

**THE ALBERTA *MUNICIPAL GOVERNMENT ACT*:
A MUNICIPAL PERSPECTIVE**

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LEGISLATIVE OVERVIEW MUNICIPAL GOVERNMENT ACT, S.A. 1994 ch. M-26.1

1. HISTORICAL EVOLUTION

The previous **Municipal Government Act** in Alberta functioned from 1968 with periodic maintenance. When the Provincial Government formulated the need for a new legislative vehicle to take municipalities into the 21st century it took nearly a decade to design a replacement. Before examining the major components of its mechanical systems it may be interesting to trace the evolution of its construction and elements of the political environment that may have tempered the boldness of its initial concept.

In 1985 the Province initiated a review process that was to be entrusted to an independent Municipal Statutes Review Committee (“MSRC”), established in 1987, which included persons with a wide range of experience with municipal government. Its mandate was to review all Provincial legislation affecting municipalities and form that raw material into a simplified and consolidated legal framework to take municipal government into the next millennium. The MSRC looked at a number of alternatives including virtually bestowing the plenary powers of the Province under the **Constitution Act**, except to the extent that the Province legislated in any area of jurisdiction. This may have been constitutional¹, but it was put aside. However, the consideration of such a legislative solution may have germinated a more robust recognition of a municipality as a unit of government rather than a corporation with the primary purpose of providing municipal services.

The Preliminary Discussion Draft, a series of six Legislation Papers issued in late 1989 and early 1990, incorporated this empowering concept of the municipality but took an inconsistent approach to business and regulatory powers by both framing a wide grant of power while also specifying these

¹ **Hodge v. The Queen** (1883) 9. App. Cas. 117 (Privy Council), also **Shannon v. Lower Mainland Dairy Products Board**, [1938] A.C. 708 (Privy Council)

same powers in considerable detail. The response at the municipal level reflected an interesting dilemma. There had been historic claims for greater autonomy at the local level based on increasing administrative sophistication and high levels of political connection to the constituency. However, the spectre of wider powers engendered concerns about broader political demands which could not be deflected with responses of lack of jurisdiction. Overlaying this was an apprehension that this legislative approach was a harbinger of Provincial "downloading" of its responsibilities, leaving the municipality as a forum of last resort. There appeared to be little desire for municipalities to take up traditional Provincial responsibilities, even on an interim basis.

These municipal responses, perhaps couched in less candour, brought a purposeful counter-response from MSRC. The second discussion paper, produced in late 1990, was in a novel legislative form produced by former Legislative Counsel David Elliott and appropriately entitled "Local Autonomy, You Want It, You Got It". It removed all the detailed regulatory provisions and replaced them with a description of "spheres of jurisdiction", predicated on a philosophy that the legislation would not dictate how municipalities would regulate within their jurisdiction. In the writer's view, even this approach was received with reluctance by smaller centres which were beginning to see the Provincial Government withdrawing its historical rural support services such as model bylaws and regulatory advice. Now even the legislation would be providing no guidance as to regulatory content.

The more significant change, engendered in part by a desire to reduce the volume of the legislation, was the introduction of the "natural person" concept as a metaphor for the provisions of how the municipality could carry on its proprietary business. This was an ideal solution to the performance measures specified for the new legislation.

In 1991 the MSRC presented a recommended Municipal Government Act to the Minister of Municipal Affairs and it is this legislation, after redrafting in more traditional language and incorporating provisions relating to assessment and taxation, that came into force January 1, 1995.

2. STRUCTURAL ELEMENTS OF THE LEGISLATION

There are three major components constituting the framework of the new Act, which are distinct and even contradictory in their attributes yet bestowed at once on a single entity. The municipality is empowered not so much with specific functions but legal personality traits from which certain powers follow at law. These traits are:

- ▶ a provider of good government
- ▶ a body corporate
- ▶ a natural person.

Before examining how these disparate attributes function in concert it is useful to briefly review the manner in which powers and attributes of municipalities have been historically interpreted and regarded.

