
The Law of Worker Ownership

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Citation Information

Axworthy, Christopher S. and Perry, David. "The Law of Worker Ownership." *Osgoode Hall Law Journal* 27.3 (1989) : 647-686.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol27/iss3/5>

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Abstract

This article discusses Canadian, U.K., U.S., French, and Swedish models of worker ownership and the legal principles which apply to them. Based on the evidence that, in contrast to other traditional forms of workplace organization, worker participation in ownership and management gives rise to greater efficiency and productivity, lower employee absentee rates, greater job satisfaction, reduced need for managerial supervision, the lowest cost per job created and a democratic workplace, the article argues for comprehensive legislation to address the relevant issues surrounding worker ownership, so that worker co-operatives and other forms of worker ownership can reach their full potential in Canada.

THE LAW OF WORKER OWNERSHIP[©]

BY CHRISTOPHER S. AXWORTHY* AND DAVID PERRY**

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I. INTRODUCTION

This article discusses various models of worker ownership law which may be considered in drafting appropriate legislation on the topic in Canada. If forms of worker ownership are to be encouraged in Canada appropriate legislation is desirable. This legislation must serve demands of democratic decision making and economic efficiency. Also, because most worker-owned firms are small, it must address, in an imaginative manner, the very real difficulties faced by small business in Canada.

As a viable economic form, worker ownership holds great promise which has yet to be tapped in Canada. Part of the problem lies in the lack of an appropriate legislative model which could encourage, or at least facilitate, the growth of such enterprises.

Worker-owned enterprises are of varied design. Most examples in Canada are worker co-operatives, but there are other models in use. Different models suit different purposes and workers. This article will concentrate on the co-operative model, but other important models will also be examined.

II. THE CANADIAN CO-OPERATIVE LAW STRUCTURE AND WORK CO-OPERATIVES

In Canada, only Saskatchewan and Quebec have enacted legislation providing a mechanism particularly for establishing worker

co-operatives. If worker co-operation is to become a potent force in Canada's economic mosaic, effective and appropriate provincial statutes need to be enacted, and favourable government policies need to be directed towards such enterprises. This paper will, therefore, discuss the implications of different structures which have been adopted for worker co-operatives with a view to suggesting the ingredients of an appropriate legislative structure in Canada.

No jurisdiction in Canada has a separate act covering worker co-operatives. Most provinces require them to be incorporated in one of two ways. First, they can choose the province's *Co-operatives Act*. These *Acts* are most suited to consumer and farmer co-operatives but can, nonetheless, accommodate worker co-operatives. Alternatively, worker co-operatives can incorporate under the provinces' *Business Corporations Act*. In this case, special by-laws would be required to define the democratic structure of the co-operative. Neither of these two incorporation devices is optimal. One factor may have a bearing on the decision of which route to choose: the words "co-operative" and "co-op" cannot be included in the name of the enterprise unless it is registered under the appropriate *Co-operatives Act*. A special section on worker co-operatives exists in the legislation of Saskatchewan and Quebec. This is an improvement over the other provinces, but these special sections do not go far enough in dealing specifically with the substantive issues facing worker co-operatives.

A. *Part XXIV of the Co-operatives Act of Saskatchewan*

Worker co-operatives in Saskatchewan are covered by sections 263-69 of *The Co-operatives Act*.¹ In all other respects they are treated exactly as are other co-operatives. These provisions define a worker co-operative (called an employment co-operative in Saskatchewan) as a co-operative "... whose primary purpose is to operate an enterprise in which its members are the workers necessary for the operation."² The relationship between employment

¹ S.S. 1983, c. C-37.1.

² *Ibid.*, s. 263.

and membership is dealt with in section 265: "75% of all employees are required to be members of the co-operative and 75% of the employees of a subsidiary of the employment co-operative are required to be members of the co-operative."³ To ensure that these employee-membership ratios are not circumvented too easily, it is provided that, unless the Registrar agrees,⁴ "no employment co-operative shall subcontract out more than 50% of its work."⁵

A worker co-operative's by-laws are required to contain provisions covering the "conditions of admission or suspension of its members" as well as "a procedure for laying off members when there is a lack of work and a procedure of recall to work."⁶ Worker co-operatives will not be permitted to incorporate "where the acquisition of goods for resale to the public is one of its principal objects stated in its articles."⁷ Section 268 permits, though strangely does not require, a worker co-operative to allocate patronage rebates on the basis of the "labour contribution of each member."⁸ The last provision in the Saskatchewan Act dealing with worker co-operatives permits worker co-operatives' boards of directors to be comprised of a majority of workers. Again, rather strangely, it does not require the boards to be totally comprised of worker members.⁹

³ *Ibid.*, s. 265(1).

⁴ *Ibid.*, s. 265(3).

⁵ *Ibid.*, s. 265(2).

⁶ *Ibid.*, s. 266. Section 8 of the *Act* contains a long list of matters which must be dealt with in the by-laws of all co-operatives. The two requirements listed in s. 266 are additional for worker co-operatives.

⁷ *Ibid.*, s. 267. It is very difficult to find a good reason why this restriction should prevail. Proposed changes to the *Act* are to permit worker co-operatives to engage in retail activities provided they do not use the words co-operative or co-op in their trading name. The argument in support of this restriction is that it will save any possible confusion with consumer co-operative stores. If worker co-operative retailers were required to prefix any reference to co-operative or co-op with the word *worker* the same purpose would be achieved.

⁸ Section 268 contains the following words: "... the directors *may* decide to allocate the patronage dividend by *taking into account* the labour contribution of each member [emphasis added]."

⁹ *Ibid.*, s. 269. Section 76 of the *Act* provides that if a co-operative wishes to make employees eligible to serve on its board of directors the co-operative's by-laws must so prescribe, and even then a maximum of one-third only of the total number of directors may

B. Chapter V of the Quebec Cooperatives Act

The Quebec *Cooperatives Act*¹⁰ is of similar scope. Worker co-operatives are referred to as workers' production co-operatives or work co-operatives, and are defined as "enterprise[s] whose workers are the members."¹¹ As in Saskatchewan, worker co-operatives are precluded from engaging in the retail trade as one of the principal objectives.¹² It is provided that the by-laws "may" establish "conditions of admission, expulsion or suspension of members," require members to

submit to a period of probation and to a technical and co-operative training course, ... form a reception committee for new members or auxiliary members, ... form a liaison committee between the members and the board of directors" and "establish a procedure for laying off members when there is a lack of work and a procedure of recall to work."¹³

Section 225 provides that a co-operative may hold shares in a subsidiary corporation provided the subsidiary is in the same business as, or a related business to, the co-operative. It may also hold shares in a corporation if such provides the co-operative's members with the right to work in that corporation. Patronage rebates are to be calculated on the basis of the "amount of work done by the member" and this may be measured "by the income of the member, the number of hours of work or any other scale determined by the by-laws."¹⁴

These provisions deal only with a few of the structural issues facing working co-operatives, and do not fully address the most important ones. Further, the provisions themselves do not address the matters to which they refer in very satisfactory or imaginative ways. In fact, experience in other jurisdictions suggests considerable

be employees.

¹⁰ S.Q., 1982, c. 26.

¹¹ *Ibid.*, s. 222.

¹² *Ibid.*, s. 223.

¹³ *Ibid.*, s. 224 [emphasis added].

¹⁴ *Ibid.*, s. 226.

scope for worker co-operatives, but in each country in which there is a substantial worker co-operative sector there exists a separate legislative framework designed specifically for worker co-operatives.¹⁵

III. PROBLEMS ASSOCIATED WITH INAPPROPRIATE CO-OPERATIVE LEGISLATION

The split in the British co-operative movement between consumer co-operatives and producer co-operatives (including agricultural co-operatives and the co-operative productive societies — the early U.K. worker co-operatives)¹⁶ at least gave rise to a readily recognizable worker co-operative sector. Unfortunately, this sector was weak from the beginning largely as a result of this severance from a relatively strong consumer organization. In essence, co-operative productive societies (CPSs), as they were called, were left to contend with the vagaries and pressures of the marketplace without a larger support network to help sustain them. A similar phenomenon does not have to occur in Canada in the late 1980s. While the established co-operative movement referred to worker co-operative development in very positive terms in the 1984 *Report of the National Task Force on Co-operative Development*,¹⁷ little has been put into place. However, an Implementation Steering Committee, recommended in the Report, has now been established.

