# Worker Co-operatives and Employment Law in Canada

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# 1.0 Introduction

Worker co-operatives occupy a unique place in the economy and employment law. The employees of the organization also control the organization as owners. As a result, the workers set the rules, which they must follow. Organizationally, the government sees these co-operatives as employers and treats them as any other employer. It may be a sentiment of members in a worker co-operative that they should be able to do what they want since they are both employer and employee, but the state has different considerations. Worker co-operatives must act within the law. Among other things, this means determining if there is an employer-employee relationship. If there is such a relationship, then the co-operative must also abide by employment standards. Even if there is not, the co-operative must still comply with other legislation including human rights, occupational safety and health, and workers' compensation.

This paper will examine the relationship between worker co-operatives and employment law in Canada. It will consider the definition of an employee, the rights of members, the rights of employers, the method of proper termination and the role of labour unions. It will provide recommendations for worker co-operatives to consider as they navigate the legislation in order to create a strong co-operative and a workplace beneficial to its membership.

As a disclaimer, this paper should not be considered to provide any sort of legal advice. It merely analyzes the existing statutes and the role of employment and labour law within worker co-operatives. Before acting on recommendations set forth, directors and managers should consult a lawyer, especially one knowledgeable about worker co-operatives and employment law.

### *1.1 Jurisdictions in Canada*

Canada is a country divided into several legal jurisdictions. There is the federal jurisdiction and thirteen provincial (and territorial) jurisdictions, each with sovereign constitutional power in their areas of power. For the most part the laws concerning relations between organizations and their workers are governed, not by the federal government, but by the province or territory where they do business. Thus, even if a co-operative operates in more than one province, the employment law in each province will govern its relations with its workers in that province. This applies to about 90% of Canadian organizations.

However, some organizations come under federal employment law. These include a very specific group of organizations (which are usually not co-operatives). Radio, television and telecommunications, banking (but not credit unions), and transportation that crosses provincial boundaries, all come under federal jurisdiction.

Just to make things more complicated, the jurisdictional picture that governs co-operatives does not exactly mirror that of employment law. Thus a co-operative may be federally regulated as a co-operative, but provincially regulated in employment law.

Most co-operatives, however, are regulated provincially both in employment matters and co-operative matters.

## 2.0 Employee or Independent Contractor?

One of the key decisions worker co-operatives need to make is the relationship of the worker to the co-operative. If the worker is an employee, the co-operative must understand its

relationship and obligations as an employer. If the worker is an independent contractor[1], the co-operative must ensure that it has a relationship that truly exemplifies that status. Inaccurate classification could cost the co-operative (and the membership) time and money in addition to creating a lot of confusion and ill will. This section of the report will consider the methods of defining the relationship between the co-operative and the worker and the legal responsibilities involved in each relationship. The most important principle in understanding the relationship will be how the different parties act with regards to the other. Regardless of how the co-operative and its membership would like to define the relationship, the "law will recognize the relationship by what it really is [in actual practice], not what it is called". (Christie, 1980 p. 11).[2]

## *2.1 Definition of an Employee*

The case law recognizes employees as people who work under a contract of service (real or implied). This distinguishes those people to whom the business or individual contract for services. The distinction becomes muddied because contracts exist in both instances, which spell out the duties of the parties. What makes a person an employee instead of a private contractor is not always clear.

Canadian case law has developed protocols for identifying employees in a business relationship. Most importantly, the notion of control will determine, to a large degree, the relationship of the worker to the person or organization for which the work is being done. "Control includes the power of deciding the thing to be done, the way in which is shall be done,

[1] In this paper, "independent contractor" and "contractor" are used interchangeably, with the same meaning.
[2] The employees of a worker co-operative may be co-operative members and they may be non-members. Likewise, the independent contractors associated with a worker co-operative may be co-operative members or non-members. These distinctions will be addressed later.

the means to be employed in doing it, the time when and the place where it shall be done." (Christie, 1980, p. 20). However, control is not the only issue, as independent contractors may also give up significant control in the project as part of their contract with the other party.

Employees have a "contract of service" which may be defined when the "individual agrees to work on a full-time or part-time basis for the other party to the contract for either a specified or indeterminate amount of time" (CWCF, 1995, p. 5) In addition to the controlling function, this will also generally include a wage or other remuneration that is distinct from the chance of sharing in either the profit or the loss that the employer may enjoy (profit-sharing schemes and other incentive mechanisms are not considered in this manner as they are generally not a significant portion of the employee's income).

## *2.2 Definition of an Employer*

Traditionally, the law compares the employer to a controlling position of a different age: The Master (until early in the 20th century, the relevant statute was called the "Master and Servant Act"). Employers, by their nature, tell people what to do, how to do it, when to do it and where to do it. Of course, this could apply to a person engaging a contractor for service, although it is not the norm. More commonly, businesses engaging contractors tell the contractor *what* to do which often includes a deadline, but not usually the specifics of when, where or how. Employers, however, have an on-going relationship with the employee. As mentioned, the degree of control must be significant and will include: the authority to hire, pay a salary or wage, determine the work methods used and lay off or dismiss employees. (CWCF, 1995, p. 6) As the Canadian Revenue Agency points out, "It is the right of the payer to exercise control that is relevant, not whether the payer actually exercises this right." Participatory management schemes

do not reduce the control of the employer as the employer may alter or cease those management tools. The CRA also points out the "it is the control of a payer over a worker that is relevant, and not the control of a payer over the end result of a product or service purchased." (CRA, 2008, p.4). In this sense, the control will happen whether or not the product is successfully produced. The employer may direct the employee to other tasks that have little or nothing to do with the main purpose of the business or even for that which the worker was originally hired to accomplish.

In lieu of a written contract with the labour force or individual workers, employers may also be defined by the common law[3] obligations of the employer through an implied contract. Such obligations are also generally encoded in employment standards legislation (to be discussed later) or are part of the co-operative's assumed position in its relationship with the workers. Such obligations include (England, 2000, pp 66-72):

- Duty of Fairness
- Duty to pay for work actually performed by employee
- Duty to give notice of termination
- Duty to provide actual working opportunities
- Duty to provide a safe workplace
- Duty to provide a testimonial

The more that a co-operative assumes these duties toward the workforce, the more likely that it has entered into an employer-employee relationship with its workers.

## *2.3 Tests for Employment*

The nature of case law has been to define employees by saying what they are not: contractors. Contractors do not have an "employer-employee relationship". Instead they have a

[3] Common law refers to the body of law developed through court decisions rather than actions of the legislative body (statutes) or the executive branch (regulations). It has the same force of law as statutes and regulations, but comes from the experience of legal cases before the court.

"business relationship" or "business to business relationship". (RCA, 2008, p. 3) The organization that might have employees with a "contract of service" (called "employees") may also hire people with a "contract for services" (called "contractors"). A contractor contracts with the organization or individual to provide services or produce material. The law is clear on the name "employer" but not so clear on the name of the person or organization that engages independent contractors to perform work. We will try to use the word "engager" to make this clearer. In general, contractors will often identify themselves as a business; whereas, independent contractors may only use their personhood as the name of the business and therein lies the confusion. In general, the relationship between an independent contractor and an engager will be quite clear: independent contractors have more than one engager; they supply their own tools and equipment; they negotiate (or in some cases dictate) the method of delivery, the scope of the work, and other aspects of control. Finally, contractors do not receive a wage or salary; a payment based on services and the termination of their work is based on either the completion of a contract or a determined method to prematurely end the contract. If an organization engages the individual worker as a contractor, then they are external to the organization, even if they are working side-by-side with employees.

