

A BASIC OUTLINE:

**NEW GENERATION CO-OPS;
ALBERTA'S NEWEST OPTION FOR
AGRICULTURAL BUSINESS**

Based on a Seminar
presented by Brian P.
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A. CHOOSING THE RIGHT ORGANIZATIONAL MODEL FOR AGRI-BUSINESS IN ALBERTA

1. **Business Models**

- ▶ Business Corporations
- ▶ Partnership/Joint Venture
- ▶ New Generation Cooperatives

2. **Be Objective and Dispassionate About Choosing a Model - Pick the Model Which Makes the Best Business Sense**

- ▶ De-politicizing NCGs/The Corporate Name Issue (eg: "NCG", "Group", "Association", rather than Co-op or Limited).

3. **NCG vs. Business Corporation
NCG vs. Partnership/Joint Venture**

The Key Issues:

- ▶ Control: - Producer/Members or Investors
- "One Member One Vote" is not the end of the story
- ▶ Raising Capital: - Whether an NCG, or a business corporation or a partnership/joint venture is best will depend on the circumstances in each case
- ▶ Tax Issues: - eg: Is patronage flowthrough an issue?

4. **NCG vs. Traditional Co-op**

NCGs better suited if:

- ▶ Limited Membership/Producer Control an Issue
- ▶ High Capital Contribution Per Member Required
- ▶ Delivery Rights Contracts Involved
- ▶ Increase/Maintenance in Share Value/Investment an Issue

- ▶ Producers wish to pool/raise capital to aggressively pursue a business opportunity which will yield additional profits to their individual operations; and are interested in an investment which may increase in value.

5. "Legal" Differences Between NCGs and Traditional Co-ops

NCGs:

- ▶ Agricultural Use Only
- ▶ Must Issue Member Shares and Shares for Patronage Rights - Shareholder Value Tied to Share Capital
- ▶ Name Flexibility
- ▶ Ability to Issue "Designated" Shares Connected With Delivery Rights/Patronage Dividends
- ▶ More Flexibility for Redemption Rights/Share Transfer Rights Through Bylaws

The main difference is in how NCGs are used. The *Cooperatives Act* gives all Cooperatives the ability to restrict membership (different than Saskatchewan, Manitoba and Canada legislation).

6. Prime NCG "Situations"

- ▶ Capital:
 - Where the ability/need to raise significant amounts of capital from producer members is an issue.
 - Where community support to raise capital for a "rural development project" is an issue.
- ▶ Value Added Projects/Producer Control:
 - Where producers wish to control marketing and processing of their products and receive value added returns.
- ▶ Diversification/Innovation:
 - Where there is no existing business or service to meet producer needs, and producers wish to pool resources to create new markets or ventures.

B. GETTING ORGANIZED - PRE-INCORPORATION STEPS

1. The Organizational Personnel

- ▶ Organizing Committees
- ▶ Paid Organizers and Consultants
- ▶ Key Issues: - Avoid "Burn Out" and Loss of Focus
 - Qualified and Knowledgeable Management

2. The Business Plan

- ▶ The Crucial Question - Knowing Exactly How the Project is Going to Make Money For You.
- ▶ Consultants/Feasibility Studies and Your Particular Project.
- ▶ May be Required for Offering Memorandum and Due Diligence.

3. Consider the Use of A Society For Pre-Incorporation Steps

- ▶ Government Funding.
- ▶ Society Documents Should Provide For Transfer of Assets to NCG.

4. Determine Capital Requirements

- ▶ Minimum Approximately 50%
- ▶ How Much?
- ▶ From Whom? Define Your Potential Investors
- ▶ How - What Type of Share Capital (eg: Membership; Investor; Designated; How Many Classes; Conversion Rights; Redemption Rights; Options; Preferences; Returns; etc.)?
- ▶ Is RRSP eligibility an issue?

5. Determine Seed Capital Requirements

- ▶ How much?
- ▶ What Mechanism (eg: Loans, Convertible Shares, etc.)?

