

M A N I T O B A) Order No. 20/06
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THE PUBLIC UTILITIES BOARD ACT) February 8, 2006
)
THE CEMETERIES ACT)
)
THE PREARRANGED FUNERAL SERVICES ACT)

BEFORE: Graham F. J. Lane, C.A., Chairman
Monica Girouard, C.G.A., Member
Susan Proven, P.H.Ec., Member

Scattering Grounds: Expansion of Crematorium

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1.0 EXECUTIVE SUMMARY

By this Order, the Public Utility Board (Board) conditionally approves the expansion of Neil Bardal Inc.'s (NBI) crematorium, an expansion to encompass the enclosing of an existing scattering garden (Rose Garden). Simultaneously, the Board establishes new guidelines for the storage and disposal of the ashes of human remains.

Application of the operative directions of this Order is suspended for 45 days, to allow interested parties to provide comments to the Board.

The growing reliance on cremations reflects a shift in societal attitudes in the western world. In the past, death was generally followed by a funeral commemorating the deceased, then by the interment of the body in a cemetery. While this is still the case for some religious faiths and many families, others accept cremation. And, rather than interment of ashes in an earth plot or columbarium, there has been an increasing occurrence of ash scattering at places that had special meaning to the deceased. There has also been a relatively small group of families that have left the decision on the disposal of the ashes to the Funeral Home/director. This has resulted in storage problems: what to do with unclaimed ashes?

The Cemeteries Act allows crematoriums dispensation to dispose of unclaimed ashes. However, in most cases unclaimed ashes are picked up by Funeral Homes that, lacking legislative sanction to dispose of ashes, store the ashes indefinitely.

It is in this context that the Board conditionally approves NBI's specific proposal and also provides for:

- a) the charging of a fee for the storage of ashes; and
- b) crematoriums entering into arrangements with Funeral Homes to facilitate the disposal of unclaimed ashes.

NBI's crematorium operates as NBI Cremation Services and fronts onto Notre Dame Avenue at 3030 Notre Dame Avenue, Winnipeg; the Rose Garden is located on the property.

The expansion of the crematorium will provide for:

1. funerals and receptions;
2. enclosure of the Rose Garden; and
3. a "wall of remembrance" with commemorative plaques to recognize deceased individuals whose ashes were scattered either in the Rose Garden or elsewhere.

The conditions of the Board's approval are:

- a) no charge shall be made for scattering cremated human remains in the Rose Garden;
- b) NBI shall make known the options available with respect to the scattering of ashes, beyond the use of the Rose Garden;
- c) NBI and successor companies will not require ashes arising from a NBI cremation to be scattered in the Rose Garden;

- d) NBI will retain or receive, if requested by the Funeral Home arranging the cremation, unclaimed ashes, with respect to cremations occurring at NBI;
- e) NBI shall make it very clear to persons, in both verbal and written communication, that no permanency is attached to the present location of the Rose Garden;;
- f) the Rose Garden shall be operated as if it is a permanent "resting place" for ashes, such as is the case with cemeteries, subject to condition (f) below;
- g) public access to the Rose Garden shall be provided during the advertised hours of service for the crematorium;
- h) NBI and its related companies shall provide the Board with an undertaking:
 - i) committing NBI to, as best as possible, preserve and continue in perpetuity the Rose Garden as a "final resting place" for cremated human remains; and
 - ii) assuring the Board that should the Rose Garden and/or the crematorium cease operations, NBI or its successor companies will relocate the Rose Garden, along with the "wall of remembrance", commemorative plaques and related records, to a suitable and operating Winnipeg-area cemetery, and notify known next of kin; and
- i) the planned expansion must receive such approvals and licensing as are required by the City of Winnipeg and/or the Province of Manitoba.

Within this Order, the Board provides clarification with respect to the storage of ashes by persons other than cemetery owners, i.e. crematoriums and Funeral Homes. The Board directs and/or supports storage of ashes on the following terms:

- a) temporary, with either interment or scattering to follow;
- b) crematorium charges may include a reasonable storage charge, refundable if and when the involved family takes possession of the ashes;
- c) after two years, unclaimed ashes in the possession of Funeral Homes may be returned to the respective crematorium for disposal;
- d) notice of storage arrangements, charges and a condition providing for the return of unclaimed ashes to the crematorium for disposal shall be provided to the family in advance of service;
- e) records to be maintained identifying the deceased for whom ashes are stored, next-of-kin and disposal details; and
- f) disposal to occur only following adequate notice having been made to known next-of-kin.

In this Order, the Board also confirms that the law permits crematoriums to dispose of unclaimed ashes. While legislation is silent with respect to the rights of funeral directors with respect to unclaimed ashes, the Board notes that storage and disposal arrangements between crematoriums and Funeral Homes are not prohibited.

The Board also confirms its understanding that cemeteries are permanent resting-places for "dead human bodies". Ashes are not

"dead human bodies" pursuant to legislation, and may be interred in cemeteries or otherwise disposed of. If scattered, interred or buried outside of a cemetery, the final resting place for ashes are not assured permanency through either perpetual care accounts or legislation.