3. CURRENT VIEW OF MUNICIPAL POWERS

From a political science perspective the municipal council does not have the traditional attributes of a governing organization. Lacking distinct parties, party discipline and the roles of structured government and opposition creates a barrier to the perception that the council is a mirror of the two senior levels of government. The council may be seen more as a controller of the public administration dedicated to delivering services. Even the term “services” developed a specific and narrow connotation in the municipal context, a hard infrastructure concept.

There was a compounding effect as the corporate conceptualization of the municipality was and still is heir to the judicial approach that its powers were limited to what was expressly granted by legislation or flowed by necessary implication to exercise those express powers. This may have derived by analogy from the common law approach to the powers of business corporations but has

persisted through the legislated demise of that approach to business corporations.

4. WHAT HAS CHANGED?

Prior to considering specific provisions of the Act one can speculate about how political perspectives of local government may have changed. The Province has been forced by its budget process to withdraw subsidies and "intellectual" support to municipalities in order to deal with its deficit. Local governments have, by legislative necessity, operated on balanced budgets even while financing capital debt. As a result it is more difficult to suggest that municipalities need to put their financial houses in order. The Province was more inclined to suggest that its municipalities find better ways to do their business. This explicit encouragement to finding innovation in governance dictated a need for flexibility at the local level to do the business of government in different ways and with private sector partners.

A cursory examination of The **Alberta Business Corporations Act** will reveal that these business enterprises are no longer obligated to operate under the cumbersome concept of having only those powers which its constating documents specifically provide. While the judicial approach to municipal corporations is derived from constitutional principles and delegation concepts rather than the mechanics of business corporations, if the new political emphasis is on the "business" of government one would expect legislation to reflect the modern approach to private sector business.

5. SYNTHESIS

How can a single entity be government, corporation and a natural person? As the Act is now assembled the corporate aspect may be of the least significance, pertaining primarily to administrative systems and liabilities to third parties. The natural person is the personality which transacts business and arguably has more freedom to act with outside agencies than it does with its own banking, investing and financing. The government aspect is the traditional role of legislator and regulator in

the public interest in addition to its taxation powers. These legislative functions are beyond the authority of a natural person.

Having postulated some underlying political principles and the structural elements used to force a political vision into legislative reality we turn to an analysis of whether the Act has successfully integrated these new materials into a viable model.

6. SPECIFIC PROVISIONS

Section 3 provides a statement of the purposes of a municipality in the following terms:

- “(a) to provide good government,
- (b) to provide services, facilities and other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality, and
- (c) to develop and maintain safe and viable communities.”

It replaces a "peace, order and good government" provision² which described legislative authority in terms that would have been the last resort of desperate counsel to fend off an attack of *ultra vires*. It appears that s. 3 may be seen more as a limitation of power than a broad grant of authority. A "purpose" may not confer any power and the Act makes no statement that the municipality can exercise any power or function so long as its purpose falls within s. 3. The words "municipal purposes" are defined in the Act as referring to the purposes set out in this section. It is suggested that the construction which s. 3 will likely receive is as a limitation, either express or implied, on powers and functions of a natural person, corporation and legislator bestowed elsewhere in the Act. This is achieved by linkage of s. 3 to those other provisions which bestow these three attributes on the municipality and each will be examined specifically in that context.

² s. 112, R.S.A. 1980 ch. M-26

7. THE CORPORATION

Section 4 provides simply that the municipality is a corporation. Does this mean that it can exercise the powers of an unrestricted business corporation? It is more likely that this description is relevant not to the objects which can be pursued but the structure of the entity. The “objects” of the corporate personality are largely defined by s. 3. of the Act. Its attributes in how it acts are corporate in nature.

The municipality acts through a council which has many of the attributes of a board of directors, such as defined procedures for its meetings (s. 145), protection from liability (s. 535), disqualification (s. 174), disclosure of pecuniary interest (s. 172) and personal liability for unauthorized decisions (ss. 249 and 275). Even legislation such as the **Environment Protection and Enhancement Act** treat councillors in a similar manner as corporate directors (s. 219).

It is also extensively regulated in matters such as borrowing, investing, banking and generating financial statements and budgets. Resolutions regarding banking, signing cheques, bonds and authorizing signing officers to affix the corporate seal are required.