¹⁵ See the discussion of the experiences in France, Italy, Spain, Yugoslavia, the U.K. and the U.S. in R. Oakeshott, *The Case for Worker Co-ops* (London: Routledge and Kegan Paul, 1978); G.D. Garson, ed., *Worker Self-Management in Industry — The West European Experience* (New York: Praeger, 1977); I. Adizes & E.M. Borgese, *Self-Management: New Dimensions to Democracy: Alternatives for a New Society* (Santa Barbara: A.B.C.-Clio Inc., 1975); C.S. Axworthy, *Worker Co-operatives in Mondragon, The U.K. and France* [Occasional Paper] (Saskatoon: Centre for the Study of Co-operatives, 1985); R. Gips, *Structuring Employee Owned and Democratically Controlled Businesses* (Somerville, Mass.: I.C.A., 1982). See also the *Proceedings of the Colloque international des coopératives de travailleurs pour le création et le maintien de l'emploi*, held at the Centre de gestion des coopératives at the Ecole des Hautes Etudes Commerciales, Université de Montréal, 26-30 August 1984. Cf. O. Williamson, "Corporate Government" (1984) 93 Yale L.J. 1197.

¹⁶ See A. Bonner, *British Co-operation*, rev'd ed. (Manchester: Co-operative Union Ltd., 1970) at 133-36. The split took place in 1888.

¹⁷ *A Co-operative Development Strategy for Canada* (Ottawa: CUC/CCC, 1984).

Generally, the British CPSs were incorporated under the U.K. *Industrial and Provident Societies Acts*,¹⁸ the legislation under which consumer co-operatives were also registered. These statutes were not ideal, nor could they be expected to be. The structure dictated or permitted by these *Acts* contributed in a major way to the difficulties faced by CPSs. However, it is worth remembering that the view propounded by the Webbs, and later accepted by the whole co-operative movement,¹⁹ that CPSs were less successful and had worse survival rates than small enterprises incorporated in a conventional capitalist form has now been refuted.²⁰ The Co-operative Productive Federation (CPF) was established to act as a federation of CPSs, and it prepared model rules which members and prospective members could use when incorporating their associations.

The *Industrial and Provident Societies Acts* were and are permissive in character. They do not prohibit structures which subsequently caused difficulties for CPSs. Newer structural approaches to worker co-operatives stipulate that certain components of the enterprise structure are mandatory. This is to ensure that responses to particularly troublesome deficiencies in previous worker co-operative structures are incorporated in the new structure, hopefully eradicating reasons for failure and providing successful worker co-operatives with long term potential. For example, the *Industrial and Provident Societies Acts* permitted shares in the CPSs to be held by persons who did not work in the enterprise, and by associations such as trade unions and consumer co-operatives. At first, outside capital was favourably received because, like all co-operatives, the CPSs were short on capital and keen to encourage as much investment as possible. This need not have caused difficulties, but invariably did, mainly because control was not kept distinct from capital investment. Outside shareholders were able to exercise ultimate management control, and in many circumstances they

¹⁸ 1965, c. 12, as am.

¹⁹ See the discussion in D.C. Jones, "British Producer Co-operatives" in K. Coates, ed., *The New Worker Co-operatives* (Nottingham, U.K.: Spokesman Books, 1976) at 34-68. Sidney and Beatrice Webb argued that worker co-operatives would inevitably degenerate into non-participatory institutions. While the statistics indicate the CPSs survived better than small capitalist enterprises in the same trades, it cannot be denied that many failed.

²⁰ *Ibid.*

concluded that because their investments had reached a certain value, their best interest was served by selling their shares to a conventional corporation. While this may have been beneficial for outside shareholders, it was not always so for the worker members.

Clearly, the problem of outside investors cashing in their investment would have been solved if shareholders were restricted to the return of their investment plus interest upon dissolution of the co-operative. This essentially anti-capitalistic co-operative principle is frequently omitted from co-operative legislation and it does not form part of the *Industrial and Provident Societies Acts*. The participation of outside investors and the opportunity for investors to receive surplus assets on dissolution, when taken together, constitute a self-destructive mechanism; the likelihood of it being brought into operation increases with the degree of economic success experienced by the co-operative. CPSs were not themselves at fault. Indeed, the most successful ones were frequently dissolved because of the phenomenon.

In definitional terms, CPSs incorporated under the *Industrial and Provident Societies Acts* were and are autonomous, providing for employees to become members by purchasing a nominal amount of share capital. They were managed democratically, with employees participating directly at all levels of management as well as sharing in the profits.²¹

The experience of the American Plywood Co-operatives is similarly instructive.²² Although productivity was 10 percent higher than at non-co-operative mills, all were seen to suffer from inadequate financing, shortage of working capital, and difficulty in obtaining adequate timber reserves. In these plywood co-operatives it also proved difficult to maintain high productivity and wage equality in the absence of high morale and personal commitment to

²¹ *Ibid.* at 35.

²² See, for example, C. Bellas, *Industrial Democracy and the Worker-Owned Firm: A Study of Twenty-one Plywood Companies in the Pacific North West* (New York: Praeger, 1972).

the co-operative.²³ Long-term planning proved problematic as the members were generally more concerned about short-term gains.²⁴

Much of what caused difficulties may have been due to the co-operatives' membership structure. Contrary to worker co-operative principles, many of the co-operative mills employed a large number of non-member workers. In addition, non-workers were admitted as members and were entitled to vote. In terms of selling shares, these co-operatives acted rather like private corporations with the requirement that a new member be acceptable to the present owners. Also, there were provisions for co-operatives to buy the shares of departing members at the market price with the intention either to sell them to a suitable new member or to increase the value of the present members' stakes in the co-operative.

The plywood co-operatives faced their most serious difficulties as a result of their ownership structure. The value of the owners' shares grew to large dollar amounts in the most successful co-operatives, and in many cases the members decided to sell the enterprise to a conventional corporation. This was especially attractive to long-term members, and also was generally attractive because the plywood trade was a volatile one prone to frequent fluctuations in business activity. Frequently if a member was retiring or wished to leave the co-operative, the co-operative itself either did not have the resources to buy the member out or experienced problems in finding a replacement with sufficient capital to buy into the co-operative. As a result, viable, successful plywood co-operatives disintegrated or were purchased by capitalist enterprises.

In conclusion, then, traditionally organized worker co-operatives have been less than successful. This is a consequence of structural problems, which can be resolved if they are addressed early in the co-operative's life or at the commencement of its operations.

²³ *Ibid.* at 245.

²⁴ *Ibid.* at 29.

IV. OTHER WORKER CO-OPERATIVE LEGISLATIVE MODELS

A. *Worker Co-operative Legislation in the U.K.*

In the U.K. a group of worker-owned corporations, dissatisfied with the legal frameworks available to them, pressed for and obtained passage of *The Industrial Common Ownership Act, 1976* (ICOA).²⁵ This statute defines Common Ownership Enterprises and provides financial assistance to such enterprises. Finding both corporation law and co-operative law unsatisfactory, the Industrial Common Ownership Movement (ICOM), the organization of Industrial Common Ownership (ICO) co-operatives and the driving force behind the legislative changes, opted for incorporation and regulation under a reformed co-operative law regime.

The Act defines a Common Ownership Enterprise in a precise and comprehensive fashion, as do the regulations for incorporating ICO co-operatives. The Act also defines co-operative enterprises, as compared to common ownership enterprises, although it does so in a most cursory fashion. Section 2(2) merely states that for an enterprise to be a co-operative, the trading surplus must be distributed to the members, the enterprise should be controlled by "a majority of the people working for" it or its subsidiaries, and it must be "in substance a co-operative association."²⁶ The Act's purpose in defining these enterprises is to delineate the organizations which are eligible to receive certain government grants and loans: namely, grants and loans administered by the "relevant bodies" which the appropriate government official recognizes as being "constituted for the purpose of encouraging the development of common ownership enterprises or co-operative enterprises."²⁷

²⁵ 1976, c. 78.

²⁶ See generally C.S. Axworthy, "Consumer Co-operatives and the Rochdale Principles To-day" (1977) 15 Osgoode Hall L. J. 137; C.S. Axworthy, "Credit Unions in Canada: The Dilemma of Success" (1981) 31 U. Toronto L. J. 72.

²⁷ *Supra*, note 25, s. 1(5). In 1976 a small (£250,000) fund for the support of new co-operatives was established.

To facilitate registration under the *Industrial and Provident Societies Acts*,²⁸ ICOM prepared a set of Model Rules acceptable to the Registrar for use by prospective ICO co-operatives. The intention behind the Model Rules was that they be used without the need for a lawyer. Any advice required is supplied by the Registrar or by ICOM, thus generating a considerable financial saving. The objects clause of the Model Rules shows the non-business side of ICOM and reflects the Christian roots of the movement. Part of the objects clause of the Model Rules, section 2(b), states that "the Co-operative shall have regard to promoting the physical, mental and spiritual well-being of the community ... and to assist people in need by any means whatsoever."²⁹

ICO enterprises are *bona fide* co-operative societies registered or deemed to be registered under the *Industrial and Provident Societies Acts* of 1965 to 1975. They have no share capital, but are limited by guarantee. Their constitutions must provide that only employees of the enterprise or a subsidiary may be members, and all employees may be members subject to conditions relating to age, length of employment and other requirements, provided there is no political or religious discrimination.³⁰ All members are to have equal voting rights at meetings. Assets are only to be handed over to the members for value. Profits are to be shared amongst the members. On dissolution, after satisfaction of all liabilities, assets are not to be distributed to the members but are to be transferred to a central fund maintained for the benefit of common ownership enterprises or used for charitable purposes. Lastly, the enterprise is controlled by a majority of those working in it and in a subsidiary of it, should one exist.³¹

²⁸ 1965, c. 12. See *How to Form an Industrial Co-operative* (London: I.C.O.M., 1979).

