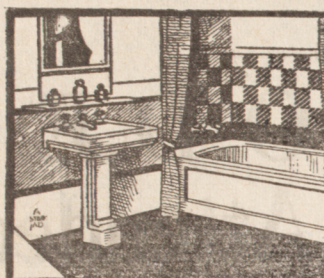




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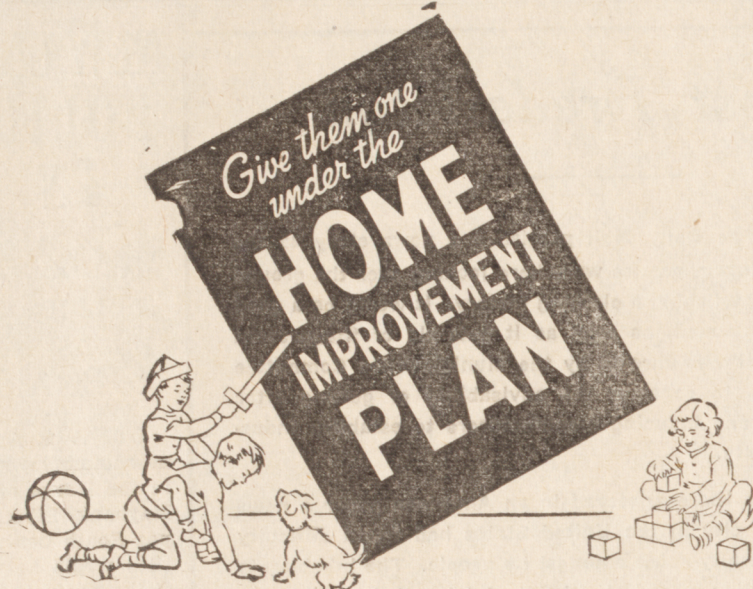
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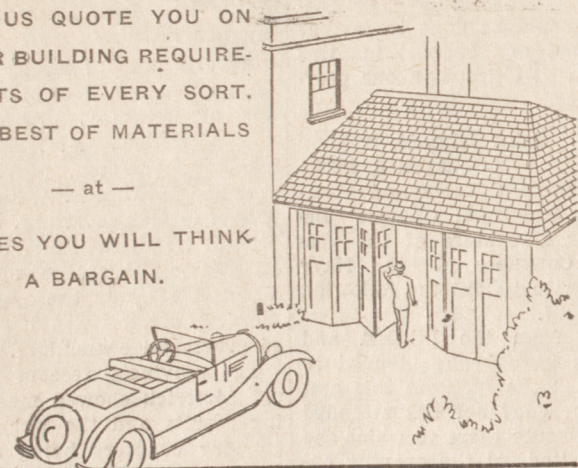
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CITY SOLICITOR'S REPORT  
ON CONSTITUTIONAL PROBLEM

April 6th, 1937

Mr. G. Willard Kitchen,  
Mayor of Fredericton,  
City.

Your Worship:

I beg to advise you as follows with respect to the situation created by the resignation of seven Aldermen from the City Council.

It is impossible to state with certainty what course should be followed. There seems to be no similar case anywhere amongst the reported cases.

Under the provisions of 4 George V, 1914, Chapter 98 an Alderman is permitted to resign his office upon paying the fine of \$25.00. This provision no doubt has two purposes, namely, to compel citizens to perform the public duties to which they have been elected and to prevent the City from being put to the useless expense of holding extraordinary elections. The section is as follows:

"65. The Mayor or any Alderman may at any time after taking the oath of office resign such office upon payment of a fine of \$50.00 in case of the resignation of the Mayor and of \$25.00 in the case of the resignation of an Alderman unless excused from payment of the same by the City Council."

Resignations under this section to take effect April 8th have been filed with the City Clerk by the seven Aldermen concerned and a fine of \$25.00

has been paid to the City Clerk by each of them. So on April 8th the resignations will be complete.

The City Council has no control over these resignations. The Council does not accept or reject them. When the time arrives they become effective at once and cannot be withdrawn.

A similar question fell for determination by the Court in England in the case of The Queen v. The Mayor, etc. of The Wigan (54 L.J. Q.B. 338). In that case a Town Councillor wrote to the Town Clerk resigning his office of Councillor and enclosing the fine payable on resignation. At the next meeting of the Town Council the letter of resignation was read but on some members of the Council desiring that he should not resign he consented to withdraw his resignation. The matter was brought before the Court and it was held by the Judges that it was not competent to the Council to accept the withdrawal of the resignation; that when the Councillor has filed his resignation and paid the fine his resignation was complete and that a new election had to be ordered.

