

ESTABLISHING A CROWN AGENCY

PURPOSE:

The creation of a new Crown agency should only be undertaken in circumstances where there is a compelling business case. Because Crown agencies have great potential to affect the government's fiscal and policy plans, they should only be created in a way that ensures appropriate financial and governance review and management structures are in place.

These guidelines outline how this should be done, and are organized in three sections:

Definition of a Crown Agency

- defines what a Crown agency is and includes information to assess whether a Crown agency is the appropriate service delivery option

Steps Required to Establish a Crown Agency

- sets out the basic steps required to establish a Crown agency and includes information how to submit a request for approval to establish a Crown agency

Performance Reporting and Mandate Reviews of Crown Agencies

- describes the regular cycle of performance and mandate reviews that apply to Crown agencies

DEFINITION OF A CROWN AGENCY

A Crown agency is an organization that is established or acquired by the provincial government that is outside of a ministry. Crown agencies:

- are accountable to the government through a Responsible Minister; and
- have assigned/delegated authority and responsibility from government, or otherwise have statutory authority and responsibility to perform specified functions or services.

Crown agencies will have some or all of the following specific characteristics:

- The organization is formally established by a statute, by a regulation under an enabling statute, or under the *Company Act*, *Society Act*, *Canada Business Corporations Act*, or other authorities;
- There is a government interest in the function or service, such as:
 - the agency's fulfilment of its statutory obligations;
 - the agency's management of the resources it uses, and/or
 - the agency's standards of service.
- The Province has direct interest in the agency, in particular government:
 - appoints a majority of the governing board of the agency;
 - may provide 50% or more of the operating funds of the agency,

- may give sole authority to the agency to engage in commercial activity and generate revenues;
- owns (if *Company Act* company or other corporate entity with share capital) directly or indirectly 50% or more of the issued and outstanding shares with voting rights of the agency; and/or
- may establish the agency as an agent of the Province.

If the Crown agency is established as a separate legal entity (e.g. statutory corporation or government owned company under the *Company Act*, non-profit society, etc.) it will, except under exceptional circumstances, be part of the Government Reporting Entity (GRE), and, as such, included in the government's budget and financial reports and subject to related financial and performance reporting requirements (See Appendix I for additional information regarding inclusion factors for the GRE). For this reason, the creation of these types of Crown agencies are of particular interest to government due to their potential impact on the fiscal plan.

STEPS REQUIRED TO ESTABLISH A CROWN AGENCY

Step 1. Approval and Preparation of a Business Case

Approval of the Business Case:

Cabinet approval must be secured to create a Crown agency. The request for approval must be supported by a business case. The business case must clearly demonstrate that other alternative service delivery options are not viable and that a Crown agency is the only feasible delivery option for the proposed function. Treasury Board approval of the business case must be secured prior to Cabinet review if the proposed Crown agency will have a fiscal impact. The Ministry of Finance and the Crown Agencies Secretariat must review the business case.

If Cabinet approves the establishment of a Crown agency, Cabinet will appoint a Minister responsible for the Crown agency. Crown Agencies Secretariat will work with the Minister responsible and the Crown agency to establish a Shareholders' Letter of Expectations (see CAS website <http://www.gov.bc.ca/cas>).

Preparation of the Business Case:

Required Components of the Business Case

The Business Case must include the following seven components

1. *Business Rationale for the Creation of a Crown Agency*
2. *Mandate of the Crown Agency*
3. *Type of Crown Agency*
4. *Funding Arrangements (including request for funding if required)*
5. *Applicability of Legislative, Regulatory and Policy Requirements*
6. *Identification and Mitigation of Crown Agency Risks and Liabilities*
7. *Financial and Administrative Arrangements*

1. Business Rationale for the Creation of a Crown Agency

The Business Case must demonstrate a sound business rationale for establishing the Crown agency (e.g. cost/benefit analysis, risk assessment, tax analysis and implications of accounting treatment on the fiscal plan). This needs to include a thorough review of the full range of delivery options and a complete justification for the creation of a Crown agency.

a) Review and Analysis of Alternative Options:

The business case must include a thorough analysis of the feasibility or desirability of alternative delivery options for the proposed function, such as a Ministry, using an existing Crown agency, or using the private sector.

b) Justification for Creating a Crown Agency:

The Business Case must demonstrate a need for a Crown agency, based on the following two considerations.

i) There is a demonstrated need for government intervention in the area. The generally accepted reasons for government intervention include:

- Market imperfections/market failure
- Equity or social justice considerations
- Public/Economic security and safety
- Financial or contractual relations with other governments or entities

ii) There is demonstrated need for independence from government in delivering a service. The criteria should meet one or more of the following circumstances:

- A need for an independent source of advice on an ongoing basis;
- A need for independent decision-making;
- A need for independent delivery of good and services (i.e. a requirement to operate outside of government financial policies or the *Public Service Act*); or
- A need for independent authority for collecting contributions.

2. Mandate of a Crown Agency

The proposed mandate of the Crown agency must also be included in the Business Case.

Mandate generally includes the following components:

- a vision statement
- a mission statement
- definition of core business areas
- definition of authorities of the Crown agency;
- definition of the board roles and responsibilities;
- draft performance agreement between the proposed Crown agency and the Shareholder (government) - i.e. statement of high level Shareholder expectations that the Crown agency will commit to and related performance measures.

3. Type of Crown Agency

The business case must assess the applicability of different types of Crown agencies and provide a compelling case for a recommended type. Government has established the following types of Crown agencies:

- Board
- Commission
- Tribunal
- Advisory Council
- Professional Body
- Authority
- Partnership
- Special Operating Agency
- Society
- Crown Corporation (*Company Act* or *Canada Business Corporations Act* company or its own legislation)

The decision on a type of Crown agency should be based on the functions to be performed by that agency (see Appendix 2 for a flowchart that sets out some high level questions that can help determine an appropriate type of Crown agency).

The business case must also, depending on the model chosen, outline the necessary legal steps required to bring the crown agency into effect. This may include all or some of:

- approval by Cabinet (e.g. of an special operating agency charter);
- legislation and/or regulations; or
- incorporation or establishment under *Company Act*, *Society Act*, *Canada Business Corporations Act*, or other authorities.

4. Funding Arrangements

The Business Case must identify the funding mechanism for the Crown agency, including any impacts on the fiscal plan. Funding for new agencies must be found within existing budget targets and/or from identified non -provincial government funding sources. Any funding from government that is required to establish or operate the Crown agency, and other sources of funding must be included.

5. Applicability of Legislative, Regulatory and Policy Requirements

The business case must identify which regulations and legislation will apply to the proposed Crown agency. Currently, notwithstanding the legislation under which a Crown agency may be established, Crown agencies are generally subject to requirements included in the following legislation:

- *Auditor General Act*;
- *Budget Transparency and Accountability Act*;
- *Balanced Budget and Ministerial Accountability Act*;
- *Financial Administration Act*;

- *Financial Disclosure Act;*
- *Financial Information Act;*
- *Multiculturalism Act;*
- *Ombudsman Act;*
- *Public Sector Employers Act;*
- *Workers Compensation Act; and*
- *Freedom of Information and Protection of Privacy Act.*

Depending on any legislation that may be amended or established to create the Crown agency, the Crown agency may also be subject to additional legislative requirements. For instance, certain Crown agencies are subject to the *Public Service Act*, *Public Service Labour Relations Act*, *Public Service Pension Act*, *Benefits Act*, etc. Crown agencies are also subject to statutes of general application (e.g., *Waste Management Act*, *Environmental Assessment Act*).

The Shareholders Letter of Expectations identifies other policies that apply to Crown agencies and additional areas that Crown agencies should anticipate policy direction from government.

6. Identification and Mitigation Strategy for Crown Agency Risks and Liabilities

The business case must identify risks and risk mitigation strategies. Legal advice is normally required to determine what liabilities a new Crown agency may face. This will depend on the type of Crown agency and particulars of any legislative requirements that apply to it. Advice should be sought from the Ministry of Attorney General on potential real and contingent liabilities.

Generally, Crown agencies must address issues such as the need for governing board members' and executive indemnities, and the tax status of the organization and any assets that may be transferred to it. The Risk Management Branch of the Ministry of Finance can provide advice and has a number of programs that are available across the public sector, including government guarantees, director's and project indemnities, enterprise risk management modeling, and claim-loss mitigation. The Tax Policy Branch will comment on any analysis done by the sponsoring Ministry or Crown agency of the federal and provincial tax implications, including any required payment of grants-in-lieu of taxation by the proposed Crown agency (See Appendix 3 for a list of provincial and federal tax statutes that must be considered).