²⁹ See P. Cockerton & A. Whyatt, *The Workers Co-operative Handbook* (London: I.C.O.M., 1984).

³⁰ At any one time a majority of employees must be members. However, as some employees may choose not to join the co-operative and others may be serving a qualifying period imposed by some co-operatives, not all employees will necessarily be members. Thus all members are employees, but not all employees are members.

³¹ *Supra*, note 25, s. 2.

Regulation 6(b) provides that "all people employed by the co-operative have the right to be members of it and thus participate in the decision-making process."³² This is an expression of ICOM's philosophy that non-workers should not be members. It internalizes the ownership such as it is; from past experience this is clearly advisable. The converse is also the case — all workers should be members, thus preventing any exploitation of non-member employees by the members and the enterprise.³³ In the same vein, members are not considered investors. Of course, members can be required to, and frequently do, lend money to the enterprise, generally through a delay in wage payment. In such cases they will receive an adequate but limited return on their loans. This complies with the co-operative principle that assets remaining after dissolution of a co-operative should be used for co-operative development or other charitable purposes. The *Industrial Common Ownership Act* clearly stipulates that these principles must be adhered to in order for the enterprise in question to be recognized as a common ownership enterprise.

Member-employees own the firm collectively rather than individually. Thus, the nominal share capital (valued at £1) does not entitle the bearer to a percentage of assets of the company; rather, it serves as a "membership ticket."³⁴ This is made explicit in the *Industrial Common Ownership Act* which prohibits the transfer of assets to members except for value.³⁵ In effect, common ownership is more like membership than actual ownership and as a result, member-owners do not own shares in their enterprise. As a consequence, rather than the liability of the enterprise's members being limited by shares, it is limited by guarantee. There is provision for profit sharing. All members are entitled to a profit share above their regular wage, with the share size determined by the general meeting.³⁶

³² *Supra*, note 29.

³³ See the conclusions of Bellas, *supra*, note 22.

³⁴ Oakeshott, *supra*, note 15 at 105.

³⁵ *Supra*, note 25, s. 2(1)(b)(ii).

³⁶ *Supra*, note 25, Regulation 14.

The Model Rules specify that profits are to be distributed to general reserves, to the members in the form of a bonus and for social and charitable purposes. The general membership decides on the proportions to be allocated to each purpose, but it seems that the Rules envisage the order of priority to be reserves first, bonuses second and disbursements for charitable purposes, including support for sister co-operatives, third. A common arrangement pioneered by the Scott Bader Commonwealth³⁷ is for 60 percent of the surplus to be retained as reserves with the remainder divided equally between bonuses and charitable donations.³⁸ Unlike ordinary company shares, the membership share in an ICO firm does not entitle the member to a dividend. As well, profit sharing is strictly egalitarian, with every member receiving the same bonus. This is in sharp contrast to the co-operative principle of dividends according to patronage.

Upon dissolution of the company, assets are likewise not distributed individually among the members. The model rules provide that if, upon winding up,

any of its assets remain to be disposed of after its liabilities are satisfied, the assets shall not be distributed among the members but shall be transferred to ... a common ownership enterprise or ... a central fund maintained for the benefit of common ownership enterprises ... or shall be held for charitable purposes.³⁹

³⁷ See the description of this pioneering enterprise and its development in Oakeshott, *supra*, note 15 at 75-78, E.F. Schumacher, *Small is Beautiful: A Study of Economics as if People Mattered* (London: Blond and Briggs, 1973) at 230-37. The birth of the British Industrial Common Ownership Movement can be traced to the establishment of the Scott Bader Commonwealth in 1951. In 1983 this highly successful plastic resins manufacturer experienced profits of £1.5 million and had 750 employees. See Cockerton & Whyatt, *supra*, note 29 at 71. It was turned over to its employees by the original owner, Ernest Bader, a Quaker interested in economic reform. Since then the company has grown one-hundredfold. The company has been very influential in the worker co-operative movement in the U.K. through its establishment of the ICOM support group to propagate the development of worker co-operatives. Of particular interest to the present discussion is the legal form invented by Scott Bader which has largely been duplicated in the subsequent development of ICOM co-operatives.

³⁸ Oakeshott, *supra*, note 15 at 114.

³⁹ *Supra*, note 25, Regulation 18.

Members have no claim to the full output of the firm and cannot claim a residual value after dissolution; they collectively own the firm but cannot claim its assets. Consequently they are in a distinctly different situation from that of ordinary corporate shareholders as regards dissolution of their respective enterprises. The latter can claim a share of liquidated assets in proportion to their holding in the company, whereas ICO firm members cannot.

This kind of property is an amalgam of both private and social property. The member of an ICO firm is entitled to important incidents of title — control of the work place, participation in policy making, determining the disposition of profits — yet does not have legal title. As a result, the members cannot freely alienate their shares in the co-operative. The democratic control of the co-operative and the requirement that only members be permitted to exercise a franchise within the structure give the firm many of the characteristics of public property, rather than simply private property held as an aggregate of individualities.

In one sense, then, the co-operative is a form of collective property. However, other characteristics of the ICO co-operatives distinguish it from a pure collective. An ICO co-operative is not like a kibbutz or a Hutterite colony, both of which can loosely be characterized as collective property. The rights of membership, wherein the members in general meeting have ultimate authority over the firm, give members the political and social benefits of property. Control over the disposition of assets, but not a full entitlement to the surplus, gives members important economic benefits of property. Only the right of free alienability, the distinguishing characteristic of capitalist private property, is lacking. Once created, an ICO co-operative will continue to exist as a co-operatively held entity, although membership will change.

It is this characteristic of non-distribution upon dissolution that makes this form of property so durable. The disintegrating forces at work on early producer co-operatives will not destroy a worker co-operative established under the ICO model. The lure of capital gains cannot seduce individual members because they have no authority to destroy, as individuals, what they have created collectively. The co-operative as an artificial person truly has a life of its own, and is not merely a fragmented holding by a collection of individuals temporarily joined together for mutual gain.

ICO co-operatives recognize that growth in a corporation is due to a congruence of capital input and labour. As production on a societal basis necessarily involves a division of labour, all working people should benefit, not just the holders of capital. However, individuals should not be able to realize the economic benefits created over several generations by dividing the spoils amongst themselves. Members must pass on for posterity what they received from the past and have themselves created. In this sense, the ICO co-operatives employ a sense of stewardship, rather than just ownership, seeking to preserve economic assets and not merely to exploit them.

This is a very distinctive model of co-operative property. As the result of attempting to create a core of non-alienable property that will be permanently removed from the free market of property, it has been heavily criticized, particularly by proponents of Mondragon-style co-operatives, which are discussed below. The main criticism of what Oakeshott terms "high-minded coops" is that collective ownership will destroy the economic incentive to maximize profits.⁴⁰ These co-operatives, it is argued, will lose the higher productivity effects observed in other worker co-operatives, because members will not receive all the benefits of more efficient production. Another economic critique is that removing capital reserves from the individual control of members will discourage capitalization from retained earnings and force the co-operative to rely heavily on borrowed capital.⁴¹ Theoretical criticism such as this is belied by the unmistakable success of the ICO co-operatives in the U.K. In 1978, Oakeshott could still point to the dearth of common ownership enterprises to support his contention that ordinary workers would never choose to belong to a co-operative that denied them full individuated ownership of capital assets.⁴² However, membership in worker co-operatives in the U.K. is now in excess of 6,000, with 90 percent of new co-operatives registering under ICOM

⁴⁰ *Supra*, note 15 at 84.

⁴¹ K. Bradley & A. Gelb, "The Replication and Sustainability of the Mondragon Experiment" (1982) 20 Br. J. of Indus. Rels. 21.

⁴² *Supra*, note 15.

model rules.⁴³ The common ownership structure has proven itself to be relatively popular with U.K. workers.⁴⁴

With regard to membership and majority control, the Act stipulates that the ICO enterprise be controlled by a majority of the members, so the Model Rules demand that a majority of the people working in the enterprise be members. To allow managers to make necessary but unpopular decisions, the Rules sensibly provide for ICO firms to appoint managers for a fixed period of time. Were it not for such a provision, it is clear that managers' positions would frequently be quite untenable and uncertain. With this security, managers are able to address long-term issues as well as short-term ones without immediate fear of losing their jobs. Control of the enterprise is vested in the membership which has the right to select the board of directors (termed the Committee in the Model Rules) by majority ballot. Regulation 10 provides that the general meeting of the membership is the basic governing body of the co-operative, with power to elect and recall board members on a majority ballot basis, every member being entitled to one vote.⁴⁵ The Committee in turn appoints the management. Thus the membership has direct formal control over the policy-making aspect of the firm and indirect control over executive power exercised by managers.

