

# Launching and Maintaining a Local Government Corporation

A Guide for Local Officials 2006



BRITISH  
COLUMBIA

Ministry of Community Services

## Acknowledgments

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This guide was prepared by the Local Government Department, Ministry of Community Services, as a resource for local governments in British Columbia. The Ministry is solely responsible for its content.

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## Disclaimer

This guide was developed to provide general advice and direction to municipalities and other local governments that are considering creating a corporation or acquiring shares in an existing corporation. The contents of the guide are not intended to provide legal advice and should not be relied upon as legal advice.

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## Feedback

Feedback on this publication and suggestions for its enhancement are welcome. Please send your comments by email to: [lgde@gov.bc.ca](mailto:lgde@gov.bc.ca)

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# INTRODUCTION

## How the guide can help

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*Launching and Maintaining a Local Government Corporation: A Guide for Local Officials* is designed to help elected officials and staff of local governments. The guide was created from the accumulated experience of local governments, the majority of them municipalities. It raises issues to consider before proceeding to incorporate a separate corporation or acquire shares in a corporation.

After reading the guide a local government may decide that another arrangement will allow it to achieve its goals more efficiently than a corporation.

On the other hand, a local government may decide to pursue a request for approval of the Inspector of Municipalities for an incorporation or acquisition of shares in a corporation. In that case, the contents of the guide will help explain the process and organize the submission. The guide outlines the information the Inspector and Ministry staff require for reviewing requests for approval. It also provides information on what needs to be sent to the Inspector after the corporation is formed.

The guide also discusses the wealth of advice that can be accessed from business, legal and financial specialists; important considerations for corporation setup; provincial regulations and federal tax laws; and steps that can be taken to control a variety of risks.

## Why the guide was created

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The guide was inspired by the work of the Ministry of Community Services Local Government Incorporations Project Team, with the support and direction of the Inspector of Municipalities. In 2005, as part of a broader departmental review of all approval requirements, the team studied the approval process for local government requests to incorporate separate corporations or acquire shares in corporations.

The project team examined the 78 requests received by the Inspector since 1976, noting corporate purpose or activity, ownership, board structure and membership, public involvement and sources of capitalization. They concluded that local government elected officials and staff could benefit from a guide that addresses the options for accomplishing their goals and the requirements for approval.

An overview of the requests made by local governments to the Inspector of Municipalities is in **Appendix 1—Overview of Municipal Experience.**

## The Inspector's approval

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Prior to 1976, municipalities had “full power to engage in any commercial, industrial or business undertaking” under the *Municipal Act*. In 1976, the government added to the statutes a requirement for local governments to receive approval from the Inspector of Municipalities in order to incorporate a corporation or acquire shares in a corporation other than a society. These restrictions on municipal authority still apply.

However since 1976, and particularly from 1998 to 2004, municipal and regional district powers have been significantly expanded via the reformed *Municipal Act*—which evolved into the *Local Government Act*—and the *Community Charter*. The changes have emphasized a balance between the broader powers and autonomy given local government and greater transparency of council decision-making and accountability to the electorate.

In the case of municipalities, *Community Charter* Section 185 provides the authority for incorporation of corporations. *Local Government Act* Section 195 provides parallel authority for regional districts.

The approval process governed by these Acts aims to safeguard the “public interest.” In addition, it provides an opportunity for all involved to create an optimal outcome.

## The approach

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The guide presents information in what could be considered sequential order—in sections entitled **Consider, Consult, Create, Comply** and **Control Risk**. However, many issues will be considered, and actions taken, concurrently. Because some issues are relevant at more than one point in the cycles of planning and implementation, some information appears in more than one place.

To illustrate the decision process, concepts and advice in these sections, four fictitious scenarios are provided in **Appendix 3 – Case Summaries**. Three of these scenarios deal with situations where creating a corporation is the preferred route for local government, and one where an unincorporated joint venture is chosen.

### **Community Charter Section 185**

(1) A municipality may only  
(a) incorporate a corporation other than a society, or  
(b) acquire shares in a corporation with the approval of the inspector or as authorized by regulation.

(2) An incorporation or acquisition under subsection (1) applies as an exception to the restriction under Section 183 [investment of municipal funds].

The **Inspector’s Approval Process and Checklist** is a separate section at the end of the guide. It will be helpful to have read the other sections before considering these requirements.

While there are various legal options for forming a corporation, as discussed in the **Consider** and **Create** sections, the guide primarily addresses corporations that are wholly owned by local government and created using the B.C. *Business Corporations Act*.

Local governments include both municipalities (and their councils) and regional districts (and their boards). Both are governed by the *Community Charter and the Local Government Act*. However, the authority is somewhat different in the case of regional districts. Regional districts have not been granted “natural person powers”<sup>1</sup> as have municipalities under the *Community Charter*. Nor have they been given exemption from elector approval for agreements with capital liabilities to the same extent as municipalities.

For simplicity, the guide refers to municipalities and their councils throughout. Footnotes indicate where the legislative regime for regional districts differs from that of municipalities.

<sup>1</sup> “Natural person powers” is a legal term that refers to the types of things an individual is empowered to do, such as enter contracts, borrow money, buy property, hire staff, provide assistance, sue and be sued.

# CONSIDER

When council and staff begin to explore the subject, they will find numerous issues to consider throughout the process of forming a corporation—before, during and after. Consideration will need to be given to what they want to achieve and why, the relative merits of different arrangements, the interests of other parties and the additional responsibilities involved. These key factors will help decide whether to proceed and, if so, how.

## Council objectives

The first question for Council to ask is “why consider this course of action?” If a municipality adequately defines the need or problem and evaluates different options for addressing it, the municipality may find that it can achieve its objectives without forming a corporation.

The *Community Charter* provides municipalities and their councils with:

- a guiding legal framework;
- the authority to address community needs; and
- the flexibility to determine the local public interest and respond accordingly.

Municipalities will find that their powers under the *Community Charter* allow them the flexibility to achieve their goals using various mechanisms. A corporation is simply one of a number of approaches.

## Explore different arrangements

When a municipality is considering the launch of a new initiative, one of the first decisions will be to select the most appropriate form for the enterprise. The choices will affect such things as tax planning, management and liability. While a number of legal arrangements are available, the guide focuses on the options that are relevant to municipalities, providing a brief overview of each.

## Establish an in-house function

An enterprise or service can be set up inside a municipal corporation. As for any new activity, a municipality can establish a new department or operating unit with dedicated staff. Or it can simply incorporate the function within its existing organizational structure.

This approach provides flexibility, while avoiding some of the legal implications of forming a stand-alone corporation. However some of the considerations that apply to forming a corporation may also apply to initiating a new in-house function. For example, do any special legislation or regulations apply in this area? Will additional staff be required? How should the function report to council?

Although an in-house function will not be governed by its own board, council may establish citizen advisory committees for access to special expertise. For example, an economic development program could work in liaison with a business advisory committee, with or without council representation.

## Enter into a partnering agreement

A municipality can also arrange a partnering agreement with a person, public authority or private business. Under the agreement, the latter agrees to provide a service—an activity, work or facility—on behalf of the municipality. The partnering agreement serves to protect both the municipality and the other party or parties to the agreement.

Partnering agreements apply to both public-public and public-private partnerships. A public-public partnership allows a municipality to accomplish joint goals with another municipality and/or a regional district. A public-private partnership between a municipality and a private partner allows it to transfer both risk and financial return from the municipality to the private partner. The private partner's success depends on the success of the overall project.

A partnering agreement is a legal requirement under the *Community Charter* in order for a municipality to transfer property or other assets, provide funding to, or borrow on behalf of, a private partner, including a municipal corporation that it incorporated.

### Set up a separate corporation

A corporation is a legal entity separate and apart from its owners, the shareholders. Legally, it has all the rights and obligations of an individual. The corporation can enter into contracts, own real property, sue and be sued.

A corporation provides limited liability to a municipality as shareholder. The municipality's liability is limited to the value of the shares it purchased in the corporation. The corporation is also taxed independently from shareholders.

While shareholders own the corporation, they typically delegate most of the authority and responsibility for operation of the corporation to its board of directors.

### Establish a society

A society is a not-for-profit, non-taxable organization that may or may not be incorporated. If it is incorporated, the society is—like a corporation—a separate legal entity. Whether incorporated or not, the society's assets and income must be used to fulfill its purposes. Like a corporation, a society may have directors, but share capital is prohibited.

According to the province's *Society Act*, a society may be incorporated for any lawful purpose, including charitable, artistic, educational, social, agricultural or sporting purposes. Purposes for which you may not incorporate a society include, among others, carrying on a business, trade, industry or profession for profit or gain. However, a society may carry on a for-profit business providing it is incidental to, and used to carry out, the society's stated purposes.

If a municipality becomes a member of an existing society, it can support and participate in an initiative that addresses municipal goals without taking on the demands of administering the society.

### Invest in an existing corporation

Acquiring shares in an existing corporation may be optimal when a municipality's interests are closely aligned with those of the corporation and setting up a competing corporation would not be advisable. This approach allows a municipality to support the success of the venture, without having to go through the process of creating the enterprise from the ground up. As a shareholder, the municipality's financial exposure will be limited to the purchase price of any shares.

### Holding companies and trusts

A municipality may use a "holding" company to acquire or hold assets for a temporary purpose, perhaps in a situation that calls for confidentiality regarding ownership. An example would be land holdings destined for future development either by the municipality or in conjunction with a private or public body. A holding company is simply a corporation created for this sort of purpose and it has exactly the same legal status as any other corporation. If a municipality needs to hold assets temporarily, it may quickly create such a corporation using a standard "off-the-shelf" set of articles.

In unusual circumstances, a municipality may find trusts useful. This would be the case where the municipality has not yet acquired regulatory approvals and needs to ensure that an independent party controls the assets or business on an interim basis. Trusts may also be used to structure ownership where income tax implications arise, as in the operation of a municipal business outside the geographic boundaries of the municipality.

### Establish a cooperative

A cooperative is a form of business association owned by the members who use its services. A not-for-profit or for-profit enterprise can be conducted via a cooperative. This type of association is organized to operate and administer assets for the benefit of its members, rather than to maximize profits for shareholders.



A cooperative must be incorporated before it can carry on business. Once incorporated, it becomes a separate legal entity from its members. Cooperatives have a one member/one vote system of governance. A cooperative's surplus funds can be used for a variety of purposes.

A cooperative can be formed provincially in accordance with the B.C. *Cooperative Association Act* or, if the cooperative will have a place of business in more than one province, federally under the *Canada Cooperatives Act*.

It is unlikely that a municipality would wish to use a cooperative for a municipal business. However, if a municipality is considering a non-profit joint venture, especially with other public or non-profit organizations, it might consider this arrangement.

## Why create a corporation?

Municipalities cite a number of reasons for choosing a corporation in order to achieve their goals. However, along with its advantages come considerations that may ultimately lead to a conclusion that another route is preferable. Here are some of the rationales given by municipalities seeking to incorporate a corporation or acquire shares. Under each are factors to consider when examining the route to that goal.

### Limit legal liability

A separate corporation will protect the municipal shareholder from lawsuits or other claims against the corporation.

### EXAMPLE: a municipal airport

But consider ►

- Where a corporation carries out services for a municipality, it may not be immune from vicarious or even direct liability in some circumstances. Vicarious liability may arise where the municipality retains direct control over the service. Rather than delegating regulatory control to the corporation, the municipality exercises control directly through its governing body, by bylaw or other means.
- The protection a corporation enjoys through limited liability can be lost through piercing of the corporate veil, defective incorporation and/or improper signing of documents. See the **Control Risk** section.
- If a venture will be at a low risk for attracting potential liabilities or other risks, the municipality may find that direct delivery or a partnership will suffice.
- If a municipality will be transferring assets to or lending to the enterprise, a partnership may be sufficient, since assets can be returned.
- If the enterprise will need to borrow to acquire assets or to operate, a corporate structure will provide greater flexibility. It will not be limited to borrowing through the Municipal Finance Authority.
- If a municipality plans to purchase shares in an existing corporation, especially to acquire one or more significant assets of the corporation, it will need to exercise due diligence to ensure that the municipality is not acquiring existing or contingent liabilities it is not prepared to accept. Potential income tax liabilities should also be considered.
- A municipality is required to enter into a partnering agreement in order to provide assistance to the corporation. See the **Comply** section.

