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January 2, 2019

"BY E-MAIL"

Manitoba Public Insurance
Box 6300, 234 Donald Street
Winnipeg MB R3C 4A4

Attention: Mike Triggs, General Counsel & Corporate Secretary

Dear Sirs/Mesdames:

Re: Governance Issues
Our Matter No. 0162628 GAM

You have requested a legal opinion setting out the duties and responsibilities of the Board of Directors of the Manitoba Public Insurance Corporation ("MPI") under The Crown Corporations Governance and Accountability Act (the "CCGA Act)" and The Manitoba Public Insurance Corporation Act (the "MPI Act") in relation to complying with directions and instructions from government.

You have requested that we specifically comment on the Boards' responsibility to follow directions and instructions contained in:

- Roles and responsibility record;
- Mandate letters;
- Annual business plan; and
- Directives

You have further requested our comments on the following:

1. Are there any limitations upon the scope and nature of directions and instructions contained in those four documents?

2. Can government provide directions and instructions to the Board outside of any of the four mentioned documents?

3. What is the Board's responsibility (what are their options for responding) if they believe directions and instructions from government are beyond the government's jurisdiction?

Preliminary remarks

It is useful to commence our analysis by attempting to define what we mean by the term "government".

The Legislative Assembly or "Legislature"[1] represents the people of Manitoba. The Legislature is an independent entity, separate from government. Members of the Legislature are usually members of political parties. The political party with the most seats in the Legislature becomes the governing party.

The party leader of the governing party is the Premier of Manitoba and head of the executive branch of government formally called the "Executive Council"[2] but commonly known as the "Cabinet" of Manitoba. It is usually made up of members of the Legislature from the governing party who are called "cabinet ministers" or simply "ministers".

The Lieutenant Governor of Manitoba, as the representative of the Queen, is the titular head of the Executive Council. The Lieutenant Governor, together with the Premier and the other members of the Executive Council, are collectively referred to as the "Lieutenant Governor in Council".[3]

The Executive Council has its own staff headed by an individual with the title "Clerk of the Executive Council and Cabinet Secretary". The premier's office also has its own staff headed by an individual with the title of "Chief of Staff". Ministers also have staff including a "Deputy

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[1] The Legislative Assembly Act states that the Legislature of the Province of Manitoba shall consist of the Lieutenant Governor and the Legislative Assembly. The Interpretation Act R.S.M. c. I80 states: "Legislature" means the Lieutenant Governor acting by and with the advice and consent of the Assembly.

[2] See the Executive Government Organization Act, C.C.S.M. c. E170

[3] The Interpretation Act R.S.M. c. I80 states: "Lieutenant Governor in Council" means the Lieutenant Governor acting by and with the advice of the Executive Council.

Minister" who is typically a career civil servant and a "Special Assistant", who is typically part of the Minister's political staff and reports to the Chief of Staff.

Based on the foregoing analysis, we are of the view that the term "government" refers to the executive branch or what is formally known as the "Lieutenant Governor in Council". Ministers, are members of the government and would also come within the broad definition of "government". The Legislative Assembly and the governing party are not part of government. While, the Premier's staff, the Executive Council's staff and the Minister's staff are not formally part of government, they typically speak on behalf of government.[4]

Introduction

As you are aware, MPI is a corporation created pursuant to the MPI Act. The Corporation is managed by a Board of Directors appointed by the Lieutenant Governor in Council.[5] MPI comes within the definition of a "crown corporation".[6] It is owned by the province of Manitoba (i.e. the Crown) and established by an Act of the Legislature and reports to the Legislature through a Minister of the Crown in the Manitoba cabinet. The fundamental idea of a Crown corporation is that they are arm's-length from government and thus generally enjoy greater freedom from direct political control than government departments.[7]

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[4] The Office of the Auditor General of Manitoba, Study of Board Governance in Crown Organizations, September 2009 states: "Public sector organizations are ultimately accountable to the Legislature. The linkage between the Legislature and the organization can often occur through a variety of entities and individuals, including the Minister, senior government officials from the relevant Department, as well as other legislative actors including but not limited to Cabinet, Treasury Board, and Legislative Committees such as the Public Accounts Committee and the Crown Corporations Committee. The Minister answers for the organization in the Legislature including tabling any relevant legislation, as well as all accountability information such as quarterly and annual reports. The Minister also ensures that government's expectations are effectively communicated to the Boards under their purview, as set out in legislation and regulations. The relevant Department may also act as an agent of the Minister to provide the necessary information and support that the Boards need to meet government expectations."

[5] MPI Act, section 2

[6] Crown corporations are defined as "corporations [that are] wholly owned by the Crown and most are agents of the Crown. Each Crown corporation's enabling legislation [...] sets out in broad terms the Crown corporation's mandate, powers and objectives" and "[while] Crown corporations operate at arm's length from the government, as public institutions, they are ultimately accountable to the government." Treasury Board of Canada Secretariat, "Guidance for Crown Corporations," 2010

[7] "Crown Corporation", The Canadian Encyclopedia, December 2012

In the case of MPI, it is accountable to the Legislature for the conduct of its affairs through a Minister appointed by Lieutenant Governor in Council.[8] It is through the responsible Minister that MPI reports to the government and to the Legislature on its plans and its performance.[9]

Background

Since their inception, Crown corporations have played an important role in serving the public interest, as well as advancing policy and commercial objectives. For decades, governments have endeavoured to strike the right balance between Crown corporation autonomy and government oversight and control. Unfortunately, growing government intervention is increasingly eroding the autonomy, agility, and responsiveness that have been the defining rationale for the existence of Crown corporations.[10]

When first established, Crown corporations were given a greater level of managerial autonomy than other government departments in order to achieve their business objectives and public needs. This relationship was meant to shield the activities of Crown corporations from direct political control, allowing them the flexibility to respond quickly to rapidly changing market conditions. In addition, increased operational independence also provided state-owned enterprises with greater opportunities for longer-term thinking than most government departments.[11]

Boards of directors were appointed by government to oversee the management of Crown corporations with a view to the best interests of the corporation. To fulfil their overall stewardship responsibility for the management of the affairs of corporations, boards of directors are expected to exercise judgment in the broad areas such as:

- the establishment of the corporation's strategic direction;
- the safeguarding of the corporation's resources;
- the monitoring of corporate performance; and
- reporting to government.

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[8] MPI Act, section 1(1)
[9] MPI Act, section 2(13)
[10] Public Policy Forum: Crown Corporation Governance - Three ways to manage the tension between autonomy and control, August 2016
[11] Public Policy Forum: Crown Corporation Governance - Three ways to manage the tension between autonomy and control, August 2016

Governments are the ultimate owner and shareholder of public sector organizations, on behalf of all citizens. Governments are responsible for oversight of a Crown corporation's business activities and have the responsibility to ensure the Crown corporation acts in the best interests of the public.

This unique balance between autonomy and accountability creates tension between the Crown corporation and the government.

According to the late Professor Peter Aucoin, a leading Canadian academic on public administration and governance, there are three conflicting forces creating this tension:

> 1. A desire on the part of politicians to have increased control over Crown corporations,
>
> 2. The demands by the public for increased transparency and accountability, and
>
> 3. The requirement of "best practices" of "corporate governance" emanating from the broader universe of private sector management.[12]

These conflicting tensions are present in the issues you have raised, as will become apparent in our analysis that follows.