7. Financial and Administrative Arrangements

The business case should include proposed financial and administrative arrangements for the Crown agency. These would include:

- the structure of the Crown agency, the accounting policies to be followed; financial policies and procedures; preparation of the Public Accounts; internal audit structure and plan; and the selection of an external auditor (Contact: Office of the Comptroller General);
- the banking, cash management, and financing and risk management requirements (Contact: Provincial Treasury);

- a description of how the Crown agency will meet its legal service needs (MAG, in-house counsel, private firm) (Contact: Legal Services Branch);
- a description of the reporting relationships and requirements to government (see CAS website for Information Requirements and Events Calendar for Crown agencies <http://www.gov.bc.ca/cas>); and
- New Crown agencies are required to use the services provided by Solutions BC (e.g., payroll, information technology support). If this is not feasible, justification must be provided.

Consultation and Review Requirements for the Business Case

In developing business cases and assessing the need for and appropriate structure of a new Crown agency, Ministries and Crown agencies will need to consult with the following central agencies of government throughout the process of developing their business case:

- Crown Agencies Secretariat;
- Office of the Comptroller General;
- Treasury Board Staff;
- Provincial Treasury (including Risk Management Branch);
- Ministry of Attorney General;
- Board Resourcing and Development Office; and
- Public Sector Employers' Council Secretariat.

Central agencies will not develop the business case. This is the responsibility of the Ministry/Crown agency proposing to create a new Crown agency. Consultation with Crown Agencies Secretariat and Treasury Board Staff is advisable early in the development of the concept for a new Crown agency to discuss need and fiscal sustainability. Central agencies can also provide feedback on proposed structures and impacts, and will undertake due diligence review for Treasury Board and Cabinet.

A draft proposal for Cabinet and/or Treasury Board review that addresses the requirements set out above must be signed off by the Deputy Minister of the sponsoring Ministry or Crown agency CEO, as appropriate. The CEO of the Crown Agencies Secretariat and the Secretary to Treasury Board must then review the draft proposal prior to the review of the business case by Treasury Board and/or Cabinet.

If the business case is approved by Cabinet (and Treasury Board if required), the following steps should be completed as required. To avoid unanticipated problems at this stage, it is important that the sponsoring ministry or Crown agency advise the Public Sector Employers' Council Secretariat and the Board Resourcing and Development Office of its plans to create a new Crown agency while it is developing the business case.

Step 2. Appointment of Board Members

Crown agencies that require Boards of Directors will need to ensure that such Boards are properly constituted, and that the guidelines for Board appointments are followed. The Board Resourcing and Development Office (BRDO) has been established to support this process. The BRDO must vet all Board appointments (guidelines may be found at http://www.fin.gov.bc.ca/abc/infopages/appoint.htm#policy_full). Compensation guidelines for Board members have also been approved by Treasury Board, and can be found at (hot link when posted). Many Board appointments are made through Orders in Council.

Step 3. Establishment of Corporate Governance Structure consistent with government policy for Crown agencies

Crown agencies should work with Crown Agencies Secretariat (CAS) and/or BRDO to ensure that their corporate governance structure is consistent with government policy (see Governance Guidelines at http://www.gov.bc.ca/cas/down/govframe_redraft.pdf). The Board will need to develop the following:

- governance principles;
- policies;
- procedures;
- internal financial control and reporting regime;
- bylaws;
- key roles and responsibilities;
- board committees (audit, human resource, governance, etc.); and
- standards of ethical conduct

Step 4. Appointment of Crown Agency Staff and Establishment of Human Resources Regime

The Crown agency will need to ensure that it properly appoints its senior executives. Generally, the Board of Directors appoints the Chief Executive Officer. Crown agencies must work with the Public Sector Employers' Council Secretariat (PSEC) to ensure that executive appointments are within government approved compensation guidelines. PSEC can also advise on labour relations matters and must be consulted in labour relations negotiations. A Crown agency must establish clear human resources policies and procedures.

