

The Ontario Municipal Act
S.O. 2001, C.25

and

The Boards of Management for the Lake Huron
and Elgin Area Water Supply Systems

A discussion paper related to the legal status of the Boards of Management for the Lake Huron Water Supply System and the Elgin Area Water Supply System and the potential to consolidate the regional water systems under the Municipal Act, 2001.

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Disclaimer

This discussion paper should not be construed as a legal opinion. The information presented in this document is a consolidation of previous related discussions, research and documentation, and is presented as a framework for discussions with the municipalities which benefit from the Lake Huron Water Supply System and the Elgin Area Water Supply System.

Readers are encouraged to seek legal advice where warranted.

FOR DISCUSSION ONLY

Executive Summary

The Lake Huron Water Supply System and the Elgin Area Water Supply System (collectively the Systems) were each constructed and owned by the Province of Ontario until 2000 when the Minister of the Environment, through Transfer Order issued under the *Municipal Water and Sewage Systems Transfer Act, 1997*, created a Board of Management for each of the systems and transferred ownership to the benefiting municipalities as an undivided share and tenant-in-common. While the Transfer Order implied that the Systems were a corporation (body-corporate), the Order and the enabling Act didn't explicitly state it, leaving the legal status of the Systems in question.

As the legal status of the Systems remains unclear, legal liabilities of the Systems extend directly to the benefiting municipalities and their Councils.

The benefitting municipalities currently hold the Systems' debt on an annual basis, each in proportion to the volume supplied to the respective municipality. Debt incurred by the Systems must be held by the benefiting municipalities, and runs the risk of disproportionately reducing the debt capacity of the municipalities and hindering the municipality's ability to invest in other infrastructure within their municipality.

The *Municipal Act, 2001*, establishes the authority of a municipality to create a Municipal Service Board (sections 194 - 202), or a Municipal Services Corporation (section 203) for the purpose of undertaking activities or services authorized by the municipality. In addition, two or more municipalities may enter into an agreement to create a Joint Municipal Services Board (section 202) or Municipal Services Corporation (section 203) for the purpose of undertaking activities or services collectively authorized by the municipalities. With respect to the two regional Water Systems, there are two general options under the *Municipal Act, 2001* that can be considered: the establishment of a Joint Municipal Services Board, and the establishment of a Municipal Services Corporation.

To address the legal status of the Systems, as well as limiting the financial implications and liabilities to the benefiting municipalities, it is recommended that the municipalities acting collectively consider the establishment of a Municipal Services Corporation under section 203 of the *Municipal Act* to undertake the services currently undertaken by the Systems.

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FOR DISCUSSION ONLY

Background

In 1997, the Province of Ontario passed the *Municipal Water and Sewage Systems Transfer Act* (“Act”) which enabled the transfer of water and wastewater systems to the benefiting municipality of the water/wastewater system. In cases where a water or wastewater system benefitted more than one municipality, the Act allowed the province to establish a Board of Management for the beneficial and legal ownership of the water or wastewater systems.

In 1998, the City of London and area municipalities were notified by the Minister of the Environment of the Province of Ontario’s intent to transfer the ownership of each of the Lake Huron Water Supply System and the Elgin Area Water Supply System (collectively the “Systems” or “System”) from the province and to establish a Board of Management for the respective regional water system. Between 1998 and 1999, discussions were largely centred on undertaking a review and assessment of the condition of Systems’ assets, and the financial accounting of each System. In 1999, the pre-existing debt of the Systems were transferred to the City of London (in trust) on behalf of the yet-to-be established Board of Management for the respective water System.

In September and November of 2000, the Minister of the Environment issued the respective Transfer Order for the Lake Huron Water Supply System and the Elgin Area Water Supply System. The Transfer Order, in part, established that each of the municipalities connected and supplied by the water System had an undivided interest in the water System, and established the respective Board of Management as the governance body of the respective system.

The Transfer Order included such directives as:

- The initial composition of the Board of Management, the appointment of members and alternate members to the Board by the benefiting municipalities, quorum, and the voting structure of the Board;
- The election of Chair and Vice-Chair of the Board;
- The authority and necessary powers of the Board including but not limited to the delegation of administrative functions, the establishment of annual budgets and system rates;
- The initial establishment of the Corporation of the City of London as the “Administering Municipality” acting on behalf of and under the direction of the Board of Management.

In the following years of operation and governance, the validity and legal status of the Boards of Management have come in question under Canadian law. , despite the *Municipal Water and Sewage Systems Transfer Act* and the Transfer Orders issued by the Province of Ontario. At the core of the discussion is the question as to the legal standing of the Board of Management and the water supply system as a “body-corporate” and its derived authorities within the laws of Ontario and Canada.

