Canadian Social Economy Research Partnerships
Centre canadien de recherche partneriale en économie sociale

OCCASIONAL PAPER SERIES
NUMBER 01 - MAY 2007

CAHIERS OCCASIONNELS
NUMÉRO 01 - MAI 2007

Laying a Foundation for Mutuals in Canada

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CENTRE CANADIEN DE RECHERCHE PARTENARIALE EN ÉCONOMIE SOCIALE
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CANADIAN SOCIAL ECONOMY RESEARCH PARTNERSHIPS
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Laying a Foundation for Mutuals in Canada

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Design and Layout by Lindsay Kearns and James Kingsley

Printed in Victoria, Canada

ISBN 978-1-55058-377-9

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The Canadian Social Economy Research Partnerships (CSERP) will periodically publish research papers on the social economy. The papers will be by both scholars within the academy and by practitioners. CSERP hopes these papers will increase understanding of, and discussion about, the social economy and ideas, past, present and future.

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Introduction

While the mutual form of organisation enjoys a history predating that of corporations, mutuals have not coalesced into a distinct statutory form. Accordingly, mutuals evade a precise legal definition and lack a dedicated statutory framework. Depending on domestic law, a mutual may be established as a society, a co-operative, a corporation, a trust, or merely as a private contractual association of persons. In fact, many Canadian organisations have been and will continue to operate as mutuals without ever applying the term "mutual" to themselves.

Why then this paper? First, this paper is a response to the increasing talk of mutualism and mutuals amongst members of the social economy. It is an attempt to hammer out what exactly is meant when we refer to a mutual as opposed to mutualism. Broadly speaking, mutualism is the principle by which voluntary groups of persons (natural or legal) assemble for the purpose of meeting their common needs rather than achieving a return on investment.[1] For obvious reasons, mutuals are often thought of as organisations that embody mutualism. While this is certainly true, not all organisations that embody mutualism are mutuals. Mutuals are a distinct form of economic organisation that serve to provide a unique function in the social economy.

Mutualism is the principle by which voluntary groups of persons (natural or legal) assemble for the purpose of meeting their common needs rather than achieving a return on investment.

Second, more than simply functioning as a new jargon for old practices, it is hoped that an examination of mutuals in Canada will serve to provide a unified foundation on which a variety of organisations may begin to view themselves as sharing common values and working towards common goals. A unified mutual foundation may in turn serve to facilitate increased dialogue and sharing of information between organisations by identifying shared organisational principles. More than simply theoretical, an examination of the history of mutuals demonstrates that the shared values and organisational principles of mutual labour unions, non-profit societies and co-operatives are in fact born out of a common history. The capacity of these organisations to continue to grow within the global capital economy will likely depend in large part on their ability to regain a common foundation on which to participate in building the social economy. This paper is an attempt at beginning to find such a foundation.

The fundamental characteristic of mutuals is the solidarity through which they meet the needs of their members.

1 *Consultation Document: Mutual Societies in an enlarged Europe (European Commission, Enterprise Directorate General, October 3, 2003), p. 5. Online: European Commission, Enterprise and Industry http://ec.europa.eu/enterprise/entrepreneurship/coop/mutuals-consultation/doc/mutuals-consult-doc-en.pdf.; "Mutual Societies", p. 1. Online: European Commission, Enterprise and Industry http://ec.europa.eu/enterprise/entrepreneurship/coop/social-cmaf_agenda/social-cmaf-mutuals.htm*

1. Defining Mutuals

The European Union (EU), building on the long tradition of mutuals among its members, is in the process of drafting a statute providing for a legal form for European mutual societies (ME) that might be agreed on by all its members. The most recent definition of an ME is "a grouping of natural and/or legal persons which guarantees its members, in return for a subscription, full settlement of contractual undertakings entered into in the course of the activities authorised by its rules."[2] However, this definition fails to provide a full understanding of what a mutual is.

More helpful are the six constitutive features of mutuals identified by the European Commission Enterprise Directorate-General in its consultations with various European mutual stakeholders during the drafting process of the EU Mutual Act:[3]

1. Solidarity of membership
2. Freedom of membership
3. Absence of share capital
4. Non-profit making objectives
5. User-controlled democratic governance
6. Independence

For the purposes of this paper, these six features will be regarded as the six essential principles which any organisation must abide by in order to be considered a mutual. It should be noted, however, that hybrid mutuals, which embody each of these principles at least in part, are becoming increasingly common.

1.1 Solidarity of Membership

The fundamental characteristic of mutuals is the solidarity through which they meet the needs of their members.[4] This feature is the primary characteristic separating it from other participants in the Social Economy.[5] Mutuals are both born out of, and engender a, sense of solidarity among persons with common needs. This solidarity defines a mutual's membership requirements, its financial objectives, its ownership structure, and its governance: membership in a mutual will be open to persons who share a common need; any profit made by

2 *"The Draft Statute for a European Mutual", Online: European Commission, Enterprise and Industry http://ec.europa.eu/enterprise/entrepreneurship/coop/statutes/statutes-mutual.htm.*

3 *Supra note 1 at 6.*

4 *Supra note 1 at 6.*

5 *Willy Palm, Association Internationale De La Mutualite, The Statute of a ME: reflection and discussion document (November 28, 2005), p. 3. Online: Association Internationale De La Mutualite http://www.aim-mutual.org/docs/CEA/statut_me_reflection_en.pdf.*

the mutual must service this common need; and the only rights attaching to member-ownership of a mutual are to participate in ensuring that these needs are met.

The most common form of mutual solidarity has been the mutualisation of risk through mutual insurance. "Solidarity in the face of human risks is the central value that gives mutuality its specificity and its 'raison d'être'. Only on the basis of solidarity can access to services of general interest be guaranteed to every person, irrespective of the personal risk he or she represents and his or her financial status."[6] However, as will be discussed below, new mutuals have expanded to translate solidarity into action to meet a broad set of needs beyond risk.

Mutuals are businesses that deliver goods and services but which do so in the pursuit of primarily social objectives.

1.2 Freedom of membership

Mutual freedom of membership requires that membership is not subject to discriminatory conditions. However, freedom of membership may nonetheless be open or closed. An open mutual is one in which membership is not contingent on any particular conditions – generally where the mutual's goods and services satisfy a universal need. A closed mutual is one which limits membership to persons who share a common need, which is either limited or is best satisfied through certain conditions: for example, a health mutual may offer membership only to persons residing within a particular geographical area. In addition, a mutual may simply limit membership to persons who agree to abide by mutualist principles.[7] The aim of any closed membership condition is to maintain member solidarity.

1.3 Non-Proprietary Ownership and Membership Rights

A mutual is owned exclusively by its members. Members become owners by contributing capital in the form of service fees in exchange for agreed-upon services. Unlike contributions of share capital, the ownership rights attached to the contribution of membership capital are non-proprietary: that is, a member does not have an equitable stake in the underlying value of the business.[8]

Thus, mutual membership is generally a non-transferable asset. Even where a member voluntarily departs from a mutual, the member has no right to call their contributed capital (except in the case of a financial mutual).[9] Mutual capital exists as an indivisible fund comprised of membership contributions, borrowed funds, accumulated non-distributed profits, and invested profits –all

6 *Ibid. at 2.*

7 *Supra note 1 at 6.*

8 *Cliff Mills, "A Lawyer's Perspective" in Peter Hunt & Jean Whitehead eds., Ownership Matters: new mutual business models (London: Mutuo, 2001) 9 at 16. Online: The Caledonia Centre for Social Development http://www.caledonia.org.uk/mills.htm.*

9 *AISAM's Observations on the main document ["Mutual Societies in an enlarged Europe", European Commission Consultation Document] and answers to the questionnaire (AISAM, January 31, 2004), p. 2. Online: European Commission, Enterprise and Industry http://ec.europa.eu/enterprise/entrepreneurship/coop/mutuals-consultation/replies/aisam-en.pdf#search=%22AISAM%E2%80%99s%20 Observations%20on%20the%20main%20document%20and %20answers%20to%20the%22.*

Mutuals are independent from the state and seek to benefit their members through independent collective means.

of which remains in the mutual to continue to serve existing and future members. Each generation serves as custodian of the organisation and its capital for the generation that follows.[10]

Non-proprietary ownership further entails that members do not have a right to receive the distribution of any surplus generated from the employment of the mutual's capital. While management may decide to distribute a generated surplus to its members, they are under no obligation to do so. The only economic entitlement attached to mutual ownership is to receive a share of the mutual's assets upon dissolution or winding-up.

This ownership framework generally prohibits share capital from mutual firms. In the case of mutuals that are expressly recognized in legislation, share capital is prohibited. In the case of non-statutory mutuals, share capital is functionally not an option. Technically, the above non-proprietary framework might be accomplished by the issuance of shares which carry economic rights to assets and generated surplus only upon dissolution. However, following the principle of solidarity, mutuals may only be owned by members with common needs served by the mutual. Shares may thus only be issued to members, who have little incentive to offer capital over and above their membership fees. Moreover, by carrying limited rights and limited return on capital, such shares have little market value and thus generate negligible capital.

1.4 Non-profit objectives

Mutuals are businesses that deliver goods and services but which do so in the pursuit of primarily social objectives.[11] As a mutual exists to provide services to members instead of profits to owners, it is compelled to conduct its business to maximize its services rather than profits. However, this does not mean that a mutual is prevented from realizing a profit on its activities. To the contrary, a mutual must realize some level of profit "to improve the services offered to members, to finance and develop the business and to increase its own reserves"[12], so that it will remain financially viable and competitive in the market.

Within certain limits, a mutual may redistribute its surplus to members in order to achieve its social objectives.[13] For instance, where excess profits have been realized, a mutual may return a surplus to its members in the form of a bonus or rebate on their premiums.[14] As its members are the ones who have paid for its services, a rebate functions to reduce the cost of services to its members. Where a mutual exists to serve the wider community on behalf of its

10 *Richard Lewis, Peter Hunt & David Carson, Social Enterprise and Community based Care: Is there a future for mutually owned organisations in community and primary care? Eleanor Stanley, ed., (London: The King's Fund, 2006), p. 5. Online: The King's Fund http://www.kingsfund.org.uk/resources/publications/social.html.*

11 *Ibid. at 1.*

12 *Supra note 1 at 5-6.*

13 *Ibid at 5.*

14 *Jean-Claude Seys, Dave Anderson & Tommy Persson, AISAM Mutuality No 55: Groups of mutual insurance companies: the lessons of initial experiments, p. 55. Online: AISAM http://www.aisam.org/upload/documents/Groups_en.pdf.*

members, the mutual may invest its surplus in the community. Whatever the social objectives, the focus of a mutual's endeavors remains the person rather than the capital.[15]

1.5 User-controlled democratic governance

Aside from the right to receive contracted services, the fundamental privilege attached to mutual membership is that of participation in the governance of providing those services.[16] Just as mutuals are created by and for their members, mutuals are controlled by their members.

In smaller mutuals, such control may be directly exercised by members themselves. In larger mutuals, control is generally delegated to an elected board composed of directors who may or may not be members themselves. In either case, each member is generally entitled to one vote in any decision in which members are entitled to cast a ballot. While weighted voting may be permitted by some mutuals in certain situations, mutual governance is focused on securing the principle of solidarity in decision-making processes through democratic governance.[17]

1.6 Independence

The final principle of mutual organisation centers on the distinction between mutual and public ownership models. Mutual and public ownership models share a basic framework: individuals vote into office persons who they feel will best manage collectively-owned assets for their benefit. However, mutuals are independent from the state and seek to benefit their members through independent collective means. That is not to say that a mutual enterprise cannot receive state aid or subsidies as other businesses do, but that a mutual is not a means of distributing state aid.

15 *Supra* note 1 at 6.

16 *Myners review of the governance of life mutuals: Final report (Published with the permission of HM Treasury on behalf of the Controller of Her Majesty's Stationery Office, December 2004), p. 27. Online: HM Treasury*

http://www.hm-treasury.gov.uk/independent_reviews/myners_review/review_myners_index.cfm.

17 *Supra* note 1 at 6,7.