The operative directives of this Order are suspended until the earlier date of either the Board confirming, vacating or varying this Order, or forty-five days. The delay in the effective date of this Order is to facilitate the Board seeking comments from:

- a) cemeteries, crematoriums and Funeral Homes, and related associations;
- b) the Consumers Association of Canada (Manitoba Chapter);
- c) the Manitoba Society for Seniors;
- d) the Association of Manitoba Municipalities;
- e) the Province of Manitoba- Division of Consumer and Corporate Affairs; and
- f) the Funeral Planning and Memorial Society of Manitoba.

This Order is released concurrent with posting on the Board's web site and issuance of a media news release. Wide distribution of this Order will allow interested parties to comment in advance of the Order's effective date. While the Board does not anticipate vacating or varying its decision, it reserves the right to do so following review of such comments as may be received.

Finally, the Board observes that Manitoba legislation and regulations governing cemeteries, crematoriums, Funeral Homes and related matters are subject to future revision, and that revision may affect the rulings contained herein.

2.0 APPLICATION

On November 15, 2005, NBI requested Board approval of its plans to expand the Notre Dame crematorium, and provided the Board with drawings and other information. Subsequently, on January 11, 2006 Mr. Neil Bardal and Mr. Tim Samson (NBI's President and solicitor, respectively) met with the Board to discuss NBI's plans.

NBI's expansion plans include the enclosure of an existing outside scattering garden within an expanded crematorium, to provide:

1. a suitable space for funeral services and/or receptions, available for service throughout the year; and
2. a "wall of remembrance" with, where arranged, plaques commemorating deceased individuals whose ashes were scattered.

The current size of the facility is approximately 331 square meters, to increase to 882 square meters with the expansion. NBI advised of a ten-year lease with the Winnipeg Airport Authority, renewable for two further five-year terms, providing parking for clients and visitors to the crematorium.

NBI further advised and/or opined that:

1. societal attitudes with respect to the disposal of human remains have changed;
2. cremation occurs following approximately 60% of Manitoba deaths, an increase from 15% in 1982;
3. ashes are either interred (buried), placed in niches in columbariums, or scattered;
4. scattering occurs in both private and public places, while the owner's permission is required before ashes can be legally spread on a private property, scattering may occur without authority;
5. ashes are increasingly spread in scattering gardens, generally at NBI's facility or one of six known church-yard locations; and
6. on a relatively infrequent basis, ashes are unclaimed creating a storage problem.

A crematorium may dispose of unclaimed ashes as it determines, and legislation is silent with respect to the disposal of unclaimed ashes by Funeral Homes. Unclaimed ashes accumulate at crematoriums and Funeral Homes, as both have been reluctant to dispose of the ashes.

NBI reported that 1,500 cremations are conducted annually at its Notre Dame facility (the current level of annual deaths in Manitoba approximates 10,000) - supporting its report as to the growing incidence of cremation.

NBI advised that the scattering process involves the excavation of a small trench and the placement of ashes therein. Through a "turning process", ashes are commingled with the earth and other ashes. The Rose Garden is the size of a small backyard garden. NBI reports advising clients that there is no assurance of the permanence of the Rose Garden.

NBI also reported that:

- a) the Rose Garden is regularly visited, particularly on special occasions such as the anniversary of a death;
- b) the Rose Garden has been blessed, and is considered a sacred place, by several religious denominations; and
- c) NBI treats the Rose Garden as if it were a gravesite, though it is not a cemetery as defined in The Cemeteries Act and the obligations with respect to cemeteries are not obligatory for NBI and its Rose Garden.

NBI stated an intention to operate the facility, including the Rose Garden, as a crematorium and "sacred resting place" as long as circumstances permit.

Mr. Bardal expressed his intention, as the President and a shareholder of NBI, for NBI to continue operations at the current site for many future generations, though he noted there was no guarantee of continuation in perpetuity. This lack of assured permanence is dissimilar to the case of cemeteries, which assure perpetuity through legislative requirements and perpetual care accounts.

NBI observed that the current provisions of The Cemeteries Act provide no guidance with respect to the operations of an ash scattering ground. A cemetery is a place for the burial of, as specifically stated in the legislation, "dead human bodies". Neither the Board nor any other regulatory body has defined "ashes" as "dead human bodies." "Dead human bodies" are distinguishable from cremated human remains by the inability, other than potentially by records and location, to identify ashes as having been those of a particular deceased person.

NBI noted the benefit for families arising with the perpetual obligation assured with cemeteries, such is not the case with the Rose Garden. However, NBI noted that families seek ways to remember their deceased, and opined that NBI's Rose Garden and its plans for plaques would be a mechanism meeting the need.

NBI reported that while at least six Winnipeg churches allow the scattering of the ashes on their property, such properties are not cemeteries.

NBI opined that an unfair disparity would arise if the Rose Garden was deemed to be a cemetery, requiring NBI had to meet the obligatory operational requirements of cemeteries. The scattering of ashes in a river, lake or on private property, including church properties other than a cemetery, has not resulted in those locations being designated as cemeteries. NBI expressed no current intention to allow ashes to be stored in containers in the crematorium; though placing ashes in a columbarium is relatively commonplace for cemeteries.

Columbariums infer permanency of location -- permanency cannot be assured for the Rose Garden.