The body of literature has developed two methods of testing for employment: the "Four-Fold Test" and the "Business Integration Test." (England, 2000, p. 14-15) Worker co-operatives should employ both tests to periodically review the relationship with the people working for the co-operative. Each test provides a means for the co-operative to define the nature of the relationship between the individuals doing work for it.

The Four-fold Test considers four key areas: Control, Ownership of Tools, Chance of Profit and Risk of Loss. The Business Integrations Test suggests that the work being performed

is an integral part of the business. A further explanation states, "under a contract of service a man is employed as part of the business, and his work is an integral part of the business; whereas, under a contract for services, his work, although done for the business is not integrated into it, but only accessory to it". (England, 2000, p. 15) Utilizing both tests creates five significant areas for co-operatives to consider in determining employee or contractor status.

| **Area of Concern** | **Key Indicators** |
|---|---|
| Control of work life | Ability to hire, lay-off and fire; authorization of pay or remunerations; ability to determine work-methods used (where, when, how). |
| Ownership of Tools | In general, this is a further demonstration of control over the worker; however, some jobs traditionally expect the employee to provide their own tools (e.g., auto mechanics) |
| Chance of Profit | Workers are paid a piece rate, hourly wage or salary and have no further expectation of reward (beyond incentive plans). |
| Chance of Risk | While lay-offs may be a result of poor company performance, the employee will receive the same remuneration regardless of the final product. |
| Business Integration | The job is part of the on-going nature of the business. The employee typically has only one employer (or may be prohibited from working elsewhere while employed). |

The list of items in the test does not provide a simple "yes" or "no". The five areas should be considered in their totality with the overall issue of control being the main consideration. To help further understand the nature of *Contract of Service* (employees) versus a *Contract for Services* (contractors), it is important to also consider the nature of the Employment Contract. In Canada, written employment contracts may exist between employees and employers as well as implied contracts. It is a general principle that a contract exists in an employer-employee relationship and

each party has expectations and rights – whether or not the contract is written. While written contracts may clearly spell out the relationship, co-operatives should also be aware of the implied contract and how the by-laws and policies of the co-operative may influence the nature of the relationship between the worker and the organization.

## *2.4 Implied Contracts*

Whether the terms of the employment contract are written or unwritten, employers and employees have certain rights on the work site. By understanding these rights and responsibilities, co-operatives may gain a better understanding and assistance in determining whether the people who work for them are employees or contractors. To get a better understanding of this issue, a co-operative should consider: the right to delegate, the legal status of the worker, and the public image of the worker in terms of the employer. (England, 2000, p. 16). In addition, the common law obligations of the employee and the employer should also be considered. The more that a co-operative expresses these obligations through written policy or practice, the more likely that the worker is an employee.

Employers have the right to delegate work and to sub-contract work to parties other than those it employs. If the organization gives its workers the power to sub-contract then those workers are most likely contractors. While worker co-operatives may operate under consensus or participatory guidelines, the key aspect is that the organization allows the workers to make these decisions. Every organization has the legal right to delegate authority over work to an individual independent contractor or to an outside organization. In general, a corporate name may imply that a worker is a contractor. A person "doing-business-as" will likely have multiple contracts for services. However, this is not absolute and courts have overturned what is claimed by the

employer, e.g. when it is used to exploit or disguise the true nature of the worker. The public image of the worker may be used to determine if they are integral to the business. This might involve a corporate uniform or other means of familiarity that makes the worker "look like an employee." (England, 2000, p. 16)

The obligations of the employee have a common law basis to them that can inform the co-operative of the status of the worker. The more that the co-operative has a bona-fide interest in these issues or may have control or a vicarious liability concerning these issues, then the more likely the worker is an employee. The list of common law obligations is as follows (England, 2000, pp 44-65):

- To advance the employer's business interests
- To obey orders and avoid insolence
- To refrain from absenteeism and lateness
- To be honest
- To refrain from drunkenness, sexual harassment and moral impropriety
- To avoid incompetent or negligent performance of the job
- To give notice of termination
- Not to wrongfully exploit or abuse employer's business interests:
    - No secret profits
    - Employer ownership of copyrights of employee's inventions or work
    - Not compete with employer's business
    - Not misuse employer's trade secrets or confidential information
    - Meet any fiduciary obligations
    - Other conduct deemed unduly damaging to the employer

While the list may seem self-explanatory, it should be noted that other prevailing laws might limit the level of obligations. For instance, obedience to orders only includes those legal acts in Canada. Likewise, recent human rights legislation may affect how obligated a worker will be with regards to attendance and lateness depending on a host of factors including religious holidays and observances, cultural issues and even physical and mental disabilities (the employer must make reasonable accommodation, however if a condition of the job is a bona fide occupational requirement, then it can be enforced by the employer).

Several employment laws involve the question of discrimination against workers based upon grounds like race, sex, age etc. The Canadian courts have set out some basic principles here. First, an organization must not discriminate against workers unless it has a bona fide occupational requirement (BFOR) for doing so. For example, you can discriminate against women working as attendants in a men's locker room or you can discriminate against people with no legs if the job requires them to climb ladders. Second, an organization must reasonably accommodate workers who cannot do some duties (e.g. provide wheelchair access to the disabled, allow those who celebrate their Sabbath on Saturdays to avoid working that day.) Third, reasonable accommodation extends up to the point of undue hardship to the organisation (e.g. if the organization can prove that accommodating is too difficult, it may be able get a break. Obviously this threshold is higher for larger employers.)

## *2.5 Employment Standards in Canada*

As shown earlier, Canada has fourteen jurisdictions that make statutes to regulate relations between organizations and their workers. While there are many similarities among the jurisdictions, unfortunately there are also differences. Co-operative leaders and organizers should make a point of being aware of the specific rule variations in their province or territory. One common type of statute is “employment standards” (also called “labour standards” or “work standards”. These standards change and evolve with the nature of the industry and understanding of the role of the state in protecting workers from exploitation. This paper will consider federal standards as well as the provincial standards set by Ontario and Nova Scotia in order to be consistent with other areas of the report. Co-operative leaders and organizers should be aware of the specific rules in their province. Even worker co-operatives that organize as a co-operative of

contractors may need to consider the effects of these standards. As employment rules and the law change, co-operatives may find themselves in an employer relationship. In any event, the standards provide worker co-operatives with minimum thresholds of worker safety and benefits to which all co-operatives should aspire to meet regardless of the status of the people who work for them.

### *2.51 Employment Standards in Ontario*

The Employment Standards Act (ESA) of Ontario provides standards of employment that establish a minimal level of expectation between the employer and employee. These standards apply only to an employer-employee relationship. (S.O. 2000, Ch. 41, s. 1) The ESA defines an "employee" in this Act as a person who provides work for wages or provides a service for wages. Further, "wages" have the definition of "monetary remuneration payable to an employee under the terms of an employment contract, oral or written, express or implied; any payment required to be made by an employer to an employee under this Act, and any allowances for room or board under an employment contract" (S.O. 2000, Ch. 41, s. 1). This definition is significant because it appears to allow voluntary work and excludes volunteer labour from the Act, as it is not considered part of the employer-employee relationship. However, the effects of that definition will be discussed in the next section.

