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# Representation without Taxation? A Historical Review of Newfoundland and Labrador's Municipal System and Quasi-Municipal Structures

Gregory French
*Mills Pittman & Twyne*



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# Representation without Taxation? A Historical Review of Newfoundland and Labrador's Municipal System and Quasi-Municipal Structures

*Newfoundland and Labrador is unique among Canadian provinces in its municipal-level governmental structures, and in particular, its substantial lack thereof. The province does not have a system of counties or an operating form of regional government. Many areas of the province operate without a formal municipal government and avoid property taxation by operating on a limited fee-for-service model of local government, or in some cases a total lack of sub-provincial government. Tens of thousands of residents live within this tax-free model today. This paper explores how this anomalous situation came to be, the issues it creates in modern society and how these issues are dealt with in practice.*

*Terre-Neuve-et-Labrador est unique parmi les provinces canadiennes en ce qui concerne les structures gouvernementales au niveau municipal, et en particulier leur absence quasi totale. La province ne dispose pas d'un système de comtés ou d'une forme opérationnelle de gouvernement régional. De nombreuses régions de la province fonctionnent sans administration municipale officielle et évitent l'impôt foncier en appliquant un modèle limité de paiement à l'acte de l'administration locale ou, dans certains cas, une absence totale d'administration infraprovinciale. Des dizaines de milliers d'habitants vivent aujourd'hui dans le cadre de ce modèle d'exonération fiscale. Dans présent article, nous explorons la genèse de cette situation anormale, les problèmes qu'elle engendre dans la société moderne et la manière dont ces problèmes sont traités dans la pratique.*

* BA (Hons), LLB, Partner at Mills Pittman & Twyne, Clarenville, NL.

## I. *Evolution of municipal government in Newfoundland and Labrador*

### 1. *Settlement of Newfoundland and Labrador: A general history*

Settlement of Newfoundland and Labrador began in unusual circumstances. Unique among colonies in the New World, the British Crown did not encourage settlement in Newfoundland and Labrador.[1] The value of Newfoundland and Labrador was not as a permanent colony, but as a transitory station for British fishing fleets prosecuting the

1. See discussion in Gregory French, *Property Interests in Resettled Communities* (2015) 66 UNB LJ 210 at 211-214 [French (2015)].

fisheries on the Grand Banks.[2] The settlement of coastal Newfoundland would run counter to the interests of the British West Country mercantile class, who did not want a permanent population established adjacent to the Grand Banks. Such a population would compete with the British fleets and would have advantageous access to the Grand Banks by their proximity thereto.[3] Limited formal efforts to settle areas of the island of Newfoundland occurred in the early 17th century, but were ultimately abandoned.[4] Apart from these efforts, the formal position of the British Crown was to discourage settlement and to ensure that Newfoundland legally remained nothing more than a fishing outpost. This intention was manifested in legislation beginning in 1634 with the Western Charter, and ultimately in what became known as "King William's Act" in 1698.[5] The effect of this legislation was to formally prohibit the ownership of coastal lands in the Colony of Newfoundland, although the legislation was vaguely worded regarding the extent of the prohibition.[6] Notwithstanding the formal prohibition, settlement of the island of Newfoundland had begun since its initial discovery.[7] Settlement began initially in order to stake out favourable harbours for English fishing fleets, but developed into a permanent resident population, as people remained behind after the transitory fishery was complete in order to preserve spots for the coming year.[8] The result of this settlement pattern was a small population, widely dispersed along the coastline, in communities consisting of a population measuring into the dozens at most. These settlements became known as "outports."[9]

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2. Kevin Major, *As Near as To Heaven By Sea: A History of Newfoundland and Labrador* (Toronto: Penguin Press, 2001) at 68-71. See also discussion in DW Prowse, *A History of Newfoundland From The English, Colonial and Foreign Records* (London: Eyre and Spottiswoode, 1896) at 228 and 319 [Prowse].
3. Prowse, *supra* note 2 at 190-195.
4. *Ibid* at 91-153 canvasses in detail the colonization efforts of John Guy, David Kirke and Lord Baltimore in the early 17th century, pursuant to royal charters.
5. The Western Charter of 1634, issued by King Charles I is reprinted in full on the Government of Newfoundland and Labrador Heritage website: <heritage.nf.ca> [perma.cc/WTU5-KZAH]. This would be legislated by "King William's Act," aka the "Statute of William": *An Act to Encourage the Trade to Newfoundland, 1698* (UK), Imp Act 10 & 11 Will III, c 25, with the particular restrictive provisions at sections 5-6.
6. See discussion of the 17th century statutes by the Supreme Court of Newfoundland in *The King v. Cuddihy* (1831), 2 Nfld LR 8 at 21: "That portion, therefore, of the land which was not clothed with the character of "Ships-rooms," either under the Acts of William or of George the Third [which barred private ownership by settlers], must have been, comparatively, very small indeed."
7. Prowse, *supra* note 2 at 59, 99-100.
8. *Ibid* at 59-61.
9. French (2015), *supra* note 1, at 211-214.

In the outports, land title and ownership was given little attention by the resident population from the outset.[10] There are three principal reasons for this neglect. Firstly, the prohibitions imposed by King William's Act meant that all land claims were vulnerable to the caprices of the transitory enforcers known as the "fishing admirals," who would readily destroy the illegal settlements.[11] Secondly, with a small population dispersed over a wide area, there was no shortage of available land and thus no significant concern toward ownership or recordkeeping. Coastal Newfoundland and Labrador is well known to be rocky and inhospitable, and of no great utility on its own. The focus of settlement was on access to the ocean, not on developing the land. Finally, the general poverty of the outports meant that there was no financial incentive to pursue land title.[12] There were no banks, there were no significant real estate transactions in impoverished settlements, and minimal efforts by governmental authorities to provide any sort of services to the public. This lack of concern over issues of land ownership also meant that no efforts were made to organize communities or engage in local government for the management and preservation of property rights. The public focus remained toward the sea, rather than toward the land. Unlike settlers in other British colonies, who settled with a desire for extensive holdings for agricultural purposes, there was no such impetus in Newfoundland's settlement. The primary concerns of Newfoundland's settlers were proximity to fishing grounds, a good harbour, and absence of competing fishermen.[13] Settlement along the rocky, barren shoreline would have led to less concern about the scope of land acquired, since the land would have been of limited utility.

It would take centuries of continued growth of Newfoundland's population before the reality of settlement could not be ignored. By 1792, a permanent civil court system was established.[14] It would take another twenty years for the prohibitions on land ownership to be lifted.[15] Finally, in 1832, Newfoundland would be granted its own legislature and be capable of self governance.[16]

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10. *Ibid* at 213-214.
11. Prowse, *supra* note 2, at 190-197. Prowse's colourful description of the courts of the Fishing Admirals is well known to students of Newfoundland history: see Prowse at 226-228.
12. French (2015), *supra* note 1, at 213-214.
13. John C Crosbie, *Local Government in Newfoundland* (1956) 22:3 Can J of Econs and Political Science 332 at 333 [Crosbie].
14. *An Act for Establishing Courts of Judicature in the Island of Newfoundland and the Islands Adjacent* (1792) 32 Geo III, c 46.
15. *Saint Johns, Newfoundland Act, 1811* (UK) 51 Geo III c 45, lifted restrictions in St. John's. All restrictions over land ownership were lifted by the *Newfoundland Fisheries Act,* 1824 (UK), 5 Geo IV, c 51.
16. The recognized date of reception of Newfoundland is July 26th, 1832: *Buyer's Furniture Ltd v*

Newfoundland's settlement history could only be described as anarchic. Rather than adopt an approach as occurred in other colonies with controlled grants and establishment of permanent local institutions, settlement began illegally, and government institutions followed long after. The colonial legislature was faced with a unique problem, having to construct the infrastructure of civil society long after the establishment of a resident population, as a sort of "civilization" of a wild frontier.