2. Mutual History

2.1 Guilds

Mutuals have their origin in sixth century European artisan collegia, which by the eleventh century had developed into local craft guilds.[18] These guilds were formed by common work and trade groups within the quarters of medieval towns, with their solidarity rooted in the sharing of a common locale and vocation.[19] Guild vocations included lawyers, priests, scholars, stoneworkers, butchers and bakers.[20] In addition to regulating the hours and nature of the work being performed by members, guilds established a strong tradition of civic responsibility. In the UK, mutuals instituted almost 150 days of civic holidays – days on which private work ceased in order to engage in civic matters such as building a cathedral or attending to the needs of the elderly.[21]

> *Guilds took responsibility for the development of their residential area through "neighbourhood guilds" which over the years established the quarter's market square, water fountain, parish church and also the local grammar school, hospital and almshouse. Neighbourhood guild members took responsibility for street sweeping and maintaining the pavements, and for volunteer policing on a rotation basis. Each guild could turn itself into an armed regiment, to defend the town in time of war.*[22]

In addition to promoting the notion of civic responsibility, the guilds introduced the first notion of welfare – providing funeral and disability insurance, as well as pensions, for their members.[23]

The decimation of urban populations by the Black Death in the fourteenth century, together with the development of the nation state, led to the eventual decline of the local guilds and the rise of inter-community merchant guilds.[24] What remained of the local guilds was eventually either brought under the jurisdiction of the 1601 Charitable Uses Act, commonly referred to as the Statute of Elizabeth, or made the responsibility of the national poor law rate system under the Poor Law Act of 1601 – commencing an early form of welfare delivered from public taxes rather than parish contributions.[25]

2.2 Friendly, Provident, Benefit and Co-operative Societies

18 *Ed Mayo & Henrietta Moore, The Mutual State: How local communities can run public services, David Nicholson-Lord ed., (London: New Economics Foundation, 2001), p. 8. Online: New Economics Foundation https://www.neweconomics.org/gen/z_sys_publicationdetail.aspx?pid=77.*
19 *Ibid. at 10*
20 *Ibid. at 9.*
21 *Ibid. at 9.*
22 *Ibid. at 10.*
23 *Ibid. at 9.*
24 *Ibid. at 10.*
25 *Ibid. at 10.*

Mutualism was a rich source of perceived new possibilities for overcoming entrenched inequities and injustices.

The gaps left by the demise of local guilds were filled by religious fraternities, secret brotherhoods, and sickness and funeral clubs, all of which began to emerge by the fifteenth century. At first these clubs were only small associations of twenty or so people, often formed in a pub, with a simple set of rules that provided pay-as-you go insurance schemes covering illness, funeral and unemployment risks.[26] One such association, begun at a Derbyshire village pub in 1736, existed under a set of just three rules:

> *An Account of the Orders to be observed and kept by all and every one of the members of the Amicable Society of the club held at the house of Alice Frith in Hathersage, commencing the twenty ninth day of January, 1736, and in the tenth year of the Raign of our Sovereign Lord George the 2nd by the Grace of God of Great Britain, France and Ireland King, Defender of the faith, etc.*
>
> *1st This Society is to be governed by one Master, two Wardens, & 6 Councell, which are to be chosen out of the whole body.*
>
> *2nd And whoever shall enter into this Society shall give sixpence entrance and fourpence every club night into the Box, towards the maintaining and upholding of so good a design, and none shall be admitted into it under sixteen years of age nor above the age of forty.*
>
> *3rd And to every one that shall belong unto it after they have been in it one whole year, if sickness should come on them they shall have given unto them three shillings a week so long as it shall continue on them, and if their sickness be judged to be incurable they shall have two shillings a week while they live, and at their death shall have twenty shillings for to bury them if so required, and every member or at least those that are bidden shall convey their brother's corpse to the grave, & upon neglect of not coming, notice being given them, they shall forfeit sixpence to the box without good & just reasons be given to the Master and Wardens and they approve thereof.*[27]

Some of these fraternities, such as the Oddfellows and Freemasons, enjoyed tremendous support and continue to provide a variety of benefits to their members. Eventually, sickness and funeral clubs began coalescing into what became known as provident societies.

In 1793, the UK enacted the Friendly Society Act, providing a statutory basis for the provision of sickness and funeral cost insurance by provident societies. This Act defined a friendly society as "a society of good fellowship for the purpose of raising from time to time, by voluntary contributions, a stock or fund

26 *Open University, Friendly Societies Research Group, "Friendly Societies for Beginners", p. 1. Online: http://www.open.ac.uk/socialsciences/fsrg/index.html.*

27 *'An Old Benefit Society', Oddfellows Magazine, Oct, 1893, p.311. Online: http://www.takver.com/history/benefit/ctormys-06.htm#fn430.*

As the Welfare State developed to provide for a wider scope of contingencies on the basis of need rather than contributions, the role of mutuals in delivering public benefits was gradually eroded.

for the mutual relief and maintenance of all and every the members thereof, in old age, sickness, and infirmity, or for the relief of widows and children of deceased members."[28] While this Act provided certain legal rights for provident societies, its exclusion of unemployment benefits from the definition of friendly society served to distinguish between state-sanctioned friendly societies and non-sanctioned trade unions, which up until this time had often been interchangeable.[29] This separation led to the development of distinct funds for welfare and strikes, and eventually to the development of trade unions as distinct entities from friendly societies.[30]

By 1801, 7,200 friendly societies with approximately 650,000 predominantly working-class members had been registered under the Act.[31] The leaders of the friendly society movement – including Robert Owen, William King, William Thompson and the Continental thinkers Saint Simon, Fourier and Proudhon – shared a utopian ideal of creating a mutual aid economy.[32]

In 1830, the friendly and provident societies birthed a sister movement – the co-operative movement.

> *In 1830 flannel weavers in Rochdale formed the Rochdale Friendly Co-operative Society after a strike. It started with subscriptions for sickness benefits before moving on to a small library service and, in 1833, a co-op shop. The initiative failed in 1835 after giving too much credit to its members. But in 1843, after two years of another strike, two original members persuaded starving weavers to try again. They registered a new co-op in October 1844. The lessons of the previous failure were learnt; this time, the co-op prospered. With it came a new mass international co-operative movement.*[33]

The legal relationship between co-operatives and mutuals has grown to be complex and will be examined in more detail below. Functionally, however, co-operatives became the organisation of choice for groups whose solidarity was based in enterprise – such as workers, producers or consumers. By mutualizing the profits and risks associated with enterprise, co-ops facilitated the employment of collective capital in enterprise. Mutual societies, on the other hand, mutualized financial risks so as to lessen the impact that financial losses would have on individual members.

While mutuals became increasingly financial in operation, their social base enjoyed the greatest returns. An Austrian academic professor who traveled to Britain in the 1880s to examine the collective nature of friendly societies observed, "the influence exercised by the Friendly Societies, as voluntary fra-

28 (Dr) Bob James, "Mutuality" (Presented at the Australian Friendly Society Association's (AFSA) National Conference, Coffs Harbour, May 2000), p. 7. Online: http://www.takver.com/history/mutual.htm.

29 Ibid. at 7.

30 Supra note 1 at 7.

31 Supra note 18 at 10.

32 Ibid. at 10.

33 Ibid. at 11.

ternities, cannot possibly be overestimated…[They are] increasing the cohesion of the working class, and welding together elements...into a social power, by creating a union based on brotherly support."[34]

> *Mutualism was a rich source of perceived new possibilities for overcoming entrenched inequities and injustices. What key schools of reformist thought had in common was, in the words of the great Polish social-democratic philosopher, Leszak Kolakowski, "… an obstinate will to erode by inches the conditions which produce avoidable suffering, oppression, wars, racial and national greed and vindictive envy".*[35]

With the progression of actuarial science in the 18th century, the capacity of mutual societies to ascertain common risks and charge premiums reflecting those risks greatly increased.[36] Not only did this open the doors in terms of the scope of persons that a mutual society could accept as members, but also the type of risks that they could mutualize. By developing increasingly sophisticated policies to cover professional and private risks, mutuals began developing among new socio-professional groups, such as retailers, teachers and doctors.[37] Teachers were among the first group to embrace mutuals. The teachers set up the Teachers' Provident Society in the UK in 1877, the LB group in Denmark in 1880, and the Mutuelle d'assurance des Instituteurs de France (MAIF) in France in 1934.[38] The Local Insurance Mutual Company in Finland was established in 1917 by the Farmers Union to protect its members against agricultural risks such as hail, cattle mortality, and fire.[39] Other examples include the Belgium Société Mutuelle des Administrations Publiques (Public Administration Mutual Society) which was established in 1919 by representatives of the municipalities,[40] and the UK Dentists Provident Society, which was established early in the twentieth century.[41] The solidarity enjoyed by these groups has resulted in many of these early mutuals remaining key insurance providers to this day.

2.3 Building Societies and Credit Unions

Paralleling the development of friendly and provident societies, a second strand of mutuals developed in the 18th century which enabled working class persons to own housing through the mutualization of capital. The first known

34 *J Baernreither, English Associations of Working Men, 1889, Gale Reprint, 1966. p.408, quoted in "Craft, Trade or Mystery" Dr. Bob James, 2001. Online: http://www.takver.com/history/benefit/ctormys.htm.*

35 *Hon. Dr. Race Mathews, "Unchain My Mind: New Social-Democratic Ideas for Labor in Government" (Paper Presented at the Australian Fabian Society/Pluto Press Conference, Melbourne, 27 July, 2000), p. 3. Online: http://www.takver.com/history/mutual2.htm.*

36 *Ulrike Birkmaier & David Lester, David Durbin ed., Sigma No. 4/1999, Are Mutual Insurers an Endangered Species? (Zurich: Swiss Reinsurance Company Economic Research & Consulting, 1999), p. 10. Online: http://www.swissre.com/Internet/pwswpspr.nsf/fmBookMarkFrameSet?ReadForm&BM=../vwAllbyIDKeyLu/mbar-4vhqdv?OpenDocument.*

37 *Supra note 1 at 7.*

38 *Ibid. at 7.*

39 *Supra note 1 at 7.*

40 *Ibid.*

41 *Ibid.*

building society was formed in 1775 in Birmingham. Early building societies often drew lots to determine the order in which its members would be housed, building houses as their member's collective savings contributions permitted, and terminating once all of their members were housed.[42] [43] The permanent building societies that exist today first began appearing in 1850, when building societies began accepting deposits from people who did not necessarily want to buy a house but merely invest their savings.[44] [45]

Building societies, which grew out of the friendly society movement, share many qualities with credit unions, which grew out of the co-operative movement. They are both democratically-governed voluntary associations of people that pool capital in order to service members' financial needs. However, they may be distinguished by several characteristics. First, as the name suggests, and as is still required under the UK Building Societies Act 1986 (amended in 1997), a building society's main business is to provide residential mortgage loans.[46] Second, whereas a building society's solidarity is founded on a common need for housing, credit union solidarity has generally been based on community development or vocational groups.[47] Credit unions have exhibited a unique ethos and social role in communities with risk profiles that would otherwise bar access to credit, including through building societies, where solidarity demands adverse risk selection.[48]

2.4 Mutuals and the Welfare State

The social security insurance scheme created by friendly and industrial insurance mutuals became the social foundation on which the Welfare State was built.[49] In the same way as common risks might be shared between workers and communities, people began to view the state as a vehicle through which the common risks shared by its citizens might be mutualized. In 1911, the UK began providing sickness benefits, delivered through Approved Societies.[50] [51] Approved Societies were required to be not-for-profit and absolutely controlled by their members under a constitution. Any surpluses were required to be put towards providing additional benefits or allocated to capital reserves – as determined by the Ministry of Health.[52] Between 1911 and 1948, forty percent of Approved Societies were friendly societies, the remainder of government ben-

42 Building Societies Association, "Consumers: Frequently Asked Questions", p. 2. Online: http://www.bsa.org.uk/Content/ MiscPage.php?type=faq.

43 Supra note 1 at 8.

44 Ibid.

45 Supra note 42 at 2.

46 Ibid.

47 "A Case for Credit Unions" National Federation of Retail Newsagents (21 July 2005). Online: National Federation of Retail Newsagents http://www.nfrn.org.uk/files/legaluploads/KEamendedA%20case%20for%20creditUnions21stJuly20051.pdf.

48 "Shark Alert" New Start Online (19 April 2002). Online: New Start Online http://www.newstartmag.co.uk/sharks.html.

49 Supra note 1 at 8.

50 Supra note 28 at 7.

51 Supra note 26 at 1.

52 Supra note 28 at 7.

efits being paid out through industrial assurance companies (see below), trade unions and employers' provident funds.

Following the Second World War in 1945, the role of mutuals began to decline as European states began to administer and deliver public social security benefits directly through government agencies.[53] Initially, some countries such as Germany and Belgium employed friendly societies to manage the compulsory public social security system, while in others, such as France, the management of the public system was shared by mutuals and the state.[54] As the Welfare State developed to provide for a wider scope of contingencies on the basis of need rather than contributions, the role of mutuals in delivering public benefits was gradually eroded.[55] Eventually, the role of mutuals throughout Europe, as had been the case since 1948 in the UK, became the providision of complementary life, property and casualty insurance.[56]

Social enterprises, according to the UK Department of Trade and Industry, are businesses "with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community, rather than being driven by the need to maximize profit for shareholders and owners".

