ See Canadian Co-operative Association, "Examining Success Factors for Sustainable Rural Development Through the Integrated Co-operative Model: Final Research Report" (31 March 2016) at 1–2, online (pdf): *Centre for the Study of Co-operatives, University of Saskatchewan, Canada* <usaskstudies.coop> [perma.cc/3F5L-S4C7].

⁹ See generally Jessica Gordon Nembhard, *Collective Courage: A History of African American Cooperative Economic Thought and Practice* (University Park, PA: Pennsylvania State University Press, 2014); Vicky Mochama, "Black Communities Have Known about Mutual Aid All Along", *The Walrus* (1 September 2020), online: <thewalrus.ca> [perma.cc/RD9Z-8ABE].

¹⁰ See Ushnish Sengupta, "Indigenous Cooperatives in Canada: The Complex Relationship Between Cooperatives, Community Economic Development, Colonization, and Culture" (2015) 4:1 J Entrepreneurial & Organizational Diversity 121 at 123–24.

economic model”, i.e., the standard corporation.¹¹ The people who implement these frameworks are often unfamiliar with cooperatives. MEC’s CCAA proceedings suggest that insolvency practitioners and judges need to pay careful attention to the ways in which a cooperative’s legal form differs from that of a standard corporation and how these differences justify modifications to standard insolvency practices and principles.

Cooperatives are the focus of this article, but other legal forms serve valuable ends and thus this article argues that legal form should matter in insolvency proceedings. Careful attention to legal form will be important when any non-standard entities use insolvency proceedings.

This article illustrates how to attend to cooperative difference in insolvency by revisiting the arguments made by those litigants who challenged the sale of MEC: it aims to guide future insolvencies by performing an autopsy on the MEC proceedings. The dissenting members and co-op intervenors argued that the sale should be delayed to comply with the legislative criteria in the CCAA governing sales, to remedy the directors’ breach of their fiduciary duty, and to rectify oppressive conduct by the directors. The court denied these requests. This article revisits the challengers’ arguments with a focus on how attention to MEC’s cooperative form could have shifted the analysis.

This article proceeds as follows. Part 2 tells the story of MEC from its beginnings in 1971 to its demutualization in 2020, with a focus on the years leading up to its insolvency filing. Part 3 identifies key differences between a standard corporation and a traditional cooperative – it provides a legal overview of what cooperative difference means. Part 4 revisits three of the arguments raised by the dissenting members and co-op intervenors through the lens of cooperative difference. Part 5 highlights important lessons from the MEC CCAA proceedings: insolvency practitioners and judges need to pay careful attention to the legal form of the debtors, cooperatives need to focus on promoting good governance while also engaging and educating members, and law schools (as well as other educators) should be teaching students about cooperatives so that they can competently assist clients who choose to organize their economic lives according to cooperative principles.

¹¹ “Guidance Notes to the Co-operative Principles” (2015) at 46, online (pdf): *International Co-operative Alliance* <www.ica.coop> [perma.cc/SZU6-S9VX] [International Co-operative Alliance, “Guidance Notes”]. See also Chris Cornforth, “Patterns of Cooperative Management: Beyond the Degeneration Thesis” (1995) 16:4 *Economic & Industrial Democracy* 487 at 489.

I. A Brief History of MEC

In 1971, a group of outdoor enthusiasts living in Vancouver founded MEC so that they could purchase affordable climbing equipment.¹² In its early years, the organization ran on a minimal budget, sometimes storing gear in one of the member's vans.¹³ Over time it expanded, opening new stores and acquiring more members. By the time it started CCAA proceedings, it had 22 stores across Canada and 5.8 million members.

A. *Growth, Trouble and Strategic Alternatives*

In 2015, MEC “embarked on a significant growth plan.”¹⁴ The growth plan increased MEC's market share but also resulted in “higher fixed cost[s]... and increased debt levels.”¹⁵ At the end of 2014, the cooperative owed nothing on its operating loan, whereas by February 2020, it owed over \$81 million to a consortium of lenders.¹⁶

The cooperative's profitability plummeted during this aggressive growth phase.¹⁷ In 2019, the directors took steps to address the cooperative's dwindling profits. It hired new managers and formulated a plan to cut costs “through efficiencies in technology spend [and] supply chain improvements” and to boost earnings by “focusing on the member experience [and] improving merchandise assortment.”¹⁸ Before the new plan was fully implemented, COVID-19 arrived in Canada. The pandemic negatively

¹² See Mountain Equipment Company Ltd, “Our Roots” (last visited 5 August 2021), online: *Mountain Equipment Company* <www.mec.ca> [perma.cc/D29A-UPPZ].

¹³ See Mehek Mazhar, “MEC Founding Member Says She Feels ‘Grief and Betrayal’ Over Sale of Co-op to U.S. firm”, *CBC Radio* (16 September 2020), online: <www.cbc.ca/radio> [perma.cc/B6CP-S44P].

¹⁴ *Mountain Equipment Co-operative (Re)*, 2020 BCSC 1586 (Affidavit, Robert Wallis at para 4) [Wallis Affidavit].

¹⁵ *Mountain Equipment Co-operative (Re)*, 2020 BCSC 1586 (Affidavit, Philippe Arrata at para 42) [Arrata Affidavit].

¹⁶ See KMPG LLP, “Consolidated Financial Statements of Mountain Equipment Cooperative year ended December 28, 2014” (10 April 2015) at 1, 9, online (pdf): *MEC* <www.mec.ca> [perma.cc/63LT-KENF]; KMPG LLP, “Consolidated Financial Statements of Mountain Equipment Cooperative Period from February 24, 2019 to February 23, 2020” (7 July 2020) at 1, 12, online (pdf): *Alvarez and Marsal* <www.alvarezandmarsal.com> [perma.cc/GKM9-KEEV]. The Monitor reported \$74 million was outstanding in September 2020 (*Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586 (Report of the Proposed Monitor, Alvarez & Marsal Canada Inc) at para 7.4).

¹⁷ See Arrata Affidavit, *supra* note 15 at paras 48–49.

¹⁸ *Ibid* at para 44; “MEC Update – April 2020”, copy on file with author.

impacted MEC: sales decreased by \$90 million in the first 8 months of 2020 as compared to the same period in the previous year.¹⁹

MEC needed to repay its operating loan by August 3, 2020.²⁰ In anticipation of this deadline, MEC's directors hired an advisor to help them locate a new source of financing.²¹ On March 27, 2020, the directors established a special committee to investigate refinancing options and other "strategic alternatives", such as selling MEC's assets.²² Between March and September 2020, the special committee spoke with 66 lenders.²³ The special committee received five non-binding loan offers but determined that "none ... were satisfactory nor adequately met MEC's long term financing requirements."²⁴

The special committee shifted focus from refinancing MEC to selling its assets.²⁵ In June 2020, MEC asked its advisor to design and implement a sales and investment solicitation process.²⁶ The advisor contacted 158 potential buyers, 39 potential buyers signed confidentiality agreements to review information about MEC, nine submitted non-binding letters of intent, five were invited to submit binding bids, and four did.²⁷

With the assistance of the advisor and legal counsel, the special committee evaluated the bids against the following criteria: "total consideration value, closing risk, continuity of operations in terms of employees and stores, alignment with MEC's values, and the assumption of liabilities owing to MEC's suppliers and service providers."²⁸ The Kingswood Capital offer included the highest bid price, promised that at least 17 of 22 MEC stores would remain open and 75% of MEC's active employees (i.e., those not on leave or laid off) would receive offers of employment.²⁹

¹⁹ See *Arrata Affidavit*, *supra* note 15 at paras 45–46.

²⁰ See *ibid* at para 55. The maturity date was extended to September 30, 2020, see *ibid* at para 59.

²¹ See *ibid* at para 110; *Wallis Affidavit*, *supra* note 14 at para 6.

²² See *Wallis Affidavit*, *supra* note 14 at paras 8–9, 11; First Report of the Monitor, *supra* note 1 at para 8.1.

²³ See *Wallis Affidavit*, *supra* note 14 at para 18; First Report of the Monitor, *supra* note 1 at paras 8.2–8.3.

²⁴ First Report of the Monitor, *supra* note 1 at para 8.3.

²⁵ See *Wallis Affidavit*, *supra* note 14 at paras 24, 27–28.

²⁶ See *Arrata Affidavit*, *supra* note 15 at para 113.

²⁷ See *ibid* at paras 115–19; First Report of the Monitor, *supra* note 1 at paras 8.9–8.20.

²⁸ *Wallis Affidavit*, *supra* note 14 at para 34.

²⁹ See *ibid* at paras 35, 40; First Report of the Monitor, *supra* note 1 at paras 9.2, 9.25. MEC operates 22 stores across Canada, see *Arrata Affidavit*, *supra* note 15 at para 23.

B. MEC Members Were Not Involved in Exploring Strategic Alternatives

MEC's directors did not communicate with MEC's members about the special committee's activities. The special committee considered approaching the members for financing but recommended against this approach.³⁰ The committee did not think MEC would be able to raise sufficient funds from its members and they believed that publicizing MEC's financial problems would negatively impact the cooperative's operations.³¹

Normally, MEC held an Annual General Meeting (AGM) every year, where it provided members with a financial statement for the cooperative.³² COVID-19 disrupted MEC's Annual General Meeting, resulting in it being delayed almost 6 months from June 23, 2020 to December 10, 2020.³³ MEC advised its members that the delay was necessary "in order to focus on our mission, ensuring our members' access to outdoor gear, know-how and inspiration, while dealing with the acute challenges stemming from COVID-19."³⁴

Even without an AGM, the members had indications that MEC was struggling. In January 2020, news media reported that MEC had subleased its head offices in Vancouver.³⁵ In April 2020, MEC advised its members that it was experiencing significant financial pressure and had laid off staff.³⁶ But it was not until MEC started insolvency proceedings that the members comprehended the severity of MEC's financial problems.

C. MEC Uses Insolvency Proceedings to Sell its Assets

MEC started insolvency proceedings on September 14, 2020. Its directors authorized legal counsel to apply for an Initial Order to facilitate the sale of MEC's assets to Kingswood Capital. A group of members organized

³⁰ See *Wallis Affidavit*, *supra* note 14 at para 20.

³¹ See *ibid.* See also First Report of the Monitor, *supra* note 1 at para 9.24.

³² See *Cooperative Association Act*, SBC 1999, c 28, s 143(2), 153; MEC AGM FAQs, copy on file with author.

³³ See *Arrata Affidavit*, *supra* note 15 at para 39 (this change was authorized by: "Cooperative Associations – COVID 19 Updates for Annual Meetings" (last visited 5 August 2021), online: *Government of British Columbia* <www2.gov.bc.ca> [perma.cc/7SHH-FU7G]).

³⁴ MEC AGM FAQs, copy on file with author.

³⁵ See *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586 (Affidavit, Kevin Harding at para 13).

