Potter v. Vancouver East Cooperative Housing Assn., [2019] B.C.J. No. 993

British Columbia and Yukon Judgments

British Columbia Supreme Court

Vancouver, British Columbia

F.V. Marzari J.

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Judgment: June 3, 2019.

Docket: S1711841

Registry: Vancouver

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Between Anna Potter and Paul Buckley, Petitioners, and Vancouver East Cooperative Housing Association, Respondent

(226 paras.)

Counsel

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Restriction on Publication: A publication ban has been imposed by an order of this Court dated May 16, 2018 restricting the publication, broadcasting or transmission in any way of evidence that could identify the petitioners' minor children, referred to in this judgment as "the children". This publication ban applies indefinitely unless otherwise ordered.

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F.V. MARZARI J.

INTRODUCTION

1 The petitioners seek relief against the respondent, Vancouver East Cooperative Housing

Association (the "Co-op"), pursuant to s. 156 of the *Cooperative Association Act*, *S.B.C. 1999, c. 28* [*Act*]. Specifically, they challenge a series of policies and practices that they say are oppressive to them and other members of the Co-op insofar that they unfairly prioritize the maintenance of housing of members with extra bedrooms (over-housed members) over the provision of housing to those members that do not have sufficient bedrooms to meet their housing needs (under-housed members).

2 The petitioners seek orders that would require the Co-op to prioritize the allocation of the cooperatively owned units on the basis of housing need, including changes to the Co-op's policies, the striking down of recent policy amendments, and orders in relation to the implementation of these policies.

FACTUAL CONTEXT

The Parties

3 The respondent, Vancouver East Cooperative Housing Association, is a housing cooperative association operating under the *Act*. It is located near the Commercial Drive area of Vancouver in British Columbia.

4 The Co-op is governed by the *Act*. Under the *Act*, occupancy of a residential unit by a member is contingent upon membership in the cooperative, and occupancy rights are terminated with the termination or other end of membership: s. 171 of the *Act*. This is also a fundamental principle of the Co-op's Rules and Operating Agreement.

5 The Co-op has existed since 1979. Members of the Co-op own shares of the association; the association, in turn, owns the housing units occupied by its members. The members collectively own and support the Co-op and its housing units, and the allocation and occupation of the various units is determined through application of the Co-op's rules and policies. The rules and policies are in turn administered by the Co-op Board and its members.

6 As the Co-op owns the residential units, and those units are occupied by its members, there are no "tenancies" and the *Residential Tenancy Act*, *S.B.C. 2002, c. 78* [*RTA*] has no application. The *RTA* specifically excludes protection for members of housing cooperatives: s. 4(a) of the *RTA*.

7 The Co-op is a "scattered" housing cooperative spread across 13 buildings at six locations, and consists of 39 units in total, as follows:

1) 2 four-bedroom units;
2) 9 three-bedroom units;
3) 14 two-bedroom units;
4) 8 one-bedroom units; and

5) 6 "bachelor" or studio units, one of which is not for residency but contains facilities common to the Co-op.

8 The buildings owned by the Co-op range from heritage homes to rancher style houses and townhouses. The difference between the units can be marked, not just in their size, but also in their location, attractiveness, construction and overall desirability. This feature of the Co-op may have the effect of exacerbating the tensions between members when it comes to a fair and equitable unit allocation among them.

9 The petitioners are members and residents of the Co-op. They are married and have two children ("the children"). The older child was approximately 12 at the time of the hearing of this matter and the younger child was approximately eight. The petitioners live in a two bedroom basement suite of a rancher style house built in the 1940's. Another member of the Co-op lives in the upstairs unit.

10 For seven years, the petitioners were on an external waitlist to become members of the Co-op before being offered membership. The petitioners were ultimately offered their two-bedroom unit in 2013. At that time their eldest child was six and the youngest was two.

11 With only two bedrooms for four people, the petitioners were and are considered to be "under-housed" members of the Co-op. They have been on the internal waitlist for a larger unit since November 2013.

12 Based on the evidence filed, including the medical evidence, I find that the petitioners' elder son, the 12-year old, has a disability. The parents wish for their children's identities and the details of the 12-year old's condition to remain confidential. A sealing order exists over their affidavits and there is a publication ban over the children's names for this reason.

13 The 12-year old's disability is sufficiently serious that he requires his own bedroom. Currently, the family provides the 12-year old with the second bedroom, which means that the eight year old sleeps with his parents in the only other available bedroom.

14 The evidence also establishes that the eight year old is negatively impacted by this situation. Furthermore, according to the petitioners, the 12-year old's condition is worsening.

15 On any measure, including the Co-op's policies, the petitioners have been and are inadequately housed. The Co-op does not dispute this.

16 In these proceedings, the petitioners challenge a series of policies, conduct and practices of the Co-op that they say unfairly provide housing units with more bedrooms than required to some members, while other members, including themselves, remain under-housed.

Governance of the Co-op

17 The Co-op is a non-profit housing cooperative association operating under the *Act* and has

been in existence some 40 years. The Co-op's stated mandate is "to provide affordable and sustainable housing that nurtures a diverse community."

18 The corporate procedures of cooperative associations incorporated or continued under the *Act* are analogous to those carried out by corporations and companies. The association must file constituting documents with the registrar, including its memorandum and rules: s. 11 of the *Act*. The Co-op has adopted rules, which are analogous in function to the articles of a BC company (the "Rules").

19 Members of a housing cooperative association are subscribers of shares. Membership in the Co-op grants the right to occupancy of a Co-op unit, provided that the member also enters into a standard occupancy agreement that is a schedule to and forms part of the Rules (the "Occupancy Agreement").

20 The Co-op also has membership policies (the "policies"). The Rules of the Co-op enable the Board of Directors, who exercise the powers of the association, to propose policies. According to Rule 17.3, the policies do not take effect, and are therefore not enforceable, until approved by ordinary resolution (defined as simple majority) at a general meeting of the membership.

21 Members are expected to abide by the Rules, the Occupancy Agreement, and any applicable policies. Termination of a member's membership and occupancy rights and the procedural requirements to be followed in such an event are governed by ss. 35-39 of the *Act*.

22 The Co-op is governed by nine volunteer directors elected from its membership during annual general meetings ("AGMs") of the members. The Co-op's directors make up the Co-op's Board of Directors (the "Board").

23 Directors of the Board have duties under the *Act*, including to act honestly and in good faith with a view to the best interests of the association; to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances; to act in accordance with the *Act* and regulations; and to act in accordance with the association's memorandum and rules: see s. 84 of the *Act*. They also have duties under the Rules of the Co-op.

24 The Board may delegate its powers to committees consisting of members. Committees of the Co-op include maintenance, membership, finance, policy, landscaping and education.

25 There are many conditions of membership, mandated by the policies and the Occupancy Agreement, including living at the Co-op as a principal residence, working for the Co-op (for example, by joining a committee) a minimum of five hours per month, attending meetings, and participating at least one out of three times when asked to be on a work party, attend a house meeting, or do extraneous committee work.

26 As a housing cooperative, the members collectively own all the units through ownership of shares, and pay a "rent" or "housing charge" that goes toward the Co-op's expenses.

27 Rent paid by members of the Co-op does not necessarily vary between units based on

attractiveness or size. Rather, members pay "rent geared to income", which is approximately 31% of the member or household's gross income. If that figure is higher than market rent for the unit, then "market rent" is payable. Such "market rents" are determined by the members at budget meetings every year.

28 The Co-op was initially financed by Canada Mortgage and Housing Corporation (CMHC), although it appears to have paid off its mortgage and is no longer governed by an operating agreement with CMHC. There was some evidence that the Co-op has entered into an interim subsidy agreement with another public funding source. However, the petitioners are not seeking a remedy on the basis of breach of agreements between the Co-op and any funding agents with respect to over-housed members. I therefore have not considered and am not relying upon the requirements of any such agreements, their terms, or any potential breaches of the past or current agreements between the Co-op and its funding agents.

29 In summary, the members own all of the housing units at the Co-op collectively through subscribing to shares in the Co-op, and collectively contribute to the cost of ownership and maintenance of all the units in the Co-op. The amount they each contribute is based primarily on income rather than the value or attractiveness of the unit, unless the member is paying an agreed upon market rent that is less than 31% of the household income of the member.

30 Unit allocation is determined by Co-op policies and administered by the Board, and is based primarily on housing need and to a lesser extent on seniority of membership, and not on ability to pay. Because of the great variability of the housing units owned collectively by the Co-op, and the great need for adequate housing in Vancouver, the nature and enforcement of the Co-op's housing allocation policies have very significant effects on members' housing security. It is those policies and their administration that is the basis of the conflict at the heart of these proceedings.

Co-op Rules and Policies Regarding Allocation of Housing Units

31 The key issue in this case is how the Co-op allocates its housing units among its members. Members own the same number of shares, and their investment is means based, so neither share ownership nor financial investment are factors in the allocation of a larger versus a smaller unit. Rather, it is apparent from a contextual and comprehensive reading of the Co-op's original documents and policies that the foundational principle for the allocation of units in the Co-op is housing need, based on the number of persons in a member's household. From the outset, housing allocation at the Co-op was based on the presumption that each person in a member's household requires one bedroom.

32 Of course, household sizes grow and shrink. This gives rise to an inherent tension between growing families that need more bedrooms over time, and shrinking households and families that may not require the same number of bedrooms for persons resident in the unit, but have invested love, care and attention into their cooperatively owned housing unit.

33 To address this tension in the context of this Co-op where housing need is the organizational principle for unit allocation, the Co-op has developed policies addressing "over-housing" and "under-housing" and the transitions between them.

34 In order to evaluate the petitioners' claims regarding their reasonable expectations with respect to unit allocation at the Co-op, it is therefore necessary to review the policies that applied to unit allocation, and specifically to unit allocation as household size and needs change.

Up to May 2018

35 In evidence before me were copies of the various policies of the Co-op in place dated 1984 (the "Black Book"), 1993 (the "Pink Book"), and updated policies adopted November 2012 (the "White Book"). Although some global changes are evident in the policies throughout this time, there had been little or no substantive change to the policies addressing over and under-housing until after this petition was filed and initially heard in 2018. Indeed, it appears that this was one area where the membership of the Co-op was unable to come to an agreement about how to update the policy in 2012, and the policy remained virtually unchanged from at least 1993-2018.

36 Therefore, at the time the petitioners became members in 2013, the same policies relating to unit allocation on the basis of housing need had been in place for well over a decade. In these policies, the Co-op defined "over-housed" to mean any member living in a unit where there are more bedrooms than people. Pursuant to the Co-op's policies, two people residing in a two-bedroom unit would be considered appropriately housed; as would three people residing in a three-bedroom, and so forth. Where there are fewer bedrooms than there are residents, the member is "under-housed."

37 The specific wording of the over and under-housing policy in this period was as follows:

> **VI. Under/Overhousing**
>
> Members are required to keep the Membership Committee informed about any changes in the number of people living in their units. As a general rule, a child is considered a resident of the co-op if s/he lives at the unit in question for 3 out of 7 days per week, or at least 22 weeks out of every year.
>
> **Overhousing**
>
> 1. Any co-op member, living in a unit where there are more bedrooms then people in the residence, is overhoused.
> 2. Should a co-op member find her/himself overhoused due to a change in the number of people living in her or his unit, s/he will have one year to remain in her/his unit and make alternative housing arrangements within the co-op. After one year, the member will be required to move into the first available unit of appropriate size (as determined by the Membership Committee). However, any member who has lived in a unit for more than 20 years will have 2 years to make alternate housing arrangements within the coop. Any member who has lived in a suite for more than 30 years will have 3 years to make alternate housing arrangements within the co-op. Any member who has lived in a suite for more than 40 years will have 4 years to make alternate housing arrangements within the co-op.

3. Members who are overhoused will be eligible to apply for subsidy during the time allotted to make alternate housing arrangements. Following that period, the member will be eligible to apply for a unit of appropriate size, as determined by the Membership Committee, is available.

4. A co-op member who finds her/himself overhoused also has the option of finding an appropriate number of new housemates. The person has one year to do this. All new adult housemates must become associate members of the co-op after living in the suite for 3 months.