2.5 Insurance Mutuals

2.5.1 Life Insurance Mutuals

The first North American life insurance companies were not mutuals, but stock companies. However, following the establishment of the first American life mutual in 1843, mutuals quickly came to dominate the life insurance market.[57] Mutual insurance companies offered two significant advantages over their corporate competitors. First, mutuals were able to offer lower priced policies with whole life terms – a product with which stock corporations, where policy terms ranged from one to seven years, were largely unable to compete [58] Second, mutuals did not need to extract a profit from policy rates, thereby improving their capacity to maintain sufficient capital reserves to compensate for unforeseen losses.

Perhaps more significant, however, was that the undercapitalization of many corporate insurers had as much to do with fraudulent governance practices as it did with the extraction of legitimate profits. By 1905, sixty-one percent of the American life insurance stock companies that had been operating in 1868 had gone bankrupt.[59] In contrast, the solidarity of mutual policyholders and the control that they could democratically exert over mutual governance translated into reliable policies with lower transaction costs. While the development of more sophisticated insurance regulation helped constrain the behaviour of corporate insurers, allowing them to increase their market share in long-term life policies, regulation failed to displace the market dominance offered by

53 *Supra note 1 at 8.*
54 *Ibid. at 8.*
55 *The Association of Friendly Societies, "A Brief History of Friendly Societies", p. 8. Online: http://www.afs.org.uk/research/researchpgrayhistorypage.htm*
56 *Supra note 1 at 8.*
57 *Supra note 36 at 11.*
58 *Ibid. at 11.*
59 *Ibid. at 11.*

By placing both the governance and ownership of a social service directly in the hands of its users, a mutual social enterprise has the potential to provide a "middle way" to achieve an optimum balance of social goods and economic efficiency.

solidarity.[60]

Partially in response to the Armstrong Commission[61] investigation of 1905, which found a large degree of abuses and fraud amongst corporate insurance companies, and partly in response to market demand from consumers who exhibited greater faith in mutuals, several of the largest American life/health stock companies, including Prudential, Metropolitan Life, and the Equitable, converted into mutuals. [62] Mutual insurance companies had become the normative form of organisation through which the public could confidently invest their savings to protect against long term health and life risks.

In Canada, the rise of mutual insurance companies came somewhat later, and for significantly different reasons. During the 1950s and 1960s, Canadian life insurance corporations came under the threat of being acquired by foreign interests. To pre-empt this threat, five of the largest Canadian life companies converted from stock to mutual ownership, which cannot be acquired.[63]

2.5.2 Property and Casualty Insurance Mutuals

Property and casualty (P&C) insurers also enjoyed a market advantage over corporate competitors. However, the market advantages offered by the mutual framework in terms of P&C policies differed from life insurance companies. As property and casualty insurance does not lend itself to long-term policies, P&C insurance did not enjoy the benefit of low cost long-term capitalization enjoyed by life mutuals.[64] However, as with friendly societies, P&C mutuals generally developed among communities and industry groups. These groups possessed "clearer insight into risk identification and assessment" than remote corporate insurers, and a "moral suasion" resulting in fewer fraudulent claims.[65] Together, these advantages translated into lower transaction costs and thus lower policy rates.

2.6 The Pendulum of Demutualization

Persons interested in carrying out mutual activity that does not require substantial amounts of capital may find that a voluntary association is the best means to achieve their goals.

In the past ten years Europe and North America have witnessed a trend towards demutualization – not only of mutual insurance companies from mutual to stock ownership, but also of the delivery of public services such as health care from the state to private corporations. In Canada, mutual life insurance companies have demutualized "in the belief that public ownership will enable

60 Ibid. at 11.

61 The Armstrong Life Insurance Commission was set up in 1905 to investigate the conduct of all life insurance companies operating within the state of New York. The Commission was created as a response to a multitude of newspaper articles portraying extravagant spending and political payoffs by executives at the Equitable Life Assurance Society. United States Supreme Court Chief Justice Charles Evans Hughes was appointed chief counsel of the investigation. The Commission severely chastised the New York Insurance Department for permitting malpractices to occur and recommended the enactment of a wide array of reform measures. These revelations induced numerous other states to conduct their own investigations, including New Jersey, Massachusetts, Ohio, Missouri, Wisconsin, Tennessee, Kentucky, Minnesota, and Nebraska. For more information see: http://eh.net/encyclopedia/article/murphy.life.insurance.us.

62 Ibid. at 25.

63 Ibid. at 25.

64 Supra note 36 at 11.

65 Ibid.

them to compete effectively in the very same international arena from which they withdrew two generations earlier."[66] The reasons and legitimacy of this belief will be examined below. For now, however, it should be noted that this demutualization exists as a pendulum movement.

> *It's not usually recognised that the intervention that the government made at that time was the beginning of what we now call 'the Welfare State'. We here really only know the 'Welfare State' because it peaked in the 20th century and has dominated our lives, but the current surge back into free market economics is the result of a swing of a pendulum, firstly away from free trade now back again, a swing which has taken 200 years.*[67]

As with all pendulums, this pendulum has not swung back to the position from which it started. The earth has turned in the past 200 years, and instead of risk once again being mutualized through the private pooling of capital in solidarity, public welfare services are increasingly being delivered by corporations seeking to earn a profit for shareholders in the process. Ironically, it was from such profiteers, who came calling on debts when people became unable to pay, that friendly societies had originally sought to provide protection.

A mutual that engages in commercial activity and transactions, possesses substantial property or capital that may become subject to dispute, or engages in activities that may give rise to future liability for its members and directors would be well advised to obtain separate legal status.

There is no doubt that the regulatory environment in which insurance corporations now operate provides a much greater degree of protection for policy holders than existed in the early 20th century. However, there remains a fundamental difference in the delivery of services to meet shared needs and risks by capital pooled in solidarity, and capital lent by rent-chargers. But is there a role for mutuals in the new global economic climate? The members of the mutuals who have voted "yes" to demutualization have answered "no". Others argue that while the obstacles are many, the challenges facing societies with widening economic gaps between the wealthy and the poor demand that mutuals find a way:

> *Just as mutual benefit societies played an historic role in the resolution of the social issues raised by industrialisation during the late 19th century – they created the foundation for the welfare state – they are well placed to formulate responses to new social problems posed by the current societal transformation, that is, the emergence of the information society. The challenges are many: the fight against social exclusion, financing of social protection (pensions, health care, disability income) in an ageing society and a globalised economy, access to increasingly complex and expensive medical treatment and to chronic care that above all requires significant human resources.*[68]

Just as mutuals played an important role in the establishment of the welfare

66 *Ibid.* at 25.
67 *Supra* note 28 at 7.
68 *Supra* note 5 at 6.

state in both Britain and Canada, they may again serve to mutualize economic risk for citizens in jurisdictions where the welfare state is being dismantled.

2.7 Social Enterprise Mutuals

If the friendly societies and mutual insurance companies that pooled capital to mutualize risk might be called the first wave of mutuals, and the building societies that mutualized capital to provide access to housing ownership might be called the second wave, then the development of organisations that mutualized capital to provide shared social services could be called a third wave of mutuals.

In 1979 a group of residents in Craigmillar Edinburgh began setting up enterprises run by and for the community.[69] Despite Margaret Thatcher's claim in 1987 that "there is no such thing as society",[70] by 1984, residents across the Lothian and adjacent Strathclyde had established 45 mutuals providing shared social services such as arts and workspace.[71]

> *Not all [of the early new mutuals] succeeded. Nevertheless a new generation of what might loosely be termed social enterprises was born. There was no insistence on a co-operative ownership model – the new bodies ranged from charities to co-operatives, from informal voluntary groups to industrial and provident societies – but there was an emerging, shared, focus. The new mutuals worked to benefit the community. They sought the genuine participation of local people.*[72]

Social enterprises, according to the UK Department of Trade and Industry, are businesses "with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community, rather than being driven by the need to maximize profit for shareholders and owners".[73] New social enterprise mutuals have been springing up across Europe – providing access to general interest services such as health care, justice, mobility, information, employment, and social leisure opportunities.[74]

By placing both the governance and ownership of a social service directly in the hands of its users, a mutual social enterprise has the potential to provide a "middle way" to achieve an optimum balance of social goods and economic efficiency. On the one hand, they avoid the bureaucratic and remote governance of public service delivery models. At the same time, they reduce the "efficiencies" that often result from remote shareholder interests being placed above

69 *Supra* note 18 at 12.
70 Interview of Margaret Thatcher by Douglas Keay (23 September 1987) in Woman's Own, online: Margaret Thatcher Foundation http://www.margaretthatcher.org/speeches/displaydocument.asp?docid=106689.
71 *Supra* note 18 at 12.
72 *Ibid.*
73 *Supra* note 10 at 5.
74 *Supra* note 5 at 6.

those of the community in the delivery of social services by corporations.[75] By eliminating these profit-driven efficiencies, new mutuals are able to "offer ways of involving excluded groups – including residents in low-income areas and people with disabilities – in designing and delivering their own services."[76]

Participating in what Peter Kellner, a well-known UK political columnist and broadcaster, coined as new mutualism, these mutual social enterprises have exhibited "a renewed search for policies that…form the basis for action, in both the public and private sectors, to combat adverse social and economic trends."[77]

At the local neighbourhood level, these new mutuals have included community cafes, furniture recycling facilities, house repair assistance, child-care co-operatives and other local services.[78] New Mutuals not only "provide services that are often in very short supply in disadvantaged neighbourhoods," but they "enable local residents to develop skills, self-confidence, business experience and employability."[79]

At the municipal and regional level, new mutuals have assumed the delivery of water utilities, hospitals, health care clinics, accessible housing, retirement services and funds, and community leisure facilities. The capacity of the mutual model to deliver these services will be examined in more detail below, however, it is necessary to first examine the legal form of mutuals.

75 *Supra note 1 at 21.*

76 *Supra note 18 at vi.*

77 *David Rodgers, "Housing co-operatives and social exclusion" in Johnston Birchall ed., The New Mutualism in Public Policy (London: Routledge, 2001) 60 at 61.*

78 *Supra note 18 at vi.*

79 *Ibid.*

3. Mutuals as Legal Entities

A legal form functions to "harness the interest of a particular group or groups of people and use that interest as a tool within the governance structure as a driver for success."[80] As the above history demonstrates mutuals have emerged in a variety of legal forms while harnessing these interests, including trade unions, co-operatives, and societies. It is perhaps this variety of mutual interests that has prevented mutuals from emerging as a distinct legal form, existing instead as any legal form which adheres to the six aforementioned mutual principles.

However, while this lack of distinct legal form has provided flexibility for mutual organisation, it has also created difficulties in determining under what legal form it is most appropriate for a mutual to organise. This section provides an overview of the legal options available to organisations that wish to establish themselves as mutuals in Canada.

3.1 Voluntary Associations and Unincorporated Societies

Persons interested in carrying out mutual activity that does not require substantial amounts of capital may find that a voluntary association is the best means to achieve their goals. An unincorporated association has the advantage of being simple, flexible and informal.

A voluntary association, or unincorporated society, will exist where a group of persons have a written or verbal agreement among them setting out that any funds or goods contributed to the group may only be used for the group's stated purposes. Further, this purpose must not be a common view to profit, which will be presumed to be a business partnership. The very nature of an unincorporated society embodies the first and fourth principle of a mutual: solidarity and non-profit making objectives. To be a mutual, the association need only ensure that membership does not exclude others who are in solidarity with the mutual's members, the association is democratically governed by its members, it is independent from government, and its members retain no individual share in the association's capital.

For example, a mutual voluntary association might be formed by persons in a particular community who wish to mutualize the seeds and produce grown in the privately owned gardens of community members for the purpose of providing fresh vegetables and fruits for its members. Such an association would enable individual members to gain access to a wider variety of local produce, and would hedge against the potential failure of any one member's garden. An agreement between the members of such an association might provide that any person in a particular community with a garden of a minimum size may be a member by contributing the produce and seeds grown by their garden. If small

80 *Cliff Mills "Care on call – A new vision for Out of Hours primary care" in Peter Hunt & Oliver Fry eds., Care on Call: a mutual approach to out of hours primary care services (London: Mutuo 2004) 12 at 16.. Online: http://www.out-of-hours.info/downloads/care_on_call2.pdf.*

enough, the association might be directly controlled by its members through democratic votes on any issues that arise, as discussed in regular meetings. The members might agree that if they grow more produce than they can collectively use, they may donate the produce to other organisations, or sell it (subject to any other legal requirements governing the sale of produce). The proceeds form the sale of the produce and seeds would then be required to be reinvested in gardening implements or new seeds for the next growing season, or invested in a fund to be distributed to members to purchase produce in the event of a poor growing season in the future. No individual member would own a share of any of the association's capital, including assets purchased through reinvested funds. Instead, other than the privately owned gardens themselves, all implements, seeds, and produce would be mutually owned as a collective and indivisible fund.

