

LEGAL STATUS OF A MUNICIPALITY AS A CORPORATION IN CANADIAN LAW

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The purpose of this article is to study the legal status of a municipality as a corporation in Canadian law.

The methods of theoretical analysis, along with legal methods, including formal-legal method are used to achieve this goal.

Results. In the article the author notes the difficulties in determining the legal nature of a municipal corporation in legal research. In literature, there exists an approach to the corresponding subject as both a public corporation, differentiating from the entrepreneurial form (J.Dillon, E.A. Suhanov), as well as the dual approach, which allows for the double, private-public character of its legal nature (I. Rogers).

As the author maintains, a municipal corporation in Canadian law can be defined as a form of a statutory corporation of a special kind, the legal personality of which, unlike one of the common law corporations, is limited by normative legal acts (statutes) of general or individual character.

Despite the existence of general theoretical framework of legal design of a municipal corporation, legislators of Canadian provinces differ in determination of its elements. Among the most common elements to be identified is the population, but in some cases the legislation also indicates the territory and local government bodies.

The form of a statutory corporation also presupposes the definition in the legislation of a clear goal (goals) for its creation. At the same time, as noted in the article, the tendency of the recent time is a departure from specifying concrete goals in favor of more general formulations.

Conclusions. This tendency, together with other separate measures to liberalize the legal status of municipal corporations (for example, giving municipalities the status of *natural person*), without reconsidering the fundamental foundations of their legal nature, indicates a virtual erosion of the approach to the status of a municipality as a statutory corporation, as well as the need for both theoretical and normative work in order to eliminate the corresponding defects and contradictions.

Keywords: *municipality, statutory corporation, legal status, legal design, experience of Canada.*

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1. Review of scientific works on the subject of research

Despite the interest to the institute of local self-government and analysis of its genesis as a political phenomenon, the legal nature and status of municipalities as corporations of a special type, very little attention has been paid to classical English literature. In 1659, the first work on the incorporation of cities in England was published [1], but it contained more practical comments than scientific analysis. Certain aspects of the law of municipal corporations were considered at a later time in the works of S. Kud, F. Meitland, V. Holdsworth [2], [3], [4, c.469-

490]. In North America, an attempt to describe the status of public corporations and the place among them municipal was undertaken in the writings of J. Dillon, R. Culi and J. Smith [5], [6], [7].

One of the first and most well-known North American legal definitions directly to the *municipal* corporation was given the American judge John Dillon in 1890 in "Comments on the Law of the municipal corporations". Dillon defines such a corporation as "a political and corporate entity created through the incorporation of the city's population in order to implement local government" [5, p.38].

The distinction of the municipal corporation from other types "consists in combining a number of features of the corporation and other communities of individuals" [7, p.9]. The municipal corporation is neither a corporation in its pure form, nor simply a city in conjunction with its population. It is a combination of land, infrastructure, people, as well as power, which holds these elements together in a special political subject.

It should be noted that Dillon counted municipal corporation to the *public* type. In the now classic case of Dartmouth College in the US, during which the status of the institution as a corporation had been disputed, the judge gave a detailed analysis of the concept: "*public corporations* aim the implementation of exclusively political function, even if their activities ensures the implementation of a number of private interests; strictly speaking, public corporations are those that are established by governments to ensure the implementation of public interests. If, on the basis of the creation of the corporation, private interest is at stake, even if it is formally established as an act of government, the corporation should be considered private, despite the breadth of its activities" [7, p.4].

American legal practice distinguishes actual municipal corporations and *quasi-corporations*. The latter features a smaller legal personality. However, there is no consensus on an exact distinction between the two classes. Quasi-corporations can be classified as municipalities that do not have an individual charter, and municipalities with special status, counties and quasi-municipal units (specialized districts). Sometimes all municipal corporations are classified as quasi-corporations, and ordinary corporations are created for entrepreneurial purposes [8, p.21-23]. This division is not typical for Canada.