Underhousing

1. Any member living in a unit, which has more than one person per bedroom, will be entitled to apply for a larger unit in the co-op. Any member living in a bachelor unit is considered to be underhoused.
2. In cases where a member prefers not to apply for a larger unit, no more than 2 people per bedroom will be acceptable.

[Emphasis added.]

38 As of November 2012, the Unit Allocation policy, which is also relevant to over and under-housing, provided as follows:

UNIT ALLOCATION

PURPOSE OF THE POLICY

To establish an equitable and consistent system for allocating units to internal and external members and/or applicants

...

POLICY

Unit Allocation

1) Available units will be offered first to members on the Internal Wait Lists before being offered to external applicants. Internal Wait Lists include:

i. Members who are over-housed;

ii. Members who are under-housed;

iii. Members who have lived in the co-op for at least one year who wish to move to another suite of a size consistent with the under/over-housing policy;

iv. Members who have lived in the co-op for at least one year and who wish to move to a larger unit with a named external applicant(s) who is a partner and/or family member(s) of the member and for whom the member has had a request on file for at least three months.

2) For external applicants, units will be allocated as they come available, in accordance with the member selection policy.

3) External applicants with disabilities may receive priorities for units that are accessible.

Internal Moves

4) Members who wish to move to another unit in the co-op must indicate this on the Request to Transfer portion of the Annual Member Survey and file it with the co-op's management company. Members may also submit this form to the management company at any time during the year.

5) The management company will maintain Internal Wait Lists from these requests and forward a copy of the list and copies of each Request to Transfer portion of the Annual Member Survey form to the co-op as requests are received. Members will retain one copy of the form for their records.

6) Internal moves will be offered to members in the following manner:

   i. By date of receipt of the Request to Transfer Form

And in the following order:

   ii. Over-housed and under-housed members;

   iii. Members of at least one year's residency that are interested in a lateral move to an unit with the same number of bedrooms;

   iv. Members of at least one year residency who wish to move to a larger unit with a named external applicant(s) who is a partner and/or family member(s) of the current member(s) and has had a request on file for at least 3 months.

7) Member households' that include people with disabilities may receive priority for Internal moves to more accessible units.

[Emphasis added.]

39 During the period from 2012 to 2017, the Co-op's over and under-housing policies were as above, which I will refer to collectively as the "Policy" or the "over and under-housing Policy". The evidence suggests that the Co-op had the same definition of over-housing since the 1980's.

40 The Policy allowed members to remain over-housed for a minimum of one year as of right while they arranged for appropriately sized housing in the Co-op. During this time, rent subsidies would remain in place. The Policy was more favourable to longstanding members of the Co-op, who could remain over-housed an extra year for each decade they had lived in the Co-op.

41 On its face, it is possible to interpret the Policy to require any member that became over-housed as a result of a change in their household size to immediately begin making arrangements to identify and move into an appropriately sized unit, and to actually move at the expiry of their one to four year grace period, during which the member's housing subsidy may continue. However, the Policy also contains language suggesting that the move need only be made when "the first available unit of appropriate size" becomes available after the expiry of the

grace period, and is somewhat ambiguous about the availability of housing subsidies in the interim period.

42 It is on this latter basis that the Policy appears to have been implemented, such that an over-housed member would both have to be outside their grace period and an appropriately sized smaller unit would have to come available, before the over-housed member was required to move.

43 In addition, clause 4 of the Policy allowed members to take in "housemates" as co-residents to use up extra bedrooms on the condition that, after three months, those residents would become associate members. A member wishing to avoid being deemed over-housed would have the one year grace period to make this arrangement.

44 The "Guest/Associate Member Status" Policy sets out the requirement and mechanism for any adult living with a member to apply for associate membership. All such persons are required to purchase a share of the Co-op after living with a member for a period of three months or more, and to fully participate in the Co-op as a member with respect to volunteer hours and contributions to calculations of household income. The Guest/Associate Member Status Policy provides:

> **VIII. Guest/Associate Member Status**
>
> Any adult living with a member for a period of 3 months or more must purchase one share ($10) in the co-op and become [an] associate member. The original occupant remains the full member and retains control of the unit. Participation requirements for the associate members are the same as those for full members.
>
> [Emphasis added.]

45 Members were responsible for self-reporting their over-housing situation to the Board.

46 The above policy is consistent with the Occupancy Agreement, which deems any adult living in a unit with a member to be a "visitor" and imposes certain obligations on any such visitor who stayed in the unit for more than 90 days in aggregate in a calendar year, including provision of their income statement for the purpose of calculating the availability of rent subsidies to the member.

47 The relevant provisions of the Occupancy Agreement have remained unchanged for many years, and are more difficult to change as the Agreement is a foundational document of the Co-op. Clause 24, relating to visitors, their status and their obligations, is also identified in the Occupancy Agreement as a "material provision." The relevant provisions of the Occupancy Agreement are as follows:

> **7 Rules and Policies**
>
> 7.02 Rules and Occupancy Agreement govern

If there is a conflict or inconsistency between the Rules, the Occupancy Agreement and the policies, the Rules and Occupancy Agreement govern.

...

24 Visitors

24.01 Obligations for visitors

The member understands and agrees that:

(a) any adult person residing in the Member's Unit who is not accepted as a member of the Co-op shall have visitor status;

(b) the Member shall submit promptly to the Directors the name of any adult person with visitor status and planning to visit the Member for more than 90 days, in aggregate, during a fiscal year of the Co-op;

(c) the Member shall submit on behalf of any adult person with visitor status and visiting with the Member for more than 90 days, in aggregate, during the fiscal year of the Co-op an income statement for that person as required by the Directors to the Co-op signed by that person, if the Member with whom the person is visiting is receiving rent supplement, assistance or other housing subsidy;

(d) persons with visitor status and residing with the Member for more than 90 days, in aggregate, during the fiscal year of the Co-op may make application to the Co-op for membership;

48 Read as a whole, the Rules, Occupancy Agreement, and longstanding policies of the Co-op up until 2018 provide that membership is inextricably tied to occupancy of a unit. Anyone who occupies or resides in a Co-op unit that is not a member has "visitor status", must be registered with the Board, and, if they stay longer than 3 months, must purchase a share and fully participate in the Co-op financially and in all other respects as an associate member. Subletting to non-members is strictly limited in time and requires permission of the membership.

49 I find that when read in its full context, together with the purposes of the Co-op, the Occupancy Agreement does not provide resident status to visitors, and such persons may not count toward household size or need unless or until they became associate members and sign the Occupancy Agreement. Non-members occupying Co-op units are subject to time limits and case-by-case permissions by the Board. Adults residing in member units are required to be principal or associate members and to have entered into the Occupancy Agreement.

Lead-up to a New Policy

50 The petitioners have been seeking to address the implementation and of the over and under-housing since 2014, including through membership on the Board and the Membership Committee at various times. In the year of 2015-2016, one of the petitioners joined the Board and the other joined the Policy Committee. During that time period, the petitioners were aware that three out of the six members of the Board were over-housed members.

51 In early 2016, an independent committee was tasked with considering changes to the over and under-housing policies. By April of 2016, the Policy Committee made a report of observations and research regarding alternatives to the over and under- housing policies to the Board. The Committee noted "the absence of clear procedures in the current policy, for instance, a requirement for members to report new over-housing conditions in their unit." It noted that other cooperatives in the city have adopted policies to address this issue, such as offering financial incentives for over-housed members to move or mandating that they report a change of status within 30 days. Ultimately, the Policy Committee was unable to agree on a recommendation to the Board regarding the over and under-housing Policy.

52 In minutes of a meeting of the Board in May 2016, it was reported that the Policy Committee representative of the Board expressed that:

> ...the review of the Over-Under-Housing Policy has been very slow going and expressed frustration with the very vested interests of the Committee members, including her own, in the process and outcome of the recommendations to the Board and general membership, and suggested that perhaps 'simply' adopting the CHFBC prototype policy might be an option to consider and put all Van East input aside in attempt to create a more objective policy.

53 This recommendation also apparently did not find favour, and eventually, in September 2016, a facilitator was engaged to work on the issue with the Policy Committee. According to the Board's records, efforts of the Policy Committee to work with the facilitator were not productive. One of the Policy Committee members was delegated the task of working with the facilitator by herself. In April 2017, at a general meeting of the membership, a motion was passed to continue with the review of the over and under-housing Policy including consultation with the general membership.

54 The petitioners originally brought this petition in late 2017 seeking to have this Court rule that the Policy was oppressive or unfairly prejudicial to their interests, and those of other under-housed members, and seeking changes to the Policy as it existed. In particular, they challenged the Policy that allows non-member adults or housemates to move in with over-housed members, thereby skipping the queue for external applicants and avoiding the requirement that over-housed members might have to move.

55 Ultimately, the Board called a meeting of members in May 2018 and put forward a new recommended over and under-housing policy to replace the existing Policy. The new policy put forward by the Board not only confirmed that non-members adults could move in to over-housed units and count towards a member's housing needs, but also removed the requirement that they become associate members. It also substantially increased the Co-op's tolerance of over-housing, essentially removing the problem of over-housing by nearly defining it out of existence (the "New Policy").

56 This petition was first heard on May 16, 2018, shortly before the membership voted in the New Policy on May 23, 2018. At that time, Mr. Justice Abrioux heard the matter and determined

that the petitioners should be given an opportunity to propose an alternative policy at the May 23, 2018 general meeting that would address their concerns. He also ordered the Co-op to disclose the under-housed waitlist, and the list of over-housed and under-housed members. The petition was adjourned generally until after the May 23, 2018 general meeting.

57 The petitioners' proposed a policy modelled closely from the Co-operative Housing Federation of BC (CHFBC) model over and under-housing policy (the "Proposed Policy"). I note that while the Co-op is a member of the CHFBC, there is no rule that they must adopt the model policy.

58 The petitioners' Proposed Policy was put to the membership first. It was rejected. The New Policy, proposed by the Board, was adopted by the membership with a 2/3 majority. A quarter of the membership attending at the meeting voted against the New Policy. There were no abstentions.

59 The evidence suggests that the petitioners' efforts have garnered them negative and increasingly hostile attention from the Board and other members of the Co-op, particularly as a result of this litigation.

The New Policy after May 2018

60 The New Policy changes the definition of "over-housed" in a number of significant respects that are challenged by the petitioners.

61 First, it provides that any existing members currently living in a unit with one extra bedroom where the over-housing resulted from a shrinkage of household size will no longer be considered over-housed. That is, the New Policy grandfathers in any members currently over-housed by no more than one bedroom, and also prevents any current or future members from being considered over-housed, if they are over-housed as a result of a reduction in household size in the future. I will refer to this change as the "Extra Bedroom Allowance".

62 Second, the New Policy includes in the "household size" count a list of persons that were previously excluded, including children living in the home only 60 days per year (reduced from 22 weeks per year) and adult children living away from home while attending post-secondary educational/training institutions. Youth who do not live with a member are also counted toward household size until age 18. Adult children may also count toward a member's household needs, even if they do not reside in the unit at all, until they have completed all post-secondary studies they may attend, and/or "have had a stable living situation outside the Co-op for a period of two years." Other adults who are part of a member's family but are not themselves members of the Co-op may also be included in an otherwise over-housed members' housing requirements if they stay with a member a minimum of 60 days each year. I will refer to this group of changes as the "Extended Family Allowance".

63 The New Policy provides as follows:

Definitions

Household is the co-op member, associate members, and all other residents of a unit.

Household size is the number of full-time permanent residents of a unit as well as the acceptable part-time or periodic occupants as set out in #2 below.

Over-housed: A co-op member is over-housed when living in a unit where there are more bedrooms than people in the household size. (For example, a household of 2 people is over-housed in a 4-bedroom unit.) **Except that: existing members with one spare bedroom resulting from a reduction in household size are not considered over-housed. (For example, a household of 1 person is not considered over-housed in a 2-bedroom unit if there was a reduction in household size.)**

Under-housed: A co-op member is under-housed when living in a bachelor unit or in a unit where there is more than one person per bedroom. (For example, a household of 3 people is considered under-housed in a 2-bedroom unit.)