Such an association would have little need for legal status as there is no substantial property owned by the group, nor are there significant liability issues facing its operation. Any dispute between members would be settled according to the terms of their contractual agreement.

3.2 Incorporated Societies

A mutual that engages in commercial activity and transactions, possesses substantial property or capital that may become subject to dispute, or engages in activities that may give rise to future liability for its members and directors would be well advised to obtain separate legal status. One of the simplest ways of doing so is to incorporate as a society.

In the UK, a society may incorporate under the Industrial and Provident Societies Act, or as a corporation limited by guarantee under the Companies Act. While societies incorporated under the former Act generally provide for the mutualization of risk for members, corporations limited by guarantee under the Companies Act are generally established for the benefit of the wider community through benevolent or charitable activities. Cliff Mills, a leading mutual lawyer in the UK, notes that the main characteristic separating the two forms is relative openness of membership. While membership in a provident or friendly society is largely open, membership of a company limited by guarantee tends to be selected by the directors in order to maintain and direct the organisation's benevolent and charitable intentions.[81] This lack of openness has tended to result in decreased managerial accountability on the part of mutual companies limited by guarantee.[82]

In Canada, these two forms of organisation have largely been reduced to one – societies incorporated as corporations without share capital. As the name suggests, a corporation without share capital possesses all the basic rights and responsibilities of a corporation except one: it is not authorized to issue share

81 *Supra* note 8 at 20.
82 *Ibid.*

capital.

With incorporation flow the benefits of legal capacity to enter into contracts and own property as an organisation, and limited liability for members and directors from creditors and lawsuits. However, whereas a corporation with share capital may carry out any otherwise legal activity, several important requirements and restrictions are placed on societies. Some of these requirements and restrictions are shared between all Canadian jurisdictions, others are not.

First, an incorporated society in any Canadian jurisdiction may not operate for the purpose of making a profit for its members. While an incorporated society may generate a profit from a business incidental to its purposes, any such profit or gain may only be distributed to its members for full consideration.[83] This requirement is consistent with the mutual principle of non-profit objectives. Where an incorporated mutual society's revenue exceeds its costs, it may distribute the resulting net surplus to its members in the form of a rebate on their membership fees. In doing so, the net fees paid by members will amount to fair and full consideration for the cost of the services provided.

Second, a federally incorporated society must have a constitutionally stated purpose of carrying on activities limited to "a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional, or sporting character".[84] BC also includes provident and benevolent purposes.[85] While these purposes are broad, most jurisdictions prohibit incorporated societies from carrying on certain activities and require express permissions for others.

For instance, societies incorporated under the British Columbia Societies Act may not (1) operate a boarding home, orphanage or any other institution or supply of care for minors without the written consent of the director designated under the Child, Family and Community Service Act, and may not (2) own, manage, or operate a hospital without the written consent of the Minister of Health.[86]

Further, a British Columbian society must obtain written permission from the Financial Institutions Commission under the Financial Institutions Act in order to provide members with (1) life insurance, (2) funeral benefits or relief, (3) accident, sickness or disability benefits or services, or (4) pensions or annuities.[87] A provincially incorporated society may not provide benefits or compensation for loss of or damage to property. Instead, a property and casualty society must be incorporated under the federal Insurance Companies Act.

Similarly, a federally incorporated society may only engage in insurance activities (including both life and property and casualty insurance) under the Insur-

83 *Canada Corporations Act, R.S.C. 1970, c. C-32, Part II, s. 154(1)) ("Canada Corporations Act"); and BC Society Act, , R.S.B.C. 1996, c. 433, s. 2(2)) ("BC Society Act").*

84 *Canada Corporations Act, Part II, s. 154.*

85 *BC Society Act, s. 2(1).*

86 *BC Society Act, ss. 2(1)(a), (b).*

87 *BC Society Act, ss. 2(1)(d), 14.*

ance Companies Act, and may only engage in banking activities as a credit union under the Co-operative Credit Associations Act. However, as credit union members earn interest on their deposits, credit unions fail to fall within the scope of the definition of mutuals. Federal legislation does not provide for the incorporation of building societies.

Third, an incorporated society must state its organisational purpose in its constitutional documents, and may not carry out activities which are beyond and not incidental to the scope of this purpose. Where it does so, it may be dissolved.[88] While a mutual can amend its stated purpose, this process is time consuming and may limit its ability to take advantage of certain time-sensitive opportunities.

Fourth, the distribution of the assets of an incorporated mutual society upon dissolution may be subject to certain limitations. The by-laws of a society incorporated in British Columbia must specify how its assets are to be distributed upon dissolution. In the case of a society with charitable purposes, its assets may not be distributed to its members. Drawing from the same common law definition of charity as is applied under the federal Income Tax Act, the British Columbia Society Act defines charitable purposes as the relief of poverty, the advancement of education, the advancement of religion, and any other purpose beneficial to the community. While this limitation on the distribution of assets does not apply to non-charitable incorporated societies, the broad definition of charitable purposes may apply to a society irrespective of whether or not it is registered as a charity with the Canada Revenue Agency under the Income Tax Act. In either case, in the absence of any by-laws providing for alternate recipients of the society's assets upon dissolution, they will flow to the Crown.[89]

These restrictions on the dissolution of a society's assets are, in part, meant to maintain public confidence in societies as socially-beneficial organisations. However, the primary reason for these restrictions are tax issues. A society which is registered with the Canada Revenue Agency as a non-profit organisation will not be liable for income tax on any surplus it enjoys, or for tax on purchases of goods and services. As these tax advantages amount to public subsidies, policy dictates that they should not be inherited by a society's members.

As will be discussed in more detail below, the organisational model of societies provides for appropriate flexibility to address concerns of windfall payments to members in the event of demutualization. The by-laws of societies may be drafted or amended to ensure that members do not profit from demutualization by specifying that the society's assets are to be transferred to recipients who will further the society's objectives.

It should be noted that a Canadian non-profit society that is registered as a

88 *Canada Corporations Act, Part II, ss. 5.6, 157(1)(a).*
89 *BC Society Act, ss. 73(1), (2).*

"As a general rule, while cooperatives aim primarily to organise the production and provision of goods on the basis of solidarity, mutual societies strive to ensure access to services and protection considered to be of common or even general interest on the basis of solidarity."

charity will not be a mutual. Under current Canadian law, a charity may not exist for the benefit of its members, but only for the community at large. While a mutual may benefit the community, its primary existence is to benefit its members. Thus, a charity is prohibited from meeting the first principle of mutuals – solidarity.

3.3 Corporations

The corporation with share capital has become the dominant legal form through which persons interested in earning a profit have organised themselves. "It has been so successful as a vehicle for ownership because the underlying purpose of the vehicle (generating wealth) is aligned with ownership, and company law as applied by the courts has consistently stuck to the principal that the ultimate duty of directors is to act in the interests of the company and its shareholders…."[90]

Strictly speaking, as shares entitle their holders to participate in a company's profits and capital, a mutual cannot exist as a corporation with share capital. However, if the principles of mutuals are applied in a broader purposeful way, a mutual could theoretically be set up as a corporation where its members agree in its constituting documents or unanimous shareholders agreement that:

1. Only one voting share may be issued per person;
2. No share carries with it the right to participate in the equity or profits of the company, including distributions of any surpluses; and
3. Shares are either issued for a nominal amount to members only with all service rights attaching to membership and not the share, or the shares are non-transferable.

The third criteria in this list is a crucial requirement in ensuring that a capital share structure does not give rise to for-profit shareholder activity. Where service rights attach to transferable shares, shareholders may liquidate their rights on the market.[91] While a share may have limited value without rights to dividends, a shareholder might nonetheless realize a profit by selling their share should the value of the service increase.

Further, to protect against demutualization, members might agree that upon dissolution, shareholders would only be entitled to the amount paid in consideration for their shares plus the value of any services not yet provided.

While the above corporate structure would be unusual, a corporate mutual would enjoy broad powers and would face very few limitations regarding how it chose to conduct its business. However, there would remain a conceptual

90 Cliff Mills, "Health and well-being through Community Ownership?" in Stephen Hogan ed., Making Healthcare Mutual: A publicly funded, locally accountable NHS (London: Mutuo, 2002) 27, p. 31. Online: Cobbetts LLP http://www.cobbetts.co.uk/PublicationsEvents/AllPublications/MakingHealthcareMutual.

91 Leigh Drake & David T. Llewellyn, "The economics of mutuality: a perspective on UK building societies" in Johnston Birchall ed., The New Mutualism in Public Policy (London: Routledge, 2001) 14 at 24.

tension in respect of its governance. Under Canadian statutes, corporate directors must act in the best interests of their companies' shareholders. Canadian courts, together with courts around the world, have interpreted the best interests of shareholders, who are chargers of rent, to be profit. Thus, a corporation is arguably bound by law to conduct its affairs so as to maximize profits for its shareholders. It has not yet been tested as to whether a universal restriction on the distribution of profits to shareholders would be upheld by Canadian courts.

In deciding between incorporating as a society or corporation with share capital, a mutual must determine whether, in light of its objects, greater benefits are provided by the broad and unrestricted powers of a corporation or by the tax exemptions and non-profit framework enjoyed by a society.

3.4 Co-operatives

Co-operatives have become a popular vehicle through which persons may collectively own the means of production so as to improve their bottom line – whether or not a profit is earned. Workers who own their company, consumers who own their retailer, or producers who own their processing facilities – each of these co-operative scenarios improve the financial bottom line of their members though the collective ownership of a common enterprise and thereby prevent a third party from extracting a profit from their activities. Co-operatives are also becoming increasingly popular as a vehicle to balance business objectives with social sustainability.

Co-operatives engage in mutualism in the broad sense and thus share many qualities with mutuals. "Co-operatives are constituted as democratic organisations on the basis of one person, one vote; they return surpluses to members in proportion to trade and not to capital; and so are designed to have a different relationship between people, capital, and economic results."[92] What then is the difference between a co-operative and a mutual?

Some have attempted to distinguish between mutuals and co-operatives on the basis of their product: "As a general rule, while cooperatives aim primarily to organise the production and provision of goods on the basis of solidarity, mutual societies strive to ensure access to services and protection considered to be of common or even general interest on the basis of solidarity."[93] However, the growth of social and worker co-operatives has put such a distinction into question.

A second way in which co-operatives might be distinguished from mutuals is by their for-profit objectives. While mutuals may distribute rebates in order to reduce the service costs payable by their members, they may not carry on business with the aim to distribute realized profits. In contrast, many co-op-

92 Johnston Birchall, "Consumer co-operatives in retrospect and prospect" in Johnston Birchall ed., The New Mutualism in Public Policy (London: Routledge, 2001) 72 at 90.
93 Supra note 5 at 3.

eratives, including producer, worker, and agricultural co-operatives, seek to maximize the profit that members may derive from their labour. However, this distinction is also muted by the fact that many forms of co-operatives are also prohibited from carrying on a business with for-profit objectives. For example, housing, building, social and utility co-ops often limit the use of realized profits to re-investment in the provision of member services. Additionally, some retail co-ops limit the distribution of profits to investment in broader community or social projects.

A third way in which some researchers have attempted to distinguish between mutuals and co-operatives is by their ownership structures: "Mutuals can be differentiated from co-operatives (which are in many respects similar) by the fact that they operate with their own, collective and indivisible funds, and not with share capital. Rather than purchase shares, members pay fees (for example based on insurance calculations)."[94] However, this distinction is also tenuous in light of the fact that many legislative schemes allow for co-operatives to be formed without share capital.

In the UK, where specific co-operative legislation was not enacted until recently, co-operatives may be registered as a corporation under the Companies Act (either as a company limited by guarantee or with share capital) or as a society under the Industrial & Provident Societies Act. Unlike mutuals, a co-operative may exist to earn a profit for its members, resulting in a flexibility of organisation that has enabled the development of a broad range of co-operative organisations in the UK. "A number of quite complex composite legal structures have been proposed and in some instances tried out, as a way of attempting to combine elements of co-operative member control with investor input."[95]

In Canada, co-operatives are incorporated under specific co-operative legislation – either federally or provincially. While this paper will focus on the federal cooperative legislation, provincial cooperative statutes provide for similar organisational structures – and both provide for organisational flexibility similar to that enjoyed by UK co-operatives.

A Canadian co-operative will, by definition, possess four of the six mutual characteristics: solidarity, user-controlled democratic governance, independence, and freedom of membership are inherent in operating on a "co-operative basis", as defined in the Canada Cooperatives Act.[96] However, the mutual status of any given Canadian co-operative will depend on how it has navigated the statutory options available to it in respect of share capital and the distributions of dividends.

94 Matthew Ball and Peter Hunt, eds., The All-Parliamentary Group for Building Societies & Financial Mutuals: Short Inquiry (December 2004) , p. 1. Online: Building Societies Association http://www.bsa.org.uk/docs/policy/mutuality/appgreport_2004.pdf.

