



LEGAL COOPERATIVE FRAMEWORK ANALYSIS

Within the ICA-EU Alliance

NATIONAL REPORT of CANADA

I. Introduction

This report was produced within the investigation of the Legal Cooperative Framework Analysis initiated by the International Cooperative Alliance (ICA) and its regional offices. The investigation is carried out in the framework of an alliance signed between the European Union and the ICA for the 2016-2020 period, which aims to strengthen the cooperative movement and its capacity to promote international development.

The analysis of the legal framework seeks to improve the knowledge and evaluation of cooperative legislation, with the aim of ensuring that legal regulations recognize the specificities of the cooperative model and ensure equal conditions, compared to other forms of association. This analysis will also serve ICA members as input into their advocacy and recommendations regarding the creation or improvement of legal frameworks, to document the implementation of cooperative laws and policies, and to monitor their evolution.

This report does not deal generally with the law applicable to credit unions, caisses-populaires, or federations of either of them. Although they are also co-operatively organized, they are subject to different legislation than the cooperative legislation and another report would need to be done with respect to them. The only exception is the brief discussion herein of 'federal credit unions' which are basically banks at the federal level with credit union characteristics.

In line with the objectives set out in the ICA-EU Project, this report aims to provide a general understanding of Canadian cooperative legislation and an assessment of the degree of its ability to promote the development of cooperatives. Recommendations are also made for the improvement of legislation in order to overcome some difficulties that cooperatives are currently facing.

The document has been prepared by Frank Lowery, formerly Senior Vice-President, General Counsel and Secretary of The Co-operators Group Limited, a large financial services cooperative in Canada which is also a member of the International Co-operative and Mutual Insurance Federation, as an independent expert. Mr. Lowery retired from The Co-operators as of December 31, 2017 and though still a lawyer 'on the rolls' in the Province of Ontario, is no longer practising law and has an 'exempt' status from the Law Society. As such he cannot provide legal advice in Ontario and nothing herein is intended nor should be taken as legal advice. Recourse to primary statutes, regulations, cases and materials should be had by the reader to ensure the accuracy and interpretation of the provincial, territorial and Canadian laws herein referenced. In addition, should the reader want legal advice with respect to any of the matters discussed in this chapter, they should consult qualified and licensed lawyers in Canada.



"This document has been produced with the financial assistance of the European Union. The content of this document is the sole responsibility of the International Cooperative Alliance, and in no way can it be considered to reflect the views of the European Union."



Mr. Lowery researched and prepared responses to the questionnaire prepared by the International Cooperative Alliance and its regional offices in preparing this report. Any opinions expressed in this report are his opinions, particularly as they relate to recommended changes to the law or to governmental policies.

The inputs from the expert and from the Canadian member organization of Cooperatives of the Americas were recollected through a questionnaire prepared by the International Cooperative Alliance and its regional offices. The questionnaire was sent in its entirety to all members in Canada and they could decide whether to answer or not.

II. National Cooperative Legislation of Canada

i. General Context

Canada is a 'federation' with a federal government (the 'Canadian' government), provincial governments and territorial governments. The powers available to each level of government are divided in the Canadian Constitution between the Federal Government and the governments of each province (each province basically having the same powers). At this point in time the three territories effectively have powers derived from the Federal government. Each province and territory have their own specific cooperative legislation separate from the Canada Cooperatives Act ("CCA") at the federal level.

The Government of Canada through the department of Innovation, Science and Economic Development, Canada provides an excellent 'Information Guide on Co-operatives – Co-operatives in Canada'¹. This guide was 'developed in partnership with the provinces and territories and was designed to provide Canadians with essential information on the co-operative business model.' More particularly it provides a comprehensive description of: What is a cooperative? How is a cooperative different from other business forms? Values and Principles of a Co-operative, structure of a co-operative, the seven steps [in Canada] in forming a co-operative, developing the business plan of a new co-operative and frequently asked questions about new co-operatives. The guide also gives a summary review of the co-operative legislation in Canada, the ten provinces and the three territories.

Although the CCA sets out the parameters for the incorporation of Canadian co-operatives as well as how they must operate to be under the jurisdiction of the Act ('on a co-operative basis' as defined in section 7 of the Act), and Provincial and Territorial co-operative legislation provide for co-operatives incorporated or operating in their jurisdictions, co-operatives operating in different areas of the economy and country, including federal co-operatives, are also subject to laws of general application applicable to for-profit stock corporations or in the case of not-for-profit cooperatives, to laws of general application applicable to non-for-profit organizations.

Both the Federal and the Provincial level of government have authority over cooperatives in their respective jurisdictions. This is based on the division of powers in the constitution as they have been interpreted by the courts over time. Neither level of government has exclusive jurisdiction over cooperatives.





As noted, cooperatives operating in Canada are subject to laws of general application unless they are otherwise specifically excepted. Also, to the extent there are co-operative like entities, or entities structured with co-operative characteristics, within an exclusive area of jurisdiction of one level of government, those entities are solely within the jurisdiction of that level of government. A good example of this would be federal banks with credit union characteristics. You can find a good discussion of the division of powers in Timothy Petrou's chapter in the 'International Handbook of Cooperative Law'ⁱⁱ.