1. The co-op will use the following standards in determining the appropriate unit size for each household size:
    * The usual co-op formula for an appropriately sized unit at the time of intake/move-in is one person per bedroom.
    * There should be no more than two people per bedroom.
    * There should be no fewer than one person per bedroom. **There is an exception for existing members where there has been a reduction in household size: there should be no fewer than one person per bedroom plus one. For example, two people are not over-housed in a 3-bedroom unit if there was a reduction in household size**.
2. If units are available, members will be provided with sufficient bedrooms to house:
    * The member and all other residents living on a full-time permanent basis
    * Children on a part-time basis (at least 60 days in the past fiscal year) due to custody arrangements; documentation of the child's or children's status is required
    * Youth who move out will be considered residents until age 18
    * Foster children or family members on an interim basis (at least 60 days in the past fiscal year)
    * Care-givers for members with special needs
    * Members with medical conditions requiring an additional bedroom
    * Young adult children living away from home while attending post-secondary educational/training institutions
    * Dependent adult members with disability support needs.

3. The Board may consider adult children no longer residents of the co-op when they have completed post-secondary education and/or have had a stable living situation outside the co-op for a period of two years.

4. Members must provide documentation acceptable to the co-op if required by the Board.

5. Members must advise the co-op's management company in writing of any change in household size within 30 days.

6. When members become over-housed, they must put themselves on the Internal Wait List and may specify which units they're interested in moving to. When a move is motivated by over or under housing, the Board will reimburse the Member up to $400.00 per household upon submission of receipts. (cleaning costs, hook up, moving costs).

7. The co-op will inform over and under-housed members whenever an appropriate sized unit becomes available.

8. The Board may approve a request by an over-housed member for an exemption to the requirement to move:

    * Where age or medical conditions make a move inadvisable or impossible upon provision of appropriate documentation, or

    * For 18 months following a bereavement.

In other cases, the co-op will require a household that is over-housed to move to an appropriate sized unit when one becomes available.

9. Members required to move may turn down one offer of an appropriate size unit. Members must accept the offer of a second appropriate size unit, unless there is a valid reason acceptable to the co-op, as outlined in #8.

10. Any member who is under-housed will be entitled to apply for a larger unit in the co-op.

[Emphasis added.]

64 I have underlined those portions of the New Policy that are challenged by the petitioners and relate to the Extended Family Allowance, and have placed in bold the challenged portions that provide the Extra Bedroom Allowance.

65 Many provisions of the New Policy are not challenged by the petitioners. For example, the New Policy replaces the one year grace period, and the seniority grace periods, with clause 9 that allows over-housed members the ability to turn down the first available unit whenever it becomes available, but requires them to take the next available unit. There is no longer a grace period of any length in the New Policy but this does give an over-housed member a choice between two different units in most cases. Although clause 6 allows over-housed members to express a preference for specific smaller units, they are still required to accept either the first or the second appropriately sized unit that comes available. There are obvious administrative and enforcement benefits to this change, and it is not challenged.

66 In September 2018, at its AGM, the Board put forward a further policy amendment to the membership called the Associate Members, Co-Residents & Visitors Policy (the "New Co-resident Policy"), written to work "hand in hand with the new over/under housing policy." According to the materials, the purpose of the New Co-resident Policy was to stop requiring housemates to become associate members after three months of residing in the Co-op. According to minutes of the General Meeting, one of the stated bases for this motion was that "open and voluntary membership is one of the International Co-operative Principles."

67 The New Co-resident Policy contains a provision that would allow adult non-members, described now as "co-residents", to have the benefits of occupancy of a Co-op housing unit without becoming a member or associate member of the Co-op. Those persons would have to sign a document promising to abide by the terms of the Occupancy Agreement (though their legal status is unclear in terms of their tenancy rights or rights to enforce that Agreement against the Co-op or the Co-op's rights to enforce any tenancy related laws against them). Significantly, these non-member adults would also count toward the number of bedrooms required in a household--that is, they would count towards a member's housing needs. This motion was passed by a simple majority of members present at the AGM.

68 Together with the New Policy, the New Co-resident Policy eliminated the stipulation in the old Policy that all residents who are part of the household *must* become associate members if residing in the Co-op for more than 3 months. Instead, "co-residents" are encouraged to apply and *may* be admitted as associate members. Co-residents may reside in the Co-op with a principal member and count towards that household's over or under-housing status, but cannot vote or become a Board member. Nor is there any requirement that such non-member adults fit within the terms of the Extended Family Allowance.

The Co-op's Internal WaitLists

69 It is apparent that the Co-op does not share with its members or even its Committees any information about the internal waitlists, and what the various housing statuses of its members are. According to the petitioners, the Board had also been unwilling to answer their questions or to provide non-identifying statistical information about the number of people in each size of unit. However, in 2015, a member of the Board who was the Chair of the Membership Committee sent an e-mail to the petitioners indicating that they were on the "top of the list" for a three-bedroom unit.

70 At the hearing of the petition before me, the Board disclosed the waitlist and two lists of over and under-housing status pursuant to this Court's earlier order, although with significant redactions.

71 The first redacted internal list of over and under-housing status disclosed by the Co-op was based on the definitions in the longstanding Policy, and showed that in May of 2018 there were:

1) Five members living in bachelors who were under-housed by definition;

2) Six units were under-housed by one occupant; and

3) Two units were under-housed by two occupants (this includes the petitioners).

72 There were therefore a total of 13 households that were under-housed pursuant to the old Policy in May 2018.

73 At the same time, five Co-op units were over-housed, including four units in which one occupant was living in a two-bedroom; and one unit in which two occupants were living in a three-bedroom. The list did not indicate whether the number of occupants used to calculate over or under-housing status included any non-member adults.

74 The Co-op also provided a later list, which contained more detail, classifying each of the occupants as principal members, associates, "resident adults", or children. The later list also noted the date on which the over or under-housing status was effective. In comparing the two lists, it is clear that the original May 2018 list did in fact include non-member visitors or "resident adults" as occupants counting towards over and under-housing status of members.

75 For example, the later list reveals that one of the households characterized as "under-housed" since May 1, 2013, is a three-bedroom currently housing: one principal member, one associate member, two "resident adults" and no children. Another household classified as "under-housed" since February 2011 is also a three-bedroom and currently houses: one principal member, no associate members, two "resident adults" and a 17-year old child.

76 If I use the definition of "over-housed" from the original Policy as households with more bedrooms than household members, but where non-member visitors or "resident adults" do *not* count as part of the household size, then a total of 11 households (not five) were apparently over-housed in May 2018 before the New Policy came into effect.

77 The Co-op also provided a redacted list showing over and under-housing statuses after the application of the New Policy and New Co-Resident Policy, including the Extra Bedroom Allowance and Extended Family Allowance, and including non-member adults in household size. This list shows only one household that is still considered over-housed. That over-housing situation is shown as existing since 2013.

78 The disclosed waitlist shows that prior to the New Policy, there were 12 households on the internal waitlist. The waitlist is in chronological order of the request date. Unfortunately, the lists of over and under-housed households are not cross-referenced with the waitlist. There are numerous people on the waitlist who are looking to transfer to a different unit of the same size (e.g., from a one-bedroom to another one-bedroom; from a two-bedroom to another two-bedroom; and from a three-bedroom to a three-bedroom), citing reasons such as desire for a larger bedroom or a different style of unit. It also contains requests by associate members who wish to move into their own unit (who may have their own bedroom in their current unit that they share with a principal member). The waitlist does not indicate any disability or special needs of the households, and there is no indication that these are prioritized.

79 According to the lists produced in court by the Co-op, the petitioners are second on the waitlist for a three-or four-bedroom unit behind another unit that has been waiting since 2007. Of the 12 households on the waitlist, eight of the requests are from or before the year 2014.

RELIEF SOUGHT

80 This petition is brought pursuant to s. 156(1) of the *Act*, which authorizes members of a cooperative association to apply to the court for a remedy where the association is conducting itself in a manner which is oppressive or unfairly prejudicial to one or more of the members, including the applicant.

81 If satisfied that there has been oppressive or unfairly prejudicial conduct on the part of an association, the potential remedies or orders a court may make under s. 156(3) of the *Act* are extremely broad.

82 Subsections (1) and (3) of s. 156 of the *Act* provide as follows:

> **Court proceedings on member's or investment shareholder's application**
>
> 156 (1) Despite the rules of an association, but subject to subsection (2), a member or investment shareholder of the association may apply to the court for an order on the ground that
>
> (a) the affairs of the association are being conducted, or the powers of the directors of the association are being exercised, in a manner oppressive to one or more of the members or investment shareholders, including the applicant, or
>
> (b) an act of the association has been done, or is threatened, or a resolution of the members has been passed or is proposed, that is unfairly prejudicial to one or more of the members or investment shareholders, including the applicant.
>
> ...
>
> (3) On an application under subsection (1), the court may, with a view to bringing to an end or to remedying the matters complained of, make an interim or final order it considers appropriate, and, without limiting this, the court may
>
> (a) direct or prohibit any act or cancel or vary any transaction or resolution,
>
> (b) regulate the conduct of the association's affairs in future,
>
> (c) provide for the purchase of the shares of any member or investment shareholder of the association by another member or investment shareholder of the association, or by the association,
>
> (d) in the case of a purchase by the association, reduce the association's capital or otherwise,
>
> (e) appoint a receiver or receiver manager,
>
> (f) order that the association be wound up under Part 14,

(g) authorize or direct that proceedings be commenced in the name of the association against any party on the terms the court directs,

(h) require the association to produce financial statements,

(i) order the association to compensate an aggrieved person, and

(j) direct rectification of any record of the association.

83 The petition filed by the petitioners sought a panoply of relief, all of which was opposed by the Co-op, including the following types of orders:

1) Declarations that the affairs of the Co-op are being conducted in an oppressive manner;

2) Declarations that the provisions of the original Policy allowing extended grace periods and housemates to be recruited to fill empty bedrooms were oppressive and unfairly prejudicial and declaring them invalid;

3) Declarations that the Extra Bedroom Allowance and Extended Family Allowance in the New Policy are oppressive and unfairly prejudicial and therefore invalid;

4) Declarations that the New Co-Resident Policy and the inclusion of non-member resident adults to the calculation of member household size is oppressive and unfairly prejudicial and therefore invalid;

5) A declaration that housemates, lodgers, guests, former dependents not residing with a member, and associate members do not count toward household size;

6) An order that the Board of Directors give notice to all over-housed members that they may be internally moved within a specified time;

7) An order that the next available three-bedroom or four-bedroom unit in the Co-op be offered to the petitioners or that the petitioners perform a "swap" with an over-housed member;

8) Further, and in the alternative, an order that the next available appropriately sized unit be offered to an over-housed member rather than an under-housed member; and

9) An order that the Co-op adopt the CHFBC's "A sample Over-and-under-housing policy" model policy on the issue.

84 Essentially the petitioners seek orders striking down or rewriting portions of the New Policy and New Co-Resident Policy, and directing that the policies be enforced in a way that requires over-housed members to move into smaller units to facilitate the movement of under-housed members into larger units.

85 I am therefore required to consider numerous policies and actions by the Co-op and determine whether some or all of them amount to oppressive or unfairly prejudicial conduct against the petitioners and other members and, if so, I must consider the appropriate remedy.

OPPRESSIVE CONDUCT UNDER S. 156 OF THE ACT

86 Section 156(1) of the *Act* allows a member to apply to the court to rectify the matters complained of where the association has acted in a manner that is oppressive or unfairly prejudicial to one or more members.

87 This statutory oppression remedy under the *Act* has been interpreted to be similar to what is available to shareholders in the corporate context: see *Scipio v. False Creek Housing Co-operative Housing Association*, 2012 BCSC 1339; *Johns v. Otter Point Recreational Co-operative Association*, 2007 BCSC 968; and *Marshman v. Lavender Housing Cooperative*, [1991] B.C.J. No. 3710 (S.C.).

88 Section 227 of the *Business Corporations Act*, *S.B.C. 2002, c. 57* [*BCA*] and s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 [*CBCA*] contain similar wording. Section 227(2) of the *BCA*, in particular, contains nearly identical wording to s. 156(1) of the *Act*, while s. 241 of the *CBCA* enumerates an additional type of conduct, that being conduct which "unfairly disregards" the interests of any security holder, creditor, director or officer.

89 Section 102 of the *Societies Act*, *S.B.C. 2015, c. 18*, also uses wording similar to s. 156(1) of the *Act*, and has recently attracted the application of jurisprudence on the test for oppression and unfairly prejudicial conduct: see *Dalpadado v. North Bend Land Society*, 2018 BCSC 835; *Dauphinee v. White Rock Harbour Board*, 2018 BCSC 1286; and *Vancouver Island Junior Hockey League Society v. British Columbia Amateur Hockey Association*, 2018 BCSC 2289.