SECTION III PERFORMANCE REPORTING AND MANDATE REVIEWS

A. Performance Reporting

Annual performance reviews of Crown agencies may lead to modifications of Crown agencies performance measures and/or targets. Where appropriate, these changes will be reflected in changes to Shareholder's Letters of Expectations between ministers and Crown agencies.

Compliance with Government Reporting Requirements for Crown Agencies

The Crown agency must work with CAS to ensure that government's reporting requirements for Crown agencies are fulfilled.

CAS and the Ministry of Finance have established guidelines for the development of service plans and annual reports (<http://www.gov.bc.ca/cas/rpts/>) and an Information Requirements and Events Calendar for Crown agencies (see CAS website <http://www.gov.bc.ca/cas>) and that includes a reporting timetable that allows government and Crown agencies to meet their collective statutory requirements for:

- Service Plans and Budgets;
- Financial forecasts;
- Monthly, quarterly and annual reports; and
- Audited financial statements and public accounts.

CAS will work with the Chair of the Crown agency Board and the Minister Responsible to establish a shareholder's letter of expectations to lay out the core direction, roles and responsibilities, and performance outcomes the shareholder expects from the Crown agency. Crown agencies will be subject to mandate reviews, similar to the Core Services Review, every 4 to 5 years, to ensure their mandates continue to be relevant, and that their service delivery models continue to represent value to taxpayers.

Compliance with Crown Agency Reporting Requirements to the Legislature

Government has established an all-party committee of the legislature as a public accountability mechanism to review the performance of Crown agencies. The Select Standing Committee on Crown Corporations sets its own schedule for reviewing Service Plans and Annual Reports of Crown agencies. CAS works with the SSCCC to ensure it has current information for its reviews.

B. Mandate Reviews

Crown agencies will be subject to mandate reviews, similar to the Core Services Review, every four to five years, to ensure their mandates continue to be relevant, and that their service delivery models continue to represent value to the taxpayers.

Appendix 1

Control Criteria for determining that an organization is in the Government Reporting Entity

The following indicators of control are based on Generally Accepted Accounting Principles (GAAP) for government, as set by the Canadian Institute of Chartered Accountants' Public Sector Accounting Board (PSAB).¹

