2.3 Creation of Crown Agencies and Borrowing without Authority

Introduction

Crown agencies are distinct legal entities in which Government holds ownership and control on behalf of the Province. As a result Government generally appoints the members of the board of directors, provides direction in the area of policy and, where necessary, provides operating funds to permit the agency to carry out its mandate. Ownership and support of Crown agencies represent a significant expenditure of public money and use of other resources on behalf of the Province. This public money is provided to Government through the approval of the Province's annual budget by the Legislature.

Crown agencies are generally created by the Legislature under some form of legislation to be an instrument for carrying out public policy on behalf of the Crown. This legislation generally provides authority and direction relating to the mandate, purpose, and responsibility of each entity.

On 16 December 2004, a *Transparency and Accountability Act* received Royal Assent. Pursuant to section 24 of the *Act*, it will come into force on a day to be proclaimed by the Lieutenant-Governor in Council. This *Act* provides direction relating to the creation of Crown agencies and borrowing by such entities.

Scope and Objectives

We reviewed the status of the various Crown agencies to determine under what authority they were created.

We reviewed the *Financial Administration Act* and other legislation to determine under what authority these Crown agencies borrow money.

We also reviewed the financial statements and other supporting information of the Crown agencies which were created under the *Corporations Act* to determine whether they had any debt due outside of the government reporting entity at the most recent financial statement date.

Conclusions

Creation of Crown Agencies

Of the 82 Crown agencies which existed at 31 March 2004, 15 were created under the *Corporations Act* rather than by legislation enacted by the Legislature. If there is to be appropriate legislative control over the creation and operation of Crown agencies and if they are to be held accountable to the House of Assembly, then all Crown agencies should be created under the authority of the Legislature. An act of the Legislature would outline the mandate of a Crown agency and also state its purpose, authority and responsibility. In this way all Members of the House of Assembly would be aware of newly created Crown agencies.

2.3 Creation of Crown Agencies and Borrowing without Authority

Although the *Transparency and Accountability Act* requires that the Lieutenant-Governor in Council must provide approval for the incorporation of a corporation (Crown agency) under the *Corporations Act*, this does not provide legislative control over the creation and operation of these corporations.

Borrowing without Legislative Authority

The most recent financial statements of the 15 Crown agencies created under the *Corporations Act* disclosed that 5 of these entities had a total of $174.7 million in outstanding debt due to entities outside of the government reporting entity. If the enabling legislation of an agency does not provide specific authority for it to borrow funds or if it has been created under the *Corporations Act*, then the Crown agency does not have the legislative authority to borrow. The *Financial Administration Act* prohibits the raising of money by way of loan without legislative authority. As a result, these entities contravened the *Financial Administration Act* by borrowing money without legislative authority.

The most recent financial statements of the 4 health and community services boards which were created under the *Health and Community Services Act* disclosed that 2 of these entities had a total of $983,000 in outstanding long-term debt to entities outside of the government reporting entity. The *Health and Community Services Act*, under which these entities were created, does not provide specific authority to borrow. The *Financial Administration Act* prohibits the raising of money by way of loan without legislative authority. As a result, these entities contravened the *Financial Administration Act* by borrowing money without legislative authority.

Although the *Transparency and Accountability Act* requires that the approval of the Minister of Finance be obtained before a public body (Crown agency) may borrow, this does not provide legislative borrowing authority to Crown agencies created under the *Corporations Act* or entities without borrowing powers in their legislation.

Findings and Recommendations

Creation of Crown Agencies

Crown agencies are generally created by the Legislature under some form of legislation to be an instrument for carrying out public policy on behalf of the Crown. In many cases these entities are created under their own legislation as in the case of Newfoundland and Labrador Hydro-Electric Corporation (Newfoundland and Labrador Hydro), Workplace Health, Safety and Compensation Commission, Newfoundland Liquor Corporation, and Newfoundland and Labrador Housing Corporation. In

other cases they are created under general legislation such as the *Hospitals Act* under which all hospitals in the Province are created. The legislation generally provides authority and direction relating to the mandate, purpose and responsibility of each entity.

The Legislature approves approximately $4 billion to fund the various programs proposed by Government through its annual budget. Much of this funding is then distributed to the various Crown agencies to carry out their programs. Therefore, it is important that Government and its entities report back to the House of Assembly on the use of any public money or other public resources which they have received. Because these entities are authorized to spend public money or use other public resources, it is important that they be created specifically by an act of the Legislature or under a blanket act such as the *Hospitals Act* or the *Schools Act.* In this way the Legislature can authorize the creation of Crown agencies, approve the specific governing provisions of their legislation and hold them accountable for their use of public money and other public resources.

