

# Changes to Ontario's Act: Non-Member Directors on the Board



## Introduction

Until recently, co-operatives could only elect members of the co-operative to its board. The rationale was to ensure the board would represent the members' interests in governance activities and to protect the co-operative from outside influence. However, this would sometimes leave co-operatives in the position of being unable to seek or recruit directors with particular skills or expertise. Excluding knowledgeable non-members from the board represented a missed opportunity for some co-ops.

## What are the Changes?

Recent amendments to the *Co-operative Corporations Act* (the "Act") in December 2009 have made it possible for co-operatives, other than non-profit housing co-operatives, to have up to 20 per cent of its board of directors composed of non-members. In order to make use of these changes, co-operatives need to amend their bylaws, and make sure they follow guidelines prescribed by the Act. The new sections of the Act are set out below.

*Section 87(1)* Subject to subsection (2), no person shall be a director of a co-operative unless he or she is a member thereof or a director, officer, shareholder or member of a corporate member thereof, and, where a director or a corporation of which he or she is an officer, director, shareholder or member ceases to be a member, he or she thereupon ceases to be a director.

*Section 87(2)* Subject to subsection (3), the by-laws of a co-operative, other than a non-profit housing co-operative, may provide for the appointment or election of directors who are non-members or who are not directors, officers, shareholders or members of a corporate member.

*Section 87(3)* The number of directors appointed or elected who are non-members or who are not directors, officers, shareholders or members of a corporate member must not exceed one-fifth of the total number of directors.

*Section 93(2)* Directors who are non-members or who are not directors, officers, shareholders or members of a corporate member are not to be counted for the purpose of constituting a quorum.

## What Does This Really Mean?

Co-operative boards must still be composed entirely of members, unless the co-operative has enacted a bylaw that allows non-members to be elected to the board. The number of non-member directors is limited to one-fifth of the directors (and the bylaws cannot provide for more than that) and the non-member directors do not count towards quorum.

Non-member directors are elected or appointed to the board in the same way as a member director. They are either (1) elected at the Annual General Meeting (AGM) or (2) appointed to fill a vacancy that arises during the term and then confirmed by the membership at a member meeting, provided the co-operative's Articles of Incorporation do not prohibit this. They have the same responsibilities and liability as member directors, the same rights to dissent and the same voting power.

The one exception to the foregoing is non-profit housing co-operatives. Outside board members are not permitted.

- There are over 1,300 co-operatives, credit unions and caisse populaires incorporated and operating in Ontario, with 1,900 locations in 400 communities.
- In 2012 alone, 73 new co-ops incorporated in Ontario.
- Housing is Ontario's largest co-op sector (45%), followed by Financial Services (17%), Child care (17%) and Agriculture (6%).
- The co-operative sector in Ontario represents a very conservative \$30 billion in assets (2007).

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### How Do We Change Our Bylaws?

In order to change the bylaws of a co-operative, a special resolution is required. A special resolution is one where (1) the board of a co-operative makes and votes on a resolution (in this case, to approve the changes to the bylaws) and (2) two thirds of those present at a member meeting then confirm the resolution to change the bylaws, unless the co-operative's Articles of Incorporation provide a greater proportion of votes are required, in which case the special resolution would need to be confirmed by such greater proportion. Both of these steps need to be followed in order for a change in the bylaws to become effective.

The board of directors may find it useful to strike a committee or empower staff to work on the bylaw changes. Staff may also need time to develop new processes or provide comments to the board on the impact of the changes. Although it is not required to have a lawyer review the proposed bylaw changes or have a lawyer draft bylaw text, the board of a co-operative may wish to seek legal advice or review of the new bylaws before passing a board resolution or taking the bylaws to the membership for approval.

By-law changes can be handled at any member meeting, but the co-operative will have to comply with the legislation in the Act and the co-operative's by-laws with respect to the notice and documentation

### Key Facts

**Co-operatives (other than non-profit housing co-ops) can elect a prescribed number of non-members to the board of directors. These are full voting director positions. Non-member directors assume the same liability, responsibilities and duty of care as member directors.**

**Up to 1/5 (20%) of the total directors on a co-operative's board can be non-members. The number is based on the actual number of member directors sitting in a given year.**

**Non-member directors do not count towards board quorum, only member directors do. This ensures that members maintain ultimate control in the board's decision making processes (especially in smaller co-operative boards).**

**Co-operatives have to amend their bylaws to make use of this change, which will take time and effort on the part of the board and requires approval from the membership.**

**Co-operatives do not have to make use of this new provision if they do not want to, in which case, no change to their governing documents or processes is required.**

to be given to members in advance of the meeting. It is recommended in any event that the text of the proposed new by-laws be given to members in advance of a member meeting where the changes will be voted on. This provides time for the members to review and consider the proposed changes.

### Operational Guidelines

#### Figuring Out the Permitted Number of Non-Member Directors

In order to determine how many non-member directors a co-operative can have, the board must know how many member directors are specified in the co-operative's Articles of Incorporation. There will be a difference in the process to determine the appropriate number of non-member directors depending on if the co-operative's Articles specify a fixed number of directors, or a range:

1. **If the co-operative's articles specify a fixed number of directors**, then the number of non-member directors will remain constant as well.
2. **If the co-operative's Articles specify a range of directors**, then the Act prescribes the exact number of directors shall be determined by a special resolution or, if authorized by special resolution, by a resolution of the directors.

- Three recent studies demonstrate that co-operative enterprises have significantly higher survival rates than other business corporations. In fact, a co-operative is twice as likely to be in operation after 10 years.
- Ontario co-ops employ and provide benefits to 15,500 people (greater than the total number of Ontarians employed in production of goods).
- 1.4 million Ontarians are members of a co-operative, credit union or caisse populaire (more than 10% of the population).

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If a co-operative has between five (5) and nine (9) directors inclusive, then one of those directors can be a non-member. If a co-operative has between ten (10) and fourteen (14) directors inclusive, then two (2) of those directors can be non-members.

Where co-operatives will have to be careful is where one or more member directors leave the board and, as a result, more than twenty percent (20%) of the board members remaining are non-members. In this instance immediate steps will have to be taken to fill the member vacancies on the board or a non-member will have to be removed from the board to comply with the twenty percent (20%) non-member board threshold set out in the Act.

### Determining Board Quorum When There Are Non-Member Directors

Quorum for board meetings is determined using the number outlined in the co-operative's Articles or bylaws as it applies to member directors. For example, if the co-operative's bylaws require that quorum is four directors being present, it applies only to the member directors. In a case where a co-operative has seven member directors and one non-member director, four member directors have to be present in order to run a board meeting. If only three member directors and the non-

member director are present, then there is no quorum.

If the co-operative's bylaws do not provide a quorum number, then the two-fifths proportion in the Act applies. This means two-fifths of the member directors would need to be present in order for the co-operative to run a duly constituted board meeting.

### Conclusion

The ability for co-operatives to have non-members on the board of directors offers opportunities to bring in outside perspectives and expertise to the board. However, there are governance and operational concerns that co-operative boards and staff will need to carefully consider the implications of when deciding whether or not to make use of the new provisions.

#### FOR MORE INFORMATION, CONTACT

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**More resources are available at:**  
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