³⁶ See "MEC Update – April 2020", copy on file with author.

under the name Save MEC and opposed the application.³⁷ They asked the court to delay the sale for two weeks to allow the members to explore alternative solutions, including securing debt financing elsewhere or selling MEC's real estate holdings.³⁸ Additionally, two organizations representing the Canadian cooperative sector intervened in the CCAA proceedings.³⁹ They argued that the application raised important questions about the ability of cooperative members to participate in major decisions affecting the cooperative.⁴⁰

The dissenting members argued that a delay in the proceedings was appropriate because British Columbia's cooperative statute and MEC's Rules of Cooperation required MEC to consult the members.⁴¹ They also alleged that the directors acted oppressively when they failed to consult with members.⁴² The intervenors identified a third ground for relief, namely, that the directors had not complied with their fiduciary duty.⁴³

In a decision released on October 28, 2020, the court rejected the challengers' arguments and authorized the sale of MEC's assets.⁴⁴ It characterized consultation with members as "a very unwieldy step."⁴⁵ The court determined that the language of the CCAA obviated the consultation requirements in the cooperative statute and MEC's rules. The court did not explicitly address the allegations of fiduciary breach. It declined to engage in a full analysis of the oppression argument but noted that it would be "unrealistic" for the members to think that "they, and they alone, would dictate whether a sale would occur, when the co-operative is insolvent and their memberships presently have no value."⁴⁶

³⁷ See *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586 (Notice of Application, Kevin Harding on his own behalf and on behalf of Save MEC at Part 2, paras 11–12) [*Harding Application*].

³⁸ See *ibid* at Part 1, para 2, Part 2, paras 12–14.

³⁹ See *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586 (Notice of Application, BC Co-op Association and Cooperatives and Mutuals Canada at Part 1, para 1) [*BC Co-op Application*].

⁴⁰ See *ibid* at Part 2, para 2.

⁴¹ See *Harding Application*, *supra* note 37 at Part 3, para 18.

⁴² See *ibid* at Part 3, para 17.

⁴³ See *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586 (Affidavit, Ben Hyman at para 20) [Hyman Affidavit].

⁴⁴ See *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586 [*Mountain Equipment Co-Operative*].

⁴⁵ *Ibid* at para 132.

⁴⁶ *Ibid* at para 136.

On October 30, 2020 MEC finalized the sale of its assets to a wholly-owned subsidiary of Kingswood Capital.⁴⁷ The new entity retained 90% of the cooperative's 1,100 active employees; 210 employees were terminated during the CCAA proceedings.⁴⁸ It kept 21 of 22 stores open.⁴⁹ MEC had sold its intellectual property, including its rights to the name Mountain Equipment Co-operative and thus MEC changed its name to 1077 Holdings Cooperative.⁵⁰ As of the writing of this article, the cooperative has no operations and no employees and the monitor is overseeing a claims process to distribute the sales proceeds to the cooperative's creditors.

The court authorized the sale of MEC's assets without giving sufficient weight to how a cooperative differs from a standard corporation, and in particular, failing to appreciate how members in a cooperative are differently situated from shareholders in a standard corporation. Though this article critiques the court's reasons, the author does not fault the court for reaching the conclusions that it did, given the time pressures facing the court and the prevailing lack of awareness of what makes cooperatives different. The pace of pre-pack CCAA proceedings puts courts and opposing litigants in a difficult situation. In MEC's case, the sale transaction deadlines left little time for the dissenting members and co-op intervenors to develop their arguments or for the court to scrutinize the sale application. Thus, it is unsurprising that more was not done to flesh out the relevance of cooperative difference. Academic scholarship moves at a slower pace and this article has been written with the benefit of time, which was unavailable to the courts and the litigants. Section 4.1.2 below revisits this idea that time pressures impact the fairness of CCAA proceedings.

Cooperative scholars have bemoaned how few people understand the cooperative legal form: MEC's sale suggests that judges, as well as lawyers, lenders, and business people do not appreciate how cooperatives differ from corporations.⁵¹ The International Co-operative Alliance (ICA) observes that "co-operatives are rarely taught in mainstream business

⁴⁷ See *Mountain Equipment Co-operative (Re)*, 2020 BCSC 1586 (Fourth Report of the Monitor, Alvarez & Marsal Canada Inc) at para 4.1 [Fourth Report of the Monitor].

⁴⁸ See First Report of the Monitor, *supra* note 1 at para 4.4; Fourth Report of the Monitor, *supra* note 47 at paras 4.1, 11.1.

⁴⁹ See Fourth Report of the Monitor, *supra* note 47 at para 4.1.

⁵⁰ See *ibid* at para 10.1.

⁵¹ Lack of awareness about cooperative difference is a significant problem facing the cooperative sector, see generally Stan Yu, "Top Co-op Issues 2020" (April 2021) at 3, online (pdf): *Canadian Centre for the Study of Co-operatives* <usaskstudies.coop> [perma.cc/3YTJ-4EKP].

schools, law schools, sociology and other relevant areas of study.”⁵² This article explicitly seeks to address this knowledge gap. The next section provides an overview of the salient differences between standard corporations and cooperatives.

II. Salient Differences Between Corporations and Cooperatives

Businesses can be carried out under different legal forms, including sole proprietorships, partnerships, cooperatives or standard corporations. Standard corporations predominate in Canada and the CCAA was drafted using standard corporations as the default debtor. The CCAA applies to other legal forms by analogizing them to a standard corporation.⁵³ Yet, there are important differences between standard corporations and other legal forms of business. To appreciate what was at stake in the MEC CCAA proceedings, one must first understand how cooperatives differ from standard corporations with respect to their purpose, ownership structure, guiding principles, and the rules governing voting by and payments to members. Members who structure their economic activities through the vehicle of a cooperative have chosen a democratic method for collaborating with others to fulfill a shared need. Equating members with corporate shareholders risks undermining their autonomy to structure their economic activities.

Note that this section describes archetypal corporations and cooperatives. In practice organizations can depart from these archetypes by stipulating different rules in their incorporating documents. Cooperatives adopt structural features that resemble a corporation and corporations can model aspects of their structure on a cooperative. Legislators have expanded cooperatives’ ability to include corporation-like features in their structures: in many Canadian provinces, and federally, legislators have harmonized cooperative and business corporation legislation by transplanting elements from business corporation legislation into cooperative statutes.⁵⁴ In the conclusion, this article returns to the topic of harmonization and suggests that it has the potential to undermine the cooperative sector by eroding the differences between corporations and cooperatives.

⁵² International Co-operative Alliance, “Guidance Notes”, *supra* note 11 at 65.

⁵³ See CCAA, *supra* note 3, s 2(1) “company”.

⁵⁴ See Canada, Library of Parliament, *Bill C-5: Canada Cooperatives Act*, by Antony G Jackson & Margaret Smith, revised 7 January 1998, (Legislative Summary), LS-296E (Ottawa: Library of Parliament, 1997) at parts 7–19, 22; *Collins Barrow Vancouver v Collins Barrow National Cooperative Inc*, 2015 BCSC 510 at para 109, *aff’d* 2016 BCCA 60 [*Collins*]; Hans H Münkner, *Co-operative Principles and Co-operative Law*, 2nd ed (Vienna: LIT, 2015) at 34.

But first, the article examines those differences, using MEC to illustrate the cooperative form.

A. Purpose

A standard corporation aims to make money for its shareholders.⁵⁵ Historically, the incorporating documents of a corporation specified how the corporation would pursue this goal. For example, the incorporating documents might set out that the corporation would pursue specific types of commercial activity (e.g., operating a clothing store).⁵⁶ Nowadays, drafters rarely include such limits, thus the corporation can pursue profit by engaging in a broad range of commercial activities. In contrast, a cooperative is incorporated to serve an identified, shared need of its members.⁵⁷ For example, a producers' cooperative might market agricultural goods produced by its members.⁵⁸ A consumers' cooperative, like MEC, acquires goods for purchase by its members.⁵⁹ A workers' cooperative empowers employees to control the enterprises in which they work.

B. Legislation and Owners

Standard corporations are incorporated under the *Canada Business Corporations Act*⁶⁰ or comparable provincial or territorial legislation ("business corporation" legislation).⁶¹ Investors (called shareholders) purchase shares in the corporation and these shares allow investors to receive part of any profits and to participate in governing the business. Cooperatives are incorporated under specialized federal or provincial legislation. For example, MEC was incorporated under British Columbia's *Cooperative Association Act*.⁶² The people served by the cooperative are called members.

⁵⁵ See Antonio Fici, "An Introduction to Cooperative Law" in Dante Cracogna, Antonio Fici & Hagen Henry, eds, *International Handbook of Cooperative Law* (Berlin: Springer-Verlag Berlin Heidelberg, 2013) 3 at 20–21.

⁵⁶ See e.g. *Re Jon Beauforte (London) Ltd*, [1953] 2 WLR 465.

⁵⁷ See Fici, *supra* note 55 at 23; International Co-operative Alliance, "Guidance Notes", *supra* note 11 at 34.

⁵⁸ See Fici, *supra* note 55 at 24; Lois Stanford & Julie A Hogeland, "Designing Organizations for a Globalized World: Calavo's Transition from Cooperative to Corporation" (2004) 86:5 *American J Agricultural Economics* 1269 at 1269.

⁵⁹ See Fici, *supra* note 55 at 24.

⁶⁰ RSC 1985, c C-44, Part II [CBCA].

⁶¹ See e.g. *Business Corporations Act*, RSO 1990, c B-16, Part II.

⁶² See *supra* note 32.

C. Cooperative Values and Principles

Cooperative enterprises are guided by the ICA's values and principles. According to the ICA, cooperatives are driven by six values: "self-help, self-responsibility, democracy, equality, equity, and solidarity."⁶³ They put these values into practice with seven principles:

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 Community⁶⁴

Canadian cooperative statutes transform these principles and values into legal obligations. When the federal legislation was adopted in 1998, it was drafted to reflect the ICA's principles.⁶⁵ Cooperatives incorporated under the legislation must state in their incorporating documents that they will operate on a cooperative basis.⁶⁶ The legislation specifies what it means for an enterprise to operate on a cooperative basis and these provisions broadly reflect the ICA's seven principles.⁶⁷ British Columbia's legislation adopts a similar structure.⁶⁸ For example, both the federal and British Columbia statutes set out that organizations operate on a cooperative basis when they give each member one vote.⁶⁹ A cooperative may further bind itself to the ICA principles by incorporating them into its rules and bylaws.⁷⁰ There is no comparable statement of principles and values applicable to standard corporations.

⁶³ International Cooperative Alliance, "Cooperative Identity, Values and Principles" (last visited 5 August 2021), online: <www.ica.coop> [perma.cc/XGF7-28DE].

⁶⁴ See *ibid.*

⁶⁵ See Jackson & Smith, *supra* note 54 at part 1.

⁶⁶ See *Canada Cooperatives Act*, SC 1998, c 1, s 11(1)(g) [CCA].

⁶⁷ See *ibid.*, s 7.

⁶⁸ See *Cooperative Association Act*, *supra* note 32, s 8(1)–(2).

⁶⁹ See CCA, *supra* note 66, s 7(1)(b); *Cooperative Association Act*, *supra* note 32, s 8(2)(b).

⁷⁰ See e.g. *Harry Sherman Crowe Housing Co-operative Inc v Benjamin*, 2014 ONSC 3744 at para 4.