90 The development of the statutory oppression remedy contained in s. 164 of the *Strata Property Act*, *S.B.C. 1998, c. 43* [*SPA*] has also been informed by corporate case law around the oppression remedy. It captures activities of the strata corporation which are "significantly unfair" with reference to the jurisprudence around the oppression remedy but with consideration to the unique context of strata complexes. It has been suggested that the use of the word "significantly" to modify "unfairness" was deliberate and signals a higher level of deference to a strata corporation: see *Gentis v. The Owners, Strata Plan VR368*, 2003 BCSC 120; and *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44 [*Dollan*].

91 Overall, the authorities establish that the legal test for relief under s. 156(1) of the *Act* should be informed by the same legal framework as the reasonable expectations test for oppression and unfair prejudice under the *BCA* and *CBCA*, with appropriate regard to the housing cooperative context.

92 As members of the Co-op, it is not disputed that the petitioners have standing to seek relief under s. 156(1) of the *Act*. In order to maintain an action for oppression or unfair prejudice, the applicant must establish harm to their interests and that harm must be distinct from the interests of others: see *Dauphinee* at para. 49.

93 The key case on the availability of oppression remedies in the corporate context and the test for reasonable expectations is *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 [*BCE*], which

dealt with s. 241 of the *CBCA. BCE* sets out a two stage test for establishing oppression at paragraph 68 as follows:

> 1) Does the evidence support the reasonable expectation asserted by the claimant; and
> 2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

94 I will now go on to consider the various elements of the analysis before applying them to the policies and conduct at issue in these proceedings.

What are Reasonable Expectations?

95 The first issue in any oppression case is to determine whether the petitioners' expectations for conduct by the corporation (or in this case by the housing cooperative) are reasonable. Before reviewing the specific expectations of the petitioners in this case, it is helpful to review what defines reasonable expectations more generally, with a focus on the case law and principles most applicable to the not-for-profit cooperative context.

96 In *BCE*, the Supreme Court emphasized a contextual approach, taking into account the particular relationships at issue and noting that "there may be conflicting claims and expectations." At paragraph 64 the Court explained:

> [64] ... The oppression remedy recognizes that a corporation is an entity that encompasses and affects various individuals and groups, some of whose interests may conflict with others. Directors or other corporate actors may make corporate decisions or seek to resolve conflicts in a way that abusively or unfairly maximizes a particular group's interest at the expense of other stakeholders. The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly. Fair treatment -- the central theme running through the oppression jurisprudence -- is most fundamentally what stakeholders are entitled to "reasonably expect".
>
> [Emphasis added.]

97 The principles to be drawn from *BCE* and other cases were recently summarized in *Radford v. MacMillan*, *2017 BCSC 1168*, aff'd in *2018 BCCA 335*, as follows:

> [119] Reasonable expectations are assessed by what is "objective and contextual", rather than only according to the stakeholder's own expectations. The expectations must be realistic. Expectations may evolve over time and not be static. The overarching considerations guiding the reasonable expectations analysis were best summarized by the Court in *BCE* as follows: ...

> [120] The Court in *BCE* compiled a non-exhaustive list of factors that may be looked to in determining the existence of reasonable expectations: general commercial practice, the nature of the corporation, the relationship that exists between the parties, past practice, self-protection steps the petitioner could have taken, any representations and agreements and the fair resolution of conflicting interests between corporate stakeholders (BCE at para. 72).
>
> [121] Evidence of expectation may take many forms depending on the facts of a case (*BCE* at para. 70). The determinations as to an expectation and its reasonableness are questions of fact.
>
> [Emphasis added.]

98 In the context of this case and housing cooperatives more generally, the purpose and nature of the Co-op is a significant factor, as is the relationship between the parties, past practices of the Co-op, and representations to and agreements with various members.

99 In this case, where the policies at issue pit under-housed members against over-housed members, the fair resolution of conflicting interests between stakeholders is perhaps the most significant factor in defining reasonable expectations.

100 The duty of a Board of directors to reach a fair resolution is not confined to applying particular rules, but is rather a function of judgment of what is in the best interests of the corporation, in the particular situation it faces: *BCE* at para. 87.

Oppressive or Unfairly Prejudicial Conduct

101 Under the second part of the *BCE* test, the petitioners must establish a harmful effect or prejudicial consequences on their own particular interests that has been caused by the breach of a reasonably-held expectation. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that justify a remedy: see *BCE* at para. 89.

102 In *BCE*, the Court described the concepts of oppression and unfair prejudice as follows, referencing their use in the *CBCA*:

> [92] The original wrong recognized in the cases was described simply as oppression, and was generally associated with conduct 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: see Koehnen, at p. 81. It is this wrong that gave the remedy its name, which now is generally used to cover all s. 241 claims. However, the term also operates to connote a particular type of injury within the modern rubric of oppression generally -- a wrong of the most serious sort.
>
> [93] The CBCA has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and

> abusive conduct connoted by "oppression" may fall within s. 241. "Unfair prejudice" is generally seen as involving conduct less offensive than "oppression". ...
>
> [Emphasis added.]

103 Oppressive conduct has been variously described as conduct that is coercive or abusive; "burdensome, harsh, and wrongful"; a "visible departure from standards of fair dealing"; or an abuse of power: see *BCE* at para. 92. Unfair prejudice requires less; it is generally concerned with what is unfair or inequitable. The key case on the meaning of "unfairly prejudicial" in British Columbia is *Diligenti v. RWMD Operations Kelowna Ltd.*, *[1976] B.C.J. No. 38*, *1 B.C.L.R. 36* (S.C.), in which Justice Fulton applied dictionary definitions and noted that they supported the "instinctive reactions that what is unjust and inequitable is obviously also unfairly prejudicial" (at para. 23).

104 Examples of unfair prejudice or unfair disregard in the corporate context include: squeezing out a minority shareholder, preferring some shareholders with management fees, paying directors' fees higher than the industry norm, favouring a director, improperly reducing a shareholder's dividend, et cetera: see *BCE* at paras. 93-94.

The Role of Good Faith and Proper Purposes

105 Equity and fairness are the primary considerations with which to assess directors' actions. In each case, "the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen": *BCE* at para. 83.

106 However, the inquiry is not driven solely by the motive of the Board or the manner in which the breach of reasonable expectations was committed. Rather, the focus is on the *result* or *effect* of the decision or conduct complained of. See, for example, the following discussion in *Deluce Holdings Inc. v. Air Canada* *(1992), 12 O.R. (3d) 131* (Gen. Div.) as cited at paragraph 127 of *Radford*:

> All of the facts must be considered, however, I agree with Farley J.'s conclusion in *Ballard*, supra, at p. 176, that when assessing the directors' conduct in relation to the s. 122 duty to act in good faith with a view to the best interests of the corporation, "the question is, what was it the directors had uppermost in their minds *after a reasonable analysis of the situation*" (emphasis in original). I also agree with the view expressed at p. 178 of the same decision, that even if, after a proper analysis of the situation, the directors may be said to have acted in good faith, as required by s. 122 of the C.B.C.A., the result of such action may still be such that it "oppresses" the interests of the minority shareholder in a fashion which brings the "oppression remedy" section (s. 241) into play.
>
> [Italics in original.]

107 Bad faith intent of directors is no longer a requirement of oppression and related remedies. Conversely, evidence of good faith does not foreclose a finding that the act was nevertheless

oppressive or unfairly prejudicial. The issue was canvassed by our Court of Appeal in *Icahn Partners LP v. Lions Gate Entertainment Corp.*, *2011 BCCA 228*:

> [71] ... Professor Markus Koehnen observes in *Oppression and Related Remedies* (2004) that in most Canadian provinces, "bad faith" (i.e., a "lack of probity and fair dealing", in the words of *Scottish Co-operative Wholesale Society Ltd. v. Meyer* [1959] A.C. 324 (H.L.) at 363-4) is no longer seen as a prerequisite to relief for oppression. (The one exception noted by Koehnen is British Columbia, where this court in *Safarik v. Ocean Fisheries Ltd*. *(1995) 22 B.L.R. (2d) 1* suggested that eliminating the prerequisite of bad faith carried "the potentiality for serious error." (At 33.)) The author continues:
>
> The rejection of bad faith as a prerequisite to relief has immediate implications for defences to oppression. Older cases suggested that if directors were acting in the best interests of the corporation they would be exonerated from any allegations of oppression. While a lack of valid corporate purpose will be oppressive, the fact that directors believed they were acting bona fides in the best interests of the corporation does not suffice to dismiss the claim. Oppression can exist even where directors legitimately believe they are acting in the best interests of the corporation because equitable considerations override the best interests of the corporation. [At 117-18; emphasis added.]
>
> Although Koehnen cites a number of cases in his footnote to the underlined passage, those cases confirm only that oppression no longer requires that bad faith be shown, and that the "effect" rather than the subjective intent behind directors' conduct is the key to whether oppression will be found: see *Westfair Foods Ltd. v. Watt* *(1991) 5 B.L.R. (2d) 160* (Alta. C.A.) at para 15; *Sparling v. Javelin Int'l Ltd*. *[1986] R.J.Q. 1073* at 1077, varied on other grounds *[1992] R.J.Q. 11* (Que. C.A.), lve. to app. refused *(1992) 53 Q.A.C.169*; *Low v. Ascot Jockey Club* *(1986) 1 B.C.L.R. (2d) 123* (S.C.) at 129; *Brant Investments Ltd. v. KeepRite Inc*. *(1991) 80 D.L.R. (4th) 161* (Ont. C.A.) at 176; *R.S. v. RW-LB Holdings Ltd*. *[1994] 3 W.W.R. 725* (Alta. Q.B.) at para. 64. In this regard, they are not inconsistent with Starcom, supra.
>
> > [72] I would not accede to Mr. Gelowitz's suggestion that proof of an improper purpose alone effectively equates to oppressive conduct - or conversely, that the absence of an improper purpose negatives the possibility of oppression or unfair prejudice. ...
>
> [Emphasis in original.]

108 In *Dalpadado*, Mr. Justice Brundrett interpreted s. 102 of the *Societies Act* in line with this approach:

> [88] ... The obligation of a society to act fairly and without oppression arises independently of how any dispute with a member came about. There is no requirement for a finding of bad faith or improper motive in order to establish oppressive or unfairly prejudicial conduct: what is at issue is the effect of the conduct or acts complained of: *Low v. Ascot Jockey Club Ltd*. *(1986), 1 B.C.L.R. (2d) 123* at 129 (S.C.); *Starcom International Optics v. Macdonald* *(1994), 46 A.C.W.S. (3d) 430* at para. 36 (S.C.) (WL); *Diligenti v. RWMD Operations Kelowna Ltd*. *(1976), 1 B.C.L.R. 36* at 45-46 (S.C.) (WL); Paley v. Leduc, *2002 BCSC 1757* at para. 30.

[Emphasis added.]

109 In summary, bad faith is not a requirement to establish oppression, but any lack of good faith is a factor in considering both the existence of reasonable expectations and whether conduct was oppressive or unfairly prejudicial. In this regard, the question is whether, in all the circumstances, the Board acted in the best interest of the Co-op, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner. Even if the Board acted in good faith, the result or effect of a practice or policy may still be oppressive or unfairly prejudice the interests of the members in a way that calls for a remedy.

Deference and the Standard of Review

110 Initially, counsel for the Co-op sought to rely almost entirely on cases decided by the courts under s. 37 of the *Act*, which provides for an appeal to this Court where a housing cooperative's board terminates the membership and right to possession of a co-op member. Cases decided under s. 37 of the *Act* characterize the decision of a housing cooperative to terminate membership as a quasi-judicial determination that requires deference to the decision-making process of the board of directors in the absence of a breach of procedural fairness requirements or an error in law. Counsel for the Co-op says that this case similarly raises issues of deference to the democratic processes of the Board and that the decisions of the Board in this case are also quasi-judicial and should not be interfered with in the absence of a procedural error.