3.0 BACKGROUND

Crematoriums, like privately owned for-profit cemeteries, are licensed by the Board under The Cemeteries Act (Manitoba). The Act and related statutes concerning funerals have not been substantially revised for many decades, and certain provisions are generally considered to be out-of-date and requiring revision. Revision may attend to matters raised herein, and affect the determinations.

NBI

Mr. Neil Bardal is a principal shareholder and President of NBI. Mr. Bardal is also the Registrar of the Board of Administration under the Embalmers and Funeral Directors Act; a body not involved in the Board's determinations. Mr. Bardal's role with the Board of Administration for that Act did not affect the Board's findings.

NBI owns and operates the crematorium located on Notre Dame Avenue, and operates a Winnipeg Funeral Home at a separate location.

In 1982, NBI bought Brooklawn Crematorium Limited (BCL). BCL owned and operated the crematorium now the subject of this Order. BCL was first licensed in 1973 by the Consumers' Bureau

(Manitoba). At that time, the Bureau had jurisdiction now provided the Board under The Cemeteries Act.

Consistent with the licensing requirements of the time, BCL obtained approvals from the Clean Environment Commission and The City of Winnipeg for the construction and operation of the crematorium. Renewal licenses have been issued to BCL and its successor, NBI, from 1973. Around 1990, the BCL name was changed to NBI Cremation Services and the crematorium has operated under that name since then.

NBI initially operated the crematorium similarly to BCL's past approach (same registration method, retort and facilities). Regarding the disposal of ashes, and again consistent with BCL's practice, NBI initially returned ashes to the originating Funeral Home, these then being NBI's only clients. Direct service to the public was not then envisioned.

Past Involvement with the Board

In 1986, NBI advised the Board of an intention to charge a \$75.00 fee for scattering ashes in the Rose Garden. It was then that NBI first advised the Board of its plans to construct an atrium over the Rose Garden to facilitate committals and visitations. NBI intended the Rose Garden to exist in perpetuity as long as circumstances so permitted, serving as a solution to an even-then increasing unclaimed ash problem.

At that time, the Board suggested that the Rose Garden could be considered a cemetery, and, if so deemed, would then bear the

same perpetual maintenance obligation as a cemetery. The Board rejected NBI's then-proposal to scatter ashes in the Rose Garden, encouraging NBI to seek other alternatives to the unclaimed ash problem. In its critical response to the Board's decision, NBI advised that while it would adhere to the Board's ruling and would no longer scatter ashes in the Rose Garden, it continued to support the concept, opining:

"... the concept of placing ashes in the earth, unencumbered, is practical, ecological and economical ... (we) fail(s) to see the strength in an argument to stop this practice. Our cupboards are once more filling up with unclaimed ashes."

In 1999, and with the Board's approval, NBI expanded the crematorium, with the outside Rose Garden remaining in place. In 2001, NBI, in this case in its Funeral Home capacity, applied to the Board for a fee for scattering ashes.

NBI advised that a "scattering" service was provided for a fee to families utilizing scattering locations other than NBI's Rose Garden. The Board accepted the change in practice.

In May 2002, NBI again wrote the Board regarding the problem of unclaimed ashes, noting that the Cemeteries Act allowed for the disposal of the ashes at the discretion of the crematorium owner. NBI opined it had a moral obligation to advise the next of kin, if it were to scatter unclaimed ashes.

Disposal of Ashes

The Cemeteries Act addresses the disposal of ashes by a crematorium, but, as previously indicated, is silent with respect to a Funeral Home. Pursuant to the Cemeteries Act, ash disposal by a crematorium may occur if the ashes have been unclaimed for over two years.

Because both The Cemeteries Act and The Embalmers and Funeral Directors Act are silent with respect to the disposal of ashes by Funeral Homes/directors, the problems encountered by crematoriums with respect to the disposal of ashes are not as great as those of Funeral Homes/directors. The Board understands that oftentimes a funeral director picks up ashes from the crematorium when the family of the deceased fails to take custody of the ashes, resulting in stored unclaimed ashes.

The Board notes that under current legislation Funeral Homes/directors do not have the authority to dispose of unclaimed ashes. Accordingly Funeral Homes/directors are storing unclaimed ashes "in perpetuity".

In 2002, NBI reported that it had received twelve unclaimed ashes from 1983 to 1993. NBI proposed disposing the unclaimed ashes in the Rose Garden, and suggested it would advertise in the Winnipeg Free Press to alert families prior to acting. NBI then-indicated it would provide visitation rights to the site for the families.

At the time, Board was involved in general discussions with the funeral industry with respect to the problem of accumulating unclaimed ashes in the possession of funeral directors. The Board had advised funeral directors that a fee could not be charged for the storage of ashes, and suggested all reasonable efforts be made to return unclaimed ashes to the next of kin.

Rose Garden

In June 2002, NBI confirmed its desire to use the Rose Garden for permanent disposal of unclaimed ashes, once again providing an opinion that its proposal as a crematorium owner was consistent with The Cemeteries Act (i.e. crematorium owners may dispose of unclaimed ashes at their discretion).

In support of its plan, NBI opined that scattering ashes in the Rose Garden would:

1. provide for dignified disposal;
2. be within NBI's rights as a crematorium under the Cemeteries Act;
3. serve as an alternative to either interring remains in a cemetery, disposing of ashes in another location, or storing ashes in a family member's residence; and
4. provide an appropriate final "resting place", one accessible to the public for visits.