D. Voting

In a standard corporation, shareholders elect directors to manage the business, they vote on fundamental changes to the corporation and they provide the directors with guidance by passing shareholder resolutions.⁷¹ A shareholder's clout depends on the type and number of shares that the investor holds. An investor holding voting shares is entitled to vote at all regular and special shareholders' meetings. An investor holding non-voting shares only gets to vote when the corporation is contemplating a fundamental change to its structure, such as a sale of all its property.⁷² Investors holding more shares have more clout when they vote because votes are decided on the basis of how many *shares* were voted for or against a resolution. For example, shareholders pass an ordinary resolution when investors holding a majority of the outstanding shares vote in favour of the resolution.⁷³

In a cooperative, members are all entitled to one vote per *member*.⁷⁴ Members cannot increase their clout by investing more in the cooperative. Democratic control is a foundational principle of the cooperative movement. In cooperatives, democratic control is put into practice through the one-member-one-vote structure.⁷⁵

E. Payments to Owners and Residual Value

When a standard corporation is profitable, it can pay out some of its profits to its shareholders. These payments are called dividends. An investor's right to receive a dividend varies according to the class and number of shares that an investor holds. For example, a company may have two classes of shares, one of which is entitled to receive dividends in priority to the other. If two investors hold shares with the same priority to dividends, the investor who holds more shares will receive proportionally bigger payments.

In a cooperative, profit is distributed to members through patronage returns. These returns vary according to how much business a member

⁷¹ See *CBCA*, *supra* note 60, ss 103, 106(3), 137, 173–92.

⁷² See *ibid.*, s 189(3–9).

⁷³ See *ibid.*, s 2 “ordinary resolution”, 140(1).

⁷⁴ See Fabio R Chaddad & Michael L Cook, “Understanding New Cooperative Models: An Ownership Control Rights Typology” (2004) 26:3 *Rev Agricultural Econ* 348 at 351.

⁷⁵ See International Co-operative Alliance, “Guidance Notes”, *supra* note 11 at 15; Münkner, *supra* note 54 at 111.

did with the cooperative.⁷⁶ For example, a member who bought more goods from a consumer cooperative will receive a bigger patronage return. Patronage returns exemplify the philosophy that a cooperative is not intended to profit off its members, but rather to increase their economic well-being.⁷⁷ The patronage return allows the cooperative to refund its profit to its members in proportion to the amount of business the member did with the cooperative.

A cooperative requires funds to operate. One way a cooperative can generate these funds is to allocate, but not pay, patronage returns to a member.⁷⁸ The cooperative issues shares to the member in lieu of payment. Alternatively, cooperative's members may choose to invest their funds into the cooperative in return for shares.⁷⁹ Members holding shares may be entitled to receive dividend payments, but these payments differ from the dividends paid to investors in a corporation.⁸⁰ In a corporation, the amount of a dividend fluctuates with the profitability of the corporation, usually with no upper limit on how much of its profit a corporation can distribute as dividends. Conversely, the dividend paid on cooperative's shares is limited to a reasonable rate of return, measured as a percentage of the member's initial investment.⁸¹ The default rule in British Columbia is that the dividend cannot exceed eight percent of the book value of a share (i.e., the price the member initially paid for the share).⁸² Some cooperatives "pay no interest on... retained equity."⁸³

⁷⁶ See Heather Heavin, "The Dilemma of Change: A Story of the Saskatchewan Wheat Pool" (1995) 59:1 Sask L Rev 189 at 212–13. See also *Joncas v the Queen*, 2002 CanLII 3 (TCC) at paras 39–40, 50, 58 DTC 2315.

⁷⁷ See Brett Fairbairn, "Three Strategic Concepts for the Guidance of Co-operatives: Linkage, Transparency, and Cognition" (January 2003) at 8–9, online (pdf): *Centre for the Study of Co-operatives of the University of Saskatchewan* <www.usaskstudies.coop> [perma.cc/2C7E-YPJ3].

⁷⁸ See Murray Fulton & Jean-Pierre Girard, "Demutualization of Co-operatives and Mutuals" (October 2015) at 9, online (pdf): *Centre for the Study of Co-operatives of the University of Saskatchewan* <usaskstudies.coop> [perma.cc/2AR9-G2DF]; Anders Bruun, "A Cooperative Amalgamation: Proud Histories Meet a New Frontier" (1999) 26:2 Man LJ 203 at 211; see David W Cobia, "Distribution of Net Income" in David W Cobia, ed, *Cooperatives in Agriculture* (Englewood Cliffs, NJ: Prentice-Hall, 1989) 221 at 230.

⁷⁹ See *Cooperative Association Act*, *supra* note 32, s 51; see David W Cobia & Thomas A Brewer, "Equity & Debt" in David W Cobia, ed, *Cooperatives in Agriculture* (Englewood Cliffs, NJ: Prentice-Hall, 1989) 243 at 247.

⁸⁰ See Heavin, *supra* note 76 at 204.

⁸¹ See Bruun, *supra* note 78 at 204.

⁸² See *Cooperative Association Act*, *supra* note 32, s 66(1)(c).

⁸³ Heavin, *supra* note 76 at 204, n 32 (describing the Saskatchewan Wheat Pool).

Shareholders may have their shares re-purchased by the corporation, through a process called redemption. Cooperatives have an implied obligation to redeem their members' shares by buying them back at book value.⁸⁴ Cooperatives satisfy this obligation in varying ways. Some cooperatives will redeem shares on a "first-in, first-out basis", meaning the cooperative buys back shares starting with those issued the earliest in time.⁸⁵ Other cooperatives will redeem shares when a triggering event occurs, such as when a member reaches a certain age, retires, or dies.⁸⁶ MEC redeemed outstanding member shares by issuing gift cards to members.⁸⁷

Shareholders have a "residual claim" against a standard corporation: if someone winds up the corporation, they must first pay off any creditors and then distribute any residual value to the shareholders. Members may or may not have a comparable residual claim depending on which legislation governs the cooperative. British Columbia's statute provides that when someone winds up a cooperative, the residual value should be distributed to the members.⁸⁸ In Québec, cooperatives operate on a principle of disinterested devolution, meaning that the residual value is not distributed to the members, but instead must be conveyed to a different cooperative or other similar organization.⁸⁹ Statutory provisions that prohibit members from receiving the residual value are called "asset-locks."⁹⁰ Asset-locks prevent members from profiting when cooperatives are demu-

⁸⁴ See Cobia & Brewer, *supra* note 79 at 245.

⁸⁵ See David W Cobia, Jeffrey Royer & Gene Igalsbe, "Equity Redemption" in David W Cobia, ed, *Cooperatives in Agriculture* (Englewood Cliffs, NJ: Prentice-Hall, 1989) 267 at 272.

⁸⁶ See *ibid* at 278. See e.g. Heavin, *supra* note 76 at 204.

⁸⁷ See "MEC 2016-17 Annual Report" (2017) at 21, online (pdf): *Wayback Machine* <meccms.wpengine.com> [perma.cc/G78M-LBQ7] (reporting that since 1971 MEC had made 16 share redemptions totalling \$35 million, including \$5.4 million in 2016 and \$1.8 million in 2017); "MEC 2017-18 Annual Report: Investing for the continued success of your co-op" (2018) at 28, online (pdf): *Wayback Machine* <meccms.wpengine.com> [perma.cc/B9GH-5RNA] (reporting no redemption that year); "MEC 2018-19 Annual Report: See what your Co-op was up to over the last year" (2019) at 26, online (pdf): *Wayback Machine* <meccms.wpengine.com> [perma.cc/93CC-68KP] (reporting no redemption that year).

⁸⁸ See *Cooperative Association Act*, *supra* note 32, s 194.24(1)(d). But see special rules re: community service cooperatives, *Cooperative Association Act*, *supra* note 32, s 178.1(4).

⁸⁹ See Fici, *supra* note 55 at 46; Timothy Petrou, "Canada" in Dante Cracogna, Antonio Fici & Hagen Henry, eds, *International Handbook of Cooperative Law* (Berlin: Springer-Verlag, 2013) 289 at 310; *Cooperatives Act*, CQLR c C-67.2, s 185.

⁹⁰ International Co-operative Alliance, "Guidance Notes", *supra* note 11 at 33.

tualized and thus safeguard the enterprise value that members have built up over time.⁹¹

Both shareholders and members can have a range of interests in a business. Some of these interests are solely financial. A shareholder hopes to receive dividends, to share in the residual value when a corporation is wound down, or to sell their shares for more than they were purchased. A member may welcome patronage returns and, eventually, a redemption of their shares, but they have also joined the cooperative because it serves an identified economic need. These needs may have a financial aspect, such as when a consumer cooperative makes goods available to members at affordable prices or when members are employed by a workers cooperative. But a member's interests can also be non-financial, such as when a member chooses to do business with a cooperative because of its values and principles, including its democratic approach to governance. All these interests differ sufficiently from the financial interests of a shareholder in a corporation that they risk being overlooked when members are equated with shareholders, as occurred in MEC's CCAA proceedings. The next section explores some of the ways in which cooperative difference was overlooked during the sale approval hearing.

III. Rethinking the Challengers' Arguments with a Focus on Cooperative Difference

This section re-examines three arguments raised by the dissenting members and intervenors to illuminate how the court may have analyzed them differently if the court had attended to the democratic ethos of the cooperative model and the range of interests of MEC's members. It argues that members should have a greater role in future insolvency proceedings involving *cooperatives*, but even in a standard corporation, stakeholders can hold a range of interests, financial and otherwise, that merit consideration in the insolvency process. This section concludes by drawing lessons about how to empower cooperative members in insolvency proceedings from Janis Sarra's work on how to enhance the participation of stakeholders with non-capital economic interests.

A. *Cooperative Difference is Relevant to the Approval of a Sale under Section 36 of the CCAA*

The dissenting members argued that the directors needed to consult the members before taking steps to sell the cooperative's assets. Directors can use the CCAA to circumvent the usual requirement that they consult

⁹¹ See *ibid.*

shareholders or members before making fundamental changes to a business but only if they receive court approval. When courts approve pre-pack sales where the normal consultation has not occurred, the process can work unfairness on any stakeholders not involved in the pre-insolvency negotiations. Courts should exercise their discretion to approve such sales in a way that accounts for this potential unfairness and, when a cooperative is involved, acknowledges the multiplicity of members' interests.

1. Section 36 of the CCAA Allows for a Sale of Assets Without Member Approval

In a standard corporation, the directors must seek shareholder approval before the directors can sell all or substantially all of the corporation's assets.⁹² This means that the directors must call for a shareholder vote and a super majority of shareholders must vote in favour of the sale.⁹³ Similar provisions exist in the cooperative legislation that applied to MEC.⁹⁴ But when a business sells assets as part of insolvency proceedings, the court can approve the sale in the absence of shareholder or member approval. Section 36 of the CCAA reads in part: "*Despite any requirement for shareholder approval*, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained."⁹⁵ (italics added) The CCAA defines "company" and "shareholder" broadly to include cooperatives and members, respectively.⁹⁶ Thus, section 36 empowers the court to authorize a sale by a cooperative even when a member vote has not been held. At the same time, the provision contains permissive language ("may authorize"), and thus the court retains the discretion to require a vote or to consider the lack of consultation when deciding whether to authorize a sale. Section 36 contains a non-exhaustive list of criteria that a court should consider when deciding whether to authorize a sale. These criteria direct the court to consider the fairness of the sale process and its outcome.⁹⁷ Additionally, courts evaluate applications to authorize sales under the CCAA using the principles articulated in the case of *Royal Bank v Soundair*,

⁹² See *CBCA*, *supra* note 60, s 189(3).

⁹³ See *ibid*, s 189(8).

⁹⁴ See *Cooperative Association Act*, *supra* note 32, s 71(2). See also *ibid*, s 1(1) "special resolution".