We should note that at the time of publication of the International Handbook of Cooperative Law, credit unions in Canada could not incorporate federally and this is noted by Mr. Petrou.ⁱⁱⁱ Since then the federal government has amended the Bank Act, which is in one of their areas of exclusive jurisdiction, to permit provincial credit unions to 'continue' under that act, effectively becoming Banks with credit union characteristics.^{iv} They are also often referred to as Federal Credit Unions, but technically they are actually Banks under the Bank Act.

"S.C. 2010, c. 12, the Jobs and Economic Growth Act, sections 1894-2093 and 2135, came into force December 19, 2012, and established the new national framework for credit unions, based on the framework applicable to banks, to enable credit unions to be incorporated and continue at the federal level. The framework contains unique co-operative elements for federal credit unions and establishes transitional elements to facilitate the migration of credit unions to federal jurisdiction"^v

Although it can be argued that the national law applicable to credit unions in Canada is now the Bank Act to the extent it facilitates "federal credit unions" and possibly the Cooperative Credit Associations Act which allows provincial credit union entities to be registered under that Act in order to be subject to federal oversight, most of the law and history relating to credit unions in Canada is and has been at the provincial level. The reader is encouraged to research credit union and caisses populaires legislation at the provincial level as well as looking at federal legislation, as this is where most of the history and legislative activity with respect to credit unions resides. Each province has credit union and/or caisses populaires legislation, though apparently no such legislation currently exists in Canada's three territories.

In understanding the effect of provisions regarding cooperatives in the Canadian constitution, it is important to note that the Canadian constitution is not just one written document. The 'Canada Guide on The Constitution Act of Canada'^{vi} is a useful guide which the reader can access to more fully understand this.

The effect of our constitutional provisions and case law with respect to co-operatives in Canada, is that incorporators of cooperatives in Canada or one of its provinces have the ability to decide at which level to incorporate based on the needs and objectives of the incorporators/members. It has also been possible in the past for certain cooperatives to incorporate by way of special legislation within a province or within Canada.

The law of general application in Canada (at the federal level of government) is the Canada Cooperatives Act, assented to on March 31, 1998 and proclaimed one year later (the "CCA")^{vii}. Other than acknowledging the existence of cooperative legislation in the other provinces and territories, this report will not deal with them in detail.





The CCA is a general law, which governs all classes of cooperatives whatever their specific goals may be other than credit unions and caisses populaires which are under provincial jurisdiction and federal credit unions which have already been addressed.

There are provisions of the CCA which apply to particular types of cooperatives, but as a general matter there are few other federal cooperative statutes relating to cooperatives. The only real exceptions relate to certain financial cooperatives and ‘federal credit unions’^{viii}. There is also a ‘Cooperative Energy Act’^{ix}. This was a special purpose cooperative and not one which is within the purview of this paper.

At the federal level there are specific provisions for particular types of cooperatives contained within the CCA as well as provisions for ‘cooperative’ or ‘credit union’ banks in the Bank Act. The provisions in the CCA are near the end of the Act and are referred to as ‘Additional Provisions Respecting . . . [the type of cooperative]’. In the CCA there are specific provisions respecting Non-profit Housing Cooperatives and Worker Cooperatives.

ii. Specific Elements of the Cooperative Law

a) Definition and Objectives of Cooperatives

The purpose of the CCA at the federal level is stated to be: “to set out the law applicable to the business endeavours of persons who have associated themselves in a democratic manner to carry on a common purpose; and to advance the cause of uniformity of cooperative business law in Canada”^x. The CCA does not explicitly define a cooperative using the ICA principles, but it does effectively do so through a number of provisions outside of the definitions section in the Act.

The definition of a cooperative in the definitions section of the Act is “a body corporate that is incorporated under this Act and not discontinued under this Act”. This is clearly a generic description of an organization under any Act, not of cooperatives per se. It is in other provisions that one must look for the cooperative characteristics of a cooperative incorporated under the Act. The Act requires that Articles of Incorporation must include “a statement that the cooperative will be organized and operated and will carry on business on a cooperative basis”.

Cooperative basis is defined in section 7 (1) h to f as follows: “For the purposes of this Act, a cooperative is organized and operated, and carries on business, on a cooperative basis if

- (a) Membership in the cooperative is open, in a non-discriminatory manner, to persons who can use the services of the cooperative and who are willing and able to accept the responsibilities of membership;
- (b) Each member or delegate has only one vote;
- (c) No member or delegate may vote by proxy;
- (d) Interest on any member loan is limited to a maximum percentage fixed in the articles;
- (e) Dividends on any membership share are limited to the maximum percentage fixed in the articles;
- (f) To the extent feasible, members provide the capital required by the cooperative, with the return paid on member capital not to exceed the maximum percentage specified in the articles;



"This document has been produced with the financial assistance of the European Union. The content of this document is the sole responsibility of the International Cooperative Alliance, and in no way can it be considered to reflect the views of the European Union."



- (g) Surplus funds arising from the cooperative's operations are used
 - (i) to develop its business,
 - (ii) to provide or improve common services to members,
 - (iii) to provide for reserves or the payment of interest on member loans or dividends on membership shares and investment shares,
 - (iv) to community welfare or the propagation of cooperative enterprises, or
 - (v) as a distribution among its members as a patronage return; and
- (h) it educates its members, officers, employees and the public on the principles and techniques of cooperative enterprise.”

Every cooperative incorporated and organized under the Act must operate on a ‘cooperative basis’ as defined in the Act. If they do not, the Act provides remedies for members and other interested persons to challenge the cooperative in court for failure to operate on a cooperative basis.