Recent history of Crown corporations in Canada

In the 1970s, many observers began to question the autonomy of Crown corporations.[13] This led, in 1984, to a number of changes at the federal level in the Financial Administration Act by giving federal ministers sufficient powers to enable them to direct and control Crown corporations and to hold them to account while respecting the concept of an arm's length relationship between the Minister and the Board of Directors of the Crown corporation.[14]

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[12] Peter Aucoin, Dalhousie University, A paper presented to the Canadian Political Science Association 2007 Annual Conference (University of Saskatchewan, Saskatoon) May 31, 2007
[13] Public Policy Forum: Crown Corporation Governance - Three ways to manage the tension between autonomy and control, August 2016
[14] Peter Aucoin, Dalhousie University, A paper presented to the Canadian Political Science Association 2007 Annual Conference (University of Saskatchewan, Saskatoon) May 31, 2007

According to Professor Aucoin:

> The most important powers in these regards are the powers to issue binding policy directives to boards and to approve their corporate plans and budgets. These are the most important because they give ministers ultimate control over policy direction and the use of public money. As a consequence, democratic control is secured: ministers have final say and can be held responsible and accountable by Parliament. At the same time, in order to respect the arm's length design, the exercise of these powers is not only constrained in specified ways, such as the requirement that a minister consult the board before issuing a policy directive and the requirement that a directive be tabled in Parliament, it also constitutes an indirect method of executive control, such as the power to approve corporate plans and budgets whereby these governance documents are prepared by the corporation itself with ministers possessing a veto power.

The issues of transparency and accountability once again became an issue in 2004 when the federal Auditor General issued her report into what came to be known as the "Sponsorship Scandal". Several Crown corporations were involved in the corruption that led to the Sponsorship Scandal. Interestingly, it was not the independence of the Crown corporations which led to the problem. Rather, the maladministration arose because many Crown corporation officials were "under the thumb of ministers and their political staff, aided and abetted by those departmental public servants doing their bidding".[15] Indeed, the arm's-length nature of these organizations "collapsed under the pressures of politicized intervention in their internal affairs".[16]

In the wake of the Sponsorship Scandal the government of Canada produced a report to Parliament entitled "Meeting the Expectations of Canadians – Review of the Governance Framework for Canada's Crown Corporations". On the key issue of governance and accountability, the report to Parliament concluded:

1. The responsible Minister is accountable to Parliament for the Crown corporation. The Minister is **accountable** for the discharge of his or her responsibilities under Part X of the FAA [Financial Administration Act]

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[15] Peter Aucoin, Dalhousie University, A paper presented to the Canadian Political Science Association 2007 Annual Conference (University of Saskatchewan, Saskatoon) May 31, 2007
[16] Peter Aucoin, Dalhousie University, A paper presented to the Canadian Political Science Association 2007 Annual Conference (University of Saskatchewan, Saskatoon) May 31, 2007

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and constituent legislation, for the legislative and regulatory framework applicable to the corporation, and for the policy instruments of the government, including the provision of broad policy direction to the corporation. In addition, the Minister is **answerable** in Parliament for all activities of the corporation, including those pertaining to day-to-day operations.

2. The Board of Directors is accountable to the responsible Minister for the stewardship of the corporation.

3. The CEO is accountable to the Board of Directors for the management and performance of the corporation.[17] (emphasis in the original)

The significance of the emphasized words is that the Minister is "accountable" for "the discharge of his or her own responsibilities" but merely "answerable" for all other activities of the Crown corporation. The report to Parliament led to changes to the federal Financial Administration Act which we will comment later in this opinion.

Despite attempts to modernize the interrelationship of Crown corporations with government, the literature tends to identify the same core issues as requiring greater understanding and clarification:

1. misaligned objectives;

2. unclear roles and responsibilities; and

3. uncertain relationships and irregular interactions between government and Crown corporation leaders.[18]

Independence of Crown corporations in Manitoba

As at 2009, there were at least 50 entities identified by the Auditor General as "Crown Organizations" in Manitoba.[19]

As noted by the Auditor General's report on the Governance of Crown organizations:

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[17] Meeting the Expectations of Canadians – Review of the Governance Framework for Canada's Crown Corporations, 2005

[18] Public Policy Forum: Crown Corporation Governance - Three ways to manage the tension between autonomy and control, August 2016

[19] The Office of the Auditor General of Manitoba, Study of Board Governance in Crown Organizations, September 2009, Appendix A

> The extent to which a public sector organization can operate independently of government varies, depending on such factors as the funding arrangements, the potential impact on public policy, historical precedence and government expectations. Government may intervene in a public sector Board's governance by "directing the Board to follow a particular course of action when the government believes it is in the public interest to do so." While this sometimes occurs informally, leading practices suggest such communication take place through a formal directive from government that is then reflected in the organization's strategic plan. In some jurisdictions, public sector organizations enter into a Memorandum of Understanding with their Minister to ensure clarity of mandate and alignment of objectives, as well as to clarify accountability and reporting requirements. Nevertheless, public sector Boards should advise the Minister if a situation arises where "a government-initiated directive will materially impact the approved strategic plan for the corporation; or other planned government initiatives or legislation may have unintended negative consequences for the corporation."[20] (Citations omitted)

Missing from the Auditor General's list of factors to be considered in ascertaining the degree of independence to be afforded to Crown corporations, are what we consider to be the two most important factors as follows:

1. The statute creating the crown corporation; and
2. Whether the Crown corporation is governed by CCGA Act.[21]

It is useful to consider these issues separately.

The statute creating the Crown corporation

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[20] The Office of the Auditor General of Manitoba, Study of Board Governance in Crown Organizations, September 2009, page 91

[21] In 2009, when the Auditor General prepared this report the current CCGA Act was not in force. At that time, the relevant legislation was the Crown Corporations Public Review and Accountability Act, C.C.S.M. c. C336

The Phrase "Lieutenant Governor in Council" appears 61 times in the MPI Act. The Lieutenant Governor in Council has extensive regulatory power. This suggests a relatively high degree of government control over the affairs of MPI.

The following chart demonstrates how the MPI Act compares with other Crown corporations in this regard:

Crown Corporation	References to Lieutenant Governor in Council	Extent of Regulatory Authority	Subject to CCGA Act	Government Appoints CEO
MPI	61	extensive	Yes	Yes
Manitoba Hydro	65	extensive	Yes	Yes
Manitoba Liquor and Lotteries Corporation	18	extensive	Yes	Yes
Workers Compensation Board	33	moderate	No	No
Efficiency Manitoba Inc.	16	moderate	Yes	No
Manitoba Centennial Centre Corporation	8	none	Yes	No

The foregoing chart is not intended to be a precise indicator of the extent to which each Crown corporation operates independently in government. However, it does illustrate there are significant differences between organizations.