## Protect electorate from financial risk

A separate corporation will limit the municipal shareholder's financial exposure. This makes it easier to capitalize on new, but potentially risky, opportunities in emerging technologies or economic development.

**EXAMPLE:** a municipal cogeneration facility

But consider ►

- See the first two bullets under **Limit legal liability**, above.
- If a municipality is seeking to generate revenues and/or profits, it may be able to achieve these goals by operating the enterprise directly, rather than as a corporation or partnership.
- If the enterprise will constitute a monopoly service in the area, without immediate competitors, the municipality may choose to deliver the service directly unless there is a high risk of liability.
- If a municipality is unlikely to want to sell or divest the enterprise in the future, then it may be preferable to operate directly or in a partnership. If the municipality is likely to sell or divest, operating through a corporation would simplify that eventual sale of shares or assets.
- If a municipality wishes to incur a capital liability or loan guarantee on behalf of the corporation it will need approval of the electorate if the agreement is for more than five years or may exceed five years through renewal or extension. In doing so, the municipality will need to publicly identify the other parties to the agreement and the nature, term and amount of the liability.
- Other circumstances, such as the transfer of certain utilities to a corporation, may also require approval of the electorate.

## Engage external expertise and free council time

A separate corporation with its own board of directors may allow a municipality to tap into special expertise. At the same time, it could free council members to focus on other municipal issues.

**EXAMPLE:** a local economic development corporation

But consider ►

- If a municipality plans to engage external expertise in a consultative—rather than decision-making—role, it might choose to operate the venture directly or in a partnership. If it wants to harness that external expertise in direct decision-making, it can appoint external directors through a society as well as other corporate arrangements.
- Both at the outset and on an ongoing basis, a municipality will need to take into account how the public, media and taxpayer groups may perceive appointments to the board. Clear guidelines should be established to address and prevent any potential conflicts of interest, with special mention of the involvement of members of council in corporate governance.
- If significant municipal assets are likely to be transferred or there is concern about maintaining municipal control, the board should include council members or municipal officers.
- Consider who will sign, as shareholder, on the municipality's behalf. Council can delegate authority to vote its shares, but may prefer to ensure that matters requiring its decision are referred to the council as a whole. Routine or administrative matters may be delegated to a council member or municipal officer.

## Share control with economies of scale

Joining together to form a corporation to serve a wide geographic area may be more cost effective than each municipality proceeding on its own.

**EXAMPLE:** a 911 telephone service

But consider ►

- If creating a corporation with one or more public authorities, a municipality will want to reflect its relative investment through the corporate share or dividend structure.
- Where municipalities are combining to create or acquire a municipal corporation, they will usually require a shareholder agreement.
- If the enterprise has a time-limited purpose, it may be more efficient to use an unincorporated joint venture.
- The corporation's articles should include a limit on the ability to issue and dispose of shares without shareholder approval, to ensure that ownership is not diluted and control endangered.
- Advances should be secured to ensure that any proposed investment on the part of a partner will materialize. Provision should be made for inspection of appropriate records of the partner(s).
- When multiple parties are involved, obtaining consensus on various issues can sometimes pose a problem. Therefore, a clear dispute resolution mechanism should be specified.

## Use an operating model distinct from a municipal department

A separate corporation may allow a municipality to address unique local needs through a focussed operation and financial management distinct from the municipality itself.

**EXAMPLE:** an employee housing corporation in a resort community

But consider ►

- If a municipality's plans are of a short-term nature, it could most efficiently meet its needs by operating directly or through an unincorporated joint venture, rather than by forming a corporation or partnership.
- If a municipal corporation will operate, in whole or in part, beyond the municipality's geographic area, its income may be subject to income tax. If so, it may be preferable to operate the enterprise directly. If planning a corporation or partnership, the municipality should obtain legal advice.
- Local government corporations are not entitled to apply for or receive grants under the provincial grants statute—*Local Government Grants Act* and regulations.<sup>2</sup> A municipality should check the eligibility requirements for any grant programs from which it intends to seek funds to determine if a local government corporation would be eligible.
- Consider the possible reactions of managers, employees and labour unions. By fully informing them and involving them in discussions, a municipality may promote positive labour relations, whatever the chosen operating model.
- If a municipality will be transferring employees from a municipal department, issues such as benefits should be addressed.

<sup>2</sup> An exception is the New Deal for Cities and Communities, the tri-partite agreement between Canada, B.C. and the Union of BC Municipalities covering the period 2005 to 2015. Wholly owned local government corporations can apply for funding directly under this program.

## Incorporate provincially or federally?

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A corporation may be incorporated under the provincial *Business Corporations Act* (BCA) or the federal *Canada Business Corporations Act* (CBCA), depending on the nature and extent of business carried on by the corporation. Municipalities will need to consider some differences when deciding between the two options. These differences were more significant prior to recent amendments in the provincial legislation. Some of the remaining differences are noted below.

### Jurisdiction

Federally incorporated companies are able to conduct business throughout Canada, subject to provincial regulations and registration fees. A corporation incorporated in B.C. may also operate in other provinces. However, it will also be subject to the other provinces' regulations and registration fees.

### Corporate Name

The corporation's name will enjoy broader protection under the CBCA than under the BCA. Once a federally incorporated corporation reserves its name, it has the right to register its name in all provinces. A corporation incorporated under the BCA does not enjoy the same name protection rights. If the corporation plans to carry on business in another province where a similar name is already in use, it may have to change its name.

### Directors

**Residency**—Twenty-five percent of the directors of a CBCA corporation must be "resident Canadians" (Canadian citizens or permanent residents). The BCA does not include any residency or Canadian citizenship requirements.

**Term**—A director of a CBCA corporation may hold office for a maximum of three years. There is no similar limit for BCA companies.

**Liability for Wages**—Directors of both BCBCA and CBCA companies can be personally liable for debts owing to employees. Directors of B.C. companies are liable for up to two months' wages while directors of federal companies are liable for up to six months' wages.

## Consider who may have an interest

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A number of parties may be interested in a municipality's plans to establish a municipal corporation. A business may find itself impacted by what it perceives as unfair competition. A non-profit organization may have useful experience and insight on a local service or economic development venture. A First Nation may want to be involved as a business partner. And the municipality's plans will be of interest to the electorate.

Some discussion and decision-making may require closed council meetings. Identifying, communicating and consulting with interested parties may allow council to better understand opposing interests and solve the problems that arise from them. Council may also discover potential options and partners that can help the municipality reach its objectives.

Some bodies or individuals that council may wish to involve at an early stage are:

- Business community
- First Nations
- Neighbouring municipalities and the regional district
- Local residents

For more information on informing or involving the public, see the **Control Risk** section.

## Plan for extra responsibilities

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Extra responsibilities may arise and while some may constitute initial duties, others will be ongoing. A municipality will need to ensure that staff and/or council resources will be adequate to meet these responsibilities.

See the **Create** and **Comply** sections for specific regulatory requirements.

## In summary

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Municipal councils and staff often face complex issues when deciding how best to meet their goals. The more aware they are of the ramifications of each arrangement and the unique factors the municipality must take into account when making decisions, the more robust the outcomes will be.

The next section—**Consult**—explores the advice that can be enlisted from experts in the business, legal and financial fields as council and staff reflect on their options. They may also prove to be valuable allies when creating the enterprise, meeting regulatory requirements and managing risk.

# CONSULT

At all stages—consideration, creation and continued compliance—expert business, legal and financial specialists can assist municipal staff and council to make effective decisions, avoid pitfalls, ensure achievement of goals and protect investments.

## Consult a business specialist

Whatever the considered initiative, a municipality will likely find the services of a business consultant invaluable. At the outset, a business consultant with expertise in the proposed area of enterprise can help develop a sound business plan. Appendix 2 provides a checklist of components in a typical plan.

The upfront expense of hiring a consultant may ultimately save a municipality significant time and money. This is particularly true when establishing a corporation in a business area or regulatory field that is new to council or staff.

An expert business consultant offers:

- specialized knowledge of niche areas;
- knowledge of best practices;
- knowledge of regulations;
- management expertise relevant to the sector;
- advice on suitable technology and software;
- knowledge of the operating environment and competition; and
- wise counsel on strategic communications.

Based on the types of corporations that have been created by local governments in B.C. to date, these consulting specialties may be relevant:

- tourism;
- energy;
- telecommunication;
- land development/real estate; and
- forestry.

## Engage legal advice

Municipalities can benefit from discussing their plans with their solicitor. Here, in alphabetical order, are some of the topics which may need general legal advice at a preliminary stage. Once a municipality has decided how to proceed, it may need more specialized legal assistance to help structure its corporation and prepare incorporation documents and other legal agreements.

### Corporate structure

A variety of matters will influence a municipality's choice of corporate structure. See the **Consider** and **Create** sections.

- A solicitor can help council evaluate such factors as business environment, public or private participation, proposed length of the endeavour, anticipated investment and expectation of return, and involvement of the municipal council.
- The solicitor can then advise council on the best corporate structure for the circumstances.

### Current and contingent liabilities

For situations involving the acquisition of shares in an existing corporation, a municipality will need to exercise due diligence in reviewing the current and contingent liabilities of the corporation.

- A number of issues will be the focus of review by a solicitor in such situations, including assets and any current charges or debts associated with them, known and contingent liabilities, insurance policies and the implications of share transfer, contracts and other factors.

## Delegation limits

Local government legislation imposes limitations on the matters that a local government may delegate, and delegation to a corporation is not permitted.

- A solicitor can consider the remaining role of municipal council in the creation of a corporation including, for example, fees and charges for a service.

## Director liabilities, immunities, indemnities

Directors will want to avoid financial responsibility for contingent liabilities such as unpaid employee wages. Municipalities will want to protect directors against liabilities, through insurance or indemnity, in situations in which immunity does not apply.

- Municipalities may want to seek a legal opinion on whether the statutory immunities enjoyed by municipal officers, officials, employees and volunteers extend to directors of the corporation.
- Legal advice can clarify whether any indemnities a municipality has adopted in the form of an indemnity bylaw may be extended to directors of a wholly owned corporation.
- A solicitor may also advise council on errors and omissions insurance and directors' liability insurance.

## Dividends

Along with share classes, a municipality will need to consider, especially in the case of multiple shareholders, the relative rights to dividends each shareholder may enjoy. See the **Create** section.

- A solicitor can help the municipality decide how dividends will be differentially allocated and suggest measures to ensure municipal influence over decision-making.

## Labour relations

Whether a municipality employs union and/or non-union employees that will be transferred to a new corporation, it will need to abide by provincial regulations. The municipality will also want to ensure a smooth launch or transition with regard to the corporation's human resources.

- A solicitor can advise on the relevant requirements of the B.C. *Labour Relations Code* and the *Employment Standards Act*, including successorship and notice obligations.
- The solicitor will review any collective agreements, giving special consideration to any contracting out issues that may be triggered.
- Legal advice can assist the corporation to develop acceptable terms and conditions in order to retain experienced employees.

## Regulatory requirements

- A municipality may need to obtain legal advice on the applicable regulatory scheme, particularly if it lacks previous experience in the particular kind of enterprise. See the **Comply** section.

## Share classes and shareholder agreement

The relative participation of two or more shareholders will drive the share structure for a corporation and determine whether more than one type of share will be issued.

- A solicitor may advise the municipality on decisions about share classes.
- The solicitor can also draw up a shareholder agreement establishing rights among two or more shareholders and stipulating conditions such as disposition of shares.