The Regulations provide for consultation with appropriate trade unions before loans are made.⁴⁶ This holds true even where

⁴³ Cockerton & Whyatt, *supra*, note 29 at 5, 10.

⁴⁴ The local government programmes available to ICOM co-operatives are a powerful force. See Axworthy, *supra*, note 15.

⁴⁵ *Supra*, note 25, Regulation 11.

⁴⁶ Regulations under the *Act* provide that only common ownership and co-operative enterprises wholly or mainly engaged in the manufacturing sector are eligible to receive assistance. It is unfortunate that grants and loans are not available to enterprises wishing to become, but not yet, involved in manufacturing. It would seem only sensible to provide assistance for feasibility studies and start-up. Similarly, there are no grants or loans for worker co-operatives engaged in the service industry, even if they want to move into the manufacturing sector. The Regulations also limit the purpose for which loans can be made: Regulation 3 stipulates that loans are only available for the whole or part of fixed and working capital requirements of the enterprise and then only for an "identified project" which has a "reasonable prospect of success." The local government assistance programmes do not have these same limitations (see Axworthy, *supra*, note 15 at 33-36, 41-42, 51-55). Under the *ICO Act*, if a loan is to be made in excess of £7500 (about \$13,000), the appropriate government official must approve it and may attach any conditions seen fit. Furthermore, loans are to be

the worker-members do not belong to a union. The unions which will have to be consulted when a non-unionized worker co-operative applies for a loan are those which would normally represent workers of those trades, professions and skills in unionized enterprises. Consultation with trade unions can be seen as merely a political act, but it is a useful and valid exhortation to obtain as much information as possible in order to make the decision on the loan as effectively as possible.

The money available under the Act to both co-operative and common ownership enterprises is not large, but does represent a commitment to the idea of worker co-operatives. Similarly, the Act, being a private member's bill, had to receive unanimous support in the House of Commons and thus all-party support. Too adventurous a scheme would not have achieved this degree of support. In fact, local governments have established extensive assistance programmes for such economic organizations,⁴⁷ even though the national government in the U.K. is not at all sympathetic to worker-owned enterprises.⁴⁸

Individual equity co-operatives still predominate in France, Mondragon (in the Basque region of Northern Spain) and Italy, all of which have thriving worker co-operative sectors. But ICOM provides an alternative model that appears to have durability, and a more egalitarian distribution of property and power in a co-operative firm.

adequately secured unless the relevant body believes the prospects of success of the project would be seriously jeopardized. In that case, security can be completely or partially dispensed with (Regulation 4). The loans are interest-bearing at, or above, the rate prescribed by the appropriate government official and interest is payable at least annually with the principal repayable within five years (Regulation 5). Interest can be accumulated for the first three years of the loan and added to the principal to accommodate enterprises where, according to the relevant body, the project in question would be seriously jeopardized by a requirement that interest be payable annually or at shorter intervals from the outset (Regulation 6).

⁴⁷ See Axworthy, *supra*, note 15 at 28-55.

⁴⁸ *Ibid.*

B. *Worker Co-operative Legislation in the U.S.: Mondragon-Style Worker Co-operatives*

The ICOM approach to worker co-operatives can be contrasted to that represented by the Massachusetts *Employee Cooperative Corporations Act* 1982.⁴⁹ It follows the Mondragon model of worker co-operative organization which has been so successful that many observers have been prompted to seek to apply it to other locations. The statute provides that a business corporation may elect to become an "employee cooperative." In order to do so the co-operative must issue a class of voting shares called "membership shares" — one, and only one, of which shall be owned by each employee member. Only full- or part-time employees can be members. These membership shares are to constitute the only voting shares in the co-operative. Earnings from the activities of the co-operative are to be apportioned and distributed in accordance with the proportion of the worker-member's work to the total work contributed by all of the members. The earnings can be retained by the co-operative and provision for an intricate system of internal capital accounts offers a means of keeping records.⁵⁰ The statute also deals with a hybrid form of co-operative, which bears many similarities to an Employee Stock Ownership Plan (ESOP) and a profit-sharing capitalist firm. However, the pure Mondragon-style co-operative aspects of the Act will be the focus of analysis in the remainder of this section.

The legal structure in the worker co-operative legislation recently passed in Massachusetts⁵¹ and other states⁵² (sponsored by the Industrial Cooperative Association (ICA)) is closely modelled on the Mondragon experience, and is framed in concepts accessible to

⁴⁹ St. Mass. 1982, c. 104, para 3. For discussions of the model followed by the very successful group of worker co-operatives in Mondragon, Northern Spain, which inspires this Act see the sources referred to *supra*, note 15.

⁵⁰ *Ibid.* at para. 10.

⁵¹ M.G.L. c. 157A (1982).

⁵² Maine, Connecticut, Vermont and New York have also passed similar worker co-operative legislation. See P. Pitegoff, "Organizing Worker Coops" (1985) 7 Law and Pol. Q. 45 at 48.

Canadian audiences. For the purposes of this paper it will be beneficial to discuss the provisions of the Massachusetts Act as representative of Mondragon-style worker co-operative legislation.

The framework for this form of worker co-operative is described by the principal drafters of the legislation as follows: "The legal structure of the worker cooperative, which assigns membership rights (the voting and net income rights) to the workers' role, implements two fundamental normative principles: the democratic theory of government and the labor theory of property."⁵³

The basic thrust of the ICA Model Legislation is its recognition of three factors: that democratic self-government in the work place is critical, that property is essentially the production of labour, and that labourers have a moral right to their own product and thus should legally own whatever property they produce.⁵⁴

There are several noteworthy characteristics of the Massachusetts law. For example, an ordinary corporation can become an employee co-operative by amending its by-laws.⁵⁵ In terms of membership, only employees can be members of the co-operative, and members are issued with shares designated as voting stock.⁵⁶ Non-members can be issued non-member stock and are entitled to approve amendments to the structure of the co-operative which affect their interest, such as the issue of more stock.⁵⁷ This measure is intended to allow "creative financing schemes built upon stock sales to non-members" and to ease the "gradual conversion of existing business corporations to employee corporations."⁵⁸ However, ultimate control remains with the workers on the principle of one worker-one vote: only members can vote to issue voting stock other

⁵³ D. Ellerman & P. Pitegoff, "The Democratic Corporation: The New Worker Cooperative Statute in Massachusetts" (1983) N.Y.U. Rev. Law and Social Change 441 at 460.

⁵⁴ See D. Ellerman, *Theory of Legal Structure* (Somerville, Mass.: Industrial Cooperative Association, 1983) for a fuller explanation.

⁵⁵ *Supra*, note 49 at para. 3.

⁵⁶ *Ibid.* at para. 6.

⁵⁷ *Ibid.* at para. 7.

⁵⁸ *Supra*, note 53 at 457.

than membership shares.⁵⁹ The co-operative must issue "patronage allocations," or profit shares based on work contribution.⁶⁰ The co-operative may also set up an internal capital account for each member. This account reflects appreciation in stock value and serves to separate the capital value of a membership share from its voting privileges. This innovation allows new members to join the firm without having to buy out older members, a problem that has developed with traditional co-operative structures such as the Northwest plywood co-operatives.⁶¹

If the co-operative so chooses, it can be structured as a replica of a Mondragon co-operative by following the system outlined in section 10 of the Act. These "internal capital account co-operatives" are wholly member-owned, with all assets of the firm either listed in individual capital accounts or in collective reserves. Retained earnings are to be divided among these accounts. Non-employees cannot hold capital or voting stock in the co-operative. The members of the co-operative can vote to transform it into an ordinary corporation by a two-thirds vote⁶² and having done so, membership shares and internal capital accounts will be transferred into ordinary shares of the newly established corporation.⁶³ If the co-operative remains a co-operative, members who leave it have the right to have their membership shares redeemed, with the price of redemption determined by reference to the members' internal capital accounts.⁶⁴

Due to pressure from the State Bar, the Mondragon-style co-operative model was not made mandatory for coverage under the Act. "The result of legislative compromise is a statute that authorises, but does not prescribe, the Mondragon model for

⁵⁹ *Ibid.* at 454.

⁶⁰ *Supra*, note 49 at para. 8.

⁶¹ See Bellas, *supra*, note 22.

⁶² *Supra*, note 49 at para. 4.

⁶³ *Ibid.* at para. 11.

⁶⁴ *Ibid.* at para. 9.

structuring a worker cooperative."⁶⁵ However, the Act's distinctive contribution to legal structure lies in the Mondragon-style co-operative model which is under discussion here. It is this form of co-operative that makes membership rights a functional role of employment, in contrast to the capitalist hybrid firms where individual control increases with share ownership.