The most cumbersome area is delegation of executive and administrative powers. The framework of this delegation is quite specific for municipalities and correlates to the corporate model in general principles only. Executive and administrative authority is allocated in three ways under the Act, as shown on the attachment entitled Consolidated Delegation Scheme.

- A. Council may delegate its powers, duties and functions to a committee, chief administrative officer (“C.A.O.”) or designated officer (“D.O.”). The exceptions to this, such as passing bylaws, budgets and taxes, are specified in s. 203(2). Council may also authorize a committee, C.A.O. and D.O. to further delegate this delegated authority under s. 203(3). This override of the **delegatus non potest delegare** maxim is a welcome recognition of the complexity of larger municipalities.

- B. The Act also directly confers certain duties on the C.A.O. and provides in s. 209 that these may be further delegated by the C.A.O. to a D.O. or employee. There are two caveats to this. Firstly, the Act provides in s. 201(2) that council is not allowed to claim these pieces of the C.A.O.'s jurisdiction for itself, an interesting exception to the local autonomy principle. Secondly, there are numerous provisions in the Act and other legislation for serving documents and notices directed to the municipality on the C.A.O. or D.O.. Can this function be further delegated or would this conflict with the rights of third parties to rely on the designated procedures in the Act to protect their interests rather than an internal delegation which may not be in the form of a public document?
- C. The Act also directly confers duties on a D.O., or the C.A.O. or D.O., at the choice of council. In these situations if a D.O. is not appointed then s. 210(5) provides a default mechanism which moves these duties to the C.A.O. where they could be further delegated. The legislative mechanism to constitute a D.O. is not a paradigm of clarity. Section 210 refers to a bylaw establishing the "position" of D.O. and its powers, duties and functions. It may not have to specify the person appointed to fill that position. The anomaly is that under s. 210(4) the D.O. is "subject to the supervision of and accountable to" the C.A.O., unless the bylaw otherwise provides. However, s.211 states that it is council who revokes the D.O. appointment and provides for notice and compensation as if it were an employee dismissal situation. Is there a distinction intended between employee discipline and a council decision to revoke an "appointment" as D.O.?

There are some interesting internal contradictions in the Act which are also highlighted on the attachment entitled Consolidated Delegation Scheme that may challenge the ability of the organization to control vertical delegation. It is mandatory to establish a C.A.O. position under s. 205(1) but once this position or a D.O. is established a council may have no legislative authority to control further delegation.

8. THE NATURAL PERSON

Section 6 states that a municipality has natural person powers, except as limited by “enactment”, a defined term in the Act referring to federal and Alberta legislation and regulations. This does not include the common law or a bylaw. The term is also defined in the Act itself:

“1(1)(t) “natural person powers” means the capacity, rights, powers and privileges of a natural person;”

The Alberta **Interpretation Act** does not define a natural person but defines a “person” to include a corporation, which is not a natural person.³ The result is that the term must be defined by its common meaning.

The legislative intent can, to some extent, be derived by what is not in the Act but was in the preceding legislation. Provisions respecting matters such as transactions in property, public housing, pensions, insurance and employee relations are not carried forward. For example, in s. 45 a municipality may grant a monopoly to supply a utility service but the Act no longer details the manner in which the franchise agreement must be structured. This bargaining process is a natural person attribute. It is suggested, however, that it must still be negotiated in good faith and for a municipal purpose. The contention that a municipality, when acting in a pure business capacity, is no more constrained than a business corporation was the subject of divided opinions recently⁴ both in the Supreme Court of Canada and the courts below but was ultimately not accepted.

In many respects the natural person power was the ideal instrument to achieve the desired ends of the new legislation. Public/private sector partnerships and innovation in doing municipal business are the predominant themes. The cumbersome aspect of traditional municipal legislation is that whenever a new way of doing something surfaced, a municipality often could not act until its enabling

³ **Blunden v. Cubana Airlines**, (1987) 65 Nfld. & P.E.I.R. 288

⁴ **Shell Canada Products Limited v. City of Vancouver**, (1994) 20 M.P.L.R. 1 (S.C.C.)

legislation was amended. That paradigm now has shifted radically. The natural person power is in reality a framework of federal and provincial laws that is constantly changing. All these changes are incorporated into the new **Municipal Government Act** on an ongoing basis by the natural person reference. The municipality as a natural person now acts in much the same business framework as business organizations in the private sector.