Analyzing the specifics of public corporations, which in Anglo-Saxon law include municipalities, the Russian jurist E.A.Suhanov calls not to mix them with the business of public corporations (*publicly held business corporations*). The first, according to Professor Sukhanov, operate exclusively on the basis of special legislation, and no norms of corporate law apply to their status and relations with their participation [9].

The Canadian researcher J. Rogers, in turn, points to the dual nature of the modern municipal corporation. As Rogers notes, when a municipal corporation performs the function of a provincial agent in applying regional legislation on its territory, it acts in a public role. On the other hand, when it provides for the needs of the population through the adoption of municipal acts, it acts in its municipal aspect. In the latter case, it acts as a *private corporation*, the first - as a *division of the state*. However, although the municipality performs a specific set of public tasks, it is not part of the Crown. This is a legal entity, separated from the Crown in favor of the province [10, p.7].

It should be assumed that such a dual approach to the nature of the municipal corporation is not in the least related to the specifics of the Anglo-Saxon legal system, in which there is no clear distinction between public and private law [11, c.22]. This feature also allows, considering

the historical origins of the formation of municipal corporations, to consider them as a kind of legal hybrid of two principles [12, p.375, 379-380].

2. **Municipal corporations in the corporate system**

Modern Canadian municipal law is quite developed, and contains a large amount of statutory regulation of the organization and operation of municipal corporations.

The legal act of creating the corresponding subject was, therefore, his "incorporation". This mechanism was extended not only to municipal, but also to another types of corporations (in particular, trade ones). Corporation, by appropriately termed "common law corporations» (*common law corporations*) [10, c.37].

The legal features of the corporation of common law, which were formed before the deep theoretical elaboration and integrated regulation of this issue in the legislation included such as the law of continuous succession, the right of judicial protection and the possibility of prosecution on its own behalf, the right to acquire property, the right to corporate seal and acceptance Corporate acts [13, c.585].

Unlike statutory corporations, a corporation of the common law is not limited to the provisions of the charters or charters on the basis of which they were created, which gives them a de facto full juridical personality, equal in terms of the legal personality of an individual. Such corporations are not covered by the doctrine of *ultra vires* .

Only a small number of municipalities In Canada were created in this manner , while in British Columbia, until recently, the right to establish municipal corporations in the name of the Crown was granted to "Lieutenant Governor in Council" (i.e. the provincial government).

Statutory corporations, in turn, were originally created by the acts of the Parliament of England. Legislators were forced to detail all the elements of the corporation's status: the rights, duties, authorities of the bodies, restrictions on their activities and responsibilities.

Since the creation of each individual municipal corporation in this way was technically inconvenient, the legislative bodies of most of the subjects of Canada adopted the basic legislation on local self-government, which defines all the parameters of the status of municipal corporations depending on their type (i.e., the type of municipal formation), the incorporation mechanism and so on. The relevant basic statutes now define the bodies authorized by the legislature to create municipal corporations (these are usually provincial governments, specialized ministries or quasi-judicial bodies).

Despite the prevalence of authority delegated by basic acts (statutes) on local self-government of executive power to create municipal corporations, the mechanism of incorporation of municipalities by legislative bodies is used directly in provinces and territories. We are talking mainly about the major Canadian cities (Toronto, Montreal, Vancouver), whose status is determined in charters.

The courts of Canada repeatedly examined cases of violation of the law, including exceeding the authority to create municipal corporations. In this case, *de facto* Corporation was recognized as legally created on the basis of the corporate functions for extended periods. In such cases the legislator also often resorts to the adoption of the so-called corrective instruments (*curative acts*), or contributes to the statutes authorizing provision retroactively [10, c.72-73].

3. Elements of the legal design of the municipal corporation in Canadian law

Despite the existence of general theoretical developments of the legal design of the municipal corporation, the legislators of the Canadian provinces determine the elements that make up it differently.

