

A Cooperative Amalgamation: Proud Histories Meet A New Frontier

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I. INTRODUCTION

THE AMALGAMATION OF Manitoba Pool Elevators (MPE) and Alberta Wheat Pool (AWP) on 30 October 1998 to form Agricore Cooperative Ltd. (Agricore) was, in a broad economic sense, a very small part of a massive global trend.¹ However, in the context of the agricultural economy of the Canadian prairies this amalgamation was a significant event signalling major structural change in the industry and setting the stage for renewed prairie wide competition between farmer owned and investor owned grain handling and farm service companies. This amalgamation, among traditional cooperatives and across provincial borders, was also a rare legal event requiring the development of, in farming terminology, groundbreaking solutions for several significant issues.²

Cooperatives have been significant and successful participants in prairie agriculture for over ninety years. United Grain Growers (UGG), a prairie-wide cooperative was formed in 1906 in Saskatchewan and then expanded across the prairies. Alberta Wheat Pool (AWP) and Saskatchewan Wheat Pool (SWP) were formed in 1923 and MPE was formed in 1925. The three Pools have a

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¹ In 1998, according to Securities Data Company, there were mergers worth \$2.4 trillion worldwide, a 50 percent increase on 1997, itself a record year. "After the Deal" *The Economist* (9 January 1999) 21.

² The only other recent major amalgamation among cooperatives in Western Canada occurred in 1992 when Central Alberta Dairy Pool, Fraser Valley Milk Producers Cooperative Association and Northern Alberta Dairy Pool Limited amalgamated to form Agrifoods International Cooperative Ltd., under the *Canada Cooperative Associations Act*, R.S.C. 1985, c. 40.

market share in their core business of grain³ handling of approximately 55% of the grain handled commercially in their respective provinces. UGG has a market share of approximately 17 percent of all grain handled prairie wide for a combined market share of approximately 72 percent across the prairies. The economic significance of these grain-handling cooperatives is perhaps best symbolized by the fact that the dominant visual feature of many communities on the prairies was and is the cooperatively owned grain elevator.

II. THE TRADITIONAL COOPERATIVE: A DEFINITION

A TRADITIONAL COOPERATIVE is a voluntary contractual organization of persons having a mutual interest in providing themselves with needed goods and services. A cooperative is formed as a legal entity under specific cooperative legislation and not under general business corporations legislation. Membership in a traditional cooperative is open to all who wish to use its services and does not require the investment of capital as a condition of membership. A cooperative is democratically controlled by its members, each of whom has one vote, on the basis of their status as member patrons and not as investors in the capital structure of the cooperative. In a cooperative the investment and operational risks and the benefits gained or losses incurred are shared equitably by its members in proportion to their use of the cooperative's services. The financial surplus generated by a cooperative either accrues to its member patrons in proportion to their use of the cooperative's services or is used as a reserve and to finance the provision of services. When members do invest capital in a cooperative, the interest rate or dividend is limited in some manner. These concepts are often referred to as "basis cooperative principles".

Some cooperatives have moved away from this traditional model by replacing members' equity with publicly traded shares.⁴ Legislative amendments which are expected to come into effect in Manitoba in the very near future will allow cooperatives to, *inter alia*, make membership contingent on capital investment.⁵ This paper focuses on amalgamations among traditional cooperatives such as MPE and AWP.

³ Grain for the purposes of this paper includes wheat, barley, canola, oats, flax, rye and special crops such as mustard, buckwheat, beans, peas, lentils, etc.

⁴ UGG took this step in 1992 and SWP followed in 1996. Both organizations remain under the effective control of their members as 12 of 15 directors of UGG and all of the directors of SWP are elected from among the ranks of the member patrons.

⁵ Bill 51, the *Cooperatives and Consequential Amendments Act* has been passed by the Manitoba Legislature but not proclaimed as of this writing and will permit the formation of the so called closed or new generation cooperatives when it comes into effect.