The ESA sets forth a number of standard workplace issues including wages, payments, vacation, holidays, hours, leaves, and reprisals. The following chart shows the basic provisions required by the ESA; however, the Act has a high level of detail with regulations that may exempt certain industries and types of workers. This presentation provides only a basic overview of what a co-operative should consider when establishing work rules.

| Area | Specifics |
|---|---|
| Payments of Wages | • In cash or cheque<br>• Distributed at workplace |
| Records | • Name, address, Date of Hire<br>• Hours worked for day/week |
| Hours of Work | • 8-hour day<br>• 48-hour week<br>• 1-hour rest period (daily)<br>• 24-hour rest period (per week)<br>• 30-minute unpaid lunch |
| Overtime | • 1.5 times pay for hours over 44 |
| Minimum Wage | • Required to pay minimum |
| Public Holidays | • Paid Day Off<br>• 1.5 times pay if working |
| Vacation Pay | • 2 weeks |
| Equal Pay for Equal Work | • No sex disparity in wages |
| Benefit Plans | • May not be based on age, sex or marital status |
| Termination Notice | • 1 week (1 year of less employment)<br>• 2 weeks (1-2 years)<br>• 3 weeks (2-3 years)<br>• 4 weeks (3-4 years)<br>• 5 weeks (4-5 years)<br>• 6 weeks (5-6 years)<br>• 7 weeks (6-7 years)<br>• 8 weeks (8 or more years) |
| Lie Detectors | • Right to refuse<br>• Right to not be asked<br>• Right to not be required |
| Refusal of Work (retail, non-restaurant) | • Public Holidays and Sundays |
| Reprisals | • Employer may not retaliate (intimidate, dismiss, or penalize) a worker for complying with or asking about the Act, or for filing a complaint and cooperating with an inquiry. |
| Liability of Directors for Wages | • Co-operatives exempt from this provision for unlimited wage liability; though the Co-ops Act provides for liability for 6 months' wages; see sec. 3.2, below. |

**Table 1: Employment Standards (source: Employment Standards Act, S.O. 2000, Ch. 41)**

Leaves of Absence have a number of rules that employers should understand. When creating a leave policy, it will be important for directors to consider these issues as well. The ESA does not require that any of these leaves be paid leaves.

| Type of Leave | Basic Level |
|---|---|
| Pregnancy | 17 weeks |
| Parental | 52 weeks |
| Family Medical | 8 weeks |
| Personal Emergency | Up to 10 days per year |
| Emergency Leave | As declared by Emergency Management and Civil Protection Act |
| Reservist Leave | For duration of deployment outside of Canada. |

**Table 2: Leaves of Absence (source: Employment Standards Act, S.O. 2000 Ch. 41, part XIV)**

## *2.6 Independent Contractors*

Employment Standards clearly applies exclusively to parties in an employer-employee relationship. However, where independent contractors are concerned, the co-operative should proceed with care in the realm of occupational safety, workers' compensation and human rights. The aforementioned areas may still place legal liability on the co-operative even if it is not the employer. If the written contract is not clear, then the cooperative may be found to be in an employer-employee relationship and liable for the acts of the worker and worker compensation claims. It is important for the co-operative to know the status of the independent contractor's insurance and workers' compensation coverage. Coverage should likely be required as a condition for receiving the contract

### *2.61 Occupational Health and Safety Law*

Canadian jurisdictions share some basic principles when it comes to Occupational Health and Safety Law. Nova Scotia provides a good example of one of the principles, which is the presumption of Internal Responsibility with respect to Occupational Health and Safety. (Occupational Health and Safety Act, 1996, C. 7) All the parties involved in the workplace share the responsibility for a safe and healthy workplace. The employee or contractor status does not diminish or enhance one's responsibility under the Act.[4] The Act requires every employer to do the following (OHSA, 1996, c. 7 s. 3):

(1) Every employer shall take every precaution that is reasonable in the circumstances to
    (a) Ensure the health and safety of persons at or near the workplace;
    (b) Provide and maintain equipment, machines, materials or things that are properly equipped with safety devices;
    (c) Provide such information, instruction, training, supervision and facilities as are necessary to the health or safety of the employees;
    (d) Ensure that the employees, and particularly the supervisors and foremen, are made familiar with any health or safety hazards that may be met by them at the workplace;
    (e) Ensure that the employees are made familiar with the proper use of all devices, equipment and clothing required for their protection; and
    (f) Conduct the employer's undertaking so that employees are not exposed to health or safety hazards because of the undertaking.

In addition, every contractor (or self-employed person) has the following obligations:

(a) Take every reasonable precaution in the circumstances to protect the self-employed person's own health and safety and that of other persons who may be affected by the self-employed person's undertaking;
(b) Co-operate with any employer, joint occupational health and safety committee or health and safety representative that may be found at a place at which the self-employed person conducts an undertaking, to protect the self-employed person's own health and safety and that of other persons who may be affected by the undertaking;
(c) Co-operate with any person performing a duty or exercising a power conferred by this Act or the regulations.

[4] The Nova Scotia Act defines an employer as "a person who employs one or more employees or contracts for the services of one or more employees, and includes a constructor, contractor or subcontractor" (OHSA, 1996, c. 7 s. 3 (p))

Co-operatives whose members include contractors, or who deal with non-member contractors, should still make requirements concerning insurance and workers' compensation.

### *2.62 Workers' Compensation*

In Nova Scotia, the language of the Occupational Health and Safety Act clearly excludes independent contractors from coverage; however, the Workers Compensation Act allows the Workers' Compensation Board to make a final determination of who is covered. In fact, the Act specifically states, "The Board may, on the application of an independent contractor, admit the independent contractor to the operation of this Part as if the independent contractor were a worker where the independent contractor performs work, the nature of which falls within the scope of this Part." (Workers' Compensation Act, 1994-95, c. 10 s. 4) This latitude may create further difficulties for co-operatives engaged in contracts for service; however, one way around this would be to require all members (contractors) to carry the appropriate level of workers' compensation insurance.

### *2.63 Human Rights*

Every Canadian jurisdiction, including the federal, has its own legislation meant to deal with human rights. However, unlike the other laws we discuss here, there is a *Charter of Rights and Freedoms* that governs all jurisdictions in Canada. But it should be noted that the Charter applies only to situations involving government institutions, laws and actions: both federal and provincial. So if a private, non-governmental organization like a co-operative discriminates against someone, that will likely be dealt with under the human rights law of the province in which it is situated.

The Nova Scotia Human Rights Act defines an employer: “"Employer" includes a person who contracts with a person for services to be performed by that person or wholly or partly by another person” (Human Rights Act, R.S. c. 214, s. 3 (e)) In other words, it covers contractors as well as employees. The Act prohibits discrimination that is defined as making a distinction “whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.” (Human Rights Act, R.S. c. 214, s. 4). The list of protected characteristics includes: age; race; colour; religion; creed; sex; sexual orientation; physical disability or mental disability; an irrational fear of contracting an illness or disease; ethnic, national or aboriginal origin; family status; marital status; source of income; political belief, affiliation or activity; that individual's association with another individual or class of individuals having characteristics referred to in clauses. It includes not only employment but also membership. Further, the Act also bars harassment of individuals based on these characteristics as well as sexual harassment. The Nova Scotia Act does appear to exempt actions that have as its goal to benefit disadvantaged persons[5]. For example, one Nova Scotia employer, Dalhousie University, interprets the language of the Act as follows:

“The Nova Scotia Human Rights Act states that furthering employment equity by preferential treatment designed to promote the welfare of any group in Nova Scotia is not a violation of the Act if it has the approval of the Nova Scotia Human Rights Commission.” At the federal level, the Employment Equity Act requires employers to take action to improve the

[5] The statute states an exemption as valid if the intent and effect is to ameliorate pre-existing conditions of discrimination against visible minorities or women.

diversity of the workforce to mirror that of the community. However, the employer is not expected to forgo essential qualifications for the job or to create unneeded positions. Ontario's Act does not provide for exceptions. Like all jurisdictions, the Nova Scotia Act exempts discrimination intended to redress past injustice to designated groups. Thus an organization can institute measures to favour women, visible minorities, aboriginals and the disabled in employment and work. Even where it is absent, the Charter insists that such an exemption be made.