95 Andrew Bibby, Financial participation by employees in co-operatives in Britain, Paper produced for the EU project Confidence, January 2004. Extra material added March 2004, p. 4. Online: http://www.andrewbibby.com/socialenterprise/Confidencereport.pdf.

96 Canada Cooperatives Act, R.S.C. 1998, c.1, s. 7. ("Canada Cooperatives Act")

A co-operative established under the Canada Cooperatives Act may be incorporated with or without share capital.[97] A co-operative that is incorporated without share capital is statutorily required to state in its articles that the interest of each member in the co-operative is equal.[98] Where a co-operative's articles provide that "equally" means jointly and indivisibly, it will have satisfied the mutual principle of absence of share capital.[99]

A mutual might also be established as a co-operative with share capital, provided that the rights attaching to such share capital are limited. Examples of such limitations have been successfully attempted in the UK. For example, the UK Glasgow Housing Co-operative Association provides in its rules that its shares have a nominal value of 1 pound, that no interest, dividend or bonus is payable on shares, and that when shareholders end their membership, the Association will cancel their shares, the value of which will remain with the Association.[100] A person must hold a "membership share" to be a registered member, and may hold only one share. Voting is one vote per member. The Association may not distribute profits to members or shareholders. Instead, profits must be used for the objects of the Association in the current year or carried forward to the next year. A similar structure might be established under the Canada Cooperatives Act.

However, under the Canada Cooperatives Act, additional considerations will have to be made. The Act provides that only one class of membership shares may be issued, such that all members have one vote and equal entitlements.[101] But, unless a co-operative's articles provide otherwise, it may issue one or more classes of investment shares in addition to membership shares (except in the case of non-profit housing co-operatives and worker co-operatives), and such shares may be issued to either members or non-members.[102] Investment shareholders will be entitled to receive dividends, with the maximum percentage of dividends payable to any class of shareholders being set out in the co-operatives articles.[103]

In addition to threatening the non-profit objectives of a co-operative, investment shares also threaten the democratic governance of its members. Each membership share carries with it one vote, and no person may hold more than one membership share.[104] The only statutory voting right given to investment shareholders is in regards to dissolution. Where a co-operative has assets or liabilities, it may be dissolved by a special resolution of the investment shareholders, provided that the special resolution entitles the directors to distribute

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97 Canada Cooperatives Act, s. 9.

98 Canada Cooperatives Act, s. 11(1)(i).

99 Supra note 1 at 5.

100 All Previous Rules Rescinded: Rules of the Glasgow Housing Association Limited, ss. 13-15. Online: Glasgow Housing Association http://www.gha.org.uk/content/mediaassets/doc/GHA%20RulesFinal11June2004.pdf.

101 Canada Cooperatives Act, s. 118(2)(a).

102 Canada Cooperatives Act, ss. 9, 5, 6, 124(1)(a), 135, 354(a).

103 Canada Cooperatives Act, s. 7(1)(f).

104 Canada Cooperatives Act, s. 7(1)(b).

Whether or not a mutual is the appropriate form of organisation to meet the objectives of a particular group will depend on a variety factors.

the property and discharge liabilities.[105] However, the articles of a co-operative may provide that investment shareholders have the right to elect directors.[106] In that case, investment shareholders will have one vote per share.[107] However such directors must be voted upon independently from members, and may not amount to more than 20 per cent of the board.[108] Regardless of voting entitlements, investment shareholders may participate in any co-operative meeting.[109]

Thus, a Canadian co-operative that has issued investment shares will fail to be a mutual – whether or not investment shares are limited to members – as such shares would have no value apart from the entitlements held by their owners to a return on their investment. Further, a co-operative established with share capital will not be a mutual where holders of membership shares are entitled to receive dividends on any profits realized by the co-operative, except as a rebate on consideration paid by members for goods and services. Accordingly, a mutual co-operative must provide in its articles that (1) it may not issue investment shares, and (2) membership shares may not carry the right to dividends except as a rebate on consideration paid for goods and services.

In addition to organisational limitations, a co-operative may fail to be a mutual on account of the for-profit nature of the services provided to its members. For example, producer and employee co-operatives attract membership investment capital as a vehicle through which members might receive a greater return on their labour. While the return on such investment is as much correlated to the member's labour as it is their capital, it is nonetheless facilitated by the capital investment. And while such investment is different than corporate investment, it is by nature an enterprise with a view to profit and, thus, is not properly a mutual.

This leads to what might be the most effective distinction drawn between co-operatives and mutuals. "As a general rule, while cooperatives aim primarily to organise the production and provision of goods on the basis of solidarity, mutual societies strive to ensure access to services and protection considered to be of common or even general interest on the basis of solidarity."[110]

3.5 Trusts

Trusts are becoming an increasingly popular instrument in the UK by which the assets of former public services are being transferred to communities within a mutual organisational framework. For example, in the UK the title to certain "foundation hospitals" have been transferred from the National Health Service (NHS) to trustees to hold in trust for the benefit of particular communities. The trustees are generally a company limited by guarantee, and the

105 Canada Cooperatives Act, s. 309(2).
106 Canada Cooperatives Act, s. 124(2).
107 Canada Cooperatives Act, s. 61(6).
108 Canada Cooperatives Act, ss. 83(11), 124(4).
109 Canada Cooperatives Act, s. 48(3).
110 Supra note 5 at 3.

beneficiaries of the trust are the members of the community served by the hospital.[111] As beneficiaries, community members hold equal equitable interests in the hospital and are entitled to receive its services and hold the trustees accountable in the operation of the hospital for their benefit.[112] The hospital is owned as a collective and indivisible asset of the trust which no beneficiary has any individual claim to. This model has also been applied to community leisure trusts and community housing (which will be discussed in greater detail below).[113]

The evidence in respect of UK financial mutuals supports the conclusion that mutuals are able to provide services at lower costs than organisations with share capital.

Further, the trustee corporation is generally governed by multi-stakeholder interests representing workers, service users, council members, community and business representatives, and even academics which "provides a counterweight to problems of self-interest attributed both to publicly-owned monopolies and to private-sector enterprise."[114] However, some mutual supporters have argued that trust arrangements are most prone to managerial complacency and corruption, as the enforceability of equitable interests are not as strong as legal interests.[115]

3.6 Community Interest Companies (CICs)

Perhaps one of the most flexible and appropriate models for mutual organisation is as a Community Interest Company (CIC). Introduced into UK legislation in 2005, it is likely that a model similar to CICs will be introduced into Canadian legislation in the not too distant future. "The CIC is an organisational form designed for social enterprises that want to use their profits and assets for the public good. CICs will be easy to set up, with all the flexibility and certainty of the company form, but with some special features to ensure they are working for the benefit of the community."[116] A CIC may be incorporated with or without share capital, and provides for an increased capacity for an organisation to carry on a business to meet social objectives instead of profit for shareholders.

To become a CIC, the articles of the company must be approved by a regulator as meeting a "community interest test" and an "asset lock."[117] An approved CIC will be subject to ongoing compliance monitoring and enforcement by the regulator. The community interest test is more relaxed than the charitable test, thereby allowing for the community to include the members of the CIC. However, the members of a CIC must not include only those persons who derive a profit from the labour they offer to the CIC, such as its directors and

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111 Richard Simmons, "Mutuality and public services: lessons from the 'new leisure trusts'" in Johnston Birchall ed., *The New Mutualism in Public Policy* (London: Routledge, 2001) 95 at 101.

112 *Supra note 89 at 20.*

113 *Supra note 79 at 16.*

114 *Supra note 110 at 104.*

115 *Ibid. at 107.*

116 *Community Interest Companies, "Frequently Asked Questions", online: Community Interest Companies http://www.cicregulator.gov.uk/faq.shtml.*

117 *Community Interest Companies, online: http://www.cicregulator.gov.uk/*

workers.[118]

The CIC asset lock provides that no company assets may be used for purposes other than serving the community that the CIC was incorporated to serve. Accordingly, a CIC may not distribute profits or assets to its members; may only transfer its assets, including upon dissolution, to another asset locked body such as a CIC or charity (other than the paid up capital of members); and may only dispose of its assets at full market value.[119] However, subject to its articles, a CIC will be able to issue investment shares and pay dividends on such shares. The dividend on such shares will be subject to a cap set by the Secretary of State that can be adjusted by the Regulator. "The Dividend Cap strikes a balance between encouraging people to invest in CICs and the principle that the assets and profits of a CIC should be devoted to the benefit of the community and therefore that the dividends should not be disproportionate to the amount invested and the profits made by the company."[120] However, a CIC will nonetheless only be a mutual where its articles state that it is not authorized to issue investment shares.

3.7 Labour Unions

Post-industrial labour unions share a common purpose with the early guild mutuals: to secure a better life for their members through improved wages and working conditions and the mitigation of common risks such as sickness and death. As such, labour unions operate for non-profit objectives and invest any surplus in providing improved services to their members – including "rainy day" funds for arbitration, litigation and strikes, and reduced union dues.

However, the industrial revolution and the advent of capitalism has resulted in a fundamental shift in the capital being mutualized and employed by union members. Guild solidarity served to mutualize member capital in order to provide a common fund from which members could draw in the face of common risks. Union solidarity, on the other hand, mitigates these risks through the mutualisation of member labour in order to facilitate collective bargaining in the allocation of employer capital towards the provision of wages and benefits – either directly or through third party insurers.

While the distinction between the mutualisation of labour and capital may seem to dissociate labour unions from the mutual movement, the distinction becomes less pronounced insofar as benefits and wages are viewed as entitlements owed to workers in exchange for their labour: the mutualisation of member labour can be viewed as an indirect means of mutualizing member capital. Seen this way, labour unions illustrate the breadth of mutual activity.

Further, despite their focus on the mutualisation of labour, labour unions must

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118 Ibid.
119 Ibid.
120 Community Interest Companies, "The Guidance, Part 6" (23 June 2005), online: http://www.cicregulator.gov.uk/guidance/ Part6package.pdf.

nonetheless mutualize a minimum amount of capital for administrative purposes and strike funds. A labour union may mutualize this capital by organizing in any of the forms discussed above, including a trust or society. The democratic nature of a labour union will largely depend on its organisational form and constitution, as discussed in the above sections. Regardless of form, however, a union may only strike when a majority of the employees affected have voted in favour of doing so.

Whichever form is utilized, statutory collective bargaining regimes will only be available to recognized trade unions under provincial or federal legislation. Under the BC Labour Relations Code,[121] an employee association will only be recognized as a trade union where it:

1. Has as one of its purposes the regulation in British Columbia of relations between employers and employees through collective bargaining;
2. Is not dominated or influenced by an employer; and
3. Has either (a) negotiated or ratified a voluntary recognition agreement with an employer or (b) been approved by the Labour Relations Board as an "appropriate bargaining unit" with a bargaining agent certified to represent them (e.g., CUPE or CAW).[122]

The BC Labour Relations Board has stated that a bargaining unit will be "appropriate" where the workers share a "community of interest" such that a single collective agreement will be sufficient to address the workers' interests.[123] Communities of interest may reflect locales and/or technical and professional skills. Employees performing managerial functions will generally be excluded from communities of interest on the presumption that their interests align more closely with their employer than other employees.[124]

Within the restrictions applicable to the definition of what constitutes an appropriate community of interest, the Code provides that a trade union must not act in a discriminatory manner in respect of its membership.[125] While this is consistent with the mutual principle of freedom of membership, the role of the Board in determining what constitutes "appropriate" is a second way in which a union can be distinguished from traditional mutuals. However, insofar as the community of interest test is applied by the Board to determine and secure member solidarity, Board involvement does not violate the principle of freedom of membership. What is unique is that the member solidarity of labour unions is often defined by a third party.

121 *Labour Relations Code, RSBC 1996, Chapter 244 ("Labour Relations Code").*

122 *Labour Relations Code, ss.1,22.*

123 *Island Medical Laboratories Ltd and Health Sciences Association of British Columbia*, BCLRB No. B308/93 (IML);

124 *Labour Relations Code*, ss. 1, 22; *B.C. Ferry Corp.*, BCLRB No. 65/78, [1979] 1 Can LRBR 116; *Vancouver General Hospital*, BCLRB No. B81/93 (Reconsideration of IRC No. C179/91), (1993), 18 CLRBR (2d) 161.

125 *Labour Relations Code*, s.10.

These social and community benefits are more difficult to market than lower numbers, and mutuals have found themselves faced with an uphill battle to remind customers of the true costs of the services they purchase.