The cooperative form which was chosen by prairie farmers to realize their aspirations in the early part of the twentieth century had its roots in the principles adopted by a consumer's cooperative formed in Rochdale, England in 1844. The founding principles of this cooperative, which are captured in the definition set forth above, shaped the formation of the prairie cooperatives and are expressed in cooperative legislation today. Subsection 1(2) of the *Manitoba Cooperatives Act* provides :

... a body corporate that is organized and operated in accordance with principles and methods whereby except as otherwise provided in this Act, each member or delegate has only one vote and no member or delegate may vote by proxy; interest and dividends on capital are limited by statute or by-law; the business of the body corporate is carried on primarily for the benefit of members; and the business of the body corporate is carried on as nearly as possible at cost after providing for reasonable reserves and the payment or crediting of interest or dividends on capital, and any surplus arising from the business of the body corporate after providing for the reserves and the interest or dividends, unless used to maintain or improve the services of the body corporate for its members or donated for community welfare or the propagation of cooperative principles, is distributed in whole or in part among the members or the members and patrons of the body corporate in proportion to the volume of business that each has done with or through the body corporate; is a body corporate operated on a cooperative basis.⁶

Subsection 6(6) of the *Manitoba Act* goes on to stipulate that: "A cooperative shall be organized and operated on a cooperative basis and in such manner as to fulfill the purpose stated in its articles."

These provisions will be carried forward in subsection 4(1) and section 13 respectively in Bill 51, *The Cooperatives and Consequential Amendments Act*.⁷

III. THE BIRTH OF THE POOLS

A BRIEF ANALYSIS of some of the features of cooperative history is warranted for the purposes of this paper because the objectives and values reflected in that history continue to govern and shape the solutions which cooperatives adopt to address today's business requirements.

The history of the formation and evolution of these cooperatives is a fascinating blend of the shared ideology and aspirations of farmers and the imperatives of doing business on a global scale. This history, which has been

⁶ C.C.S.M c. C 223 [hereinafter *Manitoba Act*]

⁷ Bill 51, *The Cooperatives and Consequential Amendments Act*, 2d. Sess. 36th Leg., Manitoba, 1998 (assented to 29 June 29 1998) [hereinafter proposed *Manitoba Act*]

well documented,⁸ shows, in a very tangible way, how ideas and aspirations become reality through law by way of social and political processes.

The prevailing view among most prairie farmers during the years leading up to and following the formation of the Pools (and The Canadian Wheat Board in 1935) held that it was essential for them to join together in as large a group as possible in order to establish mechanisms by which they could unify and more effectively coordinate their marketing. This in turn they believed would reduce the impact of volatile global commodity markets on their farming operations and would reduce the role of middlemen (private grain handlers and traders, brokers, speculators and so forth) who were perceived to be earning exorbitant profits at the farmers' expense. The cooperative model was considered to be the only way to secure the benefits of group action and some of the advantages enjoyed by large corporations for their farmer members who were also individual business people.

In the summer of 1923 a California lawyer, Aaron Sapiro, with experience in establishing cooperatives in California and a number of other states made a series of widely reported speeches across Western Canada which arguably crystallized ideology into action. In one particularly rousing speech to farmers delivered 7 August 1923 he declared:

When will you learn that you are not dealing with wheat? What you are dealing with is human lives, what your children will eat, what your children will wear, how you will pay the doctor, how you will send them to school, whether you will have taxes to pay for roads, whether you will even have taxes enough to start and pay off the national debt. It is not wheat at all! It is all of your standard of life wrapped up in the doings of a little gang of men at Winnipeg, a larger gang of men at Chicago, and a cleverer gang of men at Liverpool.⁹

Winnipeg was the home of the Winnipeg Grain Exchange, The Chicago Board of Trade was probably the world's largest commodity exchange and Liverpool was the location of much of the U.K. milling industry, then Canada's largest export market. Mr. Sapiro was not telling prairie farmers anything that they did not, for the large part, already believe. However, his ability to express their most fundamental worries coupled with his advice to farmers that they form cooperatives to improve their position in the market place, given at a

⁸ See G. L. Fairbairn, *From Prairie Roots, Western Producer* (Winnipeg: Prairie Books, 1984); L. D. Nesbitt, *Tides in the West*, (Wilmington: Modern Press, 1962); F. W. Hamilton, *Service at Cost*, (Wilmington: Modern Press, 1976); V. Fowke, *The National Policy and the Wheat Economy* (Toronto: University of Toronto Press, 1957). See also P. D. Earl *Rhetoric, Reality and Righteousness: The Ideological Debate Between the Farm Organization and the Grain Trade, 1917-1935* for a very thorough analysis of the origins, structure and content of the political and social ideologies held by the founders of the prairie cooperatives. (Ph. D. Thesis, University of Manitoba (1992) [unpublished].