2. *Governmental institutions in the Colonial Era: The proto-municipal system*

At the outset of Newfoundland's colonial government, municipal-level delegated government was nonexistent. Formal development of rural Newfoundland by government began with the appointment of "Surveyors of Highways" by "Grand Juries of the several Circuit or District Courts," under the *Act to Regulate the Making and Repairing of Roads and Highways in this Island*.[17] The Surveyor, appointed by grand jury, was empowered to compel the owners of carts, teams and trucks to furnish animals and manpower toward labour on establishing highways.[18] This Act was amended the following year to broaden the liability for labour to the occupiers of all dwelling houses, and to appoint a "Board of Commissioners" to carry out the role formerly occupied by the "Surveyors of Highways."[19] For the "Central District" (being the St. John's area), this Board of Commissioners was appointed by the Governor; and for all other districts, Justices of the Peace were instructed to form a Board of Commissioners.[20]

These unelected "Boards of Commissioners" constituted the extent of delegated authority from the colonial legislature. Even the limited appointment authority delegated out to Justices of the Peace would be recalled to the Governor in Council by 1872.[21] The Central District Board of Commissioners would later vest into standalone legislation establishing a "Board of Works" for the St. John's settlement.[22] All other authority remained vested in the House of Assembly, and what would otherwise be municipal-level regulations were managed at a national level.[23]

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*Barney's Sales and Transport Ltd* (1983), 43 Nfld & PEIR 158 (CA).

17. 1834, 4 Wm IV, c 6, s 1.
18. *Ibid*, ss 2-5.
19. *An Act to Amend an Act Passed in the Second Session of the Parliament of this Colony, Entitled "An Act to Regulate the making and repairing of Roads and Highways in this Island"*(1835), 5 Wm IV, c 5.
20. *Ibid*, ss 4 and 5.
21. CSN 1872, c 75, s 1.
22. CSN, 1872, c 59.
23. See CSN 1872, c 79. Also see WJS Donnelly, *Report on Crown Lands by Surveyor General For*

Once settlement became actively encouraged by the colonial government in the mid-19th century, local government was still not contemplated. The colonial government briefly experimented with a "Township System" of surveys intended to offer land to settlers to cultivate the interior of Newfoundland, though this system was limited to surveying land and not to establishing a municipal form of government.[24] The legislative background to the Township plan included legislation to encourage sawmills and mining, and to alleviate poverty by encouraging settlement in promising agricultural areas.[25] The Township model of surveying and planning failed, in no small part due to the lack of organization of existing rural settlements and lack of control exercised over land development in the absence of local government.[26] While the central government in St. John's attempted to establish its authority in these areas, the lack of governmental presence on the ground meant that such developments operated in relative anarchy. Minimal involvement of the St. John's-based government made formal control untenable. Ultimately, this limited attempt at control of rural development was abandoned abruptly by the end of 1887.[27]

It would not be until 1888 that the first proper municipality in Newfoundland came into existence. The capital of St. John's was constituted as a city with authority delegated to a Municipal Council.[28] The creation of a local municipal council for St. John's was controversial. Under the "national control" model existing at the time, control over the St. John's area remained vested in the governing Protestant elite which controlled the colonial government, rather than the primarily Catholic urban population of St. John's.[29] However, the growth of the St. John's area meant that municipal affairs were increasingly occupying the time

*1879*, in Journal of the House of Assembly 1880 (St. John's: King's Printer, 1880) at 507-508, wherein the Surveyor General of Newfoundland reports on his efforts to establish boundaries for widening streets in St. John's and in Carbonear. Such matters would otherwise be within the purview of a municipal government, if such existed at the time.

24. Dr Alec McEwen, *The Township System of Surveys in Newfoundland* (June 1983), 37:2. The Canadian Surveyor 39 at 41-42, 45.

25. *Crown Lands (Amendment) Act* (1860), 23 Vic, c 3; *An Act for the Reduction of Pauperism by encouraging Agriculture and more efficiently carrying into operation the Provisions of the Act 23 Vic, Cap 3* (1866), 29 Vic, Cap 5.

26. McEwen, *supra* note 25 at 44-47, 49.

27. *Ibid* at 47-48.

28. *Municipal Act, 1888*, 51 Vic, c 5.

29. Melvin Baker, *The Politics of Municipal Reform in St. John's, Newfoundland, 1888–1892*, (1976) 2 Urban History Rev 12 at 12 [Baker].

and revenue of the national government, much to the consternation of legislators elected from rural districts.[30]

Upon establishing a partially elected municipal council in St. John's, the delegation of authority to rural areas would come next on the national agenda.[31] In 1890, the House of Assembly passed the *Local Government Act*.[32] This Act repealed the "Boards of Commissioners" established under the predecessor legislation effective January 1st, 1891.[33] Local affairs would now be managed by elected "Divisional Boards," which were vested with limited authority dealing with roads, sewers, sanitary conditions, lighting, and abating nuisances.[34] This power expanded slightly in the late 1890s, with the delegation of relief for the poor and authority to pass bylaws.[35] The Divisional Boards were defined by the existing national electoral districts, later permitting the Governor in Council to prescribe sectional divisions.[36]

The 1890 Act was replaced in 1915 by *An Act Respecting the Administration of Local Affairs*.[37] Under the new Act, the nomenclature had reverted to local councils being defined as "Road Boards" once more.[38] Notwithstanding the change of name, the Road Boards had the same authority as had been vested by the 1890 Act, and this power expanded yet again to include management of public wharves and breakwaters, and the keeping of dogs, as well as authority to divert watercourses.[39] However, establishment of local councils required a petition by the residents of the area, rather than unilateral establishment by the Governor in Council.[40]

"Local affairs" legislation through the 19th century and early 20th century did not create towns or other community-based governments. Road Boards were constituted on a geographic model akin to a county-style of regional government, based on large electoral boundaries, as opposed to individual community-level boards. The powers delegated to these boards

30. *Ibid*, at 15-16.
31. The *Municipal Act 1888*, (*supra* note 28) s 2, established a municipal council consisting of two members appointed by the Governor, and five members elected by the "rate-payers of St. John's."
32. *Local Government Act, 1890*, 53 Vic, c 5 [*1890 Act*].
33. *Ibid* at s 17.
34. *Ibid* at s 22.
35. (1898) 61 Vic, c 31, s 27, 28 and 43.
36. *1890 Act*, *supra* note 32, s 4; amended by (1899), 62 & 63 Vic, c 15, s 1.
37. (1915), 6 Geo V, Cap XVIII [*1915 Act*].
38. *Ibid* at s 1.
39. *Ibid* at s 31, 32 and 45.
40. *Ibid* at s 3; See also *1890 Act*, s 4 (*supra* note 32) which applied to electoral districts or divisions of a district, on proclamation of the governor.

were minimal. Significantly, local boards were funded by direct grant from the national government and had no taxation authority.[41]

The reluctance to allow taxation authority to these rural boards may stem from two sources. Rural poverty may have made taxation unpopular and ultimately futile with regard to the resident population.[42] Property tax in particular was a matter of concern for impoverished rural areas, where residents had little else but their land, and were concerned of losing that to taxation authorities.[43] Creating such an obligation would have meant local resistance to municipal governance, resulting in a self-defeating program. Secondly, as occurred in the establishment of the St. John's municipal government, the national government expressed concern about the potential profligacy of local government.[44] The landowning merchant class, who controlled the national government, would assuredly have been reluctant to have their rural landholdings taxed by a local population, who could control the rates of taxation and expenditures. This was an express concern with the incorporation of the St. John's municipal government, that property owners would bear the brunt of local taxation.[45] For St. John's-based merchants operating stores and fish processing facilities in rural Newfoundland, there would be no desire to subject themselves to taxation by the rural population.

### 3. *The introduction of municipal systems in the 20th Century*

It would not be until 1933 that broad, modern-style municipal legislation would be enacted.[46] The *Local Government Act 1933* established for the first time "Towns," "Villages" and "Divisions."[47] These municipal structures were to be funded by a combination of government grant and taxation.[48] With the taxation authority came much broader control,

41. See *Of the Administration of Local Affairs in Outport Districts*, CSN 1916, c 50, s 50; *Local Government Act 1890*, *supra* note 32, s 45.

42. See discussion in French (2015), *supra* note 2 at 211-214 regarding rural conditions and poverty.

43. *Royal Commission on Municipal Government in Newfoundland and Labrador* (St. John's, NL: Government of Newfoundland, Sept 1974) at 29-33 ("Whalen Report"); See also Crosbie, *supra* note 13 at 333-334. Note that while such concerns are expressed in the literature, paradoxically, much of rural Newfoundland and Labrador remained unconcerned with matters of land title, which produced problems still being addressed to the present day: See Gregory French, *The Abolition of Adverse Possession of Crown Lands in Newfoundland and Labrador* (2020), 71 UNBLJ 227 at 229-231. One could surmise that imposition of a local tax burden was seen as more of a threat than esoteric legal title issues in which an otherwise absentee national/provincial government took little active interest.

44. Baker, *supra* note 29 at 16-17.

45. *Ibid* at 16.

46. *Local Government Act 1933*, 23 & 24 Geo V, Cap. 29 [*1933 Act*].

