

If you have questions about this lecture or the legal issues confronting OCCUPY FREDERICTON, you are welcome to contact:

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DATE: FEB 12

Lecture Notes by Paul Groarke

RE: OCCUPY FRED

Disclaimers

I suppose I need to start with some disclaimers.

1. Although I am a lawyer, I am a member of the Law Society of Alberta and the Law Society of New Brunswick has made it clear that I cannot act for Occupy Fredericton. So I do not represent anyone.
2. I have no personal knowledge of what happened at Phoenix Square. So I am working with the information that I have received from other people.
3. The city has been less than forthright about its actions with regard to the occupation of Phoenix Square. As a result, I really have no idea what position the Mayor and the City take in these matters.

Facts

My understanding of the facts is relatively simple:

1. As part of a political protest, the members of OCCUPY FREDERICTON erected a shelter in Phoenix Square approximately three months ago. This consisted of a shelter, the skeleton of which consisted of wooden beams. These were covered with tarps. I understand that the shelter was sound structurally and had been inspected and approved by the fire Marshal. There was a sign adjacent to the shelter, apparently attached to a tree, which stated in large letters: "Occupy Fredericton We are the 99% and so are you".
2. The shelter contained a table, a heater, and assorted goods, owned by Occupy Fredericton and the individuals who made use of the shelter. I also understand that Alex Davenport was living in the shelter at the time. A number of people had been sleeping there.
3. The Mayor delivered a letter to Mr. Davenport and other individuals on the afternoon of December 31st, stating that the occupiers were "not permitted to live, erect or

maintain a building or structure on public property.” This letter included a Notice from the Director of Engineering, which directed the Occupiers to remove “any and all structures” from Phoenix Square within 3 days, or face the possibility of charges under By-law No. T-4. I have attached a copy of the letter and the Notice to these lecture notes.

4. The Mayor and a city crew arrived at Phoenix Square without warning on January 3rd, before the 3 days had expired. The crew carried chain saws and box cutters and basically cut the shelter into pieces. This was in spite of the fact that Mr. Davenport and two other people were inside it at the time. I believe that someone inside the shelter was struck by one of the falling beams. The crew then removed what was left of the shelter and its contents. They also removed the sign, which was destroyed in the next three days.

Law

The relevant by-law is By-Lay No. T-4, which is entitled: “A By-law Respecting Streets and Sidewalks”. The letter and the Notice refer to section 5 of the by-law, which reads as follows:

5. BUILDINGS AND STRUCTURES

The Director of Engineering and Public Works shall give to any person who erects or maintains a building or structure contrary to this section three days notice in writing to remove the same or such portion thereof as may be within or over a street. If such person fails to obey the notice, the Director of Engineering and Public Works shall report the facts and circumstances to the City Clerk.

There is also a penalty clause, which is actually found in section 16:

16. PENALTIES

Every person who violates any provision of this by-law is guilty of an offence and is liable on summary conviction to a fine of not less than fifty dollars (\$50.00) and not more than five hundred dollars (\$500.00).

Section 5 is defective

Section 5 is part of a standard legislative scheme, which creates an offence. This scheme contains three separate parts.

1. a substantive clause that prohibits some form of conduct

2. a clause providing for Notice
3. a penalty clause that sets out what the penalty is for violating A

Each part would normally have its own clause.

The scheme in the by-law is defective, however. Section 5 does not contain a substantive clause that prohibits anyone from doing anything. This is naturally the clause that creates an offence.

So part 1 of the above scheme is missing. The clause that the protesters are alleged to have violated is missing.

I can only speculate that someone made a mistake in transcribing the proposed by-law and left out the missing clause. But section 5 does not contain a substantive clause.

The Mayor implies in his letter that the section was supposed to say something like: “no one may erect or maintain a building or structure without the permission of the city.” Really he implies that the section says that. I suppose he can tell you where he got this language from.

But he did not get it from section 5.

The use of section 5 raises at least 3 issues

The case raises two sets of issues. The first concerns the city’s use of section 5. The letter and the Notice from the Mayor and the Director of Engineering allege explicitly that the protesters have violated section 5. But the part of section 5 that they are alleged to have violated does not exist.

It follows that the occupiers in Phoenix Square were not in contravention of the section. Because there is nothing to be in contravention of –

The first question, then, is whether the Mayor and the Director of Engineering were aware of this? The city solicitor must have reviewed the law as soon as the protesters occupied the Square and discovered the problem. It is hard to believe that anyone could draft a Notice under section 5 without realizing that the substantive clause was missing. This probably explains why the city delayed so long before taking action against the protesters.

The first set of issues, then, includes at least three issues:

1. If there was no contravention of s. 5,

- a. why did the Mayor suggest that there was?
- b. what authority did the Director of Engineering have to issue the Notice?
- c. why did City Solicitor allow the Director and the Mayor to proceed under the section?

Other issues

Then there are the legal issues. The question that arises in this context is whether the city had the legal authority to take down the shelter? In point of fact, I cannot find anything in the by-law that gives the Mayor the authority to take down the shelter and sign.

This raises a number of issues:

1. The first is natural justice. The Notice from the Director of Engineering does not disclose why the Director was issuing the Notice. This is probably a fatal defect.
2. There is nothing in the Notice that gives the city the authority to take down the shelter. As the Director of Engineering indicates in the Notice, the penalty for violating the missing part of section 5 is a charge under section 16.
3. The city did not give the protesters the three days stipulated in the Notice
4. It is notable that there are provisions in By-law S-7 and the *Municipalities Act* that set out the kind of process that should have been followed by the city. Section 1 of By-law S-7, which is entitled "A By-Law Respecting Dangerous or Unsightly Premises" reads as follows:

1. Section 190.001 to 190.07 of the *Municipalities Act*, Chapter M-22, RSNB, 1973, with amendments thereto, applies to the whole area within the city limits of the City of Fredericton.