⁹ Fairbairn, *supra* note 8 at 17.

historically opportune time, had a powerful impact. AWP came into existence on 18 August 1923, SWP on 25 August 1923 and MPE on 25 February 1925.

The following words of SWP President A.E. Wilson reflected farmers' hopes at the time:

Cooperative marketing is on trial in this province on a scale that, if it succeeds, will take the distribution and merchandising of wheat out of the hands of private and speculative interests forever. If it fails, they will be entrenched as they have never been entrenched before. The eyes of the world are upon Saskatchewan.¹⁰

IV. THE BUSINESS CASE FOR AMALGAMATION

PRAIRIE AGRICULTURE HAS ALWAYS been connected to the international marketplace as most of the grain produced has, due to the small domestic market, been exported. This basic fact will not change in the foreseeable future. Thus the capacity to effectively market prairie grain to the export market is essential to the survival of prairie agriculture as it is now practiced. In recent years growth and economic consolidation among international competitors and other economic trends such as the well publicized use of export subsidies by competing agricultural exporters has put real pressure on the cooperative grain handling companies to both reduce their own costs of doing business and to expand their commercial capacity to serve grain buyers around the world. First UGG and then SWP issued equity shares which allowed them to attract investment capital to finance their growth. MPE and AWP chose amalgamation as the commercial strategy by which to increase their commercial strength and ability to serve their members effectively.

The amalgamation process is often seen as a reasonable way to enhance shareholder value for share capital corporations. In comparison, cooperative members place a high value on the services which the cooperative provides. Thus the underlying business case for amalgamation among cooperatives will tend to focus on service and cost of service issues. This is demonstrated in the Joint Information Circular (JIC) issued by MPE and AWP to their delegates prior to the vote on the amalgamation.

The benefits of amalgamation set forth in the JIC were that a combination of two already financially strong cooperatives can be expected to create an even stronger financial entity on a going forward basis; significant savings in operating costs can be achieved through amalgamation; amalgamation will create a platform for growth not only in the core business of the cooperatives but also in non-core businesses which will enhance members' potential for patronage earnings; amalgamation will allow increased investment in technology and re-

¹⁰ Fairbairn, *supra* note 8 at 39.

search and will also improve and expand the range of services which can be provided to members.¹¹

As the delegate bodies of both MPE and AWP overwhelmingly voted in favour of the amalgamation which formed Agricore it is clear that amalgamation was considered to be a necessary step forward.

This paper will not provide an overview of all the mechanical aspects of a cooperative amalgamation. Most of the formal requirements are set out clearly in the applicable legislation and regulations. Nor will this paper address the business aspects of amalgamation as these are matters negotiated among the parties to an amalgamation and as such will vary from transaction to transaction. Rather it is the intention of this paper to focus discussion on several issues which are likely to be common to all cooperative amalgamations for which the legislative and other legal guidance available to practitioners may be less than completely helpful. This paper will also discuss briefly the steps taken to ensure that the amalgamation proposal not only met or exceeded applicable legal requirements but also met the expectations of the membership of the cooperatives.

V. LEGISLATIVE ISSUES

CROSS BORDER AMALGAMATIONS among cooperatives are relatively rare events in Canada. It is perhaps for this reason that the applicable legislation is not in some respects as developed as business corporations legislation. The statutes governing both MPE and AWP required amendment to facilitate the amalgamation to form Agricore.¹² The *Alberta Wheat Pool Act*¹³ a special act of the Alberta Legislature, did not permit amalgamation or continuance to another jurisdiction for the purpose of amalgamation at all until amended in 1998.¹⁴ The Manitoba Act did not permit continuance to another jurisdiction and amalgamation in a single step until amended in June 1998.