We reviewed the status of the various Crown agencies to determine under what authority these entities were created. The authorities supporting the creation of the 82 Crown agencies which existed as at 31 March 2004 are presented in Figure 1.

Figure 1

Authority for Creation of Crown Agencies
31 March 2004

How the Crown Agency was Created	Number of Entities
Own separate legislation	36
Hospitals Act	11
Schools Act	11
Subsidiaries of Newfoundland and Labrador Hydro	4
Health and Community Services Act	4
Financial Administration Act	1
Crown Agencies Created under Legislation	**67**
Corporations Act	15
Total Crown Agencies	**82**

Source: Legislation and Entities' Financial Statements

2.3 Creation of Crown Agencies and Borrowing without Authority

Figure 1 shows that 15 Crown agencies have been created under the *Corporations Act*. These Crown agencies were created under the *Corporations Act* rather than by legislation enacted by the Legislature. If there is to be appropriate legislative control over the creation and operation of Crown agencies and if they are to be held accountable to the House of Assembly, then all Crown agencies should be created under the authority of the Legislature. An act of the Legislature would outline the mandate of a Crown agency and also state its purpose, authority and responsibility. In this way all Members of the House of Assembly would be aware of newly created Crown agencies.

On 16 December 2004, a *Transparency and Accountability Act* received Royal Assent. Pursuant to section 24 of the *Act*, it will come into force on a day to be proclaimed by the Lieutenant-Governor in Council. Although this *Act* requires that the Lieutenant-Governor in Council must provide approval for the incorporation of a corporation (Crown agency) under the *Corporations Act*, this does not provide legislative control over the creation and operation of these corporations.

Borrowing without Legislative Authority

In general, most Crown agencies are created under some form of legislation which establishes the mandate of a Crown agency and also states its purpose, authority and responsibility. Where a Crown agency has been created by legislation, the legislation usually provides direction as to procedures which the Crown agency must follow if it intends to borrow funds. If the enabling legislation does not provide specific authority for the Crown agency to borrow funds or if it has been created under the *Corporations Act*, then the Crown agency does not have the legislative authority to borrow. Section 37 of the *Financial Administration Act* states that; *"No money shall be raised by way of loan by the province except under this or some other Act of the Legislature."* and Section 52 of the *Act* states that *".... nothing in this Act authorizes an increase in the public debt without the express authority of the Legislature"*. In other words, government departments and Crown agencies cannot borrow money without the express authority of the Legislature.

2.3 Creation of Crown Agencies and Borrowing without Authority

Our review of the legislation under which the Crown agencies were created disclosed the following:

- of the 36 agencies created under their own separate legislation, 20 were granted authority to borrow and 16 agencies were not granted legislative authority to borrow. Of the 20 agencies which were granted legislative authority to borrow, 11 must receive prior approval of the Lieutenant-Governor in Council, 6 must receive prior approval of the minister and in 3 cases (one of which is no longer active) the agency may borrow on its own;

- in the case of the 15 agencies created under the *Corporations Act*, there was no provision or authority in legislation for the agencies to borrow funds;

- for the 11 agencies created under the *Hospitals Act*, the *Act* provides that they may borrow subject to the approval of the minister;

- for the 11 agencies created under the *Schools Act*, the *Act* provides that they may borrow subject to the prior written approval of the minister;

- the 4 subsidiaries of Newfoundland and Labrador Hydro, which were created under the *Corporations Act*, are covered by the *Hydro Corporation Act* which permits Newfoundland and Labrador Hydro to borrow subject to the prior approval of the Lieutenant-Governor in Council;

- the 4 agencies created under the *Health and Community Services Act* have no legislative authority to borrow; and

- the Newfoundland Government Sinking Fund, created under the *Financial Administration Act* has not been granted legislative authority to borrow.

As indicated above, the 15 agencies which were created under the *Corporations Act* do not have the legislative authority to borrow. However, our review of the most recent financial statements and other supporting information relating to the 15 Crown agencies disclosed that 5 of these entities had borrowed a total of $174.7 million from entities outside of the government reporting entity. For 1 of the 5 agencies, Newvest Realty Corporation, the *Pensions Funding Act* was amened on 16 December 2004 to provide authority for borrowing.

2.3 Creation of Crown Agencies and Borrowing without Authority

Figure 2 provides a listing of Crown agencies created under the *Corporations Act* along with details relating to the $174.7 million in outstanding debt.