In July 2002, the Board again rejected NBI's proposal, and advised that its direction remained as provided in 1986: ashes were not to be spread in the Rose Garden.

That said, and acknowledging the dilemma resting with an increasing number of unclaimed ashes, the Board requested that NBI consult with the Manitoba funeral industry to determine if the existing legislation required amendment. Noting that the Act had not been amended, NBI confirmed its adherence to the Board's continuing moratorium on the scattering of ashes in the Rose Garden.

In March 2003, the Board and NBI met once again to discuss the disposition of ashes and the potential utilization of the Rose Garden. In May 2003, the Board considered a more detailed proposal by NBI regarding the Rose Garden and amended its longstanding bar against the scattering of ashes in the Rose Garden by approving NBI's plan.

In changing its position and granting approval, the Board noted:

1. the Rose Garden had been used in the past for scattering ashes;
2. NBI's assurance that it encourages families to arrange for either the interment or other disposal of ashes, and only when such plans are not made permits scattering in the Rose Garden;
3. NBI's assurance that it advises clients that no permanency is assured for the location of the Rose Garden;
4. NBI's assurance that visitations of and access to the Rose Garden continue; and

5. NBI intends to develop the Rose Garden as a permanent "resting place", and will conduct its future operations with this understanding.

The Board made its approval conditional, restricting the use of the Rose Garden to occasional scatterings, stating in part:

"...only in exceptional cases (is) scattering permitted and only on the basis of full disclosure with respect to lack of permanency of the site. The Board acknowledges the Rose Garden is not being offered as a regular service and that all reasonable steps are being taken to encourage families to plan for another permanent resting place of the remains."

Other Jurisdictions

The Board reviewed the legislation and regulatory practices of Ontario, Alberta, Saskatchewan and British Columbia and found same to be not determinative.

In Ontario, in an Act yet to be proclaimed, if ashes are buried the event is considered an interment and areas contemplated for interments must be established as a cemetery subject to the provisions governing perpetual care. A scattering of ashes is not considered an interment, as with dispersal over land or water results in ashes that are not retrievable. The burial of cremated remains implies permanency and the ability to retrieve,

and would be considered an interment subject to the provincial Cemeteries Act, if the Act as amended is proclaimed.

Ontario reported to the Board that it advises the public that ashes may be scattered only once, with the written permission of the property owner. If the property owner allows multiple scatterings (on going), the site must be established and registered as a cemetery. Cemeteries must have a Care and Maintenance Trust Account, requiring a \$100,000 or more initial investment.

Ontario reported that pending requirements have reduced the number of requests from churches seeking scattering gardens for their front lawns, etc., as rarely had the churches considered the long term obligations with respect to maintenance and record keeping that would be assumed.

In British Columbia, buried ashes meet the definition of an interment, and the land is required to be registered as a cemetery and is subject to perpetual care requirements. However, a scattering of ashes does not make a property a cemetery. Given the implied perpetual interment right conveyed at the time of scattering, B.C. requires any industry participant offering scattering on their property to make it clear to consumers that there is no perpetual interment right or obligation being created by the scattering.

B.C. has a sample bylaw on its web site to inform consumers about the recommended rules governing scattering areas. The draft bylaw was designed primarily for church gardens, as they

have constituted the majority of enquiries on this matter for the B.C. regulator.

The regulator advised that if an existing crematorium were to offer a scattering garden option, a condition of its license would be that it adopts the recommended bylaw and make adequate disclosure respecting scattering and commemorating activities.

In Saskatchewan, a scattering garden is not a cemetery. Conditions may be placed on the licenses of operators offering scattering on their property, and these conditions may require the advising of consumers that the garden is not a cemetery and perpetual care is neither implied nor guaranteed.

Saskatchewan suggests a standard form providing a sign-off by the consumer, this to acknowledge an understanding of the situation. A notice placed in the scattering garden stating the lack of assured permanency is also recommended.

The Alberta regulator advised of neither statute provisions nor regulations covering scattering. The Alberta regulatory experience with respect to ash scattering apparently has not involved private industry, though churches scatter ashes. The regulator advised that churches with scattering gardens generally require the consumer to sign a form indicating awareness that perpetual care and permanency with respect to the area where the ashes were spread are not assured.

4.0 DISCUSSION AND BOARD FINDINGS

Preparing for Determinations

The Board determined it would consider matters related to cremation thoroughly, and, subject to future legislation, establish guidelines and provide approvals where warranted.

The Board is cognizant that NBI's plans represent a significant investment decision (NBI plans to commence work in the spring), and that a firm decision from the Board on its application may prove helpful to consumers and the industry.

Through this application and Order, the Board provides guidance to other service providers within the funeral industry, as well as allows the general public to be better informed as to industry practices and implications thereof.

The Board has determined that the current understandings between the Board and the industry with respect to the storage and disposal of ashes requires amendment, and provides herein direction to the industry allowing increased flexibility for crematoriums and Funeral Homes/directors with respect to these matters.

The Board views NBI's application as a means through which solutions to the existing "ash spreading, storage and disposal" difficulties may be determined to both the industry's and society's general benefit, ahead of possible future statutory amendments.