111 This position confuses two fundamentally different processes: judicial or quasi-judicial decision-making on the one hand, and corporate or cooperative democratic decision-making on the other. Jurisprudence discussing s. 37 of the *Act* engages quasi-judicial decision-making that requires a housing cooperative's board to adjudicate upon the membership rights of a specific individual who is being considered for termination. The decision is quasi-judicial in the sense that it requires the board to determine whether the member breached a provision of the cooperative's rules or policies, or acted in a manner that is "detrimental to the cooperative" under s. 35(4).

112 The court hears such matters in the manner of an appeal pursuant to s. 37, and takes a deferential approach to the fact-finding and weighing of interests engaged in by a board considering such a matter: see *Kelly v. 115 Place Co-operative Housing Assn.*, *2009 BCSC 302*; *Kovak v. Alexander Laidlaw Housing Co-operative*, *2016 BCSC 2049*; and *Heatheridge Housing Cooperative v. Harrison*, *2009 BCSC 1067*. The court will generally not overturn the decision of a board that is reasonably supported by the evidence absent an error of law or a breach of the principles of natural justice. The content of procedural fairness under s. 37 has been interpreted to include the right of a member to receive adequate notice of and to respond to the case against them, and that the decision-makers themselves be impartial: see *Kelly* and *Heatheridge*.

113 The Co-op also relies upon cases where parallels were drawn between the relief available under s. 37 and what is now s. 156 of the *Act*. In *Nystad v. Harcrest Apt. Ltd*. *(1986), 3 B.C.L.R. (2d) 39* (S.C.), Chief Justice McEachern (as he then was) applied similar considerations to a petition for an oppression remedy under s. 224 of the (former) *Company Act*, R.S.B.C. 1979, c. 59 made against a company "more or less" operating as a cooperative. However, that case

involved a termination decision related to the rights of the petitioner to remain a shareholder and occupant of the apartment and so was indeed very similar to a s. 37 appeal.

114 In *Johns*, the respondent association was not a housing cooperative but instead a recreational motor vehicle park. The decision by the association's board of directors to remove the petitioner's recreational vehicle was held to be a quasi-judicial one: at para. 38. In that case, the decision again involved "terminating" the rights of a specific member based on an alleged breach of the association's rules and bylaws. Both these decisions were quasi-judicial in nature and had strong parallels to an appeal under s. 37 of the *Act*.

115 In contrast, the petition before me is not a quasi-judicial decision of the Co-op Board adjudicating the rights of an individual member, but instead a broader review of whether policies of the Co-op and their implementation are oppressive or unfairly prejudicial to a member or group of members. These did not require the Board to apply their rules or other legal standards to the facts of a specific member's grievance. Instead, this petition requires a review of a housing cooperative's decisions in applying and enacting certain policies that affect all members, and that are alleged to unfairly benefit the majority over the minority.

116 The framework of review in this context cannot be the same as an appeal under s. 37 of the *Act* of a termination decision. While the Board is still required to balance interests when governing democratically, the court has a different role when considering whether that balance is one that is consistent with the reasonable expectations of its members, and is not oppressive or unfairly prejudicial.

117 For example, impartiality cannot be a requirement of such decision-making as it is in the context of a quasi-judicial termination decision about an individual's right to remain a member. The partiality of members developing policies about the allocation of housing units as between them is almost inevitable, as every member will have a vested interest in the outcome.

118 Nor can the democratic nature of the decision be given the same weight as it is in other contexts. The democratic process is fundamentally majoritarian. The oppression remedy exists in part to protect minorities from certain kinds of democratic decisions even though those decisions are approved by a majority of directors or members. A board of directors is entitled to favour the interests of the majority and prejudice the minority in the best interests of the corporation (in this case, a housing cooperative association), but it may not do so in a manner that is oppressive or unfairly prejudicial to the interests of a minority.

119 Overall, I find the case law dealing with terminations of membership unhelpful in this case. Rather, I prefer to rely on case law providing guidance on the reasonable expectations analysis applicable to analogous provisions to s. 156(1) under the *BCA, CBCA*, *SPA*, and the *Societies Act* as described above. Pursuant to these lines of authority, consideration must be given to the full context, including the fact that the Board is required to weigh the competing interests of its members in making decisions about housing allocations to both over and under housed members while fulfilling its mandate to provide sustainable and affordable housing to its members.

120 The extent to which the Co-op fairly balanced the interests of its members in all of the circumstances, and had reasonable grounds for its decision or policy, may inform whether reasonable expectations have been breached. It may also be relevant at the second stage of whether the policy or conduct is oppressive. There is no requirement that the Co-op find the perfect balance in this regard. It must, however, not breach the reasonable expectations of its members in an oppressive manner.

121 I find that the most compelling cases to guide the deference to be given to the Co-op's decision come from the line of authorities that address strata decision-making. Although the legislation is not identical, both cooperative housing and strata housing address the need to balance the interests of those living together in a democratically managed space with collective ownership aspects. The deference owed to the democratic processes of a strata corporation in the context of an action under s. 164 of the *SPA* has been determined by our Court of Appeal in *Dollan*. Paragraph 24 of Justice Garson's reasons provide as follows:

> [24] Section 164 is remedial. It addresses that, despite using a fair process and holding a democratic vote, the outcome of majoritarian decision-making processes may yield results that are significantly unfair to the interests of minority owners. Section 164 provides a remedy to an owner who has been treated significantly unfairly by co-owners or the strata council that represents them. The view that significantly unfair decisions reached through a fair process are insulated from judicial intervention would rob the section of any meaningful purpose. I agree with what Masuhara J. said in *Gentis* that the outcome of the vote is one factor to be considered in determining if the impugned action is unfair. I do not agree with the suggestion in Pearce that provided the process is fair and democratic, a court should defer to the decision of the strata council or corporation.
>
> [Emphasis added.]

122 Justice Hall wrote the following on the same issue in his concurring reasons in *Dollan*:

> [44] I do not, however, consider that in the unusual circumstances of the present case, that we can properly limit our consideration solely to the practice and procedure adopted by the Council. If such were to be the only consideration in a case raising such an issue as the present one, a court would have no ability to look beyond a majority supported decision to take account of the position of one or more parties in a minority. I might consider it an appropriate approach to a matter like the present controversy to adopt something of a presumption of regularity about a decision of a strata council supported by a majority of owners but to afford some limited ability in a court to address a decision that imposes a too heavy burden on a minority. That is rather how I see the present case.

123 In the strata context, the democratically elected Board and the democratically adopted policies can have significant impacts on individual owners. In the cooperative housing association context, where the Board controls not just common property but all property, including the allocation of commonly owned housing units to individual members, the impact and the potential for oppression by the majority of a minority can be much more significant. I

therefore find the reasoning of the Court of Appeal in *Dollan* to be equally applicable to the issue of deference owed to a policy decision of a housing cooperative approved by a majority of its members. The focus of the analysis under s. 156 of the *Act* should not simply be on the processes and procedures used by the Co-op leading up to the decision or policy implementation.

124 As mentioned, the *RTA* has no application and offers no remedies. Apart from human rights legislation, the oppression and termination sections of the *Act* contain the bulk of the housing security rights afforded to housing cooperative members. In this context, I am inclined to interpret s. 156 of the *Act* as requiring the Co-op Board to ensure that resolutions and policies put to the membership do not have the effect of placing too high a burden on minority members as to be oppressive or unfairly prejudicial to their interests. Accordingly, if the policies proposed or implemented by the Board breaches the reasonable expectations of its members in an unfairly prejudicial or oppressive manner, taking into account the purposes of the Co-op and the need to balance competing interests, the petitioners may have their remedy notwithstanding that a fair democratic decision-making process was followed.

125 I will now go on to consider whether the various policies and decisions of the Co-op that the petitioners take issue with in this case give rise to a remedy to the petitioners under s. 156(3) of the *Act*.

126 I will consider each of the policies and practices that the petitioners challenge, and consider whether the Co-op breached the petitioners' reasonably-held expectations and, if so, whether it did so in an unfairly prejudicial or oppressive manner, with regard to the differences between the corporate context and the cooperative housing context.

ANALYSIS

127 The specific policy provisions that the petitioners challenge as unfairly prejudicial and oppressive to them are as follows:

1) The grace periods and housemate provisions in the Policy in place up to May 2018;
2) The enforcement of the previous Policy and other policies in place up to the time of trial;
3) The New Co-Resident policy allowing non-members to reside in Co-op units and count towards household need; and
4) The Extra Bedroom Allowance and Extended Family Allowance in the New Policy.

1. The Original Policy: Grace Periods and Housemates

128 The petitioners argue that the previous Policy, as it existed when they joined the Co-op, contained provisions that were a breach of their reasonable expectations that housing would be allocated fairly on the basis of need (defined by household size). In particular, they challenge the grace period provisions and the ability of over-housed members under the old Policy to bring in

housemates as new associate members who then count toward household size. They say that because they were not given a copy of the policies in place when they joined the Co-op, their expectations that household size alone would determine allocation of the Co-op's housing units were reasonable and were breached.

129 While the Board did not lead any evidence or make any submissions as to the reasons or interests it was seeking to protect through the Policy in place up to May 2018, it is apparent that the Co-op was balancing the interests of its members. On the one hand, the Policy recognizes as a primary principle the allocation of units based on household size and need. That principle is then balanced against the interests of other members wanting to stay in a unit they may have occupied for a long time despite decreases in their household size by allowing grace periods for transition based on length of tenure and the addition of new members to the household. The petitioners say that the favouring of some members' desires to maintain the status quo against the pressing and acknowledged housing needs of other members is not a valid policy basis to allocate cooperatively owned housing units and is objectively unfair.

130 The petitioners say that the CHFBC model policy, and their proposed policy modelled from it, strikes the appropriate balance between these interests, and should be enforced by this Court. That proposed policy would allow for accommodation of a member's dependent family members, but would not allow non-dependant adults to count toward housing requirements.

131 While the model policy provides some evidence of a best practice or standard practice in BC, that is only one factor with respect to the establishment of reasonable expectations.

132 When the petitioners joined the Co-op, it was governed by policies that varied from the model policy in key respects, including the one year grace period for over-housed members to move, and the additional grace periods based on decades of membership in the Co-op. The evidence shows that the Rules, Occupancy Agreement, and Policy existed in much the same state that they were in since at least 1993, until their more recent changes in 2018.

133 The petitioners' reasonable expectations must be informed by the Policy in place relating to over and under-housing at the Co-op when they became members. It is not sufficient for them to say they were not provided with or that they did not read the Policy, and had different expectations of what the applicable policies were or would be.

134 Furthermore, the Policy as I have reviewed and interpreted it above, was not so unreasonable that persons choosing to become members of the Co-op could not reasonably have accepted them. In these circumstances, it is not reasonable for the petitioners to have expectations that were different than those in the existing policies of the Co-op.

135 I therefore find that the Policy, as originally in place when the petitioners became members, did not breach the petitioners' reasonable expectations as to what policies should or would apply with respect to over and under-housing at the Co-op.

2. Enforcement of the Over-housing Policies

136 The petitioners say that even if the previous Policy was not oppressive or unfairly prejudicial, the Board's practices and conduct in applying it were.

137 As a result of the Policy, it is clear that years could pass before an over-housed household could be required to move to a smaller unit, depending on whether a suitably sized unit came available, whether that unit came available during or after the expiry of the applicable grace period, and whether the over-housed members had taken on a housemate as a new associate member.

138 Once the petitioners were on the internal waitlist for a larger unit, it became apparent that there was another obstacle to people on the under-housed waitlist getting a larger unit: The Co-op was implementing the Policy by offering units that could have accommodated an over-housed household to persons on the under-housed list *first*. While this might appear at first blush to favour the under-housed, in fact its effect is and was the opposite: little or no vacancies that would have accommodated the over-housed members were offered to them, allowing the over-housed to potentially remain in their units much longer past the applicable grace period, and reducing the overall movement of units of every size.

139 The petitioners argue that they had a reasonable expectation that the over-housing policy would be enforced such that when a vacant unit did become available that was an appropriate size for an over-housed household, the over-housed household would be required to accept it after expiry of the applicable grace periods specified in the Policy. This would require over-housed members to take such units, thereby freeing up larger units for under-housed members in a cascade effect.

140 The Board says that there is nothing in its past policies or practices that give rise to such an expectation, and that it is open to the Board to offer units that come available to under-housed members before offering them to over-housed members.