It should be noted as well that the current Canada Cooperatives Act was developed using the Canada Business Corporations Act as a model so there are now elements in the Act, particularly in the area of remedies and penalties, which parallel those for for-profit stock corporations although most of them have not yet been judicially considered in a cooperative context.

Although the CCA does not specifically set out the objectives or purpose of a cooperative, there are some suggestions as to one particular purpose which cooperatives can fulfill, which is in the area of the social economy.

Historically in Canada it was highly unusual for a piece of legislation to have a ‘preamble’, but the Canada Cooperatives Act does have one. Other newer pieces of legislation also have preambles, but it is not a uniform approach. Given the general lack of preambles to legislation in Canada, it is not entirely clear how the preamble would be interpreted, or how it would affect the interpretation of the Act, but one presumes that it would.

The preamble is interesting in that it seems to set out the “social purpose” objective of federal cooperatives by observing that: “cooperatives in Canada carry on business in accordance with internationally recognized cooperative principles; [and] *Cooperatives work for the social and economic development of their communities* through policies approved by their members” [my italicizing and bolding].

Presumably members’ policies would be adopted in accordance with the internationally recognized cooperative principles as well as the requirement that a cooperative under the Act is to operate on a cooperative basis as defined in section 7 of the Act.

The cooperatives constating documents would also set out the purpose of the cooperative, but it is not specifically prescribed in the Act.

There are restrictions on the activities which cooperatives can engage in. The CCA provides that “No cooperative may carry on the business of: A bank; A company to which the Insurance Companies Act applies;





A company to which the Trust and Loan Companies Act applies; or An association to which the Cooperative Credit Associations Act applies”.

Other than with respect to specialized cooperatives noted at the end of the Act (e.g. housing), there does not appear to be a restriction in the CCA with respect to the amount of business which a cooperative incorporated under that Act needs to do with its members. To put it differently, in theory a cooperative could do a great deal of business with non-members, but it would still need to be cautious to ensure that it continues to do business on a ‘co-operative’ basis as defined in section 7 of the Act. In looking at section 7 though, it does not explicitly set out a standard of member business or promotion for the cooperative to reach.

It should be noted as well that a cooperative incorporated under the CCA “has the capacity and the rights, powers and privileges of a natural person; and may carry on business throughout Canada”. That is to say that unless it is otherwise restricted either by law or by its own constating documents, a federal cooperative can engage in any business and conduct itself much like for profit stock corporations.

b) Establishment, Cooperative Membership and Government

The CCA states ‘a minimum of three persons’ or ‘one or more cooperative entities can apply for incorporate a cooperative under the CCA. ‘If the membership of a cooperative is reduced to a number less than the number of members required for incorporation, and if after thirty days notice remains at less than that number, the Director may require the cooperative

- (a) To apply for a certificate of continuance under the Canada Business Corporations Act, if it was incorporated with share capital; or
- (b) To be liquidated or dissolved under Part 17.’

Federal Cooperatives are registered federally and if they do business in any province or territory, they are registered ‘extra-provincially’ as well. At the federal level they are registered as cooperatives with other cooperatives, but the actual registration is with the director of the corporations’ branch who is responsible for the registration of all federal corporations. The registration is on the Canada Corporate Registry.

If a federal cooperative is ‘active’, there is a requirement to file an Annual Return. The initial application to incorporate a cooperative federally is also done through the corporations’ branch.

The ‘cooperative basis’ section of the Act, sets out the requirement that: “membership in the cooperative is open, in a non-discriminatory manner, to persons who can use the services of the cooperative and who are willing and able to accept the responsibilities of membership”.

This section is further modified by section 7(2) which provides that ‘Paragraph 1(a) is subject to any restrictions on the classes of person to which membership may be available that may reasonably relate to any business restriction set out in the articles of the cooperative and to the reasonable commercial ability of the cooperative to provide services to prospective members, as long as the restrictions are consistent with applicable laws with respect to human rights.’





“Any restriction on the class of membership in the cooperative” must be set out in The Articles of Incorporation of a cooperative incorporated under the CCA. This would suggest that there is not an ‘open door principle’, but rather open membership subject to the ability of members to use the services of the cooperative and whatever other restrictions the cooperatives puts on membership. The only other constraint is that any such restrictions need to comply with human rights law.

There are provisions in the act with respect to how members become members of a cooperative. “Subject to this Act and any provision in the articles, membership in a cooperative is governed by its by-laws.” The Act sets out that ‘no person may be admitted to membership in a cooperative until

- (a) The person has applied for membership in writing;
- (b) The application has been approved by the directors; and
- (c) The person has complied with the membership provisions required by the by-laws, including subscribing for any minimum number of membership shares, paying any minimum amount on account of the subscription price of the shares or paying any amount on account of a member loan.’

The CCA sets out the effective date of the membership if all of the above conditions have been met. This provides that the effective date of the membership should not be more than six months from the effective date of receipt of the application.

It also requires that ‘each member or delegate has only one vote’, provides that “a member has one vote on all matters to be decided by the members” and “if the by-laws provide that the voting rights of a member are vested in one or more delegates to be elected or appointed by the members, the delegates so elected or appointed may exercise all or any of those rights”.

