

## **Why municipal reforms are necessary – part 1: permissive legislation**

*Municipal reform has become an important topic of discussion in New Brunswick. Since the Alward Government announced imminent changes to the way municipalities operate, discussions on municipal legislation, finances and structures have filled the halls of academia, provincial government offices and coffee shops. Most agree that change is required, but there is no consensus on the specifics. The devil will be in the details.*

*Thus far, the debate has been framed by the Province, notably its Finn report published in the Fall of 2008 and shelved immediately. Municipal associations and academics chimed in, but to no avail: no action was taken. Action is now imminent: the Province will soon consult citizens. Since municipal governance is complex and the problems associated with our municipal system are ignored or misunderstood, we propose four articles to highlight concrete examples of what is wrong with municipal governance in New Brunswick, how the issues affect average citizens, and how we could resolve them.*

*In this first part, we look at the legislation guiding municipal operations. In the next article, we will look at municipal finances. The third part will tackle municipal structures. These three pillars of municipal governance are presented separately, but they are interdependent. A fourth article will tie up the three strings and review the Finn report.*

### **Municipal legislation**

Unlike the federal and provincial governments, municipalities are not a level of government. They are institutions of the Province. The Province could operate without municipalities, but this would prove ineffective. First, there is a perception among citizens that elected municipal councils form a 'level of government'. After centuries of local governance, eliminating municipalities would stir significant controversy. Second, the provincial bureaucracy in Fredericton would be unable to handle thousands of requests daily from hundreds of local employees throughout the province to approve decisions requiring immediate attention. Third, provincial bureaucracies are effective with standard one-size-fits-all decisions, but one issue in Shippagan will need a different decision than a similar issue in Sussex. Finally, communities matter: although most local services are standardized, including police, fire and building inspection, local wishes and realities can affect the number and level of services. The Minister of Local Government cannot effectively set the number and level of services for the 105 municipalities and 266 local service districts (LSDs) to the satisfaction of all citizens, but local councils can.

So, to maintain effective local services and democracy, the Province lets communities establish a municipal corporation and, to ensure its appropriate oversight of these institutions, it enacts legislation and regulations. In New Brunswick, more than 20 provincial statutes and regulations frame municipal operations. The most important legislation is the *Municipalities Act*. When it was adopted, in 1966, it crowned New

Brunswick as Canada's most innovative province. But over the past 45 years, the other provinces caught up and surpassed us while our *Municipalities Act* became outdated.

Our Act states that a municipality must provide police services and may provide 'any service deemed by the council to be expedient for the peace, order, and good government of the municipality, and for promoting the health, safety, and welfare of the inhabitants of the municipality including [...] drainage; fire protection; garbage and refuse collection and disposal; sewerage; sidewalks; roads and streets; regulation of traffic; street lighting; water; parks; community services; tourist promotion and development; industrial development and promotion; urban redevelopment and urban renewal; housing; land assembly; recreational and sports facilities and programs; first aid and ambulance services; and the sale of gas.'

At first glance, the list seems permissive. But a list of what municipalities 'may' do is one thing; the fact they 'may not' do other things is another. Once Prince Edward Island updates its legislation, probably this year, ours will be the only legislation that dictates that municipalities can only act in matters prescribed by the Province.

A few examples will illustrate the fallacy of the restrictive approach in our day and age. New Brunswick municipalities cannot regulate hunting and trapping within town limits. A couple of men recently hunted – legally – within Moncton's Centennial Park, located in the middle of the city. The City intends to rectify the anomaly by prohibiting hunting on its own land, but it cannot stop hunters from shooting a moose found wandering last spring in undeveloped lands in the nearby Pinehurst area. Provincial regulations simply require that the shotgun be fired at least 100 meters from a building. Municipalities cannot ban uranium exploration or fracking for natural gas. Moncton was therefore powerless to protect the Turtle Creek watershed that supplies water to 100,000 urban residents. Municipalities cannot prohibit the use of jake brakes or adult entertainment clubs. Finally, as the City of Moncton recently discovered in its laudable efforts to enhance local democracy, municipalities cannot level the electoral playing field by, among other things, providing tax credits for campaign contributions, forcing candidates to disclose contributions or limiting candidate spending. Only the Province can enhance local democracy, but it refuses to make significant efforts to that end.

