COURT OF APPEAL FOR ONTARIO

CITATION: Friends of Toronto Public Cemeteries Inc. v. Public Guardian and Trustee, 2020 ONCA 282
DATE: 20200505
DOCKET: C66494

Pepall, Tulloch and Benotto JJ.A.

BETWEEN

Friends of Toronto Public Cemeteries Inc. and Kristyn Wong-Tam

Applicants (Respondents/
Appellants by way of cross-appeal)

and

Public Guardian and Trustee and Mount Pleasant Group of Cemeteries

Respondents (Appellant/Respondent/
Respondents by way of cross-appeal)

Ronald G. Slaght, Q.C. and Margaret Robbins, for the appellant/respondent by way of cross-appeal, Mount Pleasant Group of Cemeteries

Michael S.F. Watson, Rodney Northey and Michael Finley, for the respondents/appellants by way of cross-appeal, Friends of Toronto Public Cemeteries Inc. and Kristyn Wong-Tam

Dana De Sante, for the respondent/respondent by way of cross-appeal, Public Guardian and Trustee

Heard: November 13, 2019

On appeal from the order of Justice Sean F. Dunphy of the Superior Court of Justice, dated December 31, 2018, with reasons reported at 2018 ONSC 7711, 144 O.R. (3d) 521.

Pepall J.A.:

INTRODUCTION

[1] This appeal involves the interpretation of archaic statutes, and the operation of modern cemeteries by the appellant, Mount Pleasant Group of Cemeteries ("MPGC"), a not-for-profit, non-share capital corporation created by a special Act of the Legislature of Upper Canada in the 1800s. The development of a crematorium and visitation centre at one of MPGC's cemeteries was the catalyst that resulted in proceedings brought by the respondents, Friends of Toronto Public Cemeteries Inc., a company incorporated to pursue this application, which consists of members of a local neighbourhood ratepayers' association, and Kristyn Wong-Tam, a Toronto resident[1] (collectively referred to as "FTPC"). FTPC challenges MPGC's governance and status. The Public Guardian and Trustee (the "PGT") was named as a respondent to the proceedings.

[2] There are four broad issues on this appeal.

[3] The first involves the application judge's conclusion that statutes from 1826 and 1849 continue to govern the election and appointment of MPGC's trustees or directors. MPGC argues that a statute from 1871 fundamentally changed the election and governance model provided for in the 1826 and 1849 statutes.

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[1] Ms. Wong-Tam is a Toronto City Councilor, but her participation in these proceedings is in her personal capacity and not as a representative of the City of Toronto or City Council.

[4] The second issue involves the application judge's conclusion that MPGC's visitation centre and funeral home businesses exceed MPGC's objects. (Based on the evidence before him, the application judge was unable to decide whether the current crematoria operations exceed MPGC's objects.) MPGC argues that none of these business activities are outside of MPGC's objects, and in any event, the relief granted was not requested by the respondents.

[5] The third issue concerns the application judge's finding that MPGC was a charitable trust subject to the provisions of the *Charities Accounting Act*, R.S.O. 1990, c. C.10 (the "*CAA*"). MPGC argues that it does not have a charitable purpose.

[6] Finally, the fourth issue, which is the basis of the cross-appeal, involves the application judge's decision not to order the PGT to conduct an investigation of MPGC under the *CAA*. The application judge concluded that the public interest would not be served by ordering such an investigation.

[7] MPGC appeals the application judge's conclusion on the first three issues. FTPC cross-appeals from the refusal of the application judge to order an investigation. The PGT supports FTPC's position on the main appeal, but opposes FTPC's cross-appeal seeking an investigation.

[8] For the reasons that follow, I would allow the appeal and dismiss the cross-appeal.

FACTS

[9] The War of 1812 brought a surge in the population of the Town of York in Upper Canada. Up to 1825, York's only two burial grounds were an Anglican cemetery and a Catholic cemetery. With the increase in population, there was a need for a non-denominational cemetery. This heralded the birth in 1826 of a six-acre cemetery at Potters Field located at the northwest corner of what is now the intersection of Bloor and Yonge streets. This was followed by the acquisition of the Toronto Necropolis in the 1850s and the acquisition of a 205-acre plot that opened as Mount Pleasant Cemetery in 1876.

[10] Over time, those cemetery operations have expanded. MPGC now has close to 450 employees and operates ten cemeteries on 1,222 acres of land containing the resting place of roughly 600,000 people. Its facilities are in Toronto, Vaughan, Pickering, Richmond Hill, Brampton, and Oshawa, and include four crematoria, 14 mausoleums and five visitation centres. Other than the original $300 raised in 1826 to acquire Potters Field, there has been no recourse to government funding or public fundraising in the course of MPGC's extensive expansion.

[11] A more detailed history of MPGC is revealed in numerous statutes.

(1) *1826 Act*

[12] In 1826, certain inhabitants of the Town of York petitioned the Legislative Council of Upper Canada. The petition resulted in *An act to authorize certain*

persons therein named, and their successors, to hold certain lands for the purpose therein mentioned, 1826, Act of U.C. 7 G. 4, c. 21 (the "*1826 Act*").

[13] The *1826 Act* stated that the inhabitants of the Town of York had held meetings to fix a plan to obtain land "for the purpose of a general burying ground, as well for strangers as for inhabitants of the town, of whatever sect or denomination they may be". It also stated that arrangements had been made to purchase six acres of land for this purpose by means of a private subscription. The petitioners asked the Legislative Council to authorize five named individuals, who had been nominated by the subscribers as trustees, as well as their successors, to hold the six acres of land in a corporate capacity. They also requested that power be given to make such rules and regulations as may be necessary.

[14] The *1826 Act* declared that it was lawful for the five named trustees and their successors to buy and hold the six acres of land for the aforesaid purpose of a general burying ground, and that it was lawful for the trustees, and their successors, "to be appointed as hereinafter mentioned, to have and to hold the same, to and for the use and purpose aforesaid, in perpetuity forever".

[15] Section II of the *1826 Act* expressly provided a mechanism to avoid a failure of succession. If more than two of the trustees died, became resident abroad, or became otherwise incapable of acting, inhabitant householders of the Town of York could be elected as trustees (to complete the number of five trustees) by a vote of the majority of the inhabitant householders of the Town of York on the first

Monday of January, upon 30 days' notice in the government Gazette. The six acres to be purchased would immediately vest in the new trustees upon their election.

[16] Section III of the *1826 Act* provided that "for the time being", the trustees would have the power to make rules and regulations "for the due management of the said land for the purpose aforesaid".

[17] In the result, although the petitioners had sought the right to hold the land in a corporate capacity, this element of the petition was not enacted. The land vested in five trustees for the purpose of a general burying ground whose successors would be elected by inhabitant householders of the Town of York.

(2) *1849 Act*

[18] Next came the 1849 statute: *An Act to amend an Act therein mentioned, and to vest the Toronto General Burying Ground in certain Trustees, and their Successors*, 1849, S.C. 12 Vic., c. 104 (the "*1849 Act*").

[19] Perpetual succession was of evident concern. Two of the trustees had died and one was no longer willing to act. The preamble of the *1849 Act* noted that the provision in the *1826 Act* "for perpetuating the Trust thereby created is inconvenient and ineffectual, and it is therefore expedient to name new Trustees for the purposes of the said Act, and to make better provision for perpetuating the succession of such Trustees". It repealed Section II of the *1826 Act* (dealing with the election of trustees) and that part of the first section limiting the number of

trustees to five, declared certain individuals to be trustees under the *1849 Act* (along with the two remaining and willing trustees from the *1826 Act*), and vested the land in them and their successors. The number of trustees under the *1849 Act* was fixed at seven.

[20] The *1849 Act* also introduced a new method of electing trustees. If a trustee died or resigned, it was the duty of each of the remaining trustees to call a meeting of the remaining trustees and elect a replacement from among the "inhabitant householders of the City of Toronto"[2]. The election would not be valid unless and until a notice of the election had been placed in the Canada Gazette. However, if within one month from the notice, the majority of the inhabitant householders of the City of Toronto present at a public meeting (announced twice in two or more newspapers) agreed to elect any inhabitant householder of the City other than the one elected by the trustees, that person would supersede the one chosen by the trustees. Thus, public elections were maintained in the *1849 Act* but now only served to overturn the trustees' selection of a successor.

[21] It is this procedure that the respondents urged upon the application judge and which he accepted as governing MPGC today. Put differently, the respondents argued, and the application judge agreed, that the 1849 pioneer procedure for appointing trustees should apply to MPGC nearly two centuries later.

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[2] The City of Toronto was incorporated in 1834 and replaced the Town of York.

[22] The *1849 Act* also provided that the parcel of land held by the trustees would now be called “The Toronto General Burying Ground”. The *1849 Act* therefore made two major changes: it changed the governance by the trustees in whom the land was vested and assigned a name to the land.

(3) 1851 and 1855 Acts

[23] The scheme enacted required repeated legislative attention. Under the 1851 statute, *An Act to authorize the Trustees of the Toronto General Burying Ground, to acquire an additional lot of land*, 1851, S.C. 14&15 Vic., c. 167 (the “*1851 Act*”), the trustees asked for and were granted the right to lease land and to buy more land. (No land was in fact acquired under the *1851 Act*.) The *1851 Act* also permitted an aggrieved party to sue the trustees for fouling the water, empowered the trustees to make regulations for burials, prohibited certain interments, and imposed certain enclosure requirements.

[24] In 1855, the trustees were authorized to close the existing burial ground at Potters Field and to purchase a site in the Township of York, provided it was not used for any purpose other than a cemetery. The land acquired under the 1855 statute, *An Act to enable the Trustees of the Toronto General Burying Ground, to close the same, to sell a portion thereof, and to acquire other ground for the purposes of the Trust*, 1855, S.C. 14&15 Vic., c. 146 (the “*1855 Act*”), was the Toronto Necropolis, located in the north-east of Toronto.

[25] The year 1867 brought Confederation and the Province of Ontario assumed jurisdiction over the cemetery from the former Province of Canada.

(4) *1871 Act*

[26] In 1871, the Legislature of the young new province enacted the statute that is in issue in these proceedings: *An Act to Incorporate the Trustees of the Toronto General Burying Ground, to confirm certain purchases made by them, to authorize them to acquire additional lands for the purposes of the said trust, and to amend the Acts relating to the said trust*, 1871, S.O. 34 Vic., c. 95 (the "*1871 Act*"). Unlike the 1826 and 1849 Acts, no reference was made to "successors" in the title.