Based on our review of the enabling statutes for the six Crown corporations noted above, we have concluded that there is a relatively high degree of government control over MPI and Manitoba Hydro. There is a moderate degree of control over the Manitoba Liquor and Lotteries

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Corporation and the WCB. There is minimal control over Efficiency Manitoba Inc. and the Manitoba Centennial Centre Corporation.

In all six Crown corporations, the Lieutenant Governor in Council has authority to appoint the Minister responsible for the Crown corporation, to appoint the Board of Directors and to determine the remuneration of the board. In most cases, the government can order an audit of the Crown corporation. Similarly, in most cases there is a requirement for government approval to borrow funds or construct major capital projects. Other than the foregoing, the extent of government control varies greatly.

This is important to keep in mind when reviewing the literature pertaining to the duties and roles of a board of directors of a Crown corporation. Ultimately, Crown corporations are creatures of statute and are governed by their enabling legislation as well as any other legislation enacted by the Legislature defining roles and responsibilities of Crown corporations.

To what extent does the Board of Directors control the affairs of MPI?

The objects and powers of MPI are set out in section 6(1) of the Act as follows:

> 6(1) It is the function of the corporation and it has the power and capacity
>
> (a) subject to the approval of the Lieutenant Governor in Council to engage in and carry on the activity of automobile insurance in all its classes;
>
> (b) subject to the approval of the Lieutenant Governor in Council to operate and administer such plans of universal compulsory automobile insurance as may be set out in this Act and regulations and may provide plans of extension insurance upon such terms and conditions as may be prescribed by the regulations;
>
> (c) subject to the approval of the Lieutenant Governor in Council to engage in and carry on, both within and without the province, the business of insurance and reinsurance in all its classes and without limiting the generality of the foregoing, to engage in and carry on the business of insurance and reinsurance in all its branches in the following classes of insurance as such classes are defined in The Insurance Act:

(i) Accident insurance;

(ii) Aircraft insurance;

(iii) Boiler and machinery insurance;

(iv) Fire insurance;

(v) Guarantee insurance;

(vi) Inland transportation insurance;

(vii) Live stock insurance;

(viii) Marine insurance;

(ix) Plate glass insurance;

(x) Property damage insurance;

(xi) Public liability insurance;

(xii) Theft insurance;

(xiii) Weather insurance;

(c.1) to administer The Drivers and Vehicles Act, and to perform the duties and exercise the powers described in subsection 2(2) of that Act;

(d) to engage in and carry on the business of

(i) repairing any property insured by the corporation; and

(ii) salvaging and disposing of by public or private sale any property insured and acquired under a contract by which the corporation may be liable as an insurer, or to make agreements with other persons for those purposes;

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> (e) to acquire by purchase, lease, licence, or otherwise, and hold, develop, construct, use, maintain, repair, operate, and improve, as owner or tenant or otherwise, for its own use and benefit, real property
>
> > (i) necessary or required for the conduct of its business and to allow it to carry out its role as administrator under The Drivers and Vehicles Act or perform the duties and exercise the powers described in subsection 2(2) of that Act;
> >
> > (ii) conveyed, mortgaged, or hypothecated to it by way of security; or
> >
> > (iii) conveyed to it in satisfaction in whole or in part in respect of debts and judgments;
>
> and to sell, lease, or otherwise dispose of the whole or any part of such real property, in each case upon such terms and conditions as the board deems proper;
>
> (f) to acquire by purchase the business and property or any portion thereof of any other insurer, agent, or adjuster, or to enter into agreements to carry on jointly any class of insurance with another insurer whether within or without the province; and The Insurance Act does not apply to such agreements.

We note that clauses (a), (b) and (c) all begin with the phrase "subject to the approval of the Lieutenant Governor in Council". That phrase indicates that the approval of the Lieutenant Governor in Council is necessary before MPI can enter into any line of insurance referenced in clauses (a), (b) and (c). We interpret this provision as applying only to the initial decision to enter into a particular line of business. For example, MPI could not enter into the business of issuing aircraft insurance without the approval of the Lieutenant Governor in Council. Once approval has been granted, the administration of the insurance program is the responsibility of MPI.

Other business activities, such as operating a salvage business for the disposal of vehicles, would not require the approval of the Lieutenant Governor in Council.

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Notwithstanding these limitations on the authority of the Corporation, the Board of Directors of MPI retains jurisdiction over the administration of the insurance program as noted in subsection 6(2) of the MPI Act which states as follows:

> Additional powers
>
> 6(2) The corporation has the power and capacity to do all acts and things necessary or required for the purpose of carrying out its functions and powers and, without limiting the generality of the foregoing, the corporation may
>
> (a) conduct surveys and research programs and obtain statistics for its purposes and for the purpose of establishing and administering any insurance plan;
>
> (b) enter into agreements with, or retain agents or adjusters for the purpose of soliciting and receiving applications for insurance, for collecting premiums, adjusting claims, and doing of such other things on its behalf as the corporation considers necessary;
>
> (c) prescribe forms of applications, contracts, and forms of policy and such other forms as the corporation considers necessary;
>
> (d) prescribe the information and detail required to be set out on any form;
>
> (e) evaluate damages and losses and pay claims under a contract by which the corporation may be liable as an insurer; ...

To what extent does the government control the affairs of MPI?

As noted above, the Lieutenant Governor in Council retains the jurisdiction to appoint the Minister responsible for MPI, to appoint the board of directors, to determine the remuneration of the board, to order an audit of the corporation approve the borrowing of funds borrow funds as is the case with most Crown corporations. In addition, with respect to MPI, the Lieutenant Governor in Council has statutory authority to:

- enact regulations to include any other class of vehicle to be a motor vehicle subject to the Act[22]

- designate the head office of the corporation[23]

- appoint the CEO and determine his or her salary [24]

- approve the corporation engaging in the activity of automobile insurance, universal compulsory automobile insurance and the business of insurance and reinsurance in all its classes[25]

- order officers and employees of the corporation to be subject to the Civil Service Superannuation Act.[26]

- approve grants to municipalities in lieu of taxes[27]

- establish procedures for a referendum relating to privatization of the corporation[28]

- order that provisions of the Insurance Act apply (or not apply) to the corporation[29]

- approve agreements with Canada at any province respecting the business of insurance[30]

- make regulations establishing, amending, and revoking such plans of automobile insurance and plans of universal compulsory automobile insurance for the insurance[31]

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[22] MPI Act, section 1
[23] MPI Act, section 3
[24] MPI Act, section 4
[25] MPI Act, section 6
[26] MPI Act, section 13
[27] MPI Act, section 14
[28] MPI Act, section 14.1
[29] MPI Act, section 30
[30] MPI Act, section 32
[31] MPI Act, section 33

- make regulations prescribing the premiums payable by drivers and owners of motor vehicles as the Lieutenant Governor in Council may see fit [32]

- make regulations respecting any matter considered necessary or deemed advisable by the Lieutenant Governor in Council for the effective carrying out of the intent and purpose of the MPI Act and the regulations and any insurance plan established under the MPI Act.[33]

- direct that MPI pay to Manitoba surplus assets of the corporation[34]

- appoint a Rates Appeal Board and establish their remuneration[35]

- direct that any provision of the Corporations Act apply to MPI[36]

- appoint a chief Appeal Commission and the Appeal Commission[37]