As well, subsection 147(1) of the Manitoba Act requires a cooperative wishing to continue under the laws of another jurisdiction to establish "... to

¹¹ The Joint Information Circular, dated 8 October 1998, is on file with the Manitoba Registrar of Cooperatives and is available for public examination. [hereinafter JIC]

¹² The amalgamation which formed Agrifoods International Cooperative Ltd. was possible only after amendment of the *Cooperative Associations Act*, R.S.B.C 1979 c. 66, which governed one of the parties, to permit the continuance of B.C. cooperatives from B. C. to another jurisdiction, in this case Canada. See *Cooperative Associations Amendment Act*, S.B.C. 1992.

¹³ S.A. 1970 [hereinafter AWP Act]

¹⁴ *Alberta Wheat Pool Amendment Act*, S.A. 1998.

the satisfaction of the Registrar that its proposed continuance in another jurisdiction will not adversely affect creditors or members of the cooperative”

VI. DIRECTORS AND OFFICERS DUTIES AND LIABILITIES

WHEN UNDERTAKING AN AMALGAMATION, directors and officers must be fully aware of the duties attached to their positions with due regard for the complex requirements of assessing the merits of, and consummating, the proposed transaction. Subsection 83(1) of the Manitoba Act provides:

Every director and officer of a cooperative, in exercising his powers and discharging his duties, shall act honestly and in good faith with a view to the best interests of the cooperative, and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The Manitoba Act modifies the obligations imposed on directors of cooperatives, but not officers, through subsection 84(4) which provides:

A director is not liable under section 79, 80 or 83 if he relies in good faith upon financial statements of the cooperative represented to him by an officer of the cooperative or in a written report of the auditor of the cooperative fairly to reflect the financial condition of the cooperative; or a report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him.

The AWP Act does not contain similar provisions.¹⁵ Thus the duties imposed by common law apply. The duties imposed on directors by the common law are succinctly set by Professor Pennington who states:

... [the] directors owe their company a number of fiduciary duties similar to those owed by an agent to his principal, and also a common law duty to take reasonable care in the management of a companies' affairs.¹⁶

Among these duties are the duty to act honestly, in good faith and primarily in the interest of the shareholders as a whole.¹⁷ These duties were reviewed in the cooperative context by the British Columbia Court of Appeal in *Re: Wilson and Cowichan Co-operative Services*. In this matter which arose as a result of a dispute among members of a cooperative which was being dissolved, McLachlin J.A. stated:

The directors of a company or cooperative stand in a fiduciary relationship with the corporation or cooperative and its members The duty to act honestly and in good faith includes the duty to act bona fide in the interests of the company or cooperative and its members.¹⁸

¹⁵ JIC, *supra* note 11 at 23.

¹⁶ R.R. Pennington, *Company Law*, 6th ed. (Toronto: Butterworths, 1990) at 583.

¹⁷ *Ibid.* at 584.

¹⁸ 34 D.L.R. (4th) at 620.

Successful cooperatives often have a market value that exceeds the amount of their debts and other external obligations and the members' equity and other liability to its members. Under the bylaws of MPE and AWP members were entitled to receive this additional value on a dissolution and windup and this was carried forward in the Agricore bylaws.¹⁹ It is submitted that the duty of cooperative directors, whether imposed by statute or the common law, being a duty to the cooperative as a whole, encompasses this additional value, in addition to ensuring that its external obligations and actual member liabilities. While not expressly stated in *Wilson* this view is consistent with the judgment of the British Columbia Court of Appeal in that case. The manner in which this issue was addressed in the Agricore amalgamation will be discussed in detail below.

VII. AMALGAMATION APPROVAL PROCESS

PURSUANT TO THE *Alberta Wheat Pool Amendment Act*, AWP was empowered, when authorized by a majority of three-fifths of its delegates, to continue under another Alberta Act or the laws of another province or Canada and to amalgamate under such law. Continuance and amalgamation under the Manitoba Act requires approval by a special resolution supported by at least two thirds of the delegates voting on the resolution.

However the AWP Act did not permit AWP to continue out and then come back under its Act. This contrasts with the Manitoba Act in which subsection 147(4) permits the directors of a cooperative to abandon a continuance application if such abandonment is approved by the members or delegates at the time that the continuance was approved. To avoid undue risk, the MPE and AWP delegate meetings held to approve amalgamation, which were held at the same time, were structured to permit the MPE delegates to vote first thereby permitting MPE to continue under the laws of Saskatchewan, as discussed below, to await the AWP continuance.