47. *Ibid* at s 2 and 3. "Towns" had a minimum population of 1,000; "Villages" and "Divisions" had a minimum population of 500. The distinction between "Villages" and "Divisions" is not clear in the statute.

48. *Ibid* at s 34-46.

including, in addition to the powers previously existing under the 1915 Act, authority for matters more familiar to modern municipalities, such as building inspection, fire wardens, hospitals, tourism and attracting industry.[49] One should note that the 1933 Act took a step backward on democratic reform: the Governor-in-Council was empowered to create Towns, Villages and Divisions, with an onus on the electors in an area to petition for elections, otherwise the Governor would continue to appoint the municipal council.[50]

The new structure of local government was only months old when examined in a Royal Commission Report by Lord Amulree investigating the conditions and financial means of the Colony of Newfoundland. His final Royal Commission Report was published in November 1933.[51] At the time of publication of this Report, there had been no opportunity to establish municipal government outside of St. John's under the 1933 Act, which had only passed four months prior.[52] Lord Amulree was critical of the absence of local government in Newfoundland, remarking as follows:

> The country was thus exposed to the evils of paternalism in its most extreme form. The people, instead of being trained to independence and self-reliance, became increasingly dependent on those who were placed in authority; instead of being trained to think of the national interest, they were encouraged to think only of the interests of their own district. […] The [Member of the House of Assembly] was caught in his own meshes. As there was no local Government, he was expected to fulfil the functions of Mayor and of every department of public authority. In addition, he was the guardian of local interest, the counsellor and friend of every voter in the constituency and their mouthpiece in the Legislature of the country. Finally, under the peculiar system of administration adopted in Newfoundland, he was not only the liaison between the people and the Government but the channel through which the money voted by the Legislature for public purposes within his constituency was allocated and spent.[53]

Amulree's derisive and patrician comments about rural dependence may give some insight as to why rural areas were given taxation power at that time, when it had been consistently rejected for decades prior.[54]

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49. *Ibid* at s 59-77.
50. *Ibid* at ss 2, 5 and 7.
51. *Newfoundland Royal Commission 1933 Report* (London: His Majesty's Stationery Office, November 1933) [*Amulree Report*].
52. The *1933 Act*, *supra* note 46, passed on 7 July 1933. See Statutes of Newfoundland 1933, at 130.
53. *Amulree Report*, *supra* note 51 at 220.
54. *Amulree Report*, *supra* note 51, at 617. ("Freedom from any requirement to make a direct contribution to the expenses of administration produces in the average man an indifference to waste and extravagance […] The formation of municipal Governments in the more important outports, under

Though the Amulree Report was released four months after enactment of the 1933 Act, his Report's comments had likely come to be shared by those in government before the Report's publication.[55] Newfoundland's precarious financial situation by 1933 also likely played a significant role. The colonial government of Frederick Alderdice announced in November 1932 that Newfoundland would default on its sovereign debt, which had risen to almost $100 million by that time.[56] In exchange for temporary debt payment relief from the United Kingdom and Canada, Lord Amulree's Royal Commission of Inquiry was established to investigate Newfoundland's finances and future prospects.[57] Amulree's Royal Warrant for the Commission of Inquiry was granted on February 17th, 1933, and his investigation of the Colony's financial situation was undertaken between March and July of that year.[58] The opportunity to both delegate rural expenses and raise new revenue sources was surely on the mind of the national legislature by 1933, particularly so by the end of Amulree's investigation. It is likely no coincidence that longstanding reluctance to grant expansive local taxation powers was suddenly overcome while the Colony was under examination by its creditors.[59]

The *Local Government Act* was supplemented by the *Local Administration Act* in 1937, which allowed for the establishment of a "Local Government Area" for any area outside of a municipality without restriction on area or population.[60] By 1937, Newfoundland was no longer a democracy, and was governed by an appointed Commission of Government, a situation which had arisen from the Amulree Report's conclusions, which recommended balancing Newfoundland's finances via outside governance.[61] Perhaps responding to the Amulree Report's criticism of outport areas escaping a tax burden but relying on national funding, the *Local Administration Act* required property taxes to be paid

proper control and with proper safeguards, would do much to induce a sense of responsibility in those called upon to contribute toward the expenses of such governments.")

55. See Amulree Report, *supra* note 51 at 220.

56. Patrick O'Flaherty, *Lost Country: The Rise and Fall of Newfoundland, 1843–1933* (St. John's, NL: Long Beach Press, 2005) at 396. The total national debt by 1933 was $96,603,000, an amount "wholly beyond the country's capacity" in the view of Amulree: O'Flaherty at 404-405.

57. Heritage, "The Newfoundland Royal Commission, 1933 (The Amulree Commission), online (website): <heritage.nf.ca> [perma.cc/G7AG-YS9T].

58. Amulree Report, *supra* note 51 at 1-12.

59. *Ibid* at 155, where Amulree notes: "We have already indicated that, in their anxiety to restore the finances of the island, they have gone to extreme lengths in imposing increased taxation and enforcing reductions of expenditure."

60. *Local Administration Act*, SN 1937, c 6, s 2 [*1937 Act*].

61. O'Flaherty, *supra* note 56 at 405-408. The Commission of Government was sworn into office in February 1934.

by landowners if approved by the local council.[62] Local Government Areas were expanded to areas where land surrounded or included an airport, and areas within 15 miles of a United States military base.[63] One may theorize that this too was an effort at revenue generation in newly-established and growing settlements where labourers moved in search of lucrative work outside of the fishery.[64]

The municipal reforms of the 1930s do not appear to have been popular and did not encourage the constitution of local municipal-level governments. One could cynically conclude that the purpose behind the municipal reforms of the 1930s was purely financial, as an effort to foist obligations onto local populations from an otherwise insolvent national government. The lack of public uptake on the newly available municipal powers implies that the public view of these developments was equally cynical. It was only by continued government pressure and encouragement by grant money from the national government that any areas began to incorporate.[65] By 1949, only 15 towns and three rural districts had been established, all being established after 1942.[66]

### 4. *The Provincial Era: Municipal structures post-Confederation*

In 1949, the *1933 Act* and the *1937 Act* were replaced by a single statute: the *Local Government Act 1949*.[67] The *1949 Act* effectively consolidated

62. *1937 Act*, *supra* note 60 at s 30(1); See also the *1933 Act*, *supra* note 46, which permitted local government to impose taxes if taxes were approved by the Board of Control (at s 44-45); the *1937 Act* allowed council the decision to impose tax at a rate to be fixed by the Governor. Note that the *Whalen Report*, supra note 43 at 30-31 states that no such taxation was carried out.

63. *Local Administration (Amendment) Act*, SN 1938, No 19. Based upon the timing of passage, this could only relate to the international airport at Gander, on which construction began in 1937. The Gander area had no established community nearby apart from the workers' settlement; *Local Administration (Military Areas) Act*, SN 1941, No 10. This would have related to areas around American basis constructed under the US-UK Lend-Lease Agreement at Happy Valley-Goose Bay, Argentia and Stephenville. The "Lend-Lease Agreement" was signed on March 27th, 1941, and this Act (passed on June 3rd, 1941) specifically refers to the areas developed under that Agreement (at s 1).

64. See *Amulree Report*, *supra* note 51 at 542, and French (2015), *supra* note 1 at 212-214, regarding the effectively cashless nature of rural communities operating on merchant credit systems.

65. Melvin Baker & Janet Miller Pitt, "*The Third Tier: A Historical Overview of the Development of Local Government in Newfoundland and Labrador*," originally published in the Programme of the 38th Annual Convention of the Newfoundland and Labrador Federation of Municipalities (Oct 7–9, 1988) at 39-43 [Baker and Pitt].

66. Schedule "A" to the *Local Government Act*, SN 1949, c 52 records all municipalities continued under that Act [*1949 Act*].