Cosmetic pesticides provide another example. Shediac, Caraquet, Sackville and St. Andrews banned pesticide use for cosmetic purposes within their respective towns, even if they did not have the authority to do so. Since no one contested the by-laws, the Province was forced to intervene to prevent a legal vacuum. It banned 200 different pesticide products and recognized Integrated Pesticides Management as the law of the land, thereby making the progressive efforts of the four more aggressive towns virtually meaningless. Had the *Municipalities Act* been permissive, the debates would have been resolved in town halls – taking into account the concerns of the local community.

Another example: unlike most municipalities in North America, ours cannot charge an accommodation levy to collect revenues from tourists to market our province to seduce more tourists. Local hoteliers can establish a voluntary levy, but the amounts collected and invested may jeopardize the levy without a by-law. The Cities Association of New Brunswick has repeatedly asked the Province to enable municipalities to adopt a by-law to establish local accommodation levies. This circular incoherence is ineffective.

An argument can be made that the Province should keep control because it can better tackle those issues that spill over municipal boundaries. For instance, Rothesay could ban cosmetic pesticides but pesticides sprayed 20 meters away in Quispamsis could hover into Rothesay and negate the ban. One could also argue that municipalities should not be able to tamper with democracy because councilors could be tempted to rig the system in their favour. These arguments do not hold water.

Indeed, many municipalities in other parts of the country can intervene almost as they wish, making ours appear powerless in comparison. Beginning in the mid-90s, provincial governments elsewhere renewed their municipal legislation. Most of the new Acts included a reinterpretation of what municipalities could and could not do. Rather than listing specific items that municipalities could tackle, the new acts often described these functions under broad categories, and most granted general powers to municipalities. Some permissive legislation even allow a municipality to have a say on and pass by-laws affecting most provincial matters within their own boundaries.

Alberta's Municipal Government Act provides a good example. It states that the purposes of a municipality are to provide good government, to develop and maintain safe and viable communities, and to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality. The Act also gives municipalities 'natural person powers': it gives broad authority to councils and respects their right to govern municipalities in whatever way the councils deem appropriate, within the jurisdiction they are given. Finally, the Act seeks to enhance the ability of councils to respond to present and future issues in their municipalities. This is a far cry from our antiquated and restrictive *Municipalities Act*.

The only rational argument heard against permissive legislation is that it will allow our elected municipal councilors to act on a variety of issues that will increase costs and property taxes. The Province must thus 'control' our municipal councils. That argument does not hold water. First, the Province is the last place one should look to for guidance in regards to overspending and tax increases. Indeed, municipalities cannot incur deficits, while the Province's debt is over \$750M. Second, if councilors dare invest significant tax dollars to tackle unimportant issues, disgruntled citizens can get rid of them at the subsequent municipal elections. Local citizens have no power over the minister and provincial civil servants presently in charge of 'controlling' municipalities.

On matters of provincial importance or when solutions are contentious, the Province could still show leadership and provide direction. As it stands, the Province intercedes, albeit in a heavy-handed and standard manner, and enforces a negotiated solution that may be universal across New Brunswick. Also, if permissive legislation fails to improve provincial and local services, the Province can always modify the *Municipalities Act*.

New Brunswick needs permissive legislation to give our municipal councils modern governance tools. These tools are essential in an age shaped by significant and fast-paced change where our provincial legislature cannot foresee all future local issues. More importantly, the Province cannot effectively prioritize the issues on behalf of the citizens in their own community. Finally, uniform provincial restrictive legislation cannot solve all local problems and should not prevent locally elected councils from resolving pressing local issues. New Brunswickers deserve better. It is time to replace the paternalistic and restrictive *Municipalities Act* with modern permissive legislation.

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