[27] The preamble of the *1871 Act* reveals that the trustees again made a petition. They reported that they had contracted to buy land from the Toronto Necropolis and that it was expedient to buy more. The preamble continued:

> …it is desirable that resident householders of the village of Yorkville and of the township of York may be eligible for selection to fill vacancies as trustees, and that the choice should not be limited to resident householders of the city of Toronto; and that it is expedient that the said trustees and their successors should be constituted a body corporate by the name of "The Trustees of the Toronto General Burying Grounds;" and that it is expedient that the provisions hereinafter contained should be enacted for the better management of the said trust, and whereas it is prayed by the said petition that the said trustees shall be incorporated and the said deeds confirmed, and the said corporation empowered to hold said lands and acquire additional lands for the purposes of the said trust, and that the provisions

> hereinafter contained should be enacted for the better management of the said trust…[Emphasis added.]

[28] The Legislature then proceeded to enact the following provisions, among others.

[29] Section 1 of the *1871 Act* expressly stated that the seven named individuals and their successors are:

> …hereby constituted and declared a body, corporate and politic, by the name of "The Trustees of the Toronto General Burying Grounds," and by that name shall have perpetual succession and a common seal, and by that name shall sue and be sued, plead and be impleaded in all courts whatsoever, and shall have all the powers vested in corporations generally by the Interpretation Act.

[30] Section 2 went on to provide:

> All the estate, real and personal, now vested in or owned or held by the Trustees of the Toronto General Burying Ground is hereby vested in and transferred to the said corporation hereby constituted, and all the powers and privileges granted to the said trustees by any former Act or Acts of the Province of Upper Canada or of Canada are hereby granted to said corporation, subject nevertheless, to all the conditions and duties imposed on said trustees not inconsistent with the provisions of this Act; and the said corporation shall be liable for all the debts, obligations and liabilities of the said trustees of the Toronto General Burying Ground.

[31] Section 3 of the Act vested the lands in the corporation and empowered the corporation to hold the purchased land for the purposes of the trust.

[32] Section 4 then stated that “Resident householders of the village of Yorkville, or of the township of York, shall be eligible for selection to fill vacancies as trustees of the said corporation.”[3]

[33] The corporation was also given power to acquire additional lands in s. 5. Section 6 provided that the lands acquired by the corporation were to be “used exclusively as a cemetery or cemeteries or places for the burial of the dead”. The corporation could also sell lots to “any person or persons on such terms and conditions and subject to such by laws of the corporation, and at such prices as shall be agreed on, to be used and appropriated exclusively for the burial of the dead”.

[34] Section 7 stated that the corporation “may enclose, lay out, improve and embellish such land in such manner, and may erect such buildings thereon, as the nature of the establishment may require, and may also further take and hold such personal property as may be necessary and proper for attaining the objects and carrying into effect the purposes of the said corporation.” Section 8 went on to state that the lands were not to be encumbered by the corporation. Moreover, the cemeteries or burying grounds were exempt from all public taxes, rates or assessments under s. 13.

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[3] In 1853, Yorkville was incorporated as a village. In 1871, the City of Toronto, the Township of York and the village of Yorkville were all separate, distinct entities.

[35] Section 14 is of particular importance. It stated:

> That the said corporation shall appoint a secretary and treasurer to the same, with power to dismiss and re-appoint or appoint another at pleasure; and are hereby authorized to make by-laws and to repeal or alter the same, such by-laws not being inconsistent with any existing law, for the management of its property and for the suitable remuneration of the trustees, secretary, treasurer and other officers and servants of said corporation and the regulation of its affairs.

[36] The *1871 Act* therefore introduced a corporation and perpetual succession into the structure. The parameters of that corporate structure lie at the core of the first ground of appeal.

(5) *Interpretation Act*

[37] As mentioned, s. 1 of the *1871 Act* declared the seven individuals a body corporate and politic, which would have all the powers generally vested in corporations by the "Interpretation Act". The relevant Act then in force was *An Act Respecting the Statutes*, S.O. 1867-1869, c. 1 (the "*1867 Interpretation Act*"). Subsection 7(28) stated:

> Words making any association or number of persons a corporation or body politic and corporate, shall vest in such corporation, power to sue and be sued, contract and be contracted with, by their corporate name, to have a common seal, and to alter or change the same at their pleasure, and to have perpetual succession, and power to acquire and hold personal property or moveables for the purposes for which the corporation is constituted, and to alienate the same at pleasure; and shall also vest in any majority of the members of the Corporation, the

> power to bind the others by their acts; and shall exempt the individual members of the Corporation from personal liability for its debts or obligations or acts, provided they do not contravene the provisions of the Act incorporating them…

[38] Subsection 7(32) provided that every Act was to be construed so as to reserve to the Legislature "the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage" thereby vested or granted.

[39] Lastly, s. 7(39) stated that the preamble of an Act "shall be deemed a part thereof intended to assist in explaining the purport and object of the Act." Furthermore, every enactment was to be deemed remedial and was to receive "such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning and spirit."

[40] The current *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, mirrors ss. 7(28), 7(32) and 7(39) of the 1867 statute in ss. 7, 64(1), 69 and 92(1).

(6) Subsequent Acts Dedicated to MPGC

[41] The years 1876, 1888, 1910, 1925, 1968 and 1977 saw other Acts which authorized further sales and purchases by the corporation. Proceeds of disposition were to be used for the proper purposes of the trust. The preamble of the *1876 Act* (*An Act to authorize the sale of certain lands by the Trustees of the Toronto*

General Burying Grounds to the City of Toronto, 1876, S.O. 39 Vic., c. 66) spoke of the burial of the dead being the sole purpose for which the lands were held and reiterated that the lands were held subject to and for the carrying out of certain trusts.

[42] The *1910 Act* (*An Act respecting the Trustees of the Toronto General Burying Grounds*, S.O. 1910, c. 160) again addressed the sale of land. The preamble contemplated the amendment of s. 4 of the *1851 Act* dealing with enclosure of cemetery lands, but s. 3 of the *1910 Act* in fact repealed s. 4 of the *1851 Act* entirely and substituted it with a different provision. The remaining relevant 20th century statutes authorized the corporation to acquire lands in other locations including the Regional Municipalities of Durham, Halton, and Peel.

(7) The *Corporations Act, 1953*

[43] The year 1953 saw the introduction of the *Corporations Act, 1953*, S.O. 1953, c. 19, concerning corporations with or without share capital. Part III of the statute, respecting "corporations without share capital", applied to every corporation incorporated by or under a general or special Act of the Legislature "except where it is otherwise expressly provided". Part III therefore applied to MPGC unless the respondents are correct in their assertion that the *1849 Act* expressly provided otherwise. Subsection 112(1) of the *Corporations Act, 1953* stated that "[t]he directors of a corporation may pass by-laws not contrary to this

Act…to regulate,…(g) the time for and the manner of election of directors…and (j) the conduct in all other particulars of the affairs of the corporation."

(8) Cemetery Legislation

[44] In 1913, the Legislature passed *An Act respecting Cemeteries and the Interment of the Dead*, S.O. 1913, c. 56, which defined "cemetery" to "mean and include any land which is set apart or used as a place for the interment of the dead, or in which human bodies have been buried". This Act was amended in the years that followed. In 1980, for example, the Legislature passed the *Cemeteries Act*, R.S.O. 1980, c. 59, and then revised it in 1989 with *An Act to revise the Cemeteries Act*, S.O. 1989, c. 50. The 1989 *Cemeteries Act* had a broader definition of cemetery as "land set aside to be used for the interment of human remains and includes a mausoleum, columbarium or other structure intended for the interment of human remains". Cemetery services received a broad definition and included "in respect of a cemetery, such other services as are provided by the owner of the cemetery at the cemetery".

[45] This Act was repealed in 2012 and replaced by provisions of the *Funeral, Burial and Cremation Services Act, 2002*, S.O. 2002, c. 33 (the "*FBCSA*"), which permits appropriately-licensed entities to operate funeral homes and crematoria.

(9) Trustees' Conduct

[46] The respondents rely on the MPGC trustees' conduct to support their position that the election procedure described in the *1849 Act* continues to govern MPGC today. Most notably, notices were placed in the Ontario Gazette following the election of a new trustee until 1987, when this practice stopped. There is no record that any resident householder of the City of Toronto ever sought to hold a public meeting to select a different trustee from that chosen by the existing trustees and no public meeting was ever held.

[47] In 1891, the corporation published a pamphlet stating that "[t]he property to be acquired was declared to be, and is to-day, that of the citizens of Toronto, to be administered by a Board of seven Trustees, to be elected in the manner set out in the said Acts." References to "Acts" was "to the various Acts passed since 1826 down to the present time [being 1891]".

[48] By 1975, the trustees started to describe themselves as "directors",[4] and, as mentioned, by 1987, the corporation stopped placing notices in the Ontario Gazette. As the application judge noted, s. 283 of the *Corporations Act*, R.S.O. 1990, c. C.38, currently provides that the corporation's affairs shall be managed by a board of directors "howsoever designated", but does not require they be designated as "directors".

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[4] See Affidavit of Glenn McClary (MPGC's President), at para. 38.

[49] The application judge found that the by-laws of MPGC around 1989 provided for ten directors, each of whom had a maximum of three four-year terms.[5]

[50] Directors are members of MPGC. Directors receive an honorarium, but MPGC does not pay dividends or make other distributions to its members. The maximum received for a director's honorarium and meeting attendances is in the $25,000 to $35,000 range annually.

[51] Cremation and other alternative services became increasingly popular in the 1980s and MPGC grew concerned that these alternatives would cut into its revenues and impact its ability to meet its obligations, including its perpetual care obligations. As the appellant's President, Glenn McClary, stated, the tradition of interring human remains in a cemetery was also being reassessed. Now cremated remains are frequently scattered in nature or kept at home in a decorative urn. To secure new sources of revenue, MPGC decided to offer funeral services as part of its product and service offerings. Due to regulations, however, this required a separate corporation.

[52] In 1989, the directors of MPGC incorporated a new funeral services corporation named "Canadian Memorial Services" ("CMS"), a not-for-profit, non-share capital company with a board of directors that more or less mirrored MPGC's. MPGC appoints four of CMS' directors. CMS has three funeral homes,

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[5] The record does not disclose when MPGC's by-laws were first enacted.

four crematoria, and five visitation centres that are located in MPGC cemeteries. CMS pays licensing fees to MPGC, who provides loans to, and receives interest from, CMS. As a funeral service provider, CMS also refers potential cemetery clients to MPGC. As the application judge found, CMS is effectively a wholly-owned subsidiary of MPGC "in all but name". CMS' long-term objectives are to meet a public need for funeral services and to contribute to ensuring the long-term financial viability of MPGC.