In the province of Alberta, a formula was previously used according to which residents were included in the municipal corporation, as well as local authorities (in particular, the mayor, the council) [10, c.59]. In the modern version of the basic act on local self-government, such a formulation is lacking. However, Municipal Council Act declares municipalities Newfoundland and Labrador as corporations (Article 15, Part 2 of Article 40). This approach continues to exist, despite the fact that the courts of Canada previously recognized that the municipality council itself is not a corporation, and only represents its interests.

Court decisions can also find the argument that the territory of the municipality itself can't be incorporated. The latter distinguishes the position of the courts in relation to the design of the corporation in comparison with the classical works of North American authors. However, this doctrine is not imperative and universal for the Canadian legislator. For example, according to the Montreal Charter, the city itself is declared as a legal person (Article 2).

The most common formulation can be considered as the following: "the inhabitants of the municipality's corporate *entity*» (*the inhabitants of every municipality are incorporated as a body corporate*). Sometimes, instead of the term *inhabitant* ("resident") the term *resident*, indicating a permanent residence, is used. This is consistent with the electoral legislation of most provinces, according to which permanent residents of municipalities can vote in municipal elections.

Municipal corporations may also be referred as taxpayers, although this approach is less common in the legislation.

The Supreme Court of Canada, exploring the legal structure of the municipal corporation, came to the conclusion that there is no legal distinction between a corporation and its individual members.

From the refusal to legal distinction of individual members of the corporation, it could be concluded that the rights to manage and resolve all issues related to its activities are collective and are implemented in management forms determined by the statutes and municipal acts adopted on their basis.

This is indirectly confirmed by individual decisions of the courts, according to which the municipal council as a representative of the interests of members of the corporation, may not be delegated all the powers, but often leaving the inhabitants of itself. However, the idea of the municipal ownership of residents is expressed inconsistently, and in many legislative acts of the subjects of Canada is refuted by indicating the corporation itself and municipal authorities as its carriers.

Regional statutes also differently define the goals of creating municipal corporations. In seven subjects of the Statutes of Canada secured a list of relevant goals, in others legislator is limited to one formulation. For example, in the original version of the basic law on local self-government - the Municipal Act of the Municipal Act, adopted in 2001, the objectives of creating municipalities were defined as following ones (art. 2): a) the provision of services that the municipality deems necessary; B) management and preservation of the material fund of the

local community; (C) support and development of economic, social and environmental well-being; (D) ensuring implementation and participation in provincial programs and initiatives.

However, in 2006, changes were made to the Act, according to which the purpose of municipal management had been replaced by a more general formulation: "the exercise of control in relation to matters under their jurisdiction". In the opinion of specialists, this formulation reflects the great freedom of municipalities and expands the interpretation of their functions in the consideration of disputed issues of competence by courts [14, c.15]. At the same time, it should be noted that the chosen path leads to the actual "erosion" of the notion of local self-government and the limits of its implementation.

4. Giving municipalities the status of a *natural person*

However, in the last decade there were significant changes in the basic legislation on local self-government of provinces which are to empower local governments more authority, granting municipalities the status of a *natural person*.

In a direct translation from English the term *natural person* is "an individual". The concept of *natural person* refers to a person who has full legal personality and, therefore, has the right to act on their own to enjoy all the rights and to fulfill legal duties. Thus, a *natural person* can carry and entities with legal and partly coinciding with the personality of an individual [15], [16].

Under this status local authorities on behalf of the Corporation may acquire property, to enter into contractual commitments to hire staff and take other actions within its competence.

It should be emphasized that the new status does not extend the competence of local authorities in relation to local issues, but provides greater flexibility in the implementation of the relevant authority. At the same time, it continues to remain in limited powers, not related to the civil legal personality (legal regulation, taxes and charges, etc.).

This approach was first tried out in the legislation of the Province of Alberta, its example was followed by the province of Ontario (2001), Saskatchewan (2002) and British Columbia (2003). At the same time, provinces of Manitoba, Nova Scotia, Newfoundland and Labrador did not provide their municipalities the status of *natural name person*, although in general their legal status was changed in the direction of increasing rights and the expansion of regulatory and enforcement capabilities [17, c.180-185].