⁹⁵ CCAA, *supra* note 3, s 36(1).

⁹⁶ See *ibid*, s 2(1).

⁹⁷ See *ibid*, s 36(3).

which dealt with how to evaluate a sale by a receiver.⁹⁸ As compared to the procedural *and substantive* criteria articulated in section 36, the *Soundair* principles are more narrowly focused on questions of process.

2. Pre-pack Sales Under Section 36 Create a Risk of Unfairness

A debtor can use section 36 to sell its assets in two ways. The debtor may market its assets after commencing CCAA proceedings, in which case the sales process will be pre-approved by the court and overseen by the monitor. Stakeholders can challenge the proposed sale process before it is implemented. Alternatively, the debtor may opt for a “pre-pack” sale, meaning that it markets its assets and finalizes a sale agreement before commencing CCAA proceedings. In a “pre-pack” scenario, the Court does not pre-approve the sale process and disgruntled stakeholders may challenge the sale when the debtor applies for approval under section 36.⁹⁹ MEC used a pre-pack sale.

Scholars and practitioners have critiqued pre-pack sales. Tushara Weerasooriya et al argue that when a debtor conducts a pre-pack sale, this creates a “momentum problem” that prevents scrutiny of the pre-insolvency process:

The challenge created by this deal momentum is that it promotes a narrative (usually presented to the court when the debtor is ready to file) that the debtor company is playing an all or nothing game. In other words, it is this deal or disaster... the pressure to conclude a particular transaction on a tight timeline has the collateral effect of restricting creditor engagement, scrutiny of the transaction and honest debate over the value judgments made by the debtor in its decisions about how to allocate value.¹⁰⁰

Janis Sarra expresses a related concern, that “courts are confronted with fait accompli applications before them, in effect bypassing many of

⁹⁸ See *Royal Bank of Canada v Soundair Corp et al* (1991), 83 DLR (4th) 76 at 93, 1991 CarswellOnt 205 [*Soundair*], cited with approval in the context of a section 36 application in *Sanjel Corporation (Re)*, 2016 ABQB 257 at para 56 [*Sanjel Corp*], cited with approval in *Mountain Equipment Co-op*, *supra* note 44 at para 103; Alfonso Nocilla, “Reorganizations, Sales, and the Changing Face of Restructuring in Canada: Quantitative Outcomes of 2012 and 2013 CCAA Proceedings” (2019) 42:2 Dalhousie LJ 371 at 377 [Nocilla, “Restructuring in Canada”]; Alfonso Nocilla, “Asset Sales under the Companies’ Creditors Arrangement Act and the Failure of Section 36” (2012) 52:2 Can Bus LJ 226 at 242.

⁹⁹ See *Sanjel Corp*, *supra* note 98 at para 71.

¹⁰⁰ Tushara Weerasooriya et al, *supra* note 4 at The Momentum Problem; see also David A Skeel Jr, “Competing Narratives in Corporate Bankruptcy: Debtor in Control vs No Time to Spare” (2009) 2009:4 Mich St L Rev 1187 at 1199.

the checks and balances of the system.”¹⁰¹ Matthew Nied and Natalie Levine note that the pre-pack approach unfairly shifts the onus onto creditors to challenge the pre-filing sales process rather than having the Court pre-approve the process.¹⁰² Alfonso Nocilla and Vern DaRe suggest that pre-packs raise questions about fairness and transparency, given that few creditors are involved in the pre-insolvency negotiations and, once the sale agreement is concluded, there is only a brief window in which to challenge it.¹⁰³ The fairness of the pre-pack process is not merely an academic concern, but impacts the outcome of insolvency proceedings. Secured creditors regularly participate in the pre-insolvency negotiations and empirical evidence from the United Kingdom suggests that pre-packs benefit secured creditors and disadvantage unsecured creditors as compared to other methods of realization.¹⁰⁴

MEC’s use of a pre-pack sale illustrates the concerns raised by scholars and practitioners. MEC excluded its members from the pre-insolvency search for refinancing and the subsequent sales process. The members were unaware of the extent of the financial peril facing their cooperative until MEC applied for an Initial Order. In their application, MEC and the monitor highlighted the urgency of approving the sale to Kingswood without delay. For example, the monitor wrote: “[S]uccessful execution and a timely Closing of the Proposed Transaction on these timelines is *critical* in order to transition MEC’s business operations to a new equity sponsor, preserve employment and ensure the much needed continuity and stability of the business for trade suppliers [...]”¹⁰⁵ (italics added). It is difficult for anyone to counter this manner of “deal or disaster” argument and the members had very little time to try: in the 14 days

¹⁰¹ Sarra, “The Oscillating Pendulum” *supra* note 4 at n 64.

¹⁰² See Nied & Levine, *supra* note 4 at s 2 (iii).

¹⁰³ See Nocilla & DaRe, *supra* note 4 at 625. See also Nocilla, “Restructuring in Canada”, *supra* note 98 at 379; Jason Dolman & Gabriel Faure, “PrePlan Sales Under Section 65.13 BIA and Section 36 CCAA” (2017) 59:3 Can Bus LJ 332 at 355, 357.

¹⁰⁴ See Nocilla & DaRe, “The Trouble with Pre-Packs”, *supra* note 4 at s II(2)(A) citing Rizwaan Mokhal, Nigel J Balmer & Alfonso Nocilla, “Contractualised Distress Resolution in the Shadow of the Law: United Kingdom National Findings”, Draft of 14 May 2018, online (PDF): *Università degli Studi di Firenze Dipartimento di Scienze Giuridiche* <www.codire.eu> [perma.cc/KFU3-V422] at figures 70, 80; Sandra Frisby, “A preliminary analysis of pre-packaged administrations: Report to The Association of Business Recovery Professionals” (August 2007) at 67, online (pdf): *International Insolvency Institute* <www.iiiglobal.org> [perma.cc/9CFV-VZ5T]. Empirical research on Canadian CCAA suggests that liquidating CCAA’s benefit secured creditors and disadvantage unsecured creditors, as compared to restructuring CCAAs, but this analysis has not been carried out yet with respect to pre-packs as a subset of liquidating CCAAs, Nocilla, “Restructuring in Canada”, *supra* note 98 at 387, 393.

¹⁰⁵ First Report of the Monitor, *supra* note 1 at para 9.28.

between MEC's initial application and the comeback hearing, the members had to connect with each other, digest the information, work with legal counsel to develop their arguments and produce evidence that there were other viable options available to MEC. Because pre-pack sales can work unfairness on stakeholders not involved in the pre-insolvency negotiations, the court would have been justified in granting the members more time to explore alternatives to the proposed sale.

3. Cooperative Difference and Section 36

MEC's sale illustrates the shortcomings of pre-packs generally, but the court might also have applied section 36 differently if it had centred MEC's cooperative difference in its analysis. The court equated MEC's members with shareholders in a standard corporation.¹⁰⁶ The CCAA invites this comparison by how it is drafted: it uses the term "shareholders" throughout, but the term includes the members of a cooperative.¹⁰⁷ The use of the term "shareholder" in the CCAA to designate both shareholders in standard corporations and members in a cooperative obscures important differences between the two. The Court held that MEC was justified in excluding the members from the decision to sell the cooperative's assets because the members had no remaining financial interest in the cooperative.¹⁰⁸ This justification is commonly offered for disempowering the shareholders of an insolvent corporation, but it does not apply equally to members of a cooperative because of their multiplicity of interests in the cooperative.

Consider first the shareholder. In a CCAA proceeding, shareholders have very little power: their approval is not required before the company sells its assets and they do not usually vote on a plan of arrangement.¹⁰⁹ The rationale for disempowering shareholders is that once a corporation is insolvent, their residual claim is worthless. Recall that shareholders in a standard corporation have a right to receive a distribution when a company is wound down *if there is anything left after all the creditors have been paid*. When a standard corporation is insolvent, it does not have enough assets to cover its liabilities and, consequently, the shareholders will receive nothing.¹¹⁰ If shareholders were given leverage in the insol-

¹⁰⁶ See *Mountain Equipment Co-Operative*, *supra* note 44 at para 134.

¹⁰⁷ See CCAA, *supra* note 3, s 2(1).

¹⁰⁸ See *Mountain Equipment Co-Operative*, *supra* note 44 at paras 132, 136.

¹⁰⁹ See CCAA, *supra* note 3, ss 6(1), 36(1).

¹¹⁰ See Jacob S Ziegel, "Creditors as Corporate Stakeholders: The Quiet Revolution – An Anglo-Canadian Perspective" (1993) 43:3 UTLJ 511 at 530; Luc Morin & Arad Mojta-hedi, "What did you Expect? Equity Claims, Shareholders and the Insolvent Corpora-

veny proceedings, they might use it to pursue high risk/high reward options.¹¹¹ They have nothing to lose if the gambit fails, but if the gambit succeeds, they might increase the value of the company enough to pay the creditors' claims and have something left over for the shareholders' residual claims.

Contrast shareholders of a standard corporation with members of a cooperative. Members may have some financial claims against a cooperative, including the right to receive patronage returns or dividends and the right to have their equity redeemed.¹¹² A member may have a residual claim against a cooperative if the cooperative operates in a jurisdiction that allows for such claims.¹¹³ The members have a multiplicity of other interests in a cooperative, and may regard these as more important than protecting their investment or their right to share in the profits of the cooperative. Consider three:

- Members join cooperatives because the business satisfies an economic need that they share with other members.¹¹⁴ MEC's insolvency implicated the members' access to affordable, reliable outdoor gear; other cooperatives satisfy fundamental needs including housing, work, and food.
- A member might value the cooperative because it fulfills their need in a way that aligns with their values. They may view the cooperative as a more ethical business model which allows them to "[contribute] to building a different type of economy, one that pays closer attention to the full range of interests one has as a resident, citizen, and user of services."¹¹⁵ For example, MEC had

tion" in Janis P Sarra et al, eds, *Annual Review of Insolvency Law 2018* (Toronto: Thomson Reuters, 2019) 753 at 754. See also Stephanie Ben-Ishai & Poonam Puri, "The Canadian Oppression Remedy Judicially Considered: 1995-2001" (2004) 30:1 Queen's LJ 79 at 100.

¹¹¹ See *Stelco Inc., Re*, 2006 CanLII 1773 at para 18, 2005 CarswellOnt 6483.

¹¹² See *Cooperative Association Act*, *supra* note 32, s 9; 66(1)(a), (c).

¹¹³ See Petrou, *supra* note 89 and accompanying text.

¹¹⁴ See Fici, *supra* note 55 at 27; International Co-operative Alliance, "Guidance Notes", *supra* note 11 at 8; Fairbairn, *supra* note 77 at 5; Carol Liao, "The Next Stage of CSR for Canada: Transformational Corporate Governance, Hybrid Legal Structures, and the Growth of Social Enterprise" (2013) 9:1 JSDLP 53 at 77 [Liao, "The Next Stage"]; Ian MacPherson, "Into the Twenty-First Century: Co-operatives Yesterday, Today and Tomorrow" in Ian MacPherson, ed, *One Path to Co-operative Studies* (Victoria, BC: New Rochdale Press, 2007) 219 at 236; Münkner, *supra* note 54 at 7.

¹¹⁵ Michael Gertler, *Co-operative Membership as a Complex and Dynamic Social Process* (Saskatoon: University of Saskatchewan for the Centre for the Study of Co-operatives, 2006) at 6.

established itself as an environmental steward.¹¹⁶ Some members may have bought from MEC for this reason.