[53] In January 1991, the corporation changed its name from "The Trustees of the Toronto General Burying Ground" to "Commemorative Services of Ontario" and then to "Mount Pleasant Group of Cemeteries" in 1997. No dispute is taken as to the authority to affect these name changes. For ease of reference, the company has been referred to as "MPGC" throughout these reasons.

(10) Dispute with the PGT

[54] On July 19, 1991, the PGT requested copies of MPGC's financial statements, taking the position that MPGC was a charity and relying on the provisions of the *CAA*. MPGC's solicitors, Weir & Foulds, responded, denying that MPGC was a charity subject to the *CAA*, and referred the PGT to Revenue Canada's written advice that MPGC was not a charity. Among other things, MPGC's solicitor observed that pursuant to s. 132(5) of the *Corporations Act*, on

dissolution, the net assets of MPGC were to be distributed to the members of the company.[6]

[55] The PGT did not pursue the matter. MPGC had not taken issue with the fact that it was regulated by the Cemeteries' Regulation Unit and moreover, there were no allegations of any financial impropriety. The application judge noted that there was never any serious question of the directors of MPGC liquidating the corporation for their own profit. The letter sent by MPGC's solicitors referenced the "net assets" of the corporation and, in any event, all or substantially all of the assets of the company were held subject to a statutory trust.

[56] In 1997, as mentioned, the name of the company was changed to its current name, "Mount Pleasant Group of Cemeteries". That year there was a corporate reorganization and another company was established to provide funeral services. That company was later renamed "Mount Pleasant Memorial Services".

(11) 21st Century Developments

[57] In 2006, MPGC wished to create a "visitation centre" at the Mount Pleasant Cemetery. The visitation centre proposed to replicate much of what might be found in a traditional funeral home, including a chapel for memorial services or funerals,

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[6] The solicitors also noted that under the *Cemeteries Act*, R.S.O., 1980 c. 59, all incorporated cemeteries had to provide graves for strangers and indigents free of charge and that, under the proposed new *Cemeteries Act*, if space to do so, with the exception of cemeteries run by a religious denomination, all cemeteries and crematoria had to provide for welfare funerals upon payment of the prescribed amount.

a clergy room, and a number of visitation rooms for paying last respects to the remains of the deceased. This development became a focus of the neighbourhood dispute, and the “pleasant” descriptor of MPGC’s peaceful history became less apt.

[58] In 2006, a group of local ratepayers (referred to in the record as the “Moore Park Residents’ Association” or the “Moore Park Ratepayers’ Association”) complained to the PGT about the proposed visitation centre and MPGC’s assertion that it was a privately-owned commercial cemetery.

[59] Subsequently, the PGT reiterated that MPGC was a charity. An exchange of letters ensued, but the PGT took no further steps.

[60] Around this time, Humphrey Funeral Home and the Moore Park Ratepayers’ Association applied to court and challenged the establishment of a visitation centre on the grounds that it was not an “associated use” to the main use of the cemetery within the meaning of the relevant City of Toronto by-law. In March of 2007, the application was rejected in reasons given by Harvison Young J. (as she then was). No express reference was made to any of the special statutes that had governed MPGC: *Humphrey Funeral Home v. Toronto (City)* (2007), 32 M.P.L.R. (4th) 124 (Ont. S.C.). The Court of Appeal for Ontario released its reasons upholding the decision and dismissed Humphrey Funeral Home’s application in November 2007: *Humphrey Funeral Home – A.W. Miles Chapel v. Toronto (City)*, 2007 ONCA 828, 40 M.P.L.R. (4th) 126. This court agreed with Harvison Young J. that “the cemetery

is as much about the living survivors as it is about the disposition of human remains”: at para. 7. The visitation centre fell within a use that was associated with a cemetery.

[61] Construction of the visitation centre began shortly afterwards and was completed in or about 2009. It has been in operation since that time.

[62] In the meantime, in 2008, the appellant brought and then withdrew an application to be continued under the *Corporations Act*.

[63] In 2010, in response to correspondence sent by counsel for the Moore Park Ratepayers’ Association to the Premier of Ontario, the Deputy Minister of Research and Innovation and Consumer Services responded and stated that given the local nature of the dispute, and the fact that there was appropriate government oversight of the cemeteries operated by MPGC, the government was not considering making any legislative amendments to address the issue of the validity of the board of directors.

[64] As mentioned, in 2012, the *FBCSA* was enacted. In his affidavit, MPGC’s President explained that the *FBCSA* allowed MPGC to simplify its corporate structure as cemeteries were now able to own funeral homes and funeral homes were able to operate crematoria. Accordingly, there was an ensuing reorganization in which Mount Pleasant Memorial Services surrendered its charter and transferred its assets to MPGC.

[65] In 2013, the respondent FTPC was incorporated by some members of the Moore Park Ratepayers' Association that had been involved in the prior interventions, augmented by others who joined as members. That same year, the respondent Ms. Wong-Tam brought a proceeding before the Environmental Review Tribunal seeking leave to appeal a decision of the Director of the Ministry of the Environment that had permitted an expanded crematorium operation at the Mount Pleasant Cemetery. On July 8, 2013, the Environmental Review Tribunal rejected her application.

[66] MPGC is self-sufficient. As of 2014, when Mr. McClary's affidavit was sworn, in addition to ownership of its lands and buildings, MPGC maintained numerous separate funds, as described by Mr. McClary:

> ***Care and Maintenance ("C&M") Trust Fund***
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> When MPGC sells an interment right, be it a grave, a crypt in a mausoleum or a niche in a columbarium, provincial legislation requires that a certain portion of the revenue be deposited in a C&M Trust Fund…The C&M Trust Fund must be managed by a corporation registered under the Loan and Trust Corporations Act or by a Credit Union…HSBC Trust Company (Canada) ("HSBC") is the trustee for the C&M Trust Fund…Our C&M Trust Fund was valued at $349 million as of March 31, 2014.
>
> ***Prepaid Trust Fund***
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> When money is received from the sale of a product or service that is not being delivered until a date in the future, provincial legislation requires that the money be deposited into a Prepaid Trust Fund. This trust fund must

> be managed by a corporation registered under the Loan and Trust Corporations Act or by a Credit Union. HSBC is the trustee for our Prepaid Trust Fund…As of March 31, 2014, our cemetery Prepaid Trust Fund was valued at $113.5 million.
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> ***Endowment Fund***
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> When families wish to make a provision for ongoing special care of their interment right, at a level not provided by the regular cemetery maintenance program, they can invest a specific amount in our Endowment Fund. This amount will be invested in interest bearing securities. The capital can be refunded at any time, and the interest earned each year will go to providing the desired special care (for example wreath placement, monument cleaning, or special gardening or flower requirements)… As of March 31, 2014, our Endowment Fund was valued at $3.9 million.
>
> ***General Fund***
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> After operating expenses and care and maintenance contributions are deducted from revenues, any balance is placed in MPGC's General Fund. This fund is used to create products and services that meet the changing needs of Toronto families; to develop new facilities and enhance existing ones; and to secure new lands to meet the needs of the Greater Toronto Area's rapidly-growing population. As of March 31, 2014, our General fund was valued at $63.4 million.

[67] MPGC has consistently taken the position that it is not a charity. It says it does not act for a charitable purpose and charges market and above market rates. In 1977, Revenue Canada confirmed that MPGC was not a charity for the purposes of the *Income Tax Act* in force at the time.

(12) Government Oversight

[68] MPGC and CMS are subject to considerable government oversight. MPGC and CMS are currently regulated by the Bereavement Authority of Ontario as well as by the PGT under the *FBCSA*. A brief summary of this oversight, and of the information MPGC and CMS provide to the supervising organizations, was also described by MPGC's President.

(A) Cemetery Registrar

[69] A registrar is appointed under s. 3 of the *FBCSA* to administer certain of its provisions. The *FBCSA* requires that any information requested by the registrar be provided "within the time that the registrar specifies, with the information that the registrar requests, including at the registrar's request, verification, by affidavit or otherwise, of any of the information requested": s. 111. MPGC's President stated that MPGC files annual reports with the registrar within 90 days of its fiscal year end in respect of: (a) Cemetery Activity; (b) the Care and Maintenance Fund; (c) the Prepaid Trust Fund; and (d) Audited Financial Statements (when available after completion of the audit).

[70] *FBCSA* cemetery oversight also extends to: (a) directors, management and sales staff changes; (b) licensing and education of cemetery operators, crematorium operators and sales representatives; (c) selling and display of caskets; (d) pricing and contracts; (e) trust funds; (f) record keeping; (g)

construction of interment rights; (h) cemetery by-laws; (i) customer complaints; (j) site inspections; and (k) information to be available to the public.

[71] Over the 2010-2011 period, all MPGC cemetery sites except Pine Hills in Scarborough were inspected. The MPGC site at Meadowvale in Mississauga was inspected twice. Financial records at MPGC's head office were also inspected twice.

(B) Board Funeral Services

[72] CMS is also heavily regulated under the *FBCSA*. Sections 8 and 9 require operators to hold a valid licence. In addition, MPGC's President explained that funeral oversight also extends to: (a) directors, management and licensed staff changes; (b) licensing and education of funeral directors and preplanning sales representatives; (c) premises and vehicles; (d) selling and display of caskets; (e) pricing and contracts; (f) trust funds; (g) record keeping; (h) customer complaints; (i) site inspections and investigations; and (j) discipline.

[73] Prior to 2013, CMS had three licensed funeral homes, operating under the name "The Simple Alternative". In 2013, the five MPGC visitation centres were licensed to CMS and inspections were conducted prior to the issuance of licences. Regular inspections were also conducted.

(C) Powers of the PGT

[74] The PGT may require any licensee or trustee to provide: (a) audited financial statements for any trust account or trust fund; and (b) any information related to trust accounts or trust funds: *FBCSA*, s. 58.

[75] MPGC's financial records are regularly inspected. At the time the application was heard by the application judge, MPGC cemeteries and visitation centres were described as having been inspected from 2010 to 2013, which included the inspection of financial records on two occasions. As the application judge observed, there were no allegations that funds had gone missing or had been misappropriated, nor any basis to conclude that the directors had acted in bad faith: at para. 14.

[76] I will return to the oversight provisions in the *FBCSA* when discussing the third issue relating to a charitable purpose trust.