3.8 Insurance Mutuals

As discussed above, mutual societies that wish to provide insurance services to members will generally be required to incorporate under the federal Insurance Companies Act (with the exception of provincial societies that wish to provide life insurance). The Insurance Companies Act (ICA) provides requirements in respect of both "mutual companies" and "fraternal benefit societies." A mutual company is an insurance company incorporated or continued under the ICA either without share capital or with limited participation shares. A fraternal benefit society is a mutual company without share capital that is (1) democratically governed and (2) incorporated for fraternal, benevolent, or religious purposes.[126] Thus, while all fraternal benefit societies are mutual companies under the ICA, not all mutuals are fraternal benefit societies.

Mutual insurance companies may issue share capital, subject to several important restrictions. First, a mutual may only issue participating shares (shares that confer on the holder the right to receive remaining property of the company in the event of dissolution or conversion) where authorized to do so in the mutual's by-laws. The ICA provides for detailed rules as to the calculation of the amount a participating shareholder is entitled to in the event of dissolution. Second, issued shares may not confer the right to vote at mutual policyholder meetings except (a) in respect of matters relating to specified events, and (b) the election of directors (but only if the shares are participating.[127] Third, participating shareholders may not elect more than one third of the directors of a mutual insurance company.[128] Further, mutuals are not permitted to merge with other insurance mutuals or companies.[129] These statutory restrictions place a significant cap on the market value of mutual insurance shares.

Additional restrictions apply to types of business that may be carried out by fraternal benefit society mutuals. Fraternal benefit societies may only

- Insure risks in respect of its members or the spouses, common-law partners or children of its members;
- engage in activities that are reasonably ancillary to the society's insurance business (upon the consent of the Minister of Finance);
- engage in fraternal, benevolent or religious activities;
- hold, manage and otherwise deal with real property; and
- act as an agent for a person in respect of certain other financial services.[130]

All risks insured by a fraternal benefit society must be authorized under a by-

126 *Insurance Companies Act*, R.S.C. 1991, c.47, s. 1. ("**Insurance Companies Act**").
127 *Insurance Companies Act* , ss. 83.02(1),(2).
128 *Insurance Companies Act* , ss. 83.02(3), 173(4.1).
129 *Insurance Companies Act* , s. 857.
130 *Insurance Companies Act* , ss. 541,542.

law of the society passed on the recommendation of the society's actuary and approved by the Superintendent of Financial Institutions.

The ICA provides for mutualization mechanisms by which insurance companies with share capital may mutualize, and demutualization mechanisms by which mutual insurance companies may become corporations with share capital. However, existing demutualization mechanisms apply only to mutual life insurance companies.

The lack of share capital and profit siphoning also create significant disadvantages.

4. Mutual Strengths

Whether or not a mutual is the appropriate form of organisation to meet the objectives of a particular group will depend on a variety factors. This section will examine the advantages and disadvantages of the mutual form of organisation in order to provide a framework for persons considering whether or not a mutual framework is right for them.

4.1 Margin advantage

Mutuals are often said to enjoy a "margin advantage" over non-mutual service providers due to lower capital costs. Without share capital, a mutual does not have external capital that must be serviced, thereby providing free internal capital reserves within the mutual.[131] This margin advantage provides mutuals with operational flexibility through which members may benefit in one of three ways:[132]

1. A mutual may maintain a wide price margin for its services than is necessary in order to build up reserves through high profits. In doing so, the mutual improves its security, credit ratings and long-term strategic options.
2. A mutual may maintain a wide margin to improve its short-term security, but then distribute some of the profits at the end of the year as a mutual rebate.
3. A mutual may maintain a low margin in order to increase its market share.

4.2 Avoiding the Owner-Customer Agency Problem

The two dominant theories describing firm behaviour are the managerial and property rights models. The managerial theory suggests that a firm operates within the dynamic of managers and owners, where managers maximize profits for the owners and charge rent from the owners relative to their performance.[133] The property rights model, popularized by Fama and Jensen, describes a firm as a "nexus of contracts, written and unwritten, among owners of factors of production and customers…[specifying] the rights of each agent in the organisation, performance criteria on which the agents are evaluated and the payoff functions they face…. The form of organisation that delivers the output demanded by customers at the lowest price while covering costs survives." [134]

In either model, "agency problems can arise [where] there is a separation of de-

131 *Supra* note 90 at 19.
132 *Ibid*. at 24.
133 *Ibid.* at 16.
134 *Ibid.* at 17.

cision-making and risk-bearing functions such that important decision agents do not bear a substantial share of the wealth effects of their decisions."[135] It is generally the owners and customers of a firm who bear the risk associated with the decisions made by the firm's managers. Accordingly, the agency problem can be looked at as two sub-problems: (1) owner-customer and (2) owner-manager. A firm must expend significant amounts of resources in managing both of these conflicts and its market success will depend on its ability to do so efficiently.

In respect of the first conflict (the second conflict will be addressed below), customers generally want to spend as little as possible, while owners generally want to extract as much profit from customers as possible. Where a customer has outlaid a large sum of capital under an extended service contract, it is in the customer's interest to ensure that this capital will not be squandered such that future services will cease. The owners are of course interested in distributing as much of that capital as is possible to themselves in the form of profit. By eliminating the distinction between consumer and owner, mutuals theoretically do away with this conflict. The owners are the customers, and therefore have no incentive to risk service provisions by extracting too much capital out of the business. This advantage was one of the key "selling features" of the mass conversion of insurance companies to mutuals in the early twentieth century. As the CEO of Metropolitan Life stated at the time of its 1915 conversion:

> *No longer would the board be subject to the conflicting interests of shareholders and policyholders – their primary responsibility would now be to the policyholders.... Let me emphasize that Metropolitan's conversion to a mutual company benefited the policy holders by insulating them from possible attempts to raid the large pools of marketable assets, representing policy reserves and surplus.*[136]

The homogeneity of owner-customer interests in a mutual not only results in decreased transaction costs, but also results in a psychological marketing advantage over non-mutual competitors, whose customers are well aware of their service provider's bottom line.[137]

4.3 Financial Benefits from Margin and Agency Advantages

It is one thing to evaluate the theoretical advantages and disadvantages that result from the agency and margin advantages. It is another to look at the actual numbers. Few numbers are available in respect of Canadian mutuals, and in the UK little statistical evidence has been gathered in respect of non-financial mutuals. However, the evidence in respect of UK financial mutuals supports the conclusion that mutuals are able to provide services at lower costs than or-

135 *Ibid.* at 16

136 *Supra* note 36 at 23.

137 Jacqueline Cook, Simon Deakin & Alan Hughes, *Mutuality and Corporate Governance: The Evolution of UK Building Societies Following Deregulation* (ESRC Centre for Business Research, University of Cambridge, Working Paper #205, June 2001) , p. 37.

The issue thus becomes one of governance.

ganisations with share capital. This is particularly true of building societies.

> *Efficiency and profitability measures are often used as proxy measures for managerial performance, or as indicators of the relative size of underlying agency problems. Drake (1997) charts cost to income and return on capital ratios for UK building societies and commercial banks. These show that building societies have tended to operate with greater efficiency, showing much lower cost to income ratios over the period 1970-1994, and with higher and less volatile profitability. These efficiencies may be used to bolster building society reserves or can be redistributed to members via improved rates. Valnek (1999) derives empirical evidence for the period 1983 to 1993 showing that UK building societies had significantly higher returns on assets, whether or not measures were risk-adjusted, as well as higher net income than investor-owned banks. Since the mid-1990s these performance advantages appear to have been translated into superior savings and borrowing rates offered by building societies to their members.*[138]

In a June 2004 survey of the top 35 mortgage lenders in the UK, "13 of the top 20 best value lenders over 12 months were building societies. Only one high street bank made it into the top 20 (HBSC)."[139] This success continues to date.

> *In the January 2006 Moneyfacts bi-annual survey of mortgage providers, [building society] mutuals together with direct lenders, dominated the higher placings for best value on standard variable rate mortgages. Moneyfacts said: "this survey continues to underline the competitiveness of the mutuals, who occupy over half of the top 25 positions."… The average Standard Variable Rate mortgage of the former mutuals was 6.58% compared to the remaining mutuals' 6.37%. In three other areas examined, (5-year fixed rate mortgage, instant access mini cash ISA and instant access account) the best available rates were from one or more of the building societies. The building societies now accounted for 37% of the ISA market, double what they might be expected to have, given their size in the market for all deposits.*[140]

There has also been "a strong correlation between the level of profits non-mutual banks made and the amount of competition they faced from the mutual sector. For example, in the Polish banking sector, where mutuals have around five percent of the market share, commercial banks make around three times the profits of the German banking sector, where mutuals have a 60 per cent market

138 *Ibid.* at 37.

139 *Supra* note 93 at 10.

140 Ian Welch, *Windfalls or Shortfalls? The true cost of Demutualisation: Short Inquiry* (London: The All-Party Parliamentary Group for Building Societies & Financial Mutuals, 2006), p. 7. Online: http://www.mutuo.co.uk/pdf/windfallsorshortfallsfinal.pdf#search =%22Windfalls%20or%20Shortfalls%3F%20The%20true%20cost%20of%20Demutualisation%22.

share."[141] There is little doubt that other factors including regulatory structure play a role in determining such figures. However, in 2001 the Consumers' Association analyzed the consumer costs that would result from Nationwide, the largest UK building society, converting from being a mutual.

> *Comparing savings and mortgage interests rates and costs charged for maintaining an overdraft on a current account [...]. The report concluded that if Nationwide converted from being a mutual, savers and borrowers in the UK would pay an extra £33 billion over the subsequent ten years in higher mortgage costs and lost interest on savings.*[142]

This mutual advantage has been argued to exist only in larger mutuals which are able to achieve economies of scale similar to those of large share corporations.[143] The decreased economies of scale existing in local mutual operations not only results in increased service prices, but in decreased product selection.

> *With mortgages, small societies lost hands down. On standard variable rates, two-thirds of small societies charged more than the average bank. Though some, such as Stafford Railway and Harpenden, had low variable rates, others, such as Lambeth and Dudley, had the most expensive. With two-year fixed rate or discounted rate mortgages, small societies fared even worse. Only one in five offered a two-year fixed rate, even though it has been the most popular mortgage deal in recent years. Where two-year fixes were offered, they were on average almost half a percentage point higher than the rates offered by banks.*[144]

> *[With savings accounts] the average small society paid 4.32% compared with an average rate of 4.15% from the biggest 15 providers. But while 14 of the big 15 paid interest on deposits of £10 or less, the small societies insisted on minimum deposits of anything up to £3,000.*[145]

These numbers suggest that while mutuals enjoy a real margin advantage, this advantage exists only in comparison with share corporations with similar economies of scale.

4.4 Community Connection and Social Cohesion

However, while the numbers in respect of smaller mutuals may not lie, they certainly don't tell the whole story. Mutuals are quick to remind customers that while large share corporations may be able to offer lower prices in some

141 *Supra* note 93 at 14.

142 *Ibid*. at 11.

143 Richard Dyson, "Mutuals Fail the Value Test", *Mail on Sunday* (8 November 2005) , p. 1. Online: http://www.thisismoney.co.uk/ saving-and-banking/article.html?in_article_id=404894&in_page_id=7.

144 *Ibid*.

145 *Ibid*.

situations, these prices come with a hefty social cost born by customers. In the UK, during the ten years between 1995 to 2005, only 2.4 per cent of building society branches closed compared with 24.9 per cent of bank branches.[146] "In fact, of the banks with the worst record for closing down branches, three of the top five were former building societies."[147] In addition to maintaining services in communities and for population sectors from which their corporate counterparts have withdrawn, mutual services have also provided jobs and contributed to economic stability in regions and sectors experiencing economic downturn.

These social and community benefits are more difficult to market than lower numbers, and mutuals have found themselves faced with an uphill battle to remind customers of the true costs of the services they purchase. Drawing from their early roots, mutuals continue to conduct their business on the principles of community relationships and social values.

> *[A mutual is] prepared to commit resources to longer-term relationships, exercising less choice over partners, and working towards more collaboratively defined goals…[entailing] long term social exchange between parties, mutual trust, interpersonal attachment, commitment to specific partners, altruism and co-operative problem solving.*[148]

4.5 Sustainable Decision-Making and Corporate Social Responsibility

Drawing from their commitment to community and social values, mutuals are established to meet the common needs of existing and future generations.[149] In contrast to corporate mandates which serve the individual accumulation of wealth, the mutual mandate provides management flexibility to "undertake initiatives in the long-term interest of policyholders that may not bear fruit initially."[150]

> *This can be a major advantage for mutuals with a clear strategic vision and superior management. Publicly traded stock companies often lack this flexibility because they are under constant pressure to report financial results that meet or surpass investor expectations. Such a highly pressured environment creates incentives to focus on the short-term and forego projects that, while likely beneficial to stockholders, will not turn a profit in the immediate future.*[151]

146 *Supra* note 93 at 26; *Myners Review of the Governance of Life Mutuals: Response by The Building Societies Association* (Building Societies Association, September 2004), para 32. online: http://www.bsa.org.uk/policy/response/100558.htm.