While not law, co-operatives also find guidance in The Statement on Co-operative Identity that the International Co-opeative Alliance created in 1995. This statement provides a definition of "co-operative" and a clear set of values, ethical values and principles that all co-operatives should follow. The statement identifies voluntary and open membership as the first principle of co-operatives. The statement further defines this idea as follows:
"Co-operatives are voluntary organisations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination." This suggests that co-operatives should strive to create an open and honest application process that focuses on the needs of the co-operative. However, co-operatives, as social enterprises, may have more goals than to simply provide employment. For example, women construction workers may choose to create a worker co-operative for women in order to increase the experience of women in the construction industry and to provide a safe space for women to learn and excel at the trades. This meets the co-operative definition of "an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise". In Nova Scotia, such a co-operative may get approval to make the sex of a worker an essential

characteristic of the job; however, in some provinces, the effort to form such a co-operative may have to focus on recruitment strategies and be willing to accept men as workers and members.

Although the employees may control worker co-operatives, directors and managers need to recognize that they are legally employers when acting as the controlling entity of the organization and engage in an employer-employee relationship with the workers of the co-operative. As employers, they must follow the laws from the employer's standpoint and may be subject to the same penalties as any employer. Worker Co-operatives should consider the recommendations at the end of this section as they set out policies and their governance models.

### *2.64. Collective Bargaining Law*

One further statute that affects the work relationship involves trade unions. This statute usually applies only to employees and not to independent contractors. Employees have the right to have a trade union represent them in negotiations to set terms and conditions of employment. Once agreed, these terms appear in a legally binding *collective agreement* and remain in force for the life of that agreement. The co-operative is empowered to enter into such agreements. This method allows the workers to express their collective will and change the work environment by limiting the power of management. In some cases, this may include having a voice in the hiring process, the disciplinary process, scheduling of hours and work, promotions, health and safety and any other facet of work life. The ability of the labour union or management to win concessions from the other depends on the relationship between the two parties and the relative power of each organization. It is often described as an "antagonistic" relationship, though this may not always or necessarily be so. Worker co-operatives could use collective bargaining to create a formal process to limit employer's control (especially when the co-operative has

employees who are not members of the co-operative). This will be discussed in detail later in the paper.

Collective bargaining laws, like the Ontario Labour Relations Act, include several common features. Unions will be granted a certificate that makes them the sole and exclusive representative of a group of workers if they can show a minimum level of support among those workers. In most jurisdictions the union must show that a certain proportion of employees have signed union cards in order to obtain a vote. It then must obtain a higher level of support in the vote (usually a majority) in order to be certified. In a few jurisdictions, the union cards will suffice. Once the union is certified, the employer and the union must sit down and negotiate a collective agreement *in good faith*. Neither of them can engage in a specified list of *unfair labour practices* on pain of legal sanctions. One such prohibition is dismissing employees for union activity. A Labour Relations Board will order an employer to rehire that person and the courts will back this up.

The workers can change or get rid of their union at regular intervals, but the vast majority of bargaining relationships last a long time, especially after the parties get used to each other. Because first negotiations can be acrimonious, in some jurisdictions, first collective agreements can be settled by binding arbitration.

Every number of years, the parties resume negotiations to amend the collective agreement. In any set of negotiations, if the parties cannot come to an agreement, the union can strike or the employer can lock the workers out. During a legal strike an employer cannot dismiss employees for failing to come to work and generally must take them back when the strike is over. In some jurisdictions the employer is barred from hiring replacement workers during a strike.

Strikes cannot legally occur during the life of a collective agreement and all unresolved disputes over the interpretation, application and alleged violation of the agreement must be taken to binding, third party arbitration. One such dispute is over discipline and disciplinary dismissal. Union members have the right to grieve (submit a complaint over) unfair discipline. Failing agreement of the dispute, an arbitrator has the power to decide to uphold the discipline or to alter it because it is too severe.

Another major feature of collective agreements is the importance of seniority in cases of promotion, layoff, and recall from layoff. Seniority is sometimes the sole criterion, but most often it is combined with employee qualifications.

Directors, managers and other agents of the co-operatives should review the collective bargaining law in their jurisdiction and the statutory list of unfair practices to ensure that the process remains fair and limits the exposure of the co-operative to charges of unfair labour practices.

**Recommendation:** Co-operatives should clearly define their workers as either employees or contractors. If they utilize both, then the by-laws should reflect the different types of memberships and relationships**.**

**Recommendation:** Co-operatives that have contractors should require contractors to carry workers' compensation insurance.

**Recommendation:** Co-operatives should endorse and codify Human Rights legislation into their by-laws. Co-operatives should establish Employment Equity programs regardless of whether they fall under Federal jurisdiction. In Nova Scotia, co-operatives seeking to use their organization to create diversity in the industry should seek approval from the Province's Human Rights Commission.

**Recommendation:** Co-operatives should educate their directors, managers and workers on employment standards and ensure that their policies maintain these basic thresholds.

# 3.0 Co-operative Law and By-Laws

Any study of employment issues and worker co-operatives should include an understanding of the laws governing co-operatives and co-operative by-laws, and how they might interact with the relevant employment law. This report will consider the regulations of Ontario and Nova Scotia with a cursory look at the Federal level. Ultimately, the purpose will be to gain an understanding of how the by-laws and actions of the co-operative must be drafted in order to stay in compliance with employment law. Among the many aspects of employment standards, the issue of minimum wage and voluntary work may serve as a suitable example of how the various acts and codes interact. It may be inferred that the minimum standards set forth by statute will have a similar interaction throughout the regulations. Specific issues regarding termination of employment and membership will be discussed later in the document.

## *3.1 Federal Legislation*

Employment law is divided among several jurisdictions in Canada. Some co-operatives are federally, others provincially, incorporated. However, whether federally or provincially incorporated, the provincial authority tends to have jurisdiction with regard to employment law, unless the co-operative is in a federally regulated industry. Federal legal authority only takes precedence if the co-operative is engaged in certain industries (such as grain elevators, inter-provincial transportation, or communications). Once a co-operative has been deemed an employer it will be required to meet the standards set forth in provincial employment standards regulations. In fact, the floor established by statute may prevent any voluntary act by a person deemed to be an employee: “in several provinces it is an offence for an employee to accept less

than the minimum wage or to 'directly or indirectly return to his employer any part of his wage' so as to reduce his wages below the minimum (Christie, 1980, p. 143)

## *3.2 Ontario Legislation*

The points in the first paragraph of this section apply in all provinces, in some case with slight variations. Ontario's Co-operative Corporations Act authorizes a co-operative to enter into contracts written or implied by a person authorized by the co-op to do so. (R.S.O. Ch. 35.21). This creates a dynamic in which the co-operative, with the power to enter into contracts, engages workers as an employer with either a written or implied labour contract of service. Further, under section 103, directors are liable to the employees of a co-operative "for all debts that become due while they are directors for services performed for the co-operative, not exceeding six months wages" (R.S.O. Ch. 35.103) This specifically covers any person covered under the Ontario Employers and Employees Act and the Ontario Employment Standards Act as well as any collective bargaining agreement

The Employment Standards Act of Ontario requires an employer to pay wages in a timely manner and to pay at least the minimum wage. The Act makes no provision for paying less than minimum wage. This presents a critical issue for worker co-operatives. The distinction between the work of an employee and that of a member may not be clear. While participating at the annual membership meeting would likely be seen as a requirement of membership, serving on a management team may be seen as work required by the employer to carry out the functions of the business[6]. In this case, the co-operative's by-laws may play a significant role in determining when wages must be paid. Co-operatives should consider incorporating specific member duties