Indicators of Control

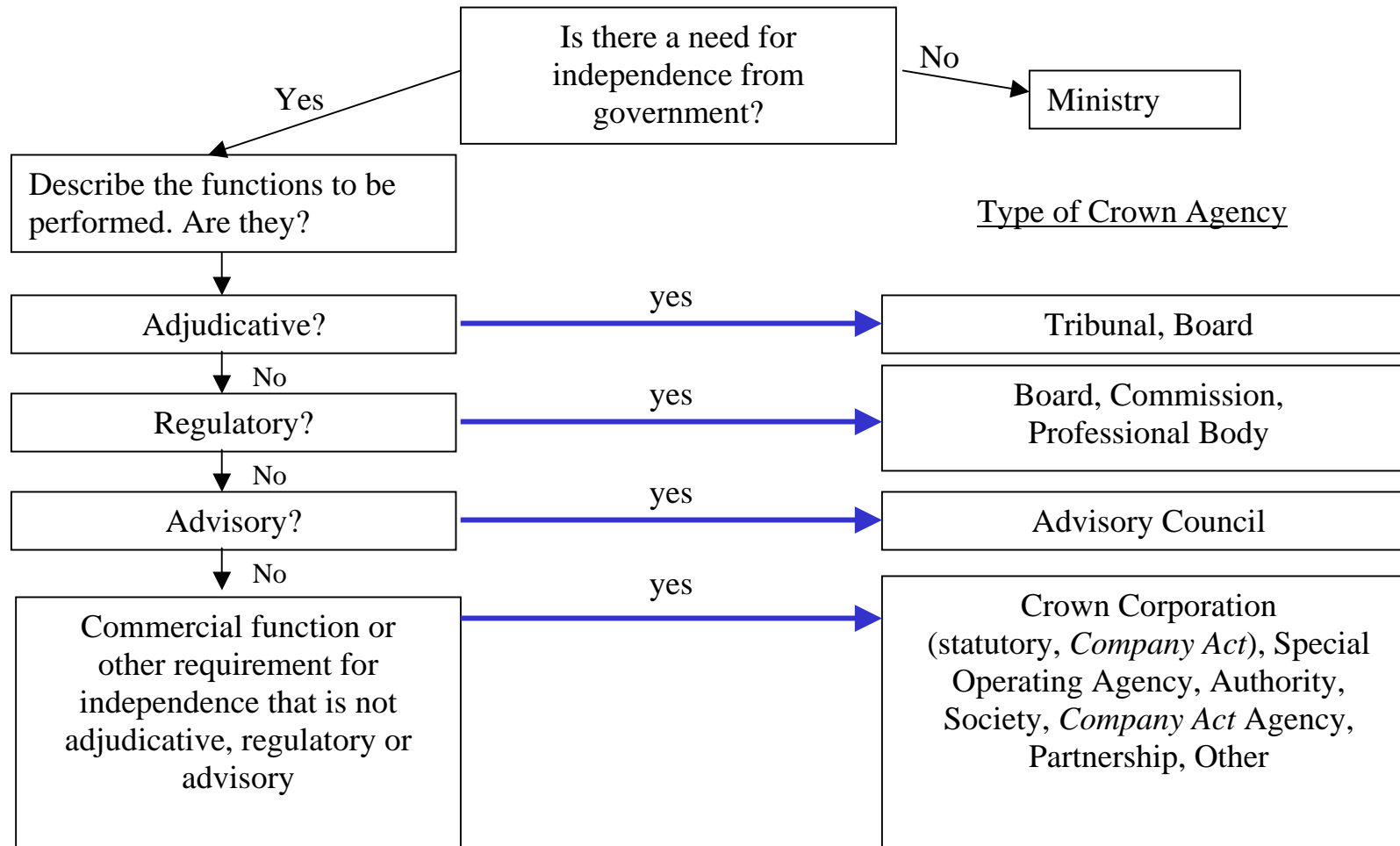
- .18 There are certain indicators that provide more persuasive evidence of control:
- (a) Government has the power to unilaterally appoint or remove a majority of the members of the governing body of the organization;
 - (b) Government has ongoing access to the assets of the organization, has the ability to direct the ongoing use of those assets, or has ongoing responsibility for losses;
 - (c) Government holds the majority of the voting shares or a "golden share"² that confers the power to govern the financial and operating policies of the organization;
 - (d) Government has the unilateral power to dissolve the organization and thereby access its assets and become responsible for its obligations.
- .19 Other indicators that may provide evidence of control exist where the government has the power to:
- (a) provide significant input into the appointment of members of the governing body of the organization by appointing a majority of those members from a list of nominees provided by others or being otherwise involved in the appointment or removal of a significant number of members;
 - (b) appoint or remove the CEO or other key personnel;
 - (c) establish or amend the mission or mandate of the organization;
 - (d) approve the business plans or budgets for the organization and require amendments, either on a net or line-by-line basis;
 - (e) establish borrowing or investment limits or restrict the organization's investments;
 - (f) restrict the revenue-generating capacity of the organization, notably the sources of revenue;
 - (g) establish or amend the policies that the organization uses to manage, such as those relating to accounting, personnel, compensation, collective bargaining or deployment of resources.

¹ The specific criteria to determine which organizations are in the GRE are set out in section 1300 of the PSAB handbook. The application of these criteria needs to be done by existing crown corporations with the guidance of their auditors, and by all organizations with the advice of the Comptroller General.

² "Golden share" refers to a class of share that entitles the holder to specified powers or rights generally exceeding those normally associated with the holder's ownership interest or representation on the governing body.

Appendix 2

Where government has determined it needs to be involved in the delivery or administration of a function, what type of government organization should be used?



Appendix 3: Provincial and Federal Tax Statutes Requiring Consideration

Federal:

1. Goods and Services Tax - status (tax immunity, charity, non-profit, hospital, etc.)
2. Personal and Corporate Income Tax (including potential charitable or non-profit status)
3. Large Corporations Tax
4. Payroll taxes (Employment Insurance, Canada Pension Plan, etc.)
5. Withholding taxes

Provincial:

1. Property Transfer Tax (real property transfers registered in land title office)
2. Provincial Sales Tax
3. Income Tax (both personal and corporate)
4. Property Taxes (local, regional and provincial)
5. Assumption about whether all other provincial taxes will be paid on an ongoing basis (payment of all taxes is the starting policy position).