67. *1949 Act*, *Ibid.* The stated intention of the legislation in the House of Assembly was to facilitate municipal incorporation by regulation rather than by separate legislation for ease of incorporation, and to consolidate the legislation of the prior statutory scheme. See *Proceedings of the House of Assembly 1949*, (8 August 1949) at 309-312 (Finance Minister Herbert W Quinton (L-Burgeo-Lapoile)) [Hansard]. One posits a possible connection between the new legislation and Confederation in the same year, as Confederation increased the budgetary capacity of the provincial government due to federal funding, which funds could be directed to improving local conditions in underdeveloped rural

the existing powers under the earlier Acts, and created three classes of municipality: "Towns," "Rural Districts" and "Local Government Areas."[68] Strangely, the Act does not distinguish between these three classes or define them.[69] The *1949 Act* appears to empower the Lieutenant-Governor in Council to unilaterally declare such municipalities, although the discussion in the House of Assembly indicates that the intention was facilitation of incorporation rather than compulsion.[70] Where the former system requires a special Act of the House of Assembly, and thus a sitting of the House, the new regime permitted incorporation by proclamation. "Local Government Areas" were replaced with "Local Improvement Districts" in 1956, which appear to be the same structure under a different name.[71]

In spite of the scope of the 1949 Act, in 1952 yet another level of delegated municipal-level authority was created by the *Community Councils Act*.[72] This Act permitted residents of an area which was not in an existing municipality to organize as a council with limited authority over water, sewer, waste disposal and roads.[73] "Community Councils" also had limited taxation authority, which did not include property taxation, but did include "community service fees" "water and sewer rates" and "business tax."[74] The necessity of the class of "Community Council" is unclear, given the broad scope of the *1949 Act* and the class of "Local Government Area" first defined in the *1937 Act*. Hansard records discussing the purposes behind the *1952 Act* indicate that this was intended as "an intermediate

communities. If there is any such connection with the spoils of Confederation, it was unspoken in the House of Assembly.

68. *Ibid* at s 2(c).

69. One can infer a continuity of the *1933* and *1937 Acts* (*supra* notes 46 and 60) in the *1949 Act*, particularly since "Towns" and "Rural Districts" were continued under the new *Act*. If so, one presumes a population threshold of 1,000 for a "Town," 500 for a "Rural District," and anything else to constitute a "Local Government Area." See ss 2-3 of the *1933 Act*, and s 2 of the *1937 Act*. Crosbie, *supra* note 13 at 340, notes that "Rural Districts" were agglomerations of two or more contiguous communities, effectively amalgamating them in all but name under a single municipal government.

70. *1949 Act*, *supra* note 66, s 3. See Hansard, supra note 67 at 312 ("We want to be very frank, sir, about the situation, and to say that the government desires to encourage local government and not compel it.")

71. *Local Government Act*, SN 1956, No 52, s 47. Crosbie, *supra* note 13 at 341, notes that "Local Improvement Districts" were established by the Lieutenant-Governor-in-Council, if deemed necessary and desirable due to an anticipated influx of people. Crosbie's article notes three local improvement districts in existence as of 1956: Gander (then a townsite built in connection with the airport); Happy Valley (then a townsite built in connection with the Goose Bay airbase); and La Scie (a community designated as a "growth centre" as part of the provincial government's nascent resettlement scheme). This plan anticipated government taking charge of the area in an expectant role, with a turnover to a municipal government after three years: Crosbie at 341.

72. SN 1952, No 46.

73. *Ibid* at s 3.

74. *Ibid* at ss 29-31.

step between local roads committees and town councils" for areas with small populations that would otherwise be overwhelmed by the costs of operating a full municipal council.[75] The "Community Council" idea was premised on "the old New England town meeting," rather than an election, and would run a much narrower government with limited authority and a mandate only to provide services.[76] In particular, Community Councils would be unable to assess property tax, which appears to be a significant distinguishing factor between the contemplated "Local Government Area" under the *1949 Act* and the new community council structure.[77] Given the history of municipal development since the *1933 Act*, one can surmise this new structure was intended to overcome reluctance to establish municipal councils and services due to a potential tax burden or "regulation creep," where municipalities could extend beyond a limited purpose into other aspects of control.[78] Given the broad scope of the *1949 Act*, it is unclear how the population-based justification for the *Community Councils Act* makes sense. "Local Government Areas" were established under the *1937 Act*, seemingly to address the minimum population restrictions of the *1933 Act*.[79] "Local Government Areas" were continued in the *1949 Act* and remained available as a municipal structure. However, the provincial government's desire to delegate authority would require local uptake to administer. If taxation were the sticking point to such uptake, the Community Council framework makes sense.

The limited "Community Council" framework was supplemented by an even more skeletal framework of "Road Boards."[80] This structure was available to areas with a minimum population of 50 voters, that was not otherwise a municipality, Local Improvement District or Community

75. Proceedings of the House of Assembly During the First Session of the Thirtieth General Assembly of Newfoundland 1952, (24 April 1952) at 528 (Mr. Philip Forsey).
76. *Ibid.*
77. This is premised on the presumption that a "Local Government Area" was continued as a concept from the 1937 Act (*supra* note 60), where it was defined as a general catch-all for non-municipal areas. The *1949 Act* (*supra* note 66) provides no definition of a "Local Government Area."
78. At least three settlements: Botwood, Catalina and Port Union, are known to have refused incorporation. Bonavista was initially incorporated, but wound up after a short period due to unpopularity. Bay De Verde was incorporated in 1950, apparently to obtain funding for a water system. When the Council attempted to impose further regulations, a popular revolt led to the abandonment of the Council. See Crosbie, *supra* note 13 at 340.
79. See *supra* notes 46 and 60.
80. *Local Road Boards Act*, SN 1956, No 41.

Council.[81] It provided for nothing more than road and drainage management, and afforded no power to collect taxes or fees.[82]

The complicated framework of municipal government nevertheless drew increasing support from the public, as more communities began to opt in to these municipal structures. Municipal incorporation was encouraged in no small part due to available funding from the provincial and federal governments since Confederation in 1949. The number of towns and cities in Newfoundland and Labrador doubled between 1949 and 1955.[83] This figure had grown again by 1966, now including 62 towns and 74 communities.[84]

In 1972, the Newfoundland and Labrador government created a Royal Commission on Municipal Government, chaired by Professor Hugh Whalen of Memorial University, which became known as the Whalen Commission. The commission was created out of concern for the rapid growth of municipal government in Newfoundland and Labrador, and the financial viability of the multitude of municipalities.[85]

The Whalen Commission's Report, released in September 1974, was critical of the province's municipal structure, finding that "the Newfoundland municipal system is neither properly designed nor adequately staffed to achieve satisfactory performance levels in relation to either the service or efficiency criteria."[86] The Whalen Report noted that Newfoundland and Labrador had more municipal units than most other provinces (notably having twice as many municipal units as British Columbia, which had four times the population), the vast majority of which a population under one thousand.[87] The smallest municipal units in Newfoundland and Labrador included Local Improvement Districts with no permanent residents, and local government Communities and Rural Districts with populations in the single digits.[88] Approximately 20

81. *Ibid*, s 2(b). Crosbie, *supra* note 13 at 338, notes that in the 1956 session of the House of Assembly, the government announced plans discontinue the road board scheme and assume provincial control of roads. While this appears to have happened, as road boards no longer operate in the province, the enabling legislation continues to exist today: RSNL 1990, c L-25. There are no regulations passed under the current *Local Road Boards Act*.

82. *Ibid* at s 5(2) and (3).

83. Baker & Pitt, *supra* note 65, indicate that Newfoundland and Labrador now had two cities and 40 towns by 1955. Crosbie, *supra* note 13 at 345, counts two cities, 37 towns and rural districts, and 15 community councils by the same year.

84. Baker and Pitt, *supra* note 65.

85. *Encyclopedia of Newfoundland and Labrador*, Vol 2 (St. John's: Newfoundland Book Publishers (1967) Limited, 1984) at 657-658.

86. *Whalen Report,* supra note 43 at 394.

87. *Ibid* at 3. Crosbie, *supra* note 13 at 341, counted only 100 settlements out of 1,300 in total in Newfoundland and Labrador as having a population over 1,000, as of 1956.