[6] Holders of elected office in an organization are exempt, which should include the work of directors but only in their official capacity as directors or officers of the co-operative.

into the by-laws of the organization. Such duties would be distinct, or separate, from the duties of a member in an implied or written employment contract. Such duties might include:

- Attending membership meetings and functions;
- Participating in the governance of the co-operative;
- Providing a set amount of volunteer labour;
- Other duties that the membership may determine essential for the co-operative

In addition to this, the hours spent in these duties should not also accrue towards overtime. The Co-operative Corporations Act and the model by-laws tend to be silent on the duties of membership beyond that of basic qualifications. While co-operatives in other sectors may have volunteers to assist in operations, the line between an employee and member is very clear. If the co-operative pays a wage for the work or service being performed, then it must pay at least minimum wage for that position. If a written contract or collective bargaining agreement exists that incorporates a higher minimum wage, then the co-operative would likely need to pay the worker the minimum wage set down by the contract. Additionally, the Ontario Employment Standards Act also guarantees "equal pay for equal work" among employees of each sex. In this case, allowing, for example, a female member to work for minimum wage as a form of volunteerism would be illegal if others doing the work (especially males) did not also receive minimum wage. (S.O. 2000, Ch. 41.42)

## *3.3 Nova Scotia Legislation*

As with Ontario, a co-operative acting as an employer with contract of service would either have a written contract or implied contract when it engages in an employer-employee relationship. Further the model by-laws for worker co-operatives give the manager of the co-operative the power to enter into contracts and that such contracts "shall be binding on the co-

operative". (Innovations Project, 1989, 7) Interestingly, in the duties of the membership, the by-laws suggest that it is the member's duty to do the following (Innovations Project, 1989 2.1):

A. Support the objects of the co-operative, as set forth in the Articles of Incorporation;
B. Perform paid work for the co-operative, defined as (working at least ___hours of paid work for the co-operative in the last____weeks) (earning at least ____ in wages form the co-operative in the last ___weeks (and expect to continue this relationship with the co-operative;
C. Agree to participate in management committees and accept other management duties in the co-operative, as determined by the board of directors.

On the issue of wages, employers covered under the Nova Scotia Labour Code (RS 1989, Ch. 246) must pay at least the minimum wage. As with Ontario, Nova Scotia also mandates an equal pay clause similar to Ontario's Act. (RS 1989 Ch. 246.57) One might think that the requirement that members to participate in management teams and even accept management duties could be a method for the co-operative to allow members to voluntarily earn less than minimum wage (such as might be needed during a start-up phase). The most practical way for this to occur would be to pay members who take on management duties on a salaried basis and even officially place them in the role of management. By paying members in this capacity for the work accomplished rather than the hours worked, the co-operative may accomplish the goal of allowing sweat equity to play a role in the start-up of the organization. However, it should be clear that co-operatives should not use this as a means to re-classify non-management work as this might fail a challenge under the Labour Code.

## *3.4 Voluntary Labour by Members*

Previously, this paper considered the difference between an independent contractor and an employee. An equally important distinction must also be made between a member and an employee. When do members exercise their will as members to engage in volunteer labour and

when must the co-operative treat them as employees? Further, what methods should the co-operative use to track voluntary work and even reward such work? Co-operatives in start-up mode may need volunteer labour to help offset the lack of capital. In many cases, it might be impossible for the co-operative to survive the start-up phase without volunteer labour (or labour at a reduced rate). At the same time, the values of co-operatives promote honesty and openness. Worker co-operatives must be careful to limit the self-exploitation of the membership.

In the Ontario model, the ESA allows volunteer labour by defining employees as those paid wages for their work or services. The key distinction is wages. If a member foregoes earning a wage, then the co-operative may make use of the member's labour. This does not mean that a member must make a complete sacrifice for the co-operative. However, the co-operative should be careful in how it relates to the member. Not all monetary payments constitute a wage. Tips and gratuities will not be considered wages in Ontario (but may elsewhere). Neither is any bonus paid provided that there is no *requirement* to pay the bonus and that the amount of the bonus does not relate to "hours, production or efficiency." (S.O. 2000, Ch. 214 s. 1). This is one possible method of working within the law while still honouring the quality of ownership in a co-operative. In addition, expenses, travel allowances, and some contributions to benefit plans will also be excluded from wages.

This provides a means by which a co-operative could develop a volunteer program that might involve a monthly bonus payable only if the board of directors chose to issue a bonus. Alternatively, the board could create a large bonus after the co-operative successfully survived the start-up phase to reward the pioneer members. In any event, the co-operative should only engage in a volunteer program with a well-thought out method to track the volunteer hours of the members to ensure solidarity among the membership and prevent undue heroics (i.e. one or two

members doing way more than other members) or less than equal commitment (i.e. one or two members who do way less than other members), which might undermine social cohesion later. The participants should be limited to members of the co-operative as well.

If the co-operative engages in a volunteer program, it should make sure that a formal process exists to govern it. Written contracts with each member should determine the amount of volunteerism. This should be consistent for each member (for instance, each member may be required to perform 20% of their hours as volunteer hours). They may not receive a wage or any compensation from the employer (tips and gratuities are not considered wages in some provinces and in those industries with tips, the tips should be shared as decided by members; co-operatives should ensure there is a policy on tips that will support solidarity within the organization). If any bonus is given, it must be a bonus based on membership only. A bonus cannot be based on criteria that might cause it to be considered a wage.[7]

If the co-operative should consider this route, the board should create a solid mechanism to track the voluntary hours and efforts of the membership. This would have the benefit of helping the board to determine a bonus that, while not based on hours, would still provide an economic fairness to the membership. It would also allow the board to ensure solidarity among the membership by identifying if members are providing too much or too little volunteerism in comparison to their peers. A volunteer accounting method would enable the board to gauge the true value of its product or service to the community in terms of labour costs that might otherwise be devalued through volunteerism.[8]

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[7] As this would not be employment income, co-operatives should consult a tax lawyer or accountant to determine the proper method of reporting income.

[8] Laurie Mook and Jack Quarter have developed such a method called the Expanded Value Added Statement. Their book, *What Counts?* provides detailed methods to track the economic value of volunteerism in non-profits and co-operatives.

### *3.5 Summary of Co-operative Laws and By-laws*

The nature of worker co-operatives requires the worker-owners to wear two hats. While it may be difficult to manage this duality, the one constant is that workers must always be considered employees if there is a bona fide employer-employee relationship as discussed in the first section. As with the mischaracterization of employees with independent contractors, the co-operative could open itself up to liability if the controlling authorities of the province disagree or believe that the co-operative has been intentionally misrepresenting its action. Co-operatives should encourage some type of voluntary contribution by members to the work of the co-operative. Not only will this help the co-operative succeed financially, but also it will help to create a culture of ownership within the co-operative. This will enhance social cohesion among the membership and provide for a stronger co-operative overall.

**Recommendation:** If the co-operative chooses to engage in a volunteer program, it needs to have clearly worded contracts to establish the voluntary nature of the program and not pay any wages or bonuses based on that time. It needs to clearly define the social labour as that of a member-owner not an employee.

**Recommendation:** Volunteerism should be tracked through a process so that the board and management can see the true value of work being performed and the real cost of business.

## 4.0 Rights of the Employer

As an employer, the co-operative maintains legal rights over the workers in the workplace regardless of the membership status of the individual worker. However, the by-laws and specific statutes relating to the co-operative model must also bind the co-operative. The duality of worker-ownership suggests that the collective decision of the members of a worker co-operative has the power to limit the rights of the employer (themselves in a collective sense).

Worker co-operatives have additional powers to limit the rights of the employer. This section will consider the different methods available to the workers: Statutory compliance, Collective Bargaining, and Membership Control. The latter includes membership resolution, by-laws, and board policy.