- ▶ Seed Capital Agreement

6. **Financing Requirements**

- ▶ Ensure Financing Will be Available if Capital Raised.
- ▶ Discuss Lending Terms. Consider Setting A Conditional Commitment.

7. **Governance and Control Issues**

- ▶ What model is best suited to the proposed members/shareholders/ investors.
- ▶ Is Producer Control Essential?
- ▶ Will Other Investors Require Control Based on Amount of Investment?

8. **Timing Issues**

- ▶ Develop a Time Line for the Project

9. **Legal and Tax Advice**

10. **The Last Step: Choose the Organizational Model Which Best Suits The Project**

- ▶ Be Prepared to Be Flexible. It's Okay to Change Your Mind.

- honesty, skill, insurance, indemnity

▶ **Shares, Membership and Transfers:**

- Qualifications, classes of shares, applications for membership, right to refuse membership, transfer and transmission of share, duty of members, withdrawal of members, termination of membership, redemption of shares.

▶ **Allocation of Revenues:**

- Disposition of surplus, patronage dividends, borrowing, purchase of share capital

▶ **Delegates:**

- Right to vote through delegates

▶ **Meetings of Members:**

- Annual meeting, notice, place and time, voting procedure, special meetings

C. INCORPORATION

1. The Incorporation Documents

- ▶ Articles of Incorporation
 - name
 - registered office and business address
 - names and addresses of incorporators (at least 3) (important - first directors: sign initial corporate documents, offering memorandum, etc.)
 - minimum and maximum number of directors
 - restrictions on business (NCG's - agriculture)
 - objects and purposes of cooperatives
 - restrictions on powers of directors
 - "Cooperative" basis
 - capitalization [VERY IMPORTANT]
 - maximum interest rate on member loans
 - restrictions on transfer of member interest
- ▶ Notice of Registered Office
- ▶ Notice of Names & Addresses of Directors
- ▶ Incorporators' Declaration re: Section 2 (Cooperative Basis)
- ▶ Incorporators' Declaration re: Part 18 Division 4 (NCG Provisions)
- ▶ NUANS name search
- ▶ Filing Fee (\$100.00)

2. The Result

A body corporate with a Board of Directors (the original Incorporators) who can carry through with the important remaining steps.

NOTE: STEPS TO BE TAKEN NEXT WILL VARY WITH EACH PROJECT

D. POST-INCORPORATION DOCUMENTS (THE SUBSCRIPTION PACKAGE) - RAISING THE CAPITAL

1. Subscription Agreement/Membership Application

- ▶ Securities Compliance
- ▶ Types and Numbers of Share Capital Applied For
- ▶ Covenants

2. Offering Memorandum/Prospectus

3. Risk Acknowledgment

4. Delivery Rights Contract

- ▶ See Section F

5. Unanimous Agreement

- ▶ A Unanimous Agreement may require a greater number of votes for directors or members, or investment shareholders, to effect an action, than is required by the Act. s. 5(3)

6. Proposed Bylaws

- ▶ General Conduct of Business: - Use of corporate seal; fiscal year; execution of instruments; business to be conducted by Board; information available to members.
- ▶ Directors: - Number of directors, election of directors, apportionment of directors, quorum, qualifications, removal, vacancies, electronic meetings, written Resolutions; notice time and place of meeting, officers, votes to govern, conflict of interest.
- ▶ Committees and Officers: - Powers and duties, terms of employment, auditor, bonding requirements.
- ▶ Duty of Care and Protection of Directors and Officers:

E. POST-INCORPORATION - COMPLETING CAPITALIZATION TO FIRST MEETING OF MEMBERS

1. **Has the Capitalization Threshold (and Other Conditions) Been Met?**
 - ▶ Release of Capital

2. **Share Issue**
 - ▶ Directors Review and Accept/Reject Share Subscriptions

3. **Financing/Project Acquisition Issues**

4. **First Meeting of Member Shareholders (180 Days)**
 - ▶ Adopt Bylaws
 - ▶ Elect First Board (Minimum 60%)