88. *Whalen Report*, *supra* note 43 at 57-58.

per cent of the province's population resided outside of any municipal structure whatsoever.[89] Among the conclusions of the Whalen Report were the consolidation of existing municipal legislation, abolition of quasi-municipal structures, and conversion of quasi-municipal structures to traditional towns.[90]

In 1979, the province adopted many of the findings of the Whalen Report and made significant changes to its municipal structures, consolidating most prior statutes into a single act: the *Municipalities Act*.[91] The new *Act* provided for "Towns," "Communities," "Regions" and "Local Service Districts." All prior Towns, Local Improvement Districts and Rural Districts were continued as "Towns" under the new *Act*, with the usual powers of Towns.[92] Communities under the *Community Councils Act* were continued as such.[93] The newly-created concept of "Regions" adopts the Whalen Report's recommendation for regionalized service delivery at a supra-municipal level of government.[94] Regional councils were also empowered to create "Local Service Districts," further indicating an intention to create an intermediate level of government between the province and municipalities.[95] Local Service Districts could be created for the management of limited services, including water, sewerage, fire protection, waste collection and lighting, on a fee-for-service basis.[96] However, they are expressly deemed not to be municipalities.[97]

The *1979 Act* was continued in the 1990 consolidation, and was replaced on the passage of a new *Municipalities Act* in 1999.[98] The only significant change until 1999 was the elimination of the "Community" model in 1996, and converting all Communities to Towns.[99] Since 1997, the only classifications of municipal-level governments are "Towns,"

89. *Ibid* at 58. The Report cites a figure of 104,890 people living outside of municipalities. At the time of the *Whalen Report*, this would have amounted to almost 20 per cent of the population of Newfoundland and Labrador.
90. *Ibid* at 394 and 398.
91. SN 1979, c 33.
92. *Ibid* at s 7(1). The scope of power of Towns is contained in sections 3-250 of the *Act*.
93. *Ibid* at s 254(1).
94. *Ibid* at ss 304-306.
95. *Ibid* at s 307.
96. *Ibid* at ss 635-642.
97. *Ibid* at s 631; see SNL 1999, c M-24, s 389 for current provision.
98. RSNL 1990, c M-23; SNL 1999, c M-24 [*1999 Act*].
99. *Municipalities (Amendment) Act*, SN 1996, c 25, s 11 repeals all provisions of the "communities" section of the Act. All communities were converted to towns by SN 1996, c 25, s 4 and 27, effective 1 January 1997.

"Regions" and "Local Service Districts."[100] The availability of "Road Boards" continues to the present day, although without any utility.[101]

The present municipal system in Newfoundland and Labrador thus allows for one supra-municipal level of government (Regions); two municipal forms of government (Towns established under the *Municipalities Act*, and cities established by their own statutes); and two service-based forms of quasi-municipal government that operate with limited authority for local service delivery (Local Service Districts and Road Boards).[102] The Local Service District corporate model is of particular focus for this paper, as there are no Road Boards in existence today.

5. *Reviewing historical circumstances on unincorporated areas*

A review of the foregoing history shows the gaps through which many of the unincorporated areas of Newfoundland and Labrador fell. Settlement began without any external control and without any contemplation of establishing local government. Small communities with small populations, unconcerned with controlling development, existed for centuries before the establishment of any form of permanent government in Newfoundland and Labrador. When the option to assume formal local control first arose, it carried almost exclusively a burden of labour and of taxation. The benefits of common enterprise were easily realized in communities of small size, operating almost as anarchic communes. The formation of a properly constituted local government, exercising control over the community and imposing rules, regulations and taxes, was undesirable for residents in communities where people handled matters on their own, and could rely on the colonial or provincial governments to provide what the local population could not or would not. Without local government, any undertaking of significance, such as roads or wharves or breakwaters, would be foisted upward to the provincial or colonial government to underwrite and complete.[103] Existing mechanisms to provide local services

100. *1999 Act*, supra note 98 at s 3-25 (Towns); s 26-52 (Regions); s 387-403 (Local Service Districts).
101. See *supra* notes 80 and 81.
102. To date, only one region has been incorporated: see *Fogo Island Region Order*, NLR 9/96. The regional government was superseded by the amalgamation of the towns and settlements of Fogo Island into the unitary Town of Fogo Island in 2011 by the *Town of Fogo Island Order*, NLR 3/11; *City of Corner Brook Act*, RSNL 1990, c C-15 (established by SN 1955, No 35); *City of Mount Pearl Act*, RSNL 1990, c C-16 (established by SN 1988, c 35); and *City of St. John's Act*, RSNL 1990, c C-17 (established by *Municipal Act, 1888*, 51 Vic, c 5).
103. The Journals of the House of Assembly in the 19th century are replete with petitions from localities seeking grants for roads, breakwaters and wharves and other local undertakings. Such local matters fell to the national House of Assembly in the absence of local government equipped to handle same. One must consider that these communities would only have small populations, and likely would not have the means to provide such services in any event: see *supra* note 42.

were largely funded at the national/provincial level, rather than funded locally. While the colonial government was vested with a power to simply declare a local municipal government for many years, including appointing a council to govern, it seldom occurred without the express desire of the population to be incorporated. Where it did, those projects tended to end in failure until the 1950s.

The end result of a such an opt-in system is that many small communities simply did not opt in and faced no compulsion or pressure to do so. Those smaller communities that did not opt into a formal municipal incorporation could avail of the limited "Community Council" or "Local Service District" models, which provided benefits with a minimum of formal responsibility, and importantly an absence of property taxation. These "quasi-municipal areas" bear superficial resemblance to municipalities in that they were governed by local councils, but fall well short of the powers of municipalities. These unique structures allowed residents to avoid the strictures of municipal control and taxation. However, the legislative withholding of such powers means that the exercise of certain controls and services must rest elsewhere. In today's modern integrated society, far removed from the free-for-all individualistic development of the past, it falls to the residents of the community to assume enforcement of their own rights, or for a higher level of government to assume them.

## II. *Quasi-municipal areas in modern practice*

As of 2022, approximately 9.5 per cent of the population of Newfoundland and Labrador live outside of incorporated towns and cities.[104] The majority of these people live in Local Service Districts and are assessed only user levies based on the provision of services, rather than property and business taxes. As of the date of writing, Newfoundland and Labrador has 180 Local Service Districts.[105] Local Service Districts are established on an opt-in basis, in the same manner as such communities were established under

104. Government of Newfoundland and Labrador, *Joint Working Group on Regionalization: Report and Recommendations* (St. John's: Government of Newfoundland and Labrador, February 2022). The Report (at 9) states that approximately 6.5 per cent of the population of Newfoundland and Labrador live in local service districts, and an additional 3 per cent live outside of any form of municipal control. Applying the 2021 census population of Newfoundland and Labrador at 510,550 (Statistics Canada, "2021 Census of Canada"(9 February 2022), online: <stats.gov.nl.ca> [perma.cc/5QMS-46EB]) this amounts to over 33,000 people living in local service districts and over 15,000 people living outside of any form of local government.

105. Regulations are passed for the incorporation of each local service district, pursuant to the *Municipalities Act, 1999*, supra note 98 at s 387; See *Working Group on Regionalization Report*, *ibid* at 9. A total of 180 incorporating regulations remain in effect as of the date of writing, though the provincial government's Joint Working Group on Regionalization reports 172 active local service districts.

previous legislation, requiring a community petition to the Minister.[106] A smaller proportion of the population living outside of Towns and Cities live in areas which are not even subject to a Local Service District, and operate without any form of municipal-level control, service or fee payment whatsoever.[107]

Local Service Districts are limited to the provision of only minimal services, as the governing committee may choose: water, sewer, waste management, establishing a volunteer fire department, street lighting, and regulation of dogs.[108] Few, if any, Local Service Districts exercise the full scope of permitted authority, in large part due to the cost to provide such services to a small population which may be dispersed over a wide area. The vast majority of these Local Service Districts have populations under 1000 and would find the installation of full water and sewer systems completely cost prohibitive, particularly in the absence of property tax authority.[109] None of these services would be available for those outside of Local Service Districts. The below examples of service delivery and control indicate how these areas are managed in practice today.

Management of such areas in practice is a unique hybrid model of provincial-level control and service provision, with a libertarian form of collective problem solving for purely local matters affecting the community.

1. *Service delivery: Waste management*

Waste management represents the most significant consolidation of power, in both municipalities and unincorporated areas, covering the island of Newfoundland. Waste management has been "uploaded" from local municipal-level authorities to "Regional Service Boards" established by the province under the *Regional Service Boards Act*.[110] Instead of a patchwork of municipal authorities and Local Service Districts exercising waste management control, broadly-defined Regional Service Boards assume control of same on behalf of defined geographic areas. While these Regional Service Boards established under the *Regional Service Boards Act* are theoretically capable of exercising greater authority by statute, in practice the regionalized power has been limited to waste collection.[111]

106. *Local Service District Regulations*, NLR 747/96, ss 3-6.
107. Approximately 3 per cent of the Newfoundland and Labrador population as living outside of any level of local government, which amounts to just over 15,000 people. See *supra* note 104.
108. *Supra* note 106 at Part II ss 44-64.
109. The report of the Joint Working Group on Regionalization, *supra* note 104 at 9, states that only two local service districts have a population of more than 1,000.
110. SNL 2012, c R-8.1.
111. The regulations under the *Regional Service Board Act* establishes eight Regional Service

The effect of the Regional Service Boards is to encompass the whole of the island of Newfoundland for waste management purposes.[112] Regional Service Boards are established by provincial order at the option of the Lieutenant-Governor in Council.[113] This is in contrast to Local Service Districts and municipalities, which require the opting in of the local population for creation. Regional Service Boards thus allow the provincial government to impose the responsibility for certain specified services onto segments of the population who otherwise could avoid such responsibility by not opting into a municipal government structure. Cost recovery is available to Regional Service Boards on a fee-for-service basis.[114] This amounts to an indirect provincial control of such matters, not unlike the delegation of service delivery to the colonial-era "Road Boards."