Definition of Body-Corporate (Corporation)

For the purpose of this discussion paper, the term “body-corporate” (commonly referred to as corporation) is generally described as *“an entity (usually a business) having authority under the law to act as a single person distinct from its shareholders who own it and have rights to issue stock and exist indefinitely, a group or succession of persons established in accordance with legal rules into a legal or juristic person that has legal personality distinct from natural persons who make it up, exists indefinitely apart from them, and has the legal powers that its constitution gives it”*. The use of the term corporation in this this discussion paper is used broadly and should not be construed as to solely and exclusively suggest a Corporation under the *Ontario Business Corporations Act, 1990* or the *Corporations Act, 1990*.

Definition of Undivided Interest

For the purpose of this discussion paper, the term “undivided interest” is generally described as a *“claim of ownership of commonly-owned assets or property (as in a corporation, partnership or tenancy-in-common) where each co-owner has unrestricted claim to all the assets or the entire property, but no co-owner has exclusive claim to any single asset or part of the property. Also called undivided share”*.

The Transfer Orders

The respective Transfer Order for each of the Lake Huron Water Supply System and the Elgin Area Water Supply System (collectively referred to as “Systems”) is the primary document setting out the owners, governance, and authority of each System.

Article 2 of the Transfer Orders issued by the Minister of the Environment states that:

2. *The Joint Board will have full authority and necessary powers, to manage on behalf of the Municipalities, the System including for the purpose of constructing, operating, repairing, and improving the System:*
 - (a) obtaining approvals;*
 - (b) contracting for services;*
 - (c) entering into agreements with individuals, corporations and other governments;*
 - (d) operating bank accounts and other transactions;*
 - (e) approving the annual Operating Budget, and the annual Capital Replacement and Rehabilitation Budget;*
 - (f) setting the System Rate; and,*
 - (g) executing conveyances of any surplus property*

In law, only a natural person or a Corporation can, among other things, enter into agreements/contracts and have a bank account. Although not explicitly stated, the Transfer Orders suggest that the Joint Boards established by the Transfer Order for each of the Systems is a corporation. Notwithstanding the implication of legal status, the vagueness in the Transfer Orders have, on occasion, called into question as to whether the Joint Boards could actually sign agreements, hire employees, hold debt, or have its own bank account rather than simply leveraging the financial capacities of the Corporation of the City of London through implied or explicit arrangement.

The Transfer Orders further establish that each of the benefiting municipalities, including future municipalities when they join the Systems, have an undivided interest in the respective System and that the Joint Board of Management (Water Board) is the governing authority of the Water System. Having an undivided interest in the Water System does not imply that a given municipality has a specified or proportionate share of the rated system capacity, but rather that the capacity of the system is available to all beneficiaries (all the municipalities) without restriction or division.

The Municipal Act

The *Municipal Act, 2001*, establishes the authority of a municipality to create a local board or a , a Municipal Service Board (sections.194 - 202), or a Municipal Services Corporation (section 203) for the purpose of undertaking activities or services authorized by the municipality. In addition, two or more municipalities may enter into an agreement to create a joint municipal service board (section202) for the purpose of undertaking activities or services collectively authorized by the municipalities. With respect to the two regional Water Systems, there are two general options under the *Municipal Act, 2001* that can be considered; the establishment of a joint municipal service board under section 202, and the establishment of a Municipal Services Corporation under section 203.

It is important to note that there is no organizational vehicle whereby a Municipality can completely escape ultimate liability in the event of a failure of a municipal drinking water system due to the provisions of the *Safe Drinking Water Act, 2002*. Notwithstanding, the organizational structures available under the *Municipal Act, 2001*, being a joint municipal service board or a Municipal Services Corporation in the case of each of the Lake Huron and Elgin Area Water Systems, would allow the benefiting municipalities to better manage and mitigate the assets and liabilities associated with the undivided interest each municipality has in the respective regional Water System. The use of a joint service board or a Municipal Services Corporation will also better manage the responsibilities and liabilities associated with the ownership, governance, and management of the drinking Water Systems. This includes legal liabilities for actions or inactions by the Joint Municipal Services Board or Municipal Services Corporation and insulate the benefiting municipalities from liabilities of the regional water systems.

The issues related to the goals and objectives, as well as potential advantages and disadvantages, associated with the use of the organizational structures under the *Municipal Act, 2001* are discussed later in this paper.