Membership requirements are formally similar to those of other co-operatives. Only members can be employed by the co-operative and no one outside the firm can control any equity capital. Thus, in the familiar co-operative manner, capital serves labour, rather than labour serving capital. Thomas and Logan describe the process of capital accumulation at Mondragon as having rather contradictory objectives. They write that "capital resources are allocated with two objectives: to gradually increase the capital intensity of production in order to integrate new technological developments, and to create the highest possible number of new jobs."⁶⁶ However, an important difference is that these co-operatives usually require a considerable capital contribution from each member upon joining. The Mondragon experience is a relevant guide to how the structure established under the ICA statute will operate. Mondragon requires a contribution equal to the annual wage of the lowest paid worker at Mondragon from each worker entering a co-operative.⁶⁷ This works out to about 20 percent of the start-up capital of new co-operatives, with another 20 percent provided by the government and 60 percent lent by the Caja Laboral Popular — the bank of the Mondragon worker co-operative system.⁶⁸ Ellerman terms the firm a democratic community rather than a piece of property, but this capital contribution gives the firm a greater affinity with the property-owning democracies of the seventeenth century than with the universal franchise of today. Membership can no longer be open to any worker or unemployed person. It is only

⁶⁵ *Supra*, note 53 at 457.

⁶⁶ H. Thomas & C. Logan, *Mondragon: An Economic Analysis* (London: George Allen & Unwin, 1982) at 186.

⁶⁷ Oakeshott, *supra*, note 15 at 191.

⁶⁸ A.G. Johnston & W.F. Whyte, "The Mondragon System of Worker Production Coops" (1977) 31 *Indus. & Lab. Rels. Rev.* 18 at 21.

open to those who can raise the necessary membership fee from savings or through borrowing. Worker co-operatives operating a system such as this generally provide for regular deductions to be made from the contributing members' paycheques. Such a large personal capital contribution provides a stark contrast with the ico co-operatives and radically alters the nature of the co-operative membership. ico co-operatives grant membership in a firm and commensurate control over capital as of right, simply for being a member-employee.

Control of the co-operative is formally vested in the membership. Only members can make important decisions on matters such as the issue of stock, sharing of profits, and dissolution, but several factors limit this democratic control. In the Mondragon system, the Caja plays an important part in controlling the individual co-operatives, due to its large loan position in the capital base of the firm and its continual monitoring of the co-operative's performance. Similarly, the Mondragon-style co-operative model is also open to some form of external control. Although a central financing agency has not been developed in the u.s. or Canada serving this type of worker co-operative, this ICA model allows for equity to be issued to non-members, thus turning over partial control to outside interests. Even in Mondragon-style co-operatives, where no external ownership is permitted, lending institutions may acquire capital interests through secured financing arrangements. This form of effective power is also possible in ico co-operatives, and, indeed, in any economic organization.

Finally, differential control within the firm is assured by the emphasis on individual equity ownership. Although each member will formally have the same vote, there is little doubt that long-term members with larger internal capital accounts will command greater influence over the policy of the co-operative than newer members with smaller investments. A democracy of inequality inevitably leads to elite rule.

The main difference between Mondragon-style worker co-operatives and other forms of worker ownership is the emphasis in the former on individual ownership of equity. This is at the core of the theory behind these co-operatives where the labour theory of property is to be implemented simultaneously with democratic self-management in the firm. Members are entitled to their ordinary

wage plus the bulk of retained earnings (actual or deferred). At Mondragon, while it has varied over time, about 70 percent of the surplus of each co-operative is allocated to individual capital accounts, with the remainder split between community contributions and co-operative reserves.⁶⁹ Members have a right to this account upon leaving, although the co-operative may retain up to 30 percent of the account upon pay-out.⁷⁰ Members are entitled to a fair rate of interest on their accounts. Oakeshott states that this interest is a factor in determining future profit shares. As profit is distributed according to member income, and as interest payments on internal capital accounts are included in income, larger equity positions are given a greater profit share.⁷¹ Ellerman and Pitegoff are ambiguous as to whether a similar provision applies in the ICA Mondragon-based model. They state that "patronage allocation" is based on "relative amount of work, usually measured by hours of work or total wages."⁷² In order to avoid paying tax on these allocations, the earnings must be distributed according to patronage, which in a worker co-operative is based on labour, rather than relative capital investment.⁷³ The ambiguity arises in how the interest payments on internal capital accounts are to be classified. Are they interest on capital nominally loaned to the co-operative, or should the interest payment be considered part of wages because the internal capital account is theoretically deferred wages? If interest on deferred wages is also considered wages, it should figure in the distribution of profits, as it does in Mondragon.

Regardless of whether interest payments are considered in the distribution of retained earnings, there will still be unequal distribution of profits which will clearly establish a two-tiered membership. Older members with larger capital accounts will benefit disproportionately from increases in retained earnings. There will be differential rewards to members even if the profits are

⁶⁹ *Ibid.* at 22.

⁷⁰ Oakeshott, *supra*, note 15 at 191.

⁷¹ *Ibid.* at 193.

⁷² *Supra*, note 53 at 455.

⁷³ *Ibid.* at 456.

distributed solely according to wages. This is so because, in all likelihood, there will be differential wages according (at least partly) to seniority of position in the firm. Secondly, older members with larger capital accounts will command large interest income which must come out of retained earnings even before profits are distributed to the accounts. Therefore, they will receive a greater benefit from interest payments, plus profit share and wages, than will new members.

It should be noted that Ellerman and Pitegoff are well aware of the difficulties which differential ownership poses for the continued democratic existence of worker co-operatives. In fact, they criticize ESOPs and the Plywood co-operatives because of "an inherent tendency toward increasing concentration of capital ownership."⁷⁴ Should the co-operative be successful, share prices will become very large; this will make it difficult for new members to buy out retiring workers. This problem is at the heart of the separation of membership shares from internal capital accounts, as the system is designed to avoid the degenerative problems associated with the plywood co-operatives.⁷⁵

However, the internal capital account solution has only confronted an external manifestation of an underlying problem. The Mondragon-style worker co-operative model partially answers the problem of inter-generational collapse of co-operatives by requiring the co-operative as a firm to pay out internal capital accounts, while separating the admission-ticket membership shares so they can be sold at a fixed value. But the reality of differential ownership in a democratic institution is not addressed. Ellerman and Pitegoff claim that this bifurcation of democratic membership shares and private property internal capital accounts means that a worker co-operative "is not owned at all — it is a democratic social institution."⁷⁶ In practice, however, this will certainly not be the case. Differential profit shares and unequal equity control will negatively affect the co-operative in two ways, one political and one economic.

⁷⁴ *Ibid.* at 445.

⁷⁵ D.F. Wade, "Employee Ownership: Alternative Financing Models" (1984) 2(2) *Econ. Dev. Rev.* 53 at 56.

⁷⁶ *Supra*, note 53 at 464.

The political issues have been canvassed in the discussion on control. Economic leverage inevitably leads to political influence, as can readily be seen in society at large. Even though members with larger internal capital accounts would still only have one formal vote, their influence due to their greater ownership would doubtless be greater. The economic problem reflects the dichotomy at the heart of the Mondragon-style model's reliance on the twin pillars of democracy and labour property. Democratic rights are inherent in the individual and are by definition held equally. Democracy cannot function without equality, thus all votes count the same. Every citizen is held to have an equal and inalienable right to exercise power in whatever arena is democratically controlled. In the democratic state, the right is expressed in the power to choose governments. In the worker co-operative or democratic ESOP it is the right to choose directors. Individual involvement and participation in policy setting and management in some way, in addition to franchise, establishes participatory democracy. However, the labour property theory leads to diametrically opposite conclusions. By granting differential distribution of economic values, the firm is sanctioning inequality. Although all members contribute to the co-operative through their labour, those members with the longest service and membership can command a larger share of values. Thus membership in the democratic community of the co-operative is not equal; it is differentiated in a hierarchy based on length of service. This is chain-letter democracy — the latest additions to the chain must pay value to the first in line and receive the right to command the same values from those hired later.

Although all members contribute to the co-operative through their labour, the first members can command a larger share of values. Individuals have a right to own what they individually create, but the product of the modern firm is a collective effort based on a division of labour. Surpluses are a result of community effort, not merely combined individualities. Assume worker A is the first member of the co-operative. All that he or she produces is due to his or her own effort. Now worker B joins. Their joint effort creates a larger output. But A claims a larger share as interest on his or her capital. How can labour theory distinguish between the additional value created by B and the contribution of A's capital in the form of stored labour value? The addition of external loan

capital and many workers further complicates the problem. The Mondragon-style worker co-operative model does not recognize production as a social endeavour and thus the firm never becomes social property. Instead it remains aggregated individual property; a partnership of small capitalists, rather than a co-operative. In effect, labour still serves capital, but the capital is held by fellow members, rather than by a capitalist or outside shareholders.