(13) Court Proceedings

[77] On April 29, 2013 (and then as amended on May 30, 2014), FTPC applied for a number of declarations and orders. FTPC sought a declaration that MPGC continues to be governed by the *1826 Act*, as amended by the *1849 Act*, including the provisions in the *1849 Act* relating to the public election of trustees. Accordingly, they sought a declaration that the current directors of MPGC were not validly appointed. FTPC also sought a declaration that MPGC was incorporated

pursuant to the *1871 Act* for the sole purpose of acting as trustee for the statutory trust created in 1826 (what it called the “Burying Grounds Trust”) and for the benefit of the public. In addition, FTPC asked that the Burying Grounds Trust be declared a charitable purpose trust within the meaning of the *CAA*, and that MPGC be declared a charitable corporation within the meaning of the *CAA*. Finally, FTPC sought an order pursuant to s. 10 of the *CAA* that the PGT investigate: whether MPGC had conducted its affairs consistent with its legal obligations as a trustee; whether MPGC had elected or appointed its directors in a manner consistent with the requirements of the 1826 and 1849 Acts; and whether MPGC had ensured that the Burying Grounds Trust was appropriately compensated.

[78] The application was stated to have been brought because MPGC was now denying: (1) that it was a trustee; (2) that its lands and assets were subject to a trust; (3) that it was subject to the Special Act incorporating it; (4) and that it had any accountability to the public or the province. The PGT was named as a respondent to the application. Ms. Wong-Tam was added as an applicant in May 2014.

REASONS OF THE APPLICATION JUDGE

[79] The application judge granted the application with the exception of the request for an investigation. He determined that the incorporation of MPGC in 1871 neither repealed prior Acts nor made any direct provision for the appointment of directors. The provisions for the appointment of trustees contained in the *1849 Act*

remained the same. As such, directors were required to be appointed in accordance with the terms of the *1849 Act*. As there had been noncompliance since 1987, the application judge held that all of the current directors had been invalidly appointed. Relying on s. 288(4) of the *Corporations Act*, he appointed MPGC's seven most senior directors as trustees and ordered the parties to negotiate a protocol (to be approved by him) to govern the meeting for the election. The trustees were to place a notice of the meeting in the Ontario Gazette. It would then be open to FPTC to call a public meeting in accordance with the provisions of the *1849 Act* at which one or more inhabitant householders of the City of Toronto could be elected in replacement of one or more of the seven trustees named by the application judge.

[80] The application judge also declared that MPGC was a trustee subject to the provisions of the *CAA*, and that the trust administered by it was a charitable trust because the operation of a non-profit, non-denominational public cemetery qualified as a charitable purpose. He further declared that the funding and operation of visitation centres and the CMS funeral home business went beyond the scope of the statutory trust. As the evidence before him was inconclusive on the current scale of operation of crematoria, he was unable to make a determination in that regard. Nothing was said on how MPGC was to manage in the interim with all these now illegal lines of business.

[81] The application judge was not satisfied that the public interest would be served by ordering an investigation. To use his terminology, MPGC was not a runaway train. He stated, at para. 14, that "[t]here is no basis to conclude that its trustees – even if invalidly appointed – have acted in bad faith even if I have concluded that they have acted in error. They have not gone rogue."

[82] The application judge's reasons were released on December 31, 2018. MPGC appealed from that decision. The respondent FTPC cross-appealed from the application judge's refusal to order an investigation under the *CAA*.

[83] On March 14, 2019, on consent, this court granted an order staying the following declarations granted by the application judge: (1) that MPGC is required to be governed by a board of not more than seven trustees each of whom is required to be appointed in accordance with the provisions of the *1826 Act* as amended by the *1849 Act*; (2) that none of the ten current directors of MPGC has been validly appointed as a trustee of MPGC and none has the authority to appoint a new or replacement trustee; and (3) that the funding and operation of visitation centres and the CMS funeral home business is beyond the scope of the existing statutory trust administered by MPGC.

GROUNDS OF APPEAL

[84] The appellant relies on three alleged errors of the application judge in support of its appeal. It states that the application judge (1) erred in his statutory

interpretation of the 1800s legislation, and in particular, the *1871 Act*; (2) erred in declaring that the operation of the visitation centres and funeral homes was outside MPGC's legislative objects, which was relief the respondents did not request; and (3) erred in concluding that MPGC was a charitable trust (referred to throughout these reasons as a charitable purpose trust). The parties agree that a standard of correctness applies to each of these grounds.

ISSUE 1: DID THE APPLICATION JUDGE ERR IN HIS INTERPRETATION OF THE *1871 ACT*?

(1) Positions of the Parties

[85] The appellant submits that the application judge erred by disregarding the fundamental shift to the corporate legal framework governing MPGC that was introduced by the Legislature in 1871. The appellant argues that the application judge failed to recognize that with incorporation, perpetual succession was no longer a concern and that MPGC's governing body was given the power to pass by-laws to regulate its affairs, which necessarily included governance. The expansion of trustee eligibility requirements in the absence of a corresponding change to the voting requirement is consistent with this. Moreover, the change to the legislation reflected a legislative intent to prioritize efficiency of governance over public oversight.

[86] The appellant also argues that the scope of the by-law making power found in s. 14 of the *1871 Act* gave MPGC full authority to elect its directors, an authority that is consistent with general corporate statutes in effect around the time of the *1871 Act*, the interpretation mandated by the *Interpretation Act*, and the statutory principles of harmony and consistency, as well as common sense. It submits that the application judge's errors in statutory interpretation led to an outcome that is inconsistent with the purpose of the 1871 legislation and results in an absurdity.

[87] The respondent FTPC and the PGT dispute that the *1871 Act* reflected a fundamental shift in the legal framework governing MPGC. Their position is that the *1849 Act* established both the number of MPGC's trustees (seven) and the "manner" in which they were to be selected, not the *1871 Act* or any subsequent statutes. The *1849 Act* was not repealed either expressly or impliedly; incorporation did not alter the method of selection of the trustees; and the creation of a body corporate did not constitute a repeal of the prior statutes. The respondent FTPC and the PGT contend that the *1871 Act* provided for the trust to be continued and be bound by "all the conditions and duties" imposed by the prior legislation. Moreover, they submit that MPGC's subsequent conduct and publications support this interpretation.

[88] Before embarking on an analysis of the legal effect of the *1871 Act*, it should be emphasized that, consistent with the application judge's finding, all parties before this court concede that a statutory trust was established by the Legislature

and no appeal is taken in that regard. Accordingly, I do not propose to address that issue.[7]

[89] The parties also agree on nomenclature. Under the 1826 and 1849 Acts, the men identified in the statutes were trustees who held the land in trust as dictated by the statutes. With the introduction of the *1871 Act*, the corporation was the trustee and the individual trustees no longer held that position in a legal sense. The *1871 Act* continues to speak of trustees rather than directors, but this is an issue of nomenclature rather than legal significance, a fact acknowledged by the application judge and by counsel.

(2) Analysis

[90] The starting point with statutory interpretation is Elmer Driedger's description of the modern principle:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: Elmer A. Driedger, The Construction of Statutes (Toronto: Butterworths, 1974), at p. 67.

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[7] The respondents assert that MPGC's directors began to deny that MPGC was a statutory trust in 1991 and persisted in this position until April 2018 when MPGC filed its responding factum on the application. This issue is now fully resolved. That said, the appellant's previous position may have an impact on any costs award.

[91] Both under s. 7(39) of the *1867 Interpretation Act* and s. 64(1) of the current *Legislation Act*, *2006*, every enactment shall be deemed to be remedial and receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act.

[92] The modern principle was adopted by the Supreme Court in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. Justice Iacobucci observed that "statutory interpretation cannot be founded on the wording of the legislation alone": at para. 21. Among other things, he considered the purpose of the Act, along with its consequences or effects, and also noted that the legislature does not intend to produce absurd consequences: at para. 27. See also *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. That decision reiterated the presumption of harmony, coherence, and consistency between statutes dealing with the same subject matter: *Bell ExpressVu*, at para. 27.

[93] It is fair to say that the historical Acts in issue in this appeal are not models of legislative clarity; rather, they are products of their times, times devoid of computers, photocopiers, and ubiquity of publication. As historical statutes, they present real interpretative challenges.

[94] Changes to legislation may be effected by amendment or express or implied repeal: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada Inc., 2014) (QL), at para. 24.30.

[95] The appellant took the position in oral argument that it was not relying on implied repeal and argued that changes to MPGC's governance were effected by amendment, as reflected in the title of the *1871 Act*. In oral submissions, counsel relied on Sullivan's commentary on amending legislation (found in a chapter of her book entitled "Temporal Operation") in support of his position. She writes, at paras. 24.70–24.72, that in analyzing the temporal operation of amendments, the courts look to substance rather than form and that the part of the amendment that introduces new law is treated as new legislation. Sullivan goes on to state that "the part of existing law that is not substantively reproduced in the new text is treated as a repeal. It ceases to be law and ceases to be in force from the moment the amendment operates": Sullivan, at para. 24.71.

[96] While I accept that the governance of MPGC was altered by the *1871 Act*, in this passage, Sullivan is addressing the temporal operation of amendments rather than providing a stand-alone interpretative principle. Accordingly, I would not place weight, as the appellant does, on this passage.

[97] The appellant also relies on *Montreal v. ILGWU Center Inc.* (1971), 1974 S.C.R. 59, in support of its position. In that case, the relevant amending Act expressly stated that it was replacing the prior Act. From a timing perspective, the part of the prior Act that was replaced (i.e., that was not substantively reproduced in the new Act) was treated as a repeal. The decision does not stand for the proposition that a substantive change requires that all continuing provisions be

reproduced, failing which, those provisions that are not reproduced are considered to be repealed.

[98] As FTPC argued, the appellant's submission is more properly characterized as being based on implied repeal. As a standard of correctness applies to statutory interpretation, the appellant's mischaracterization is not determinative; it is for this court to determine points of law: *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 50, at para. 125. I see no unfairness as FTPC addressed implied repeal in its factum and, in any event, the substance of the appellant's argument was based on implied repeal and was simply mischaracterized.

[99] In *R. v. Mercure*, [1988] 1 S.C.R. 234, a case relied upon by FTPC, La Forest J. addressed implied repeal at p. 265:

> [S]tringent tests…have been established to warrant a holding that a statute has been impliedly repealed. As the court put it in *The India* (1865), 12 L.T.N.S. 316, at p. 316, a prior statute is repealed by implication only "if the entire subject-matter has been so dealt with in subsequent statutes that, according to all ordinary reasoning, the particular provisions in the prior statute could not have been intended to subsist".

[100] In *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42, [2013] 2 S.C.R. 774, also relied upon by the FTPC, Wagner J. (as he then was) commented on the holding in *Mercure*, stating at para. 44:

> [A]n implied repeal has occurred if subsequent legislation has occupied the field to such an extent that the court can infer that the legislature intended to repeal the earlier statutes. There was no mention in *Mercure* of a requirement to prove conflict. Both the test for implied repeal and the test for implied modification are based on the occupation of the field by subsequent legislation.