VIII. NOTICE OF MEETING AND DISCLOSURE ISSUES

SUBSECTION 95(6) OF THE MANITOBA ACT stipulates that:

The notice of a meeting of members at which special business is to be transacted shall state the nature of that business in sufficient detail to permit the member to form a reasoned judgment thereon; the text of any special resolution to be submitted to the meeting or, if the full text is too lengthy for convenient inclusion in the notice, a summary thereof.

The *Alberta Wheat Pool Act* and AWP's bylaws did not contain any provision having a similar effect. In view of the nature of the proposal, the legal duties

¹⁹ JIC, *supra* note 11 at J-33.

imposed on directors and officers and the corporate culture of cooperatives, which requires frankness and open, honest discussion because the members and delegates demand that, it was clearly desirable to ensure that the information made available to both groups not only met or exceeded applicable legal standards but was identical and as detailed as reasonably possible. A review of the JIC indicates that a very substantial wealth of information on all aspects of the transaction was provided.

IX. CHOICE OF JURISDICTION

COOPERATIVES CONTEMPLATING A CROSS BORDER amalgamation will need to assess the jurisdictional options which may be available in order to enhance their prospects for future success. Following a review of the statutes of Alberta, Saskatchewan, Manitoba and Canada which govern cooperatives, Saskatchewan was chosen as the jurisdiction in which MPE and AWP would continue and amalgamate. This statute was considered to offer the most appropriate environment within which to achieve the business objectives of the amalgamated cooperative.²⁰ Note however that subsection 156(4) of the *Saskatchewan Cooperatives Act*²¹ permits the Registrar under that Act to issue a certificate of continuance to a cooperative wishing to come under that Act if the Registrar is satisfied that all of the requirements of that Act are met. This includes the requirement that such a cooperative will be operated on a cooperative basis as defined in s.3 of that Act.

X. COOPERATIVE FINANCE

PERHAPS THE MOST TANGIBLE DIFFERENCES between cooperatives and share capital corporations lie in their respective capital structures. The basic mechanism by which traditional cooperatives finance their business operations can be expressed succinctly. Pursuant to s. 29 of the Manitoba Act each cooperative must allocate among and credit to its members the surplus arising from its operations in each fiscal year to each member a share of that surplus proportionate to the business done with or through the cooperative as computed by the Board of Directors and approved by the members at a general meeting. These amounts are referred to as patronage dividends and the accounts in which the funds are held are referred to as the members' patronage loan accounts.

Section 36 of the Manitoba Act permits cooperatives to adopt, by charter bylaw, a requirement that the members receiving a patronage dividend must

²⁰ JIC, *supra* note 11 at 10.

²¹ S. S. 1996 c. C-37.3.

lend all or part of amounts allocated to members' patronage accounts to the cooperative on such terms and at such rate of interests, or without interest, as the charter bylaws may specify. MPE's charter bylaws²² provide that each member shall in each fiscal year lend to MPE the amount of the patronage dividend credited to the member, less any tax obligations.

Each members' patronage loan account is repaid to the member upon application in a number of specific situations; most commonly when the member reaches a specified age, which was 65 in the case of MPE, or ceases farming. While the patronage loan accounts do not carry interest it is arguable, at least in the case of a well managed cooperative, that the gains produced by having access to interest-free capital through the members' patronage loan accounts, increases the surplus available for allocation to patronage loan accounts by a corresponding amount.

AWP's equity structure, while somewhat more complex, appeared to also be more satisfactory to members.²³ In summary, earnings from operations, less a number of specified amounts and an allocation to retained earnings usually ranging from 20–35 percent of the earnings available for patronage allocation, were allocated among members in an amount proportional to their volume or value of business with a particular business unit relative to the total volume or value of business done by that business unit. AWP then remitted the source deductions required under the *Income Tax Act*.²⁴ The balance referred to as distributable earnings is further allocated with 20 percent being paid to members immediately. Forty percent is credited to a Revolving Equity Account which earns interest and is paid out over a ten-year period. The remaining 40 percent is credited to a Long Term Equity account which is to be paid out over a 20 year period starting in 2015. Payment from the Revolving Equity Account and the Long Term Equity Account was accelerated if the member reaches the age of 70 or ceases farming.