The issues confronted include unclaimed ashes; changing public perceptions and attitudes with respect to cremation; deficiencies in existing legislation; and the reluctance of owners of crematoriums and funeral directors to dispose of unclaimed ashes, even when legally allowed to do so (not the case for funeral directors).

In considering this matter, the Board reviewed:

- a) the history of discussions and determinations with respect to NBI;
- b) the requirements of The Cemeteries Act; and
- c) the experience and plans of Ontario, Saskatchewan, Alberta and British Columbia.

Board Deems NBI's Application Acceptable

In short, the Board finds NBI's proposal to enclose the Rose Garden within an expanded crematorium acceptable.

In doing so, the Board addresses the dilemma faced by NBI and the funeral industry in general with respect to the disposal of ashes.

The Cemeteries Act

Part I of The Cemeteries Act applies to all cemeteries in Manitoba regardless of ownership; the Board has oversight over only privately owned for-profit cemeteries. Part I provides for

the adequate care and maintenance of cemeteries (fencing, drainage, and requirements for good order and repair).

Good order implies, among other things, adequate record keeping. Without adequate record keeping, future generations of a family would be unable to locate the site where the remains of their deceased family member rest. Again, with respect to existing legislation, ashes are not considered "dead human bodies" (human remains).

This part of the Act also defines what is meant by the word "cemetery", that being a place where human remains are buried.

While ashes are often buried in a cemetery, this does not in and of itself create a cemetery. From its review, the Board will conclude that ashes fail to meet the definition of human remains and, thus, will determine that the land to which ashes are scattered or interred is not a cemetery. Accordingly, the Rose Garden is not deemed to be a cemetery.

That said, the Board also concludes that the Act is outdated, and has failed to stay current with the changing preferences of consumers with respect to cremations and the scattering of ashes. The Board will conclude that regardless of the definitional deficiency as to what is meant by "human remains" and "ashes", ashes resulting from cremation are, from a general understanding perspective, the remains of deceased humans. Where and how they are scattered or otherwise disposed are matters of importance to families and society.

Spreading and Disposal of Ashes

The Board concludes that when ashes are interred, spread or stored on cemetery properties:

- a) the obligations set out in the Cemeteries Act apply;
- b) good record keeping is required;
- c) access to the site should be granted for visitations; and
- d) perpetual care provisions must be respected.

The scattering of ashes on non-cemetery property do not trigger the requirements of The Cemeteries Act.

Part II of the Cemeteries Act (the Act) applies to crematoriums and requires cemetery owners to obtain the Board's approval to construct and operate crematoriums; annual licenses granted by the Board are issued pursuant to this part. Thus, NBI's plans to expand and amend its crematorium are subject to the Board's approval.

Also with respect to Part II of the Act, and as previously indicated, a crematorium owner may dispose of unclaimed ashes. Custody and disposal issues arise for a crematorium only when the involved funeral director or family doesn't take possession of the ashes.

Pursuant to current law, the Board holds that a crematorium at its discretion may dispose of unclaimed ashes. However, the Board is of the view that disposal should occur only after notice has been provided to the family.

While the situation of a crematorium appears relatively clear, the Board notes no legislative approval allowing Funeral Homes/directors to dispose of unclaimed ashes. As a possible solution, the Board suggests that Funeral Homes/directors consider including in their funeral contracts provision for the return of ashes to the crematoriums for disposal after due notice, when the ashes are not claimed.

As previously indicated, the Board received a prior request from NBI to store ashes for families on a fee basis. While a storage fee may have served as an effective incentive motivating some families to claim the ashes of their deceased family member, the Board did not approve the proposal, noting that the storage of ashes has historically been a cemetery service offering (a crematorium is not a cemetery).

Storage Fee Permitted

By this Order, the Board changes its view, and approves the charging of a storage fee. The approval comes with two conditions:

- a) no charge will be levied for the scattering of ashes in the Rose Garden, and
- b) no charge will be levied if the ashes are picked up the next of kin.

The Board will allow crematoriums to levy a one-time reasonable refundable charge for storing ashes, provided:

- a) storage is intended to be temporary, with either interment or scattering to follow;
- b) crematorium charges are refundable if or when the families pick up the ashes;
- c) unclaimed ashes may be returned to the crematorium after two years, for disposal;
- d) notice of the storage arrangements is provided to families in advance of service; and
- e) records are kept identifying the ashes and next of kin; and
- f) disposal occurs only with advance notice to the families.

This approval is restricted to ashes stored other than in a columbarium within a cemetery. The latter implies permanency and is regulated by the Act.

The Board does not licence the operation of every funeral director, only those selling pre-arranged funeral plans under The Prearranged Funeral Services Act. For those licensed by the Board, it will be required that the above conditions apply with respect to the pre-arrangement. The Board hopes such provisions become the industry norm.

If this does not prove to the case, the Board will recommend such rules be adopted by the Board of Administration which license funeral directors under The Embalmers and Funeral Directors Act.

Licensed crematoriums, cemeteries and funeral directors are not to be involved in spreading the ashes of deceased humans on private property, without the approval of the property owner.