## Shareholder controls

Controls in the corporation articles can ensure that certain matters will always be first referred to the municipal shareholder for decision.

- A solicitor can draft the appropriate articles to provide this control over issues such as borrowing, incurring liabilities, board appointments and reporting.

## Shareholder liability

Unless a shareholder has been instrumental in directing a corporation in actions that accrue liability, liability is normally limited to the value of the shares held. However, municipal shareholders often wish to exercise more control over the decisions of their wholly owned corporation than is typical.

- Council should consider seeking legal advice on the risk of liability to the municipality as shareholder.

## Tax implications

Municipalities enjoy general income tax exemptions and special status for such taxes as GST and property transfer tax, benefits that most private corporations do not enjoy. However a municipality should give careful consideration to the tax status of any corporation it plans to acquire.

- A solicitor will be able to review the income tax and capital gains implications of acquiring a private corporation.
- The solicitor can also consider the tax status of the new municipal corporation under taxing legislation, including the implications of any public-private partnership.

## Transfer of assets

- A solicitor may help a municipality consider such matters as environmental liabilities, existing land tenure rights, underlying title issues and liabilities and personal property security issues. See the **Comply** section.

## Seek financial guidance from the auditor

The municipal auditor should be a valuable resource as a municipality explores forming a corporation. The auditor can also ensure compliance with financial regulations. Here, in alphabetical order, are some things that a municipality should consider.

### Auditing

The Inspector of Municipalities requires that new business corporations mandate the preparation of audited financial statements in their corporate articles.

- The municipal auditor may be willing and able to perform the audit or may help select an auditor with private sector audit experience.

### Consolidation

As a for-profit entity, a business corporation must comply with Generally Accepted Accounting Principles (GAAP) but, as a subsidiary of a municipality, its financial information forms part of the consolidated financial statements of the municipality.

- The auditor must provide an opinion on the consolidated financial statements, meeting Public Sector Accounting Board (PSAB) standards.
- The auditor may identify issues that affect financial consolidation and that should be addressed when establishing the corporation's financial reporting systems.
- The auditor must also be prepared to accept the audit opinion of the subsidiary's own auditor.



## Staff capacity

The scale and type of an enterprise may call for dedicated, specialized financial staff. Existing staff may not have sufficient time or expertise to take on financial oversight. Financial officers may be needed with direct knowledge of the business, its terminology, accounting practices, tax compliance and filing, and other regulatory requirements.

- The auditor may advise on setting qualifications and recruiting personnel.
- Municipal staff can be offered training and updates in accounting and tax matters relevant to the enterprise to help them satisfy consolidation requirements.

## Tax issues

- The auditor may be able to provide advice on tax treatment of the proposed corporation and help obtain a Canada Revenue Agency ruling on a tax matter prior to incorporation.
- If unable to provide such assistance, the auditor should be able to refer the municipality to other tax experts.

See the **Create** and **Comply** sections for more information on financial reporting, financial records, capitalization and tax treatment.

## Confer with Ministry staff

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Municipalities are encouraged to discuss their plans with Ministry staff before submitting a formal request for approval of the Inspector of Municipalities. The financial analysts in the Local Government Department understand the legislation and financial requirements that apply to municipalities. They are also familiar with the diverse range of corporations that have been considered or created by B.C. municipalities.

The financial analyst can discuss approval requirements and the expectations of the Inspector, and may be able to direct municipal staff to other municipalities that have dealt with the same issues or created a similar corporation.

## In summary

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When a municipality is exploring options, experts in business, law and finance can help council make an informed decision. They can also support the municipality as it puts its plans into place and serve as invaluable future resources as needed. A municipality can also benefit by tapping into the knowledge and insight of Ministry staff.

The following section—**Create**—introduces the process and decisions that will need to be made if a municipal council has made the decision to form a business corporation.

# CREATE

If, after an initial exploratory period, council has decided to proceed with forming a business corporation, this section will guide a municipality through the basic steps to incorporation, including choosing a business name, determining ownership structure, selecting directors and officers, maintaining control, capitalizing the corporation and preparing articles. Some of these steps cannot be finalized until the new corporation is formed.

Prior to incorporation, a municipality must obtain the Inspector's approval. For these requirements see the **Inspector's Approval Process and Checklist** section.

In most cases, municipalities ask their solicitor to complete the necessary steps. However, council and staff should understand the process and requirements so that they know what critical decisions they must make and when.

## Choose a business name

Examples of names that give a clear idea of the geographic scope and purpose of a corporation are the **Burns Lake Community Forest Ltd.** and the **Squamish Waterfront Development Corporation.**

Every business corporation must have a unique name that meets the requirements of the *Business Corporations Act* and regulations. When creating a new municipal corporation, a name should be selected that reflects both the public nature of the enterprise and its business purpose.

At least three alternative names should be developed that meet the requirements for name

registration in B.C. These include three components:

- distinctive element (e.g., geographical location, municipal name);
- descriptive element that describes the nature of the business; and
- corporate designation, as follows: "Limited", "Limitee", "Incorporated", "Incorporee" or "Corporation" (or abbreviation).

The name should:

- respect the intellectual property rights of another business or organization;
- reflect municipal ownership and purpose;
- be easy for others to remember and spell correctly; and
- continue to be appropriate in the event that the enterprise grows.

Municipalities are strongly discouraged from using the incorporation number as the corporation's name, although this is permitted by the *Business Corporations Act*. In very limited circumstances, using the number as the name may make sense (e.g., the formation of a temporary holding company to effect a competitive land transaction). However, in general, using a "numbered company" is not a practice that upholds the principles of open and accountable local government as it hides the public shareholder and the corporate purposes from public view.

For information on making a name approval request, registering a name and incorporating a corporation in B.C., visit the B.C. Companies web page listed in Appendix 4.

## Organize and maintain control

Council will want to consider the degree of control that it will exercise over the corporation, including the degree of share ownership, if the municipality is acquiring a participating share in an existing corporation. Where municipal assets are being transferred to a corporation, that control will confer a level of protection over municipal investments.

### How to decide which ownership structure will be best for the corporation

A municipality doesn't have to be a 100% owner of the corporation. A corporation can change ownership interests and issue and transfer shares without affecting its existence or continued operation. When shares are transferred, a share of all of the assets and obligations of the corporation, not just a particular asset, are transferred. The corporation will acquire debts, tax obligations, legal claims and other commitments.

Legal advice can help a municipality make decisions on ownership of the voting shares and control over assets.

Ownership structures used by the municipalities on record include

- Wholly owned by a single government (the most common form of ownership structure in requests reviewed by the Inspector of Municipalities to date).
- Ownership shares divided between a number of governments.
- Fifty per cent or more of the corporate shares owned by a municipality, with the rest belonging to a First Nations group, society or private corporation.
- Less than 50% of the corporate shares owned by a government

### How to determine board structure and membership

Usually directors are responsible for the overall direction of the corporation, with day-to-day operations managed by the chief executive officer and staff. The structure of the board of directors is influenced by the company's corporate purposes and ownership structure, including shareholder composition. In the case of multiple shareholders, where municipalities combine to create or acquire a municipal corporation, the owners will want to ensure that the corporation's board of directors reflects their proportionate participation.

The Village of Alert Bay and the Namgis First Nation formed Historic Alert Bay Development Corporation to take advantage of provincial and federal revitalization programs for fishing communities. The municipality and First Nation divide voting shares and control, with each party appointing members to the board of directors.

The board of a municipal corporation may be composed of elected officials, municipal officers or employees, outside appointments or any combination thereof. The board's composition will likely have implications for the municipality as a

shareholder. Through provisions in the corporate articles, a municipality can appoint directors with the appropriate interests and qualifications. For example, the articles might require that a director reside within the municipality's jurisdictional boundaries.

### What should be taken into account when selecting directors and officers?

When selecting directors and officers, a municipality will be concerned with gaining the knowledge, resources and connections the municipal corporation requires. Specialists and representatives of groups with an interest in the enterprise are a particular asset when a municipality lacks in-house expertise in the corporation's focus. This is often the case with economic development and tourism-related enterprises. Community members also help a municipal corporation operate in a transparent and accountable manner.

Four regional districts—Alberni-Clayoquot, Comox-Strathcona, Mount Waddington and Nanaimo—joined together to operate a 9-1-1 emergency response system. Five years later, Powell River joined in the venture. Each district's voting shares are proportionate to its financial contribution, and the board structure also reflects this composition.

At the same time, a municipality will want to maintain control over its investment and interests. This consideration is especially vital when transferring significant municipal assets or when the nature of the decisions to be made warrant this concern. In these cases, representatives of council and municipal officers should be included as well as community stakeholders.

When selecting board members, consideration should be given to any real or perceived conflicts of interest. The public, media and taxpayer groups often carefully monitor appointments to public boards, investigating how board members are recruited and their credentials assessed. A clear policy on the recruitment of new directors, terms of appointment, compensation and related issues will help to prevent problems resulting from appointment decisions. a municipality can also align the corporation's conflict

of interest provisions with those of the *Community Charter* in your articles. See the **Control Risk** section.

Consult the *Business Corporations Act* for more information.<sup>3</sup>

### Should staff or managers be included on the board?

Including municipal managers or staff on a corporation's board of directors can offer many advantages. They bring knowledge and experience regarding municipal objectives and policy directions, familiarity with municipal processes and requirements, a direct accountability to the municipal shareholder and an acute awareness of issues that may cause concern.

Managers and staff can serve as an ideal liaison between the corporation's board and the municipality. Their ease of consultation with the municipal shareholder may limit or eliminate controversy over decisions or actions taken by the corporation's board of directors. As a result, they may increase the efficiency of decision-making and limit instances of discord between the corporation and its political owner.

### How does a municipality maintain control?

The degree of control a municipality may seek to exercise over the corporation depends on several factors:

- Objectives of the corporation;
- Degree of risk assumed by the municipality;
- Need to involve other community interests; and
- Existence of provincial or federal interests.

Making provisions to maintain an appropriate degree of control will allow a municipality to:

- minimize risk and protect its investment;
- ensure accountability to taxpayers;

- adhere consistently to performance standards for delivery of services and comply with regulations; and
- avoid real and perceived conflict of interest.

To a great extent, municipal control can be achieved through careful drafting of the corporate articles. The articles can cover a broad range of issues, including shareholder approval, board composition and appointments, company operation, contracts and agreements and borrowing. The preparation of articles is covered below.

Local government legislation places limits on the powers and functions a council may delegate to committees or other bodies. Delegation to a corporation is not permitted. Therefore, council may retain control over some things that its corporation is not authorized to do on its own. For example, a corporation does not have the power to set fees and charges to recover the costs of providing a municipal service, such as a municipal utility. This must be done by bylaw. Council will need to consider this specific role during the creation of the corporation.

## Capitalize the corporation

The public will be interested in the level of a municipality's initial and ongoing investment in the corporation. On occasion, they will be required to obtain approval of the electors as a statutory precondition for an action the municipality wants to take. For example, the transfer of certain utilities from the municipality to a corporation may require elector approval. Other types of support also trigger statutory notice and approval requirements. See the **Comply** section.

### Purchasing shares/debt financing

A municipality may, with the authority granted by the Inspector's approval, invest in a corporation through the acquisition of shares, either at the initial issue stage or through subsequent issues. Although few, if any, municipal corporations are publicly traded, this is an option to consider if the business of the corporation is competitive and profitable or if the

<sup>3</sup> *Business Corporations Act*, Part 5 Management, Divisions 1 to 3.

municipality sees merit in more public participation in the enterprise.

The corporation may finance its undertaking either through capital investment (share issues) or debt financing. The corporation is not bound by the borrowing rules applicable to the municipal owner (except for relevant limitations established in the articles). Lenders may find an enterprise sponsored by a municipality to be an attractive type of debtor. A municipality will need to bear in mind, however, the limitations on its ability to guarantee the debt of the corporation against the municipality's security. It must ensure that no indirect guarantee is offered that may be counter to those restrictions.