5. **First Meeting of Investor Shareholders**
 - ▶ Elect Directors (Maximum 20%)

F. DELIVERY RIGHTS CONTRACTS

1. Checklist of Common Issues

▶ **Sale/Purchase Obligations:**

- Amount (units) member entitled to sell/NCG obligated to purchase
- Relationship to number of "designated" Shares held
- Type of units
- Quality/Standards.
- Compliance with Production Protocols (eg: for specialty markets such as E.U.)
- Dates and frequency of sales (timing may be important for producers and NCG to meet processing/marketing objectives)

▶ **Delivery:** - Transportation costs

▶ **Ability to Make Additional Deliveries:**

- In addition to Pre-Contracted Sales
- Terms

▶ **Acceptance/Rejection:**

- Right to Inspect
- Right to Reject Product Not Up To Standard
- Removal of Rejected Product

▶ **Payment:** - May Be Fixed to Published Rates

- May be Split

▶ **Damages/Remedies for Non-Delivery:**

- Right to Replace Delivery Shortfalls From Other Sources

- Liability For Losses

▶ Obligation to Accept Delivery:

- Define When Obligation to Accept Delivery Excused (eg: Events Beyond NCG's Control)
- Remedy for Non-Acceptance

▶ Dispute Resolution: - Arbitration/Mediation re: Price/Grades, etc.

▶ Termination: - Notice Provisions

▶ Assignment: - With Approved Transfer of "Designated" Shares

2. Legal Issues

- ▶ Not Enforceable Unless Clear (Certainty of Terms), Must be in Writing, Signed.

3. Business Issues

- ▶ As Clear, Short and Simple As Possible
- ▶ Understandable by Both Parties
- ▶ Fair to Both Sides
- ▶ Economically Attractive to Producer
- ▶ Must Permit Long Term Viability of NCG:
 - With this Guaranteed Supply of Product Will the NCG Meet Expenses and Make Money?

4. Patronage Dividends/Reserves (Bylaws)

- ▶ "Profit" to Members Based on Sales/designated Shares Held
- ▶ Provision for Reserves
- ▶ Provision for Loans

G. CONTINUANCE

1. General

- ▶ Existing Cooperatives Must Apply For Continuance Under the New Act by March 31, 2005.
- ▶ Cooperatives Which Do Not Continue Will Be Dissolved.

2. Continuance Procedure

- ▶ Submit Application to Cooperatives' Director Containing the Following:
 - Articles of Incorporation Under New Act
 - Directors' Declaration That Cooperative Will Be Organized, Operated and Carry On Business on a Cooperative Basis
 - If Continued as an NCG, a Directors' Declaration That It Will Comply with Part 18, Division 4 of the Act (the NCG Division)

No Fee is Required

- ▶ On Acceptance of Application a Certificate of Continuance Will Be Issued

3. Post-Continuance

- ▶ The Continued Cooperative Must, Within One Year of the Certificate of Continuance, or By the Next Annual Members' Meeting, Pass New Bylaws Which Comply With the New Act and Regulations

H. GOVERNANCE/CONTROL ISSUES

1. **The Role of the Board of Directors**

- all management decisions, subject to bylaws and unanimous agreement

2. **Member Elected Directors (Minimum 60%)**

- one member on vote

3. **Investor Elected Directors (Maximum 20%)**

- vote number of shares held

4. **Appointed Directors (Maximum 20%)**

- significant "partners", community groups, investors, etc.

5. **Using Unanimous Agreements**

- can be used to fundamentally change control of the NCG. Be careful.

6. **Because Members Usually "Control" the Management of NCG by Electing the Board**

- consider restricting members to only those producers who:
 - (a) make a significant financial contribution through acquisition of "designated" shares,
 - (b) are clearly able to meet delivery obligations.
- consider affording others (broader community) ability to participate through acquisition of investor shares.
- carefully consider who you want to control the Board (eg: producers or investors); be mindful of potential issues arising from dilution of membership.