Joint Municipal Service Board (*Municipal Act, 2001* section 202)

Section 196 of the *Municipal Act* gives a municipality the power to create a **Municipal Services Board** that would be authorized to undertake and provide specified services on behalf of that municipality. The Municipal Services Board generally acts as an extension of a department or departments within the municipality. The Municipal Services Board answers directly to its board whose membership is appointed by the Council of the municipality for a specified term.

Although the Municipal Services Board has delegated authority from Council to undertake specific services, the municipal Council continues to have restrictive control over the Municipal Services Board, albeit at an arms-length, and may retain specific approval authorities.

The Municipal Services Board is a corporation that can retain employees, enter into contracts, and have a bank account, unless the Municipal Council specifically provides otherwise when establishing the Municipal Services Board.

Similar to a Municipal Services Board, section 202 of the *Municipal Act* allows two or municipalities to create a **Joint Municipal Services Board** which, similar to a Municipal Services Board has the general authority under section 196 to provide: the name composition, quorum and budgetary process of the board; the eligibility of persons to hold office as board members; the manner of selecting board members; the term of office and remuneration of board members; the number of votes of the board members; the requirement that the board follow rules, procedures and policies established by the municipality; and, the relationship between the municipality and the Board, including their financial and reporting relationship. In addition, different participating municipalities may give control and management of additional municipal services to the same Joint Municipal Services Board.

A Municipal Services Board, or Joint Municipal Services Board, is bound by what a municipality(ies) itself can and cannot do. As determined by the delegation, control and management would be the Municipal Service Board leaving a municipality(ies) limited in the control and management. However, the municipality(ies) continue to assume financial and legal responsibility for the Municipal Service Board and the service.

The enabling agreement between the participating municipalities would specifically identify the service(s) to be provided by the Joint Municipal Services Board, the appointment of members to the governing board, and the specific delegated authorities.

A Joint Municipal Services Board or Municipal Services Board is required to comply with the meeting provisions set out in section 239 of the *Municipal Act, 2001* similar to any local board established under the Act.

Examples of Joint Municipal Services Boards in Ontario

The following are examples for Joint Municipal Services Boards in Ontario. The list is intended to demonstrate a broad range of services and should not be construed as a complete list of all Boards in Ontario.

Joint Animal Control Municipal Services Board (Town of Coburg, Municipality of Port Hope, Township of Hamilton, Township of Alnwick/Haldimand)

Holland Marsh Drainage System Joint Municipal Services Board (Town of Bradford West Gwillimbury, Township of King)

Severn Sound Environmental Association Joint Municipal Services Board (Township of Tay, Township of Severn, Township of Oro-Medonte, Town of Penetanguishene, Township of Springwater, Township of Georgian Bay, Town of Midland)

Warton Keppel International Airport Joint Municipal Services Board (Township of South Bruce Peninsula, Township of Georgian Bluffs)

Financial Restrictions

The Order issued by the Province of Ontario allows the existing Board of Management for the respective water supply System to authorize debt, which is obtained by the City of London (in its capacity as Administering Municipality) on behalf of the Water System and its benefiting municipalities. There is no opportunity for a municipality to decline the debenture.

For a Joint Municipal Services Board, all assets and liabilities are jointly held by the participating municipalities. Similar to the current process for the regional water Systems, the assets and liabilities of the Joint Municipal Services Board would be held and reported on the participating municipalities' financial statements which, in turn, would impact their respective debt-carrying capacity.

Municipal Corporation (*Municipal Act section 203*)

Section 203 of the Municipal Act gives a municipality the authority to create a **Municipal Services Corporation** that can be authorized to undertake and provide specified services on behalf of that municipality (or municipalities). Although its creation is authorized under the *Municipal Act, 2001* the Municipal Services Corporation would function in accordance with the Ontario *Business Corporations Act*, or the *Corporations Act* (depending on whether the Municipal Service Corporation is to be a "for-profit" or "not-for-profit") is a corporation, and would operate as an independent arms-length entity from the municipality or municipalities that created it.

The membership of the Board of Directors for the Municipal Services Corporation would be appointed to the Board as outlined under the Shareholders Declaration signed by the municipalities. In doing so, the municipalities would determine in advance as to how members are appointed, including whether the Board members are comprised of appointed elected officials, are skills-based appointees, or a combination thereof.

The Shareholder Declaration signed by the municipalities would specifically identify and/or limit the activities and scope of services of the Municipal Services Corporation, identify reporting requirements to the shareholders (the municipalities), and dividend payments to the shareholders (if any).

In addition to the authority to establish the Municipal Services Corporation, the municipality (or municipalities) may authorize subsidiary corporation(s) responsible for specific aspect of the authorized activities of the Municipal Services Corporation. Municipalities have the ability to further compartmentalize specific risks, assets, liabilities and/or operational activities authorized for the Municipal Services Corporation.