> Employer's rights include the right to hire, promote and terminate employees as well as the right to determine the method of work, place of work, time of work, and rules of the workplace. However, the rights have greater nuance in the actual day-to-day workplace. Historically, the law uses the out-dated language of Master-Servant to describe the rights of the employer. In more contemporary language, the obligations of the employee express the rights of the employer. The failure of the worker to meet these obligations gives the employer a just cause for the worker's termination or other discipline. ( these obligations have been listed earlier).

These obligations may extend to worker behavior beyond the workplace if the behavior is "injurious to the employer's interests; and the employer's interest includes an interest in having trustworthy employees." (Christie, 1980, p. 281) Case law does put some conditions on these rights. Not all offenses would warrant immediate termination at the first incident. Further, these rights are mutable and have changed over the course of time as the dominant culture and attitudes about work have changed[9].

Through common law and statute law, the rights of the employer may be curtailed. As demonstrated earlier, employment standards have been established in every province and by the government of Canada. The Human Rights Act limits the power of the employer in terms of hiring, promotion, termination and pay. Occupational Safety and Health Acts limit the employer's power to direct how the work should be done. For worker co-operatives, the provincial act relating to co-operatives may also limit the employer rights in that the employees

[9] McPherson v. City of Toronto involved a termination a worker terminated for co-habitation with a woman (not his wife) and boasting of the affair. (Christie, 1980, p. 281) Today, that would fall under the protected characteristics of the Human Rights Act.

also have rights as members of the co-operative. In some respects, these Acts go beyond the employer-employee relationship to affect the relationship of any stakeholder with the co-operative.

## *4.1 Membership Control*

In a worker co-operative, membership control creates a unique method for workers to control the employer's power. While this might seem counter-intuitive for the owners to willingly give up power to the employees, in this situation, they are the same. The real question for the worker-owners becomes one of balancing the desires of the individual with the needs of the co-operative. The methods of membership control include the by-laws, membership resolutions, and board policy. Each has its advantages and disadvantages.

## *4.2 By-Laws*

The By-laws govern the organization and define the rights and responsibilities of membership. While these issues often involve the assignment of shares, the method of dissolution, and the voting rights of the membership, they may also determine the powers of management and the board of directors. In Ontario, the by-laws may be used to regulate the "business and affairs of the co-operative". (R.S.O. 1990, ch. 35, s. 21) The federal Act allows for any by-law that the membership deems necessary (SC, 1998, part II). By-laws, however, may not violate the laws of the province or Canada. This allows a great deal of latitude. By-laws could be used to create a formal dispute resolution process to address the behavior of employees as well as regulate disputes between employees and other stakeholders. Such a process would be binding upon the management and the board of directors. It would remove internal politics from the

dispute resolution by creating a mandate for the co-operative. However, changing the by-laws is purposely cumbersome requiring a two-thirds majority (or greater in some cases) at a membership meeting. If the by-law has unintended consequences not foreseen by the members or authors when enacted, it could be difficult to amend it.

### *4.3 Membership Resolution*

If the by-laws allow, a more fluid approach to allow the membership to self-limit their employer rights might include a membership resolution. In some co-operatives members may force the board or management to reconsider a decision. In smaller co-operatives, the membership meeting may be the primary decision-making body using a collective approach. While this method does not "limit" the employer's rights, it does create a method for the workers to decide how to engage those rights collectively. In larger co-operatives, convening meetings can be cumbersome and if the co-operative operates two or three shifts (or seven-day work weeks), the co-operative will need to develop strategies to include or provide the opportunity to participate.

### *4.4 Board Policy*

Most co-operatives use their by-laws to empower the board of directors to act as the employer and exercise the rights of the employer. The directors gain their power from the by-laws and the membership meeting that elects them to office. They have a fiduciary responsibility to act in the best interests of the co-operative. The membership of the board consists of the worker-owners in the co-operative. As a result, they have the power to limit the rights of the employer by directing the manager of the co-operative and creating policy to deal with the work

environment that balances the needs of the individual and the needs of the collective body. In many respects, the policy manual of a worker co-operative acts much in the same manner as a collective bargaining agreement. However, unlike the collective bargaining agreement or the by-laws, policy can be changed rather quickly by a simple majority of directors. On the plus side, the use of the board allows a lot of fluidity in addressing concerns of the workplace and the membership. On the negative side, the decisions can become political and based on personalities. In some co-operatives, specific groups or camps of members may act in an obstructionist manner placing their personal needs or desires above those of the co-operative. It is important that the membership be aware of their legal options for addressing inappropriate board behaviour. These could include the removal of directors at a special members' meeting and election of new directors, or specifically limiting board powers in the by-laws.

## *4.5 Employer Rights Summary*

Worker co-operatives have several tools at their disposal to modify the rights of the employer in their organizations. The legislation of each province creates employment standards and provides protections against discriminations and for health and safety. If the co-operative is unionized, it may use a collective bargaining agreement to further limit the employer's rights and offer other protections to workers. However, as a democratically controlled work-place, worker-owners may also exercise their voting rights to enact by-laws controlling their organization, pass membership resolutions expressing the will of the membership, and elect directors to create policy. The power of the membership to directly influence its work environment provides a huge advantage for workers in a worker co-operative over the workers of other enterprises (including other types of co-operatives).

# 5.0 Terminations and Dismissal

Dispute resolution in a worker co-operative can often become the organization's second focus after providing good, secure jobs. The dual nature of employee and owner (of being both "master" and "servant") creates a unique dynamic when the need arises for termination or dismissal. The co-operative clearly has the right to discipline workers for failing in their obligations as employees, but does termination of employment automatically terminate the rights of membership? Further, should poor behavior as a member lead to termination as an employee? To address these questions, worker co-operatives need to consider both the law and the by-laws with regard to termination of employment and dismissal from membership.

Termination of employment has many causes: the completion of the contract, retirement, mutual agreement, quitting, firing, disciplinary dismissal, death, illness, bankruptcy or business closing, and layoffs. A worker co-operative may also have reason to dismiss a member from the co-operative. In Ontario and Nova Scotia, a member may be expelled from a co-operative by a simple majority vote of the board of directors (although the dismissed member may appeal that decision at the next membership meeting). Of course, as a voluntary organization, a member may also choose to terminate his or her membership. Similarities exist between the two actions and this paper will consider the non-voluntary acts of dismissal and termination.

## *5.1 Employee Dismissal*

All employers, including co-operatives, may dismiss an employee for just cause usually resulting from the failure of the employee to honour her obligations under a written or oral contract as discussed in the previous section. As might be expected, both common law and statute law have placed limitations on this power. Terminations that are not disciplinary (e.g. for

business reasons) are *not* considered by the courts as "just cause." If the employer terminates the employee in the normal course of business, the employer has an obligation to give proper notice or payment in lieu of notice under employment standards statutes. The amount of notice and pay will vary with the amount of time the employee has worked for the employer (see the employment standards chart in section 2). Depending on the employee's age, seniority, experience and position, this amount can be much larger than the small amount available under employment standards. Where an employer alleges it has just cause, the matter may be decided by the court.

The reaction of courts to these questions has changed greatly over the recent decades of rulings. In the past, employers had incredible power to dismiss a worker without notice for any breach of her obligations. Courts have come to recognize that employees may make mistakes and fail without the intention of harm (although dishonesty remains as an area of "zero tolerance". (Christie, 1980, p.361) Employers are now expected to give ample warning of dismissal and attempt to rehabilitate employees before dismissal is considered a viable alternative. This has created a more humane consideration of the term "just cause" and employers should consider the strength of their case against a worker before acting too rashly. Nowadays the principles of human rights law and the common law of dismissal sometimes merge, especially in the case of employees whose performance is affected by a disability. Under both regimes employers are expected to offer "reasonable accommodation" to the disabled employee up to the point of "undue hardship" to the employer.