Under the CCA one member one vote is mandatory for first-tier cooperatives, though exceptions were allowed under the New Act for former act cooperatives continued under the new Act which had weighted voting systems. Also, as per section 7(3)(a) “the articles of a federation may provide that the members or delegates of the federation have more than one vote”.

Members are allowed to leave the cooperative but this is subject to repayment of any amounts owed to the members in accordance with provisions set out in the by-laws and the Act. Subject to any other provisions set out in the cooperative’s by-laws, section 39 of the Act sets out the requirements for withdrawal as a member.

To withdraw a member must:

- Provide written notice to the cooperative
- Withdrawal will be effective on the later of the date stated in the notice and the date the cooperative received the notice
- [subject to certain restrictions as to the amounts to be paid for the membership shares] a cooperative must within one year after the effective date of the notice redeem all of the membership shares held by the withdrawing member and repay all member loans to the credit of the member



- A cooperative may delay the payment for more than one year if the payment of the required amounts to the withdrawing member would ‘adversely affect the financial well-being of the cooperative’
- Withdrawal does not release the withdrawing member from any debt or obligation to the cooperative or require the repayment of any amount for a loan which has a fixed maturity date after the effective date; this is all subject to the directors right to pay these amounts at their discretion

The CCA requires the establishment of a Board of Directors consisting of a minimum of three directors ‘or any greater minimum number that is set out in the articles. The Act does not require the establishment of other committees but it is normal for cooperatives to create committees similar in other corporations.

The Act provides that “Not less than two thirds of the directors, or any greater proportion that is provided for by the articles, must be members of the cooperative, or representatives of members that are entities or members of members that are cooperative entities.”

Section 109(1) of the Act also allows ‘the directors [to] appoint from among themselves a managing director or any committee they consider necessary.’ The board is able to delegate certain powers to the managing director or to committees of directors consisting of no less than three directors, subject to certain normal restrictions set out in section 109(3).

Control of the cooperative is exerted by members in a number of ways. The first of course is through the member’s meetings and the requirement for members to adopt or affirm by-laws by a special resolution (2/3s of members voting) and to adopt Articles or amendments thereto in the same manner and proportion. A second is the ability of members to nominate and elect members as directors. A third is the ability of members to act in member meetings and to call such meetings if necessary.

The first annual meeting of the cooperative must be called ‘not later than eighteen months after the cooperative comes into existence’ and subsequent annual meetings must be held not later than ‘fifteen months after holding the last annual meeting’ and ‘six months after the end of the preceding financial year’.

The Act provides that “a person may make an application to the court in accordance with section 329 if the person has a complaint that: A cooperative is not organized, operated or carrying on business on a cooperative basis or ... [a number of other reasons].” This allows a member or other persons to take action to deal with their cooperative if it is no longer operating on a cooperative basis. It requires going to court, but the court has wide jurisdiction to order relief including the winding up of the cooperative.

The Act also gives ‘a member or shareholder’ the right to ‘dissent’ in particular circumstances. These circumstances are basically situations where changes are being made by the cooperative which ‘adversely affects a member’s membership rights or that affects the rights of a shareholder in respect of an investment share’. It also includes other fundamental changes to the cooperative.

Members and in some cases Directors, are also able to make “Proposals” pursuant to section 58 of the Act.

A proposal is described in section 58(1) and (2) as follows:

- (1) “A member may





- (a) Submit to the cooperative notice of any matter than the member proposes to raise at an annual meeting; and
- (b) Discuss at the meeting any matter in respect of which the member would have been entitled to submit a proposal
- (2) Any member or director may, in accordance with section 290, make a proposal to amend the articles”

Other persons, namely the holders of investment shares in defined proportions, also have the right to make a proposal under section 58.

There are timing requirements for proposals and they need to be real and substantive (non-frivolous) issues, but if done properly, this is a powerful tool for members. If they meet all of the requirements, the cooperative is required to circulate the proposal with the member meeting materials and have it on the agenda at the meeting. Although this right may be used more with certain grass-roots cooperatives, in the author’s experience in 31 years working for The Co-operators Group Limited, it was never used.

Members and other persons who meet the requirement of representing “not less than five per cent of the voting rights that could be exercised at a meeting of the cooperative may requisition the directors to call...a meeting for the purposes stated in the requisition.” This is another remedy available to members and other persons, particularly investment shareholders, to hold the cooperative to account.

With respect to the ethical conduct of directors, the CCA includes the common law standard of conduct and duties expected of a director as well as a number of other specific things which a director must do.

The common law standard of care and fiduciary duty is set out in the CCA as follows: “Every director and officer must, in exercising the powers and performing the duties of office,

- (a) Act honestly and in good faith with a view to the best interests of the cooperative; and
- (b) Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”

Section 80(2) requires that every Director and Officer ‘comply with this Act, the articles, the by-laws and any unanimous agreement’.

The Act allows for directors to be removed from office ‘by ordinary resolution at a special meeting of the persons who are entitled to vote in the election or appointment of that director’. One presumes therefore that if a director violates the duties set out in section 80, this could be grounds for removal. Of course, there may be other grounds for removal as well.

c) Cooperative Financial Structure and Taxes

Under the CCA “a cooperative may be incorporated with or without membership shares and with or without the power to issue investment shares”. With respect to membership shares, the Articles must provide, “if there is to be membership share capital, whether the number of membership shares to be issued is unlimited or limited, and if limited, the maximum number of membership shares that may be issued, and, if the





membership shares are to have a par value, their par value and, if they are not to have a par value, whether the membership shares are to be issued, purchased, redeemed or otherwise acquired at a fixed price or at a price determined in accordance with a formula, and if so, the particulars of the formula.” If there are membership shares in a cooperative, there may only be one class of membership shares designated as such.