141 I find that the petitioners have established that they had an expectation that the Policy would be enforced so as to ensure that over-housed members were moved into the first available housing unit upon expiry of their applicable grace period, and that this expectation was reasonable and necessary for the fair and equitable administration of the Co-op's policies and purposes.

142 The expectation of fair, consistent and equitable enforcement of the Policy as between over-housed and under-housed members accords with the Co-op's original Unit Allocation Policy, over and under-housing policies, as well as the organizing principle evident in the Co-op's foundational documents and policies providing for the allocation of the cooperatively-owned units on the basis of housing need and household size (subject, of course, to the stated grace periods).

143 The Unit Allocation Policy provides (at Clause 6) that the internal waitlists will be resolved "in the following order: ii. Over-housed and under-housed members...". Over and under-housed members are to be moved before internal moves of persons wishing to move laterally to a

similar sized unit or to move so as to add a person to their household. This language implies a potential order of movement requiring over-housed members to be moved first, but there is some ambiguity in the wording of this policy. I find that the ambiguity can be resolved by a holistic review of the Co-op's purposes, policies and past practices.

144 I turn first to the wording of the over and under-housing policy language itself in the old Policy, which remained virtually unchanged since at least the 1990's until the recent change in 2018. Clause 2 of that policy provided:

> Should a co-op member find her/himself overhoused due to a change in the number of people living in her or his unit, s/he will have one year to remain in her/his unit and make alternative housing arrangements within the co-op. After one year, the member will be required to move into the first available unit of appropriate size (as determined by the Membership Committee).

145 This provision makes clear that even before the expiry of the applicable grace period, an over-housed member should be preparing for and making alternate arrangements for moving to appropriately sized housing. At the end of the grace period, the over-housed member was *required*, by this Policy, to "move into the *first available* unit of appropriate size."

146 The Board's submissions and correspondence in evidence suggests that they did not consider a unit to be "available" if it could instead be offered to another member who was perhaps under-housed, or interested in a lateral move.

147 The effect of the Board's interpretation is essentially to defeat the over-housing policy and the Co-op's housing need basis for unit allocation. An over-housed member in one of the three or four-bedroom units at this Co-op may find themselves needing to arrange to move to a two-bedroom unit under the Policy. However, if that two-bedroom unit is first offered to an under-housed member in a one-bedroom unit, the over-housing policy can be avoided entirely. This appears to have been the practice of the Board in recent years.

148 However, it does not appear to have been the established practice of the Membership Committee, which has been formally delegated the Board's function of managing internal moves.

149 I have evidence of written correspondence between the Chair of the Membership Committee and the Board in 2018 stating that the Membership Committee was trained and required to offer housing units to over-housed members first:

> This is the way that we have conducted the committee operation in the four years that I have served. It does not make sense if the underhoused are offered first, because then space would almost never open up in larger units, which keeps more people underhoused. Underhoused members are better served if overhoused people move out, which creates a cascade of larger places opening when triggered by a move-out, so that more than one underhoused person may be able to move into a larger place. This is common sense. Furthermore, if this policy is open to interpretation by whomever is

> managing the move-in and move-out, then this is a process that lends itself to bias and favoritism, or at the very least, a perception of those.

150 I also have evidence that the Membership Committee used to send letters demanding that over-housed members make their transitions according to the Policy.

151 I am satisfied based on the evidence that the Co-op previously had a practice of enforcing the old Policy by requiring over-housed members to take the first available unit after the expiry of their stated grace period. I am also satisfied that this is the only reasonable interpretation of the Policy as it was in place up until May 2018.

152 I find that it was a reasonable expectation of the petitioners at the time they became members in 2013 that over-housed members whose grace period had expired would be required to accept the first available properly sized unit. For clarity, that means the first vacancy of an appropriately sized unit, and not the first vacancy that no one else on the internal waitlist wanted.

153 I also find that the petitioner's reasonable expectations were frustrated by the Board's enforcement of the original Policy. The evidence shows that since the petitioners have been on the waitlist for a larger unit the Board made the acceptance of vacant units optional for over-housed households, and where over-housed households declined this option, the units were offered to under-housed members, or adequately-housed members on the internal waitlist who wished to move into a larger unit with a non-member, or even persons on the external waitlist.

154 For example, the evidence establishes that when a two-bedroom unit vacancy occurred in 2015, the Chair of the Membership Committee sent an e-mail to all members of the Co-op soliciting interest from over-housed members. That e-mail recognized the cooperative values subscribed to by the Co-op and stated that over-housed members *need* to move as household size changes "in order to be equitable...". The e-mail provides:

> Remember, according to our over/under housing policy (see attached), ***we do need to move around when our household size changes***, in order to be equitable for members who need bigger or smaller place [*sic*]. We do not own our apartments, and even if we have lived in a place for many many years and it feels like home, we are cooperative and live by cooperative values. So if you have more bedrooms than people living in your place, please prepare to downsize into a smaller apartment so that people with larger families can move into larger units. <u>We currently have families of 4 living in 2 bedrooms while 2 adults are living in 3 bedroom units, or 1 adult is living in 2 bedroom units. This is not fair, regardless of how hard it is to move</u>. Remember that roommates can live with you to help with costs, temporarily, until an appropriate sized unit becomes available, but that roommates should not be used to keep you from moving into the correct size place.

[Bolding in original and underlining added.]

155 I note that this e-mail communication was sent by a Board member in relation to a delegated Board function and in the ordinary course of business of the Co-op. The evidence is

not objected to on the basis of hearsay, and in any case I find it is admissible as a business record or as an admission in a document in possession of the Co-op.

156 Despite the evidence that there was a unit where two adults were living in a three-bedroom unit in 2015, the evidence establishes that no over-housed members moved into the two-bedroom vacancy. As a result, no under-housed members living in a two-bedroom were afforded the opportunity to move into a larger unit, including the petitioners.

157 The same thing occurred again in May of 2016 when the Membership Committee advised again that a member was moving out of the Co-op, creating a vacancy in a two-bedroom unit. This time, e-mails were sent among the members of the Board and Membership Committee, including the message from one Board member that "I'm going to send out an email to the co-op list to see if anyone's interested, but in particular to the families that are in 3 bedrooms but are only 2 people as they should technically move into this place." The evidence suggests that this email was not sent, however. Minutes of the general meeting held in May 2016 disclose that during discussion of the unit vacancy, the number of applications on file for two-bedrooms and one-bedrooms was noted, but there was no discussion of how many units contained over-housed households. Ultimately, the unit was offered to a member living in a bachelor unit who applied to move into a two-bedroom with her brother. Once again, no under-housed members residing in two- or three-bedroom units were afforded the opportunity to get off the waitlist through this process.

158 There is also evidence that in late 2017 or early 2018, a one-bedroom unit became available that could have been offered to one of two over-housed members currently occupying a two bedroom unit (one of whom appears to have been a Board member). Rather than being offered to one of those two over-housed members, thereby freeing up a two-bedroom unit that could then have been offered to an over-housed member in a three-bedroom unit waiting for a two bedroom unit, the unit was offered to an under-housed member in a bachelor apartment. This allowed one under-housed member to move from a bachelor to a one-bedroom, but did not create any further movement in larger units.

159 The Board's response is that it is entitled to not require over-housed members to take available vacancies. It goes further and says that it is entitled to choose not to offer these units to over-housed members first or at all. The Board did not provide any rationale for its decisions between 2015 and 2018 to fill vacancies from the under-housed or lateral internal waitlists, rather than through movement of over-housed members, other than to say it was open to them to implement the applicable policies as they saw fit.

160 Indeed, there is a frustrating and palpable opaqueness to the Board's evidence and approach to the unit allocation of the Co-op's commonly owned housing units. The Board consistently refused the petitioners (and apparently its own Membership Committee) any current information with respect to the over and under- housing lists for the Co-op, and only provided highly redacted lists to the court when ordered to provide this information.

161 Overall, I find the evidence, together with the Board's admissions in argument, establishes that in recent years the Board not only has not required over-housed members to make

arrangements to move upon the expiration of their grace period, it also has not required over-housed members to accept the first available vacancy at the end of the grace period. Its practices have been inconsistent and non-transparent in the last five years. It is clear that the Board has ceased to require over-housed members to accept the first (or any) available unit when it becomes available after the expiration of the applicable grace period.

162 I find the Board's practice in recent years not to require over-housed households to accept appropriately sized units when they become available is a breach of the petitioners' reasonable expectations regarding the equitable and even-handed enforcement of the Board's policies.

163 Finally, I find that this practice under the previous Policy, and to the extent that it may still be a practice under the New Policy, is unfairly prejudicial to all members that are under-housed.

164 The Policy, and the New Policy, should be informed and implemented in accordance with the values and mandate of the Co-op "to provide sustainable and affordable housing" to its members. In the corporate oppression context, the court examines whether the decision was in the best interests of the company. What is in the best interests of the Co-op in this case is that it acts to secure the aims of the Co-op in accordance with the values of the Co-op.

165 The evidence of the conflict over the Policy in the Co-op's meeting minutes and other documents demonstrates that members of the Board acknowledged and were genuinely troubled by the fact that proper implementation of the Policy requires that they do something to facilitate the transition of over-housed members to downsize to appropriately sized units. Their overall failure to create a system of accountability and ensure compliance with the Policy was unfairly prejudicial to the under-housed members.

166 One implication of the Board's conduct in this regard is that it tends to unfairly privilege more longstanding members of the Co-op, who are also well-represented on the Board. While the Policy already did this expressly through the provision of extended grace periods on the basis of seniority, the Board went beyond the balance struck in the Policy between seniority on the one hand and housing need on the other.

167 Perhaps most problematically, this conduct was accomplished in an entirely inconsistent and non-transparent manner. It is inevitable that the Co-op Board members have compelling personal interests in this issue as it directly affects their own housing situation and the possibility that they themselves might one day wish to or be required to move. Impartiality may not be possible in this context, but such a situation makes compliance with the Co-op's policies essential to the fair functioning of the Co-op. In such cases, transparent, scrupulous, and consistent application of the policy is required.

168 Failing to ensure the movement of over-housed units upon the expiration of their grace periods defeats the stated purpose of the unit allocation policy: "To establish an equitable and consistent system for allocating units to internal and external members and/or applicants." Furthermore, this practice frustrates the mission of the Co-op of providing affordable, sustainable and adequate housing to its existing and future members.

169 Finally, there is no evidence that the Board has taken concrete steps to facilitate the reduction of the waitlist of under-housed individuals in any other way. The Board's inaction has contributed to the unreasonable delay that those on the under-housed waitlist have experienced. There is one member shown on the internal waitlist ahead of the petitioners who first made their request in 2007, 12 years ago. The amount of delay is unreasonable and is not within the legitimate expectations of the minority of members who are burdened by the situation on a daily basis, even in the context of a Co-op which experiences little overall mobility.

170 In conclusion, I find the conduct of the Board in the last five years has not followed, and instead has undermined, the Unit Allocation and over and under-housing Policy by failing to require over-housed members to take the first available vacancy after their grace period expired.

171 I am satisfied that the petitioners have suffered a unique harm as a result of the Board's failure to enforce the requirements related to the movement of over-housed members under the previous Policy. Specifically, I find that the petitioners have experienced hardship with respect to having to live in a two-bedroom unit as a family of four, with one of the children suffering from a disability that requires him to have his own bedroom.

172 Going forward, the Co-op must require that over-housed members accept an appropriately sized unit before any affected units are offered to other members on the internal waitlist, or persons on the external priority or external waitlist. Under the new Policy, which removes the grace period and replaces it with one "free" refusal of an appropriately sized unit, I order that all appropriately sized vacancies must be offered *first* to over-housed members before being offered to other members or persons on an external waitlist.

3. The New Co-resident Policy

173 The petitioners say that the New Co-resident Policy adopted by the membership in September 2018 is unfairly prejudicial to them and should be declared invalid.

174 As discussed above, prior to the New Policy, and pursuant to the Co-op's Occupancy Agreement, non-member adults staying in a Co-op housing unit are "visitors" and any visitor remaining in a Co-op unit for more than 90 days in any fiscal year must be registered with the Board and be subject to Board oversight. Pursuant to the original and longstanding Policy, visitors of more than 90 days were required to apply for membership in the Co-op. The scheme of the Occupancy Agreement and the Policy indicates that visitors would not count toward a member's housing needs unless or until they became associate members.