2. *Service delivery: Roadworks*

One should note that neither the Regional Service Boards nor Local Service Districts assume responsibility for roadworks. The result of this is a hybrid of provincial responsibility for roads in such non-municipal areas, and a patchwork of private roads. Roads in municipalities, except for provincial highways, are vested in the Municipal council.[115] "Highways," with a broad and expansive definition including "public roads now used as public roads" and "all roads dedicated by the owners of the land to public use," which are not vested in a municipal authority, are vested in the provincial Crown.[116] The result of this is that main roads through such unincorporated communities and Local Service Districts are assumed by the provincial government as public highways, and residents assume responsibility for clearing and maintaining other side roads, which may or may not constitute "public roads."[117] The absence of local control means that the provincial

Boards. All Service Boards are empowered to deal with waste management: see *Baie Verte Peninsula-Green Bay Regional Service Board Regulations*, NLR 60/18; *Burin Peninsula Regional Service Board Regulations,* NLR 73/13; *Central Regional Service Board Regulations*, NLR 7/13; *Coast of Bays Regional Service Board Regulations*, NLR 90/15; *Discovery Regional Service Board Regulations*, NLR 75/13; *Eastern Regional Service Board Regulations*, NLR 8/13; *Northern Peninsula regional Service Board Regulations*, NLR 9/13; and *Western Regional Service Board Regulations*, NLR 24/13. Only the Northern Peninsula, Eastern, Central and Western Boards have powers extending beyond the limited issue of waste management.

112. No Regional Service Board has been established for Labrador.

113. *Supra* note 110 at s. 3.

114. *Ibid* at s 24(1).

115. *1999 Act*, *supra* note 98 at s 163.

116. *Works, Services and Transportation Act*, SNL 1995, c W-12, s 5.

117. *Ibid*. The expansive definition of "highways" in the *Works, Services and Transportation Act* would seem to take in any roadway established in an unincorporated community which could be used by the public, if the public is not prohibited from travelling on it. Most such roads not already established by government for public access will be established by residents on private land for accessing private property and arguably constitute "private roads," even though there may be no

Department of Works and Infrastructure funds the management of such main roads at provincial expense. While Road Boards remain available at law, there is no current uptake (or imposition) of this available power.[118] Given the lack of revenue generation power in the *Local Road Boards Act*, this may not be surprising.

3. *Governing the ungoverned: Enforcement of collective rights without a municipal system*

The absence of centralized authority at the local level has established a unique local solution to addressing private nuisances and disputes which could otherwise be mediated by a local government.

In the past, it has fallen to the national (now provincial) government to preserve such rights, though this is dependent on the national/provincial authorities to take such action.[119] In the absence of the assumption of enforcement by the Crown, the alternative route for the public to enforce the right is the use of relator actions to enforce a common right. This is discussed at some length in the unreported decision of *Aucoin v Gallant*.[120] In *Aucoin*, the plaintiff sued the defendant for constructing a building partly onto a public road and obstructing the plaintiff's access to his land at Stephenville.[121] The concern of the Court was with the plaintiff's standing to maintain an action:

> If the building had run up to the plaintiff's boundary so as to cut off completely his access to the highway from any part of the land, there would undoubtedly be an infringement of a private right enjoyed by the plaintiff in respect of which he would be able to maintain an action. […] The question for consideration in this case is whether there has been an infringement of a private right of the plaintiff in respect of his land, for if the narrowing of the highway causes inconvenience to all persons using it but no particular damage or inconvenience is sustained by the plaintiff beyond that which was suffered by the general public, the plaintiff cannot maintain an action.[122]

Chief Justice Walsh ultimately ruled for the plaintiff and awarded $250 in damages for the obstruction for the roadway, which Walsh CJN held

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explicit restriction on use. Such roads occupy an awkward middle ground of responsibility, and are often treated in practice as common easements or driveways. The absence of government or local authority in these areas creates this confusing problem, which can result in roads falling into a service delivery gap.

118. See *supra* note 81.
119. See, eg, *Surveyor General v Kean* (1892), 7 Nfld LR 683.
120. 1950 No. 219 (NL Supreme Court), decision of Walsh CJN dated 24 January 1951 [Aucoin].
121. Stephenville was not incorporated as a Town until 1952.
122. Aucoin, *supra* note 120.

had diminished the value of the plaintiff's land. Regarding the actual restoration of the roadway, he stated in conclusion:

> It is possible that this substantial trespass upon a public highway may receive the attention of the Attorney General, as custodian of the rights of the public, but in awarding damages I cannot take this into consideration as he may decide on examination of the circumstances that no action should be taken.[123]

The approach recommended by Walsh CJN was taken up in *Attorney General of Newfoundland (Ex Rel Haggett) v Moore*.[124] In *Haggett*, the plaintiff had proceeded under designation from the Attorney General by relator action against the defendant for obstruction of what was alleged to be a public road. However, the plaintiff was unsuccessful in proving the road at issue to have been a public road. *Haggett* demonstrates part of the confusion and peril of pursuing a purported collective right publicly, and the effect of the absence of a municipal government to maintain control over public rights.

Relator actions appear to have been seldom used, although the authority and the direction to do so exists in Newfoundland and Labrador's jurisprudence.[125] Those areas remaining outside of municipal government must rely on such private enforcement action to preserve public rights. In practice, such rights are enforced as individual actions, as the individual most directly impacted by such intrusion on his or her rights is the one most motivated to bring an action. Thus, while the right may be of interest to the public at large, it is the private individual who becomes the enforcer of the public's right, albeit indirectly, as the action arises for their own individual gain.

This "private public action" approach has recently led to an unusual development: a quasi-class action approach to enforcement. Such a case arises where a matter of apparent community interest is brought for enforcement without a clear private interest. The quasi-class action aspect arises where the right is enforced by the collective population, as a community, versus an individual acting in a personal capacity. In communities where there is no municipal level of government, the

123. *Ibid*.
124. *Attorney General of Newfoundland (Ex Rel. Haggett) v Moore*, 1951 No 17 (NL Supreme Court), decision of Dunfield J., dated 19 October 1951 [Haggett].
125. One should note this continues to be the law today: *Lewvest Ltd v City of St. John's* (1983), 42 Nfld & PEIR 181 (CA); *Hynes v Hynes* (1989), 79 Nfld & PEIR 86 (CA); *George v Newfoundland and Labrador*, 2016 NLCA 24 at paras 111-115; *Newhook v Colliers (Town)*, 2020 NLSC 88 at paras 33-34.

collective population would carry out civil enforcement action in a quasi-class action, by members of the public on behalf of the public at large.

Such an example of this unusual situation is the recent Supreme Court of Newfoundland and Labrador decision in *Residents of Old Bonaventure v Trinity Historical Society Inc*.[126] Old Bonaventure is not incorporated as a municipality or a Local Service District and exists without any local government. At issue in the *Old Bonaventure* case was the return of a historic church to the residents of the community when the defendant Historical Society no longer required it. Title to the church had been vested in the Diocesan Synod of Newfoundland, which conveyed the church to the Historical Society (a body corporate) in 2009. The Historical Society allegedly promised to return the church to the community once the Historical Society no longer required it.[127] By 2018, the Historical Society sought to divest itself of the church, but no residents of Old Bonaventure came forward to assume ownership of same.[128] There being no community body to hold title, such as a town council, the church was put up for sale. When a property developer submitted an offer to purchase the church, a resident of Old Bonaventure filed a *lis pendens* to assert a legal dispute relating to the community's claim to the church.