Of course, dismissal without notice is easier if done within a time-limited probationary period. It may also be legitimate if the worker continues to fail to meet his or her obligations, acts dishonestly, or endangers the health and safety of others. The former cause includes chronic

attendance problems, failure to act in a competent manner, engaging in unsafe, and illegal or imprudent behavior. It is important that worker co-operatives create a formal process to resolve these disputes and create a system that is progressive (in that the discipline for incidents that don't require immediate removal follow a pattern of increasing penalties).

It is important to note that where employees are unionized, the process of challenging dismissal is quite different. As mentioned earlier, failing resolution of an unfair dismissal grievance, the union can take the matter to arbitration. Unlike in common law, where the courts have jurisdiction only to award notice (or pay in lieu thereof) and cannot order reinstatement, an arbitrator has the power to reinstate the employee with a lighter penalty if she feels the discipline too severe or with full compensation if she thinks the dismissal unwarranted.

Worker co-operatives typically have a high level of social cohesion and solidarity between their workforce and membership. This creates the possibility of relying on informal dispute resolution techniques. The informality of talking to a manager without documenting the incident may lead to the creation of a clique and can lead to charges of favouritism and create a situation in which a termination could be challenged on grounds of discrimination. It may also confuse the workers as to the real expectations of them in the work place (Hoffman, 2005).

Wrongful dismissal contains a wide range of actions in which an employer terminates in violation of the law. This may include discriminatory practices as well as trying to obstruct a labour union or government inquiry. The list of incidents which are considered wrongful dismissal includes (but is not limited to):

- Without Cause
- Contrary to Human Rights Legislation
- Pregnancy
- Trade Union Activities
- Participation in proceedings under Industrial Labour Act or other provincial legislation such as Ontario's Employment Standards Act

Most often dismissal is done quite openly or "expressly". The employer informs the employee that her employment is terminated. However, sometimes it is not so clear. An employer can engage in actions short of express dismissal that amount to "constructive" dismissal. Any employer activity that makes a significant alteration to an employee's terms and conditions of employment without his permission such as a demotion, a reduction in pay or reassignment of job duties that demean the employee is considered "constructive dismissal". This type of dismissal includes actions by the employer that harass or bully the worker into quitting. It generally involves a unilateral change in the terms of employment by the employer such as a demotion, a reduction in pay, or reassignment of job duties that demean the employee. Ultimately, it is seen as a failure of the employer to honour the obligations of the employer to the employee. (Christie, 1980, p. 332-333) This can cause significant problems in a democratic workplace where a majority of the board may choose to reorganize workloads and departments without realizing that they are creating a constructive dismissal of a worker. Employers seeking significant changes in employee's terms and conditions should attempt to obtain or negotiate the employee's consent. If such consent cannot be obtained or negotiated, then the employer must give notice or pay in lieu. As co-operatives grow, they may find friction through generational change. This dynamic creates a greater need for a formal process.

**Recommendation:** Any time a co-operative is going to make significant variations in employment terms and conditions, it should consider seeking legal advice, and it should speak to the relevant employee(s) and be prepared to negotiate if necessary.

## *5.2 Membership Termination*

In considering the other side of the worker-owner duality, the termination of membership does not have many conditions placed upon it. The termination of membership generally requires a simple majority of the board of directors. The ability of the member to appeal may be limited to the membership meeting. Regardless of the lack of case law and legal review, it should be clear that a board could not expel a member for reasons that violate Human Rights legislation. Further, the member has rights to the capital of the organization that must also be settled upon termination. The bylaws usually specify the timing of the capital redemption, however a specific payout agreement could be negotiated if necessary.

In Ontario, once a member has been expelled, the co-operative is required to purchase all of the member's shares (other than prescribed shares) as well as any premium or unpaid dividends – subject always to a business solvency test. "Solvency" means that the business is able to meet its obligations as they generally become due; if the co-op would be at risk of becoming insolvent by paying out the member's shares, it cannot purchase the shares. In addition, any loan made to the co-operative by the member would become repayable on demand. In Nova Scotia, the member would be entitled to a refund of any amount held in his or her name by the co-operative. Accounting rules may require that the former member would become a creditor, and their shares would be re-classified as a debt liability of the co-operative if the capital is not immediately redeemed.

Theoretically, a worker co-operative could expel a member while allowing him to remain an employee (provided that the by-laws allow for non-members to work at the co-operative); however, there seems to be little value for the co-operative to take such a course of action. If a member acted in a way that forced the membership to expel him, then it would be hard to imagine that he would also be a valuable employee. For worker co-operatives, it would be best to

create a mirror process for membership expulsion with employee termination. By providing a method of citing "just cause" or giving notice as grounds for membership termination within the bylaws, the co-operative would create a protection against internal conflicts that could hurt the co-operative in both reputation and liability.

One area where the linkage may need a clear separation might involve temporary lay-offs. The law generally considers a lay-off to be a temporary termination and subject to the same notice required for termination. However, if the intention of the worker co-operative will be to recall the members once the economy improves, it would be imprudent to also terminate membership. This would cause an extra stress on cash flow to the co-operative, in addition to creating needless paperwork and the expense that comes with it. A better solution might be to consider a lay-off as a "forced leave of absence" and allow the affected members to continue to exercise their membership rights during the period of lay-off. This should again be specified in the bylaws.

**Recommendation:** Co-operatives should consider written contracts over oral contracts. This limitation on employer rights may be done through board policy, collective bargaining, or by-laws. The important aspect is that the board creates formal processes as opposed to informal processes.

**Recommendation:** Co-operatives should create formal dispute resolution processes and link the termination of employment with the termination of membership with appropriate appeals to ensure fairness, except in the case of temporary lay-offs.

**Recommendation:** Co-operatives should develop formal procedures for lay-offs that honour the membership rights and the employee rights.

## 6.0 Labour Unions and Co-operatives

Though they emerged from the same social movement in the 19$^{th}$ century, the relationship between co-operatives and trade unions has not always been smooth and has seen its

share of conflict. This need not be so. As mentioned earlier, the role of the labour union could be a method for the membership to limit the employer rights of the co-operative. Unionization of worker co-ops is not common in Canada, but there are a few, e.g. the ambulance co-ops in Quebec. And it is always an option. There may be some tangible benefits for unionized worker co-operatives. Printer co-operatives would have access to a "union bug[10]" on their work, and showing solidarity with the labour movement might be a good marketing choice. Other co-operatives might see unionization as a means of accessing government contracts in jurisdictions in which the bidding process rewards unionized workplaces. The larger issue for labour unions and worker co-operatives centres on how these two movements can work together to improve the quality of life for Canadian workers.

Workers in worker co-operatives, especially smaller ones can have a very high level of influence over their workplace through their co-operative's democratic processes. In addition, many worker co-operatives remain small enough that the needed negotiation takes place in a peer environment (at membership meetings and board meetings). For these reasons, it may be difficult for members and worker co-operative developers to understand how unionization may apply to them.

Labour unions have an important role across the labour force. They protect workers throughout Canada. One of the principal roles of a labour union is to establish prevailing wages and conditions of employment. In a market economy, labour has a market component. Workers will act in their self-interest and seek the best workplace. Thus, labour unions help all workers (even the members of worker co-operatives). Further, worker ownership requires a level of

[10] A "union bug" is a small logo that appears on a product (like a publication or a beer bottle) produced by a unionized establishment. Some organizations try to buy as many products and services as possible from such establishments. This would be one way for co-operatives to show labour solidarity.

dedication and responsibility that a number of workers may not want to assume. They may simply want a good job. The labour union helps workers have a good job without requiring them to accept the responsibilities of ownership and management.