The contradiction is exacerbated by the members' power to dissolve the co-operative. The ability of individuals to appropriate disproportionate shares of combined property leads inexorably to pressure to dissolve the co-operative. The ability of individuals to appropriate disproportionate shares of combined property leads inexorably to pressure to dissolve the co-operative. This is the same difficulty encountered by the plywood co-operatives in the Pacific North West of the United States. Once a certain proportion of the membership has obtained a large capital stake in the co-operative, they will also be able to lay claim to a share of common reserve funds should the co-operative dissolve or revoke its election to be governed by the employee co-operative statute. Success of the co-operative will lead to economic pressure to dissolve.

Even if it does not dissolve, the co-operative will have difficulties sustaining its existence. In order to retain control within the co-operative and to permit individual members to realize their shares, retiring members must be paid out. But this would lead to a serious capital drain on the co-operative's resources, especially if a large number of members were eligible for pay-out simultaneously. The Mondragon system overcomes this conflict between labour mobility and the need to retain equity in the co-operative through a naturally low mobility rate for workers.⁷⁷ In Canada there is no such commitment to place, except perhaps in certain rural communities. Thus, the problem of preventing decapitalization through labour turnover would be a serious threat to the long-term viability of the worker co-operative.

It can be seen that the Mondragon-style worker co-operative model presents serious problems for legislatures seeking a permanent and democratic form of worker ownership. The emphasis on

⁷⁷ Bradley & Gelb, *supra*, note 41 at 27.

individual ownership leading to differential rewards and the consequent pressure to dissolve the co-operative, or, alternatively, to bleed it slowly through individual capital haemorrhages, lead to serious doubts about the durability of this form of property. The peculiar factors in Mondragon, particularly the centralizing influence of the Caja, make it doubtful that the success experienced there could be transplanted to Canada. It might be better to consider an ICOM scheme or a legislative imposition of worker ownership as in Sweden. However, these last two approaches may be too ambitious in the Canada of the late 1980s and 1990s.

C. *France: The 1978 Worker Co-operative Law*

In 1978 a new law on worker co-operatives was enacted in France.⁷⁸ It is predicated on a number of general principles.⁷⁹ In the context of this Act membership and employment in a worker co-operative are seen as irretrievably linked.⁸⁰ Democratic management is enshrined as a principle. Directors and officers are elected on a one member-one vote basis. The surplus, after providing for taxes, internal reserves and interest on capital, is to be distributed to members and non-members on the basis of a formula tied to hours worked. There appears to be no limit placed on interest on capital except that it cannot exceed the amount distributed to workers.⁸¹ The property of the co-operative is seen as collective property. In addition, the worker co-operative is seen as a business with three objectives: to ensure profitable operations, to ensure high levels of productivity and to raise the necessary capital from the members for

⁷⁸ La loi n° 78-763 du 19 juillet 1978, publiée au Journal Officiel du 20 juillet 1978. See also *Le Nouveau Statut Juridique Des Sociétés Coopératives Ouvrières De Production*, an undated publication of La Confédération des SCOPs, from which most of the information in this section is derived.

⁷⁹ P. Jones, "Development Choices For A Law Of Workers Co-operatives" (Faculty of Law, University of Toronto, 1983) [unpublished] at 98-99.

⁸⁰ Non-member workers are a common feature of French worker co-operatives, consequently this notion should be seen more as an exhortation than an operating principle.

⁸¹ Jones, *supra*, note 79 at 99.

future operations.⁸² Primarily, however, such worker co-operatives are seen as organizations which worker-members own and control.

In their relationship to co-operative principles, and worker co-operative principles in particular, French worker co-operatives exhibit some interesting departures from what might be expected. They do not actively discourage non-member workers and they do not operate on the principle of limited rate of return on capital; indeed the standard by-laws refer to a minimum return on capital, but no maximum.⁸³ Also, the surplus is distributed to all the workers, not just the members. This is a fairer means of distributing surplus and is presumably based on the notion that all workers, not just the members, should be entitled to a share of the surplus because they worked to ensure it.

As Jones has noted, Antoni isolated seven principles from the pre-1978 regime.⁸⁴ First, membership was and is based on admission by the present members. A worker could not join just by buying a share; he or she must be admitted by membership. A free association of workers was what was envisaged. Consequently, the second principle provided that shares not be transferable. Third, control was to be on the basis of one member-one vote. Fourth, limited return on capital was recognized as a general operating principle; Antoni felt it important that capital be put to work for labour rather than *vice versa*.⁸⁵ Fifth, reserve funds were to have priority over members' shares of the surplus. This was to ensure that the co-operatives reinvested adequate sums of capital to ensure their survival and expansion. Sixth, the property of the co-operative was seen as collective, so the reserves were not designated as members' individual property in any way. The seventh principle dealt with dissolution: the assets remaining after satisfying the liabilities of the co-operative were to be distributed not to the

⁸² *Ibid.* at 100.

⁸³ *Ibid.*

⁸⁴ *Ibid.* at 102.

⁸⁵ This is discussed in the context of the minimum interest on capital figure now in operation; see *infra*.

members, but to another co-operative or to a federation of co-operatives.

French worker co-operatives have taken a pragmatic approach to the form of organizational model they follow. They are incorporated as private corporations with virtually no restrictions as to the activities they pursue. Worker co-operatives must clearly indicate that they are such in all forms of correspondence they use. If the worker co-operative is incorporated as a *société anonyme* (SA),⁸⁶ it must have at least seven worker-members; if it is incorporated as a *société à responsabilité limitée* (Sarl)⁸⁷ it must have at least four worker-members. The law does not require these worker-members to be full-time employees. There are no restrictions on the employment of non-members. There are, however, detailed rules about membership in the 1978 Act. Worker co-operatives in France view the legal regime in a manner which appropriately reflects their priorities: the federation of French worker co-operatives (La Confédération générale des sociétés coopératives ouvrières de production) feels that the new Act serves to add to the strength of worker co-operatives and the sector.

There are two regimes under which members may be admitted to French worker co-operatives. The first is the common-law regime. This regime will apply if the worker co-operative makes no other provisions. Under this approach, a candidate for membership, presented by members, serves a one-year probationary term. Upon its completion he or she is admitted to membership by a simple majority vote of the members present and voting. Non-members must not exceed a stipulated percentage of members.

If worker co-operatives do not wish to be governed by this legally stipulated scheme they can choose from three other optional methods for admitting members. The first involves automatic membership: the by-laws of the worker co-operative can stipulate that, after serving the required one-year probationary period, the employee be automatically admitted to membership, or be admitted to membership unless two-thirds of the members are opposed. The second option involves an obligation on the part of the candidate.

⁸⁶ Roughly equivalent to a public business corporation in Canada.

⁸⁷ Roughly equivalent to a close or private business corporation in Canada.

There are three possibilities for by-laws here, all based upon the requirement that candidates put themselves forward for membership. In the first version the employees, after completing the probationary period, put themselves forward for membership and have it granted as of right, unless two-thirds of the members present and voting at a meeting are opposed. The second has the candidates presenting themselves and being admitted to membership unless two-thirds of the membership at the next general meeting are opposed. In the third version, employees who refuse to put themselves forward for membership are treated as resigning from the co-operative, which can then end the contract of employment without facing any repercussions. The third optional admission regime involves employees, both members and non-members, investing in the co-operative. There are tax advantages attached to such investments.

Members no longer employed in the co-operative lose their membership. This can occur in one of three ways: because the member resigns, because the membership has voted by a two-thirds majority to exclude a member for cause, or because the co-operative unilaterally decides to reimburse the capital of a member who no longer works for the co-operative. Resignation as a member also carries with it the loss of the right to work in the co-operative; on the other hand, retirement does not carry with it the loss of membership. Losing membership entails losing employment rights, unless the by-laws provide otherwise.

French worker co-operatives by-laws can require members to subscribe capital, but worker-members cannot be required to buy more than one share to join nor, once they have joined, to invest more than five percent of their annual salary in any year. In the first ten years of operation of the co-operative, no member can own more than a quarter of the capital.

In worker co-operatives incorporated as an SA, one-quarter of the shares required to be subscribed have to be purchased at the time of joining; the remainder can be bought over the next three years. If the co-operative is incorporated as a Sarl, all the required investment must be made at the time of joining. If the investment is paid out of salary over a period of time, no more than ten percent of annual salary can be required to be paid over for this purpose. The amounts invested in this way are deductible from taxable income up to a stated per annum maximum. When paying

out departing members, the co-operative cannot reduce its capital below the level of half of the maximum envisaged by the constitution of the co-operative.

If the worker co-operative is formed as an SA, it can choose an administrative structure based on a board of directors and a director-general, or it can choose to be governed by a "conseil de surveillance et directoire." In the event that the worker co-operative is incorporated as a Sarl, the general meeting of the co-operative must appoint one or more managers for four years. If a Sarl co-operative has more than twenty members, it must elect a board of directors of between three and nine members. All elected officials must be members, and boards of directors and councils must be composed of at least two-thirds worker-members.