### Share classes and shareholder agreements

When a municipal corporation has more than one shareholder, then share structure, share classes, shareholder agreements and rights to dividends must also be considered.

The share structure chosen for a municipal corporation, and whether more than one type of share is issued, will typically be driven by the relative participation of the shareholders. A class of preferred shares may be a useful tool to differentiate between shareholders with different levels of investment. Voting rights can also be different for different share classes, allowing, for example, certain shareholders to participate in decision-making while others benefit from growth in equity. Shareholder agreements may also be used to establish rights among two or more shareholders. The agreement might stipulate, for example, limitations on the disposition of shares.

A municipality will also need to consider the relative rights to dividends that each class of shareholder may enjoy. As a further measure of control, it may also wish to stipulate that the decision to declare dividends be approved in advance by council.

### Current and contingent liabilities of an existing corporation

If a municipality is planning to acquire shares in an existing corporation, it will need to exercise due diligence in reviewing its current and contingent liabilities. Issues for review may include:

- valuation and life expectancy of assets, any associated current charges or debts and related security;
- known and contingent liabilities of the corporation, especially if it has been active in an area that may attract third party actions in negligence;
- existing insurance policies and the implications of share transfer;
- existing employee contracts, benefits, pensions and potential liabilities, and the implications of a transfer of ownership;
- existing contracts with third parties and performance under those contracts;
- existing land tenures, liabilities associated with those tenures and the rights of third parties such as tenants;
- unknown liabilities and potential risks, such as environmental remediation requirements; and
- the viability of representations and warranties that form part of the share transfer of the corporation.

### Lending under agreement

A municipality may lend to its partially or wholly owned corporation by borrowing or other means, but such loans may typically only be made through a partnering agreement. See the **Comply** section. Although a wholly owned corporation may appear to be simply an "arm" of the municipality, the legal requirement for a partnering agreement may still apply. Your municipality may have recourse to more advantageous interest rates for borrowing than does your corporate creation, through the availability of Municipal Finance Authority financing. This will be a consideration whenever the corporation seeks debt financing.

## Guaranteeing borrowing and transferring assets under agreement

Municipal shareholders may be restricted from guaranteeing borrowing by the corporation through limitations in the corporate articles. Municipal council and staff should exercise caution to ensure such “guarantees” are not indirectly provided. Lenders will be seeking legal assurance that borrowers have all necessary legal authority. Frank discussions with lenders can help avoid potential misunderstandings.

Prior to transferring real property to the corporation, the municipality will be required to give assurances that the rules regarding property disposition (any tender, posting and advertising requirements) have been met.

## Prepare articles

Every corporation must have a set of articles. The corporate articles are the rules that govern the conduct of the corporation and its shareholders, directors and officers. The corporation must keep the articles as part of the corporate records. In addition to the articles themselves, a Notice of Articles must be drafted. This is similar to the memorandum of association required under the previous *Company Act*. Both the articles and Notice of Articles are public documents.

Standard articles are usually not suitable for a corporation that is incorporated by a municipality, since its articles will need to be significantly customized. Legal counsel can help the municipality tailor its corporation’s articles to meet council’s specific requirements.

The Inspector of Municipalities will also require that articles include a number of special provisions or restrictions.<sup>4</sup> These are intended to protect the public interest in the management of its collective wealth by ensuring some degree of open and accountable decision-making by the corporation.

<sup>4</sup> These Inspector’s requirements apply to corporations that will be wholly owned by local government. Modifications will be required for partially owned corporations. Ministry staff will consider these requirements on a case-by-case basis.

Here, in alphabetical order, are some issues a municipality **may** choose to address in its corporation’s articles and those that **must** be addressed to meet the Inspector’s requirements. The mandatory provisions are indicated with a **I**.

### **I** Annual information meeting

The articles must stipulate that the corporation will hold an annual information meeting that is open to the public. Local residents are the ultimate stakeholders in a corporation’s business so it is important that they receive information about its activities and achievements. The meeting will provide an opportunity for local residents to meet the directors and senior officers and ask questions about the corporation’s affairs. It is also an opportunity to present the corporation’s audited financial statements or have them available for inspection.

It may be feasible to hold this information meeting with the annual public meeting of the municipality. For a further discussion on this topic, see the Ministry’s Annual Municipal Meeting web page listed in Appendix 4.

### **I** Auditor and annual audit

The articles must state that the corporation will appoint an auditor and have audited financial statements prepared each year. An audit is a standard accountability tool. The Inspector will not approve the creation of a corporation that waives the requirement for an annual audit.

### Board composition and appointments

The articles may specify the size and composition of the board of directors. The board should include a sufficient number of directors to provide adequate corporate governance. Its composition will be driven by the nature of the enterprise and the level of control the municipality needs to exercise. The board may include elected officials and municipal managers as well as appropriate community and industry representatives. The articles can state the interests and qualifications the municipality expects board members to have.

In addition to board size and composition, the articles can mandate certain officer positions, set out duties and functions for each office and specify which officers must be appointed. They can also be drafted to ensure that the municipality has the flexibility to appoint directors and a measure of control over vacancy appointments.

### Borrowing

The corporation's articles can provide a municipality with a protective insulation against financial risk. They can set borrowing powers and limitations such as the nature and amount of debt and the characteristics of the lender. They may also restrict the capacity of the corporation to borrow against the credit of the municipality.

### Business limits

The articles can specify limits on the kinds of business the corporation carries on. The municipal shareholder will have reasonable expectations that the corporation exists to fulfill certain purposes. But defining these purposes too narrowly may present drawbacks. For example, if the business is expected to evolve over time, the limits should not trigger a shareholder authorization for each minor change in direction. And third parties may be wary of doing business with a corporation that has restricted capacity.

### Company operation

A municipality can maintain control over company operation by including articles that circumscribe the powers of the directors and officers and reserve certain powers for exercise by the municipality as shareholder. These articles can identify certain material actions that cannot be carried out without consulting the board or obtaining shareholder approval. They can also impose other restrictions on the company's operation and, if desired, the objectives of the corporation to ensure that it operates within a more limited field of activity.

### Conflict of interest

It may be advisable to include provisions dealing with director and officer conflicts of interest that are in line with the standards applying to municipal councilors under the *Community Charter*. See the **Control Risk** section.

### Contracts and agreements

The articles may limit the corporation's power to enter into contracts and agreements. The articles can prohibit contracts that exceed a certain duration or value, or alternatively require shareholder approval, or dictate signing authority, for them. A municipality can impose controls on the remuneration, hiring and firing of senior officers. It may also impose requirements on the execution of agreements.

#### **I** Corporate purpose

The articles should include a short statement of the corporate mandate and operating objectives. See also **Business limits**, above.

#### **I** No amendments without approval

The articles must also provide that those articles that have been required by the Inspector may not be amended without the approval of the Inspector. This restriction will ensure that the checks and balances established through the articles remain in place. In circumstances where a relaxation of the restriction may be warranted, it must be discussed first with the Inspector.

#### **I** No subsidiary without approvals

The articles must specify that the corporation may not form a subsidiary corporation without the approval of both the shareholders and the Inspector.

## I Records available at municipal office

The audited financial statements and corporate articles must be available for public inspection at the municipal office of any local government shareholders. A request under the *Freedom of Information and Protection of Privacy Act* is not required to access this information.

Although the corporation's summary financial information and articles must be kept at the corporate records office, as required by the *Business Corporations Act*, it may be impractical to provide public access to the documents at that location, especially if it is not a public location. Therefore, the articles must stipulate that statements and the articles will be available at the municipal office, where citizens expect to find a wide range of public information.

## Shareholder approval

The articles may include any variety of provisions that require shareholder approval. Typical provisions include borrowing limits, aggregate debt limits, contract approvals and similar matters. Through these provisions a municipality, as shareholder, aims to retain reasonable controls over the financial and other obligations of the corporation.

Articles may also limit the ability of the corporation to allot and issue shares without shareholder approval, to ensure that the municipality's ownership is not diluted and control potentially lost. A municipality should also address share disposition, especially where there are multiple shareholders. For example, there might be restrictions on the transfer of shares to other than a local government entity. Rights and restrictions, including rights to dividends and voting rights, can also be attached to shares through the creation of share classes.

## I Shareholder approval of disposal of assets

The articles must specify that shareholder approval is required if the corporation intends to dispose of significant assets, including any land or improvements previously transferred or sold to the corporation by the municipality at less than market value. This will ensure that the municipal shareholder is aware of—and has an opportunity to discuss—any proposals by the corporation to divest itself of significant assets.

## I Year-end is December 31st

The articles must establish the financial year-end as December 31st. This will facilitate the financial consolidation of the subsidiary corporation with its municipal shareholder. The *Community Charter* obligates municipal councils to report the consolidated financial information to the public at an annual public meeting.

## In summary

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When municipal council and staff understand the necessary steps to launching a business corporation, they will be able to deal effectively with the issues and decisions encountered along the way.

When planning the creation of a municipal corporation, one of the tasks will be to ensure that the corporation complies with a range of statutes and regulations—provincial and federal. The next section—**Comply**—covers regulatory requirements from restrictions on providing assistance to business to financial reporting and tax filing. It also covers requirements under the *Freedom of Information and Protection of Privacy Act*, the *Business Corporations Act* and the *Income Tax Act*.



# COMPLY

Throughout the various phases in the life of a corporation, its board of directors and municipal council and staff will need to ensure compliance with a variety of statutes and regulations. This section covers the main regulatory requirements that need to be addressed. The unique nature of the business will likely involve other specific regulatory requirements.

Some regulatory issues are complex and time-consuming. Legal, business and financial specialists can help sort through the complexity, clarify issues and ensure that the corporation complies with all applicable statutes and regulations. See the **Consult** section.

## Observe restrictions on providing assistance to business

The *Community Charter* provides definitions for both “assistance” and “business.” All the business arrangements featured in the **Consider** section, with the exception of societies and trusts, meet the definition of business. If a municipality establishes a business arrangement to deliver services, it will need to pay attention to the rules surrounding assistance.

A business plan may call for contributions to the corporation from the municipality. There are three types of requirements that may come into play if a municipality wants to provide cash, property or other assistance to a municipal corporation. These are requirements for:

- a partnering agreement;
- a published notice before disposing of property (whether for less than fair market value or not); and
- approval of the electors for certain financial transactions (e.g., incurring a long-term capital liability under agreement).

The *Community Charter* says, as a general rule, that a municipality may not provide assistance to a business unless there is a partnering agreement between the municipality and the business. Although a wholly owned municipal corporation may be perceived as an extension of the municipality, it is a separate legal entity. So a grant of assistance may be

unlawful unless the municipality provides it through a partnering agreement. The other requirements apply to ensure that transactions are undertaken with the knowledge and approval of the electors.

This subsection presents some of the basic aspects of partnering agreements, published notice and elector approval.

## Partnering agreements and elector approval

The term “partnering agreement” is defined in the Schedule to the *Community Charter*. The partnering agreement is the key form of contract between a municipal shareholder and its municipal corporation. Under a partnering agreement, a municipality may transfer property or other assets or provide funding to a municipal corporation. It may also borrow for the benefit of the corporation.

If the corporation is a wholly owned municipal corporation, the partnering agreement may be relatively simple. In circumstances where there are third-party shareholders, a considerably more complex agreement may be needed. The agreement should allocate risks, obligations and entitlements among the parties.

The partnering agreement protects both the municipality as shareholder and the municipal corporation. Depending on the activity, work or undertaking the corporation will be carrying out and the scope of liability assumed by the municipality, the partnering agreement may need elector approval.

The relevant portions of the *Community Charter*<sup>5</sup> allow the council, under an agreement, to incur a liability under two conditions.

- The liability is not a debenture debt; and
- The period of the liability is not longer than the reasonable life expectancy of the activity, work or service under the agreement.