Figure 2

Crown Agencies Created under the *Corporations Act*
Total Borrowing Outside Government

Crown Agency	Year Created	Most Recent Year End	2003 Total Borrowing Outside Government $	2004 Total Borrowing Outside Government $
1. Bull Arm Site Corporation	1995	31 March 2004	0	0
2. Hotel Buildings Limited	1966	31 March 2004	0	0
3. Marble Mountain Development Corporation	1988	30 April 2004	2,198,217	1,685,269
4. Marble Mountain Management Corporation	1996	30 April 2004	0	0
5. Municipal Assessment Agency Inc.	1997	31 March 2004	0	0
6. Newfoundland and Labrador Education Investment Corporation	1998	31 March 2004	61,803,523	77,866,459
7. Newfoundland and Labrador Film Development Corporation	1997	31 March 2004	0	0
8. Newfoundland and Labrador Heritage Corporation	1999	31 March 2004	30,573,511	43,946,627
9. Newfoundland and Labrador Student Investment and Opportunity Corporation	2001	31 March 2004	0	0
10. Newfoundland Government Fund Limited	1995	31 December 2003	0	0
11. Newfoundland Hardwoods Limited	1950	31 March 2004	0	0
12. Newfoundland Ocean Enterprises Limited	1988	31 March 2004	5,250,000	5,450,500
13. Newvest Realty Limited	2001	31 December 2003	11,784,613	45,770,000
14. The Rooms Corporation	2001	31 March 2004	0	0
15. Special Celebrations Corporation of Newfoundland and Labrador, Inc.	1998	31 March 2004	0	0
Total			**111,609,864**	**174,718,855**

Source: Entities' Financial Statements

Furthermore, the 4 health and community services boards which were created under the *Health and Community Services Act* do not have the legislative authority to borrow. However, our review of the most recent financial statements and other supporting information relating to the 4 boards disclosed that 2 of these entities had borrowed a total of $983,000 from entities outside of the government reporting entity. The $983,000 was comprised of $915,000 in long-term debt for the St. John's Regional Health and Community Services Board and $68,000 in long-term debt for the Eastern Health and Community Services Board. As a result, these 2 entities borrowed without authority.

On 16 December 2004, a *Transparency and Accountability Act* received Royal Assent. Pursuant to section 24 of the *Act*, it will come into force on a day to be proclaimed by the Lieutenant-Governor in Council. Although this *Act* requires that the approval of the Minister of Finance be obtained before a public body (Crown agency) may borrow, this does not provide legislative borrowing authority to Crown agencies created under the *Corporations Act* or entities without borrowing powers in their legislation.

Recommendations

All Crown agencies should be created under the authority of the Legislature through separate specific legislation. This legislation should authorize the creation of these entities, and approve their mandate, purpose, authority and responsibility.

Crown agencies should not borrow without the express legislative authority of the Legislature.

Treasury Board Secretariat's and Department of Finance Response

By convention, it has been a long standing practice in this Province to occasionally incorporate an entity under the Corporations Act *(ie. 1950, 1987, 1991, etc.) to meet specific program or policy objectives. Although it would be desirable, it may not always be possible to enact specific legislation. Factors such as: the urgency for the entity to be created or the program implemented; and whether the House of Assembly is sitting would be considerations in such decisions.*

On a go forward basis, the Transparency and Accountability Act *contemplates the incorporation of an entity under the Corporations Act when deemed necessary and establishes in legislation the appropriate checks and balances on creating such entities. This includes full and timely public disclosure of the purpose, objects and powers of the entity as determined by the Lieutenant-Governor in Council. This process has been assented to by the Legislature and we believe strongly that this does*

provide for legislative control over the creation of these corporations in future.

Entities previously created under the Corporations Act *are created in their own right and their borrowings do not obligate the Crown unless provincial guarantees are provided under legislation. The financial institutions generally require a guarantee of the Province prior to lending to Crown corporations. Three of the five entities you have identified have guarantees in place by the Province pursuant to* The Loan and Guarantee Act, 1957. *A Schedule is prepared pursuant to that* Act *and tabled in the House in order to ratify these guarantees, and this Schedule clearly indicates the limits of guarantees provided by the Province. Regarding the other two entities, it is noted that the* Pensions Funding Act *was amended in 2004 and confirms the authority of Newvest Realty Limited to borrow for the purpose of investing in real estate. A grant was made in 2004 to Newfoundland Ocean Enterprises Limited to extinguish their guaranteed operating loan.*

Again, on a go forward basis, the Transparency and Accountability Act *contemplates the incorporation of an entity under the* Corporations Act, *when deemed necessary, and establishes in legislation that the Lieutenant-Governor in Council may determine the authority of the entity to borrow. In our view this will provide express legislative authority and a controlled process for borrowing for future entities established under the* Corporations Act. *In particular, there is a process for notification to the House of Assembly of approved borrowing.*

Regarding borrowings of the Health and Community Services Boards, we note that the Department of Health and Community Services has responded directly to you on this matter in their response to the Report "Monitoring Health and Community Services Boards".