5. Conversion and abolition of municipal corporations

During the existence of the municipal corporation its legal status can change, including a change of type of municipality. In this case, the transformation of legal status does not mean the elimination of the corporate status of the municipality, but only the change of its content.

Grounds and procedure for the abolition of the municipal corporation are also regulated by law. In contrast to the common law corporation, municipal corporation as a kind of statute can not eliminate themselves independently, although local authorities can raise the appropriate question [10, c.74-76].

If the common law property of a commercial corporation after its liquidation proceeds to its founders and shall be terminated, the property will go to the municipal corporation, to the Crown and the legislature gets the right to dispose them. Obligations of the liquidated

corporations can also break off, however, as a rule, they are transferred to the successor corporation. However, it is noteworthy that the functions and powers of the abolished municipality does not pass *automatically* to the municipality or to another tier to another, to the territory of which will concern the territory of the abolished. This transition must be confirmed by law.

6. Conclusions

Thus, the *municipal corporation* in Canadian law is a form of statutory corporation a special type, which is limited to the legal personality of the normative legal acts (statutes) of the general or individual nature.

Summing up the review of the legal status of the legal entity it should be noted that despite its elaboration as a whole in Canadian law, it should be noted a number of problems, related primarily to the lack of a single, conceptual approach to it. This entails different interpretations of the legal structure of the municipal corporation, the purposes of its creation and so on.

It does not contribute to the solution of these problems and the fragmentation of legislation regulating the status of each individual corporate entity of the Canadian federation, as well as the specifics of Canadian judicial system, which allows to take into account not necessarily the decisions taken by the courts in other regions.

References

1. Shephard W. Of Corporations, Fraternities and Guilds or a Discourse, Wherein the Learning of the Law Touching Bodies-Politique is Unfolded. London, 1659.
2. Kyd S. A Treatise on the Law of Corporations. London, 1794.
3. Maitland F.W. Township and Borough. Cambridge, 1898.
4. Holdsworth W. A History of English Law. London, 1923.
5. Dillon J.F. Commentaries on the Law of Municipal Corporations. V.1. Boston, 1890.
6. Cooley R.W. Handbook of the Law of Municipal Corporations. St. Paul, 1914.
7. Smith J.W. The Modern Law of Municipal Corporations. V.1. Indianapolis, 1903.
8. Pervyshov E.A. Understanding and Development of Local Government Bodies' Status in the USA: Historical and Theoretical Aspect: Abstract of Cand. in Law Thesis, Stavropol, 2001. (In Russ.).
9. Suhanov E.A. Comparative Corporate Law. Moscow, Statut, 2014. (In Russ.).
10. Rogers I. The Law of Canadian Municipal Corporations. Scarborough, 1992.
11. Loughlin M. Legality and Locality: The Role of Law in Central-Local Government Relations. Oxford: Clarendon Press, 1996. 427 p.
12. Williams J.C. The Invention of the Municipal Corporation: A Case Study in Legal Change//The American University Law Review. 1985. Vol. 34. P. 369-438.
13. Stubbs W. The Constitutional History of England in its Origin and Development. Vol. 3. Oxford: Clarendon Press, 1874. 676 p.
14. Mascarini J., Williams C.J. Ontario Municipal Act and Commentary. Markham, 2012.
15. Greshnikov I.P. The Concept of Subject in Private Law: the British Approach. *Pravovedenie*, 2006, no. 3, p. 63-76. (In Russ.).
16. Jastrebov O.A. Conceptual Approaches to Understanding a Legal Entity in Legal Science. URL: <http://justicemaker.ru/view-article.php?id=4&art=969> (In Russ.).
17. Tindal R., Tindal S. Local Government in Canada, 7th ed. Toronto: Nelson, 2009. 447 p.

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