That will be exactly the positions of the Fredericton Aldermen when their resignations become effective on April 8th inst.

My opinion therefore is that the seven Aldermen who have filed resignations with the City Clerk and

paid their fine will cease to be Aldermen on April 8th inst.

The next question is how are the vacancies to be filled.

Section 67 of the said Act is as follows:

"67. Every vacancy in the office of Mayor or Aldermen from death, resignation, absence or other reason, shall be declared by resolution of the City Council before proceedings are taken to fill the vacancy."

And 69 provides:

"69. The date of an election to fill a vacancy shall be fixed by the City Council."

As there can be no vacancy until the resignation becomes effective it is apparent that the City Council cannot declare that a vacancy exists until after it occurs on the 8th inst. It will be noted that vacancy by death and resignation is dealt with in the same way. There would therefore have to be a meeting of the City Council either on April 8th or on some later date to declare that vacancies caused by the resignations do exist, and to fix a date for the election if action is to be taken under the above sections.

But after the resignations have become effective there will remain only the Mayor and three Aldermen in office, and that situation has required most careful and anxious consideration.

By the Fredericton Charter (22 Vic. 1859, Chapter 8, Sec. 39) it is provided that

"In all meetings of the City Council six members with the Mayor or Chairman shall constitute a Court for the transaction of business, and a majority of the members present shall determine the questions and matters submitted for consideration."

It is apparent that the Mayor and the remaining Aldermen are not sufficient in number to meet the requirements of this section.

It has been sometimes contended that if by death or resignation or other cause a Municipal or City Council becomes reduced below the quorum required by the Charter the remainder may from necessity still act on behalf of the corporation on the principle that the corporation still exists and the public business must go on; and that if by accident or design some of the members are unable or fail to perform the duties of the office which they had assumed the balance may carry on the work. Some United States Courts seem to have accepted that view. Our Courts have not done so. They have held that there must be a quorum at all times to do business.

The case of The King v. Bellringer (4 T.R. 810, 100 E.R. 1315) is authority for this. It was there held that when a charter required that the Mayor and Common Clerk for the time being and the Common Council for the time being, or the major part of them should elect to a certain office and the Common Council was a definite body consisting of 36 a majority of the whole number must meet to form an election assembly; and that if the corporation be so reduced as that so many do not remain as form a majority of the whole no election can be had at all.

Chief Justice Lord Kenyon in delivering the unanimous opinion of the Court said:

"The Defendants argument supposes that any number of the corporators (however reduced that number may be) are competent to do the several acts for which the corporation was created; and that all acts done by a majority of the corporators though reduced, are valid. Without viewing this charter with the eye of a lawyer it cannot be supposed that The Queen ever intended that any small number of the corporation however minute would be sufficient for the purpose for which the charter was granted; and that the survivors by refusing to fill up the vacancies as they happen might monopolize the whole Government of the borough in themselves."

"Even without the assistance of any authority upon this point I could never have thought that the whole Government of the borough could devolve upon so minute number as two or three; and yet, if the Defendants argument were to prevail in this cause, the consequence that it might so devolve would necessarily follow. But the cases which were cited on the argument of this case are all one way, that there must be a major part of the whole number constituted by the charter, in order to make the election and to do the several other acts under it."

This case was decided in 1792 and has been followed since by the Courts in England whenever a similar case has occurred.

In the case of Downey v. Commissioners of Sewers for the Parish of Hopewell (45 N.B.R. 90) the Court of Appeal of this Province held that a Board of Commissioners of Sewers although reduced to one member by death or resignation and refusal to act could continue to act through that member and impose a rate on the district. Mr. Justice Crockett, who was then a member of the Court dissented from this view. An appeal was taken to the Supreme Court of Canada and that Court found that the single Commissioner was not empowered to act and accepted as sound the reasons which Mr. Justice Crockett had given in the Court of Appeal (1923 S.C.R. 522). Mr. Justice Crockett had stated the law thus:

"The general rule of law is that where a power of a public nature is given to a definite number or a definite portion of persons, such power, in the absence of clear and express provision to the contrary, cannot be exercised but by a majority of such persons, and that if a majority of such body does not exist at the time any act is to be done, the power cannot be legally executed. See judgment of Bayley J. in Blackett v. Blizard (2). And further than no contumacy upon the part of the persons composing the majority can have the effect of transferring to the minority the right to exercise the powers and duties of the body. See judgment of Lord Truro, in Gosling v. Velez (3), at pages 801 and 808, reversing the judgment of the Court of Exchequer

upon a writ of error from the Queen's Bench in this case (4)."