- approve regulations made by the corporation,[38] and

- make regulations respecting the Personal Injury Protection Plan. [39]

Every regulation enacted by the Lieutenant Governor in Council under the MPI Act is deemed to be part of the MPI Act and has the force of law.[40]

The Lieutenant Governor in Council has certainly exercised its jurisdiction to enact regulations. For example, the Automobile Insurance Coverage Regulation, MR 290/88, consists of 169 pages of regulation setting out the terms of coverage available under the MPI insurance

[32] MPI Act, section 33
[33] MPI Act, section 33
[34] MPI Act, section 44
[35] MPI Act, section 67
[36] MPI Act, section 68
[37] MPI Act, section 176
[38] MPI Act, section 202
[39] MPI Act, section 202.1
[40] MPI Act, section 33

program. The Automobile Insurance Certificates and Rates Regulation, MR 23/2017, consists of 1122 pages of regulation setting out the premiums payable for insurance and the fees payable for drivers licenses.[41] Manitoba Regulation 93/2009, the Agent Commissions Regulation, sets out, in a detailed Schedule, the commissions payable by MPI to insurance brokers for various transactions such as issuing basic Autopac coverage or issuing optional coverage and flat fees payable for specific transactions such as issuance of driver's license or a certificate of insurance.

In total, the Lieutenant Governor in Council has enacted 12 Regulations containing a total of 1887 pages. Given the technical nature of these regulations we assume that these regulations were enacted on the advice and recommendation of MPI. The Lieutenant Governor in Council would not have the expertise necessary to create such regulations. Having said that, the regulations are enactments of the Lieutenant Governor in Council. Thus, ultimate control does rest with the government on many fundamental aspects of the insurance program.

The Crown Corporations Governance and Accountability Act

On June 2, 2017, The Crown Corporations Governance and Accountability Act was proclaimed into law[42]. The CCGA Act applies to:

(a) the Manitoba Centennial Centre Corporation;

(b) Manitoba Hydro;

(c) the Manitoba Liquor and Lotteries Corporation;

(d) the Manitoba Public Insurance Corporation; and

(e) other agencies as prescribed by government.[43] [44]

In presenting the Bill to the Legislature, Crowns Services Minister Ron Schuler stated:

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[41] The Automobile Insurance Certificates and Rates Regulation will be greatly reduced when Bill 12, the Red Tape Reduction and Government Efficiency Act comes into effect in 2019. According to the explanatory note, motor vehicle insurance premiums will no longer be established by regulation under the MPI Act.

[42] The CCGA Act was slightly amended in 2018 but that amendment is not relevant for our analysis.

[43] CCGA Act, section 2

[44] Under the Government Agencies Regulation, MR 90/2018, Efficiency Manitoba Inc. is designated as a government agency under clause 2(e) of the CCGA Act.

> Madam Speaker, as part of our government's commitment to improving the province of Manitoba, restoring prudent fiscal management and increasing openness and transparency of our Crown corporations, I am pleased to introduce Bill 20, The Crown Corporations Governance and Accountability Act.
>
> This bill will strengthen the oversight of these entities while respecting the responsibility of the boards and professionals to govern and manage. The new act will improve transparency and clearly define a governance model that will clarify the accountability relationship and understanding of the respective roles of minister, boards, executive offices and officials of our Crown corporations.
>
> This new legislation furthers our government's pledge to eliminate overlap and duplication within government, find efficiencies and savings and allow our Crown corporations to deliver effective essential services to all Manitobans.[45]

According to the government press release, the CCGA Act was intended to accomplish the following:

> • dissolve the Crown Corporation Council and establish a new secretariat that would provide policy and regulatory oversight support for government and Crown corporations;
>
> • establish an accountability-based governance model that would ensure co-ordinated management;
>
> • establish board accountability requirements that would clearly define expectations of board members and requirements for reporting including annual reports and budgets; and
>
> • increase accountability requirements with annual mandate letters to board chairs that would set board performance evaluations and measurements against key performance

[45] Hansard, Thursday, March 9, 2017

> indicators, as well as clarifying the roles of the minister, boards, executive offices and officials.[46] (emphasis added)

The reference to "coordinated management" would appear to reflect the intention of government that Crown corporations, including MPI, will be managed in coordination with government. The CCGA Act attempts to achieve these goals through the following mechanisms:

1. Roles and responsibilities record that is jointly developed between the corporation and the minister;[47]
2. Mandate letters from the minister;[48]
3. Annual business plans that is acceptable to the minister;[49] and
4. Directives issued by the minister with the approval of the Lieutenant Governor in Council.[50]

For convenience, we will refer to these as "coordinated management" tools. As noted above, you have specifically asked us to comment on the Boards' responsibility to follow directions and instructions contained in these four documents. We will comment on each requirement separately.

Roles and responsibilities record

The CCGA Act requires MPI to develop a "roles and responsibilities record" jointly with Minister responsible within three months of becoming subject to the CCGA Act.[51] The contents of a roles and responsibilities record is set out in section 4(2) of the CCGA Act as follows:

> 4(2) A roles and responsibilities record must include a description of the following:

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[46] Winnipeg Free Press, March 9, 2017
[47] CCGA Act, section 4
[48] CCGA Act, section 6
[49] CCGA Act, sections 7 and 8
[50] CCGA Act, section 13
[51] CCGA Act, section 4(1). The CCGA Act received royal assent on June 2, 2017. Accordingly, a rules and responsibilities record should have been developed by September 2, 2017.

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(a) the corporation's objects, mandate or purposes, as set out in the Act or instrument creating or continuing it;

(b) the roles and responsibilities of

(i) the corporation,

(ii) its board and its individual directors, including the chair,

(iii) its chief executive officer, or the person who is responsible for performing functions that are similar to those normally performed by the chief executive officer of a corporation,

(iv) the responsible minister,

(v) any department of government or statutory officer that provides support or services to the corporation, and

(vi) any subsidiaries of the corporation;

(c) the corporation's accountability relationships, including its duty to account to the responsible minister;

(d) the committee structure of the corporation's board, including the committees required under this Act, and the role and responsibility of any other committee established by the board;

(e) the corporation's planning and reporting requirements;

(f) the mutual expectations of the corporation and the responsible minister in respect of communications, collaboration and consultations with each other;

(g) any other prescribed matter.

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The roles and responsibilities record must be made public in accordance with section 9 of the CCGA Act.[52] The roles and responsibilities record must be reviewed and renewed every three years.[53]

We have reviewed the current Roles and Responsibilities Record for MPI, dated September 20, 2017. It covers the issues required in section 4(2) of the CCGA Act. Of particular relevance to our current analysis are the following provisions:

1. MPI has a duty of accountability to the Minister and to comply with ministerial directives.

2. The Annual Business Plan must take into account guidelines issued by the Minister and any applicable mandate letter.

3. MPI is committed to "effective communication, collaboration and consultation with the Minister".

4. The Board Chair is the primary contact for the Minister. The Board Chair is responsible to provide the Minister with a description of the business transacted, including supporting materials, immediately following each meeting of the Board or committee.