However, in larger worker co-operatives, the distance between the board members and the work floor is greater; boards often delegate a lot of discretion to managers, and a significant proportion of workers may be non-members. In such cases, a union can provide workers with a workplace voice that the co-operative simply cannot. For larger co-operatives, as strange as it may sound, the labour union also offers a means of "out-sourcing" some of the human resources function, especially the dispute resolution process. Unions have extensive experience in processing worker complaints and concerns and separating the more frivolous from those with merit. Thus, not every complaint finds its way onto management's desk. Also, because there is a formal method and impartial umpire to adjudicate grievances, especially disciplinary ones, the unionized regime, in essence can de-politicize disputes In addition, the collective agreement locks policies into place for a definite period, lending an element of certainty amid much uncertainty. This prevents constant tinkering by directors and allows for a structured method for appraising the need to change work rules. The seniority principle has proven to be a very useful method for adding fairness to many managerial decisions. For the co-operative movement, labour unions have access to capital and educational programs that might assist, e.g., succession plans of companies as the owners retire. This could improve the ability of workers to own the means of production and create a stronger network.

To be sure, disputes between co-operatives (especially other types of co-operatives) and trade unions have sometimes been long and rancorous. They are, after all, both organizations dedicated to their own ideals of improving the human condition. Despite their devotion to

pluralism and diversity, they can both be single-minded in pursuit of those ideals. Both organizations need to be more respectful of each other's goals, methods, and dialogue with each other much more. Co-operatives especially need to be more open-minded toward unions and realize they can provide many helpful services. Both the union and worker co-operative movements might consider preferential buying campaigns to support each other, i.e. that members are encouraged to support both worker co-operatives and unionized enterprises. In addition, worker co-ops may also consider supporting union-led boycotts, honour picket lines, etc.

**Recommendation:** Co-operatives should support the labour movement. If its members choose to unionize, it should work with the labour union to create a synergy between the organizations that will build social cohesion and worker loyalty.

# 7.0 Conclusions

This paper considered the implications of employment law on worker co-operatives in Canada. It described the process by which a co-operative may determine if it has an employer-employee relationship with its workforce and the implications of such a relationship. The discussion of the dual role of the member as a worker and as an owner demonstrated the means by which a worker may engage employee and employer rights as well as the limitations of each with a specific focus on the termination of membership and dismissal from the workplace. Finally, the paper considered the role of labour unions in a worker co-operative environment.

This discussion has made some recommendations for co-operatives to consider as they examine policies and work rules. At all stages (when worker co-operatives are starting out, when they grow and as they have generational change-over in leadership), it is important to establish a clear policy code and culture of engaging the protections of workers found in the law.

## *7.1 Summary of Recommendations:*

- Co-operatives should clearly define their workers as either employees or contractors. If they utilize both, then the by-laws should reflect the different types of memberships and relationships.
- Co-operatives that have contractors should require contractors to carry workers' compensation insurance.
- Co-operatives should endorse and codify Human Rights legislation into their by-laws.
- Co-operatives should educate their directors, managers and workers on employment standards and ensure that their policies maintain these basic thresholds.
- If the co-operative chooses to engage in a volunteer program, it needs to have clearly worded contracts to establish the voluntary nature of the program and not pay any wages or bonuses based on that time. It needs to clearly define the social labour as that of a member-owner not an employee.
- Volunteerism should be tracked through a process so that the board and management can see the true value of work being performed and the real cost of business.
- Co-operatives should consider written contracts over oral contracts. This limitation on employer rights may be done through board policy, collective bargaining, or by-laws. The important aspect is that the board creates formal processes as opposed to informal processes.
- Any time a co-operative is going to make significant variations in employment terms and conditions, it should consider seeking legal advice, and it should speak to the relevant employee(s) and be prepared to negotiate if necessary.
- Co-operatives should create formal dispute resolution processes and link the termination of employment with the termination of membership with appropriate appeals to ensure fairness.
- Co-operatives should develop formal procedures for lay-offs that honour the membership rights and the employee rights.
- Co-operatives should support the labour movement. If its members choose to unionize, it should work with the labour union to create a synergy between the organizations that will build social cohesion and worker loyalty.

## *References:*


Axworthy, Christopher (1986) "Co-operatives and their Employees: Towards a Harmonious Relationship." Occasional Paper Series, Centre for Co-operatives University of Saskatchewan

Axworthy, Christopher and D. Perry (1988) Worker Co-operative and Worker Ownership: Issues Affecting the Development of Worker Co-operatives in Canada. Occasional Paper Series, Centre for Co-operatives University of Saskatchewan

Canadian Worker Co-op Federation (1995) Guidelines for Determining Whether of Not There is an Employer-Employee Relationship in a Worker Co-operative.

Canadian Worker Co-op Federation (2004) Sample Incorporation Documents chapter 3.0 of WCDN Toolkit

Canadian Revenue Agency. (2008) Employee or Self-Employed?

Christie, Innis (1980) Employment Law in Canada Butterworths Toronto.

Co-op Ventures Worker Co-op (2009) "A Co-operative Solution to the Job Crisis: Worker Co-op Buy-out Guide." Western Labour-Worker Co-operative Council. March 2009

England, Geoffrey (2000) Individual Employment Law Essentials of Canada Law Irwin Law, Toronto.

Frost, Mary (2009) "Union Supported Worker Buyouts Using the Worker Co-operative Model." Western Labour Worker Co-op Council. Vancouver

Government of Canada (1998) Canada Co-operatives Act S.C. 1998 C. 1 retrieved from http://www.canlii.org/ca/laws/stat/sc-1998-c-1/latest/ on May 13, 2009.

Haiven, Larry (2006) "Expanding the Union Zone: Union Renewal through Alternative forms of Worker Organization." Labor Studies Journal, vol. 31, no. 3

Hoffman, Elizabeth (2005) "Dispute Resolution in a Worker Co-operative: Formal Procedures and Procedural Justice." Law and Society Review. Vol. 39, No. 1 (March)

Howard, Michael (2003) "Libertarianism, Worker Ownership and Wage Slavery: A Critique of Ellerman's Theory of Property." Journal of Social Philosophy. Vo. 34 No. 2 summer

Industrial Workers of the World (IWW) (2009) "One Big Union." retrieved from http://www.iww.org/culture/official/obu/index.shtml#control on May 17, 2009.

Innovations Project (1989) "Annotated Model By-laws for Worker Co-operatives." St. Francis Xavier University. Halifax.

Mook, Laurie, B.J. Richmond & J. Quarter (2003) What Counts: Social Accounting for Non-profits and Co-operatives 2nd edition. Prentice-Hall. Toronto

Province of Nova Scotia (1989) Co-operation Association Act. Chapter 98 of the Revised Statutes

Province of Nova Scotia (1996) Occupational Health and Safety Act. Chapter 7 of the Acts 1996

Province of Nova Scotia (1994) Workers' Compensation Act. Chapter 10 of the Acts of 1994-95

Province of Nova Scotia (1989) Labour Standards Code. Chapter 246 of the Revised Statutes

Province of Ontario (1995) Labour Relations Act. S.O. Chapter 1 Schedule A http://www.e-laws.gov.on.ca

Province of Ontario (2000) Employment Standards Act S.O. chapter 41 retrieved from http://www.e-laws.gov.on.ca

Province of Ontario (1990) Co-operative Corporations Act R.S.O. chapter 35 retrieved from http://www.e-laws.gov.on.ca