- A member might value a cooperative because it provides them with democratic tools for shaping their economic life. The members' democratic control of a cooperative is considered "the heart and soul of co-operative governance," and a "key differentiating characteristic of co-operatives in comparison to investor or shareholder-owned businesses."¹¹⁷ Shareholders also exert control over the management of a business enterprise, but the quality of their participation is different. Shareholders are provided with tools for overseeing management to guard against their investments being mismanaged. Members are provided with tools to exert control over management so that they can fulfill a shared need using democratic tools.

The members' range of interests matter for how a court applies section 36. Decisions made during insolvency proceedings — to sell the cooperative, to liquidate it, to restructure it — can significantly impact the members. These decisions can undermine the members' ability to fulfill their shared needs or to do so in a way that aligns with their values. When taken without sufficient member consultation, these decisions violate the democratic principle by which the members have chosen to organize their economic lives.

Section 36 of the CCAA allows courts to override the legislation that protects a member's right to be consulted on fundamental changes to a cooperative, but courts should be cautious when granting such an override given the potential impact on members and the centrality of democratic decision-making to cooperatives. Such a cautious approach would be consistent with legal principles governing section 36. The legislation directs courts to consider the effects of a sale on "other interested parties" and, when applying the *Soundair* principles, courts ask whether the interests of all parties have been considered. Members of a consumer cooperative qualify as interested parties twice over, as owners and as customers. Stephanie Ben-Ishai and Stephen Lubben observe that courts "may be more willing to approve a [sale of assets prior to a plan] when there is some greater benefit to be obtained on top of simply repaying creditors."¹¹⁸

¹¹⁶ See Bill Turner, *Co-operative Membership: Issues and Challenges* (Saskatoon: University of Saskatchewan for the Centre for the Study of Co-operatives, 2006) at 6.

¹¹⁷ International Co-operative Alliance, "Guidance Notes", *supra* note 11 at 15, 18.

¹¹⁸ Stephanie Ben-Ishai & Stephen J Lubben, "Sales or Plans: A Comparative Account of the 'New' Corporate Reorganization" (2011) 56:3 McGill LJ 591 at 608.

Conversely, courts should be less willing to approve a sale of a cooperative's assets under section 36 where there are negative repercussions for members, including potential interruptions to the services provided by a cooperative or where members have not been given an opportunity to participate in decision-making about the future of their shared enterprise.

Had the court centred cooperative differences in its analysis of section 36, it might still have concluded that the sale should be approved because the Kingswood bid best served the members' shared need. Recall that the directors selected the Kingswood bid, in part, because it guaranteed the highest level of continued service to the members by keeping the most stores open (of any of the bids), fulfilling MEC's warranty obligations and honouring outstanding gift cards.¹¹⁹ Additionally, Kingswood undertook to "operate facilities and operations with a sustainable footprint in line with Environmental, Social and Governance investment criteria."¹²⁰ A court could conclude that the members would benefit sufficiently from the sale to justify the infringement on the democratic rights they hold as members in a cooperative. On the other hand, it would be open to a court to consider the members' range of interests and reach the opposite conclusion. The important point here is that the court should have considered the full range of the members' interests in the cooperative and resisted sidelining members simply because their residual claim had no value.

B. Fiduciary Duty

The cooperative intervenors argued that selling MEC's assets without first consulting the members amounted to a fiduciary breach.¹²¹ They characterized this as a breach of the cooperative's fiduciary duty to its members, but they key fiduciary duty implicated in the sales transaction was owed by the directors to the cooperative. The court did not engage with the breach of fiduciary duty claim in its written reasons, but the intervenors were unlikely to have succeeded with this claim in any event. The way in which Canadian courts have interpreted the content of a corporate director's fiduciary duty makes it difficult to establish a breach absent evidence of a conflict between a director's interests and those of the corporation. Directors of a cooperative are similarly insulated from claims of fiduciary breach; however, the content of their duty varies somewhat because cooperatives are established to fulfill a specific purpose, other than creating profits, because they are governed by the ICA's values and prin-

¹¹⁹ See First Report of the Monitor, *supra* note 1 at paras 9.2, 9.25; See Wallis Affidavit, *supra* note 14 at para 36.

¹²⁰ Wallis Affidavit, *supra* note 14 at para 36.

¹²¹ See Hyman Affidavit, *supra* note 43 at para 20.

ciples and because members have interests as both investors and users in a cooperative.

1. A Corporate Director's Fiduciary Obligation

Directors of a standard corporation have a fiduciary duty to act in the best interest of the corporation.¹²² In Canada's past, scholars and practitioners debated whether the duty obligated directors to maximize the value available to shareholders (aka shareholder primacy) or if they could also consider the interests of other stakeholders, such as employees, customers, and the environment (aka stakeholder theory). The Supreme Court of Canada resolved this uncertainty by espousing stakeholder theory in a pair of cases: *Peoples Department Stores Inc. (Trustee of) v Wise* and *BCE Inc. v 1976 Debentureholders*.¹²³ The court indicated that directors could consider the interests of stakeholders, including "shareholders, employees, creditors, consumers, governments and the environment", when deciding what course of action was in the best interest of the corporation.¹²⁴ These cases created uncertainty about whether directors were *encouraged*, *required*, or merely *permitted* to consider the interests of these stakeholders.¹²⁵ In practice, this distinction appears moot. Directors are careful to document that they have considered the interests of stakeholders so as to avoid any potential lawsuits.¹²⁶ Subsequent amendments to the *CBCA* adopt a permissive standard: directors "may" consider other stakeholder interests.¹²⁷

Fiduciary breach claims against directors often allege a conflict between the director's interest and that of the corporation.¹²⁸ Absent such a conflict, it is difficult to establish that directors have breached their fiduciary duty. They can justify a decision with reference to the interests of

¹²² See *CBCA*, *supra* note 60, s 122(1)(a).

¹²³ 2004 SCC 68 [*Peoples*].

¹²⁴ *Ibid* at para 42. Cited in *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at paras 39–40 [*BCE*].

¹²⁵ See Carol Liao, "A Critical Canadian Perspective on the Benefit Corporation" (2017) 40:2 Seattle UL Rev 683 at 702 [Liao, "A Critical Canadian Perspective"]; Robert E Milnes, "Acting in the Best Interests of the Corporation: To Whom is this Duty Owed by Canadian Directors? The Supreme Court of Canada in the *BCE* Case Clarifies the Duty" (2009) 24:3 BFLR 601 at 617.

¹²⁶ See also Carol Liao, "A Canadian Model of Corporate Governance" (2014) 37:2 Dal LJ 559 at 582.

¹²⁷ See *CBCA*, *supra* note 60, s 122(1.1).

¹²⁸ See J Anthony VanDuzer, *The Law of Partnerships and Corporations*, 4th ed, (Toronto: Irwin Law, 2018) at 380.

different stakeholders.¹²⁹ For example, a decision that does not positively influence shareholder profits can be justified because it benefits the corporation's employees or customers. Additionally, directors are protected by the business judgment rule, namely that courts will not second guess the business judgments of directors so long as they "have acted honestly and reasonably."¹³⁰ Poonam Puri contends that the degree of deference accorded to directors under the business judgment rule means they "are effectively insulated from review by the courts."¹³¹

2. A Cooperative Director's Fiduciary Obligation

Directors of a cooperative owe a fiduciary duty to the cooperative. The duty is stipulated in statutory provisions that mirror the language found in business corporation legislation. Directors of a standard corporation must act in the best interest of the *corporation*, whereas directors of a cooperative must act in the best interest of the *association*.¹³² However, the underlying structure of a cooperative differs from a corporation in at least three salient ways that affect the content of the director's fiduciary duty.

First, a cooperative is not established to make a profit, but rather to serve an identified need of the members.¹³³ Daniel Ish and Kathleen Ring argue that "minimization of costs is a primary goal" of a cooperative and, therefore, cooperative directors are in a position similar to corporate directors because minimizing costs and maximizing profits are two sides of the same coin.¹³⁴ Conversely, Heather Heavin argues that a cooperative's "primary objective is to serve members' needs and as such its effectiveness and efficiency must be judged by the service and benefits rendered to its members."¹³⁵ In other words, cost minimization is a secondary

¹²⁹ But see Mohamed F Khimji, "Peoples v Wise: Conflating Directors' Duties, Oppression, and Stakeholder Protection" (2006) 39:1 UBC L Rev 209 at 216.

¹³⁰ *Pente Investment Management Ltd v Schneider Corp* [1998], 42 OR (3d) 177 at para 34, 1998 CarswellOnt 4035 [*Pente Investment Management*]; *BCE*, *supra* note 124 at para 40.

¹³¹ Poonam Puri, "The Future of Stakeholder Interests in Corporate Governance" (2010) 48:3 Can Bus LJ 427 at 430.

¹³² See *Cooperative Association Act*, *supra* note 32, s 84(1)(a); *CCA*, *supra* note 66, s 80(1)(a).

¹³³ See Fairbairn, *supra* note 77 at 8.

¹³⁴ See Daniel Ish & Kathleen Ring, *Legal Responsibilities of Directors and Officers in Canadian Co-operatives* (Saskatoon: University of Saskatchewan for the Centre for the Study of Co-operatives, 1995) at 47.

¹³⁵ Heavin, *supra* note 76 at 192; Roger Spear, "Governance in Democratic Member-Based Organizations" (2004) 75:1 Annals Public & Cooperative Economics 33 at 46 [Spear,

goal and desirable only to the extent it helps the cooperative better fulfill its members' needs. Heavin's description is more accurate: the primary goal of the directors at MEC was to supply outdoor goods to the membership. Cutting costs could help the directors to achieve this goal, but could never supplant the cooperative's primary goal. When deciding between alternative courses of action, directors of a cooperative must consider how each option will affect the cooperative's ability to fulfill its primary purpose.

Second, the ICA's principles and values infuse the directors' fiduciary duty. Recall that these values and principles are broadly reflected in cooperative statutes.¹³⁶ The principles and values are flexible and do not dictate specific courses of action, but they do favour some over others. For example, democracy is a fundamental cooperative value.¹³⁷ When directors of a cooperative are considering a major transaction, such as selling the business, they should put greater importance on consultation with members than would the directors of a standard corporation because their organization has embraced member democracy as a guiding value.

Third, the members play (at least) two different roles in the cooperative: as owners and as users. In MEC's case, this meant that the directors were not deciding between the competing interests of shareholders and customers, but rather trying to decide how best to serve a group of members who played both roles. Carol Liao suggests that "the fusion of owner and user roles in cooperative ownership enforces an unassailable stakeholder-based style of governance that cannot be replicated in for-profit companies."¹³⁸ Yet still, directors must balance conflicting stakeholder interests. Members have interests that can conflict with those of non-member stakeholders, such as creditors and suppliers. Members hold multiple roles in the cooperative and may find that their interests in one role conflict with their interests in another. MEC's directors were faced with a decision to either sell the cooperative's assets or ask the members for financial contributions. When weighing these options, the directors may have considered that a sale would better sustain the enterprise's operations (thereby benefitting the members as customers), whereas a member contribution drive would be more likely to retain the cooperative structure of the enterprise (thereby benefitting the members as owners).

"Governance"]. See also Kathryn Chan, "Identifying the Institutional Religious Freedom Claimant" (2017) 95:3 Can Bar Rev 707 at 721 (making a similar argument about the fiduciary duties of the directors of charitable organizations).