Against this backdrop, Handrigan J had to address only the limited question of the validity of the *lis pendens* as a cloud on title and found the residents' *lis pendens* constituted a valid registration against title. However, the litigation underlying this decision raises practical questions about common enforcement of the community right. How would a community, as an unincorporated entity without legal existence, hold title to this church, if the litigation were successful? If the intention was to constitute a holding company or other organization, why was this not done as a precursor to the litigation? By what authority did the so-called "representative plaintiff" truly represent the common will of the community?[129] One may even rightly question how the litigation is even validly constituted, if the plaintiff is an amorphous non-legal entity or a collection of unspecified "plaintiffs."[130] The low threshold for determination of the *lis pendens*

126. 2021 NLSC 23 [*Old Bonaventure*].
127. *Ibid* at para 1.
128. *Ibid* at paras 21-23.
129. Old Bonaventure had a total of 33 adult residents at the time of the litigation, of whom 29 had signed a petition in favour of the action. See *Old Bonaventure*, *ibid* at paras 11-13. *Quaere* the impact of the litigation as apparently structured on the four non-participant residents, or of the 29 petition signatories, i.e. could a cost award be levied against every resident of the community, or against the individuals who merely signed a petition?
130. One should consider the implication of the *Class Actions Act*, SNL 2001, c C-18.1, for the exercise of "community" rights in the absence of a proper municipal body. Establishing a

issue allowed these questions to be set aside for another day.[131] However the case is instructive for the potential pitfalls and procedural issues that can arise for enforcement of a common right in this manner. Pending a final decision in the *Old Bonaventure* case, it remains unclear how such rights will be exercised on the facts of that case. The existence of a proper municipal entity would avoid this problem entirely.

These solutions of relator actions and class actions create a serious issue for collective enforcement of common rights. The public would benefit from the exercise of such rights, hence why such claims are brought in the first place. However, the absence of an existing structure for pursuing the collective benefit of enforcement leaves such enforcement in private hands. This creates a free rider problem, where the cost may be unequally borne to gain a collective benefit. It is in each individual's personal best interest to take no action, and let someone else pursue the action, since someone may pursue the action on their own. If the individual plaintiff is successful, the benefit will be shared by the community: in *Old Bonaventure*, the community could, in some form, obtain title to the church, at the expense of the individual litigants as some amorphous class. In *Haggett* and *Aucoin*, the obstructions to the roads at issue would be lifted and public access restored if the private actions were successful. If unsuccessful, only the individual plaintiff would bear the costs of the loss.

Given the infrequent reliance on such actions, one may question how pressing of an issue such collective problems are. However, in any society, collective problems are predictable and foreseeable, as a consequence of individuals living in close proximity with shared common areas. Such communities find themselves unprepared to deal with issues that may arise, except on an *ad hoc* basis. The extent to which this presents a problem is practically unknowable, since it is only those examples where action is taken that produce litigation. Problem situations where a wrongdoer is unchallenged in his actions will not be discoverable by research. In such cases, the failure to act because of an absence of enforcement may result in communities falling into a Hobbesian state of nature. Enforcement of rights in this context is not uniform; it is reliant on the means of those adversely affected to pursue enforcement action themselves. In such communities,

"representative plaintiff" under that Act requires court certification of the proceeding and Court approval of the representative plaintiff. It is unclear if any of this occurred in *Old Bonaventure*, as the reported decision deals only with a narrow interlocutory issue.

131. A *lis pendens* only constitutes a cloud on title and can validly exist so long as litigation exists asserting a claim on title. Due to the low threshold for maintaining a valid Notice of Lis Pendens, an interlocutory challenge to the validity of the Notice itself will often be unsuccessful. See discussion in Gregory French, *On the Law of Lis Pendens in Newfoundland and Labrador* (2021), 72 UNBLJ 282.

might makes right, and those who act adversely to community interests or to other private interests are accountable only if those affected have the wherewithal to seek enforcement through the civil litigation process.

4. *Tension in delivery—The free rider problem and absence of enforcement*

The free rider problem in non-municipal areas extends beyond the communities themselves. Enforcement of development restrictions and road maintenance currently falls to the provincial government in the absence of municipal government.[132] Enforcement and maintenance that would ordinarily be borne by municipal authorities, paid by municipal taxation, is instead borne by provincial officials and departments. The result of the "uploading" of such responsibility from the local level to the provincial level is that enforcement may be lacking or non-existent in practice, resulting in chaotic and uncontrolled development and unequal reactive enforcement. Such enforcement as would ordinarily be paid for and managed locally within a municipality is avoided by the absence of delegated regional authority or municipal government. The provincial government is not able to focus on local-level affairs to the same degree as a municipal or regional government could. However, these non-municipal communities are uniformly small, and would be limited in their ability to individually raise funds to enforce such regulations and conduct such development.

Solutions exist within the legal framework of municipal law in Newfoundland and Labrador, particularly with the option of regionalization under the *Municipalities Act*.[133] However this option has been used infrequently, perhaps hearkening back to the lessons of the 1950s and its popular revolts against municipal incorporation. Regionalization does not eliminate Local Service Districts or existing municipalities, nor does it compel incorporation of wholly unincorporated areas. Instead, it allows for specific authority to be vested in supra-municipal body as a level above local governments. Judicious utilization of the regional authority could address particular issues of enforcement and maintenance, by spreading the cost of such services across a number of communities. However, the historical background to municipal growth in Newfoundland and Labrador, coupled with longstanding public reluctance to submit to property taxation, may make such an option politically unpalatable.

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132. See provincial-level zoning rules in the *Protected Road Zoning Regulations*, NLR 996/96; *Building Near Highways Regulations*, NLR 28/97; *Works Services and Transportation Act*, *supra* note 116.

133. *1999 Act*, *supra* note 98 at Part II.

Defenders of the unserviced community model point to provincial-level taxation as the equalizing factor. While there are no local taxes assessed for local services, there is a substantial lack of local services provided, except those assumed by the province. Those services provided provincially are covered by taxes assessed provincially to all residents, such as payroll taxes and gas tax, but which are not assessed against property.[134] From 1954 until 1992, Newfoundland and Labrador did assess a "regional" property tax imposed by local "School Tax Authorities," pursuant to the *School Tax Act*.[135] Since the repeal of the *School Tax Act* in 1992, there has been no further implementation of a similar provincial property tax.

A full cost-versus-benefit assessment of the amount paid by community residents versus the amount received in government services is difficult to quantify without an assessment of tax contributions by community and without a breakdown of the cost of service delivery by the province to a given community. However, with most unincorporated communities being of small size and with aging rural demographics, it is unlikely that the contributions made by many unincorporated communities via payroll taxes is significant.[136] The more remote the community, the greater would be the anticipated cost to provide even basic services such as road clearing. Such concerns are very much contextual. Remote communities with aging populations and minimal payroll contributions may prove to be burdensome on the provincial treasury, as they would not generate as much revenue as they consume in resources to maintain them. Non-municipal communities on the periphery of incorporated communities are a frequent cause for complaint by municipalities, who may view such communities as freeloaders, drawing residents outside of municipal boundaries while simultaneously relying on services paid for by adjacent municipalities, at

134. *Revenue Administration Act*, SNL 2009, c R-15.01, s 51 (gas tax) and 73 (health and education payroll tax).

135. The property-based school tax was introduced in the *Local School Tax Act*, SN 1954, No 78, s 6(2)(a), and continued to 1992 as the *School Tax Act*, RSNL 1990, c S-10, s 26. The *School Tax Act* was repealed on 1 July 1992, by SNL 1992, c S-10.1, s 2.

136. Newfoundland and Labrador has the highest percentage of elderly residents of any province, with 23.6 per cent of its population over 65 years of age as of 2021. See Sarah Smellie, "Atlantic Provinces will have Highest Proportion of Seniors over 85: Census" *CBC* (2022 April 27), online: <cbc.ca> [perma.cc/PBM5-BW9S]; Rural areas of Newfoundland and Labrador are particularly afflicted by demographics, with an aging resident population and outmigration. See Sarah Smellie, "Report Predicts Plummeting Population for Rural Newfoundland and Labrador" *CBC* (2017 September 8), online: <cbc.ca> [perma.cc/MDK7-3PM5]; Anna Delaney, "Drastic Population Declines Forecasted for Southern Labrador and Norther Peninsula" *CBC* (2016 July 18), online: <cbc.ca> [perma.cc/S9JG-N3NU].

least in part by municipal taxation.[137] In either case, there is tension from those who feel they bear the financial support for communities that are either financially unsustainable or, worse, which are seen as consciously avoiding sharing the cost burden for common services.

5. *The future of local service districts and municipalities in Newfoundland and Labrador*

On November 16th, 2023, the Newfoundland and Labrador House of Assembly passed the *Towns and Local Service Districts Act*.[138] This new Act will replace the 1999 *Municipalities Act* upon proclamation.[139]

For the foreseeable future, it appears that Newfoundland and Labrador will continue to maintain its status quo with respect to Local Service Districts, which continue under the new *Act*, and those Local Service Districts will continue under a fee-for-service structure rather than a taxation model.[140] Unincorporated areas, which are neither municipalities nor Local Service Districts, remain unaffected.