No Assurance of Perpetual Care

Part III of the Act applies only to cemeteries in business for profit, and excludes cemeteries owned by religious denominations or municipalities. For-profit cemeteries must be licensed by the Board, and these cemeteries are obliged to set aside a portion of lot, plot and compartment sales as a perpetual care account. Funds so collected must be deposited in a trust account. Investment income earned on these funds is to be used to provide perpetual care.

While perpetual care trust funds provide the assurance of the future maintenance of human burial grounds, i.e. cemeteries, the Board is aware that funds as now exist are generally inadequate for the production of sufficient annual income to provide for the needed maintenance. The Board has noted that ongoing annual supplements are required from general cemetery operating funds to meet the perpetual care obligation.

Given a crematorium is not a cemetery, the Board is of the view that no funds are required to be set aside to guarantee perpetual care and this includes the Rose Garden. That said, the Board notes NBI's stated intention to provide perpetual care to the Rose Garden and the planned "wall of remembrance", including visitation rights.

Part IV of the Act includes General clauses, and is not cited herein, having no bearing on the matters addressed.

Clearly, as is the case in most Canadian and North American jurisdictions, Manitoba's Cemeteries Act establishes different oversight responsibilities for the Board over for-profit cemeteries than is the case for municipal and faith-based not-for-profit cemeteries.

The Board interprets the intent of the legislation as it having been written to recognize a forecast higher likelihood that municipal and faith-based cemeteries will be maintained into perpetuity than, without the Act, would be the case for for-profit cemeteries. As well, it is the Board's understanding that it has been a common law position dating back several centuries that "every person has a right to be buried in the churchyard of the parish where he dies."

For these and other reasons, for-profit cemeteries have been made subject to much more stringent rules than municipal and faith-based cemeteries.

Part III of The Cemeteries Act was proclaimed in 1959, the other parts have been in existence, subject to the occasional amendment, since the turn of the twentieth century.

While cremation was contemplated when the Cemeteries Act was enacted, the number of cremations has since grown considerably. This significant change in public action and practice is not reflected in the Cemeteries Act.

Evolving Societal Norms

While some religious denominations remain opposed to cremation, society's attitude, in general, toward the disposal of dead bodies has apparently changed markedly. The "modern secular view" taken by many families appears to be less constrained by either religious beliefs or past traditions.

In an effort to reflect changing consumer attitudes and requirements, the funeral and cemetery industry, while not necessarily endorsing the changed environment, has amended its practices.

The long-held understanding that there was a psychological need for commemorating the deceased is not reflected in the actions of some families following a death, and this is reflected in unclaimed ashes and grave sites without permanent markers.

There appears to be a regulatory vacuum with respect to the storage of ashes, except in the case of cemeteries, and scattering of ashes generally. As the licensing authority for crematoriums and cemeteries, the Board accepts that it should provide guidance.

When NBI's concept of the Rose Garden and storage arrangements for unclaimed ashes were first advanced, the Board then-provided direction based on its then-understanding of industry practices, consumer demand and legislation.

Firstly, in Manitoba, all Funeral Homes and many cemeteries and crematoriums are for-profit enterprises, and legislation requires their regulation by the Board. Secondly, cemeteries are final resting-places for dead human bodies and increasingly, ashes. Cemeteries are legally described areas organized into plots. Through the use of maps, nameplates and access, visitation rights are usually accommodated.

Through perpetual care accounts and ongoing regulatory oversight of the funds, the operative assumption is that an irrevocable trust, established by the Cemeteries Act, and practice will protect and maintain cemeteries forever.

Ownership may change, but the perpetual care fund and the irrevocable trust ensuring maintenance and permanency remains. While the concept is sound, the reality is that the funds set aside in the perpetual care accounts are insufficient to allow for adequate investment income to meet the protection and maintenance obligations. For-profit cemeteries utilize funds earned through related Funeral Homes and other activities to meet the overall funding need.

Municipal and faith-based cemeteries are subject to the provision of Part I of the Act, but not Part III. Nonetheless, many, if not most, not-for-profit cemeteries conduct their affairs similarly to the for-profit industry, albeit that for the not-for-profits there is no regulatory oversight. This situation may change in the future as a result of legislative amendments not now contemplated.

Therefore, presently, no restrictions apply to the scattering of ashes on faith-based or municipal properties, whether cemeteries or not. Common law applies in the absence of legislation.

Families occasionally scatter the ashes of their loved ones on private and public lands other than a cemetery or church property, often regardless of whether permission has been granted.

In short, the Cemeteries Act neither provides regulatory oversight over the scattering of ashes, nor assures perpetual care of the sites where ashes have been spread, other than, and by extension, when the site is a cemetery.

Similarly, certainty as to the site where ashes were spread or as to visitation access cannot be provided for non-cemetery sites where ashes have been scattered or buried.

Private Responsibility

Families are responsible for their actions when involving private or public scattering sites, for which neither visiting rights nor an undisturbed "resting place" are assured. Such places are often not intended as scattering grounds, and neither blessed (by a faith community) nor otherwise deemed sacred.

With respect to faith-based properties, congregations generally assume full responsibility for actions taken by them and those that preceded them with respect to the scattering of ashes on their properties.

However, in the case of for-profit cemeteries and crematoriums, the Act envisages a higher level of consumer protection, and publicly traded companies owning a cemetery and/or crematorium have obligations to their shareholders as well as their customers.