¹³⁶ See *supra* notes 66-69.

¹³⁷ See Heavin, *supra* note 76 at 209-210.

¹³⁸ Liao, "The Next Stage", *supra* note 114 at 78. See also Sonja Novkovic, "Defining the Co-operative Difference" (2008) 37:6 J Socio-Econ 2168 at 2175.

Directors are entitled to choose a course of action that benefits some stakeholders over others, or the interests of members-as-customers over those of members-as-owners.

3. MECs Directors Likely Satisfied Their Fiduciary Obligation to the Cooperative

MEC's directors argued that the Kingswood bid was in the best interest of all the stakeholders. The bid allowed MEC to repay its secured creditors in full and make distributions to its unsecured creditors. Most employees had the option of continuing to work for the new owner. Most of the store locations would continue to serve members, and the members could still use the warranties and gift cards issued by MEC. Suppliers could maintain their business relationships with MEC.¹³⁹

The dissenting members believed a different course of action would serve them better as members, but MEC's directors had a strong argument that they had satisfied the Supreme Court of Canada's fiduciary standard. It is difficult for a stakeholder to establish fiduciary breach by directors for failure to give sufficient weight to a stakeholder's interest. The source of this difficulty is two-fold: directors need only show that they considered the stakeholder's interest, not that they acted in favour of it, and their decisions are subject to deference under the business judgment rule. The MEC directors considered the members' interests as owners and acted in the way that they believed best served their interests as customers as well as benefitting other stakeholders.

C. Oppression

The dissenting members argued that the directors acted oppressively by selling MEC's assets without first consulting the membership.¹⁴⁰ The court dismissed this claim holding it was unreasonable for the members to expect to be consulted given that their financial interest in the cooperative had no value. Again, the court equated members with shareholders and remained preoccupied with their residual claim. It also dismissed the members' proposed alternatives to the sale as infeasible. Had the court centred cooperative difference in its analysis, it would have been justified in granting the dissenting members' requested remedy of a two-week delay, either under the oppression remedy or using the scope available to it under the CCAA to respond to unfairness in the insolvency process.

¹³⁹ See *Mountain Equipment Co-Operative*, *supra* note 44 at para 137; *Wallis Affidavit*, *supra* note 14 at paras 34–36; First Report of the Monitor, *supra* note 1 at paras 9.2, 9.25–9.27.

¹⁴⁰ See *Harding Application*, *supra* note 37 at Part 3, para 17.

1. The Oppression Remedy

Oppression is a legal remedy that is included in both business corporation and cooperative legislation.¹⁴¹ It provides remedies to a range of stakeholders to challenge unfair conduct. For example, in a standard corporation, minority shareholders can use the oppression remedy to challenge unfair conduct by a majority shareholder, a majority shareholder might use it to challenge unfair conduct by the directors, and creditors can use it to challenge unfair conduct by the corporation.

A threshold question in an oppression claim is whether the party alleging oppressive conduct has standing. The shareholders, directors, and officers of a standard corporation can bring an oppression claim, as can any other person that the court considers to be a proper party.¹⁴² Some stakeholders – such as creditors or employees – can only bring an oppression claim if they satisfy the court that they are a proper party. Under both federal and British Columbian cooperative legislation, members are explicitly granted standing to bring oppression claims.¹⁴³ Thus, there is no question about standing in the MEC case: the members had it.

In the context of a standard corporation, the Supreme Court of Canada articulated a two-part test to determine whether a party has acted oppressively:

- (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?¹⁴⁴

This same two-part test applies to oppression actions under federal and British Columbian cooperative legislation.¹⁴⁵

¹⁴¹ See *Cooperative Association Act*, *supra* note 32, s 156.

¹⁴² See Ziegel, *supra* note 110 at 527; see also Mohamed F Khimji & Jon Viner, “Oppression: Reducing Canadian Corporate Law to a Muddy Default” (2015-16) 47:1 *Ottawa L Rev* 127 at 136–137.

¹⁴³ See *Cooperative Association Act*, *supra* note 32, s 156(1); *CCA*, *supra* note 66, ss 313(1)(b), 329(2)(d), 338, 340.

¹⁴⁴ *BCE*, *supra* note 124 at para 68.

¹⁴⁵ See *Potter v Vancouver East Cooperative Housing Association*, 2019 BCSC 871 at para 91 [Potter]; *Collins*, *supra* note 54 at paras 108–09; *Sedgwick v Edmonton Real Estate Board Co-Operative Listing Bureau Limited (Realtors Association of Edmonton)*, 2022 ABCA 264 at paras 89-93 (applying the BCE test but with attention to the different purpose and characteristics of a quasi-regulatory cooperative in Alberta); Jackson & Smith, *supra* note 54 at part 19 (the oppression provision in the federal cooperative le-

The term “reasonable expectation” indicates that the oppression remedy should address questions of fairness that go beyond the explicit agreements made between the parties.¹⁴⁶ Thus, conduct that is “technically or procedurally valid” may still be oppressive.¹⁴⁷ A court will examine a range of factors to determine whether an expectation is reasonably held, including, “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.”¹⁴⁸ The standard is very context-specific; precedents are of limited value.¹⁴⁹

A stakeholder cannot use the oppression remedy to challenge all conduct that violates their reasonable expectations. The conduct must also be oppressive, unfairly prejudicial, or evidence unfair disregard of the stakeholder’s interests.¹⁵⁰ These three standards exist on a spectrum of severity.¹⁵¹ Oppression refers to the most serious forms of misconduct “that has variously been described as “burdensome, harsh and wrongful,” “a visible departure from standards of fair dealing,” and an “abuse of power going to the probity of how the corporation’s affairs are being conducted.”¹⁵² Unfair prejudice connotes conduct on the middle of the spectrum between op-

gislation was based on the oppression provision in the *Canada Business Corporations Act*). In a second decision in the *Potter* litigation, *Potter v Vancouver East Cooperative Housing Association*, 2020 BCSC 361 at paras 38–40, the court held that principles developed by the Supreme Court of Canada in *Wilson v Alharayeri*, 2017 SCC 39 at paras 49–57 to guide courts granting remedies in situations of corporate oppression could be applied to cooperatives.

¹⁴⁶ See Mary Anne Waldron, “Corporate Theory and the Oppression Remedy” (1982) 6:2 Can Bus LJ 129 at 150–51.

¹⁴⁷ See *Collins*, *supra* note 54 at para 112 citing, *Diligenti v RWMD Operations Kelowna Ltd* [1976], 1 BCLR 36 (BCSC) at para 41, BCJ No 38.

¹⁴⁸ *BCE*, *supra* note 124 at para 72; Janis Sarra, “Creating Appropriate Incentives: A Place for the Oppression Remedy in Insolvency Proceedings” in Janis P Sarra, ed, *Annual Review of Insolvency Law, 2009* (Toronto: Thomson Reuters, 2010) 99 at 104.

¹⁴⁹ See Raymonde Crête, “Dealing with Unfairness: Some Observations on the Role of the Courts in Designing a Fair Solution” (2003) 36:3 UBC L Rev 519 at 521–24; Shannon Kathleen O’Byrne & Cindy A Schipani, “Feminism(s), Progressive Corporate Law, and the Corporate Oppression Remedy: Seeking Fairness and Justice” (2017) 19:1 Geo J Gender & L 61 at 101–104; Khimji & Viner, *supra* note 142 at 144.

¹⁵⁰ See *Business Corporations Act*, SBC 2002, c 57, s 227(2) (British Columbia’s corporate and cooperative legislation only incorporate the first two standards of conduct); *Cooperative Association Act*, *supra* note 32, s 156(1).

¹⁵¹ See *BCE*, *supra* note 124 at para 91.

¹⁵² *Ibid* at para 92, citing Markus Koehn, *Oppression and Related Remedies*, (Toronto: Thomson Carswell, 2004) at 81.

pression and unfair disregard; unfair disregard is the least serious of the three.¹⁵³

The oppression standard overlaps with, but is separate from, the fiduciary standard to which directors are held.¹⁵⁴ In considering whether directors have acted oppressively, courts may consider whether they have fulfilled their fiduciary duty.¹⁵⁵ However, conduct which does not run afoul of the fiduciary standard can still violate the oppression standard.¹⁵⁶ The fiduciary standard requires directors to engage in a “delicate and difficult balancing of interests” and courts are deferential to the decisions directors make.¹⁵⁷ In contrast, the oppression standard “merely seeks to prevent unfair disregard of stakeholder interests.”¹⁵⁸ Thus, courts have more scope to intervene when a party breaches the oppression standard, and litigants may find that it is easier to prove a breach of the oppression standard than the fiduciary one.

When a court finds oppression, it has a breadth of remedies at its disposal. The business corporation acts provide a long, non-exhaustive list of possible remedies, including the power to grant a compensatory judgment, to undo a transaction, and to grant injunctive relief.¹⁵⁹ Similar lists of remedies have been incorporated into cooperative legislation.¹⁶⁰ In British Columbia, the courts have described their remedial powers under the oppression provision in the cooperative legislation as being “extremely broad.”¹⁶¹ Yet, courts are expected to carefully tailor their remedy to rectify the oppression: “[t]he job for the court is to even up the balance, not tip it in favour of the hurt party.”¹⁶²

¹⁵³ See *BCE*, *supra* note 124 at paras 93–94.

¹⁵⁴ See Khimji, *supra* note 129 at 232.

¹⁵⁵ See *Wilson v Cowichan Co-operative Services* (1986), 10 BCLR (2d) 135 (BCCA) at paras 10, 25–30, 1986 CarswellBC 1534 DLR (4th) 620 (BCCA).

¹⁵⁶ See *ibid.*

¹⁵⁷ See notes 130 and 131.

¹⁵⁸ Ben-Ishai & Puri, *supra* note 110 at 83.

¹⁵⁹ See e.g. *CBCA*, *supra* note 60, s 241(3).

¹⁶⁰ See e.g. *CCA*, *supra* note 66, s 340(3); *Cooperative Association Act*, *supra* note 32, s 156(3).

¹⁶¹ *Potter*, *supra* note 145 at para 81.

¹⁶² *820099 Ontario Inc v Harold E Ballard Ltd* (1991), 3 BLR (2d) 113 at 197, 1991 CarswellOnt 142 (Ont Ct J (Gen Div)), quoted with approval in *Nanef v Con-Crete Holdings Ltd* (1995), 23 OR (3d) 481 at para 33, 1995 CarswellOnt 1207 (Ont CA). See also Crête, *supra* note 149 at 535–38.

2. Access to Oppression Claims is Limited in Insolvency Proceedings

Academics and practitioners have debated whether the oppression remedy should be available against a debtor after it has commenced insolvency proceedings.¹⁶³ One concern is that a litigant raising an oppression claim against an insolvent party may create delays that derail the insolvency proceedings.¹⁶⁴ Another is that the litigant may use the threat of an oppression claim to exact unfair concessions from the debtor.¹⁶⁵ Scholars and practitioners argue that these risks justify limiting litigants from making oppression claims against insolvent debtors.