<sup>5</sup> *Community Charter*, Section 175.

## What are the notice requirements for providing property to the corporation?

The *Community Charter*<sup>6</sup> requires a council to publish notice before disposing of land or improvements. This requirement also applies when a municipality provides property to a corporation in which the municipality holds shares.

## When is elector approval required?

The *Community Charter* requires a municipality to secure prior approval of the electors for certain financial transactions. These include incurring a long-term liability under agreement, lending under agreement, or guaranteeing repayment of borrowing under agreement.

Long-term liabilities include those that are established through a partnering agreement between the municipality and the municipal corporation. Elector approval is required if the partnering agreement covers more than five years, or could exceed five years through renewal or extension.

Elector approval is also needed for loans or loan guarantees that are provided to a municipal corporation under an agreement.<sup>7</sup>

Where previously municipalities were required to make an entire partnering agreement available before seeking elector approval, they may now present a “partnering concept” consisting of:

- other parties to the agreement;
- nature of the activity, work or facility;
- maximum term; and
- maximum liability involved.

<sup>6</sup> *Community Charter*, Section 26.

<sup>7</sup> *Community Charter*, Section 180 by reference to Section 179 (1) (b) and (c).

The Province has established exceptions to the elector approval requirement through the *Municipal Liabilities Regulation*.<sup>8</sup> This exemption generally allows a municipality to incur an operational liability in an agreement without elector approval, providing the agreement doesn’t contain a current or contingent capital liability and doesn’t involve a loan guarantee on the part of the municipality.

The Regulation also creates an “approval-free liability zone.” If a municipality meets the financial requirements set out in the *Regulation*—basically, if it has a relatively low debt-servicing ratio—it may be eligible to incur capital liabilities under a partnering agreement without first obtaining elector approval. Refer to the *Regulation* for the calculations needed to determine eligibility.

## Adhere to the *Freedom of Information and Protection of Privacy Act*

Wholly owned municipal corporations are included in the definition of “local government body” in Schedule 1 of the *Freedom of Information and Protection of Privacy Act (FOIPPA)*. Consequently, they are subject to this legislation. This issue should be addressed with the corporation’s directors, especially external appointees, so that they are aware of the corporation’s obligations under *FOIPPA*.

Partly owned or controlled entities are not considered local government bodies under the *Act*. However, if a corporation will provide services in what is deemed to be an employment relationship with the municipality (i.e., under contract to provide a direct service to the municipality) it may fall under the local government body definition. Legal advice may be required to confirm this matter.

<sup>8</sup> B.C. Reg. 254/2004.

Under *FOIPPA*,<sup>9</sup> a municipal corporation, as a “local public body,” must designate a “head” for the purposes of the *Act*. The head is the person principally responsible for administering the public body’s activities in accordance with *FOIPPA*. These activities include assisting applicants who seek information and responding to each applicant openly, accurately and completely. The municipal corporation may also delegate the authority of the head to any other person and set fees for services related to a request for information under *FOIPPA*.

## Comply with the *Business Corporations Act*

When a municipality creates a corporation, it needs to be familiar with ongoing requirements under the *Business Corporations Act*. Directors and officers of the corporation should be familiar with these provisions, know their obligations and understand the implications for day-to-day corporate operations. Some of the key requirements are highlighted here.

### Maintaining an office

Generally a corporation must maintain a registered office and a records office in British Columbia; typically they are one and the same place. The registered and records office is where the official records of the corporation are maintained in the province and where the corporation will typically be served with any legal notices.

### Corporate records

The *Business Corporations Act*<sup>10</sup> requires that a corporation store, maintain and provide access to certain corporate records at its records office. Under some conditions, it may keep the records at another location, providing they will be available for inspection. The corporation must make these records available at no charge to current directors and, on the basis permitted under the corporation’s articles, a shareholder or any other person.

<sup>9</sup> *Freedom of Information and Protection of Privacy Act*, Section 77.

<sup>10</sup> *Business Corporations Act*, Sections 42 to 50.

In the case of a municipal corporation, the Inspector’s approval is contingent on inclusion in the corporation’s articles of provisions making the corporation’s annual financial statements and corporate articles available for inspection by *any person* at the municipal office. See the **Create** section.

Municipal corporations may find it helpful to use a legal firm to maintain their corporate records. They can regularly review and update materials as new issues come to their attention. They can also ensure that such updates are a standard part of the materials they provide for the corporation, in addition to the standard annual corporate maintenance materials.

### Required filings

The *Business Corporations Act* requires a corporation to file an annual report with the registrar each year within two months after the anniversary of the date their corporation was recognized. The corporation must submit the annual report in the form established by the registrar, including information current to the corporation’s most recent anniversary.

In addition, a B.C. corporation is required to make public notice filings with the Registrar of Companies. The filings will most commonly relate to:

- changes to the members of the corporation’s board of directors or the address for any director;
- any change to the registered or records offices;
- a change of the corporation’s name; and
- a change to the corporation’s capital structure (e.g., creating a new class of shares).

The *Business Corporations Act* prescribes the form of such notices.

## Actions that must be taken by shareholder(s)

In the course of operating a corporation, many events may arise that will require the approval of the shareholder(s). This may simply be the municipality, represented by a senior officer or the mayor. These events can include such things as a corporate name change, amendment of capital structure or disposition of substantial assets. The articles of the corporation can designate specific matters requiring shareholder approval to suit the corporation's circumstances (i.e., placing limits on the amount that the corporation can borrow without shareholder approval).

A few matters will be dealt with by the shareholder(s) of the municipal corporation each year, including:

- election of directors;
- appointment of an auditor for the corporation; and
- establishing the annual reference date of the corporation (i.e., the reference date used for planning the next annual meeting).<sup>11</sup>

## Annual meetings

Under the *Business Corporations Act*, a corporation must hold its first annual general meeting no more than 18 months after its incorporation under the *Act*.<sup>12</sup> Subsequently it must hold an annual meeting every 15 months and at least once every calendar year. The corporation may waive the requirement to hold an annual general meeting with the unanimous consent of the shareholders.

The *Business Corporations Act* and the corporation's articles will together set out the rules for organizing and conducting shareholder meetings, including notice requirements (i.e., timing, delivery, and content), quorum, and voting procedures. The corporation may well have only a single shareholder (the municipality) and will almost certainly have

<sup>11</sup> For additional information on shareholder meetings, see the *Business Corporations Act*, Sections 166 to 186. In addition, you may refer to the sections on the maintenance of a B.C. corporation in CCH Canadian's *British Columbia Corporations Law Guide* and the Continuing Legal Education Society of BC's *British Columbia Company Law Practice Manual*.

<sup>12</sup> *Business Corporations Act*, Section 182.

a very few shareholders. In the case of a closely held private corporation, the corporation will dispense with the formal requirements of an annual meeting by having the shareholder(s) simply sign unanimous consent resolutions in lieu of the meeting. This practice is permitted by the *Business Corporations Act*.

However, when a municipality creates a corporation, local residents may have a reasonable expectation that the corporation will conduct some of its affairs in public. While local residents have no status or right to participate at the annual meeting at which the corporation conducts its formal corporate business, they are the ultimate stakeholders in its affairs. Therefore, in the interest of transparency, municipal council must include in the corporate articles a requirement for an annual public information meeting, as is required for the municipality itself under the *Community Charter*.<sup>13</sup> See the **Control Risk** section and the Ministry's Annual Municipal Meeting web page listed in Appendix 4.

## Financial disclosure

Although the *Business Corporations Act* permits shareholders to waive the preparation of financial statements in some circumstances, the Inspector will not permit such a waiver.

## Conform to labour legislation

A municipal corporation will need to abide by labour legislation and, in the case of unionized employees, collective agreements when planning and implementing human resources functions.

Two issues arise when unionized employees are involved: successorship and notice obligations.

<sup>13</sup> *Community Charter*, Section 99.

## Successorship

If a unionized business or part of it is sold or transferred, the purchasing corporation is deemed under the law to be the successor employer. A successor employer inherits various obligations as of the date of transfer, including those imposed under any collective agreement.

Employees cannot be unilaterally transferred from one employer to another. Unionized employees have a choice of electing to stay with the municipality, exercising whatever rights they may have under the collective agreement (e.g. severance, retention of recall rights) or accepting a position with the new corporation.

## Notice obligations

Under the *Labour Relations Code*,<sup>14</sup> an employer must give at least 60 days notice to the union prior to introducing a change that affects the terms and conditions or security of employment of a significant number of employees to whom a collective agreement applies. A sale of the assets of a business is an event that requires such notice.

The 60-day notice period provides the municipality and the union with the opportunity both to discuss employment-related issues resulting from the transaction and to develop an adjustment plan. The adjustment plan may include provisions designed to address any change to the affected employees' terms of employment.

The collective agreement should be reviewed to determine if the proposed transaction triggers any notice obligations on the employer or any other rights under the collective agreement. Special consideration must be given to any contracting-out issues that may be triggered.

## Non-unionized employees

If a corporation assumes a municipal service that was provided by non-unionized employees, the corporation is not obligated to offer employment to any non-unionized employees. However, if the municipality's employees are hired by the corporation, the service of those employees may be deemed continuous and uninterrupted for purposes of the B.C. *Employment Standards Act*.

For more information on ensuring a smooth transition with regard to human resources and labour relations, see the **Control Risk** section.

## Meet specific regulatory requirements

Municipal staff and council may need to obtain advice on the relevant regulatory requirements, particularly where the municipality has limited experience with the type of enterprise. For example, for utilities, the *Utilities Commission Act* must be consulted to determine whether rate regulation will apply. For telecommunications, regulations of the Canadian Radio Telecommunications Commission will need to be considered, especially if ownership restrictions apply.

Other regulatory considerations include those connected to transfer of assets. These include such matters as environmental liabilities where land tenures form part of the assets, other existing land tenure rights such as licences, easements or leases, underlying title issues for all land tenures such as reservations of mineral rights, and liabilities and personal property security issues for other forms of personal property.

<sup>14</sup> *Labour Relations Code*, Section 54.

## Establish the fiscal year as the calendar year

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The fiscal year for municipalities is the calendar year, and the corporation's audited financial statements must be prepared and presented to council (as representatives of the shareholder) annually. In order to simplify the consolidation process and reporting on the business enterprise, the Inspector will require that the corporation also take the calendar year as its fiscal year. This requirement must be included in the corporate articles.

## Make financial reports as required

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The information reported about a corporation on the municipal financial statements depends on the degree of financial control. The financial information of a wholly owned municipal corporation will be consolidated in the municipal statements, often reducing the details to a single entry and footnote.

The *Community Charter* and the *Local Government Act* require all local governments—municipalities and regional districts—to prepare annual audited financial statements in accordance with generally accepted accounting principles (GAAP). For local governments, GAAP consists of recommendations and guidance on accounting in the public sector set out by the Public Sector Accounting Board (PSAB). PSAB is authorized by the Canadian Institute of Chartered Accountants (CICA).

Note that the corporation's directors must approve the corporation's financial statements before they are presented to the shareholder(s) or otherwise published.

## Comply with taxation requirements

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Municipalities are exempt from income tax and enjoy special exemptions or rebates under certain other taxing statutes. This status does not automatically apply to municipal corporations, and a municipality should obtain legal advice on current tax implications for the corporation it is establishing.

### Income tax

Generally in Canada if not less than 90% of the voting capital of a corporation is owned by one or more municipalities, the corporation is exempt from income tax if the income from activities carried on outside the geographical boundaries of the municipality does not exceed 10% of its total net income for the fiscal period. Some limited exceptions to this rule are set out in the *Income Tax Act*.<sup>15</sup> Subsidiaries of municipal corporations are subject to the same rules for exemption. The definition of "municipality" has been held to include regional districts and First Nations carrying out government functions.