5. The primary government contact for the CEO is the Deputy Minister of Crown Services.

6. The minister sets out the corporate mandate, performance expectations and policy direction through mandate letters, directives and other communications.

7. Mandate letters are to be consistent with MPI's objectives mandate or purposes.

8. Directives address matters of policy and accounting practices, advertising standards and the conduct of special reviews. Directives ensure that Crown corporations act in concert with each other or with government when doing so furthers efficiency and effectiveness.

9. The Minister's primary contact is the Board Chair.

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[52] CCGA Act, section 4(4)
[53] CCGA Act, section 5

10. The Crown Services Secretariat is to establish "lines of communication and ensure rules and responsibilities are clear".

11. The Crown Services Secretariat are to collect, analyse and share information from the corporation. The Secretariat manages and tracks matters relating to the corporation.

12. Crown Services Secretariat staff develop regulations.

13. MPI is expected to inform the Minister when significant issues arise.

14. The Minister and the Board Chair must meet on a quarterly basis.

15. Day-to-day operational matters are to be communicated to the appropriate staff within the Crown Corporation Secretariat.

16. To facilitate their monitoring activities, Crown Services Secretariat staff will meet quarterly with MPI's executive management.

As can be seen from the foregoing, the roles and responsibility record emphasizes collaboration. This is not surprising given, as noted earlier, the roles and responsibility record must be developed jointly between MPI and the responsible Minister. There is a significant emphasis on communication, collaboration and consultation.

Notwithstanding the foregoing, the roles and responsibility record ultimately places a significant degree of control in the hands of government. It mandates the sharing of information with government and contemplates that the Crown Services Secretariat will provide strategic advice to the Minister related to MPI. The document specifically requires MPI to comply with ministerial directives.

Mandate letters

Mandate letters are the second coordinated management tool set out in the CCGA Act. Unlike the Rules and Responsibility Record, mandate letters are not developed jointly with the minister. Mandate letters are issued unilaterally by the Minister. Section 6 of the CCGA Act states:

Mandate letter

6(1) The responsible minister ... may prepare a mandate letter for a corporation that sets out, for the term of the letter,

(a) the government's goals for the corporation;

(b) the specific outcomes to be achieved by the corporation during the applicable period;

(c) the performance measures that are to be used to determine if the specific outcomes have been achieved; and

(d) any other information that is prescribed or that the minister or responsible minister considers appropriate.

Term

6(2) A mandate letter may be annual, or may apply to the particular fiscal years that are set out in the letter, which must not exceed three fiscal years.

Preparation and consistency of letters

6(3) A mandate letter must be consistent with the applicable corporation's objects, mandate or purposes.

When mandate letter becomes effective

6(4) A mandate letter is effective once it is

(a) signed by the directors and the responsible minister;

(b) approved by the Lieutenant Governor in Council; and

(c) made public in accordance with section 9.

We have been provided with a copy of what we understand to be an undated "mandate" letter from the Hon. Ron Schuler, Minister of Crown Services. This letter was issued in 2016 prior to the CCGA coming into force. On the face of the document, there is no indication that it was approved by the Lieutenant Governor in Council. Given the foregoing, we are inclined to the

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view that this "mandate letter" would have no legal force and, therefore, currently there is no mandate letter that has been issued to MPI.

In any event, the "mandate letter" is very general. For example, it states:

> Together, we will assess the current governance framework with a view to improving transparency and more clearly defining the respective roles of government and the Boards of Directors of Manitoba's major Crown Corporations. We want to find the right balance between our responsibility to ensure performance and results with the need for operational independence for our Crown Corporations.
>
> ...
>
> Once we have developed the right governance model, I look forward to working with you to improve procurement/ tendering practices, advertising and sponsorship models with the goal of ensuring competitiveness, transparency, efficiency and cost-effectiveness across government.

There are no specific outcomes to be achieved and no performance measures to be used to determine if the specific outcomes have been achieved.

The authors of MPI's 2018 – 2019 Business Plan also seem to have come to the conclusion that there is currently no mandate letter that has been issued to MPI. Article 1.2 of the 2018 – 2019 Business Plan lists 10 key priorities for the corporation which are stated to be "subject to adjustment based on Ministerial Mandate Letter". In other words, if and when the minister issues a mandate letter, MPI may have to adjust its key priorities.

Annual business plans

Annual business plans are a third tool by which the government can exercise management control over MPI. Business plans are prepared by MPI and submitted to the Minister. The Minister thus has, in effect, a veto power over the annual business plan. Section 7 of the CCGA Act states:

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Annual business plan

7(1) For each fiscal year, a corporation must prepare an annual business plan that is acceptable to the responsible minister.

Content

7(2) An annual business plan is to include

(a) the corporation's goals for the fiscal year covered by the plan;

(b) the specific outcomes to be achieved by the corporation during the applicable fiscal year including, in the case of a corporation that is subject to a mandate letter that applies to more than one fiscal year, the outcomes from the letter that are to be achieved within the fiscal year covered by the plan;

(c) a capital expenditure program for the prescribed period, which includes each proposed capital expenditure that exceeds the prescribed threshold during the period;

(d) the performance measures that are to be used to determine if the specific outcomes have been achieved; and

(e) any other information that is prescribed or that the responsible minister considers appropriate.

Consistency

7(3) An annual business plan must take into account the financial resources of the corporation and must be consistent with

(a) any guidelines for annual business plans issued by the minister under section 8;

(b) the corporation's objects, mandate or purposes; and

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(c) generally, any applicable mandate letter. Timing

7(4) An annual business plan must be submitted to the responsible minister at the time directed by the responsible minister and must be approved by the board before the beginning of the fiscal year to which it relates. (Emphasis added)

While the responsibility to prepare a business plan remains with MPI's Board of Directors, the emphasized words make it clear that the business plan must be consistent with, and therefore implement, any mandate letter issued by the Minister. As noted above, mandate letters can be issued by the minister unilaterally without consultation with MPI.

As noted by Professor Aucoin, above, ministerial vetoes over the business plan of a Crown corporation is an indirect method of control. However, in this case, when combined with the obligation to incorporate any mandate letter into the business plan, the minister has a mechanism of direct control.

Directives

Finally, the fourth way in which the government can exercise management control over MPI, is through the issuance of directives. Directives are issued by the minister with the approval of the Lieutenant Governor in Council. Directives are unilateral and do not require consultation with the Crown corporation. Section 13 of the CCGA Act states:

Directives

13(1) The minister may - with the approval of the Lieutenant Governor in Council - issue a directive to a corporation

(a) respecting

(i) matters of policy and the accounting policies and practices for the corporation,

(ii) standards to be complied with in respect of advertising done by the corporation, and

(iii) the conduct of special organizational reviews to be conducted by the corporation;

(b) to ensure that practices of two or more corporations are consistent; and

(c) to ensure that two or more corporations act in concert with each other or with government departments or agencies when doing so will further efficiency and effectiveness.

Accounting standards apply

13(2) A directive in respect of accounting policies and practices must be consistent with generally accepted accounting principles that reflect the public interest.

Compliance

13(3) A corporation must comply with a directive given under this section.