Membership capital is prescribed by the Articles and that would set out what minimum number of membership shares would need to be acquired. Membership capital including capital provided by way of member loans or investment shares must be returned to withdrawing members, or in the case of dissolution, to members at the time of dissolution, subject to the ability of the cooperative to pay as set out in the act.

There is no provision in the act requiring or permitting that contributions to the cooperative be tied to the proportional volume of transactions. Having said that, a cooperative under the Act has the powers of a natural person so it is conceivably possible that this connection would be made.

The Articles also need to make provisions if there are to be investment shares, that there will be investment shares and ‘the particulars of it [the class]’.

The CCA sets out how the surplus funds from the cooperative’s operations can be used. As noted earlier they can be used: To develop its business; To provide or improve common services to members; To provide reserves or the payment of interest on member loans or dividends on membership shares and investment shares; For community welfare or the propagation of cooperative enterprises; As a distribution among its members as a patronage return.

This would seem to restrict the payment of profits of the cooperative either to members or for the betterment of the cooperative, the community, or cooperatives more generally. If one looks at section 155 though which deals with ‘patronage returns’, though it deals primarily with the payment of patronage to members with respect to ‘the surplus arising from the operation of the cooperative in a financial year in proportion to the business done by the members with or through the cooperative in that financial year’, it also allows for a non-member patronage allocation.

With respect to a non-member patronage allocation, it can only be provided if the by-laws allow for it, and it can be provided to “persons who use the services of the cooperative but who are not members...at a rate that is equal to or less than the rate at which the surplus is distributed to members” . Reserves are permitted but not required. Also, dividends are dealt with separately in the Act from patronage returns.

The CCA gives a cooperative the rights of a natural person. Subject to whatever other restrictions might exist in the Act, in the cooperative’s by-laws or by laws of general application, cooperatives may create, buy or sell financial instruments.

The Act itself does address a few areas. For example, “Subject to [the] Act, the articles, the by-laws and any unanimous agreement, ... investment shares may be issued to any person, at any time and for money or in exchange for any thing or service that the directors may determine.”

Section 137 of the Act also allows for borrowing: “Unless the articles, the by-laws or a unanimous agreement provides otherwise, the directors may, without the authorization of the members or shareholders:





- (a) Borrow money;
- (b) Give debt obligations;
- (c) Give guarantees;
- (d) Create security interests in its property...”

The Act also provides specific details around the creation of Trust Indentures where the ‘debt obligations issued or to be issued under it are part of a distribution to the public’. Section 266 sets out what constitutes a Trust Indenture.

The members are entitled to the residue available on the dissolution of a cooperative in accordance with the provisions of the Act. Having said that, it is not completely clear as to how that distribution would occur.

Section 118 (2) provides that:

“subject to Parts 20 and 21 [which affect housing cooperatives and worker cooperatives in particular], the membership shares of a cooperative confer on their holder’s equal rights, including equal rights to

- (a) Receive dividends declared on membership shares; and
- (b) Subject to the articles, receive the remaining property of the cooperative on dissolution”

Presumably, if there was a provision in the articles setting out exactly how the residue of a cooperative is to be distributed on dissolution, this would govern in accordance with section 118(2)(b). Where there is some confusion is if there is no such provision.

In the case of a cooperative where each member only has one membership share, it is clear I would think that each member would have equal rights to the remaining property of the cooperative on dissolution. That would suggest an equal proportional distribution. But if you had a situation where members had different numbers of membership shares and the articles did not provide that those different proportions entitled them to different proportions of the residue, it would be difficult to determine what members were entitled to.

One argument might be that they would be entitled to an amount proportional to their proportionate holdings of membership shares. In the absence of any other evidence that that is what was intended, that does not seem to be a logical outcome. The provision of the former act which this section replaced provided that in the absence of any provisions in the articles, members would receive a ‘rateable’ distribution; and the rateable distribution was based on business done with the cooperative. So, it is hard to square the former concept with the idea that the new provision 118(2) would provide for a distribution based on the number of membership shares held, as though they were common shares in a for-profit stock company. It is also hard to square that idea with the provision in section 118 that ‘the membership shares of a cooperative confer on their holder’s equal rights, including equal rights to...Receive the remaining property of the cooperative on dissolution’.

Canada is a true ‘federation’ in that each of the Federal (Canadian) and provincial governments have particular taxation rights set out in Canada’s constitution. These rights have been adjudicated and defined by the courts over time. With at least one exception being Quebec, the Federal government collects the income taxes for all of the provinces as well as its own income taxes. Each province though determines their own





level of taxation and rules which are incorporated in the return which each taxpayer files in each jurisdiction. Unless sales tax is harmonized in each province with the goods and services tax, which is effectively the federal sales tax, each province collects its own sales tax. Where these taxes are harmonized, the federal government collects them.

Cooperatives are not significantly different from for-profit corporations in how they are taxed. They do receive a deduction with respect to patronage refunds, but cooperatives are not the only organizations which can make patronage refunds nor are the provisions of the Income Tax Act in this regard only available to cooperatives.