The surplus must be distributed in a fixed order to ensure the long-term viability of the co-operatives. Fifteen percent of the net surplus has to be set aside to a legal reserve until that reserve is equal to 100 percent of the highest amount of capital stipulated under the co-operative's constitution. A development reserve can be created by the by-laws into which some of the surplus can be placed. Allocation to the employees, both members and non-members, cannot be less than one-quarter of the net surplus after the allocation to the legal reserve has been made. The total amount allocated for interest on capital cannot exceed the amounts allocated to the employees.

Investors in French worker co-operatives are able to take advantage of tax incentives. In addition, worker co-operatives in France can own shares in other worker co-operatives.

The worker co-operative sector in France is growing steadily.⁸⁸ The legislative response to the issues confronting the sector presents an interesting contrast to the other models discussed in this paper.

⁸⁸ See Oakeshott, *supra*, note 15 at 121-44.

D. *Swedish Wage-Earner Funds*

No analysis of forms of worker ownership would be complete without a discussion of wage-earner funds in Sweden. After a ten-year public debate and the 1982 national election fought on the issue, Sweden has implemented a comprehensive system of wage-earner funds. Various schemes for economic democracy were discussed in Sweden throughout the post-war period, but the idea received its modern impetus from a report prepared in 1975 by Rudolph Meidner, an LO (the Swedish Trade Union Confederation) economist.⁸⁹ The LO subsequently adopted the plan as part of its programme at its 1976 congress and began to actively lobby the Swedish Social Democrats to implement it once in power. In 1978, the Social Democrats adopted a revised version of the plan and then fought and won the 1982 election on the issue. Wage-earner funds were given legislative sanction in 1984.

The funds are seen by the Social Democrats as a reflection of the "Third Democratization" of Swedish public life.⁹⁰ The first was political democracy, represented by universal suffrage and parliamentary democracy. The second was social democracy, with an emphasis on equal access to economic resources, and was implemented by a comprehensive welfare programme. The third democratization is economic democracy, which gives workers the opportunity to participate in the process of making economic decisions, rather than simply influencing the policy output through trade unions and the state.

As initially proposed by the LO, the funds were to solve several structural problems encountered in the construction of the Swedish welfare state. Due to the LO policy of "wage-solidarity," inequities were arising within the economic system. This wage policy encourages a policy of equal pay for equal work throughout Sweden. When national wage negotiations are conducted by the centrally organized employers and trade union confederations, wage rates are kept equal across national and industrial lines. However, in

⁸⁹ K. Ahlén, "Sweden Introduces Employee Ownership" (1985) 56 Pol. Q. 186 at 189.

⁹⁰ S.L. Albrecht & S. Deutsch, "The Challenge of Economic Democracy: Sweden" (1983) 4 Econ. and Indus. Dem. 287 at 309.

industries that were more efficient or enjoyed natural economies of location or scale, uniform wage rates tended to create excess profits in some firms. Some of this excess ended up being used to raise wages in some sectors, as the wage-solidarity agreement set a floor on wages, rather than a ceiling. Thus some sectors and firms were seen to enjoying an inequitable share of the national wage and profit aggregate. Beyond this peculiarly Swedish problem, arising from its particular wage policy, the funds were also aimed at counteracting the international problem of concentration of wealth, particularly equity holdings, in the hands of a small percentage of the population. Finally, LO envisaged the funds contributing to worker influence over their economic environment.⁹¹

When the proposal was adopted by the Social Democrats, another rationalization for the funds was developed. During the recent international recession, Sweden's export-oriented economy was badly hit. Profit levels declined sharply as they did elsewhere, but Sweden's social contract made it impossible to adopt the solution implemented by most other Western economies: the deliberate creation of high unemployment through monetarist policies and downward pressure on wage rates. The funds were envisaged as a new source of risk capital for domestic corporations that would lead to recapitalization and higher profit levels.⁹² Altogether, the funds were seen as likely to assist the expansion of the economy through higher profit levels without creating unacceptable unemployment or inequitable distribution of economic resources. The Ministry of Finance argued that the "most essential task of employee investment funds in this context will be to help create a distributively acceptable policy of growth and stabilization."⁹³ In the short term the plans appear to be successful, particularly in preventing a rise in wage costs from offsetting the positive effects on profits of the Swedish krona's devaluation.⁹⁴

⁹¹ *Ibid.* at 291; *Employee Investment Funds* (Stockholm: Ministry of Finance, 1984) at 10-11.

⁹² Ministry of Finance, *ibid.* at 10.

⁹³ *Ibid.* at 15.

⁹⁴ *Supra*, note 89 at 191.

As finally implemented, the wage-earner funds are an adjunct of the national pension system. Five separate funds organized on a regional basis were created in 1984, with employees appointed by the government forming a majority of directors for each fund. The local trade union of any corporation in which the fund owns shares can request that 50 percent of the voting rights for the shares be transferred to the employees in that corporation. The funds are to receive Kr 2,000 million annually (approximately C\$ 400 million), to come from a special profit-sharing tax and an employer contribution of .2 percent of the wage bill. The funds are to continue until 1990 when it is anticipated that they will have a total value of Kr 14,000 million, approximately 5 percent of the value of all publicly listed shares in Sweden. No combination of funds is to be permitted to own more than 50 percent of the shares in any single company and the funds are to provide risk capital for use within Sweden. Dividends or other returns from the funds are to be transferred to the national pension system.

It can readily be seen that the funds create a distinct form of ownership that is neither *étatist* nor capitalist. One observer has commented that "the diversion of a proportion of profits into investment funds controlled by wage-earners represented a partial "socialization" of profits and investment."⁹⁵ That this is only meant as a partial buyout of private owners is emphasized by the Swedish government. It is stated that the funds are not meant to replace the market economy, but to provide "active reforming efforts to alleviate the negative effects and restrain the destructive elements of the market economy [as] a precondition of the survival of that economy."⁹⁶

The nature of the property created by the wage-earner funds can only be understood in the general context of Swedish employment legislation and trade union organization. Throughout the 1970s, the Social Democrats passed a series of laws designed to enhance worker participation. Even in 1970, some observers saw a possibility of a transition towards worker self-management within a

⁹⁵ P. Walters, "Distributing Decline: Swedish Social Democrats and the Crisis of the Welfare State" (1985) 20 *Government and Opposition* 356 at 362.

⁹⁶ Ministry of Finance, *supra*, note 91 at 17.

parliamentary democracy as exemplified in such legislation as the *Act on Joint Regulation of Working Life*.⁹⁷ Since that time, laws such as the *Work Environment Act* and the *Act for Employee Participation in Decision Making*⁹⁸ have greatly expanded worker control of the work place. In other words, "the present discussions on economic democracy build upon an already firmly established commitment to industrial democracy."⁹⁹

This emphasis on a legislative approach to work-place democracy explains the LO rejection of corporation-based funds to achieve economic democracy. Such funds would lead to inequality of resource distribution, not only the initial distribution as some corporations are more profitable than others, but also in the future when large, profitable firms would benefit disproportionately from the self-generation of capital. Workers who fortuitously were employed by profitable corporations would benefit while the mass of employees would not. This would have a disruptive influence on the wage solidarity policy and could distort the national system of collective bargaining towards a system of plant bargaining characteristic of other Western economies.¹⁰⁰ Beyond the inequitable distribution of wealth that would be exacerbated by corporation-based plans, democratization would occur only on a local level, rather than in the entire economy. LO believes that "in view of the fact that the funds are intended as a link in the process of democratization of working life as a whole, all sections of employees must have the possibility of exercising influence over the funds."¹⁰¹ A voice in the management of the economy is seen as a direct extension of citizenship rights belonging inherently to every worker. As the economy is an aspect of public life, it should be collectively controlled through wage-earner funds that represent everyone, not

⁹⁷ G. Hunnius, "The Transition Towards Self-Management in the Industrially Advanced Countries" (1970) 41-42 *Autogestion et Socialisme* 122 at 132.

⁹⁸ Albrecht & Deutsch, *supra*, note 90 at 289.

⁹⁹ *Ibid.* at 303.

¹⁰⁰ R. Eidem & B. Ohman, *Economic Democracy through Wage-Earner Funds* (Stockholm: Arbetslivscentrum, n.d.) at 36.

¹⁰¹ *The Labour Movement and Employee Investment Funds* (Stockholm: Swedish Trade Union Confederation, 1982) at 11.

merely employees in particular corporations. The heritage of equality exemplified by political democracy and universal social programmes in Sweden is continued by a nation-wide system of wage-earner funds that benefit all working people.