Section 203 of the *Municipal Act, 2001* provides municipalities with the authority to establish corporations, to nominate a person to act as an incorporator, director, officer or member of a corporation, to exercise any power as a member of a corporation, to acquire an interest in or to guarantee such securities issued by a corporation as may be prescribed. Any corporation created shall comply with all requirements as are prescribed. Regulation 599/06 (the "Regulation") also provides municipalities with a broad scope of authority within which to operate. The Regulation provides that a municipality may utilize the authority of section 203 of the *Municipal Act, 2001* only if (i) the municipality establishes the corporation and, (ii) the purpose of the corporation is to provide a system, service or thing that the municipality itself could provide or is authorized by the Regulation.

The Regulation sets out a process, including the development of a business case to support the incorporation as well as a public consultation process prior to the incorporation. Additionally, the municipality must adopt and maintain policies relating to asset transfers to the corporation.

Municipal Service Corporations have the same investment authority as municipalities and can incur debt. A Municipal Services Corporation is not a local board and is not required to have its meetings open to the public under section 239 of the *Municipal Act, 2001*. A Municipal Services Corporation generally has more flexibility in conducting its business whether under the Ontario *Business Corporations Act* or the *Corporations Act*.

A Municipal Services Corporation has the freedom to borrow money independently of the municipality. A Municipal Services Corporation becomes a commercial enterprise that enables it to borrow as any other corporation can, however a financial institution may look to the municipality or municipalities to guarantee the loan.

Councils of the municipalities would establish the criteria and competencies for the board of directors of the Municipal Services Corporation in addition to establishing the broad policies to be followed by the board through a unanimous shareholder's declaration.

Council may designate that the board membership includes one or more elected officials of the municipality(ies). The remaining members of the board could be comprised of individuals having expertise in the water system or other aspects of corporate governance.

The advantages of establishing a Municipal Services Corporation include:

- The establishment of a corporation with a separate board and management permits the Municipalities to involve senior experienced members in the provision of the service, and engage experienced senior management for the corporation, where necessary, to create significant expertise in the intended area of endeavour of the company;
- Separating the functions of a given area to a corporation permits the company to make more expeditious decisions than the Council of a municipality or municipalities;
- The municipalities, as sole shareholder of the corporation, may use a unanimous shareholder's declaration to establish overriding policy to be followed by the board of directors of the corporation and can restrict the board's scope of authority, to the extent desired by the municipalities;
- The Council of the municipalities, as shareholders, will also be responsible for appointing the Board of the corporation, providing additional overall influence on the activities of the corporation;
- A corporation provides limited liability to the Municipalities; A Municipal Service Corporation provides the balance of having, on the one hand, a separate legal entity with a separate board and management to carry out its objectives, while on the other hand, permits a structure to fulfill the Municipalities objectives while allowing for reasonable controls through the use of a unanimous shareholder's declaration.
- The municipalities may also choose to appoint one or more members of Council to the board of the corporation to "have a voice" on the board and to transmit, in an effective manner, approaches deemed appropriate by Council and its senior staff; and,
- A Municipal Services Corporation is entitled to borrow money without impacting the debt capacity of the municipalities. To the extent desired, this may be considered a benefit. The ability to borrow (or limitations on borrowing) may also be controlled by a unanimous shareholder's declaration, as discussed above.

The disadvantages of the Municipalities establishing a Municipal Services Corporation may include:

- The use of a Municipal Services Corporation is tantamount to delegation of authority of Council(s) in the stated areas of endeavour of the corporation. A Municipal Services Corporation would only be utilized where the advantages described above are appropriate in an area to be delegated to the corporation;
- Also, further to the comments above, to the extent that freedom of action is permitted to the corporation and its board, there is, of course, a corresponding reduction in the scope of approvals by Council (although this may be controlled through the use of a unanimous shareholder's declaration, as discussed, as well as the by-laws of the corporation);

- Typically when the corporation is initially established, the municipalities may be required to provide the corporation with seed capital to commence its operations, as well as any assets that it may require to fulfill its functions. In the case of the Lake Huron and Elgin Area Water Systems, there are pre-existing reserve funds established with appropriate balances to fund reasonable capital investments in the water utility.

A Municipal Services Corporation established under section 203 of the *Municipal Act, 2001*, may be incorporated under any corporate statute and becomes subject to the relevant provisions of that corporate statute and general corporate law.