147 *Ibid*.

148 *Supra* note 110 at 100.

149 *Supra* note 89 at 33.

150 *Ibid*.

151 *Supra* note 37 at 12.

Further, freedom from servicing share capital allows a mutual to engage in member services whose benefits are of limited or no financial benefit. The capacity to engage in activities with limited financial benefit has allowed mutuals to operate in "sectors of economic activity within which the potential returns on capital fall short of the requirements of the capital markets."[152] The capacity to engage in activities with no financial benefit has enabled mutuals to provide services to their members ranging "from risk prevention (e.g. car driving lessons, information campaigns on risks in the home, information on the correct use of medicines, etc.), to ethical investment and respect for the environment."[153]

In addition to sustainable decision making, the ability of mutuals to place their customers at the centre of operations rather than non-user shareholders has resulted in a greater degree of corporate social responsibility. "Mutual insurance companies were also among the first businesses to introduce social accounting, a voluntary tool providing an overall view of the business, its effects on the environment and its social impact."[154]

> *The absence of a profit motive is a guarantee of the mutual society's long-term commitment to its members. While commercial organisations are inclined to displace their activities within the market if their profitability becomes less certain, mutual societies are more reliable as long-term social partners that support communities.*[155]

152 Acme Position on Commission Document on Mutual Societies in an Enlarged Europe (Association of European Cooperative and Mutual Insurers, February 3, 2004), p. 3. Online: http://ec.europa.eu/enterprise/entrepreneurship/coop/mutuals-consultation/replies/acme-en.pdf.

153 *Supra* note 1 at 11.

154 *Ibid.*

155 *Supra* note 5 at 3.

Mills concludes that mutuals, which mutualize capital to provide access to services, are a natural successor to public services, which provide access to service through general taxation.

5. Mutual Weaknesses

The lack of share capital and profit siphoning also create significant disadvantages. Mutuals are presented with a tremendous hurdle in the face of competition with share companies. The inability of mutuals to issue share equity (1) limits their access to capital markets, (2) limits their ability to merge with and acquire other companies, (3) reinforces owner-managerial agency issues, and (4) results in adverse selection of membership.

5.1 Limited Access to Capital Markets

In the absence of profit objectives market growth is not in and of itself a mutual concern. However, customers will only be served better by a mutual where it can offer products and services that are competitive in both scope and price with those offered by share companies. Thus, insofar as market growth is a necessary means to achieving competitive economies of scale and developing products that satisfy increasingly sophisticated consumer demand, market growth will be an essential ingredient to the survival of a mutual.

The capital outlay required to initially offer products and services will require risk capital that mutuals, which are generally limited to retained earnings and subordinated debt sources, are often not in a position to spend.[156] In contrast, in the face of new market opportunities, a share company may issue equity shares to obtain quick injections of capital with which to access these markets. The inability of mutuals to issue significant share capital may result in an enormous competitive advantage to non-mutual competitors.

> *This difficulty in raising large sums of capital restricts the flexibility of mutuals. In particular, mutuals cannot enter new lines of business or new geographic areas as easily as can stock companies. Stock insurers also find it easier to acquire other companies because their shares provide a convenient and cost-effective acquisition currency. Mutuals, by contrast, must usually spend cash to make acquisitions, which in some countries has the disadvantage of triggering immediate capital gains taxes for shareholders of the acquired firm.*[157]

Moreover, stock companies may undercut mutual prices by subsidizing the cost of their products with profits from other business operations that a mutual will be unable to run.[158]

Governments have responded to requests from mutual and other social economy sectors for an increased capacity to raise capital by permitting the issuance of limited equity. In the UK, Community Investment Corporations were in

156 *Supra* note 36 at 13.
157 *Ibid.*
158 *Richard Dyson*, "We need help say building society chiefs", *Financial Mail* (19 February 2006), p. 1. Online: http://www.thisismoney.co.uk/news/article.html?in_article_id=407097&in_page_id=2.

part conceived as a means to remedy this difficulty, and building societies have now received a limited capacity to issue permanent interest bearing shares.[159] In Canada, co-operatives are now able to offer investment shares and mutual insurance companies may offer non-voting participation shares (see Section 3.8 above).

5.2 Acquisitions and Consolidations

In the absence of the ability to raise capital through the issuance of shares, the other alternative to achieve market growth is through mergers and acquisitions. However, this is often equally impossible. Mutual insurance companies are statutorily prohibited from merging. In respect of acquisitions, as a mutual cannot purchase a competitor through the issuance of shares, it must pay cash. In addition to having limited means to do so, the tax implications of a cash purchase may make a mutual acquisition undesirable for the target company. Without the ability to acquire other businesses, many mutuals have found it difficult to compete with other increasingly large stock corporations.

> *Five of the largest Canadian life companies converted from stock to mutual ownership in the 1950s and 1960s to ensure that foreign interests would not acquire them. Many of these same companies are now converting back to stock ownership in the belief that public ownership will enable them to compete effectively in the very same international arena from which they withdrew two generations earlier.*[160]

Following the coming in force of Bill C-59 in 1999, which provided Canadian life insurance mutuals with an increased capacity to demutualize under the Insurance Companies Act, the three largest Canadian life insurance mutuals demutualized to acquire other insurance companies. Manulife acquired Clarica (formerly Mutual Life), Sun Life acquired US life company John Hancock, and Great-West Lifeco acquired Canada Life. These former mutuals are now among the largest life insurance corporations in North America.

5.3 Increased Owner-Manager Agency Problem

While mutuals may avoid the first agency problem between owners and consumers (as discussed in section 4.2 above), they are likely to experience increased difficulties with respect to the second agency conflict: between owners and managers. The directors of any firm, mutual or otherwise, have a strong incentive to operate the mutual for their own benefit, including (1) an immoderate consumption of perquisites such as salary and other compensation, (2) shirking of responsibilities, and (3) the accumulation of surplus above what is reasonably necessary.[161]

159 *Supra note 145 at 28.*
160 *Supra note 36 at 25.*
161 *Ibid. at 9.*

The solidarity of smaller mutuals may be able to mitigate this conflict where its managers are part of a tight community of members. However, managers of larger mutuals will have a strong incentive to manage the mutual for their own benefit, and distant notions of solidarity will be less effective in keeping mutual managers in check.

Corporations, on the other hand, are better able to mitigate this conflict through the market mechanism of share capital. First, through what is referred to as the "market for corporate control", poor management will reduce the value of a company's stock thereby subjecting it to hostile takeovers and the ousting of management.[162] Second, a share company may issue stock options to management whereby their interests are aligned with those of the corporation. Mutuals face a significant disadvantage on this front.[163] Without share capital, they cannot be taken over nor can they issue stock options to management. Moreover, the absence of a "secondary market for ownership claims in mutuals…[results in there being] no price mechanism through which the present value of the ownership claim, incorporating the 'implications of internal decisions for current and future net cash flows', can be signaled.[164] As might be expected, poor management performance and abuse has been one of the indicators motivating many mutual insurance companies, including Metropolitan Life, to convert back to stock companies.[165]

> *At the heart of the argument for conversion is the claim that investor-owned status provides a stricter performance focus and clearer lines of accountability and a more efficient solution to the problem of divergence of interests among classes of claimants […]. According to this point of view, demutualisation is seen to promise improved corporate governance via stricter stock market discipline; greater clarity of ownership rights; incentives for shareholder activism through concentrated holdings and the one share, one vote system of shareholder control; and potential for higher-powered managerial incentive structures through share and share-option grants.*[166]

Mayers and Smith, positing a "managerial discretion hypothesis", have argued that the limited control that mutuals exercise over management results in the tendency of mutuals to specialize in business sectors providing for equally limited managerial discretion, whereas stock companies will concentrate on lines of business requiring greater managerial discretion. [167]

> *Empirical research on the US property/casualty market confirms that this is indeed so….[US] stock companies have loss ratios that vary more widely than do those of mutuals. Among the largest lines of business, they find that mutuals concentrate significantly more*

162 *Ibid.*
163 *Ibid. at 10.*
164 *Supra* note 136 at 34.
165 *Supra* note 36 at 25.
166 *Supra note 136* at 31.
167 *Supra note 36 at 12.*

> *in homeowners peril, automotive liability, and automotive physical damage. Stocks concentrate more in workers compensation and other liability. All told, stocks write more business in lines with high underwriting risk, as measured by the variance of loss ratio. If greater underwriting risks require more discretionary behaviour, these findings support the managerial discretion hypothesis […]. This research also shows that stocks operate on a more geographically diverse basis than do mutuals. Geographic diversity requires greater managerial discretion with regard to resource allocation and similar issues.*[168]

Fama and Jensen have argued that the alleged managerial discretion of mutuals is offset by mutual member rights to withdraw their capital contributions from a mutual upon demand.

> *This imposes on mutuals' management a discipline comparable to the market for corporate control in that 'exit' reduces the amount of assets that management control. Moreover, it may be argued that the use of exit provides a more powerful control over the management of mutuals than in the case of listed companies, in that the sale of an equity stake does not have the same direct effect on the amount of assets under management control in the case of a listed company, even if the share price should fall.*[169]

However, while this right to withdraw capital contributions naturally exists in mutuals such as building societies, such a right does not generally exist in most other mutuals. To provide for such a right would not only result in decreased operational stability and access to credit, but it would defeat the very solidarity that a mutual is built on. Accordingly, successful management of owner-manager agency conflict in a mutual requires transparent and accountable governance.

> *Members have a strong economic interest in the long-term performance of the firm, and even if they do not realise it, because they cannot exit easily, face a stronger incentive to play a part in its corporate governance. Managers, on the other hand, may face strong incentives to be responsive to the needs of new customers, as they need to compete for their business, but face weaker incentives to listen to and respond to the needs of existing customers, who have little option but to remain with the firm. This makes it all the more important for existing members to make their voice heard.*[170]

The issue thus becomes one of governance. Mutuals must provide for effective accountability and management incentives. Whether they have done so remains a matter for debate, but there is evidence that they have. Mutuals have

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168 *Ibid*.

169 *Supra note 136 at 35.*

170 *Supra* note 16 at 44, 45.

There are clearly large challenges and real limitations that must be recognized in building a common mutual foundation and framework in Canada.

a higher proportion of non-executives on boards of directors, make greater use of board committees, and are more likely to set director's salaries through a remuneration committee.[171] Further, many large mutuals have established pay schemes that compensate executives on a scale comparable to their stock company counterparts.[172]

> *Incentive structures for both listed company and building society executive management include a basic salary and benefits, as well as an incentive component. The incentive component for executives of the Nationwide, the largest UK building society, has an annual bonus scheme, which is determined on the basis of performance-related criteria, and a medium term incentive plan, which takes a three year approach to the evaluation of business success. Four performance measures comprise the bonus plan: member satisfaction, efficiency, profits sufficient to sustain capital ratios, and personal performance.*[173]

Theories aside, the numbers suggest that mutuals may in fact manage owner-manager agency conflict better than non-mutuals. The annual salaries of executive directors of building society mutuals have remained substantially lower than those of their share company counterparts, which currently average around £600,000.[174]

5.4 Adverse Selection

The mutualization of risk requires that mutual members share a certain risk profile. Failure to limit members to a defined risk profile will either result in an inequitable distribution of risk or failure of the mutual. This adverse risk selection is an inherent weakness of mutuals that grows out of mutuals' greatest strength – solidarity. While a shared risk profile provides a basis to band together, it at the same time provides a basis to exclude others. "In a mutual society, low-risk members will not want to expand their pool to include high-risks, because this will reduce their benefits…the mutuals therefore guarded against adverse selection via their restrictive recruiting policies."[175]

In the early days of mutual assurance companies, mutual adverse risk selection was often referred to as "cream-skimming" by the industrial assurance companies who offered insurance to those that mutuals refused.

> *Studies in the 1940s, showed that commercially backed industrial assurance companies were less selective and open to more persons than mutuals (though this was to some extent the result of their ability to profit off of policies of high-risk individuals who were*

171 *Supra* note 136 at 31, 32
172 *Supra* note 36 at 13.
173 *Supra* note 136 at 33.
174 *Ibid* at 34.
175 Deborah Mabbett, "Mutuality in insurance and social security: retrospect and prospect" in Johnston Birchall ed., *The New Mutualism in Public Policy* (London: Routledge, 2001) 118 at 123.

> *likely to lose their benefits by forfeiting payment on their policies.*[176]

While advanced actuarial science and insurance products have enabled insurance mutuals to offer policies to a broader range of risk profiles, smaller non-financial mutuals remain subject to adverse risk selection.