If the Provincial Government does not wish municipalities under its jurisdiction to have a new power that evolves from a change in legislation outside of its control it must amend the *Municipal Government Act* to make an explicit restriction. In some respects, therefore, the senior level of government must chase after its delegatee to control its authority.

For the municipal council, the new Act has significant policy consequences. To the extent that it is more liberal, a council may no longer be able to rely on the Act as a management control mechanism. It may have to consider and set policies where it wishes its business practices to be more restricted than the Act would otherwise facilitate. For example, the new Act allows loans and guarantees to be granted in certain circumstances. They were prohibited by the previous Act. Due to the previous restriction a council would not have needed a policy to deal with third party loan requests. As it can no longer adopt a "policy" that the enabling legislation prohibits this practice, a politically acceptable policy has to be fashioned in each municipality.

9. LEGISLATIVE POWERS

Although not explicitly contained in the Act, the intention was for municipalities to have no less legislative jurisdiction than under the previous Act. It is certainly much more compactly expressed. The grant of the general bylaw jurisdiction has been reduced to eight brief descriptive phrases:

- "a) the safety, health and welfare of people and the protection of people and property;
- b) people, activities and things in, on or near a public place or place that is open to the public;
- c) nuisances, including unsightly property;

- d) transport and transportation systems;
- e) businesses, business activities and persons engaged in business;
- f) services provided by or on behalf of the municipality;
- g) public utilities;
- h) wild and domestic animals and activities in relation to them;”

The balance relates to the enforcement of those bylaws and the mechanisms of regulation.

The premise of this part of the legislation was to describe what municipalities could do but not how it would be done. For example, the description of the entire bylaw making jurisdiction of a municipality is more brief than how the previous Act detailed a bylaw to govern taxis.

It is arguably in the description of the legislative jurisdiction that the Act is at its most daring or, to change the frame of reference, at which municipalities are at the greatest risk. Will judicial authorities see a clear intent to change their historical approach of the “express or necessary implication” derivation of powers to one that is more analogous to constitutional division of powers? The legislative direction for a new interpretation is found in s.9:

“The power to pass bylaws under this Division is stated in general terms to

- (a) give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate, within the jurisdiction given to them under this or any other enactment, and
- (b) enhance the ability of councils to respond to present and future issues in their municipalities.”

While this provision refers to “broad authority” this may not be aimed at a liberal interpretation of the core jurisdiction so much as the regulatory options. For example, s. 8(b) may support an argument that, as it allows a bylaw to divide a business into classes and deal with the classes differently, it is intended to reverse the judicial “neutral discrimination” test.⁵ The word “authority”

⁵ **City of Montreal v. Arcade Amusements Inc.** [1985] 1 S.C.R. 368, also **Claudio's Restaurant Group Inc. v. Calgary (City)**, (1993) 15 M.P.L.R. 117

in s. 9 falls outside the trilogy used throughout the Act of powers, duties and functions. To achieve a liberal interpretation of bylaw jurisdiction requires either a broad interpretation of the powers described in s. 7, the municipal purposes in s. 3, or both.

Subsection 9(b) is likely the provision which is intended to bring the Act into the next century. It may have derived from the constitutional interpretation dilemma addressed by the Supreme Court of Canada in the area of aeronautics.⁶ As issues arise which were not in the contemplation of the framers of the legislation, who is to have authority? The Province has protected its future jurisdiction in this area through s. 13, which disallows any bylaw which is "inconsistent" with a provincial enactment.

10. CONCLUSION

Although the Act boldly empowers municipalities both now and into the future, it does not accord them constitutional status. In particular, legislative powers are still delegated and bylaws remain subject to the traditional legal challenges that are not available for federal or provincial legislation. It does, however, place the political responsibility for enhanced local autonomy on the municipality.

As is often the case with new legislation, it is probable that litigation will result in judicial interpretations of the intent and construction of the Act. If these decisions do not support the broad authority approach it may be fair to say that the true intention of the Act will ultimately be determined by the willingness of the Legislative Assembly to make statutory corrections.

⁶ **Johannesson v. West St. Paul** [1952] 1 S.C.R. 292