



HOW TO BEST MANAGE YOUR MUNICIPALLY CONTROLLED ENTITIES

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SUMMARY

Creating municipally controlled entities makes sense for many reasons. Regardless of the model, municipalities must keep in mind that these types of organizations are distinct from the municipality itself. Therefore, it is important to ensure that the Entity has a mandate, values and a purpose that are aligned with the purpose it was created for, namely to provide a municipal service. This article identifies the considerations that go into creating a municipally controlled entity (an “Entity”) that will effectively and successfully achieve its purpose.

VALUES TO BALANCE

The popularity of these Entities is reflected by the number of different models for municipally controlled organizations, including Corporations, Regional Service Commissions, Part 9 Companies, Societies, Cooperatives and Federal Non-Profit Corporations. An Entity can be an effective and powerful instrument to accomplish a wide variety of goals, including:

- 1) Managing regional partnerships;
- 2) Providing specialized services;
- 3) Transferring responsibility for a particular service away from day-to-day municipal operations; or
- 4) Serving other useful purposes.

Despite different goals, all Entities are alike in that they are legally distinct from the municipality(ies) that created them and they are controlled by people who may not be municipal employees or councilors.

Recognizing these two key facts guides the establishment, ongoing review and ultimate management of these Entities. It is our experience that the most successful entities are ones that achieve the best balance of the following goals:



Complete Freedom – On the far left side of the spectrum is complete freedom from municipal control. The Entity is free to operate independently of the municipality. For example, the Entity does not require municipal approvals for anything other than the bare minimum, such as appointment of directors or approval of historical financial statements.

This independence can be advantageous. The Entity will have the freedom to operate with greater efficiency by limiting the amount of approvals that are required. The primary disadvantage to this approach is that it may result in a disconnect between the Entity's ultimate goals and the municipality's ultimate goals.

There are examples of very successful entities that operate this way throughout Alberta. There are some very well-known utility companies that operate throughout the Province in such a manner. Most typically, these types of entities that are independent tend to be utilities.

Complete Municipal Control – On the far right side of the spectrum is complete municipal control. In this model, the municipality retains control over the Entity, for example by approving operational, budgetary, human resource, and business planning decisions.

This approach is advantageous because it ensures that the Entity's decisions are closely aligned with the municipality's goals. The primary disadvantage of this approach is that the Entity can be slow, as decisions require subsequent municipal approval.

There are also examples of very successful entities that operate this way throughout Alberta. The types of operations that are under complete municipal control range from: smaller utility companies or new utility companies; economic development agencies; social services entities; recreational service providers and more.

IS THERE A THIRD CHOICE/BALANCE?

The third choice, is somewhere in the middle of the two extremes. This structure is one where the Entity is given a certain degree of freedom and autonomy, but the municipality maintains a degree of control.

The balance will be different for every organization and it may change over time. For instance, at inception, the municipality may have more control. As time progresses, the municipality may empower the Entity to be more autonomous.

There is no right answer to the balance between autonomy and control. Choosing the right degree of control over the Entity depends on a number of factors, some of which include:

1. The number of municipalities that are members of the Entity;
2. The goals of the councils that are the members of the Entity;
3. The life-stage of the Entity. For example, at time of creation, there may be a need to control it more and then as it gets more experience, then let go of the control;
4. The nature of the services; and
5. The people involved in the Entity.

Creating system of checks and balances will strengthen a municipality's satisfaction with its Entities.

CONCRETE STRATEGIES FOR MAINTAINING CONTROL

As part of the inception, structuring and ongoing assessment of an Entity, the municipality should seek further legal advice on some of the following strategies for ensuring that the Entity is achieving the municipality's goals.

- **Introducing binding and/or non-binding policies**

The municipality may enact binding and non-binding policies to direct how the Entity functions. These policies may help the Entity recognize the scope of its ability to act outside of council approval.

To properly implement the concept that municipal policies are binding on the Entity, an agreement will be required whereby the Entity agrees to be subject to the control of the municipality and that directives or policies enacted by the municipality are binding upon the Entity.

- **Membership/Partnership agreements**

The municipality may require the Entity to enter into agreements which allocate certain decision making powers and responsibilities. For example, a membership agreement may state that operating and/or capital budgets of the Entity are to be approved by the municipality. These membership agreements can also be used to establish municipal obligations such as the payment of requisitions or capital contributions.

- **Passing Municipal bylaws regulating how services are to be provided and the established rates**

Depending upon the nature of the service that is being provided by the Entity, the municipality may use its statutory powers under the *Municipal Government Act* (the “MGA”) to regulate how the Entity will provide a particular service. For example, if the Entity is to provide water services, the municipality may pass a water services bylaw regulating the rates to be charged by the Entity.

- **Use of franchise agreements**

Section 45 of the *MGA* permits a municipality to enter into franchise agreements with a non-municipal utility provider. These agreements regulate how the utility service is to be provided. The agreement gives certain rights and privileges to the Entity, while at the same time imposes limits on its power.

- **Directorship agreements**

Directorship agreements are agreements of the directors of the Entity, which contractually recognize the parameters of the directors’ autonomy. Specifically, these agreements set out what types of decisions the director can make on behalf of the Entity and what types of decisions need to be approved of by the municipality. These agreements are useful for newer directors who may not realize that they require approvals from council.

CONCLUSION

Municipalities must be cautious and alert to the risks of a hands-off approach to municipally controlled entities. Without adequate controls, an Entity may fail to recognize its ultimate responsibility to the municipality. The implementation of controls can make Entities responsive to important municipal goals and align their actions with the municipality's vision. Clearly establishing each party's goals and responsibilities will lead to a successful and productive relationship.

Brownlee LLP has extensive experience in structuring an Entity to achieve the right balance between freedom and control. If you have any questions or concerns with respect to this article or require any assistance in creating or structuring municipally controlled entities, please contact John C. McDonnell at (780) 497-4801 or at jmcdonnell@brownleelaw.com or any other member of the Brownlee LLP Corporate Governance Team in Edmonton at (780) 497-4800 or in Calgary at (403) 232-8300.