I view of this judgment of the Supreme Court of Canada the principle thus stated must be accepted as the law of this Province.

In that case the statute provided that no rate should be made without the consent of the majority of the Commissioners and it was held that although there was in fact only one who was willing to act that one did not constitute a majority of the Commissioners. It seems to me that on the same principle, the Mayor and three Aldermen cannot take the place of the Mayor and six Aldermen which the Act requires to constitute a Court for the transaction of business even though they constitute the whole membership of the City Council at the time. It follows from this that the remaining members of the Council have no authority to call a meeting to declare the offices vacant and to fix a date for the holding of the election.

That conclusion necessitates an examination of the legislation to see if there is any other provision which will enable the election to be carried out.

Section 11 of the said Chapter 8 of 1859 is as follows:

"11. Every election for Mayor, Councillors and Assessors after due notice as hereinafter directed shall be held as follows, that is to say: For the election of Mayor, at one convenient place in the City; and for the election of Councillors and Assessors in one convenient place in each of the several Wards and before such persons as shall be appointed for the purpose by the City Council; or by the Sheriff of the County of York or by the City Clerk in case of the neglect or refusal of the City Council to make such appointment."

By 26 Vic. 1863, Chapter 33, Section 4, the word "Alderman" was substituted for "Councillor" in the above section.

If the members of the City Council resign and the City Council is thus prevented from appointing persons for holding an election I presume it could fairly be said that the Council has neglected or refused to make an appointment. It would seem therefore that if the provision above quoted is still in force in such case the City Clerk might appoint necessary persons to hold an election.

There have been many legislative changes made with respect to holding Civic Elections in Fredericton since the said Act 1859 was passed. In 1914 "An Act to consolidate and amend the several Acts relating to the election of Mayor and Aldermen for the City of Fredericton" which has been previously mentioned was passed. It is under this Act and certain amendments thereto that City elections are now held in Fredericton. But as already pointed out it contains no provision which covers the present situation. That Act does not specifically repeal the older Acts, but Section 79 of the said Act is as follows:

"79. So much of the Act of Assembly 22 Victoria Chapter 8, entitled

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led "An Act to amend the Act to incorporate the City of Fredericton" and all other Acts relating to the said City so far as the same or any of them are repugnant to or inconsistent with the provisions of this Act are hereby repealed."

There is no doubt that part of Section 11 of the Act 1859 is inconsistent with the provisions of the Act of 1914. There is no doubt that the Act of 1914 makes provisions inconsistent with the earlier Act for the holding of elections for Mayor and Aldermen in different places from those provided for in 1859 and in a different way; but there seems to be no provision in the Act of 1914 or in any other Act inconsistent with the provision that the Sheriff of the County of York or the City Clerk might act in the case of the neglect or refusal of the City Council to make an appointment of a person to hold such election. But that does not seem sufficient as it does not give the City Clerk authority to order the election or to fix the date. Section 33 of the Act of 1859 provided that in case of a vacancy the Mayor should order an election, or if there were no Mayor or he were absent then three Councillors might order the said Clerk to give notice of the time and place for holding the election. But this seems to be inconsistent with the provisions of Sections 67 and 69 of the Act of 1914 which provides that the City Council shall declare the vacancy and fix the date. I have reached the conclusion therefore that that course cannot be adopted.

The Act of 1859 contains another provision concerning an election to

fill a vacancy. Section 33 is as follows:

"33. If any vacancy shall happen by death, resignation or disqualification of the Mayor, Councillor or Assessor, the Mayor or in case of his absence or if there be no Mayor, then any three of the Councillors shall by order in writing within ten days after the vacancy occurs direct the City Clerk to give public notice as hereinafter provided of the time and place for an election to supply the said vacancy or vacancies and such election shall be held in the manner provided in and by this Act."

But this must be regarded as inconsistent with Sections 67 and 69 of the Act 1914 and therefore repealed.

There seems to be only one other possible way left by which the matter can be arranged. Section 39 of the Act 1859 already referred to is as follows:

"39. In all meetings of the City Council six members with the Mayor or Chairman shall constitute a Court for the transaction of business; and a majority of the members present shall determine the questions and matters submitted for consideration; the City Clerk shall keep a minute of the proceedings in which he shall enter the names of the members present at the opening or during the continuance of such meeting; and the persons whose names have been so entered shall be deemed to be present until the meeting shall be adjourned or dissolved by the presiding officer, and the rules, orders, regulations, enactments and decisions of such meeting shall be legal notwithstanding some of the members may

(Continued on Page Three)