176 *Ibid.*

6. Evaluating Suitable Mutual Enterprise

Much of the literature addressing the suitability of mutual and share company firm structures to various types of businesses have concluded that each is better at what they have traditionally done. Citing evidence gathered by Cummins, Weiss and Zi during a 1980-1991 study on the US property insurance industry, J.Cook, S. Deakin and A. Hughes write that "The evidence here is equivocal…investor-owned companies were better than mutuals at producing the outputs that investor-owned companies would normally produce (that is, operating in more complex and heterogeneous lines of business) and that mutuals were more efficient at producing outputs typical of mutuals…long-term, incomplete contracts […]."[177] The general consensus is that proprietary firms are more efficient for large, high-risk, complex enterprises and that mutual firms are more efficient for simple, low-risk, long-term relational enterprises.

> *The argument is that, in practice, the wider the range of business conducted, and the greater the probability of a firm encountering high risk, the more probable it will be that the plc form will be judged to be the more appropriate organisational form. This is because the members (customers) of a mutual would be less inclined to a (possibly long term) contractual relationship with a firm likely to be subject to substantial risk. This is especially true if the contractual relationship (e.g. a savings deposit) is such that the customer is subject to a downside risk but does not benefit from the upside potential of sharing in the profits of high risk ventures. In such a case, it is more likely that specialist risk takers will provide the risk capital of the firm. However, this does not mean that specialist firms will inevitably be mutual, or that diversified firms will always be plcs.*[178]

Some have gone so far as to say that any business requiring external sources of capital is not suitable for mutual firms. Mutual capital is intended to mutualize common risks, not bank on them. "The thing about mutuals is, if it does go wrong, then where does the money come from?"[179] "The knowledge that capital cannot easily be replaced following the generation of significant losses would be likely to induce managers of mutual financial institutions to adopt a relatively low risk profile."[180] Mutuals' are naturally suited to sustain long-term economic relationships between persons in order to meet specialized and low-risk needs.[181]

Accordingly, investor owner corporations and co-operatives "will continue to

177 *Supra* note 136 at 39, 42.
178 *Supra note 90 at 37.*
179 *Supra n*ote 139 at 11.
180 *Supra* note 90 at 35.
181 *Ibid.* at 26-34.

be the appropriate model for business ownership in the majority of instances. However, new mutual structures provide options that should be considered in a number of situations where a model designed to create wealth is less appropriate than one based on serving a community." Cliff Mills, a mutual lawyer in the UK has identified four appropriate circumstances where this is the case:

1. Public or community services – Where the business is in the nature of a public or community service, such that continuity and quality are essential;

2. Community assets – Where the service is based upon what may be characterized as "community assets" of which the community has a sense of ownership;

3. Monopoly – Where the provider of the service has an effective monopoly, whether or not there is a statutory regulator attempting to maintain some sort of balance between the interests of customers and the interest of owners; and

4. Other dependence – Where substantial numbers of individuals are dependant upon the service and effectively have no choice about where to purchase the service.[182]

Analyzing the increasing privatization of public services in states throughout the world, Richard Simmons argues that mutuals are the ideal organisational form through which public services may be delivered, acting as privately and democratically controlled agents of their consumers.[183]

> *A key challenge for the provision of public services is to connect them with the people – the users, employees, patients and the wider community. It is essential to foster a kind of ownership that enables stakeholders to feel that these services are run on their behalf, and not for someone else's vested interest […]. It is agreed that such a company would be run as a business, free of the perceived inertia of the public sector, would not distribute profits to capital investors, would have a structure which recognised the different stakeholders in the business – employees, customers, government – and, crucially, would be accountable to the public.*[184]

Mills concludes that mutuals, which mutualize capital to provide access to services, are a natural successor to public services, which provide access to service through general taxation. The public mutualisation of risk through taxation "is not an abstract relationship – most people know they do it and they do it every day."[185] While mutuals are able to continue this scheme of mutualisation, they are simultaneously able to deliver the benefits of increased efficiency

182 *Supra* note 8 at 19.
183 *See supra* note 110.
184 *Supra note* 89 at 5.
185 *Ibid.* at 12.

and response to consumer needs and demands. Mills writes,

> *Decentralisation is a priority. The services to be provided and the means of delivery need to be determined in accordance with local needs, and under the control of local management. Patients, former patients and other people in communities must be involved in a pro-active way, helping to identify and shape what is best for each community. Health workers need to have a sense of involvement and a sense of ownership of a service which is caring and people-based….Community ownership has the ability to provide accountability at a local level and to ensure that the services provided and the manner of delivery meet local needs. It gives both a sense of local ownership and provides an immediate mechanism of contact and partnership between the providers and recipients of healthcare services.*[186]

Simmons notes that mutuals have already become successful providers of a variety of public services across Europe, including:

- Medical and health care services (in Sweden, Finland, and Switzerland);
- Day care services (in Sweden, Finland, Italy);
- Home care and disabled services (in Spain);
- Community Shelter and home help services (in Italy);
- Community service centres (in Austria); and
- New leisure trusts (in the UK).[187]

However, the transfer of public assets to mutuals involves significant hurdles. First, how will the public purse be compensated for the sale of its assets by mutuals who are short on cash, and without investment capital? Second, how will the stakeholders of resulting mutuals be determined? While these issues present real challenges, solutions have been and continue to be developed by communities focused on preserving and enhancing collective ownership of shared services.[188]

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186 *Ibid.* at 27,29.

187 *Sup*ra note 110 at 96.

188 Shann Turnbull, "The competitive advantages of stakeholder mutuals" in Johnston Birchall ed., *The New Mutualism in Public Policy* (London: Routledge, 2001) 171. Turnbull has proposed a number of mutual transfer schemes similar to private sector Build, Operate, Own, and Transfer (BOOT) schemes.

7. Distribution of Mutual Assets

Much has been written on the recent wave of demutualisation of large financial mutuals throughout the world, and it is not the intent of this paper to focus on this subject. However, this activity has resulted in important lessons being learned by mutual advocates. On the one hand, this demutualization has led to a re-examination of mutual principles and an evaluation of their appropriateness and effectiveness in reaching their objectives. The preceding two sections owe their existence in large part to this activity. On the other hand, this debate has given rise to the examination of a more acute question: how should the assets of a mutual be distributed in the event of dissolution or conversion to a corporation with share capital?

While access to capital and market growth has consistently been put forward by many former mutuals as the reason for their conversion, critics maintain that the driving force behind demutualization has been the entitlement of existing policyholders to receive substantial sums of cash from the distribution of a mutual's accumulated funds in the event of dissolution or conversion. Mutual advocates see demutualisation as a process by which existing policyholders raid a mutual's surplus funds that have been built up by generations of members for the purpose of benefiting generations of members to come.

Critics argue against this cash grab on three fronts. First, it is argued that the economics of demutualisation don't make sense: whatever cash is extracted now will be far less than what must be paid back in the form of higher service costs resulting from the rent charged by capital shareholders. The extent to which this claim is true has already been addressed in the above section 4.3. Second, it is asserted that while demutualisation of any given mutual may be supported by a majority of existing members, such members nonetheless constitute a minority in light of the past and future members by whom and for whom the mutual's funds were built and who thereby have a legitimate, if silent, claim to benefit from the funds. Third, it is argued that as existing policyholders have only contributed in small part to the fund's accumulation, they have no legitimate entitlement to receive the accumulation but only to benefit from the funds in the form of increased services at decreased costs.

The legal weight of these last two arguments will depend on the circumstances of any given mutual. In respect of the claim of future members, they will only have a claim to benefit from the funds where the funds were settled on a trustee to hold in trust for future members. This does not mean that the mutual itself must have been established as a trust, but only that its funds were put into a trust to be used for the mutual's members. However, even then, the extent in time to which future persons may be seen to have a claim as beneficiaries of a trust is limited.

Absent a trust, existing policyholders will be entitled to receive a mutual's assets and accumulated funds unless prevented from doing so by (1) statutory

limitations applicable to the type of organisation which the mutual was established as, or (2) constitutional limitations governing the mutual.

7.1 Statutory Limitations

Recognizing that cash grabs by existing policyholders may very well prevent mutuals from securing their long term social and economic objectives, several European jurisdictions have begun to place substantial restrictions on the distribution of mutual assets. France, Ireland and Luxembourg have adopted what is generally referred to as the principle of "disinterested distribution" in respect of the assets of mutual insurance companies: in the event of dissolution or conversion, a mutual's assets may only be distributed "to other mutual insurance companies or to associations recognized as being of public interest."[189] "[T]he notion of disinterested distribution is an essential element of the mutualist philosophy, but also a practical means of protecting the accumulated reserves of the mutual from distribution to the current generation of members without respect to the contributions of previous generations."[190]

While disinterested distribution is certainly effective, it is not clear whether such a broad restriction is always appropriate. For example, in circumstances where a capital conversion of a mutual is legitimately in the best interests of a mutual's existing and future members, a broad disinterested distribution requirement will result in no members benefiting from the mutual's assets.[191] It may be that increased research on the matter will show that a restriction on distribution to members, coupled with requirements on how funds may be transferred and utilized by a resulting conversion company will provide a more fair and flexible solution. However, the principle of disinterested dissolution is enjoying increasingly wide support. The proposed EU Mutual Act adopts the principle of disinterested dissolution.[192] In the UK, a bill has currently been put forward to introduce disinterested distribution into the Industrial and Provident Societies Act – whereby a mutual's assets must be transferred "to a society of the same nature or to a charity."[193]

In Canada, there is no disinterested distribution clause applicable to federal mutuals, insurance or otherwise. However, as discussed in section 3.2 above, a mutual society incorporated in BC may not distribute its assets to members if it has charitable purposes (the relief of poverty, the advancement of education, the advancement of religion, and any other purpose beneficial to the community). As stated above, the broad definition of charitable purposes may apply to an incorporated society irrespective of whether or not it is registered as a charity with the Canada Revenue Agency under the Income Tax Act.

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189 *Supra* note 1 at 16.
190 *Supra* note 151 at 6.
191 Francesco Ianniello, AISAM Mutuality No 55: ***European Mutual Society: The Challenge of a Renaissance of Mutuality***, p. 38. Online: http://www.aisam.org/upload/documents/ME_en.pdf.
192 *Ibid.*
193 *Supra* note 1 at 16.

7.2 Constitutional Limitations

Absent statutory limitations, the only restrictions on the distribution of a mutual's assets that are not subject to a trust will be those existing in the constitutional bylaws or contractual agreements entered into by a mutual's members.

The most common constitutional limitation employed by mutuals is simply an internal adoption of the disinterested distribution limitation. For example, health care mutuals in the UK generally provide in their memorandum or articles that "on dissolution, net assets including reserves (and any 'consideration' for goodwill transferred on dissolution) may be transferred only to a body having similar objects and constraints on subsequent distribution – usually subject to Court approval."[194]

A less common approach that has been adopted by certain mutuals is to adopt what have become known as "anti-carpetbagging measures" (carpetbaggers being the term commonly used to describe persons who join a mutual for the sole purpose of voting to demutualize in order to realize windfall payments). One such measure is to limit the voting rights of new members so as to prevent them from voting for a demutualization campaign until three to five years after they join.[195] Another measure has been to introduce a charitable assignment clause on membership application forms such that "for a specified period of time, or in some cases indefinitely, any possible windfalls the member may receive through conversion to [share capital] would go to a charity chosen by the [mutual]."[196]

194 *Consultation Document: Mutuals in an Enlarged Europe - Annex 1: Summary Table of Members States' Laws in Respect of Mutuals, Draft*. (European Commission, Enterprise and Industry, March 3, 2003) , p. 71. Online: http://ec.europa.eu/enterprise/entrepreneurship/coop/mutuals-consultation/doc/mutuals-legis-in-ms.pdf.

195 *Supra* note 139 at 20.

196 *Supra* note 42 at 4.

Conclusion

There are many other crucial issues facing mutuals that this paper has not even mentioned, let alone covered. These include the statutory regime in which hybrid forms of mutuals might develop, and the governance issues that mutuals have had to face in the past decade. These are best saved for another paper.

The challenge for this paper was to find common organisational ground between organisations with enormous differences. It is not yet clear whether the mutual foundations in this paper have succeeded in this task. Are anti-carpetbagging measures relevant to both insurance mutuals and cultural societies? Are the challenges presented by limited access to capital relevant to both mutual housing societies and mutual labour unions? Even if the answer is yes, can dialogue between community leisure facilities and multibillion dollar insurance mutuals really be productive?

There are clearly large challenges and real limitations that must be recognized in building a common mutual foundation and framework in Canada. The first challenge is determining to what extent Canadian organisations are open to participating in a shared mutual framework. Hopefully this paper will help serve to test those waters.

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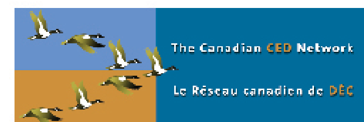

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