Share capital corporations are generally more advantageous to use than non-share capital corporations, unless the specific attributes of a non-share capital corporation are important to the objectives to be achieved. Share capital corporations are incorporated under modern business corporation acts, such as the Ontario *Business Corporations Act*. The OBCA contains a number of updated provisions that create significant practical advantages in utilizing companies incorporated under it. The practical advantage of using a share capital corporation is that the business community and the lending community are far more familiar with share capital corporations. As a result, business transactions are conducted more easily (although, there is no legal issue in carrying on business through a non-share capital corporation).

Examples of Municipal Services Corporations in Ontario

The following are examples for Municipal Services Corporations in Ontario. The list is intended to demonstrate a broad range of services and should not be construed as a complete list of all Boards in Ontario:

InnServices Utilities Inc. – This utility was created by the Town of Innisfil in 2015 to deliver water and wastewater services to Innisfil and other municipalities. InnServices is also tasked with building new infrastructure which will generate growth, economic development, and employment to Innisfil.

Oro-Medonte – A Municipal Services Corporation was created in 2019 to manage water treatment and distribution, street lighting, municipal tile bed systems, stormwater management ponds, and future infrastructure including water and wastewater systems, urban stormwater, and street lighting.

EnWin Utilities Ltd. – A managed services company providing billing, credit, financial and customer service with help desk support on behalf of EnWin Powerlines, Windsor Utilities Commission, MaXess Networkx, and the City of Windsor.

Windsor Utilities Commission – Manages and controls the treatment and distribution of water to the City of Windsor and surrounding regions.

EnWin Laboratories & Water Research Centre – This is a commercial laboratory in Essex County accredited and permitted to perform regulatory testing of drinking water.

Bluewater Power Corporation – This is a holding company and parent company to Bluewater Power Distribution Corp and Sarnia Hydro Energy Services. Bluewater Power Corporation is 85% owned by Sarnia Power Corp (owned by the City of Sarnia) and 15% owned by holding companies owned by the Township of Brook-Alviston, the Village of Oils Springs, the Town of Petrolia, the Village of Point Edward, and the Township of Watford. The subsidiary, Bluewater Power Distribution Corp, provides electrical distribution and related services. The subsidiary, Sarnia Hydro Energy Services, provides a wide range of energy products and services to customers.

Horizon Utilities – This is a local electricity distributing company jointly owned by Hamilton Utilities Corp (owned by the City of Hamilton) and St. Catharines Hydro Inc (owned by the City of St. Catharines). In addition to electricity distribution, Horizon Utilities provides billing services for the City of Hamilton for water and wastewater/stormwater usage charges, with rates set by the City of Hamilton. (Note: Horizon Utilities recently merged with Enersource, Hydro One Brampton, and Powerstream and became the second largest municipally-owned electric utility in North America known as Alectra)

Financial Restrictions

The Shareholders Declaration, ultimately, determines the financial capacity of the Municipal Services Corporation. In accordance with the Municipal Act the Member Municipalities, as Shareholders, have the ability to determine whether the Municipal Services Corporation can:

- Acquire, hold, dispose of, guarantee and otherwise deal with bonds, debentures, promissory notes, mortgages and similar evidences of indebtedness; and,
- Acquire, hold, dispose of, guarantee and otherwise deal with securities of the corporation

Accordingly, should it be deemed so by the Shareholders Declaration, the Municipal Services Corporation may hold the assets and liabilities of the water treatment and supply system without impacting the debt-carrying capacity of the benefiting municipalities.

Financial Considerations

In establishing either a Municipal Services Corporation or a (Joint) Municipal Services Board, benefiting municipalities must consider the entity's ability to:

- Approve budgets and set rates;
- Acquire and hold instruments of indebtedness (bonds, debentures, etc.);
- Acquire and dispose of assets, including real property; and,
- Establish a Development Charge related to the water treatment and transmission system(s) through by-law on behalf of the benefiting municipalities.

The Transfer Order issued by the Province of Ontario established the Boards' ability to approve operating and capital budgets for the water treatment and transmission system, as well as setting the rate (cost per cubic metre of water) charged to the benefiting municipalities. The Transfer Order does not explicitly establish that the Board(s) can approve and implement any other charge, including a charge (or part thereof) under the *Development Charges Act*.

In establishing the Municipal Services Corporation or Municipal Services Board, the benefiting municipalities must be mindful of the entity's ability to reasonably function independently from the collective municipalities and its responsibility to the collective municipalities as its shareholder(s). The ability for a Municipal Services Corporation or Municipal Services Board to obtain approval for a budget and rate on an annual basis, potentially from as many as fifteen municipalities (potentially more in future), can be significantly burdensome from an administrative perspective and may require additional administrative resources and costs to manage on an annual basis. The need for municipal consent and absolute approval versus the independence of the Corporation/Board must be measured and reasonable, and may be better served through a dispute resolution process rather than overt control.