Combining these significantly different systems to create the member equity structure for Agricare was achieved by adopting the AWP structure, thereby benefitting MPE members, and by reducing the payout age from 70 to 65 for AWP members thereby benefitting that group, to match the payout age for MPE members. Thus the revolving equity, long term equity and shares of AWP were converted into the revolving equity, long term equity and shares in Agricare on a dollar for dollar and a share for share basis. The patronage loan accounts of MPE members were also converted into revolving and long term equity accounts in Agricare on a dollar for dollar basis. The amount of each

²² The Charter Bylaws of Manitoba cooperatives must be filed with and are available for inspection at the office of the Registrar of Cooperatives.

²³ JIC, *supra* note 11 at 22.

²⁴ R.S.C. 1985 (5th Supp.), c.1. [hereinafter Tax Act]

MPE members' patronage loan account was allocated between revolving equity and long term equity in the same proportion as that existing at the effective date of amalgamation between the aggregate balances of the revolving equity and long term equity accounts of AWP.²⁵

As discussed above, cooperatives often have a market value which exceeds the face value of their obligations to their members and other liabilities. This additional value is only realizable by the members in certain circumstances such as the sale of the assets of the cooperative and its subsequent dissolution or if the cooperative issues investment shares. The financial review of MPE's and AWP's businesses determined that the fair market value of AWP relative to that of MPE varied from the relative proportions of AWP's members' equity and MPE's patronage accounts. Accordingly, it was considered inappropriate for the members' equity of AWP and patronage accounts of MPE to be converted into members' equity accounts of Agricore on a dollar for dollar basis without adjustment if those events occurred.²⁶

In order to maintain initially the respective members' equity and patronage accounts proportionately equal with respect to the relative valuations of the two Pools, it was agreed that a theoretical premium would be allocated to members of AWP in proportion to their members' equity accounts as an attribute of membership in Agricore as at the effective date of the amalgamation. This premium will have realizable value only for those AWP Members who remain members of Agricore at the time Agricore is sold, dissolved, carries out an initial public offering of its shares, lists its shares on a public stock exchange or amalgamates and only in the instance that these events enable Agricore to realize or attribute to Agricore proceeds or value greater than the then current book value, exclusive of non-participating shares, of Agricore. At the time of amalgamation, none of these events were planned or anticipated to occur.²⁷ It was estimated that this theoretical premium will initially have a face value of approximately \$92 million.²⁸ However, recognizing the indefinite and temporary nature of the premium, the face value of the premium will decline on a straight-line basis, one-tenth per year over the ten years from the date of amalgamation. If an event triggering the right to this theoretical premium were to occur, the realizable value of the premium at the time would be converted into the members' equity accounts (in the proportion of balances held by those members in their revolving and long-term equity accounts) of members of Agricore at

²⁵ JIC, *supra* note 11 at 53.

²⁶ *Ibid.* at 4.

²⁷ *Ibid.*

²⁸ *Ibid.*

that time who were also AWP Members of record on the date of amalgamation.²⁹

It goes without saying that the issue of fairness to members of the proposal outlined above and indeed of the entire transaction was of critical importance. To ensure that the transaction was fair to both groups of members, MPE and AWP each retained a qualified and reputable firm of financial advisors to assist in the negotiation and structuring of the transaction and to present their opinion on fairness of the transaction to the delegate bodies at the special general meetings at which the amalgamation was to be reviewed and voted on.³⁰

XI. MEMBERSHIP CONTROL AND GOVERNANCE IN COOPERATIVES

THE BOARDS OF DIRECTORS of the large traditional agricultural cooperatives such as MPE and AWP are comprised of farmers who have been elected as directors by delegate bodies which have in turn been elected by the farmer members of the cooperative. These formal mechanisms for member control are a reflection of the desire of cooperative members to create and maintain business organizations that are responsive to their business needs. Thus, the Boards consist of individuals who share the views, values and economic interests of the membership at large.