175 The New Co-resident Policy sets out definitions that are different than those provided in the Occupancy Agreement. It defines as a "co-resident" anyone who resides with a principal member for more than 60 days in a fiscal year, and as a "visitor" anyone who resides with a member for fewer than 60 days.

176 These definitions are problematic not only because of the introduction of new terminology inconsistent with the Occupancy Agreement and a different meaning of "visitor." By creating a

new category of "co-resident" who is not a member but who can occupy a unit for more than 90 days without applying for membership or otherwise requiring Board consideration, the New Co-resident policy substantively affects the relationship between member and non-member (visitor) rights set out in the Occupancy Agreement. It also creates a legal lacunae of adult persons who occupy the Co-op's units but who do not have ownership rights under the *Land Title Act*, *R.S.B.C. 1996, c. 250*; membership rights under the *Cooperative Associations Act*, *S.B.C. 1999, c. 28*; or tenancy rights under the *RTA*.

177 Before me, the Board took the position that the New Co-resident Policy should be taken to amend the Occupancy Agreement to the extent of its inconsistency. However, a change to the Occupancy Agreement requires a special resolution pursuant to s. 28.02 of the Occupancy Agreement and s. 68(2) of the *Act*.

178 The New Co-resident Policy is therefore invalidly enacted to the extent that it adds a new definition of co-residents that is inconsistent with the Occupancy Agreement, as notice of a special resolution was not provided and it was adopted without a special resolution passed by the membership. Pursuant to s. 28.02 of the Occupancy Agreement, it has no effect.

179 I will nevertheless address the question of whether such a change is oppressive or unfairly prejudicial in the context of this petition. In my view it is.

180 The foundational tenet of the Co-op as expressed in its Rules and Occupancy Agreement is that it is owned and occupied primarily by its membership. Members must contribute to the governance and maintenance of the cooperatively owned affordable housing which is the Co-op's purpose.

181 The New Co-resident Policy not only conflicts with ss. 7 and 24 of the Occupancy Agreement, it conflicts with the scheme of the Co-op Rules and Occupancy Agreement as a whole. This includes the provision that requires non-members to register with the Board to stay in a unit, and membership approval for any sublet of a unit to a non-member on strict limitations. To allow co-residents to be resident in the Co-op without becoming members or associate members undermines the Co-op's mandate and purpose to provide affordable housing to its members through cooperative principles.

182 I am aware of the Co-op's concern that open and voluntary membership is one of the International Co-operative Principles. I do not consider that the requirement of membership for adults residing at the Co-op conflicts with this principle. Persons who do not wish to be members need not reside at the Co-op. The nature of the Co-op is that it provides both significant benefits *and* obligations to its members. The benefits of membership include the ability to occupy much sought-after affordable housing in Vancouver. The obligations of membership include significant participation requirements, as well as financial requirements. There is nothing that I can see in the International Co-operative Principles that would require cooperative housing associations to provide the main benefit of membership, affordable housing owned by the Co-op, to persons who do not voluntarily wish to become members.

183 I also note that there may be cases where, for financial or other important reasons, a

cooperative association with similar principles and rules might choose to extend participation in its key membership rights (occupancy of a unit) to non-members without requiring them to participate in the obligations of membership in exchange for increased rent or some other benefit to the Co-op. However, one would expect some evidence of the reason for making such a fundamental change, such as financial necessity, and a legal mechanism for creating those rights, such as a tenancy agreement between the non-member and the Co-op as owner of the unit. I have no such evidence or mechanism here.

184 Most significantly in this case, the inclusion of adult non-members towards the household count of a cooperative owned unit significantly affects the legitimate expectations of the Co-op's under-housed members. Specifically it allows non-members to have access to housing units in priority over longstanding under-housed members without going through any membership process and without membership obligations. Furthermore, it allows over-housed members to continue to occupy units that the members themselves do not require. The effect of this is to privilege over-housed members and non-members above under-housed members in the allocation of the Co-op's larger and more desirable units.

185 I find that the petitioners have established that the scheme of the Occupancy Agreement and existing Policies that linked membership to occupancy, and gave non-member residents the status of a visitor only, gave rise to reasonable expectations on their part. Specifically, the petitioners had reasonable expectations that non-members would not have access to larger units before they did, and that visitors as defined under the Occupancy Agreement would not count toward an over-housed member's housing requirements unless or until they became members themselves.

186 I find that the introduction of a new type of permanent resident that is not a member, associate member, or minor child of either of these in the New Co-resident Policy was a breach of those legitimate expectations.

187 I also find that the effect of the New Co-resident Policy is to substantially and unfairly prejudice the petitioners and other under-housed members of the Co-op. The effect of the New Co-resident Policy is to further limit the ability of the Co-op to provide adequate housing to its under-housed members beyond the already significant limitations presented by the ability of over-housed members to take in new housemates willing to become members.

188 I declare that the portions of the New Co-resident Policy that create and reference co-residents as persons that may be permanent residents of a Co-op unit without applying for and obtaining associate member status are invalid, as detailed below in my order. I consider that these provisions can be properly severed from the remaining provisions of the New Co-resident Policy that do not run afoul of the Co-op's Rules or the oppression remedy, and the existing policies relating to Subletting and Policy VIII Guest/Associate Member Status also remain in effect. There is no indication in the materials before me that they have been repealed in any event. It is open to the Co-op to pass additional or new provisions to amend their associate member policies, provided that the requirement of adult membership or associate membership is maintained for the purpose of calculating household size and housing allocation, and that adults without membership status are governed by the visitor policies in the Occupancy

Agreement and the visitor-related policies.

4. The New Policy

189 The two elements of the New Policy adopted by the Co-op members in 2018 that the petitioners challenge are the Extra Bedroom Allowance and the Extended Family Allowance. I will first address whether the petitioners had reasonable expectations with respect to each of these policy changes, and then I will address the question of whether their adoption by a significant majority of Co-op members can and does amount to oppression or unfair prejudice.

The Extra Bedroom Allowance

190 The petitioners challenge the Extra Bedroom Allowance in the New Policy. Those provisions are set out in bold below in the definition of "Over-housed" in the New Policy and in the first clause of that New Policy as follows:

> Over-housed: A co-op member is over-housed when living in a unit where there are more bedrooms than people in the household size. (For example, a household of 2 people is over-housed in a 4-bedroom unit.) **Except that: existing members with one spare bedroom resulting from a reduction in household size are not considered over-housed. (For example, a household of 1 person is not considered over-housed in a 2-bedroom unit if there was a reduction in household size.)**
>
> 1. The co-op will use the following standards in determining the appropriate unit size for each household size:
>
> ...
>
> There should be no fewer than one person per bedroom. **There is an exception for existing members where there has been a reduction in household size: there should be no fewer than one person per bedroom plus one. For example, two people are not over-housed in a 3-bedroom unit if there was a reduction in household size**.
>
> [Emphasis added.]

191 On its face the Extra Bedroom Allowance is designed to and does fundamentally alter the principle of unit allocation on the basis of housing need, by privileging the maintenance of an over-housed member in their unit, over the needs of an under-housed member to access that unit, as those concepts have been defined by the Co-op for almost 40 years. There is no question that was the intent of the Extra Bedroom Allowance. Although I was provided with no evidence from the Board as to its purposes, it is clear that the Board and the members intended to change this balance between the maintenance of existing housing unit allocation on the one hand and the housing of members on the basis of housing need on the other, and to do so in a way that favoured over-housed members and maintenance of the status quo.

192 The Extra Bedroom Allowance also potentially benefits existing members that have

appropriately sized units, in that it assures them that they will be able to remain in their units even if their household size shrinks.

193 I find that the Extra Bedroom Allowance was a breach of the petitioners reasonable expectations with respect to the allocation of Co-op housing units on the basis of housing need. The scheme of the Policy in place when they accepted a unit in the Co-op in 2013 was to primarily allocate housing units on the basis of housing need based on the size of a member's household. Although some allowance was provided through a provision of grace periods for persons whose household size was reduced, fundamentally the expectation of the Rules and Policies was that housing need was paramount.

194 The Extra Bedroom Allowance represents a fundamental change to this principle and policy and I find it breached the petitioners' reasonable expectations regarding housing allocation.

195 I will discuss the question of whether it is oppressive or unfairly prejudicial after reviewing the other challenged component of the New Policy: the Extended Family Allowance.

The Extended Family Allowance

196 In addition to the changes to allow an extra bedroom and non-members to reside in Co-op units and count toward the member's housing needs, the New Policy also introduced an expansion of family member entitlements to occupy the Co-op Units and to be included in the member's housing requirements.

197 The previous Policy did not require young children of a member to apply for or become associate members. While the age at which a child of a member was no longer considered a child was not entirely clear, on a holistic reading of the previous Policy I find that the expectation was that by the time a child was 19 years of age they would be required to apply for associate membership to continue to reside at the Co-op.

198 Children were not counted toward the housing needs of a member unless they were cared for by the member at least 3 out of 7 days a week or 22 weeks a year.

199 Adult family members could be included in the housing needs of a member under the old Policy by way of external application for membership in the Co-op after a member had been resident for at least a year and the family member had been on the list for three months.

200 The New Policy significantly expands what may be considered a member's housing needs to include non-member adult family members, and adult children no longer resident at the Co-op. The provision including those family members, as well as adult children throughout their undergraduate and post graduate studies to the point of "stability" for two years, is a significant extension of the meaning of a member's housing requirements.

201 For similar reasons that I found that the extension of residency rights and member housing requirements to adult non-members was a breach of the reasonable expectations of the

petitioners, I find that the extension of these rights to adult family members who are not members is a breach of the legitimate expectations of the petitioners.

202 It is always open for adult family members, including children over 18, who meet the primary residency requirements in the Rules and Occupancy Agreement to apply for associate membership to begin to live or to continue to live with a member. Other Co-op policies also give them priority for membership should they return to the Co-op after an extended absence, or allow their family members to apply for a larger unit to accommodate them back in the member's unit after they have left.

203 To include such persons in the housing requirements of a member when they do not meet the Co-op's residency requirements for membership and have not applied for membership is contrary to the scheme of the Co-op and its Rules as I have found them. It is particularly contrary to the legitimate expectations of members such as the petitioners with respect to how housing units will be allocated on the basis of need and membership.

204 On the other hand, I am not convinced that the inclusion of a member's children under the age of 19 who are resident less than 60 days in a member's unit engages the same type of expectations. These children were never required to apply for membership or to contribute to the Co-op as members. I also consider that undergraduate students who are associate members could also continue to meet the residency requirements of the Co-op in appropriate circumstances, even if they stay in student housing 8 months a year. That will be for the Co-op to decide.

205 Overall, I find that the petitioners have a reasonable expectation that household need of members will not be defined by the needs of non-member adults, whether they be children, siblings, or parents. There are processes within the existing policies for such family members to apply for associate membership and be counted towards household size where appropriate.

206 I also find that inclusion of these non-member adults in the definition of the household needs of members under the New Policy significantly reduces the opportunity of the petitioners, and other under-housed members, of obtaining adequate housing within the Co-op. I find these aspects of the New Policy to be a significant breach of the petitioners' legitimate expectations.

Oppression and Unfair Prejudice

207 The effect of the Extra Bedroom Allowance and the Extended Family Allowance was to remove all but one of the households from the 2018 over-housed list. For the 13 households that were under-housed, this change means that it is much less likely than before the policy amendments that a larger sized unit will become available to them.

208 There is no question that the challenged new policies were designed to and do benefit existing over-housed and adequately-housed members at the expense of the under-housed members. I have found that these changes breached the reasonable expectations of the petitioners. The more difficult question is whether the Board and memberships' breach of the petitioners' expectations was oppressive or unfairly prejudicial.

209 These policies were adopted not just by the Board, but by a significant majority of the Co-op's membership. Only 25% of the members voted against these changes, and there were no abstentions. I must therefore carefully consider this decision, giving due weight to the democratic process in the context of cooperative housing and the interests of the petitioners and other members.

210 I find on the evidence that the Co-op has struggled in good faith to bring in changes to the old Policy for a number of years, but that the personal interests of the Board and the members cannot help but be engaged in this difficult issue. I do not agree with the petitioners that the time it has taken for the development of the New Policy, or the fact that their legal proceedings may have factored into the views of the membership, to be evidence of bad faith on the part of the Board or the membership.