‘CoopCreator’ an online resource source for cooperatives makes the following comments with respect to the taxation of cooperatives in Canada:

Like any other business, a co-operative should generate a profit or net income to ensure its expenses are covered and it is operating in a healthy financial position. The profit (or “surplus”) a co-op makes will be subject to corporate taxes by the federal and provincial governments. To calculate the tax rate, add the federal corporate tax rate (which is consistent across the country) to the provincial tax rate (which is different in each province).

If a co-op’s profit is less than \$500,000, it is eligible to pay the federal small business tax rate. This makes the tax burden a bit lighter and is designed to help business start-ups. [i.e. not unique to cooperatives]^{xi}

Co-operatives issue returns to their members in a few different ways. Depending on how a co-op decides to do this, it can have tax advantages.

A co-op can issue a share of its profits (a dividend) to its members before it pays its tax, which lowers its overall income...Another example is retail co-operatives that issue patronage refunds to their members in proportion to how much they spend at the co-op. Doing this essentially adjusts the price of the goods a member has purchased (by giving some of their money back) and lowers the co-op’s taxable income.

Though lowering its net income to gain a tax advantage may be a good strategy for a co-op, it should also consider the impact this could have on its members. Though the co-op won’t have to pay tax on the money it distributes as worker bonuses or investment returns, this will add to the member’s taxable income...

The patronage refunds paid to members based on goods they’ve purchased...are not subject to personal income tax.”^{xii}

See also ‘Who Says Co-ops Don’t Pay Tax’, an article written by Gary Rogers, then Vice-President, Financial Policy for Credit Union Central of Canada.^{xiii}

d) Other Specific Characteristics

With a few exceptions Co-operatives in Canada are regulated and registered in the same manner as other corporations. It is possible to argue that the ability of interested persons to obtain ‘investigations’ of co-





operatives to determine if they are meeting the ‘co-operative basis’ or other ‘co-operative rules’ test under different pieces of legislation might give an avenue to co-operative industry bodies or others to try to control or reduce non-co-operative activity in co-operatives.

Cooperatives which do business, or which through their subsidiary and affiliated organizations do business, in particular areas of enterprise (like insurance) are subject to the same types of regulations, expectations with respect to client service, financial strength, etc., as other corporations. There are some exceptions to the application of the general law to specific types of cooperatives. (e.g. housing cooperatives with respect to the rights of a ‘tenant’ under Landlord-Tenant legislation).

Members of a cooperative under the Canada Cooperatives Act ‘must appoint’ an auditor in accordance with the act.^{xiv} Annually a cooperative under the Act which is not a ‘distributing cooperative’ [which is a defined term under the Act], is able to dispense with an auditor ‘by special resolution of the members’ and ‘special resolution of all shareholders, including those who do not otherwise have the right to vote’. But as noted, this must be renewed annually, otherwise it only has effect until the next Annual Meeting.

Although the CCA does not have an explicit provision with respect to promoting cooperation among cooperatives, presumably it is included by implication in the preamble to the Act where the ‘internationally recognized cooperative principles’ are referenced^{xv}. In addition, the provision dealing with the allocation of surplus provides: “surplus funds ... are used ... for community welfare or the propagation of cooperative enterprises.”

Otherwise there are no particular national incentives or legislation which promote cooperation among cooperatives.

As noted earlier, cooperatives under the CCA have the rights of a natural person. Like other corporate entities, cooperatives under the CCA can hold shares in for-profit and not-for-profit corporations. As noted above, they can also be a member of a cooperative federation. The Act also recognizes the concept of affiliates and subsidiary corporations and cooperatives.

III. Degree of Ease of National Legislation for Cooperatives

It should be noted that the opinions stated in this section are the opinions of the author, though those opinions have been affected by his knowledge of and involvement with lobbying on behalf of the cooperative sector in the province of Ontario as well as in Canada over the 31 years of his career at The Co-operators. He has also researched recent activity and consultations in the co-operative sector with respect to the issues which are of importance to them including reaching out to former colleagues working in the sector.

Tax laws, as noted earlier, basically treat co-operatives in the same manner as they treat for-profit business corporations. Although one might argue that they should be treated differently, in my view this argument would need to be associated with a commitment from the co-operative community that the purpose of the cooperatives receiving preferential treatment would be wholly in the social economy sphere, and that any





underlying value built up by such cooperatives would be retained for further cooperative development or community development, and not for the enrichment per se of the members (other than patronage and limited returns on investments as permitted by the ICA principles). In several jurisdictions in Canada including Quebec and Saskatchewan, there are provisions for indivisible reserve. In these instances, and considering the purpose and function of the cooperatives in those jurisdictions in the social economy, consideration could and should be given to special tax treatment.

With respect to the general cooperative law in Canada and its 'easiness for co-operatives', the corporate laws per se (i.e. the CCA and others) are quite favourable for the establishment of co-operatives and increasingly both the Federal Government and the provincial governments have worked to ensure that the co-operative form of enterprise gets equal billing in government offices focussed on business and enterprise development. Having said that, much of this increased focus by government on the co-operative model has come after intensive lobbying in Canada and in the various provinces for these changes.

The procedures for the legal recognition and approval of articles of incorporation of co-operatives are similar to those required for for-profit corporations. This was not always the case and the sector has lobbied for many years to ensure that it has the same electronic access and ease of filing as other organizations. In some instances, filings were still paper based and the cooperative sector has generally been lobbying to bring the cooperative sector in line with the private sector.