A further rationale for limiting oppression actions against an insolvent party is that the oppression standard is redundant: the CCAA requires courts to examine whether the parties have acted unfairly. In the CCAA proceedings of Canadian Airlines Corporation, the Alberta Court of Queen's Bench held that it could only approve a plan of arrangement if it was fair and oppression is the "antithesis" of fairness.¹⁶⁶ But absent unfairness, "the court retains the power to compromise or prejudice rights to effect a broader purpose, [such as] the restructuring of an insolvent company."¹⁶⁷ Similar logic should guide the court when it is asked to approve a pre-plan sale. Section 36 directs the court to consider whether the sale process is "reasonable."¹⁶⁸ The *Soundair* criteria directs the court to consider whether there was any "unfairness in the working out of the process."¹⁶⁹ Both of these standards require the court to consider whether the debtor or other relevant parties have acted unfairly.

Janis Sarra has offered a solution for how courts can reconcile the redundancy between the centrality of fairness to the oppression standard and the tests set out in the CCAA for sanctioning a plan or approving a

¹⁶³ Arguing that it should not, see e.g. Stephanie Ben-Ishai & Catherine Nowak, "The Threat of the Oppression Remedy to Reorganizing Insolvent Corporations" in Janis P Sarra, ed, *Annual Review of Insolvency Law, 2008* (Toronto: Thomson Carswell, 2009) 429 at 430; Natasha MacParland & Linda Chiasson, "Narrowing the Lens: Limiting the Use of Oppression in CCAA Proceedings" in Janis P Sarra, ed, *Annual Review of Insolvency Law, 2008* (Toronto: Thomson Carswell, 2009) 407 at 407. Arguing that it should, see e.g. Sarra, "Creating Appropriate Incentives", *supra* note 148 at 99.

¹⁶⁴ See Ben-Ishai & Nowak, "The Threat of the Oppression Remedy", *supra* note 163 at 440.

¹⁶⁵ See *ibid* at pp 449-450

¹⁶⁶ See *Re Canadian Airlines Corporation*, 2000 ABQB 442 at para 145 [*Canadian Airlines*]. See also Andrew JF Kent et al, "Canadian Business Restructuring Law: When Should a Court Say 'No'?" (2008) 24:1 BFLR 1 at 27.

¹⁶⁷ *Canadian Airlines*, *supra* note 166 at para 145.

¹⁶⁸ See CCAA, *supra* note 3, s 36(3)(a).

¹⁶⁹ *Soundair*, *supra* note 98 at 93.

sale. Sarra suggests that courts should make a “preliminary assessment” of an oppression claim and if the conduct complained of was “a function of the insolvency proceeding,” the court should consider the issues within “the context of the insolvency proceeding.”¹⁷⁰ In other words, a court would apply the relevant test under the *CCAA* and decline to sanction a plan or authorize the sale if there was evidence of unfairness.¹⁷¹ The court would not grant relief under the oppression provision of the applicable corporate or cooperative statute. At the same time, this author suggests that a court should not entirely disregard the jurisprudence surrounding the oppression remedy. The question of fairness remains central to the *CCAA* tests, and the principles articulated with respect to oppression actions provide a nuanced framework that can help inform the court’s assessment of whether unfairness has occurred.¹⁷²

3. The Oppression Claim Against MEC’s Directors

In the MEC *CCAA* proceedings, the dissenting members argued that the directors acted oppressively when they sold the cooperative’s assets without consulting the members. The court disagreed. It determined that it was unrealistic of the members to expect that they would be consulted “when the co-operative is insolvent and their memberships presently have no value.”¹⁷³ In other words, the dissenting members did not satisfy the first step of the two-part oppression test: i.e., showing that they had a reasonable expectation of being consulted prior to the sale of MEC’s assets.

The failure of the dissenting members’ oppression claim was not inevitable. The court emphasized the cooperative’s insolvency and the infeasibility of an alternative solution when it characterized the members’ consultation expectation as unrealistic. However, a court that paid close attention to the relevance of MEC’s cooperative form could have reached the opposite conclusion.

A business’ insolvency affects what expectations its stakeholders can reasonably hold: “[i]nsolvency proceedings may result in otherwise unusual conduct by the company, which will not necessarily be viewed as

¹⁷⁰ Sarra, “Creating Appropriate Incentives”, *supra* note 148 at 136.

¹⁷¹ See Kent et al, *supra* note 166 at 27.

¹⁷² See Jassmine Girgis, “An Oppression Remedy v Fraudulent Conveyance Legislation: Which Legislative Scheme Better Protects Creditors from Opportunistic Debtors?” in Jill Corraini & Hon D Blair Nixon, eds, *Annual Review of Insolvency Law 2019* (Toronto: Thomson Reuters, 2020) 415 at 419–20.

¹⁷³ *Mountain Equipment Co-Operative*, *supra* note 44 at para 136.

oppressive conduct.”¹⁷⁴ All stakeholders may be subject to unusual treatment during CCAA proceedings because the statute empowers businesses to take extraordinary measures to enable their survival—for instance, disclaiming contracts, compromising claims, and staying enforcement actions. Yet, extenuating circumstances notwithstanding, fairness still matters.

The MEC decision identifies the dissenting members’ “most significant complaint” as being that they “will ‘lose’ their substantial financial interest in MEC.”¹⁷⁵ But as discussed above, members have other interests in a cooperative that go beyond their residual claim on the association. These interests—financial and otherwise—warranted consideration.¹⁷⁶

Yet the members would only have a *reasonable* expectation of consultation if there was a feasible alternative to the Kingswood sale; it would not be reasonable for the members to expect the directors to pursue an infeasible course of action. The dissenting members argued that the directors could feasibly have resolved the cooperative’s financial difficulty through other means, including raising capital from the members. Even when the CCAA proceedings commenced, the members maintained that alternative solutions were possible. They wanted time to explore these alternatives. They argued that the possibility of funding from the members warranted member consultation in the first place and justified delaying the sale.

MEC took the position that there was no better alternative to the Kingswood sale and that member consultations would have only created unnecessary delays. The directors did not canvass the members for capital because they viewed that step as “impracticable to impossible.”¹⁷⁷ They suggested that a public plea for financing from their members would have created problems, potentially including landlords and suppliers becoming less lenient with credit terms and strengthening potential purchasers’ negotiating position once such parties became aware of MEC’s financial difficulties.

The court accepted that member financing was infeasible.¹⁷⁸ The court’s deference to the directors’ view is unsurprising, given the business

¹⁷⁴ Ben-Ishai & Nowak, “The Threat of the Oppression Remedy”, *supra* note 163 at 438.

¹⁷⁵ *Mountain Equipment Co-Operative*, *supra* note 44 at para 123.

¹⁷⁶ See Poonam Puri and Stephanie Ben-Ishai’s review of oppression cases in Canada indicates that non-financial interests can be important when carrying out an oppression analysis, see Ben-Ishai & Puri, *supra* note 110 at 82, 104.

¹⁷⁷ *Wallis Affidavit*, *supra* note 14 at para 20.

¹⁷⁸ See *Mountain Equipment Co-Operative*, *supra* note 44 at para 109.

judgment rule discussed above.¹⁷⁹ Moreover, in insolvency proceedings, when the directors' decisions are endorsed by the monitor as fair and reasonable, courts are unlikely to disagree, rendering it difficult for stakeholders to challenge the outcome.¹⁸⁰ Yet, again, the court's conclusion was not foregone.

Despite the tight timeline between the initiation of the CCAA proceedings and the section 36 approval hearing, the cooperative intervenors produced evidence to show that member financing was a feasible alternative. A "recognized international co-operative expert" submitted an affidavit detailing several substantial American transactions involving member financing of cooperatives.¹⁸¹ The expert opined that similar transactions would be allowed under British Columbia's security regulations. Furthermore, MEC had a track record of using member financing to avoid insolvency. In coverage of the MEC CCAA proceedings, a founding member described how board members and senior employees made loans to the cooperative during a liquidity crisis in 1977.¹⁸²

The dissenting members and intervenors could also have tendered evidence that a solution premised on member financing would have been more consistent with cooperative values than either the proposed sale or financing from a new lender. A cooperative that finances its enterprise with loans from a third-party creditor risks giving the creditor control over the cooperative.¹⁸³ Creditors in MEC's insolvency dramatically exercised such control, yet it may also be exercised in other ways, such as through covenants in a lending agreement.¹⁸⁴ The control cooperatives cede to their creditors when they take on debt can run contrary to the 4th ICA cooperative principle: that cooperatives should be autonomous.¹⁸⁵ The ICA recommends that cooperatives first look to their own members for capital, followed by other cooperatives or cooperative institutes, then so-

¹⁷⁹ See *BCE*, *supra* note 124 at para 40; *Pente Investment Management*, *supra* note 130 at para 34; Puri, *supra* note 131 at 430; *Mountain Equipment Co-Operative*, *supra* note 44 at para 117.

¹⁸⁰ See Kent et al, *supra* note 166 at 16.

¹⁸¹ See *Re Mountain Equipment Co-Operative*, 2020 BCSC 1586 (Affidavit, William Oemichen's sworn statement dated 25 September 2020 at para 18).

¹⁸² See Rob Brussee, "MEC Members Bypassed in Sale of Assets to U.S. Firm" (22 September 2020) at 00h:09m:05s, online (podcast): *Each for All: The Co-operative Connection*, online: <eachforall.coop> [perma.cc/P7JY-62PH].

¹⁸³ See International Co-operative Alliance, "Guidance Notes", *supra* note 11 at 34, 52.

¹⁸⁴ See *ibid.*

¹⁸⁵ See *ibid* at 52.

cial bonds and investors, and finally commercial lenders as the last resort.¹⁸⁶

The criteria used by courts in oppression proceedings to assess the reasonableness of an expectation lends weight to the dissenting members' position. The criteria include "the structure of the corporation" and "representations and agreements."¹⁸⁷ In other oppression actions involving cooperatives, courts have attached significance to the internal documents of the cooperative, including its mission statement, values, and rules.¹⁸⁸ The dissenting members noted that provincial legislation and MEC's internal rules enshrined their expectation of consultation. The court attached little weight to these considerations, but it could have placed more emphasis on them.

Oppression decisions are nuanced and context specific. The dissenting members' claim of having been treated oppressively does not shade into a credible argument until the differences between corporations and cooperatives are fleshed out. A court could have found that the members had a reasonable expectation that they would be consulted given that:

- the members had an interest in the cooperative as consumers;
- democratic member control is a guiding value in the cooperative sector;
- member financing is the recommended method for cooperatives to raise capital;
- member financing has been used successfully by other cooperatives and previously by MEC, and;
- consultation was a requirement in both the internal rules of the cooperative and the applicable provincial legislation.

As such, the court could have found that the directors acted unfairly towards the members' interests when they sold the cooperative's assets without consulting its members. The sought-after remedy—a two week delay in the sale process—would have partly rectified the oppressive conduct by giving the members an opportunity to provide meaningful input into decisions about the future of their shared enterprise. The dissenting members simply wanted more time. The Court would have been justified in granting this remedy.

¹⁸⁶ See *ibid* at 40.

¹⁸⁷ *BCE*, *supra* note 124 at paras 74, 79–80.

¹⁸⁸ See *Potter*, *supra* note 145 at paras 213–14; *Scipio v False Creek Housing Co-operative Housing Association*, 2012 BCSC 1339 at para 31.