In general, therefore, if a wholly owned municipal corporation will be carrying on its activities entirely within the municipality's boundaries, the corporation will be exempt from income tax. If less than 90% of the shares are owned by one or more municipalities, or the corporation will be earning more than 10% of its income outside municipal boundaries, tax advice should be obtained. The legislation sets out some exemptions to the 90/10 rule, and it may be possible to structure the corporation so as to reduce or eliminate liability for income tax.

<sup>15</sup> *Income Tax Act*, Subsection 149(5).

## GST and PST

Federal goods and services tax resembles income tax in its exemptions and rebate systems for municipalities. A “para-municipal” organization will fall under the municipal exemptions if 90% or more of its shares or capital is owned by one or more municipalities or if one or more municipalities hold title to the organization’s assets or control asset disposition.

Municipalities do not enjoy special status with respect to PST (provincial sales tax) and therefore no unusual tax circumstances apply to municipal corporations.

## Property tax and exemptions

Land owned or held by a municipality and used for its purposes is exempt from property taxation. Wholly owned municipal corporations may hold lands “in trust” for their municipal shareholders and may therefore be similarly exempt. Permissive exemptions from municipal property taxes are a tool available under a partnering agreement and council may want to consider this option. These permissive exemptions may be for any term up to ten years and must be adopted by bylaw. Note, however, that partnering agreement property tax exemptions do not automatically apply with respect to school taxes. An exemption from school taxes, if desired, must be obtained by regulation under the *School Act*. Advice on property tax implications should be obtained if the municipal corporation intends to own land, especially if there are multiple shareholders.

## In summary

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These compliance issues cover the main regulatory requirements council and staff must address when implementing plans for a municipal corporation. Compliance-related activities will occur during initial setup and ongoing operation. The experts consulted in the planning of a municipal corporation will help identify and meet other regulatory requirements unique to the enterprise.

As well as legislated requirements, issues will be encountered that need to be managed in order to protect both the municipal corporation and the municipality itself. The following section—**Control Risk**—explores what council and staff can do to evaluate and act on the potential risks involved in operating a municipal corporation.

# CONTROL RISK

Municipalities conduct risk management activities to protect assets and objectives, as well as its employees, volunteers and citizens. They should also engage in risk management activities specific to their municipal corporation. Well-managed risk management plans and practices reassure all stakeholders—whether shareholders, citizens, employees or others—that the corporation is effectively managed and subject to appropriate municipal control. An active commitment to risk management can also ensure the corporation’s compliance with corporate governance requirements.

This section presents some of the issues and practices that council and staff should consider as they build a plan to control the risks their municipal corporation may encounter.

## Inform and involve the public

As with other municipal initiatives, informing and/or involving the public can be key to winning support for its enterprise, from the consideration phase to implementation. Effective engagement with the public can also help sustain that support throughout the corporation’s continued operation. In addition, it communicates to the electorate that the municipality is committed to an open, transparent and accountable approach to conducting business.

### Involving the public before making the decision

Before incorporating, council should consider what involvement the electorate will have in the process. They may involve the electorate through a referendum, public meetings, reporting, advertising, consultation or other means. In addition to engaging the electorate in general, they will likely find it valuable to involve the business community, First Nations, neighbouring municipalities and the regional district.

If council has chosen to hold a public meeting, it should be advertised at least 30 days in advance. As part of this advance notice, copies of the proposed plans for the incorporation should be available to the public. Including the business plan

will maximize the effectiveness of the information. People attending the meeting should be given an opportunity to make representations regarding the proposed plans.

By involving the public in a timely fashion, a municipality demonstrates its recognition that the electorate may have an interest in the enterprise. In doing so, it sets the stage for any phase or aspect of the project that may require approval of the electorate.

### Should the decision be made in a open meeting?

When council is ready to consider the resolution to form a corporation, it may be prudent to hold the vote in an open meeting. An open meeting allows taxpayers and other stakeholders to see that the process is transparent and accountable.

If there are compelling reasons not to present the resolution in an open meeting, the public should be informed as soon as possible after the resolution has passed.

### Hold an annual information meeting

Closely held private companies do not typically hold shareholder meetings. More frequently, they conduct shareholder business using resolutions in writing, including annual consent resolutions. However, the Inspector requires a municipal corporation to hold an annual information meeting. This information meeting will provide an important opportunity for members of the public to meet the corporation’s directors and senior officers and to review and ask questions about the corporation’s activities and achievements. Such meetings can help develop broad-based community support for a corporation’s activities.

The information meeting should be held some time after the formal annual meeting at which corporate law requirements are addressed (or, more likely, after consent resolutions are completed in lieu of such a meeting). This will allow the newly appointed directors for the coming year to address public inquiries. It may be possible to combine such a meeting with the annual meeting of the municipality.



For more information on *Business Corporations Act* requirements, see the **Comply** section.

## Inform and involve employees

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Council should treat labour relations as a primary issue in exploring, planning and launching a municipal corporation. They will be relying on the cooperation of employees, unions and managers to make the enterprise a success. To avoid misunderstandings and resistance, council should anticipate labour and employment issues that may arise as a result of council's plans. A thoughtful internal communications plan can help inform and involve employees.

### Ensure smooth labour relations

Both the devolution of a current municipal service to a wholly owned corporation and the acquisition of a new business and new employees may create significant concerns for municipal employees, whether union or non-union. Municipalities should consider discussing potential consequences with their employees as early in the process as possible, to reduce stress and increase cooperation. Issues such as successorship, requirements under the *Labour Relations Code* and employee benefits and pensions may need to be addressed.

Although a corporation is a separate legal entity, employees of both the municipality and the corporation may consider that in reality they have a common employer. Municipalities may therefore need to consider the effect of potential differences in positions, responsibilities, salaries and benefits to ensure a harmonious workplace for their direct and "indirect" employees.

The following specific factors should be addressed to facilitate a smooth transition.

- The corporation is not obligated to recognize an employee's past service with the municipality for common law purposes. However, a purchasing corporation often recognizes previous service in order to ensure that the municipality's employees

will accept employment with the corporation and that operations will continue seamlessly after the transfer.

- If the corporation offers employment to the municipality's employees, the terms and conditions, including position, salary, and benefit coverage, are usually substantially the same although they need not be. Terminated employees will generally accept the offered position with the corporation provided the terms and conditions are substantially similar.
- To make the transition as smooth as possible, employees are often provided with a letter of termination from the municipality and, at the same time, a letter from the corporation offering employment.
- The corporation should make arrangements with an insurance carrier to ensure that the existing employee benefit plans can be replicated with no waiting periods.
- If the employees participate in a pension plan, it should be determined whether the corporation can continue to participate in the existing plan or whether a new plan has to be established.

## Avoid actual and perceived conflict of interest

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Conflict of interest must be addressed by municipalities that intend to incorporate a municipal corporation. If council fails to act quickly and constructively to deal with an actual or perceived conflict of interest, serious consequences can result for individual councillors, also undermining the credibility of the municipality.

## What decisions need to be made about conflict of interest?

Municipalities need to consider what conflict of interest provisions should apply to the corporation's directors, especially if elected officials will be represented on the board. The establishment of clear guidelines governing the involvement of council members in the operations of the corporation can avoid any conflict of interest. And council will need to be continually alert to how municipal and corporate actions may be perceived by the public.

No particular model is required for conflict of interest guidelines, but these should conform where possible to the *Community Charter* conflict of interest rules. Discussing these rules with both elected officials and managers who may be appointed as board members, will increase their familiarity with conflict of interest issues and guidelines.

To optimize a corporation's commitment to avoiding conflict of interest, the articles of a municipal corporation should be aligned with the conflict provisions in the *Community Charter*.

## What about disclosure and participation?

The *Business Corporations Act* identifies the circumstances in which a director or senior officer should disclose an interest held in any contracts or other transactions involving the corporation. The director or officer is required to disclose the nature and extent of his or her interest, but is not prohibited from participating in the directors' discussion of the contract or transaction. The interested director must declare the nature and extent of his or her interest before the matter is approved by the board, and must, in general, abstain from voting on the applicable resolution(s). The secretary of the corporation should ensure that the interested director's disclosure and abstention is recorded in the applicable minutes. For greater certainty, the directors may wish to have the matter ratified by a special resolution of the shareholder(s).

The *Community Charter* sets a different and higher standard for interest that must be disclosed by municipal council members. In cases of direct or

indirect pecuniary interest or "another interest... that constitutes a conflict of interest," council members must both declare the conflict *and* remove themselves from the meeting and any further discussion of the matter. If a member has a conflict, he or she must not:

- remain at, or attend any part of, a meeting at which the matter is being discussed;
- participate in related discussion; or
- attempt to influence voting on any related question.

## What other *Community Charter* conflict of interest provisions should be considered?

The conflict of interest sections of the *Community Charter* also address restrictions on inside and outside influence, accepting gifts and use of insider information. The sections on disclosure of gifts and of contracts with council members and former council members may be relevant to a municipality and its municipal corporation.

## Determine duty of directors vs. duty of elected officials

Corporate directors and municipal councillors have different obligations. A corporate director is required to "act honestly and in good faith with a view to the best interests of the company." A municipal councillor is required "to consider the well-being and interests of the municipality and its community."

The best interests of the corporation are not necessarily the same as the best interests of the municipality. So when a councillor sits as a director on your municipal corporation board, which "master" does he or she serve? This divergence of interests may be more apparent if the corporation is only partially owned or controlled by a municipality. Nevertheless, the divergence also applies in the case of a wholly owned entity. Where such a conflict is encountered and cannot otherwise be resolved, the conflicted director may have to resign from at

least one of the conflicting offices in order to avoid compromising themselves.

Rather than appointing municipal councillors as directors, a municipality might address this issue by granting them observer status at meetings of the corporation's directors. In this way, they can have input on corporate decisions without taking on the fiduciary duties of a corporate director. In such cases, the corporation should require that the observers enter into non-disclosure agreements to protect the integrity of the confidential information tabled at board meetings.

As mentioned previously, a corporation's articles could also include standard conflict of interest provisions that mirror those for municipal councillors.

## Be clear on directors' and officers' liability

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According to the B.C. *Business Corporations Act*, "a company has the capacity and the rights, powers and privileges of an individual of full capacity." Furthermore, "no shareholder of a company is personally liable for the debts, obligations, defaults or acts of the company." The *Canada Business Corporations Act* includes similar sections.

However, the common law notion that the corporation is a legal person distinct from its shareholders, directors and any other legal person (as established in the 1897 case of *Saloman vs. Saloman*) is not absolute.

A municipality should obtain a legal opinion regarding its potential liability for the debts, obligations and actions of the corporation. If the corporation will be carrying out services for and on behalf of the municipal government, the municipality may not be immune from vicarious or even direct liability in some circumstances. Situations of vicarious liability may arise where the municipal shareholder in reality "directs" its municipal corporation to take actions that consequently are found to be negligent. The shareholder municipality should be reasonably careful to ensure that the corporation's board of directors is acting independently in making corporate

decisions within the mandate given to them through the corporate articles.

The *Local Government Act* provides statutory protection from personal liability for elected officials, officers, employees and volunteers working for municipalities. This protection would likely extend to cover individuals in those categories acting as directors or officers of municipal corporations. It is less clear whether the protection would extend to external board appointments. In any event, the statutory protection does not include damages arising from gross negligence, dishonesty, willful misconduct, libel or slander. It may be prudent for a municipal corporation to obtain directors' and officers' liability insurance (errors and omissions) as well as for the corporation to obtain relevant categories of general liability and property insurance.

Most municipalities also offer some form of indemnity protection for their elected officials, officers and employees. Whether such indemnities will extend to cover participation as directors or officers in municipal corporations may depend on the wording of the bylaw. No court in British Columbia has interpreted the scope and extent of such indemnities to determine if they apply to corporations. Municipalities may therefore wish to ensure that the municipal corporation indemnifies its directors and officers.

Finally, there are a host of statutory liabilities that can be imposed personally on directors and officers, such as unpaid wages or taxes as well as environmental remediation costs.