Both MPE and AWP are “open” cooperatives which accept as members any farmer who does business with the cooperative.³¹ Each member is entitled to stand for election to the delegate body of the cooperative and to vote in those elections. The delegates in each geographic region then elect the director for that region. The President and Vice-President(s) of the Board of Directors are selected by Directors from among that group. Thus all of the positions in the governing structure of the cooperative are filled from the ranks of the farmer members and have been elected by those members. Subsection 63(1) of the Manitoba Act provides:

The directors shall ... exercise the powers of the cooperative directly or indirectly through the employees and agents of the cooperative; and ... direct the management of the business and affairs of the cooperative.

Subsection 64(1) provides that the “members of a cooperative may... at any annual meeting or any special general meeting called for the purpose enact by-laws not contrary to law ...”

²⁹ JIC, *supra* note 11 at 3–4.

³⁰ See the fairness opinions of the financial advisors. JIC, *Ibid.* at App. Q and R.

³¹ In the case of AWP, and now Agricare a threshold level of \$1 500 worth of business is required for membership eligibility. JIC, *Ibid.* 11 at J–10.

This power is by virtue of section 91 of the Manitoba Act vested in the delegate body of MPE giving them meaningful control over the business and affairs of the cooperative. Delegate control was made even more explicit for AWP. Section 15 of the Alberta Act provides:

The directors of the Pool shall, as far as is practicable, administer the affairs of the Pool in accordance with policy established from time to time by the delegates and pursuant to such policy shall have the power to do all things in their opinion necessary or useful for the conduct of the business of the Pool.

Delegate control is given additional weight by subsection 70(1) of the Alberta Act which allows delegates to "by ordinary resolution at a special meeting remove any director from office".

AWP's democratic structure consisted of 72 delegates and 9 directors while MPE had 80 delegates and 8 directors. The unification of the Boards of Directors and the delegate bodies will be achieved in a two-step process. On the date of the amalgamation these two bodies were simply combined to produce a 17 person Board and a delegate body with 152 members. However, the Agricore bylaws contain a mechanism which will reduce the number of directors to 12 and the number of delegates to 96 with this transition to have full effect as of the annual meeting of delegates to be held in the fall of 1999.³²

To ensure that Agricore's democratic structure will be satisfactory to members a delegate committee was struck to review the structure created by the bylaws and to bring forth, for consideration by the delegate body, any amendments which may be considered advisable. Thus the delegate body, and, through it, the cooperatives' membership retains ultimate control over its future direction and the basic cooperative principle of member control remains undiminished.

XII. DISSENT RIGHTS

Subsection 149(1)(d) of the Manitoba Act entitles members of a cooperative to dissent if the cooperative resolves to be continued under the laws of another jurisdiction. An essential step in the proposed merger with AWP was the approval by delegates of a resolution providing for the continuance of MPE under the Saskatchewan Act. This gave rise to a right of members of MPE to dissent.

The Registrar has established a policy which will be of general application in which he has set forth the manner in which he will exercise the discretion conferred on him by subsection 149(5) of the Manitoba Act. This policy provides that:

a) The provisions of subsections 149(1), 149(2), 149(3) and 149(4) of the current Act would continue to apply.

³² JIC, *supra* note 11 at 49–50.

b) If the written objection from the dissenting member as required by subsection 149(2) requests the payout of the members' shares or loans, the Registrar will require that the cooperative terminate the membership and pay out the dissenting members' membership shares (those shares that the member purchased as a condition of membership) or membership fee within one year.

c) If the dissenting member whose membership has been terminated has shares or loans in the cooperative that were the result of patronage dividends, the cooperative may pay out those shares or loans within one year or over a five year period if the directors determine and certify that the payout would adversely affect the financial well-being of the cooperative.

d) The cooperative may, by a special resolution of the members, extend the payout of patronage shares and loans over a ten year period.

e) Payment made under c) or d) shall not be made later than it would otherwise have been made under the by-laws of the cooperative.

f) If the payment period is extended under c) or d), the cooperative shall pay interest on the outstanding balance owing to the dissenting member at a rate equal to the Bank of Canada rate plus 1% as the Bank of Canada rate stood on January 1 of that year for the period January 1 to June 30 and July 1 for the period July 1 to December 31 in each year.

g) The cooperative will not make any payments to dissenting members if the cooperative is unable to meet its liabilities as they come due.

h) A dissenting member may withdraw their dissent at any time prior to receiving payment for their membership fee.

i) A dissenting member who does not request the payout of their equity in the cooperative in their written objection will not have their membership terminated. In these cases, the Registrar will review the nature of the objection and will take such action as is deemed necessary.

