

Using a Renewable Energy Co-operative for Community Power Projects

1. Introduction

With the May 2009 enactment of the *Green Energy Act*, and the resulting changes to the Ontario Co-operative Corporations Act, it is now easier for Ontario communities to benefit from developing and owning renewable energy projects.

For many community groups, the co-operative corporation will be an attractive choice, as it:

- Ensures that decisions will always be made democratically, on a one-member/one-vote basis, and
- Provides a way to raise money for the project through the sale of Co-op shares without requiring Ontario Securities Commission oversight.

2. General Information for Incorporating a Co-operative

The Ontario Co-operative Association (On Co-op) has numerous resources to help people develop, incorporate and operate co-operatives. General considerations for incorporation are located at: http://www.ontario.coop/pages/index.php?main_id=110

The Financial Services Commission of Ontario (FSCO) regulates co-operative corporations. On Co-op's website has a link to FSCO's webpage: http://www.ontario.coop/pages/index.php?main_id=144

It is worthwhile to check the FSCO website before moving forward with developing a co-operative. The FSCO website includes a number of resources that are useful, including their "Guide to Setting Up a Co-operative".

http://www.fSCO.gov.on.ca/english/regulate/co-ops/register_co-ops-1.pdf

3. Raising Money through Selling Shares

For business corporations, the sale of securities (which by definition includes both shares and loans) is regulated by the Ontario Securities Commission. In most cases, regulations prohibit the sale of shares in a business corporation to the public unless a prospectus is filed and the sale occurs through licensed dealers.

Co-operatives, on the other hand, are generally exempt from OSC regulation, as the potential for abuse of vulnerable investors is much lower, given co-operatives' democratic values and community control.

Instead, the Financial Services Commission of Ontario requires an Offering Statement for larger capital offerings of co-operative securities. Even then, an Offering Statement is not required if any of these apply:

- a. There are fewer than 35 security holders (members and non-members);
- b. A member is only buying up to \$1,000 in securities in any year; or

- c. The co-op has less than \$200,000 in capital and the securities are being sold to members.

The Offering Statement sets out the co-operative's business plan and the risks associated with the share offering. The Offering Statement must be approved by the Financial Services Commission of Ontario before distribution to those contemplating buying shares in the co-operative.

The Offering Statement review process is designed to be affordable while at the same time providing prospective investors the information they need to make an informed decision.

Renewable energy co-operatives can use the co-operative Offering Statement process to raise the equity capital they need for their projects.

4. **What's Unique about Renewable Energy Co-operatives?**

Co-operatives are vehicles for people to provide themselves with the goods or services they need, by working together.

Originally, renewable energy co-operatives in Ontario thought that they could – at least notionally – deliver the electricity they generated to their members, in proportion to each member's investment in the co-operative.

The structure of Ontario's electricity distribution system made that difficult or impossible. But the idea of communities using a co-operative corporation to develop their own green energy projects was attractive to the Community Power sector, and the Ontario government. As a result, the *Green Energy Act* modified several rules applicable to co-operatives:

- Renewable energy co-operatives do not distribute their net income to their members in proportion to the "business" a member has done with the co-operative, but in the manner set out in the co-operative's bylaws.
- The business of a renewable energy co-operative is restricted to developing projects that generate electricity produced from renewable energy, operating such projects, selling that electricity, and promoting the purchase of electricity produced from renewable energy sources.
- The usual requirement that a co-operative does the majority (over 50%) of its business with its members is eliminated.

5. **Qualifying to be a Renewable Energy Co-operative**

To qualify to be a renewable energy co-operative, the following provision must appear in paragraph 15 of the Articles of Incorporation of a Co-operative With Share Capital:

The business of the Co-operative is restricted to:

- a. generating, within the meaning of the *Electricity Act, 1998*, as amended, electricity produced from one or more sources that are renewable energy sources for the purposes of that *Act*, and

- b. selling, as a generator within the meaning of that *Act*, electricity it produces from one or more renewable energy sources.”

In addition, the bylaws of a renewable energy co-operative must state how the surplus arising from the business of the co-operative is to be allocated, credited or paid to the members of the co-operative.

There are no restrictions at all as to how that might be done. The board of directors and the members can decide, for example:

- to allocate some or all of the surplus to reserve funds
- to issue dividends in proportion to the amount of money the member has invested in the co-operative, payable in whole or in part, by shares or cash.

6. Share Structure

In deciding upon the appropriate share structure for a renewable energy co-operative, the advice of a knowledgeable lawyer and accountant is essential.

This is a typical share provision, utilized by Toronto’s WindShare turbine project:

[to be inserted as paragraph 8 of the application for incorporation:]

The authorized capital is \$11,000,000, divided into:

- a. One million membership shares with a par value of \$1.00 each; and,
- b. One hundred thousand preference shares with a par value of \$100.00 each.

[to be inserted as paragraph 9 of the application for incorporation:]

The designations, preferences, rights, conditions, restrictions, limitations or prohibitions attaching to the preference shares, if any, are:

- a. Dividends
 - i. The holders of preference shares are entitled to a variable preferential dividend, as fixed by the Board of Directors from time to time, in priority to any dividend being paid on membership shares; and
 - ii. In the event that the Board of Directors of the Co-operative does not declare a dividend within 120 days following the close of the Co-operative financial year, the right of the holders of preference shares to a dividend for that fiscal year shall be extinguished.
- b. Voting Rights

The holders of preference shares shall be entitled to receive notice of and attend all meetings of members of the Co-operative, but shall not be entitled to vote at such meetings. The holders of preference shares shall be entitled to vote at all meetings

of preference shareholders called for the purpose of amending any of the preferences, rights, conditions, restrictions, limitations or prohibitions attaching to preference shares, and at such meetings they shall be entitled to cast one vote for each share held.

c. Dissolution

The holders of preference shares are entitled, upon the liquidation, dissolution, or winding up of the Co-operative, to payment of an amount not to exceed the par value for each preference share held, plus the amount of any declared but unpaid dividend, in priority to any holders of membership shares.

d. Redemption

The Co-operative is not obliged to redeem the preference shares.

e. Delivery of Notice

Any notice to be given by the Co-operative or the holder of preference shares shall be made by pre-paid ordinary letter post, delivered personally, by electronic mail, or fax transmission to the address of the party as it appears in the records of the Co-operative or with respect to the Co-operative, the head office of the Co-operative, or at such other address as the party to whom such notice is to be given as otherwise directed in writing. Any notice delivered by ordinary mail shall be effective 4 business days after mailing, provided that, where interruption of mail service is likely by reason of any labour dispute, notice shall be given by personal delivery, electronic mail, or fax only.

[to be inserted as paragraph 9 of the application for incorporation:]

The restrictions on the allotment, issue and transfer of shares are:

- a. Membership shares and preference shares of the Co-operative shall not be transferable except with the prior consent of the Board of Directors of the Co-operative.
- b. Each member of the Co-operative shall hold the minimum number of membership and preference shares in the Co-operative as are set out in the by-laws of the Co-operative.

Prepared for Ontario Co-operative Association
by Brian Iler, Iler Campbell LLP Barristers and Solicitors

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