Dual accountability brings significant responsibility. With respect to the care and treatment of cemeteries, crematoriums and scattering grounds, the Board places the obligation to families and consumers generally, as being of a higher order than any other concern, save adherence to law.

Board Approves Scattering in Rose Garden

With some trepidation, the Board earlier reversed a once-held position with respect to the Rose Garden, and allowed the scattering of ashes there, though without fee.

The Board acted in recognition of exceptional circumstances, these including:

- a) lack of legislative guidance;
- b) problems associated with the spreading of ashes on property not intended for that use;
- c) changing general social mores with respect to funerals and cremation;
- d) obligations assumed by NBI; and
- e) the good reputation of NBI.

It has become apparent that the Rose Garden is being used more regularly than the Board initially anticipated, and that NBI's expansion plans, if implemented, will result in greater frequency of use.

The specific matter before the Board was a request by NBI for approval of its expansion plans (with enclosure of the Rose Garden, and the development of a wall of plaques). The Board assumes that the nature and scope of the proposal, if implemented, would affect the expectations of families and consumers regarding the Rose Garden, and increase the options otherwise available to them with respect to the disposal of ashes.

NBI advises families as to a lack of assurance as to the permanency of the current location of the Rose Garden. Such notification should continue, in words and writing. Nonetheless, even given these steps are taken, the Board is concerned over the future impact on families should NBI's Notre Dame crematorium and Rose Garden close, for any reason.

Prospects for Legislative Amendments

The Cemeteries Act may be subject to a comprehensive review in the future and, if undertaken, areas now under consideration would be subject to legislative amendment. Such is also the case with respect to The Prearranged Funeral Services Act and The Embalmers and Funeral Directors Act.

NBI has been made aware and accepted that the decisions made herein are not irrevocable, and could be affected by future changes to legislation.

The Rose Garden

Notwithstanding future events the Board has determined that it must respond to NBI's plans and the overall general situation pertaining to ashes.

While NBI indicated that it was prepared to expand the crematorium without enclosing the Rose Garden, the Board has concluded enclosing the Rose Garden is in the public interest and will have value to NBI's clients.

NBI also advised that if the Board directed it to discontinue the operations of the Rose Garden at the crematorium site, it would relocate the Rose Garden to an existing cemetery, if such a commitment was required to facilitate the Board approving the expansion plans. Again, the Board is not of that mind; rather, it concludes that the Rose Garden, enclosed within the crematorium with a "wall of remembrance" close by, will represent an improvement to an existing situation.

The Board concludes its determination of matters placed before it by NBI, and arising out of the application, reflect current realities.

The Board notes that, notwithstanding the uncertainty as to the perpetuity of the Rose Garden, families currently have

visitation rights, exercise those rights and want to continue to exercise those rights, notwithstanding that neither NBI nor the Board can guarantee perpetuity as to the current location.

No Unfettered Right to Scatter Ashes

By this Order, the Board confirms that it does not accept NBI's position that it has unfettered discretion to dispose of ashes. There are obligations on NBI because of the way it has conducted and represented its operations and intentions.

Plans to relocate the Rose Garden that may arise at some future date, presumably required through some circumstance not now known, may be opposed by some. In fact, given the Rose Garden was blessed, some may find a future move sacrilegious.

On the other hand, to expect a Rose Garden, no more than the size of a small back yard garden, to be viably operated as a for-profit quasi-cemetery into perpetuity is not realistic, particularly given:

- a) existing legislation;
- b) lack of a requirement for perpetual care funds; and
- c) location outside a cemetery.

NBI's Application Singular

In coming to its determinations, the Board considered it could be inferred that it was establishing a precedent. The Board considers NBI's circumstances singular, and though it will take into account its determination in considering future

applications that may be brought by other industry participants, it is not bound to approve any such application as a result of its determinations with respect to NBI's Rose Garden.

NBI's expansion and plans will offer the public an alternative that may prove quite marketable. And, that is one of the major points of the Board's determination. The Rose Garden, enclosed within a crematorium that has been expanded and made accessible to families, will represent an improvement over the current situation.

While there is no current legislative requirement for the perpetual care of a scattering ground, by enclosing one within a crematorium to which visiting rights are to be provided, there is reasonable assurance that current and future operators of NBI will properly maintain the Rose Garden.

On balance, the Board is satisfied that NBI is providing a need in a satisfactory way, and that it intends to operate the crematorium and Rose Garden in such a fashion for the foreseeable future. Families have not been guaranteed perpetuity, and the Cemeteries Act does not require it.

Undertaking Required

NBI offered to provide an undertaking that the Rose Garden would be relocated to a cemetery if for any reason the crematorium and Rose Garden was not to continue at the present site.

In the Board's view, while this may not be seen as a reasonable safeguard by some, it is far better than the alternative, being an unregulated scattering ground operating without pre-conditions or understandings with respect to future developments.