[101] A modern statute designed to repeal a prior statute is likely to so do explicitly. And, as Sullivan observes at para. 24.39, under current Canadian practice, repeal is usually carried out through the enactment of stylized provisions.

[102] Although repeal was clearly a known concept in 1849, as mentioned, there was no express repeal here of any parts of the *1849 Act*. Moreover, there is a general presumption against implied repeal. That said, "the strength of that presumption against implied repeal varies according to the context. In modern times, when standards of legislative drafting are high, the presumption against implied repeal is stronger": Diggory Bailey & Luke Norbury, *Bennion on Statutory Interpretation*, 7th ed (UK: Lexis Nexis, 2019), at p. 207.[8] In a similar vein, Lord Roskill observed in *Government of United States of America v. Jennings and Another* (1982), 75 Cr. App. R. 367 (H.L.), that earlier cases on implied repeal had

[8] The rule of implied repeal also has been held to have no application to constitutional statutes: Bennion, at p. 207.

to be approached and applied with caution, since “until comparatively late in the last century statutes were not drafted with the same skill as today”: p. 376.[9].

[103] Reading the words of the *1871 Act* in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme and object of the Act, I conclude that the Legislature intended to change the governance of MPGC to a corporation with perpetual succession being achieved through the enactment of by-laws rather than through the vehicle of an election. The *1871 Act* occupied the field. Furthermore, a contrary conclusion produces absurd results. As such, the 1849 trustee selection process was no longer applicable. I reach this conclusion for the following reasons.

(A) Preamble of *1871 Act*

[104] Originally, the petitioners petitioned the government to hold the six acres of land in a “corporate capacity”. As noted, this was not granted by the Legislative Council in the *1826 Act*. The five named individuals were to hold the land in trust. They were also given the power, “for the time being”, to make rules and regulations for the purposes described in the Act and for the due management of the land. In

[9] In “Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting” (2014) 11:4 Col. L. Rev. 807, Jarrod Shobe advocates an interpretative methodology in the U.S. based on the evolving quality of the drafting process and the resulting need to interpret older statutes differently from modern ones.

addition, the trustee selection process would “prevent the failure of such estate in succession”.

[105] In the immediately succeeding statutes dealing with the cemetery, the Legislative Council worked with different formulations. By 1871, the Legislature had now resolved, as the name of the statute suggests, to “Incorporate the Trustees of the Toronto General Burying Ground” and, among other things, “to amend the Acts relating to the said trust”. The individual trustees were relieved of responsibilities that were then vested in the corporation.

[106] At the time, s. 7(39) of the *1867 Interpretation Act* directed the reader to the preamble of an Act to assist in explaining its purport and object. The *1871 Act*’s preamble identified the following objects:

- it was expedient that the trustees and their successors should be constituted a body corporate;
- the provisions of the Act were enacted for the better management of the trust (repeated twice in the preamble);
- it was expedient that the trustees have the power to acquire additional lands; and
- it was desirable for the residents of the village of Yorkville and the Township of York to be eligible for selection to fill vacancies as trustees, and the choice should not be limited to residents of the City of Toronto.

[107] The application judge did not focus on all elements of the preamble (and particularly the better management and body corporate objects)—which assisted in explaining the purpose of the *1871 Act*—and hence failed to give effect to the Act's purpose. The public election component of the *1849 Act* was subsumed and replaced by the vehicle of incorporation which provided for perpetual succession, the factor to which I will now turn.

(B) Perpetual Succession as an Object

[108] In addition to the direction given by the preamble, the language of the *1871 Act* reflects a legislative intent to establish a corporation, with the individuals in whom the lands had previously been vested now being constituted and declared a body, corporate and politic. Thus, s. 1 of the Act recognized that "perpetual succession" was achieved and s. 2 stated that all property previously vested in the trustees was vested and transferred to the corporation. Incorporation now ensured perpetual succession, and this object of the *1849 Act,* described in that Act's preamble, was therefore rendered unnecessary. Contrary to the application judge's assumption, there was nothing in the legislation that suggested any public oversight concerns: see para. 105 of the application judge's reasons. Rather, the *1849 Act* suggested a concern with perpetual succession, a concern that was eliminated with incorporation in 1871.

(C) Better Management as an Object

[109] Recall too that the preamble of the *1871 Act* repeatedly stated that "the provisions hereinafter contained" were enacted "for the better management of the said trust". These provisions would necessarily include s. 14 on governance, a subject I will now address.

[110] Importantly, the *1871 Act* substituted a new corporate regime for the prior regime. Incorporation represented a fundamental shift in the trust's capacity, persona and operations. This new regime included replacement provisions for corporate governance, specifically in s. 14, where the corporation was granted authority to pass by-laws for "the management of its property" and for the "regulation of its affairs". In *Ontario Teachers' Federation v. Ontario Secondary School Teachers' Federation et al.*, 2002 CanLII 41933 (Ont. C.A.), leave to appeal refused, 2003 CarswellOnt 1279 (S.C.C.), this court interpreted the term "affairs of a corporation" expansively and determined that it encompassed the governance of a corporation: at para. 31.

[111] In the case before us, by giving the corporation this authority, the Legislature intended "The Trustees of the Toronto General Burying Grounds" to address its own governance.

[112] The evolution of the statutory scheme reflects the Legislative Council's emphasis on efficiency, convenience, and enhanced management of the trust. The

fledging colony's *1826 Act* provided for direct democracy—all inhabitant householders of the Town of York could vote to replace a trustee who had died, became resident abroad, or was incapable of acting. In 1849, it was recognized that this method to ensure perpetual succession was "inconvenient and ineffectual" and Trustees were given the power of selection subject to notice and further potential for a public election. With a growing population, 1871 demanded further change and a need to ensure the "better management" of the trust. Hence the introduction of the efficiency of incorporation and the demise of a system of direct democracy for the governance of Toronto's non-denominational cemetery. The directors/trustees would be elected not at public municipal elections but pursuant to the by-law powers anchored in the *1871 Act*.

(D) Context and Other Comparable Statutes

[113] In addition to the aforementioned context, other statutes of the era provided for governance by directors acting under the authority of by-laws: F.W. Wegenast, *The Law of Canadian Companies* (Toronto: Burroughs and Company [Eastern] Limited, 1931), at p. 22.

[114] I would also observe that the *Corporations Act, 1953* continued the corporate model featured in the *1871 Act*. In that statute, Part III applied to every corporation without share capital incorporated by or under a general or special Act of the Legislature except where it was otherwise expressly provided. Upon incorporation, each applicant became a member and the members would elect the directors.

Section 112 of the *Corporations Act*, *1953* provided that the directors of a corporation could pass by-laws not contrary to the Act for, among other things, the time for and the manner of election of directors and the conduct in all other particulars of the affairs of the corporation: ss. 112(g) and (j).

[115] The application judge determined that the provisions of the *Corporations Act, 1953* did not render the specific provisions of the *1849 Act* inoperative. However, given that the 1849 election provisions had been spent by the *1871 Act*, there was no such need. Rather, the *Corporations Act*, *1953*, served to reiterate and provide more detail and clearer particulars on the role of directors within the construct of a corporation. This is in keeping with the presumption of coherence in enactments of the same legislature: Pierre-André Côté, *Interpretation of Legislation in Canada*, 4th ed. (Toronto: Carswell, 2011), at p. 365.

[116] The respondents place weight on the notices placed in the Ontario Gazette and publications in the years following the *1871 Act*. However, while I accept that subsequent conduct may provide some insight, it should not determine the interpretation of a statute. Indeed, the respondents concede the non-determinative nature of subsequent documents and conduct.

(E) Language of the *1871 Act*

[117] The *1871 Act* also confirmed that the corporation would have all the powers vested in corporations generally by the *1867 Interpretation Act*. This latter statute

provided for perpetual succession in a corporation, thereby eliminating the need for the municipal elections described in the 1826 and 1849 statutes.

[118] This interpretation does not ignore s. 2 of the *1871 Act*, as asserted by the respondents. That section stated that all the powers and privileges granted to the trustees by any former Act of the Province of Upper Canada or Canada were granted to the corporation subject to all the conditions and duties imposed on the trustees not inconsistent with the *1871 Act*. Section 1 gave the new corporation all the powers vested in corporations generally by the *1867 Interpretation Act*. The public election process was inconsistent with the corporate governance model, a model instituted to achieve better management of the trust, and governance being an obvious recurring issue for the Legislature. The "conditions or duties of concern" related not to governance but to the trust and the nature of the trust property being cemeteries and burial grounds. The *1871 Act*'s reference in s. 14 to the by-laws not being inconsistent with any existing law is similarly not fatal to the appellant's position as the public election process was eliminated due to incorporation. Furthermore, with both subsections, the Legislature could have readily referred to the specific statutory provisions it wished to retain rather than using the generic language it did, language which, if interpreted as proposed by the respondents, would defeat the better management purpose of the *1871 Act*.

(F) Consequences and Effects

1. Eligible Voters

[119] There is also s. 4 of the *1871 Act*. It rendered resident householders of the village of Yorkville or of the Township of York eligible for selection to fill vacancies as trustees of the corporation. However, nowhere are these resident householders accorded a power to vote in any election. It would be anomalous if the *1849 Act* continued to govern appointment of trustees as submitted by the respondents. This would mean that householders from the village of Yorkville and Township of York would be eligible for selection as trustees but, unlike householders of the City of Toronto, would have no ability to participate in any vote. The power to vote would be confined to resident householders of the City of Toronto as prescribed by the *1849 Act*. The emphasis in the *1871 Act* on eligibility for selection undermines the submission that the eligibility to vote provisions of the *1849 Act* survived. The anomalous outcome associated with the public elections model advanced by the respondents supports the conclusion that the structure intended by the *1871 Act* was a governance model based on corporate status rather than public elections.

2. Absurd Procedure and Results

[120] Interpreting the statutes as proposed by the respondents and as accepted by the application judge would require the following steps to elect a replacement trustee:

- notice in the Ontario Gazette;
- two announcements of a public meeting in two newspapers;

- a public meeting held within one month of the notice in the Ontario Gazette if requested; and

- an election by the majority of the inhabitant householders of the City of Toronto present at the meeting.