It is clear that the Swedish plan has created a new and potentially radical form of property.¹⁰² Swedish Social Democrats have never turned to state ownership as a major tool in implementing the welfare state. However, the measures described above have fundamentally altered private property rights, for the most part without attacking formal ownership. Ownership of corporate property does not allow the exercise of unilateral power by employers within the work place, as is the case in Canada, where control of the work process is firmly in employers' hands and beyond the scope of collective bargaining. Now, after the creation of the wage-earner funds, corporate owners can no longer make an absolute claim to the product of the firm as is their right in Canada.¹⁰³ Workers have a right to share of the products of the firm which they administer and direct through the fund boards and which they appropriate through their pension funds. Thus a new property right, "an enforceable claim to some use or benefit of something,"¹⁰⁴ has been granted to every Swedish worker as an incident of employment. It is not something workers have to purchase, but rights to which they are entitled as workers. This increase in employee rights has been achieved at the expense of owners and employers. Thus the new right has both a democratizing *and* an equalizing effect.

It can be seen that the wage-earner funds straddle a middle ground between socialist and capitalist property. Traditional state socialism holds property in common, claiming that with the abolition of private property all citizens share in the fruits of their labour. However, in practice, property is controlled by a bureaucratic élite with concomitant privileges, thereby excluding the masses from using

¹⁰² Not all critics agree with this assessment; see E. Asard, "Employee Participation in Sweden 1971-1979" (1980) 1 *Econ. and Indus. Dem.* 371.

¹⁰³ K. Klare, "Critical Theory and Labor Relations Law" in D. Kairys, ed., *The Politics of Law* (New York: Pantheon, 1982) at 74.

¹⁰⁴ C.B. Macpherson, ed., *Property* (Toronto: University of Toronto Press, 1978) at 3.

property as a means of self-direction. In capitalism, private property rules, but there is an inexorable concentration of property in fewer hands. The wage-earner-fund concept attempts to decentralize control and ownership by allowing private ownership but redistributing the incidents of ownership throughout by allowing private ownership.

This new right is, in itself, quite radical compared with other Western economies, in that it contains the potential for a complete democratization of the economy. Certainly the Swedish plan is slated to stop far short of majority control of corporate property. However, it is possible to envisage the funds expanding in the future, progressively democratizing corporate property while preserving a market economy.

Durability is a major concern with new forms of democratic property. As the wage-earner funds are backed by the state and seemingly accepted by the majority of the population, it seems unlikely that the process could be reversed. Thus, Sweden has successfully implemented, through legislation, a policy instrument that achieves two central goals of worker ownership: democratic participation and economic equality in a durable form. Participation has been implemented through a series of laws designed to allow workers a voice in controlling the work environment, and economic equality has been initiated through the wage-earner funds.

This contrasts with North American worker-ownership plans which emphasize, to some degree, *individual* ownership, either through a share in the firm or through a claim to profits. North American researchers have postulated that such individual claims are necessary to realize the full benefits of self-management, particularly the incentive for economic efficiency that is present in profit-sharing schemes. This is significantly lacking in the Swedish system. Individual influence and control are indirect, diffused through representative systems within trade unions, wage-earner-fund boards and government.

Finally, the lessons of the Swedish experience may prove to be of only academic interest for advocates of worker-ownership in Canada. The wage-earner fund proposal is arguably a reflection of the unique Swedish situation, rather than a blueprint for other industrial nations. Support for this argument can be found in the extremely high unionization of the Swedish work force, which at 85

percent is the highest in the world.¹⁰⁵ This has resulted in cohesive collective bargaining on a national basis with well-defined egalitarian goals. As well, the Social Democrats have enjoyed a virtual monopoly on elected power which has allowed a progressive implementation of work democracy legislation. The wage-earner funds reflect the "Social Democratic conception of the welfare state, that distribution policy aims at the just and equitable distribution of resources."¹⁰⁶ Given this unique political culture, it is difficult to see similar legislative schemes being implemented in Canada. But the Swedish plan is nevertheless of use as yardstick for evaluating the success of more decentralized plans in achieving the shared goals of participation and equality.

V. EMPLOYEE STOCK OWNERSHIP PLANS

Although the ESOP form of worker ownership does not attempt to establish a new form of property, it will be briefly mentioned here. American attitudes to the concept have been described by a proponent of the idea in the following terms.:

Worker capitalism ought to be accepted or rejected for what it is, and it is not socialism.... Some people call it capitalism when managers exercise stock options and take equity positions in the companies in which they are employed, yet they call it socialism when workers do the same thing.¹⁰⁷

ESOPs are clearly designed to stabilize capitalism by dispersing stock ownership more widely through the economy. In fact, the thousands of ESOPs established in the U.S. owe more to the considerable tax and business incentives available under the plans than to a desire to democratize the work place. A whole panoply of legislation has been passed at the state and federal level in the U.S. to encourage employee ownership plans.¹⁰⁸ The idea has the

¹⁰⁵ Ahlén, *supra*, note 89 at 187.

¹⁰⁶ Walters, *supra*, note 95 at 360.

¹⁰⁷ J. O'Toole, "The Uneven Road of Employee Ownership" (1979) Nov/Dec Harv. Bus. Rev. 185 at 197.

¹⁰⁸ T.J. Merker, "Working Toward Employee Ownership" (1984) 11 J. of Leg. 127 at 135-43 where the various laws supporting ESOPs are described.

support of a broad range of American political opinion because it represents a redistribution of ownership without a challenge to private control of corporations. Leveraged plans allow corporations to establish trust funds where stock is held on behalf of employees. These trusts borrow money and purchase new stock issues from the corporation to infuse new capital into the business. The tax effect of these plans is that the corporation can deduct both interest and capital costs of a loan, as they are considered part of the employee benefit bill.¹⁰⁹

Experience under these plans has proved their proponents right. No significant change in management practices or democratic control of corporations generally takes place in an ESOP firm, even when workers own over 50 percent of stock, although there are a number of democratic ESOPs in which such changes have taken place. Partial worker control, through methods such as worker directors, access to corporate information, and stock positions have not been sufficient to transform traditional capitalist enterprises. Bradley examined such attempts in France, Canada and Britain and concluded that limited methods such as these inevitably result in the worker initiative collapsing under market pressures.¹¹⁰ ESOPs have been used in the past as a weapon in concessionary bargaining with unions, or to saddle workers with economically inefficient plants.¹¹¹ Hammer and Stern, in a study of the Rath Packing ESOP, found that traditional union-management conflict continued unabated in spite of majority worker ownership and employee directors. Production did not improve and the company was eventually closed.¹¹²

The main theoretical objection to ESOPs is that they rely on the medium of individual stock ownership with no other alterations to the capitalist firm. As long as the firm survives, minority stock

¹⁰⁹ J.E. Ronan, "Tax Incentives Encouraging Use of Employee Stock Ownership Plans as Corporate Finance and Anti-Takeover Devices" (1985) 58 *Temple L.Q.* 115 at 116.

¹¹⁰ K. Bradley, "A Comparative Analysis of Producer Co-operatives: Some Theoretical and Empirical Implications" (1980) 18 *Br. J. of Indus. Rels.* 155 at 164.

¹¹¹ D.G. Olson, "Union Experiences With Worker Ownership: Legal and Practical Issues Raised by ESOPs, TRASOPs, Stock Purchases and Cooperatives" [1982] *Wisc. L. Rev.* 729.

¹¹² T.H. Hammer and R.N. Stern, "A Yo-Yo Model of Cooperation" (1986) 39 *Indus. & Lab. Rels. Rev.* 337 at 340.

holders with a significant equity share will be able to exercise disproportionate influence over the firm, just as they do in ordinary capitalist firms. Differential ownership is virtually guaranteed in such plans as stock is usually issued according to wage rate. Given the great difference in salaries between senior management and shop-floor workers in North America, the upper echelons of the corporation will be able to control larger stock holdings, giving them continued control of the corporation. Finally, the failure to create a distinctive form of property that is insulated from the capitalist economy leaves the ESOP open to external takeover. Should stock prices rise, there will be inevitable pressure on individual workers to sell out and realize their capital gain. Once this occurs, the ESOP reverts to a traditional capitalist structure.

VI. CONCLUSIONS

If worker ownership is to be encouraged and nurtured in Canada, an appropriate legislative framework must be developed under which worker co-operatives and other desirable forms of worker ownership can be established. The present legislation in Canada is unsatisfactory for this purpose. This article has presented for consideration a number of options contained in models adopted in other jurisdictions. Given the generally recognized advantages of increased worker participation in ownership of work places and in worker co-operatives in particular, it is past time for effective legislation initiatives in this field. For example, as compared to other forms of economic organization, worker co-operatives generate greater efficiency and productivity, lower absentee rates and greater job satisfaction on the part of workers, reduced need for managerial supervision, and the lowest cost per job created, as well as democratic control of the work place. Consequently, they are deserving of considerable attention. The law's contribution to this scenario would be an effective legislative framework. While this would not, in itself, generate worker co-operatives and innovative forms of worker ownership, it would be of considerable assistance.