While the assets and financial liabilities can be held by each municipality in proportion to their current supply of water, affecting the financial statements and debt capacity accordingly, it appears that the overarching issue is the ability for the water supply system to significantly and detrimentally impact the financial status of the municipalities collectively with a determination to incur debt for the benefit of the region.

While the use of debt for the regional water systems has been limited to the extent possible, with the judicial use of dedicated reserves when practical, this may not always be the case given the long-term needs of the regional water systems. A unilateral decision of the water system to incur debt, without the consent of the municipalities collectively or individually, can have a lasting impact on the municipalities given their wide-ranging size and financial resource capacity potentially impacting the development and community-building capacity of the municipality.

The use of debt instruments by the regional water systems to date has largely been driven by the lack of available dedicated reserve funds, rather than the balance of fairness and equity in whether an investment is best paid by current or future consumers (rate-based reserves versus future debt payments). This has been motivated by the reluctance to negatively impact the financial standing of the benefiting municipalities and their respective debt capacity. As the need for growth-related investments increases over time, it is more than likely that this will become impossible to avoid. This is particularly true when it comes to addressing significant capacity improvements and expansions for water treatment, water transmission and regional water storage that have the potential to eclipse the debt capacities of many of the municipalities.

Additionally, a Municipal Services Corporation is deemed to be a local board for the purpose of the *Development Charges Act*. In doing so, and if authorized by the municipalities under the Shareholders Declaration, the growth-related capital investments for the regional water system can be appropriately apportioned across the region in accordance with the *Development Charges Act*, rather than solely relying on the rate charged for water consumption and debentures.

Conceptual Organizational Models for Consideration

There are a number of factors that should be considered when determining the appropriate long-term needs of the regional water system for the benefit of the municipalities. In addressing and reconciling the legal status of the water system, municipalities should also consider the consequential financial implications to the municipalities, as well as the liability as it relates to the contractual capacity of the regional water system and the extension of liability to each of the municipalities and their Councils.

There are three basic conceptual organizational models for the consideration of the benefiting municipalities. Each of these models may, in whole or in part, address the risks and objectives outlined in this paper.

Option 1: No Change

This option would continue the current arrangement between the benefiting municipalities for the operation of the Water Boards and water supply systems as they have since the issuance of the Transfer Orders. The legal standing of the Water Boards would remain in question and each of the benefiting municipalities would be liable for the actions and activities of the water systems, which may include joint and several liability. In addition, each of the benefiting municipalities would continue to hold a proportion of the water system(s) debt.

Option 2: Joint Municipal Services Board

Board Appointment: At a minimum, the Joint Municipal Services Board would be structured and function nearly identical to the current Board structure. The Members of the Board for each of the two water systems could be appointed by each of the benefiting municipalities and roughly in proportion to their respective water taking. As is the current circumstance, Board Members are not required to be elected officials, and would serve on the Board until a new Member is appointed. This opens the opportunity for the establishment of a skills-based Board, with an established appointment application and approval process, as determined by the benefiting municipalities in the Agreement.

Responsibilities: The Board would be responsible for all governance activities and accountable for decisions to the benefit of the regional water system, not any one municipality.

The Joint Municipal Services Board, by definition, is a corporation and has the ability to hire employees should it so desire. The employees could be strictly for management and administration of the regional water system, or could include other functions including activities such as operations, engineering design, and/or maintenance of the water system, as well as support services like Human Resources and finance management.

Accountability: The Joint Municipal Services Board would be directly and collectively responsible to the benefiting municipalities of the respective water system. While the Board would be accountable for the governance of the water system and decisions made, the liability of the actions (or inactions) of the Board would extend to each of the municipalities. It is therefore necessary that the reporting requirements be adequate and appropriate to ensure that the collective municipalities can be reasonably assured that risks and liabilities are being suitably managed on behalf of the benefiting municipalities.

Scope of Services: The scope of services for the Board and regional water system would be restricted to the treatment and supply of drinking water to each of the benefiting municipalities of the respective water system, including the provision of any necessary support services and activities necessary for that purpose and addressing related regulatory requirements established by jurisdictions governing the operation of the water treatment and transmission system.

In addition, each municipality, at their sole discretion, can individually transfer control and management of related services within their individual jurisdictions. For example, in addition to the general scope related to treatment and supply of drinking water to all municipalities, an individual municipality may transfer the operation of a specific distribution system to the Joint Municipal Services Board, which may or may not include related services such as meter reading and billing services.