[121] In my view, the consequences of the interpretation advocated by the respondents would be impractical and absurd. The application judge found that there have been no validly appointed trustees since the corporation ceased posting notices in the Canada Gazette over thirty years ago. The public elections model would demand an election apparatus far removed from any in the contemplation of the legislators of 1849. Moreover, the public elections model would result in City of Toronto inhabitant householders being the only eligible electors for cemeteries extending to the Regional Municipalities of Durham, Halton and Peel, among others. There is also a real issue as to who would be encompassed by the term “inhabitant householders” and as to the territorial limitations of the “City of Toronto” descriptor. The corporate structure erased this cumbersome (and no doubt costly) process. Moreover, the procedure eludes implementation. Even if one were to accept that voters from the village of Yorkville and the Township of York were precluded from voting, the definitional questions raised on the meaning to be ascribed to those former community entities and “inhabitant householders” are unanswerable.

[122] The public election model was uncovered by legal sleuthing close to two centuries after the statutes in issue had been enacted. It did not emerge as a result of any societal imperative or injustice. And, the Ontario Government advised counsel for the Moore Park Ratepayers' Association that the Government saw no need to amend the legislation.

[123] The Legislature is presumed to have intended its statutes to apply in a way that is not contrary to reason and justice. This presumption has been expressed in a variety of ways. In *Berardinelli v. Ontario Housing Corp.* (1978), [1979] 1 S.C.R. 275, Estey J. explained at p. 284:

> When one interpretation can be placed upon a statutory provision which would bring about a more workable and practical result, such an interpretation should be preferred if the words invoked by the Legislature can reasonably bear it.

[124] In *Rizzo*, at para. 27, the Supreme Court addressed absurdity in interpretation. Iacobucci J. explained that:

> …an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment [citation omitted]. Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile [citation omitted].

[125] In my view, the purpose, scheme and legislative intention all support the conclusion that the *1871 Act* heralded a new corporate regime. In maintaining adherence to the 1849 electoral governance structure, the application judge did not give effect to the change in the legal status of the trustees and their evolution into a corporation, a change that reflected a new governance model. The application judge expressly identified those sections of the Act he considered to be relevant but did not consider all the detail of the *1871 Act*'s preamble, and in particular, the better management object. Based on the provisions of the *1867 Interpretation Act*, the preamble formed part of the statute. He did not wrestle with the changed legal status of the trustees and the change of purpose that was incorporated into the Act's title. Moreover, the object of "better management" had to be referable to the preceding statute—put differently, the 1871 management model was expressly designed to be better than that contained in the *1849 Act*, an Act dedicated to an election model.

[126] Moreover, the *1871 Act* should be interpreted in a dynamic manner applied to present circumstances and not in a manner that is inconsistent with the legislative intent or that produces impractical, unworkable, anomalous and absurd results. Absurd interpretations are presumed not to be intended. (See also: *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 662-664; *Re Vabalis*, 2 D.L.R. (4th) 382 (Ont. C.A.)). I conclude that with the enactment of the *1871 Act*, the Legislature

intended to displace the public election model, and that the application judge erred in concluding otherwise.

[127] I would allow this ground of appeal. The *1871 Act* permits an interpretation that both reflects the legislative intent at the time and permits a governance model untethered from pioneer electoral practices.

ISSUE TWO: ARE THE VISITATION CENTRE AND FUNERAL HOME OPERATIONS OUTSIDE OF MPGC'S LEGISLATIVE OBJECTS?

[128] To recap, the *1826 Act* provided that the land was for a general burying ground. The *1871 Act* stated that the lands were to be used "exclusively as a cemetery or cemeteries or places for the burial of the dead".

[129] The application judge found that the terms of the trust prohibited the use of MPGC's lands for anything other than the operation of a public cemetery for the burial of the dead. He granted a declaration that "[t]he funding and operation of visitation centres and the CMS funeral home business is beyond the scope of the existing statutory trust administered by MPGC": at para. 164. He reasoned that in the 19th century, there would have been a clearly understood difference between burial of the dead and preparation of the dead for burial, the former being the responsibility of cemeteries and the latter of undertakers, funeral homes, or families. On the other hand, he observed that statutes are considered to be always speaking. Using "burial of the dead" as the defining requirement, he concluded that

visitation centres and the funeral home business did not qualify. He declined to make any finding or declaration on crematoria because he did not have sufficient evidence on the history of cremation in Ontario and its regulation: at paras. 156-157.

(1) Positions of the Parties

[130] The appellant begins by arguing that none of the respondents claimed the relief granted, namely a declaration that the use of cemetery funds to acquire and capitalize CMS and the operation of visitation centres and funeral homes on the cemetery lands is beyond the objects of the trust. It also submits that the application judge did not advert to the correct test and applied an unduly restrictive interpretation of MPGC's objects. These objects should have been construed purposively. He disregarded the evidence on the rational and close relationship between the cemetery business and the visitation centre and funeral home operations, and ought to have deferred to the board of directors whose decisions are entitled to deference under the business judgment rule.

[131] The PGT respondent submits that the issue of the operation of these other businesses had been raised in the context of the investigation requested by FTPC. It emphasizes that the issue of whether MPGC was authorized to carry on the funeral home business was raised in the PGT's factum before the application judge. The PGT also submits that the application judge applied the correct test. MPGC only has the powers expressly or impliedly granted by statute, and the *1871*

Act provided that it was to use the lands “exclusively as a cemetery or cemeteries or places for the burial of the dead”.

[132] The FTPC respondent states that there was no legal basis for the trustees to disregard the express terms of a statutory trust. The object of the trust was to provide a place for people to be buried, not to prepare people for burial. The *1871 Act* expressly requires that trust land be used “exclusively as a cemetery or cemeteries or places for the burial of the dead”. Subsequent Acts were consistent with that purpose. Moreover, FTPC notes that until repealed in 2012, the former *Cemeteries Act* did not include funeral home services in the definition of “cemetery services”. Lastly, it submits that the appellant’s reliance on the business judgment rule is a new argument, and that nevertheless, the business judgment rule does not shield directors from improper conduct and potential breaches of duty.

(2) Analysis

(A) Did the Respondents Claim the Declaratory Relief Granted?

[133] I start by examining the respondent FTPC’s Amended Notice of Application to ascertain whether there is any basis for the appellant’s first argument. It is the case that there is no mention in FTPC’s Amended Notice of Application of the declaratory relief the application judge granted with respect to the funeral homes and visitation centres. Nor are they the focus of the 11 pages of enumerated grounds for the application.

[134] The PGT did not issue a separate Notice of Application so reliance must be placed on the relief sought by FTPC.

[135] In *Rodaro v. Royal Bank of Canada*, 2002 CanLII 41834 (Ont. C.A.), at paras. 60-61, Doherty J.A. explained that quite apart from fairness concerns associated with a new theory of liability advanced at trial, courts rely on the adversarial process to get at the truth. It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings. As Labrosse J.A. said in *60635 Ontario Limited v. 1002953 Ontario Inc.*, 1999 CanLII 789 (Ont. C.A.), at para. 9:

> …[T]he parties to a legal suit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings. A finding of liability and resulting damages against a defendant on a basis that was not pleaded in the statement of claim cannot stand. It deprives the defendant of the opportunity to address that issue in the evidence at trial.

[136] The issue of the operation of the visitation centres and funeral home businesses arose in the context of FTPC's request for an investigation by the PGT as to whether the appellant had complied with its legal obligations as a trustee. As the appellant stated at para. 64 of its factum filed before the application judge, "FTPC asserts that MPGC's use of its lands and funds with respect to visitation centres and [CMS] is 'inconsistent with the purpose of the [1826 Trust]'". FTPC offered eight grounds in support of its request for an investigation, three of which related to the objects of the trust and whether they were being honoured. One of

these was that MPGC's use of its lands and funds with respect to visitation centres and CMS was inconsistent with the purpose of the *1826 Act*. While not expressly pleaded as requested declaratory relief, certainly the appellant could not be said to have been caught totally by surprise. The issue of the operation of the funeral businesses, the visitation centres, and crematoria arose out of the request for an investigation as to whether the appellant had complied with its legal obligations as a trustee.

[137] However, there is a material difference between the issue being raised in the context of a request for an order for an investigation by the PGT and a request for a declaration that the operation of the visitation centres and the CMS funeral home business are beyond the scope of the trust.

[138] The language of s. 10 of the *CAA* is flexible. Subsection 10(3) states:

> Where the court is of the opinion that the public interest can be served by an investigation of the matter alleged in the application, the court may make an order directing the PGT to make such investigation as the PGT considers proper in the circumstances and report in writing thereon to the court and the Attorney General.

[139] Thus an investigation must first examine the allegation of illegality. In contrast, a declaration pronounces on the illegality of these operations.

[140] It is also noteworthy that the application judge acknowledged that he had an inadequate evidentiary foundation to render a decision on the issue of crematoria. Had declaratory relief been sought on the legality of the three impugned business

lines of the appellant, presumably the evidentiary record would have been more extensive. This is particularly so given that at least some of the business lines, including the visitation centre at Mount Pleasant Cemetery, are fully operational.

[141] I would allow the appeal on the second issue on this ground alone. That said, I also am of the view that this ground of appeal should succeed on its merits.

(B) MPGC's Objects

[142] Section 63 of the *Legislation Act*, *2006* provides that the law is always speaking, as did its predecessor, the *1867 Interpretation Act*, in s. 6(1). Citing this provision in the 1970 version of the Ontario *Interpretation Act,* Estey J.A. (as he then was) in *Cash v. George Dundas Realty Ltd.*, 40 D.L.R. (3d) 31 (Ont. C.A.), aff'd [1976] 2 S.C.R. 796, succinctly captured this point: "[w]e are now concerned only with applying the statute according to its plain meaning in the light of the current practices and standards of the community": at p. 38. More recently, as Sharpe J.A., writing for this court in *Hilson v. 1336365 Alberta Ltd.*, 2019 ONCA 1000, 148 O.R. (3d) 609, stated at para. 28:

> Fourth, we do not accept the submission that the appellants' contention is supported by the principles of statutory interpretation. The argument that when interpreting the word "instrument" we should rigidly adhere to the specific problem that motivated its enactment would be contrary to the *Interpretation Act,* R.S.O. 1990, c. I.11, s. 4: "The law shall be considered as always speaking and, where a matter or thing is expressed in the present tense, it is to be applied to the circumstances as they arise, so that effect may be given

> to each Act and every part of it according to its true intent and meaning." This direction should be read together with s. 10 that all statutes "shall be deemed to be remedial ... and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit". See also Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at pp. 120-1. Unless the language of an enactment compels us to do so, we should avoid interpreting legislation in a way that produces impractical and unjust results.