### What does limited liability mean?

Each shareholder has limited liability. Limited liability means that, in normal circumstances, no member can be held personally liable for the debts, obligations or acts of the corporation beyond the amount of share capital the member has contributed. A creditor with a claim against the assets of the corporation would in most cases have no rights against its shareholders.

### What are the limits on limited liability?

There are limits on limited liability. In certain circumstances, shareholders may be held liable. The protection a corporation enjoys through limited liability can be lost through piercing of the corporate veil, defective incorporation and/or improper signing of documents. Because of this, a municipality should seek professional legal advice when planning to incorporate a municipal corporation.

### What does “piercing of the corporate veil” mean?

The “corporate veil” is a term used to convey the idea that a corporation is an entity separate from its directors and shareholders. The corporation essentially acts as a veil that shields them from liability. However, a court may pierce through the veil that liability protection confers on the corporation in the following situations.

#### FAIRNESS

Where the court considers that it would be “flagrantly opposed to justice” not to look behind the veil.

**EXAMPLE:** claims by third parties such as creditors or tort victims vs. claims by shareholders

#### OBJECTIONABLE PURPOSE

In cases of illegal or improper activity.

**EXAMPLE:** fraud, tax evasion, insurance scam, asset transfer to the shareholder, misrepresentation as to the identity of the corporation, avoidance of statutory obligations

#### AGENCY

In the case of a sham, alter ego or conduit corporation.

**EXAMPLE:** lack of separate existence, shareholder exerting extensive control over the corporation

#### DIRECTORS’ AND OFFICERS’ LIABILITY FOR TORTS

Where the degree of personal involvement or scope of authority exercised is deemed inappropriate.

**EXAMPLE:** high degree of personal involvement or, on the other hand, negligence; inducing breach of contract

By following the corporate formalities and regulatory requirements discussed in this guide, a municipality will be unlikely to encounter situations in which a court would rule that the corporate veil may be pierced. Ongoing “good housekeeping” on the part of the municipal corporation will include:

- keeping proper minutes of board meetings;
- keeping bank accounts separate;
- ensuring the municipality does not “interfere” with decisions of the corporate board of directors;
- carefully considering the appointment and replacement of directors; and
- ensuring that, whenever possible, the municipal corporation follows the legislative rules applicable to the parent shareholder.

## Other risk management issues

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If a municipality will be acquiring shares in an existing corporation, it will need to exercise due diligence in reviewing the current and contingent liabilities of the corporation. See the **Create** section.

Risk management also involves oversight of financial responsibilities and disclosure. See the **Comply** section.

## In summary

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This section has presented both the risk issues a municipality may encounter as it plans and implements its enterprise and effective practices to minimize those risks. Council and staff will be familiar with the management of some types of risks, but may have less experience with other issues. As well as assisting with compliance issues, legal, financial and business experts can help identify potential areas of risk and build in processes that will increase the likelihood of the success of the enterprise and reduce its risks.

As plans take shape to create, or acquire shares in a corporation, municipalities should prepare to submit a request for approval to the Inspector of Municipalities. The final section—**Inspector's Approval Process & Checklist**—outlines the required form and content for a formal request. The section also describes the review process, items a municipality must submit after incorporation of its municipal corporation and the Inspector's role after approval.

# INSPECTOR'S APPROVAL PROCESS & CHECKLIST

The Inspector of Municipalities must approve your municipality's plans before you create a corporation or acquire shares. The municipality will be required to submit various materials to the Ministry both before and after an approval is granted.

## What to submit before incorporation

Before your municipality creates or acquires shares in a corporation, you must submit a formal written request and supporting documents to:

Inspector of Municipalities  
Ministry of Community Services  
PO Box 9838 Stn Prov Govt  
Victoria, BC V8W 9T1

### YOUR REQUEST MUST INCLUDE:

#### Cover letter

The letter should be signed by an authorized representative of the municipality (e.g. solicitor, CFO, etc.) The cover letter should demonstrate that each of the issues listed below have been examined and provide a clear rationale for the proposed direction. Please reference background material where this would be helpful.

#### Certified copy of council resolution

This is the resolution that approves the formation of the corporation and authorizes the request to obtain the Inspector's approval. It should indicate who has been authorized to represent council in this regard (e.g. solicitor, CFO, etc.)

#### Background report(s)

These may include a business plan or feasibility studies and any staff reports that were prepared in evaluating the decision to create the corporation.

#### Articles

A complete set of articles in final draft form. See the **Create** section for a summary of the articles that will be required by the Inspector and other articles that may be appropriate for your purposes.

TO ASSIST MINISTRY STAFF AND EXPEDITE THE REVIEW PROCESS, YOUR REQUEST SHOULD ADDRESS EACH OF THE FOLLOWING ISSUES:

### Municipal objectives

Please identify the objectives of your local government in acquiring shares or creating the corporation. Your request should indicate why these objectives cannot be met by the exercise of other powers or by using another arrangement. See the **Consider** section for a discussion of other arrangements and the benefits and constraints of using an incorporated corporation to achieve your goals.

### Municipal control

Indicate the degree of control that council will exercise over the corporation through share ownership, representation on the board, and other restrictions or requirements in the articles.

The appropriate degree of control will depend on several factors, such as the corporate objectives, the risk associated with the municipality's investment in the corporation or the need to involve community interests.

### Financial exposure of the municipal shareholder

Explain how the corporation will be capitalized on its creation and any ongoing financial contributions that are expected from the municipality. Include details of any planned contributions of land or improvements or other municipal assets. These contributions should be identified in the business plan for the corporation or in other supporting reports, as well as in the municipal five-year financial plan. Highlight any borrowing restrictions that have been placed on the corporation in the articles.

Keep in mind that a municipality may not lend money to a corporation or guarantee the debt of the corporation without meeting certain financial tests and approval requirements in the *Community Charter*. See the **Comply** section for details.

## Conflict of interest guidelines

Describe how potential conflict of interest will be addressed in the selection of directors and the rules governing their conduct. Business corporations and municipal councillors are governed by different requirements, so you will need to consider which conflict of interest provisions should apply to the corporation's directors, especially if elected officials will be on the board. Clear guidelines must be established governing the involvement of members of council in the operations of the corporation to avoid any conflict of interest or the perception of such a conflict.

## Duty of directors

Identify the materials and process that will be used to orient directors to their new role on the corporation board and their legal obligations as directors. Relevant topics include the requirements under the *Freedom of Information and Protection of Privacy Act* and the *Business Corporations Act*, the articles and conflict of interest provisions.

## Consultation and public input

Describe the process that has been followed to advise the community of council's plans to create a corporation. Who has been consulted and how? How has their input affected the decision to proceed or the design of the corporation and its articles?

## What to expect during the review

A financial analyst will review the request to ensure that it has addressed the above requirements. This review may involve further discussion between Ministry staff and your municipal representative about aspects of the proposal or the process leading up to the application. Additional feasibility analysis, risk assessment, public involvement or changes to the corporate articles may be recommended or required as a condition of approval.

Following this review, the financial analyst will prepare a report for the Inspector, including any recommended conditions of approval. If the request

is approved, the Inspector will issue a signed approval letter.

This process typically takes from two weeks to a month. However, more complex proposals or corporate ventures involving multiple partners will take longer to review. The information in this guide should help municipalities to prepare requests that will speed the review process because they have considered all the issues. The Ministry's objective is to help municipalities prepare a request that will receive an unqualified approval from the Inspector.

## What to submit after incorporation

To complete Ministry records on your corporation, the Inspector will ask you to submit some additional information after you have completed the actual incorporation, as follows:

- Certificate of Incorporation
- Certified Copy of Incorporation Application
- Certified Copy of Notice of Articles
- Articles, in final approved form

The first three items will be provided to you by the Registrar of Companies once you have completed the requirements for incorporation.

Although you are not required to file your articles with the Registrar, you must keep a complete set signed by the persons designated as incorporators in the incorporation application. These should include any amendments requested by the Inspector during the review.

## The Inspector's role after approval

Once you have formed your corporation and sent the required documents to the Inspector, there is generally no further role for the Inspector in relation to the corporation. However, in certain circumstances, the Inspector's approval may be required to authorize changes to specific articles or the creation of a subsidiary corporation. See the **Create** section.

## Approvals published annually

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Commencing in 2006, the Inspector will publish a list of municipal corporations that have been approved and formed. The list will appear on the Ministry web site. It will indicate the corporation's name, incorporation number and the name of the municipal shareholder. This will provide a public record of these decisions and a resource to municipalities.

## Conclusion

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This guide covers a wide range of issues associated with local government corporations and provides direction on what to include in a request for approval of the Inspector of Municipalities.

The guide will complement the assistance provided by legal, financial and business experts and a local government's in-house resources.

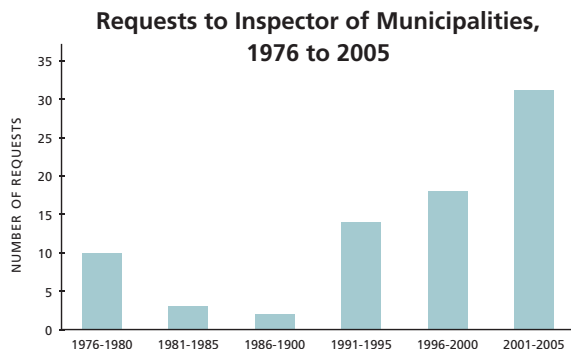
Ministry staff is also available to provide advice. Municipalities are encouraged to contact their financial analyst with questions about its plans or the approval process. The financial analysts in the Local Government Department have knowledge of the wide range of local government corporations that have been considered or created over the years. The analyst may be able to direct municipal staff to other municipalities that have dealt with the same issues or created a corporation with similar objectives to the one they are considering.



# APPENDIX 1

## Overview of Municipal Experience

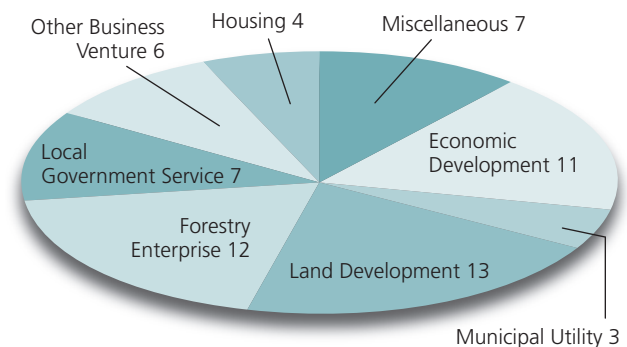
From 1976 to 2005, B.C. municipalities and, to a lesser degree, regional districts submitted 78 requests to the Inspector of Municipalities to incorporate separate corporations or acquire shares in corporations. From the early 1990s, the requests steadily increased in frequency. They came from 52 local governments located in seven of B.C.'s eight economic development regions, the majority in the more densely populated southwest corner of the province.



During this period, there were 64 requests to incorporate and 14 requests to acquire shares in an existing corporation. Ministry staff assisted parties seeking the Inspector's approval to bring their submissions in line with the Ministry's requirements for corporation efficiency, effectiveness, openness and accountability. As a result, out of the total of 78 submitted requests, only two requests were denied.

Of the approved requests,<sup>16</sup> ministry research indicates that 52 were incorporated under the *Business Corporations Act*. The balance were either not established or may have been incorporated under different legislation. The most common types of corporations considered were in the areas of land development, forestry enterprise and economic development. Other initiatives included local government service, housing, municipal utility, for-profit business venture and a few corporations less easily classified.

**Types of Corporations Considered by Local Governments, 1976 to 2005**



From the information available, the vast majority of these corporations seem to be wholly owned by a single municipality or a consortium of local governments. In a significant minority of the corporations, a municipality owns 50% or more of the shares and the rest of the shares belong to a First Nation, society or private corporation.