The relevant provision in the *Municipalities Act* reads as follows:

190.01(1) No person shall permit premises owned or occupied by him or her to be unsightly by permitting to remain on any part of such premises

(a) any ashes, junk, rubbish or refuse,

(b) an accumulation of wood shavings, paper, sawdust or other residue of production or construction,

(c) a derelict vehicle, equipment or machinery or the body or any part of a vehicle, equipment or machinery, or

(d) a dilapidated building.

190.01(1.1) No person shall permit a building or structure owned or occupied by him or her to become a hazard to the safety of the public by reason of being vacant or unoccupied.

190.01(2) No person shall permit a building or structure owned or occupied by him or her to become a hazard to the safety of the public by reason of dilapidation or unsoundness of structural strength.

There are additional provisions in the *Municipalities Act* requiring 14 days written notice from the city. Other provisions provide for a hearing before a City committee and a hearing before a judge of the Court of Queen's Bench. The city may take the position that these provisions apply to structures on private property, but the city could have followed the same procedure, *ex mero motu*.

Conclusions

The Mayor needs to explain his actions. There was nothing particularly difficult about taking the matter before a judge and, if the city wanted to move against the protesters, it seems to me that it should have sought direction from the courts. There is a strong argument that the construction and occupation of the shelter was a form of political expression and is protected by the *Charter of Rights*. There is the additional fact that the shelter was located in Phoenix Square, which functions as a public space attached to City Hall. It is significant that the Mayor and the city were taking down a shelter and seizing property that belonged to dissenters.

The case raises many serious issues. The deeper issue, however, concerns the rule of law. People who hold political office have an obligation to follow the legal procedures set out in the relevant by-laws and legislation before using force against other people. The historical position is even simpler: the use of force outside the law is violence.

E.O.E.

Fredericton

Attachment to letter dated December 31, 2011 from
Mayor Woodside to Occupy Fredericton

December 31, 2011

Delivered by hand

Alex Davenport, Occupy Fredericton
Arthur Taylor, Occupy Fredericton
Bryan Foglia, Occupy Fredericton
Julian Renaud, Occupy Fredericton
Dana Hartt, Occupy Fredericton
André Faust, Occupy Fredericton
and all other Members of Occupy Fredericton
located at Phoenix Square
Fredericton, NB

OCCUPY FREDERICTON – NOTICE

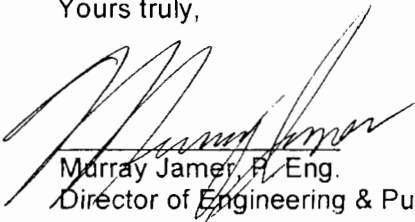
Pursuant to Section 5 of By-law No. T-4, A By-law Respecting Streets and Sidewalks, you are hereby given three (3) days notice to remove any and all structures that are located in Phoenix Square, being a public square and a public place in the City of Fredericton.

If you fail to remove any and all structures from Phoenix Square after three (3) days you will be in violation of By-law No. T-4. Please be advised that

every person who violates any provision of this by-law is guilty of an offence and is liable on summary conviction to a fine of not less than fifty dollars (\$50.00) and not more than five hundred dollars (\$500.00).

In addition, please be advised that under Section 12 of By-law No. T-4, A By-law Respecting Streets and Sidewalks, enhanced attraction signage is not permitted on a street, which includes a public square or any other public place in the City of Fredericton without the permission of City Council.

Yours truly,



Murray Jamer, P. Eng.
Director of Engineering & Public Works

Engineering & Public Works
PO Box 130 (City Hall)
Fredericton, NB E3B 4Y7
Tel.: 506-460-2038 / Fax: 506-460-2031

COR-FRM 102 (V. 1.0)
www.fredericton.ca

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Tél. : 506-460-2038 / Fax : 506-460-2031

Fredericton

December 31, 2011

Delivered by hand

**Occupy Fredericton and
Members of Occupy Fredericton**

located at Phoenix Square
Fredericton, NB

OCCUPY FREDERICTON - NOTICE:

Further to my meeting and verbal request made to Alex Davenport, on behalf of Occupy Fredericton on December 20, 2011 that the camp, located on Phoenix Square, municipal property, be removed, Occupy Fredericton is hereby given notice that you are prohibited from engaging in the following activities in Phoenix Square, being a public square and a public place located in the City of Fredericton in front of City Hall:

1. Installing, erecting or maintaining a building or other structure in contravention of Section 5 of By-law No. T-4, A By-law Respecting Streets and Sidewalks. A written notice from the Director of Engineering and Public Works is attached to and forms part of this Notice.
2. Placing or causing to be placed an enhanced attraction signage in contravention of Section 12.01(5) of By-law No. T-4, A By-law Respecting Streets and Sidewalks.

In addition, safety and sanitary concerns have now arisen as a result of Occupy Fredericton installing, erecting and maintaining a structure, tent or shelter in Phoenix Square.

The City of Fredericton hereby directs Occupy Fredericton and any members of Occupy Fredericton to remove any structure(s), tent(s), shelter(s), equipment, personal belongings and debris from Phoenix Square on or before January 1, 2012.

Members of the public are permitted to have peaceful public demonstrations in Phoenix Square, being a public square and a public place, but are not permitted to live, erect or maintain a building or structure on public property.



BRAD WOODSIDE
-MAYOR-

Attachment (1)
cc Members of Fredericton City Council

Office of the Mayor
P.O. Box 130 (City Hall)
397 Queen Street
Fredericton, NB E3B 4Y7
Tel.: 506-460-2085 / Fax: 506-460-2134



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