[143] This issue was also canvassed by this court in *Ackland v. Yonge-Esplanade Enterprises Ltd.* (1992), 10 O.R. (3d) 97 (C.A.). There the court asked whether the correct presumptive approach to statutory interpretation is an historical one or an updating or ambulatory one. Put differently, the court considered whether an Act should be interpreted as a fixed-time Act or an on-going Act. In that case, Morden A.C.J.O. quoted the following excerpt from Sir Rupert Cross, *Statutory Interpretation*, 2nd ed. (London: Butterworths, 1987), at p. 50:

> But the proposition that an Act is always speaking is often taken to mean that a statutory provision has to be considered first and foremost as a norm of the current legal system, whence it takes its force, rather than just as a product of an historically defined Parliamentary assembly. It has a legal existence independently of the historical contingencies of its promulgation, and accordingly should be interpreted in the light of its place within the system of legal norms currently in force. Such an approach takes account of the viewpoint of the ordinary legal interpreter of today, who expects to apply ordinary current meaning to legal texts, rather than to embark on research into linguistic, cultural and political

> history, unless he is specifically put on notice that the latter approach is required.

[144] Similarly, Côté states at p. 226:

> But merely because the meaning of legislation at the time of its enactment must be respected in no way suggests that the statute's effect is confined to material or social facts or events then existing. It is necessary to distinguish the meaning of a term from the things that may be included in its ambit.
>
> An enactment dated January 15, 1980 dealing with 'automobiles' will obviously apply to cars built in 1981: the law 'is ever commanding'; 'and whatever be the sense of the verb or verbs contained in a provision, such provision shall be deemed to be in force at all times and under all circumstances to which it may apply'. The guideline favouring the common meaning at the time of adoption does not mean '…that all terms in all statutes must always be confined to their original meanings. Broad statutory categories are often held to include things unknown when the statute was enacted.'

[145] Although the parties focused on the elasticity of MPGC's corporate objects, the real question is whether the objects of the trust permit the operation of the two of three additional lines of business that the application judge ruled upon and which are in issue. Certainly the power to operate a funeral home or visitation centre was not expressly conferred on MPGC. However, in my view, that power is included within the ambit of cemeteries or places for the burial of the dead. In this regard I make three observations:

[146] First, the *1826 Act* spoke of the trust object being “a general burying ground”. The *1871 Act* stated that lands acquired were to be used exclusively as “a cemetery or cemeteries or places for the burial of the dead”. The evidence before the application judge was that in the late 1980s, cremation began to emerge as an increasingly popular alternative to traditional burial services. This placed financial pressure on MPGC’s ability to meet its perpetual care obligations. Put differently, MPGC had to ensure that its obligations to those who were dead and buried in the ground could be met. The crematoria, visitation centres, and funeral homes, which provide ancillary services, were operated both in furtherance of the better management of the trust but also in keeping with the statutory trust objects.

[147] Secondly, this changed environment is reflected in the Legislature’s enactment of legislation that expressly permitted cemeteries to operate crematoria and funeral homes. Permitting the ancillary operations is in keeping with the principle of statutory coherence and a remedial interpretation.

[148] Thirdly, treating these ancillary operations as incidental to the cemetery aligns with this court’s decision in *Humphrey Funeral Home*. Although admittedly dealing with the application of a by-law, this court’s holding from that case is apposite here. The operation of visitation centres and funeral homes are associated uses of operating the cemetery.

[149] For these reasons, I would allow this ground of appeal on both bases advanced by the appellant.

ISSUE 3: IS MPGC A CHARITABLE PURPOSE TRUST?

[150] The third issue is whether the MPGC trust is a charitable purpose trust subject to the provisions of the *CAA* (for ease of discussion, I will refer to "MPGC" for the remainder of this section rather than "the MPGC trust"). The significance of this designation is at a minimum twofold. First, s. 10(1) of the *CAA* provides:

> Where any two or more persons allege a breach of a trust created for a charitable purpose or seek the direction of the court for the administration of a trust for a charitable purpose, they may apply to the Superior Court of Justice and the court may hear the application and make such order as it considers just for the carrying out of the trust under the law. [Emphasis added.]

[151] Second, as indicated, s. 10(3) of the *CAA* provides that the court, if of the opinion that the public interest would be served by an investigation of the matter alleged in an application, may make an order directing the PGT to conduct an investigation as the PGT considers proper in the circumstances. As mentioned, the PGT resisted and continues to resist any investigation of MPGC.[10]

[152] The application judge held that MPGC is a charitable purpose trust. He noted that s. 1(2) of the *CAA* provided that a corporation incorporated for a religious,

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[10] Its argument was that the public interest did not favour an investigation because: (i) the provision of funeral services by MPGC was made in the best interest of MPGC; (ii) changes to legislation in 2012 now permitted cemeteries to own and operate funeral homes; (iii) an investigation would not deal with the updating of MPGC's corporate governance and objects; (iv) MPGC's visitation centres are connected to the provision of its cemetery services; (v) the funeral services generated revenue to cover expenses of the cemetery operations; (vi) there was no evidence that the trustees of MPGC had personally benefitted from the improper expenditures; and (vii) it would be unrealistic and impracticable to require the removal of the visitation centres from MPGC's lands.

educational, charitable or public purpose shall be deemed to be a trustee within the meaning of the Act. He also noted the broad agreement of the parties that the activities of MPGC are intended to benefit the public. Turning to the case law, the application judge observed that the limited jurisprudence supported the conclusion that a cemetery pursues a charitable purpose. *Applying Re Oldfield Estate (No. 2)*, [1949] 2 D.L.R. 175 (Man. K.B.) and *Scottish Burial Reform and Cremation Society v. Glasgow Corp.*, [1967] 3 W.L.R. 1132 (H.L. Scotland), he found that the operation of a non-profit, non-denominational public cemetery qualified as a charitable purpose.

[153] For the reasons that follow, I disagree with the application judge's conclusion. In my view, MPGC is not a charitable purpose trust and is therefore not subject to the *CAA*.

(1) Positions of the Parties

[154] The appellant submits that the application judge erred in assuming that MPGC's activities were charitable because MPGC provided a benefit to the public. It argues that MPGC is not a charitable trust for three principal reasons: (i) this was the conclusion of the CRA; (ii) MPGC charges market or above market rates in keeping with rates charged by for-profit cemeteries; and (iii) 70 per cent of non-denominational cemeteries in Ontario are not considered to be charities. The appellant submits that the application judge erroneously interpreted and relied on

Scottish Burial and Re Oldfield. The evidence did not support the application judge's conclusion and, in any event, MPGC is already highly regulated.

[155] The respondent FTPC submits that the only available case law, which includes *Scottish Burial and Re Oldfield*, supports the application judge's conclusion that operating a non-denominational cemetery may constitute a charitable purpose. The respondent FTPC also notes that the Supreme Court has held that "a charitable organization may operate a commercial enterprise, so long as the enterprise serves as a means of accomplishing the purposes of the organization, rather than an end in itself": *Vancouver Society of Immigrants & Visible Minority Women v. Minister of National Revenue*, [1999] 1 S.C.R. 10, at para. 60 (per Gonthier J.'s dissenting reasons).

[156] The PGT states that the application judge did recognize that the mere existence of a public benefit is not enough to qualify an activity as charitable. The PGT highlights that MPGC has had a charitable character and purpose from inception, and the factors relied upon by the appellant are not persuasive: CRA's position is not determinative; charges for commercial services do not preclude charitable status; and other non-denominational cemeteries may not have applied for charitable registration under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th supp.) (the "ITA"). This does not mean that they would not qualify as charities at common law. The PGT also argues that *Scottish Burial* is not so narrow in scope as to hold that only burial reform and cremations are charitable.

(2) Analysis

[157] The origin of the contest in this case has little to do with the traditional lens through which a request for a charitable designation often arises. Typically, the contextual framework for such a request is income tax based. In *Vancouver Society*, Gonthier J., in dissent, described the considerable privileges that attach to charitable status. Organizations seek the ability to generate donations that produce charitable receipts, which in turn justify a deduction from income so as to achieve a reduced tax exposure. In that same decision, Iacobucci J, writing for the majority, also commented on the tremendous tax advantages and the consequent loss of revenue to the public treasury that arises from a charitable status designation. In *A.Y.S.A. Amateur Youth Soccer Assn. v. Canada Revenue Agency*, 2007 SCC 42, [2007] 3 S.C.R. 217, Rothstein J. observed, at para. 6, that associations that qualify as non-profit organizations under the *ITA*, but not as registered charities, pay no tax on income but cannot issue tax receipts to donors.

[158] As with the *CAA*, the *ITA* relies on the common law definition of charity, which is subject to incremental change as the common law adapts to societal change: *A.Y.S.A.*, at para. 8. Rothstein J. explained that “[u]nless legislation provides otherwise, it will be for the courts, through the jurisprudence, to determine what is or is not a charity for legal purposes”: at para. 8.

[159] In this case, the issue of charitable status has already been canvassed with the Minister of National Revenue, and in 1977, Revenue Canada communicated

its advice that MPGC was not a charity for tax purposes. MPGC does not solicit funds and is entirely self-sufficient. The income tax context is totally absent from this case. Furthermore, the *1871 Act* itself provided that "the said cemeteries or burying grounds shall be, and are hereby declared exempt from all public taxes, rates or assessments".[11]

[160] Here, the charitable status designation is sought so that the respondent FTPC can avail itself of the provisions of the *CAA* and obtain an order that MPGC be investigated by the PGT. However, as already discussed, MPGC is heavily regulated under the Bereavement Authority of Ontario, the *FBCSA*, and its regulations. So, by way of example, the PGT may require a funeral operator such as MPGC to provide audited financial statements on any trust account or trust fund that is required to be established under the *FBCSA*. Upon receiving a written direction from the PGT, a person who is required under the *FBCSA* to establish a trust fund or hold money in trust shall apply to the Superior Court of Justice to pass accounts. MPGC must also have appropriate licences for its operations, maintain certain trust accounts, provide certain audited financial statements, maintain certain records, and report certain changes to the Registrar under the *FBCSA*. The *FBCSA* also provides for a separate complaint and inspection procedure. No charitable designation is required for any of this.

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[11] Income tax was not introduced into Canada until 1917. This provision would apply to any provincial taxes and assessments.

[161] All this is to say that the framework within which the issue of charitable status arises in this case presents a very different context.

(A) Statutory Trust

[162] As conceded by counsel for the appellant, and, in any event, as found by the application judge, the appellant is the trustee of a statutory trust. The parties' submissions on this third ground of appeal focused on the definition of "charitable purpose" under the common law. However, all parties concede that MPGC is a statutory trust and there is no appeal of that issue.