<sup>16</sup> The total number of corporations is different from the number of requests to incorporate because, in some cases, local governments sought to purchase shares in existing corporations and, in others, multiple local governments made individual requests to create the same corporation.

# APPENDIX 2

## Business Planning

Many resources can be accessed to help develop a business plan. See **Appendix 4—Web Links**. As discussed in the **Consult** section, consultants can also offer invaluable assistance.

The following checklist is a guide to ensure that municipalities have covered all the bases in its business plan.

### Business plan checklist

#### Basic information on the corporation

Name, type and scope of operation, legal structure, permitted purposes or objectives, location, size, history, and intentions in the form of a vision or mission statement

#### Product or service description

Nature of the product or service, features, benefits and, if relevant, unique selling points or competitive advantage

#### Management plan

Ownership and management structure, responsibilities, management team and outside consultants or services such as lawyers, accountants and bankers

#### Market analysis

Nature and size of industry in which the corporation will operate, profile of the competition, target market, growth potential, common costs and profit margins, and current and future market trends (could also include a SWOT analysis of strengths, weaknesses, opportunities and threats)

#### Marketing plan

If relevant, how product or service will be presented, marketing and advertising methods, and sales and distribution

#### Operations plan

Where corporation is housed, licenses, permits insurance, materials, equipment, suppliers, production, inventory and staffing

#### Financial information

Costs, revenues, sources of financing, cash flow projections, starting balance sheet, projection of anticipated income

Projected financial consequences for a five-year period, including strengths, weaknesses and risks for the municipality, along with a comparison with other options considered for providing the same facility or service

Policy on setting fees and charges, ensuring consistency, value for money and protection of taxpayers' interests

#### Risk analysis

Key risk factors and how they may affect the enterprise—economy, competition, problems with suppliers, legal issues, personnel, technology, weather trends—and plans for managing the risks

#### Implementation plan

Schedule for completion of steps—financing, location, licences and permits, equipment, personnel, etc.—and benchmarks for measuring future progress

This checklist was adapted, with permission, from the Building Your Plan page of Starting Your Business: A guide to resources for BC women a, website produced through a partnership of the Province of British Columbia, Western Economic Diversification Canada, the Women's Enterprise Society of BC and Small Business BC.

# APPENDIX 3

## Case Summaries

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The following fictitious scenarios have been constructed to help illustrate the decision processes, concepts and advice in the previous sections. The first three deal with situations where local governments decide that creating a corporation is the best means to achieve their objectives. In the fourth scenario, an unincorporated joint venture is selected.

### Green utility corporation

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The City of Greendev is proposing to sell, for development, a number of City properties. To encourage the construction of environmentally friendly, energy-efficient buildings, the City develops a hydronic heating utility. As a municipal utility, the operation is exempt from rate regulation under the *Utilities Commission Act*. The City creates a corporation to oversee the utility, and the corporation partners with an experienced company in the field to provide day-to-day operations. The municipality obtains a grant for the utility and loans money to its wholly owned corporation through a partnering agreement. Utility rates and fees remain under the authority of the municipal council and are set by bylaw.

The corporation's board consists of City of Greendev managers only, providing an efficient means for the corporation and the City to liaise on matters such as utility rates. No municipal employees are transferred to the corporation, but a contract allows the City to provide management and accounting services to the corporation.

## Diversified telecom enterprise

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The Town of Welwired operates a telephone utility. The municipality sees an opportunity to purchase an operating cable communications system and combine the two functions into a single operation. The cable system operates within the municipality, but also outside its boundaries. The Town negotiates purchase terms to acquire the assets (not the shares) of the company, retaining a qualified telecommunications consultant to assist with the transaction and CRTC regulatory issues. To efficiently combine the operations, facilitate borrowing and limit its liability, the Town creates a wholly owned corporation. It transfers its telephone assets to the corporation. The corporation obtains private financing and buys the cable system assets.

A municipal corporation is exempt from tax as long as no more than 10% of its income is derived from operations outside the municipality. The corporation creates several subsidiaries to protect income from the cable operations inside the Town and the utility's telephone operations from assessment for income tax. The "outside" cable system is transferred to a subsidiary for this purpose. Further opportunities to protect income from income tax are explored, including a trust arrangement and a partnership (with the Town as limited partner and subsidiary as general partner).

The corporation's board includes the Town manager and four community representatives, based on qualifications contained in the corporation's articles.

## First Nations business venture

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The Village of Partnor proposes to enter into a commercial venture with a First Nation as partner. The geographic location of the venture is outside geographic territories controlled by either the Village or the First Nation. The parties consider a partnership to operate the venture, as income earned by the partnership can then be allocated to the partners. Each partner is exempt from liability for income tax; under the *Income Tax Act*, a First Nation is deemed to be a municipality where it performs similar government functions.

However, partners in a partnership are liable for the liabilities of the partnership (with some restrictions in limited liability partnerships). A corporation offers superior protection from liability for the owners, but in this scenario would not be tax exempt. The parties consider partnering with the regional district, which may also be deemed to be a municipality under the *Income Tax Act* and therefore exempt. Since the commercial venture is located within the boundaries of the regional district, the municipal corporation being created would then be exempt from income tax. It would also offer protection from liability for its shareholders. The Village and First Nation obtain legal and financial advice and consider whether to request a formal tax ruling from the Canada Revenue Agency before they proceed to structure the corporation on this basis.

To account for different levels of capital investment and involvement by the partners, share classes specifying dividend entitlements and voting rights may be created. The corporate articles can be drafted to allocate differential rights of control such as the appointment of directors. They can also deal with allocation of assets on dissolution.

## Civic building partnership

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The City of Growel and two other public authorities negotiate a project to develop a new civic centre and offices. They also offer surplus lands to the market for residential and other developments. Each of the three partners own some of the contiguous lands required for the project. The parties create an unincorporated joint venture. They draft an agreement setting out their respective investments (including land commitments), participation in construction costs and proportionate profit-sharing from land sales.

The project is relatively short term, with an estimated two to three years to completion. It also involves only public authorities. So an unincorporated joint venture is a suitable arrangement. No particularly onerous liability issues arise—construction of civic centres being familiar territory to municipalities—and no tax implications dictate a different arrangement. The joint venture agreement is similar to a shareholder agreement in establishing each party's respective rights and obligations. This arrangement is cost-effective when the partners have a positive ongoing relationship and each can access significant resources through such means as taxing powers.

# APPENDIX 4

## Web Links

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### Acts and regulations

#### Provincial

*Community Charter*

[www.qp.gov.bc.ca/statreg/stat/C/03026\\_00.00.htm](http://www.qp.gov.bc.ca/statreg/stat/C/03026_00.00.htm)

*Local Government Act*

[www.qp.gov.bc.ca/statreg/stat/L/96323\\_00.htm](http://www.qp.gov.bc.ca/statreg/stat/L/96323_00.htm)

*Business Corporations Act*

[www.qp.gov.bc.ca/statreg/stat/B/02057\\_00.htm](http://www.qp.gov.bc.ca/statreg/stat/B/02057_00.htm)

*Partnership Act*

[www.qp.gov.bc.ca/statreg/stat/P/96348\\_01.htm](http://www.qp.gov.bc.ca/statreg/stat/P/96348_01.htm)

*Society Act*

[www.qp.gov.bc.ca/statreg/stat/S/96433\\_01.htm](http://www.qp.gov.bc.ca/statreg/stat/S/96433_01.htm)

*Cooperative Association Act*

[www.qp.gov.bc.ca/statreg/stat/C/99028\\_01.htm](http://www.qp.gov.bc.ca/statreg/stat/C/99028_01.htm)

*Freedom of Information and Protection of Privacy Act*

[www.qp.gov.bc.ca/statreg/stat/F/96165\\_01.htm](http://www.qp.gov.bc.ca/statreg/stat/F/96165_01.htm)

*Labour Relations Code*

[www.qp.gov.bc.ca/statreg/stat/L/96244\\_01.htm](http://www.qp.gov.bc.ca/statreg/stat/L/96244_01.htm)

*Employment Standards Act*

[www.qp.gov.bc.ca/statreg/stat/E/96113\\_01.htm](http://www.qp.gov.bc.ca/statreg/stat/E/96113_01.htm)

#### Federal

*Canada Business Corporations Act*

[www.laws.justice.gc.ca/en/C-44/index.html](http://www.laws.justice.gc.ca/en/C-44/index.html)

Marketplace Regulations (Industry Canada)

[www.ic.gc.ca/cmb/welcomeic.nsf/ICPages/SubjectMarketplace](http://www.ic.gc.ca/cmb/welcomeic.nsf/ICPages/SubjectMarketplace)

Canada Revenue Agency Business page

[www.cra-arc.gc.ca/tax/business/menu-e.html](http://www.cra-arc.gc.ca/tax/business/menu-e.html)

## Company information

### Provincial

B.C. Companies (Ministry of Finance

Corporate Registry)

[www.fin.gov.bc.ca/registries/corppg/crcompanies.htm](http://www.fin.gov.bc.ca/registries/corppg/crcompanies.htm)

OneStop BC Business Registry

[www.bcbusinessregistry.ca/introduction/index.htm](http://www.bcbusinessregistry.ca/introduction/index.htm)

### Federal

Business and Industry (Industry Canada)

[www.ic.gc.ca/cmb/welcomeic.nsf/ICPages/SubjectBusiness](http://www.ic.gc.ca/cmb/welcomeic.nsf/ICPages/SubjectBusiness)

Western Economic Diversification Canada

[www.wd.gc.ca/default\\_e.asp](http://www.wd.gc.ca/default_e.asp)

## Business planning

Business Start-up Assistant

[www.bsa.cbcs.org/gol/bsa/site.nsf/en/su06922.html](http://www.bsa.cbcs.org/gol/bsa/site.nsf/en/su06922.html)

The Business Plan

[www.smallbusinessbc.ca/bizstart-bPlan-intro.php](http://www.smallbusinessbc.ca/bizstart-bPlan-intro.php)

Partnering with Local Government

(Ministry of Community Services website)

[www.cserv.gov.bc.ca/lgd/gov\\_structure/community\\_charter/advisory\\_materials/partnering\\_localgovernment.htm](http://www.cserv.gov.bc.ca/lgd/gov_structure/community_charter/advisory_materials/partnering_localgovernment.htm)

## Market Research

Evaluate Your Business Idea

[www.smallbusinessbc.ca/bizideas-evaluate.php](http://www.smallbusinessbc.ca/bizideas-evaluate.php)

Market Research/Marketing

[www.smallbusinessbc.ca/bizstart-marketResearch2.php](http://www.smallbusinessbc.ca/bizstart-marketResearch2.php)

BC Stats

[www.bcstats.gov.bc.ca/](http://www.bcstats.gov.bc.ca/)

## Local government resources

Local Government Department,  
Ministry of Community Services  
[www.cserv.gov.bc.ca/lgd/](http://www.cserv.gov.bc.ca/lgd/)

*Regulatory Best Practices Guide*  
[www.cserv.gov.bc.ca/lgd/gov\\_structure/library/  
regulatory\\_best\\_practices\\_guide.pdf](http://www.cserv.gov.bc.ca/lgd/gov_structure/library/regulatory_best_practices_guide.pdf)

Annual Municipal Meeting  
[www.cserv.gov.bc.ca/lgd/gov\\_structure/community\\_  
charter/advisory\\_materials/annual\\_meeting.htm](http://www.cserv.gov.bc.ca/lgd/gov_structure/community_charter/advisory_materials/annual_meeting.htm)

*Public Private Partnership:  
A Guide for Local Government*  
[www.cserv.gov.bc.ca/lgd/policy\\_research/library/  
public\\_private\\_partnerships.pdf](http://www.cserv.gov.bc.ca/lgd/policy_research/library/public_private_partnerships.pdf)

## Economic development

Community Futures Development Association  
of British Columbia  
[www.communityfutures.ca/provincial/bc/index.html](http://www.communityfutures.ca/provincial/bc/index.html)

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