Findings

Accordingly, and in specifics, the Board will allow the expansion of the crematorium and the continued use of a Rose Garden enclosed within the expansion on the same conditions previously established:

- a) no charge shall be made for scattering cremated human remains in the Rose Garden;
- b) NBI shall make known the options available with respect to the scattering of ashes, beyond that of the use of the Rose Garden;
- c) NBI and successor companies will not require ashes arising from a NBI cremation to be scattered in the Rose Garden;
- d) NBI will retain or receive, if requested by the Funeral Home arranging the cremation, unclaimed ashes, with respect to cremations occurring at NBI;
- e) NBI shall make it very clear to persons, in both verbal and written communication, that no permanency is attached to the present location of the Rose Garden;;
- f) the Rose Garden shall be operated as if it is a permanent "resting place" for ashes, such as is the case with cemeteries, subject to condition (f below;

- g) public access to the Rose Garden shall be provided during the advertised hours of service for the crematorium;
- h) NBI and its related companies shall provide the Board with an undertaking:
 - i) committing NBI to, as best as possible, preserve and continue in perpetuity the Rose Garden as a "final resting place"; and
 - ii) assuring the Board that should the Rose Garden and/or the facility enclosing cease operations, NBI or its successor companies will relocate the Rose Garden, along with the "wall of remembrance", commemorative plaques and related records to the care and management of a suitable operating Winnipeg-area cemetery property, and notify known next of kin;

With respect to service contracts beyond cremation and including the scattering of ashes, Neil Bardal Inc., operating as a Funeral Home, shall be the contracting party with the consumer and shall meet the provisions of The Prearranged Funeral Services Act; and

NBI Cremation Services, an operating division of Neil Bardal Inc., will sell only crematorium services. It may contract out the use of the facility to Neil Bardal Inc. or other Funeral Homes as NBI, acting as NBI Cremation Services, may elect.

The Board came to these specific conclusions because the Rose Garden is already in existence and within the context of the

existing law; it may have come to different conclusions if this were a new proposal or the law were different.

The Board will bring this matter to the Government's attention, and suggest the situation and the Board's ruling be taken into account in any future legislation amendments.

5.0 IT IS THEREFORE ORDERED THAT:

1. NBI's plan for expansion is hereby approved. The expansion will provide for:
 - a) funeral services and receptions;
 - b) enclosure of the existing outdoor ash scattering garden (Rose Garden); and
 - c) a "wall of remembrance" with commemorative plaques, for deceased individuals whose ashes have been scattered either in the Rose Garden or elsewhere.
2. NBI conduct its affairs consistent with this Order and, with respect to the marketing of its crematorium services, NBI, acting as NBI Cremation Services, shall remain primarily a wholesale crematorium.
3. NBI, acting in its capacity as a Funeral Home, shall remain the party engaging in retail funeral and funeral-related services.
4. Conditions attached to the approval:
 - a) no charge shall be made for scattering cremated human remains in the Rose Garden;
 - b) NBI shall make known the options available with respect to the scattering of ashes, beyond that of the use of the Rose Garden;

- c) NBI and successor companies will not require ashes arising from a NBI cremation to be scattered in the Rose Garden;
- d) NBI will retain or receive, if requested by the Funeral Home arranging the cremation, unclaimed ashes, with respect to cremations occurring at NBI;
- e) NBI shall make it very clear to persons, in both verbal and written communication, that no permanency is attached to the present location of the Rose Garden;;
- f) the Rose Garden shall be operated as if it is a permanent "resting place" for ashes, such as is the case with cemeteries, subject to condition (f below;
- g) public access to the Rose Garden shall be provided during the advertised hours of service for the crematorium;
- h) NBI and its related companies shall provide the Board with an undertaking:
 - i) committing NBI to, as best as possible, preserve and continue in perpetuity the Rose Garden as a "final resting place"; and
 - ii) assuring the Board that should the Rose Garden and/or the facility enclosing cease operations, NBI or its successor companies will relocate the Rose Garden, along with the "wall of remembrance", commemorative plaques and related records to the care and management of a suitable

operating Winnipeg-area cemetery property, and
notify known next of kin; and

- i) the planned expansion must receive such approvals and licensing as may be required by the City of Winnipeg and/or the Province of Manitoba.
5. Crematoriums and funeral directors licenced under The Prearranged Funeral Services Act will be allowed to levy a reasonable charge for storing ashes, provided:
- a) storage is intended to be temporary, with either interment or scattering to follow;
 - b) charges shall include a reasonable and refundable storage charge, refundable if and when the families pick up the ashes within two years;
 - c) unclaimed ashes may be returned to the crematorium after two years of being unclaimed for disposal;
 - d) notice of the storage arrangements and charges is to be provided to families in advance of service by agreement;
 - e) records are kept identifying the ashes and related families; and
 - f) disposal shall only occur with advance notice to the families.

The Order shall be suspended as to application until the earlier date of either the Board confirming, vacating or varying this Order, or forty-five days.

The delay provides the Board the opportunity to circulate the Order to cemeteries, crematoriums, Funeral Homes, and their associations, and the Province of Manitoba, to allow for interested parties to comment.

While the Board does not anticipate vacating or varying its decision, it reserves the right to do so.

Fees payable upon this Order - \$4,500.00

THE PUBLIC UTILITIES BOARD

"GRAHAM F. J. LANE, C.A."
Chairman

"G. GAUDREAU, CMA"
Secretary

Certified a true copy of Order No.
20/06 issued by The Public
Utilities Board

Secretary