The persistence of Local Service Districts in the 2023 *Act* thus appears to reflect a deliberate intention on the part of the provincial government, leaving them in place versus transitioning to a municipal model. The 2023 *Act* elaborates on the election of members to a Local Service District committee, and introduces the concept of an annual general meeting of community residents.[141] One likens the introduction of the annual general meeting requirement in Local Service District to the "New England town meeting" concept underlying the *Community Councils Act* in 1952.[142] Those "Community Councils" would later be established as full municipal governments in the 1990s.[143] This may be an effort to move Local Service Districts into the municipal model gradually.

One change contained in the 2023 *Act* may be seen as regressive and counterproductive to furthering municipal development in Newfoundland and Labrador. The 2023 *Act* now mandates that municipalities establish

137. Joe O'Connor, "Tax-free Utopia: Newfoundlanders in unincorporated areas pay no municipal taxes" *CBC* (2013 September 27), online: <cbc.ca> [perma.cc/7WSE-WVM3]; CBC News, "Province Not Ready to Tackle Unincorporated Communities" *CBC* (2013 September 19), online: <cbc.ca> [perma.cc/22GT-78EP].

138. SNL 2023, c T-6.2 [2023 Act].

139. As of writing, the *Act* has not been proclaimed, though it has received Royal Assent.

140. *2023 Act*, *supra* note 138 at Part XI. The authority to collect for services on a fee basis is found at s 259-260; See also Part VII, Division 2 of the *2023 Act*, regarding municipal taxation.

141. *2023 Act*, *supra* note 138 at s 219-223: annual meeting requirements at s 238.; See also the skeletal electoral framework for local service district committee elections in the *1999 Act*, *supra* note 98 at s 390.

142. See *supra* notes 72-76.

143. *Supra* note 99.

a real property tax, a power that at present is discretionary.[144] Bearing in mind the longstanding public resistance to property taxation, which has inhibited municipal development for decades, this may produce a chilling effect.

This chilling effect should be considered in context. Most settlements of substantial size have already been incorporated as municipalities. The challenge at present is to move unincorporated areas and Local Service Districts into the municipal model. The most recent community to do so was the Town of George's Brook-Milton in 2018, which had previously been a Local Service District.[145] The change from a Local Service District to a municipality occurred after a 2017 referendum, whereby a majority of the population voted in favour of becoming a Town.[146] However, fully one-third of voters opposed municipal incorporation. In the debate on the 2023 Act in the House of Assembly, one opposition member highlighted the problem posed by mandatory taxation, using the example of George's Brook-Milton:

> But in three years, in the journey, we had a lot of resistance on becoming a town. The thing that residents feared the most was property tax. We did our initial survey and in our initial survey we were down to less than 10 per cent interest in becoming a town. When the vote was cast in 2018, we settled in on 66.8 per cent of the vote in favour of becoming incorporated with the promissory note that we would not utilize property tax because they were spooked about property tax.[147]

With this in mind, one can foresee the reluctance for existing Local Service Districts to transition to municipal incorporation. But if such reluctance is predictable, why would the new legislation continue the Local Service District model, rather than encourage (if not mandate) the transition to municipal status? The answer to this question appears to be financial. Local Service Districts do not receive provincial funding in the same way or to the same degree as municipalities, and one may surmise that the relative savings to the province have been considered. As raised in the debate on the 2023 *Act*, again in reference to the George's Brook-Milton example:

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144. *2023 Act*, *supra* note 138 at s 117 and 301. See also *1999 Act*, *supra* note 98 at s 112.

145. Town of George's Brook-Milton Order, NLR 30/18. The Town was incorporated on 8 May 2018, under s 5 of the Order. As a Local Service District, see Local Service District of George's Brook-Milton Order, NLR 24/05 and its predecessor, CNLR 186/96.

146. Stephanie Tobin, "George Brook-Milton Votes Yes to Becoming Stand-alone Town" *CBC* (24 May 2017), online: <cbc.ca> [perma.cc/845Q-E2L3].

147. Newfoundland and Labrador House of Assembly, 50th session (1 November 2023) (Craig Pardy, PC-Bonavista), online: <assembly.nl.ca> [perma.cc/2NPJ-4RTU]. Mr. Pardy was previously Chairman of the Local Service District of George's Brook-Milton and served as the first Mayor of the Town of George's Brook-Milton.

> If you're in an LSD in Newfoundland and Labrador, you are paying every tax in Newfoundland and Labrador that someone in a municipality is paying, except for your local governance. Every tax is the same except for your local governance. That is the difference. […] But let me tell you what difference it made in George's Brook-Milton becoming a town from an LSD. You're an LSD; you receive no funds from government unless you apply for municipal capital works, which you've got the option to do. But you receive no funds from government. You're out there, you receive no funds.
>
> […]
>
> We became a town. When we became a town in George's Brook, we received the Municipal Operating Grant from the government because now we're a town. So our Municipal Operating Grant is approximately $54,000.
>
> So now as a town, in 2018, we're receiving a Municipal Operating Grant of $54,000; not bad. Every year, $54,000 as a Municipal Operating Grant. As an LSD, you're out there for governance, local governance, but you didn't receive that. You receive zero dollars. You pay gas tax out—and I want to be clear, people in LSDs pay gas tax, too, same as everybody—but you don't get your gas tax rebate in an LSD. You don't get it back.
>
> So what difference in George's Brook-Milton did it make? Well, in gas tax rebate, probably a little under $300,000 in gas tax. That's over – I stand to be corrected – a four to five year period. […]
>
> Then we're allowed to get a rebate on all the power consumed, or 2.5 per cent of the HST paid on our power. We can get that back as an incorporated town. As an LSD, you can't get it back. […]
>
> LSDs aren't a drag to the province; they're a benefit to the province because in George's Brook-Milton, before we got incorporated, there was $130,000 a year that we didn't receive but somebody else did.[148]

One may take a cynical view of the new legislation, that it focuses on revenue more than public services. Mandating that municipalities must implement property tax deters Local Service Districts from opting in to such a model, and thus depriving them of the ability to access provincial funding. But one may rightly consider the counterpoint, that the intention is to prevent a community from accessing the best of both worlds by accessing provincial funding sources while avoiding local contribution by property tax. To gain the benefit, the community must also bear the burden.

148. *Ibid*.

*Conclusion*

The historical basis for Newfoundland and Labrador's municipal development illustrates how this province has allowed quasi-municipal structures to persist, which prevent the provincial government from fully downloading service delivery and revenue generation to a municipal level of government.

The government of Newfoundland and Labrador has always had to catch up to society, as development occurred before regulation could constrain it. In areas unconstrained by municipal governance, the current legislative structure provides little incentive to opt into a municipal government model, as lower forms of service-delivery models exist and can obtain provincial funding, without requiring the imposition of unpopular forms of taxation. Such communities pose difficulties in the exercise of development control and collective action for its residents, and has resulted in the privatization of enforcement or uploading of responsibility to the provincial government, establishing a free rider problem that impacts on the rest of the public who bear the costs of same. While options for reform exist under current legislation, the provincial government has taken little action in respect of same.

Bearing in mind the options available under existing legislation, the provincial government has means by which to incorporate such areas into regions, but popular backlash against such efforts may well be recalled in the long institutional memory of the provincial government. However, the present arrangement, which allows public services to be outsourced to local councils with minimal authority to raise revenue, means that such expenses are borne by the provincial treasury at large.

In the future, the province's financial circumstances may require further examination of the available authority to generate revenue from local areas which currently avoid such taxation. As history teaches, imposing such taxation on the population will not be readily accepted and will require greater effort and incentive on the part of the provincial authorities to entice local cooperation. While legislative authority currently exists to unilaterally impose such financial obligations on local populations, the provincial government must consider the historical and social background in deciding to take such action. The provincial government must also consider the need to address issues of service delivery and enforcement of common rights in such areas, as a legitimate expectation of a *quid pro quo* if additional taxation will be brought to bear upon the public.

Newfoundland and Labrador's new municipal legislation continues the status quo that allows communities to avoid taxation. Considering the provisions of the new legislation, it appears to be a deliberate choice to

allow residents in unincorporated areas to avoid taxation. However, the legislation leaves unaddressed many of the issues raised in this paper, which may be worthy of further consideration by future governments.