Finances: As is currently the case, the Board would be authorized to approve annual operating and capital budgets, authorize expenditures, and financial encumbrances including debentures that are necessary for the appropriate operation and administration of the regional water system.

The original Transfer Order for each water system issued by the Province of Ontario authorized the current Board to issue debt on behalf of the water system, without the corresponding approvals and/or consent of the benefiting municipalities. Given the size and complexity of the regional water system, this arrangement should be continued, noting that there is a necessity for restraint on behalf of the Joint Municipal Services Board because of the consequential financial implications of the debt-carrying capacity of the individual municipalities.

Option 3: Municipal Services Corporation

Board Appointment: The Municipal Services Corporation would be structured and operate within the strict provisions of the Shareholder Declaration. The members of the Board of Directors for the Corporation would be appointed through a process defined by the benefiting municipalities. For example, the municipalities could establish a process whereby applicants for vacant Board of Director positions could be reviewed and approved by the benefiting municipalities acting collectively. The Board of Directors for the Corporation could be a skills-based board being comprised of individuals selected on the basis of knowledge and experience that would be beneficial to the governance of the corporation, potentially including elected officials for a select number of seats on the Board.

Responsibilities: The Board of Directors for the Corporation would be responsible for all governance activities and accountable for decisions to the benefit of the regional water system, not any one municipality.

The Municipal Services Corporation could hire employees should it so desire. The employees could be strictly for management and administration of the regional water system, or could also include other functions including activities such as operations, engineering design, and/or maintenance of the water system, as well as support services like Human Resources and finance management.

Accountability: The Municipal Services Corporation would be responsible to the benefiting municipalities of the respective water system, as the Corporation's shareholders. The Board of Directors would be directly accountable for the governance of the water system and decisions made, retaining the liability of the actions (or inactions) of the Board and acting independently of the benefiting municipalities.

Reporting requirements must be adequate and appropriate included in the Shareholders Declaration to ensure that the collective municipalities can be reasonably assured that risks and liabilities are being suitably managed within the corporation.

Scope of Service: The scope of services of the corporation would be strictly defined within the Shareholders Declaration, including the ability of the corporation to form subsidiaries to perform select services within the allowable scope of the Shareholders Declaration.

In addition, each municipality, at their sole discretion, can individually transfer control and management of related services within their individual jurisdictions to the corporation. For example, in addition to the general scope related to treatment and supply of drinking water to all municipalities, an individual municipality may transfer the operation of a specific distribution system to the Municipal Services Corporation, which may or may not include related services such as meter reading and billing services.

The scope of service defined in the Shareholders Declaration could, conceivably, include provisions whereby the municipalities would allow the Municipal Services Corporation to bid on and provide contracted services to municipalities both within and beyond the current service area of the water system. For example, if allowed by the Shareholders Declaration, the Municipal Services Board could respond to and bid on a request for proposals for the operation of a municipal water distribution system. It should be noted that this type of activity can impact the corporation's status as a for-profit or not-for-profit entity.

Finance: The Municipal Services Corporation would be authorized to approve annual operating and capital budgets, authorize expenditures, and financial encumbrances including debentures that are necessary for the appropriate operation and administration of the regional water system.

As a legal entity that is separate and distinct from the municipalities, the Municipal Services Corporation could incur debt and would not impact the debt capacity of the shareholders, the municipalities.

Option 3a: Municipal Services Holding and Subsidiary Corporations

When considering the ongoing relationship between each of the regional water systems, there are a number of variations that could be considered, not the least of which could be the consolidation of the two systems under one Corporation and either:

- The supply of treated drinking water to area municipalities is consolidated under one Municipal Services Corporation, operating within two services area associated with each water treatment plant (Huron and Elgin); or,

- The region maintains two service areas under the control of a respective subsidiary corporation (one for each of Huron and Elgin) that is responsible for governing the operational activities and budget within the area, but the two subsidiary corporations are held by one Holding Corporation that governs and consolidates administration and region-wide coordinated policies.

For the purposes of this paper and simplified discussion, the second variation is presented in its simplest form, recognizing that there are several variants that could also be explored:

Board Appointment: The Municipal Services Holding Corporation and the two Subsidiary Corporations would be structured and operate within the strict provisions of the Shareholder Declaration. The members of the Board of Directors for the Subsidiary Corporations would be appointed through a process defined by the benefiting municipalities of that service area (Huron or Elgin). For example, the municipalities could establish a process whereby applicants for vacant Board of Director positions could be reviewed and approved by the benefiting municipalities acting collectively. The Board of Directors for the Subsidiary Corporation could be a skills-based board being comprised of individuals selected on the basis of knowledge and experience that would be beneficial to the governance of the corporation, potentially including elected officials for a select number of seats on the Board.