There are some areas where co-operatives have lobbied for and received special treatment. One of the most notable is with respect to the issuance of investment shares to members. Securities law is prescribed and regulated provincially in Canada. There is no national securities regulator. Each province deals with it in its own way. Ontario is likely the leader in this field but small start-up co-operatives sought and received special treatment with respect to the filing of prospectuses for the issuance of investment share capital to the public, where the public consisted of the members of the co-operatives. Within certain monetary parameters cooperatives in Ontario are able to issue simplified prospectuses. These special rules do not apply to larger co-operatives, especially those who want to issue shares into the public marketplace. They are subject to the same rules as any for-profit corporation.

With the few exceptions noted earlier, especially in the area of financial services, co-operatives are able to do business in most sectors of the economy. One of the challenges to co-operatives in Canada and to co-operation among and between co-operatives, has been the success of some co-operatives in certain areas leading to governments and politicians viewing co-operatives by function and purpose and not by the nature of the form of enterprise. Co-op Housing in Canada has been quite successful and though it has faced many challenges, especially around government funding, changes in government programs with respect to affordable housing, etc., over time, it is an established force in terms of recognition by government and lobbying. Other large cooperatives also engage in their own lobbying. Through coop sector industry organizations other lobbying also takes place, but its effect is often diminished by the lack of a common message and the lack of resources to pursue it.





Governments over time have also considered what they could do to help promote the cooperative form of enterprise.

A number of years ago in 2016 a task force of Co-operatives and Mutuals Canada (CMC) was set up to review the Canadian Co-operatives Act. The author was a member of that task force. To the best of our knowledge, this task force did not result in a final report but a Preliminary Report draft dated July 18, 2016 was prepared^{xvi}. A survey had been done of those co-operatives constituted or continued under that Act but few of them had any issues with it and to the extent they did, they were generally administrative.

The preliminary report reported in this regard as follows: “The survey [of members under the Act and other external stakeholders] generally indicates high satisfaction with the CCA, but it also indicates that a large number of cooperatives under its jurisdiction have found no reason to be particularly engaged with it. A few, judging by their responses, clearly have been. There is a general perspective that the Act helps to preserve the identity of the co-operative model. It also gives co-operative businesses the freedom to operate in line with universally recognized co-operative principles. There were different perspectives as to the effect modeling the CCA on the CBCA had on the Act. On respondent said that the alignment with the Canada Business Corporations Act (CBCA) is appreciated. Concern was also expressed by another respondent with respect to the alignment of the Act with certain provisions in the CBCA which should not be applicable to co-operatives (e.g. the ‘oppression remedy’ and the ‘dissent and appraisal right’).”^{xvii}

To the best of my knowledge, there are no provisions in federal or provincial guidelines which promote purchases or transactions with co-operatives. Having said that, in certain sectors governments work closely with co-operatives as certain co-operatives are delivering services and fulfilling needs in the social economy which the government would otherwise have to meet. Good examples of this are housing, daycares, energy co-operatives, certain agricultural co-operatives and health care co-operatives. There are likely more, but these are a few examples.

By way of summary, it is likely true that legislation in Canada with respect to co-operatives is ‘more in favour of co-operatives than against’. But this should be measured against the challenge which co-operatives generally face that there is very poor understanding of co-operatives among politicians and governments generally, and with the few exceptions which exist, particularly in Quebec, governments and politicians do not understand why there should be any legislation favouring co-operatives over other forms of business organization.

IV. Recommendations to Improve the National Legal Framework

- Consistent with the priorities of Cooperativas and Mutuals Canada, initiate a full review of the Canada Cooperatives Act.
- In future statutory reform, include the recognition and support of the cooperative movement and the cooperative form of enterprise, where appropriate, as a way to accomplish public policies in certain sectors or for joint co-operative/public enterprises.



"This document has been produced with the financial assistance of the European Union. The content of this document is the sole responsibility of the International Cooperative Alliance, and in no way can it be considered to reflect the views of the European Union."



- Remove corporate and for-profit share corporation concepts and remedy provisions from the Canada Cooperatives Act and provincial cooperative legislation containing similar provisions, most notably the ‘dissent’ right, the ‘investigation right’ with respect to alleged oppression and the ‘oppression’ remedy.
- Allow similar organizations (mutual, cooperatives, fraternal benefit associations, reciprocals) to merge without the need for the dissolution or sale of any of them similar to the effect achieved by the Butterfills amendment in the United Kingdom.
- Adopt legislation to support the capitalization of cooperatives, especially where they have adopted indivisible reserves which are distributed for further cooperative development when a cooperative dissolves or is sold.

V. Conclusions

As noted earlier, none of this is intended or should be relied upon as legal advice. It is an overview. More detailed examination would require the reader to look at each specific statute and to the extent legal advice is required, to consult with a lawyer or lawyers licensed to practice law in Canada, its provinces or territories.

In my review I concluded that cooperative legislation in Canada both at the national and the provincial level is generally more positive for the development of cooperatives than not. In fact, from a modernity point of view, the legislation is generally very modern and very forward looking. It is comparable in this regard to other corporate legislation, including legislation applicable to for-profit corporations.

The CCA is an excellent enabling act, but it appears to be an act in an environment where cooperatives are viewed just like any other form of business; an environment where the Government itself takes no role legislatively to promote cooperatives as a way of accomplishing Governmental public policy objectives.