Granting the requested remedy could also have carried precedential value. If the court delayed the MEC sale, participants in future insolvencies would be encouraged to take a different approach to cooperative members to avoid having a court challenge derail the proceeding. Janis Sarra identified four ways that stakeholders with non-capital economic interests can be given a bigger role in insolvency proceedings: by providing them with advance notice of steps in the proceedings, by disclosing relevant information, by enhancing their participation rights (e.g., including them on a creditors committee or granting them representative counsel), and by enhancing their decision-making rights (e.g., giving them the ability to vote non-capital claims).¹⁸⁹ Though Sarra's writing pertained to stakeholders like employees and local First Nations communities, her insights could apply to cooperative members as well. In a pre-pack sale like MEC's, a cooperative's directors can take steps to ensure the members are represented in the pre-insolvency negotiation process. For example, the MEC directors could have appointed a member representative to the special committee that oversaw the search for refinancing and eventual sale. Alternatively, they could have built more time into the transaction so that members would have had a meaningful opportunity to digest information and participate once the insolvency proceedings began.

It is worth noting that the need MEC filled for its members—access to reliable, affordable outdoor gear—is less fundamental than the needs filled by other cooperatives who may operate housing, employ their members, or provide a key service, such as operating the only grocery store in a remote community. Giving cooperative members an enhanced role in insolvency proceedings will be even more important when the cooperative fills a fundamental need for its members.

IV. This is a Corporation's World (But it Ain't Nothing without A Cooperative)¹⁹⁰

MEC has completed the sale of its assets. Remutualization of the business back into a cooperative remains a possibility, at least in theory, but for the time being, MEC's most important contribution may be the lessons that can be drawn from its insolvency proceedings.¹⁹¹ Insolvency practi-

¹⁸⁹ See Janis Sarra, *Creditors Rights and the Public Interest: Restructuring Insolvent Corporations* (Toronto: University of Toronto Press, 2003) at 281–83.

¹⁹⁰ With apologies to James Brown and Betty Jean Newsome.

¹⁹¹ See generally Robert Briscoe, Olive McCarthy & Michael Ward, "From Co-operatives to Conventional Businesses and Back Again: The Irish Co-operative Experience" in Jorge Sousa & Roger Herman, eds, *A Co-operative Dilemma: Converting Organizational Form* (Saskatoon: Centre for the Study of Co-operatives, 2012) 237 at 258–67.

tioners and judges, cooperatives, educators, legislators, and lobbyists can all learn from what happened to MEC.

Some of the lessons for insolvency practitioners and judges are not new, but rather a reiteration of important issues in commercial insolvency law. Pre-pack sales create a risk of unfairness by allowing corporate insiders to complete transactions without input from or oversight by affected stakeholders. Directors must act in the best interest of the enterprise having regard for the range of stakeholders impacted by insolvency proceedings. The oppression remedy becomes partly redundant once a court is required to apply the statutory tests of the *CCAA*.

MEC's proceedings also illustrate how the legal form of a debtor demands new approaches to old ideas. The practices and principles developed to deal with insolvent corporations may not apply to entities with alternative legal forms, such as cooperatives. Alan Robb, James Smith and J Tom Webb make this point poetically:

Co-operative businesses are islands in a sea of investor-owned firms. As islands they take on the language and concepts of the world around them even when they know they are not true for them and do not fit.¹⁹²

In MEC's proceedings, the multiplicity of the members' interests and the importance of democratic control were relevant to a court's application of section 36 of the *CCAA*, the director's fiduciary duty, and questions of fairness under both the oppression standard and the *CCAA*'s statutory tests. Insolvency practitioners and judges risk creating unfair results when they treat cooperatives or other non-standard entities like corporations.

This issue of legal form is significant to insolvency practice because a growing range of entities have used the *CCAA* to address their financial difficulties. Over the past forty years, courts have shown flexibility in how they interpret the eligibility provisions in the *CCAA*, expanding what types of entities can use the statute.¹⁹³ More recently, Canadian jurisdictions have experimented with hybrid legal forms, such as community contribution companies, community service cooperatives, and benefit corpo-

¹⁹² Alan J Robb, James H Smith & J Tom Webb, "Cooperative Capital: What It is and Why Our World Needs It" (Paper delivered at the conference on Financial Co-operative Approaches to Local Development Through Sustainable Innovation, Trento, Italy, 10-11 June 2010), (28 March 2010) at 2, online (pdf): *Community-Wealth.Org* <staging.community-wealth.org> [perma.cc/JRZ6-KM4V].

¹⁹³ See Virginia Torrie, *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act* (Toronto: University of Toronto Press, 2020) at 136.

rations.¹⁹⁴ These two trends—the expanding scope of the CCAA and the growing number of available legal forms—means that more insolvency proceedings may involve non-standard entities.

The cooperative legal form includes mechanisms that should safeguard cooperative enterprises from involuntary demutualization, but only if a cooperative's leaders and members pay attention to issues of governance as well as membership engagement and education.¹⁹⁵ During MEC's CCAA proceedings, the members criticized the directors for failing to consult prior to the sale of the assets. Yet they should have consulted members even earlier—when they took on a substantial amount of new debt. Because debt threatens the independence of a co-operative, the ICA recommends that the directors seek approval from members when significant financial agreements are contemplated.¹⁹⁶ Brett Fairbairn notes that when cooperatives consult with members they may avoid taking on debt because members may help managers see that a proposed expansion is “misdirected or excessively ambitious.”¹⁹⁷

Members have statutory tools to control directors, including voting to replace them. However, in the years leading up to its insolvency, the bulk of MEC's members were not engaged in governing the cooperative. One measure of engagement is the percentage of members participating in director elections.¹⁹⁸ Between 2016 and 2018, approximately one percent of MEC members voted in board elections.¹⁹⁹ This low level of participation may be partly attributable to MEC's directors adopting “qualifications and rules for elections” which prevented interested members from being

¹⁹⁴ See *Business Corporations Act*, *supra* note 150 at Parts 2.2, 2.3; *Cooperative Association Act*, *supra* note 32 at s 178.1. See also Liao, “The Next Stage”, *supra* note 114 at 79–80; Liao, “A Critical Canadian Perspective”, *supra* note 125 at 684–85; Gail E Henderson, “Could Community Contribution Companies Improve Access to Justice?” (2016) 94:2 Can Bar Rev 209 at 217–19; Vanisha H Sukdeo, “What is the Benefit of a ‘Benefit Corporation’? Examining the Advantages and Detriment” (2015) 31:1 BFLR 89 at 109; Roger Spear, “Co-operative Hybrids” (Presentation at “Co-operatives’ Contributions to a Plural Economy”, Conference of Research Committee of the International Co-operative Alliance with the CRESS Rhone-Alpes and the University Lyon 2, 2-4 September 2010) at 2, online: *Academia* <www.academia.edu> [perma.cc/8WTE-XAAH].

¹⁹⁵ See Max Fawcett, “What Can We Learn from the Fall of MEC”, *The Walrus* (20 January 2021), online: <thewalrus.ca> [perma.cc/QR6L-UZ3K]. See also Marc-Andre Pigeon & Anthony Piscitelli, “The MEC Debacle Is a Predictable and Avoidable Governance Failure”, *The Conversation* (29 September 2020), online: <theconversation.com> [perma.cc/6QBU-AXGU]; Yu, *supra* note 51 at 4.

¹⁹⁶ See International Co-operative Alliance, “Guidance Notes”, *supra* note 11 at 52.

¹⁹⁷ Fairbairn, *supra* note 77 at 27.

¹⁹⁸ See Gertler, *supra* note 115 at 5.

¹⁹⁹ The voting turnout was 0.9% in 2018, 1.2% in 2017; 1.2% in 2016, calculations on file with author.

elected to the Board.²⁰⁰ One might also attribute the low levels of member engagement to MEC's (old) age and (big) size. As cooperatives get bigger and older, members can become disengaged: "member relations to their cooperative tend to turn into ordinary customer relations and the solidarity among members is usually weakened."²⁰¹ A negative feedback loop may arise where directors perceive low levels of participation as evidence that members are "too disinterested or too busy to take part in co-operative governance."²⁰² Subsequently, directors may do less to engage members.

The degeneration of member engagement is neither inevitable nor irreversible; cooperatives can also regenerate.²⁰³ One tool to spur regeneration is to educate members.²⁰⁴ Philosophically, this education should aim to foster a culture of engagement by "develop[ing] a shared meaning and commitment to the cooperative's aims and practices."²⁰⁵ Practically, the education should enable members to exercise democratic control over the managers of their cooperative.²⁰⁶ Member education can also help a cooperative's bottom line; a cooperative that educates its members about the benefits it provides to them may foster loyalty and trust with its members and thus do more business with them.²⁰⁷

Cooperative members are not the only players who would benefit from education. MEC's sale suggests that lawyers, judges, lenders, and business people do not have a deep appreciation for how cooperatives differ

²⁰⁰ See International Co-operative Alliance, "Guidance Notes", *supra* note 11 at 17. See Mountain Equipment Co-operative, "Minutes of the 46th Annual General Meeting" (held on 22 June 2017) at 5; Mountain Equipment Co-operative, "Minutes of the 45th Annual General Meeting" (held on 14 April 2016) at 5; Mountain Equipment Co-operative, "Minutes of the 44th Annual General Meeting" (held on 23 April 2015) at 4; Mountain Equipment Co-operative, "Minutes of the 43rd Annual General Meeting" (held on 24 April 2014) at 2–5.

²⁰¹ Münkner, *supra* note 54 at 33.

²⁰² Gertler, *supra* note 115 at 9.

²⁰³ See Spear, "Governance", *supra* note 135 at 41–42; Cornforth, *supra* note 11 at 514.

²⁰⁴ See Cornforth, *supra* note 11 at 515–16. On the centrality of education to the early Canadian cooperative movement, see Ian MacPherson, "The Origins of the Canadian Co-operative Movement, 1900-1914" in Ian MacPherson, ed, *One Path to Co-operative Studies: A Selection of Papers and Presentations* (Victoria, BC: British Columbia Institute for Co-operative Studies & New Rochdale Press, 2007) 7 at 20.

²⁰⁵ Cornforth, *supra* note 11 at 516.

²⁰⁶ See Münkner, *supra* note 54 at 113–14.

²⁰⁷ See Fairbairn, *supra* note 77 at 13; Daniel Côté, "Loyauté et identité coopérative: l'implantation d'un nouveau paradigme coopératif" (2005) 295 R Intl Économie Soc 50 at 55–56; Roger Spear, "The Co-operative Advantage" (2000) 71:4 Annals Public & Cooperative Economics 507 at 521–22.

from corporations. Those of us teaching in relevant areas of post-secondary institutions have work to do. One aim of this article has been to provide a resource for teaching about cooperatives.

It has become more difficult to educate parties about cooperative difference because legislators and lobbyists have eroded that difference by harmonizing cooperative and corporate statutes.²⁰⁸ The flexibility built into the legislation may provide those setting up a cooperative with useful options, but it also threatens to foment confusion about who qualifies as a cooperative and how they operate.²⁰⁹ Legislators and lobbyists may wish to reflect on whether harmonization has served the cooperative sector well.

Cooperatives play an important role in the Canadian economy and they provide members with a different model for organizing their economic lives. If actors apply laws—insolvency and otherwise—to cooperatives without careful attention to cooperative difference, they risk undermining the cooperative model and the choices of the members who have opted to do business in a cooperative manner.

²⁰⁸ See Münkner, *supra* note 54.

²⁰⁹ See International Co-operative Alliance, “Guidance Notes”, *supra* note 11 at 63.