In turn, each of the Subsidiary Corporations would appoint a Board Chair and Vice-Chair from the appointed Board Members. The Board Chair and Vice-Chair of the two Subsidiary Corporations would be automatically appointed as members of the Board of Directors of the Holding Corporation. To ensure the Board of Directors has the ability to break a tie-vote, it is recommended that a fifth person be directly appointed by the municipalities to the Board of Directors of the Holding Corporation. For example, this could be an executive-level management staff of the City of London such as the City Engineer or City Treasurer.

Responsibilities: The Board of Directors for the Subsidiary Corporation would be responsible for all governance activities related to the operation of the water system within the service area, such as the approval of the annual budget and the provision of oversight responsibilities related to compliance with applicable legislation for the operation of the drinking water system. Additionally, the Board of Directors for the Subsidiary Corporations are accountable for decisions to the benefit of the regional water system, not any one municipality within the service area.

The Municipal Services Holding Corporation could hire employees should it so desire. The employees could be strictly for management and administration of the regional water systems as a whole, including administrative functions for the Subsidiary Corporations, and could also include other functions including activities such as operations, engineering design, and/or maintenance of the water system, as well as support services like Human Resources and finance management.

Accountability: The Municipal Services Subsidiary Corporations would be responsible to the benefiting municipalities of the respective water system, as the Corporation's shareholders. The Holding Corporation would be responsible to the all benefiting municipalities within the region. The Board of Directors of the corporations would be directly accountable for the governance of the water system and decisions made, retaining the liability of the actions (or inactions) of the Board and acting independently of the benefiting municipalities.

Reporting requirements must be adequate and appropriate included in the Shareholders Declaration to ensure that the collective municipalities can be reasonably assured that risks and liabilities are being suitably managed within the corporation.

Scope of Service: The scope of services of the corporations would be strictly defined within the Shareholders Declaration, including the ability of the Holding Corporation to form further subsidiaries to perform select services within the allowable scope of the Shareholders Declaration.

Similar to the option 3 noted above, each municipality, at their sole discretion, can individually transfer control and management of related services within their individual jurisdictions to the subsidiary or holding corporation.

Finance: The Subsidiary Corporations would be authorized to approve annual operating and capital budgets, with the finances consolidated to the Holding Corporation. Debt instruments would be held by the Holding Corporation, along with the consolidated assets, including debentures that are necessary for the appropriate operation and administration of the regional water systems.

As a legal entity that is separate and distinct from the municipalities, the Municipal Services Holding Corporation could incur debt and would not impact the debt capacity of the shareholders, the municipalities.

Recommended Process

In order to fully address the legal status of the Lake Huron and Elgin Area Water Systems, as well as mitigate the financial impacts and liabilities to the benefiting municipalities, it is recommended that the municipalities consider the formation of a Municipal Services Corporation.

In order to pursue this further, the municipalities must undertake the development of a business case for the Municipal Services Corporation and hold public participation meetings to solicit comments and considerations from stakeholders. In the development of the business case municipalities should, among other things, specifically address:

- The scope of service or services that would be allowable and defined a Shareholders Declaration, including any restrictions and limitations deemed appropriate. At the very least, the scope of service should be the treatment and transmission of drinking water to benefiting municipalities of the corporation, including any necessary actions required by legislation to undertake the scope of service (e.g. source protection);
- The ability of the corporation to hire employees; and,
- The ability of the corporation to hold debt;

In addition, consideration should be given regarding the relationship between the Lake Huron Water Supply System and the Elgin Area Water Supply System. Consolidation of the two regional water systems under one corporation, maintain separate corporations for each system, or the utilization of holding and subsidiary corporations will have specific implications on the financial capacity of the water systems collectively and individually, as well as the administration and management of the systems.

The development of the business case(s) and undertaking public participation meetings could be assumed by the Lake Huron and Elgin Area Water Systems if requested by the benefiting municipalities. By undertaking and coordinating the development of business case(s) and public meetings through the regional water systems, a coordinated effort can be managed to ensure that all municipalities are fairly represented and comments and concerns addressed at a regional level.

References

Municipal Act, 2001, S.O. 2001, c. 25

<https://www.ontario.ca/laws/statute/01m25>

O. Reg. 599/06: MUNICIPAL SERVICES CORPORATIONS

<https://www.ontario.ca/laws/regulation/060599>

Municipal Water and Sewage Transfer Act, 1997, S.O. 1997, c. 6, Sched. A

<https://www.ontario.ca/laws/statute/97m06>

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