Directives to be made public

13(4) The minister must make a directive public, in a manner he or she determines reasonable, within 30 days of the directive being given to the corporation. (Emphasis added)

Most of section 13 is quite narrow in scope. It deals primarily with issues like accounting practices, advertising standards and special reviews. However, the difficulty we see with this provision is the lack of clarity associated with the phrase "matters of policy". Theoretically almost any governance issue can be described as a matter of policy. Therefore, it is open to the minister to issue a directive to MPI on almost any governance issue and MPI will then be compelled to implement the directive.

Transparency

The fundamental limitation on government's overuse or even abuse of the above-noted "coordinated management" tools is the requirement for public disclosure. Section 9 of the CCGA Act provides as follows:

Records, plans and directives to be public

9(1) The minister must ensure that the following are made public within 30 days of being signed or approved:

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(a) a roles and responsibilities record for a corporation, or any amendment to it;

(b) a mandate letter given to a corporation;

(c) an annual business plan of a corporation.

Manner of making public

9(2) For the purpose of subsection (1), a document is made public if it is made available to the public in a reasonable manner, which may include making it available by electronic means.

Similarly, directives issued under Section 13 must be made public within 30 days.[54]

Together, these publication requirements are intended to provide transparency so that the Government remain accountable to the public for its decisions.

As a result, in our view, the overarching intent of the CCGA Act appears to be as follows:

1. To provide a degree of ministerial control over Crown corporations.
2. To limit ministerial involvement in day-to-day decision making with respect to the organization's substantive responsibilities; particularly with respect to operational matters and quasi-judicial decisions
3. To require public disclosure of all instructions made to the Crown corporation by government.

The impact of the CCGA Act

In 2009, before the introduction of the CCGA Act, the Manitoba Office of the Auditor General conducted a broad study of board governance in Crown organizations in Manitoba. At that time, there were very few formal mechanisms available to ministers to control Crown corporations.[55] The Auditor General wrote:

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[54] CCGA Act, section 13(4)

[55] At the time, the Crown Corporations Council appointed under the Crown Corporations Public Review and Accountability Act, had a limited monitoring and advisory role in relation to the Crown corporations like MPI.

> Public sector organizations are ultimately accountable to the Legislature. The linkage between the Legislature and the organization can often occur through a variety of entities and individuals, including the Minister, senior government officials from the relevant Department, as well as other legislative actors including but not limited to Cabinet, Treasury Board, and Legislative Committees such as the Public Accounts Committee and the Crown Corporations Committee. The Minister answers for the organization in the Legislature including tabling any relevant legislation, as well as all accountability information such as quarterly and annual reports. The Minister also ensures that government's expectations are effectively communicated to the Boards under their purview, as set out in legislation and regulations. The relevant Department may also act as an agent of the Minister to provide the necessary information and support that the Boards need to meet government expectations. [56] (Emphasis added)

Thus, at that time, formal control by government was limited to appointing the Board of Directors, amending legislation and enacting regulations. However, according to the Auditor General, informal directives from government to Crown corporations were not unheard of. Relying on a report from the Canadian Institute of Chartered Accountants[57] the Auditor General wrote:

> Government may intervene in a public sector Board's governance by "directing the Board to follow a particular course of action when the government believes it is in the public interest to do so." While this sometimes occurs informally, leading practices suggest such communication take place through a formal directive from government that is then reflected in the organization's strategic plan.[58] (Emphasis added)

The enactment of the CCGA Act in 2017 in effect codifies what the Auditor General referred to as "leading practices" by eliminating the need for informal direction from government to Crown corporations. Government now has multiple mechanisms of control including mandate letters

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[56] The Office of the Auditor General of Manitoba, Study of Board Governance in Crown Organizations, September 2009, p. 90

[57] Canadian Institute of Charter Accountants, "20 Questions Directors Should Ask about Crown Corporation Governance", 2007. www.cica.ca

[58] The Office of the Auditor General of Manitoba, Study of Board Governance in Crown Organizations, September 2009, p. 91

and directives enabling government to direct a Crown agency to follow a particular course of action. The concurrent obligation of government, of course, is transparency. The minister must ensure that any mandates or directions given to the Crown agency are made public within 30 days in accordance with section 9 of the CCGA Act as noted above.

The CCGA Act is still new legislation. It remains to be seen the extent to which the CCGA Act will impact on the key decisions to be made by MPI's Board of Directors. At a practical level, MPI's Board of Directors is still the "directing mind" of the Corporation. However, depending upon the extent to which government exercises its new-found coordinated management controls, this is not guaranteed for the future.

The Auditor General of New Brunswick conducted a review of Canadian and international literature on governance of Crown corporations, and concluded that Crown corporation boards could be classified into three basic groups as follows:

> 1. "Governing boards" are boards that have total authority and total accountability for all corporate activity, within the organizational framework. Such boards are the true "directing minds" of their Crown corporations. Crown corporation boards classified as governing boards are the equivalent of private sector boards of directors.
>
> 2. "Administrative management boards" are boards whose function is to oversee the efficiency of delivery of decided services. Although they may make binding resolutions in certain areas, they are also responsible for implementing policy decisions made by the "directing mind" of the corporation. Also, in some cases they may be required to consult with the "directing mind" of the Crown corporation when making decisions on certain key matters. The "directing mind" for administrative management boards is usually the responsible government Minister.
>
> 3. "Advisory boards" are boards whose function is to give counsel, not to govern. These can be distinguished from administrative management boards in that they are not normally able to make binding resolutions. They simply make recommendations to decision-makers.[59]

[59] New Brunswick Office of the Auditor General – Crown Corporation Governance, 1996

In prior years, MPI's Board of Directors could reasonably be categorized as a "governing board". However, with the introduction of the CCGA Act, and depending upon the extent to which government chooses to become the "directing mind" of the corporation, MPI's Board of Directors could well become an administrative management board.

Comparison with other jurisdictions

Manitoba is not alone in enacting legislation that provides some degree of government control over the operation of Crown corporations. We have reviewed the situation in Ontario, Saskatchewan, Alberta, British Columbia as well as at the federal level.

In Ontario, ministerial oversight of Crown corporations is governed by the Management Board of Cabinet.[60] As a result of a Directive issued by Management Board in February 2018,[61] the situation in Ontario is not dissimilar to the situation in Manitoba.

Saskatchewan is unique insofar as the Lieutenant Governor in Council appoints members to a Crown Investment Corporation, which is, in effect, the holding company for all subsidiary Crown corporations including Saskatchewan Government Insurance.[62]

The governments of Alberta[63] and British Columbia[64], also have broad powers to control the affairs of public agencies.

In the federal domain, Parliament deals with governance and control of Crown corporations in Part X of the *Financial Administration Act*, R.S.C., 1985, c. F-11 (the "FAA").