211 However, the Co-op provided no evidence or explanation as to its purposes or goals in introducing the Extra Bedroom Allowance and the Extended Family Allowance. The minutes of the meetings provided suggest that their purpose was expressly to allow over-housed members to remain in units that would otherwise be required to be provided to the Co-op's under-housed members.

212 In the end, I have little to no evidence of the competing interests that were weighed by the Board in putting these one-sided changes to the membership. The interests represented by the amendments, as they were put to the membership, mostly promote the vested interests of the majority of members in maintaining their current housing unit allocation. I am unable to conclude that Board reached a fair resolution of conflicting interests, or that such amendments can fairly be said to be in the best interests of the Co-op as those interests are articulated in the Co-op's foundational documents.

213 In a cooperative housing association where all the units are collectively owned and where the unit allocation for the last 40 years has been on the basis of housing need, this is a significant departure. While reasonable expectations must take into consideration changes to practices and policies over time (*Radford* at para. 119), these are very substantial changes to the petitioners' reasonable expectations at the time they became members of the Co-op. The most significant of those expectations was that, in accordance with the values and mandate of the Co-op, housing allocation would be distributed based on household size and housing need, and that the under-housed members would be given priority with respect to access to appropriately-sized units above non-members and at the end of the applicable grace period for over-housed members.

214 I find that the effects of the identified portions of the New Policy to be harsh, burdensome, and inherently unfair, particularly in the context of a Co-op that has such a longstanding under-housed population. After considering the mission statement of the Co-op, its values, and the stated purpose of the New Policy, I find that the changes are such a marked departure from the reasonable expectations of under-housed members of the Co-op that they are oppressive and unfairly prejudicial within the definition of s. 156 of the *Act*.

215 Specifically, I find that the following provisions of the New Policy are oppressive and unfairly prejudicial to the interests of the petitioners and other under-housed members and should be struck from the New Policy for this reason:

i. The Extra Bedroom Allowance;

ii. Portions that refer to or allow for non-member residents adults to count towards the "household" or "household size";

iii. Reference to the provision of sufficient bedrooms to periodically house "family members" resident in the unit at least 60 days in a fiscal year;

iv. Reference to the provision of sufficient bedrooms to periodically house "young adult children living away from home while attending post-secondary educational/training institutions; and

v. The provision that the "Board may consider adult children no longer residents of the co-op when they have completed post-secondary education and/or have had a stable living situation outside the co-op for a period of two years."

216 Generally, I find it is possible to sever the offending portions of the New Policy, while leaving the rest of the New Policy intact, although some clarification is likely required to address the inclusion of children who are 18 and under and permanent residents. I have attached the form of the New Policy with the ordered provisions struck out as Schedule A to these reasons.

Other Relief Sought

217 In addition to seeking orders with respect to the policies and the Board's conduct with respect to them, the petitioners also sought orders directing the Board to give immediate notice to over-housed members to move, and that the petitioners be provided a larger unit, or at the least that the next under-housed member who qualifies for such a unit be provided with that unit.

218 The evidence suggests that there are no current vacancies in any of the larger units at this time. However, based on the evidence before me, I am concerned that at least one three-bedroom unit should have come available since 2015 when the petitioners were advised they were at the top of the list. The information provided by the Board pursuant to Justice Abrioux's order suggests this was the case, but does not provide the detailed information required to establish the units at issue and the various members' specific interests.

219 All of the units belong to the membership, and the allocation of the units is an issue of concern to all the members and one that cannot help but give rise to vested interests on the part of those administering the policies. I understand that an arms length management company has been engaged to assist with some of these functions, but I find that much greater accountability and transparency of the membership to each other and their Board is required.

220 I therefore order that the Board shall prepare an accounting of the number of household members in each Co-op unit for each year since 2013, stating the number of principles

members, associate members, under age dependents, adult associate members, and any non-member adults staying in the unit. That accounting must also show the status of each unit as adequately housed, over-housed or under-housed in accordance with these reasons to the best of the Co-op's knowledge, together with the date that status began and expiry date of any applicable grace period applicable to that unit. It must also show the move in or move out date of the principle members to each unit. I consider that all members of the Co-op are likely entitled to this information on an ongoing basis, but in the absence of argument on this point I will only require that it be provided to the petitioners at this time.

221 The petitioners are also entitled to a list of all vacancies and how they were filled since 2013, and a current copy of the Co-op's internal waitlist.

222 I note that the Co-op's current and prior policies contain a provision that says the Board may give priority to members on the waitlist based on disability. The Board is aware that the petitioners' 12-year old son has a disability that requires him to have his own room, but says that this priority is a discretionary one and that the Board need not give the petitioners priority for this reason.

223 While I agree that the Board's policy language confers a discretion, compliance with the *Human Rights Code*, *R.S.B.C. 1996, c. 210* is not discretionary. It is not in this Court's jurisdiction to hear human rights complaints at first instance, nor was the relief pled properly before me, and so I will not grant relief directing the Board to accommodate the petitioners at this time: see *Seneca College v. Bhadauria*, *[1981] 2 S.C.R. 181*. Of course, this does not and should not prevent the Board from re-considering its position in this regard, or the petitioners from seeking relief from the BC Human Rights Tribunal if appropriate.

224 The petitioners shall have leave to apply before me to pursue those portions of their petition that I have adjourned to address the issue of their entitlement to a larger unit once the disclosure ordered above has been provided on the terms set out below.

DETAILED SUMMARY OF ORDERS

225 In conclusion, I make the following declarations and orders:

1) The Board's failures to require over-housed members to accept the first available appropriately sized unit after the expiry of the applicable grace period pursuant to the Policy was oppressive and unfairly prejudicial to the petitioners and other under-housed members on the internal waitlist;
2) The Co-op must offer every appropriately sized unit to over-housed members of the Co-op before these units are offered to other members on the internal waitlist, or persons on the external priority or external waitlist;
3) The Co-op must ensure that if an over-housed member declines the first available appropriately sized unit under the New Policy, that that member be required to

accept and promptly move to the second appropriately sized unit that comes available;

4) The following portions of the New Policy are oppressive, unfairly prejudicial, and shall be struck from the New Policy:

i. The Extra Bedroom Allowance;

ii. Portions of the Extended Family Allowance as follows:

* Provisions that refer to or allow for non-member resident adults to count towards the "household" or "household size";

* Reference to the provision of sufficient bedrooms to periodically house "family members" resident in the unit at least 60 days in a fiscal year;

* Reference to the provision of sufficient bedrooms to periodically house "young adult children living away from home while attending post-secondary educational/ training institutions;" and

* The provision that the "Board may consider adult children no longer residents of the co-op when they have completed post-secondary education and/or have had a stable living situation outside the co-op for a period of two years;"

5) The New Policy shall be severed and amended as shown at Schedule A;

6) The following portions of the New Co-resident Policy are oppressive, unfairly prejudicial, and were invalidly enacted and therefore of no force and effect and shall be struck:

i. The reference to "co-resident" in each of the third and fourth bullet points under the heading "Purpose of the Policy;"

ii. The third and fourth paragraphs under the heading "Definitions;" and

iii. The heading "New Adult Residents" and all paragraphs in that sub-heading;

7) Within 60 days of this order, the Board must prepare an accounting of the number of household members in each Co-op unit since 2013 and provide it to the petitioners, including the following information:

i. The unit size and location;

ii. The number of principal members, associate members, under age dependents, adult associate members, and any non-member adults residing in the unit;

iii. The status of each unit as providing adequate housing, over-housing or under-housing pursuant to these reasons;

iv. The date that status began;

v. The expiry date of any grace period applicable to that unit, and the date of any rights of refusals were exercised; and

vi. The move in and move out date of the principal member to each unit;

8) Within 60 days of these reasons the Board shall provide the petitioners with a list of all unit vacancies since November 2013 in date order stating: the name of the principal member that took up the vacancy, their household size, how many residents had membership status and how many were non-member adults, which waitlist they were on, and the over- or under-housing status of any member accepting the vacancy;

9) Within 60 days of these reasons the Board shall provide the petitioners with an up to date and unsevered copy of the internal waitlist; and

10) The relief sought by the petitioners at paragraphs 6, 7 and 8 of the petition is adjourned, with leave to the petitioners to bring an application in relation to some or all of the relief sought there within 120 days of the disclosure ordered above being provided to them. Any relief sought in that application that might require another member to move units must be on notice not only to the Co-op but to that member directly, and I shall remain seized of that application.

226 The petitioners shall have their costs at the usual scale against the Co-op, subject to any offers to settle, agreements between the parties, or other submissions on costs that the parties may have. Should either party wish to make submissions on costs, they shall file and serve an application setting out their grounds for a different costs order within 30 days of this order and make arrangements with the Registry to appear before me.

F.V. MARZARI J.

* * * * *

SCHEDULE A

The New Policy shall be amended in accordance with the following required deletions and additions:

Definitions

Household is the co-op member, associate members, and all children aged 18 or under who reside with the co-op member [and all other residents of a unit] [Editor's note: Text in brackets is struck out in the original].

Household size is the number of members, associate members, and children under 18 that are full-time permanent residents of a unit as well as the acceptable part-time or periodic occupants as set out in #2 below.

Over-housed: A co-op member is over-housed when living in a unit where there are more bedrooms than people in the household size. (For example, a household of 2 people is over-housed in a 4-bedroom unit.) [Except that: existing members with one spare bedroom resulting from a reduction in household size are not considered over-housed. (For example, a household of 1 person is not considered over-housed in a 2-bedroom unit if there was a reduction in household size.)] [Editor's note: Text in brackets is struck out in the original]

Under-housed: A co-op member is under-housed when living in a bachelor unit or in a unit where there is more than one person per bedroom. (For example, a household of 3 people is considered under-housed in a 2-bedroom unit.)

1. The co-op will use the following standards in determining the appropriate unit size for each household size:
    * The usual co-op formula for an appropriately sized unit at the time of intake/move-in is one person per bedroom.
    * There should be no more than two people per bedroom.
    * There should be no fewer than one person per bedroom. [There is an exception for existing members where there has been a reduction in household size: there should be no fewer than one person per bedroom plus one. For example, two people are not over-housed in a 3-bedroom unit if there was a reduction in household size.] [Editor's note: Text in brackets is struck out in the original]
2. If units are available, members will be provided with sufficient bedrooms to house:
    * The member and the member's household [all other residents living on a full-time permanent basis] [Editor's note: Text in brackets is struck out in the original]
    * Children on a part-time basis (at least 60 days in the past fiscal year) due to custody arrangements; documentation of the child's or children's status is required
    * Youth who move out will be considered residents until age 18
    * Foster children [or family members] [Editor's note: Text in brackets is struck out in the original] on an interim basis (at least 60 days in the past fiscal year)
    * Care-givers for members with special needs
    * Members with medical conditions requiring an additional bedroom

[* Young adult children living away from home while attending post-secondary educational/training institutions]

[Editor's note: Text in brackets is struck out in the original]

    * Dependent adult members with disability support needs.

[3. The Board may consider adult children no longer residents of the co-op when they have completed post-secondary education and/or have had a stable living situation

outside the co-op for a period of two years.] [Editor's note: Text in brackets is struck out in the original]

4. Members must provide documentation acceptable to the co-op if required by the Board.
5. Members must advise the co-op's management company in writing of any change in household size within 30 days.
6. When members become over-housed, they must put themselves on the Internal Wait List and may specify which units they're interested in moving to. When a move is motivated by over or under housing, the Board will reimburse the Member up to $400.00 per household upon submission of receipts. (cleaning costs, hook up, moving costs).
7. The co-op will inform over and under-housed members whenever an appropriate sized unit becomes available.
8. The Board may approve a request by an over-housed member for an exemption to the requirement to move:
    * Where age or medical conditions make a move inadvisable or impossible upon provision of appropriate documentation, or
    * For 18 months following a bereavement.

In other cases, the co-op will require a household that is over-housed to move to an appropriate sized unit when one becomes available.

9. Members required to move may turn down one offer of an appropriate size unit. Members must accept the offer of a second appropriate size unit, unless there is a valid reason acceptable to the co-op, as outlined in #8.
10. Any member who is under-housed will be entitled to apply for a larger unit in the co-op.