I have not reviewed the cooperative legislation in other provinces or territories nor have I reviewed credit union legislation other than some brief comments on the federal credit union legislation (i.e. under the Bank Act). Some of these acts have not been amended or updated for a number of years, so they vary in terms of their modernity and incorporation of modern corporate concepts.

The recommendations which have been made in this report have been focussed on current issues and issues which cooperatives may face due to the legislation itself, the absence of other needed legislation and the inclusion in the legislation of for-profit corporation concepts which are inappropriate for democratically controlled organizations based on the ICA principles. In for profit corporations, profit is the motive; shareholder value. In this context dissent and oppression make a lot of sense, since one profit-oriented group can do things to disadvantage other profit-oriented groups. But they do not make sense in a democratically driven and controlled organization which by its very nature involves making decisions which some like and which some do not. The winners of a democratic election are not compelled in a democracy to compensate those who did not win. The ICA principles themselves set out the economic relationships which the members have, not the historical case law on dissent and oppression which has been built up for for-profit corporations.



"This document has been produced with the financial assistance of the European Union. The content of this document is the sole responsibility of the International Cooperative Alliance, and in no way can it be considered to reflect the views of the European Union."



Cooperatives were created to make capital one of the components of the success of people, not ‘the’ component and that is what the principles attempt to achieve.

Having worked 31 years for The Co-operators Group Limited, I also came to some conclusions relating to legislation governing the co-operative form of enterprise which bear mentioning and possible work in future projects launched by the International Cooperative Alliance or other cooperative bodies. They are as follows:

- Indivisible reserves are more than just nice to have. Indivisible reserves are essential to ensure the long-term success of co-operatives
- Co-operatives, especially large co-operatives, are extremely vulnerable to the ‘group think’ approach of policy-makers, legislators, and regulators to the form or forms which business corporations can take
- The slow ‘creep’ of ‘for profit corporate principles’ into the democratic cooperative form of enterprise needs to be stopped now otherwise the damage may be irreparable
- It is perfectly appropriate for the cooperative form of enterprise, where it has adopted indivisible reserves and is focussed on the social economy, to be given preference and special treatment as an integral part of public policy initiatives
- Special attention should be given to methodologies which alike similar types of organizations to merge, without the need to demutualize or deco-operativize, so long as they are irrevocably committed to functioning within and for the social economy, and with indivisible reserves
- Cooperative trade bodies should include consultative and representative bodies which include representatives from large and small cooperatives and focus specifically on promoting and facilitating cooperation among cooperatives
- More work needs to be done on identifying how cooperative capital can be used cross-sectorally within the cooperative movement, as well as between large and small cooperatives
- More attention should be given to educating lawyers (directors and managers) who are expert in the cooperative form of enterprise, in cooperative law and more particularly, in understanding and supporting the underlying cooperative principles

Hopefully this paper and the thoughts expressed herein will be of some use to the reader in considering Canadian and other cooperative legislation.

Toronto, Canada. March, 2020.

Frank Lowery

ⁱ https://www.ic.gc.ca/eic/site/106.nsf/eng/h_00073.html

ⁱⁱ Cracogna, Dante; Fici, Antonio; and Henry, Hagen, ‘International Handbook of Cooperative Law’, Springer, European Research Institute on Cooperative and Social Enterprises (Euricse), Germany, 2013

ⁱⁱⁱ Ibid.



"This document has been produced with the financial assistance of the European Union. The content of this document is the sole responsibility of the International Cooperative Alliance, and in no way can it be considered to reflect the views of the European Union."



-
- ^{iv} Legislation was adopted under the federal Bank Act in 2012 to allow for the creation of federal credit unions. On July 1, 2016, the Caisse populaire acadienne Itée (later rebranded as UNI Financial Cooperation), with its 155,000 members, became the first federal credit union in Canada., <https://www.canada.ca/en/financial-consumer-agency/services/industry/regulated-entities/banks-federal-credit-unions.html>
- ^v Legislative Update, Federal, CCH Corporate Brief, February 2013, Number 222, at page 4
- ^{vi} McCullough, J.J., “The Canada Guide on the Constitution of Canada”, <https://thecanadaguide.com/government/the-constitution/>
- ^{vii} The Canada Cooperatives Act, S.C. 1998 c. 1
- ^{viii} Co-operative Credit Associations Act, (1981, c. 48) and the Bank Act, (SC 1991, c.46, amended) section 47.01ff
- ^{ix} Co-operative Energy Act, (1980-81-82-83, C. 108)
- ^x Op. Cit., note x, Sections 3(1) (a) and (b)
- ^{xi} See <https://www.canada.ca/services/forms-publications/archived>
- ^{xii} ‘Coop Creator’, <https://coopcreator.ca/resource/taxtreatment-of-co-operative-business/>
- ^{xiii} ‘Who Says Co-ops Don’t Pay Tax’, Rogers, Gary, Coop Zone, www.coopzone.coop/wp-content/uploads/2015/077Co-optaxation
- ^{xiv} Op. Cit., note x, section 254(1)
- ^{xv} Ibid., Preamble
- ^{xvi} “Preliminary Report, Consultation on Modernizing the Canada Cooperatives Act, July 18, 2016, Co-operatives and Mutuals, Canada
- ^{xvii} Ibid., pages 4 and 5