Section 89(1) of the FAA states that the Governor in Council may, on the recommendation of the appropriate Minister, give a directive to any Crown corporation, if the Governor in Council is of the opinion that it is in the public interest to do so. However, before a directive is given, the Minister must consult the Board of Directors of the corporation[65]. Further, the direction must be tabled in Parliament.[66]

In commenting on the relationship between federal Crown corporations and the government of Canada the Auditor General of Canada stated:

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[60] The Management Board of Cabinet Act R.S.O. 1990, c. M1.
[61] The Agencies and Appointments Directive
[62] The Crown Corporations Act, 1993, S.S. c. C-50.101
[63] The Alberta Public Agencies Governance Act, 2009, S.A. c. A-31.5
[64] The Financial Administration Act, 1996, R.S.B.C. c. 138
[65] FAA, section 89(2)
[66] FAA, section 89(4)

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> The governance regimes attempt to balance the Crown corporation's relationship with the government - between the corporation's autonomy in day-to-day activities and the government's appropriate direction and control. The legislation places the board of directors at the centre of the governance regime for Crown corporations. Under this governance regime, the board oversees the management of each corporation and holds management responsible for its performance; it is responsible for establishing the corporation's strategic direction, safeguarding the corporation's resources, monitoring corporate performance, and reporting to the government and Parliament.[67]

Once a directive is given to a Crown corporation under the FAA, the Crown corporation is required to implement the directive in a prompt and efficient manner.[68]

If the Crown corporation implements a directive from government, the FAA specifically states the directive is deemed to be in the best interests of the corporation and the directors of the Corporation are not liable for any consequences arising from the implementation of the directive. This statutory immunity is set out in section 89.1 of the FAA which states as follows:

> Implementation
>
> 89.1 (1) The directors of a parent Crown corporation to which a directive is given shall ensure that the directive is implemented in a prompt and efficient manner and, if in so doing they act in accordance with section 115, they are not accountable for any consequences arising from the implementation of the directive.
>
> Best interests
>
> (2) Compliance by a parent Crown corporation with a directive is deemed to be in the best interests of the corporation. (Emphasis added)

In the writer's opinion, this is a particularly important provision in the FAA which is absent in the CCGA Act. Under the common law and pursuant to the CCGA Act, the directors of MPI are expected to act with a view to the best interests of the corporation and to exercise the care,

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[67] 2005 February Status Report of the Auditor General of Canada, paragraph 7.11
[68] FAA, section 89.1(1)

diligence and skill that a reasonably prudent person would exercise in similar circumstances.[69] Further, directors are personally liable under the CCGA Act unless they have acted in good faith and without negligence.[70] By virtue of section 89.1 of the FAA, the Board of Directors of any federal Crown corporation is deemed to be acting in the best interests of the corporation, and in compliance with their duties as directors, if they follow a directive issued by the minister.

The FAA also requires federal Crown corporations to submit a "corporate plan" to the minister for the approval of the Governor in Council. A "corporate plan" must include:

> (a) the objects or purposes for which the corporation is incorporated, or the restrictions on the businesses or activities that it may carry on, as set out in its charter;
>
> (b) the corporation's objectives for the period to which the plan relates and for each year in that period and the strategy the corporation intends to employ to achieve those objectives; and
>
> (c) the corporation's expected performance for the year in which the plan is required by the regulations to be submitted as compared to its objectives for that year as set out in the last corporate plan or any amendment thereto approved pursuant to this section.[71]

Finally, the FAA requires federal Crown corporations to submit the annual operating budget and the annual capital budget to the minister for approval of the Treasury Board.[72]

The Office of Audit and Advisory Services for Transport Canada conducted an audit of oversight of Crown corporations in September 2015. In commenting on the provisions of the FAA cited above, the audit report commented as follows:

> The Government can ... provide broad policy guidance and influence and direct the activities of Crown corporations by issuing directives under section 89 of the FAA and approving corporate plans under section 122. .... However, the issuance of specific directives and changing of mandates are processes generally reserved for addressing major issues or implementing

[69] CCGA Act, section 19(1)
[70] CCGA Act, section 22(2)
[71] FAA, section 122
[72] FAA, section 123 and 124

> significant changes. Conversely, the review and approval of the corporate plan on the recommendation of the Minister (based on the Department's advice) to Treasury Board (via the Treasury Board Secretariat) is the mechanism that provides the Government with the most direct control to influence Crown corporation activities on a regular basis. Indeed, the review of the Crown corporation's corporate plan is a vital control in ensuring that a Crown corporation's activities are in accordance with its mandate and aligned with government priorities. [73] (emphasis added)

As can be seen, the FAA provides the government of Canada with a significant degree of governance and control of federal Crown corporations.

We would submit that the CCGA Act provides an even greater degree of control to the government of Manitoba over the activities of MPI for the following reasons:

1. Under the FAA, the government can only issue a directive after consulting with the Crown corporation in question. Under the CCGA Act there is no such requirement. Directives can be issued by the minister, with the approval of the Lieutenant Governor in Council, without consultation.

2. The CCGA Act authorized the minister to issue mandate letters to the Crown corporation without consulting with the corporation. The FAA only gives the government jurisdiction to veto corporate plans. The corporate plans themselves are prepared by the agency and submitted to government.

3. Unlike the FAA, the CCGA Act contains no requirement that the government act in the "best interests" of the corporation when issuing mandate letters or directives to the corporation.

The other major difference is the fact that the CCGA Act does not relieve directors from liability arising from the consequences of implementing a directive or mandate letter.

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[73] Audit and Advisory Services - Transport Canada - Integrity, Innovation and Quality - Audit of Oversight of Crown Corporations, Shared Governance and Other Organizations, September 2015

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Summary and conclusion

In summary, we have concluded that the government has a significant degree of control over MPI based upon the following:

1. Under the MPI Act, there is a long list of activities which are the responsibility of government or require government approval including appointment of the Board of Directors, appointment of the CEO, determining the salary of the CEO, determining what lines of insurance the corporation may engage in, approval of borrowing, approving grants to municipalities and approving agreements with Canada and other provinces.

2. The Lieutenant Governor in Council also has a significant degree of control over MPI by virtue of its broad jurisdiction to make regulations. In particular, we note clause 33(1)(o) of the MPI Act gives government jurisdiction to make regulations "respecting any matter considered necessary or deemed advisable by the Lieutenant Governor in Council for the effective carrying out of the intent and purpose of this Act and the regulations and any insurance plan established under this Act."

3. The CCGA Act extends the government's control over MPI. The other provinces in Western Canada have similar mechanisms of control over Crown corporations. The requirement in the CCGA Act to develop a roles and responsibilities record and the governments veto over MPI's annual business plan is less intrusive because it requires collaboration. However, under the CCGA Act, the government is not required to consult with MPI prior to issuing binding mandate letters and directives.

The fundamental limitation on government control over MPI is the requirement for transparency. In the case of regulations these are, of course, public documents. In the case of roles and responsibility records, mandate letters, annual business plans and directives, these must be made public within 30 days of being signed or approved.

Are there any limitations upon the scope and nature of directions and instructions contained in those four documents?

As can be seen from our comments noted above, there are relatively few limitations upon the scope and nature of directions and instructions that might be contained in a directive or mandate. There is no legal requirement that directives and instructions be in the best interests of the corporation. There is some limitation on the roles and responsibilities record because that document must be jointly developed and signed on behalf of the corporation. There is also some limitation on the government's control over annual business plans because those

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documents must be prepared by the corporation and submitted to the government for approval. The government's control is therefore limited, in effect, to a veto.