This policy, established under the current Manitoba Act, was designed to be consistent with the dissent provisions in clause 320 of Bill 51, the *Cooperatives and Consequential Amendment Act*, which was then before the Legislature but had not received Royal Assent.

Dissent rights were introduced into Manitoba's cooperative law with the passage of the Manitoba Act in 1981. A strong argument can be made that dissent rights are not only inappropriate in cooperative law but that such rights can be damaging to cooperatives and the interests of the majority of the members by encouraging the problem known in economics as "free-riding". That is, dissenting members may wish to withdraw their patronage loans accounts and still have the expectation that the cooperative will provide services to them where the cooperative stands to benefit in some way from this additional business volume. Cooperative members accumulate patronage loan accounts through their patronage of the cooperative. These accounts form the capital

base of the cooperative, as discussed above, which it must have if it is to function. Simply put, it is arguable that the bargain between the cooperative and the member is one in which the cooperative gives to the member all of the profit or surplus attributable to that member's patronage at the time when the member is no longer in a position to use the services of the cooperative while at the same time providing goods and services on a basis that is competitive in the relevant marketplace in exchange for the use of the capital generated by that patronage.

If a large number of members were to exercise unfettered dissent rights, the financial burden could conceivably have a very negative effect on an amalgamation supported by the required majority or it could even make an amalgamation financially impossible. The burden of unfettered dissent rights would, of course, fall the hardest on the most financially vulnerable cooperatives. These concerns are reflected in the Registrar's policy and in the language of the proposed Manitoba Act.

The general trend in U.S. cooperative law is similar in effect to that reflected in the Registrar's policy. In recent years, state legislatures in Illinois, Utah, Washington, Hawaii, Iowa and Kansas have enacted legislation which either eliminated or curtailed the exercise of dissent rights by cooperative members in amalgamations and other similar transactions.³³

XIII. TAX CONSIDERATIONS

SECTION 87 OF THE *INCOME TAX ACT* provides specifically for the income tax consequences resulting from the amalgamation of corporations. Pursuant to section 87 an amalgamation will generally not have significant immediate tax consequences for the corporations involved or for the shareholders of such corporations. The general object of section 87 is to treat the amalgamated corporation as a continuation of the predecessor corporations, standing in their place with respect to various assets, liabilities, surpluses and other tax oriented accounts.

Section 87 applies to the merger of two or more taxable Canadian corporations to form one corporate entity where, by virtue of the merger, all of the property of the predecessor corporations immediately before the merger become the property of the new corporation, all of the liabilities of the predecessor corporations immediately before the merger become the liabilities of the new corporation, all of the shareholders who owned shares of the predecessor corporations immediately before the merger receive shares of the new corporation, otherwise than as a result of the acquisition of property of one corporation by another corporation, pursuant to the purchase of such property by the other cor-

³³ *Agricultural Law Update*, December, 1994.

poration or as a result of the distribution of such property to the other corporation upon the winding-up of the corporation.

However, neither section 87 or any other provision of the Tax Act specifically addresses itself to cooperative amalgamations. The proposed amalgamation of MPE and AWP met all of the section 87 tests and there does not appear to be any valid reason to differentiate between share capital corporations and cooperatives for the purposes of section 87 and related provisions of the Tax Act. Due to this apparent shortcoming in the *Income Tax Act*, MPE and AWP considered a favorable advance tax ruling to be an essential condition precedent to actual amalgamation.³⁴

XIV. CONCLUSION

AFTER APPROVAL OF THE amalgamation by the delegates of MPE and AWP a committee consisting of 17 delegates chosen by the delegate body undertook the task of reviewing Agricore's initial democratic structure. Following the report of this committee, the delegate body endorsed a democratic structure having 96 delegates and 12 directors.³⁵ Through this structure, the farmer members of Agricore will continue the cooperative tradition of member control over the business of their cooperative, thereby maintaining a strong linkage with the founding principles of the earliest cooperatives, as they move to an uncertain future.

³⁴ JIC, *supra* note 11 at 59.

³⁵ *The Manitoba Cooperator*, 15 April 1999, "Agricore delegates endorse new democratic structure" at 2.