The other limitation upon the scope and nature of directions and instructions from government is the fact that they must be made public.

Can government provide directions and instructions to the Board outside of any of the four mentioned documents?

While informal direction from government may have been acceptable in the past, we are of the opinion that the introduction of the CCGA Act in 2017 requires that any directions and instructions to the board be in the form of one of the four mentioned documents. As noted above, we are of the view that the CCGA Act codifies what the Auditor General referred to as "leading practices" and that the CCGA Act has eliminated the need for and the acceptability of informal direction from government to Crown corporations.

Having said that, on issues like the roles and responsibilities record and MPI's annual business plan, which require consultation and/or approval, there is opportunity for a fair bit of give-and-take between government and MPI's Board of Directors. We would not classify this kind of collaboration as constituting directions and instructions to government outside of the four mentioned documents.

Further, the Board of Directors may wish to encourage government to consult with it on mandate letters and letters of direction even though this is not required. In our opinion it would be in the best interests of MPI, the government and the public if government is informed by the technical expertise of MPI's executive team when the government is considering issuing a mandate letter or directive.

What is the Boards' responsibility (what are their options for responding) if they believe directions and instructions from government are beyond the government's jurisdiction?

Based on our comments above, you will see we have concluded that the government has fairly broad jurisdiction to issue directions and instructions. Further, the Lieutenant Governor in Council can give directions by virtue of its authority to make regulations.

Having said that, in our opinion, it would be beyond the jurisdiction of government to give directions and instructions that:

1. were not made public as required by section 9 of the CCGA Act, or

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2. pertained to a specific claim or specific contract which would not come within the definition of a "matter of policy" as that term is used in clause 13(1)(a)(i) of the CCGA Act.

In those cases, we would recommend MPI's Board of Directors commence any discussion with government by pointing out the government's obligation to make directions and instructions public under section 9 and section 13 of the CCGA Act and that there are limitations on the kinds of directions and instructions that can be given on specific claims or specific contracts as noted above.

Ultimately, the Board of Directors ought not to implement directions or instructions that are outside the jurisdiction of government.

We will expand this answer to include a fourth question as follows:

What is the Boards' responsibility (what are their options for responding) if they believe directions and instructions from government are not in the best interests of the corporation?

There may be situations where government will give directions or instructions to the Board of Directors that are within the jurisdiction of government, and therefore lawful, but are, in the view of the Board of Directors, not in the best interests of the corporation. It is not difficult to imagine how this could arise.

The Lieutenant Governor in Council is expected to act in the interests of all Manitobans. It is a matter solely within the jurisdiction of the Lieutenant Governor in Council to determine what is in the best interests of Manitobans. The Board of Directors has no role in regards to this issue. It is the duty and obligation of the Board of Directors to act in the best interests of the corporation. While the Lieutenant Governor in Council may have views on what is in the best interests of the corporation, ultimately, it is solely the responsibility of the Board of Directors to determine what is in the best interests of the corporation.

There will be situations where the best interests of the corporation do not align with the best interests of all Manitobans. The question, therefore, is what should the Board of Directors do if government issues directions or instructions to MPI that the Board of Directors concludes is not in the best interests of the corporation?

We want to make sure we are clear as to what we are referring to here. We are not talking about situations where a director may simply disagree with the policy direction from government. In most policy decisions there are a range of reasonable alternatives. In those cases, mere disagreement with the policy directive does not mean that the directive is not in

the best interests of the corporation. However, circumstances may arise with the Board of Directors concludes that a directive or instruction from government is clearly not in the best interests of the corporation.

As noted above, the Board of Directors has a statutory obligation under section 19 of the CCGA Act to act in the best interests of the corporation. Further, pursuant to section 22(2) of the CCGA Act, directors and officers of MPI are immune from liability only if they act "in good faith and without negligence". How can directors be acting "in good faith and without negligence" if they proceed with the course of action which they have determined not to be in the best interests of the corporation?

Our opinion as to how the Board of Directors ought to respond to directions or instructions from government that the board determines are not in the best interests of the corporation would depend upon the authority being relied upon by government to justify those directions or instructions. Based on our analysis, there are three ways in which the government could give instructions or directions to MPI. Firstly, the Lieutenant Governor in Council could deny approval for any proposed action which requires approval under the MPI Act. Secondly, Lieutenant Governor in Council could enact regulations either requiring or prohibiting a certain course of action. Finally, the government could issue directives or mandate letters requiring MPI to take a particular action.

In the first instance, the government is relying upon statutory authority in the MPI Act to approve an activity or to deny approval for that activity. As a matter of law, jurisdiction over that issue has been removed from the Board of Directors and conferred upon the Lieutenant Governor in Council. The Board of Directors must comply with the law and the issue of the best interests of the corporation is not a relevant consideration. The same analysis would apply with respect to regulations enacted by the Lieutenant Governor in Council. The legislation has conferred this jurisdiction on government and made it very clear that every regulation enacted by the Lieutenant Governor in Council has the force of law. Accordingly, if the government enacts a regulation the Board of Directors must act in accordance with that regulation.

However, if the directions or instructions are given to MPI in the form of a directive or mandate letter, the Board of Directors must, in our view, satisfy itself that implementing these directions or instructions is not be contrary to the best interests of the corporation. There is no provision in the CCGA Act which deems the Board of Directors to be acting in the best interests of the corporation when following a directive issued by government. Mandate letters and directives from government do not involve situations where jurisdiction has been removed from the Board of Directors and conferred upon the Lieutenant Governor in Council. Mandate letters and directives pertain to issues over which there is shared responsibility. To quote the government's own press release, the CCGA Act creates "an accountability-based governance model that would ensure coordinated management".

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Accordingly, the Board of Directors must proceed with great caution when implementing directives or instructions issued by government which it feels are not in the best interests of the corporation.

In such cases we would recommend that individual directors consult with their fellow directors to see if there is a consensus that any directive or instruction is not in the best interests of the corporation. If there is a consensus on this point the Board of Directors may collectively wish to:

1. Consult with representatives of government on the issue; and/or

2. Obtain legal advice either from the corporation's own lawyer or external counsel regarding the issue.[74]

If, after exhausting all options, the Board of Directors collectively determines that the directive from government conflicts with the board's obligation to act in the best interests of the corporation the Board of Directors may have no alternative but to refuse to implement the decision.

If an individual director concludes that a directive from government is contrary to the best interests of the corporation, that individual directors should, at a minimum, insist that his or her dissent is recorded in the minutes of the corporation. However, recording one's dissent in the minutes does not guarantee that the director will be immune from liability.[75] In some situations the director may have no alternative but to resign.

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[74] Generally directors may use reliance on professional advice as a defence to a claim for breach of duty to exercise care, skill and diligence

[75] Under section 22(2) of the CCGA Act, directors of MPI are not personally liable for any loss or damage suffered by any person by reason of anything done, caused, permitted or authorized to be done by them in good faith and without negligence. It may be difficult to argue that the director is acting in good faith and without negligence if they implementing a directive knowing that is not in the best interests of the corporation.

We hope our comments are of assistance to your board in dealing with this complex issue. Please do not hesitate to contact the writer if we can be of further assistance.

Yours truly,

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Per:

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