[163] A statutory trust, as the name implies, is a creature of statute: *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225, at para. 18. Being a creature of statute, a statutory trust does not have to fulfill the requirements of the common law of trusts: *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Guarantee*, at paras. 36, 47. Indeed, the authors of *Oosterhoff on Trusts* suggest that statutory trusts are generally imposed in the absence of at least one of the three certainties of trust law (certainty of intention, subject matter, and object): A.H. Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. (Toronto: Carswell, 2014), at p. 29. As noted by the Supreme Court, the provincial governments "may define "trust" as they choose for matters within their own legislative competence…": *Henfrey*, at p. 35.

[164] These authorities indicate that a statutory trust is a flexible device. In *XMCO Canada Ltd., Re*, 1991 CarswellOnt 161 (C.J.), for example, Killeen J. described it as “expansive” and having a “special form”: at paras. 18, 20. (See also: *Guarantee*, at paras. 50, 79; *Henfrey*, at pp. 34-35.) As such, and being a creature of statute, a statutory trust may be altered by the Legislature.

[165] Statutory trusts are a difficult fit with charitable purpose trusts. A statutory trust is a creature of statute and clear statutory language reflecting a legislative intention to create a charitable purpose trust would be expected. I see no such language in any of the relevant Acts. In this regard, it is telling that the Legislature did not use the word “charitable” or “charity”, even though the modern concept of charities dates back to the 17th century *Statute of Elizabeth*. One feature of a statutory trust is that, as a creature of statute, it can be changed by the Legislature. No party in this case contends that the Legislature could not change further the legislation affecting MPGC.

[166] Statutes are to be read as being coherent: Sullivan, at para. 11.2. The *CAA* supplements the court’s inherent jurisdiction to supervise the activities of charitable organizations: *Asian Outreach Canada v. Hutchinson*, 1999 CarswellOnt 1794 (S.C.), at para. 26. As noted by van Rensburg J. (as she then was) in *Friends of Camp Aneesh v. Girl Guides of Canada*, 2012 ONSC 6855, at para. 25, “the *CAA* creates machinery and provides procedures and does not significantly extend the jurisdiction of the Court over the matters to which it refers”. In *Re Centenary*

Hospital Association (1989), 59 D.L.R. (4th) 449 (Ont. S.C.), after reviewing the legislative history of the *CAA* and other Acts governing public hospitals, the court found that the activities of public hospitals were not covered by the *CAA* because:

> …the [*Public Hospitals Act*, R.S.O. 1980, c. 410] was intended to provide an exclusive statutory scheme for the supervision and regulation of public hospitals and it was not contemplated that the *Charities Accounting Act* should apply nor that the Public Trustee should have a role… Had [the *Charities Accounting Act*] been intended to give the Public Trustee, for the first time, power to supervise the financial affairs of public hospitals, quite independently of and possibly in a manner that would conflict with the powers of the Lieutenant Governor in Council and the Minister under the *Public Hospitals Act*, it would have been plainly so stated in the legislation: at pp. 463-464.

[167] As discussed, MPGC is already heavily regulated under the Bereavement Authority of Ontario, the *FBCSA*, and its regulations, and before these enactments, by a different comprehensive regulatory regime. The Legislature could not have intended that the *CAA* also apply to MPGC.

[168] MPGC is a statutory trust. If the Legislature had wished to make MPGC a charitable purpose trust, it could have done so. Indeed, presumably it still could. Moreover, when invited to change the legislation, albeit for a different purpose, in 2010, the Ontario Government declined to take any action. And, when the issue of charitable status was taken up with the PGT in 1991 and then again in later years, the PGT took no further action in the face of MPGC's stated rejection of such a characterization.

[169] For these reasons, I conclude that it was not open to the application judge to treat the statutory trust as a charitable purpose trust under the *CAA*.

[170] Having said that, in light of the other arguments made by the parties, I will also address why I would not consider this to be a charitable purpose trust in any event.

(B) Charitable Purpose Trust

[171] Although in the context of the *ITA* rather than the *CAA*, in *A.Y.S.A.*, Rothstein J. traced the evolution of the law on charitable purpose trusts and noted, at para. 25, that the cases often start by citing the preamble to the *Charitable Uses Act*, 1601 (Eng.), 43 Eliz. 1, c.4 (commonly referred to as the *Statute of Elizabeth or the Statute of Charitable Uses*), which provided a list of examples of charitable purposes. (I would observe in passing that a cemetery is not one of them.) The list was then refined into four categories in *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531 (H.L.). The *Pemsel* approach was subsequently adopted by the Supreme Court of Canada in three tax cases: *Dames du Bon Pasteur v. R.*, [1952] 2 S.C.R. 76; *Towle Estate v. Minister of National Revenue* (1966), [1967] S.C.R. 133; and *Vancouver Society*.

[172] The *CAA* incorporated the same scheme to determine a charitable purpose. Section 7 of the *CAA* provides that charitable purpose means: (a) the relief of

poverty, (b) education, (c) the advancement of religion, and (d) any purpose beneficial to the community, not falling under clause (a), (b) or (c).

[173] Only category (d), the basket clause, is relevant to the analysis in this case. In *A.Y.S.A.*, Rothstein J. explained, at para. 27:

> In *Vancouver Society*, the majority held that under the fourth head, the purposes of the organization must be of (a) "public benefit" or "beneficial to the community" and (b) "in a way the law regards as charitable" (para. 176). Recognizing that this reasoning was circular and that the law was not clear, Iacobucci J., at para. 177, adopted the following test from *D'Aguiar v. Guyana Commissioner of Inland Revenue*, [1970] T.R. 31, at p. 33:
>
> > [The Court] must first consider the trend of those decisions which have established certain objects as charitable under this heading, and ask whether, by reasonable extension or analogy, the instant case may be considered to be in line with these. Secondly, it must examine certain accepted anomalies to see whether they fairly cover the objects under consideration. Thirdly — and this is really a cross-check upon the others — it must ask whether, consistently with the objects declared, the income and property in question can be applied for purposes clearly falling outside the scope of charity; if so, the argument for charity must fail.
>
> Iacobucci J. then added to the test:
>
> > To this I would add the general requirement…that the purpose must also be "for the benefit of the community or of an appreciably important class of the community" rather than for private advantage.

[174] In *A.Y.S.A.*, Rothstein J. then highlighted that "[i]n a case involving the meaning of charity for purposes of the *ITA*, we are not applying the common law in a vacuum. It will be necessary to consider not only the common law, but the common law in relation to the scheme of the *ITA*: *A.Y.S.A.*, at para. 30. Rothstein J. summarized the proper approach, at para. 31:

> To summarize, in determining if an organization is charitable under the fourth head of *Pemsel* for purposes of registration under the [*Income Tax Act*], it will be necessary to consider the trend of cases to decide if the purposes are for a public benefit which the law regards as charitable. It will also be necessary to consider the scheme of the [*Income Tax Act*]. Finally, it is necessary to determine whether what is sought is an incremental change or a reform best left to Parliament.

[175] As in *A.Y.S.A.*, "we are not applying the common law in a vacuum", but in relation to the scheme of the *CAA*. Based on *A.Y.S.A.*, to determine whether an organization is charitable under the fourth category of *Pemsel*, for the purposes of the *CAA*, it is necessary to first examine the trend of cases to decide if the purposes are for a public benefit which the law regards as charitable.[12] Second, it is necessary to consider the scheme of the statute in question (in *A.Y.S.A.*, the *ITA*,

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[12] At paras. 37-38, Rothstein J. briefly drew attention, in obiter, to the 1984 decision of the Ontario Divisional Court in *Re Laidlaw Foundation* (1984), 13 D.L.R. (4th) 491 (Ont. Div. Ct.). *Re Laidlaw* suggested that the definition of charity under the *CAA* might be broader than under the common law because the basket clause did not include the limitation that the purpose must be recognized by the common law as charitable. The test for the basket clause clearly cannot be limited to "public benefit" only as the ambit for inclusion would be almost limitless. Justice Rothstein described the decision as anomalous and inconsistent with the Supreme Court's decision in *Vancouver Society* that public benefit is not enough. In adopting the *Pemsel* categories, the *CAA* presumably also adopted the tests for the *Pemsel* categories. In any event, neither the FTPC nor the PGT relied on *Re Laidlaw*.

and in this case, the *CAA*). Finally, it is necessary to consider whether the proposed charitable designation is in the nature of a reform demanding legislative action.

[176] Before applying this test, I must also emphasize that the law of charity is a moving subject that should evolve as new social needs arise or as old needs become obsolete or satisfied: *Vancouver Society*, at paras. 146, 150; *A.Y.S.A.*, at para. 28. To quote from Iacobucci J. in *Vancouver Society*, at para. 146:

> [T]he court has always had the jurisdiction to decide what is charitable and was never bound by the preamble. Nonetheless, the preamble proved to be a rich source of examples and the law of charities has proceeded by way of analogy to the purposes enumerated in the preamble. Indeed, as Lord Wilberforce observed in *Scottish Burial Reform and Cremation Society v. Glasgow Corporation*, [1968] A.C. 138 (H.L.), at p. 154:
>
> > …it is now accepted that what must be regarded is not the wording of the preamble itself, but the effect of decisions given by the courts as to its scope, decisions which have endeavoured to keep the law as to charities moving as new social needs arise or old ones become obsolete or satisfied.

1. <u>No Compelling Jurisprudential Trend</u>

[177] Dealing firstly with the issue of whether there is a jurisprudential trend, disposal of the dead used to be regarded as a religious activity in the advancement of religion (the third charitable purpose category) because burials traditionally took place in a churchyard. However, as the application judge noted, some cases

support the proposition that non-denominational cemeteries may also have a charitable purpose. None of the cases cited by the application judge post-date 1949 in Canada and 1968 in the United Kingdom.

[178] The 1949 decision of the Manitoba Court of King's Bench in *Re Oldfield* involved a gift for the maintenance of a communal cemetery unconnected with any church or religious denomination. The court decided that the bequest had a charitable purpose. Similarly, in *Re Quinn's Wills Trusts* (1953), 88, I.L.T.R. 161 (H. C.), the High Court in Ireland found that a gift for the annual improvement of a non-denominational cemetery was a charitable bequest within the fourth category. The PGT also referred this court to the 1976 decision in *Re Robinson* (1976), 75 D.L.R. (3d) 532 (Ont. S.C.), which found that a bequest of $5,000 for the general upkeep of a cemetery was charitable in nature: at p. 533. Importantly, these cases involved bequests, a very different factual context than a statutory trust established by the Legislature.

[179] *Scottish Burial* involved a limited company that had been incorporated to promote inexpensive and sanitary methods of burial in Scotland, particularly through cremation, and to publish information in that regard. The company charged fees, but these fees were not intended to yield a profit. As its name implies, the focus of the company was burial reform and cremation. The House of Lords accepted that this was a charity under the basket clause. Arguably, *Scottish Burial*

simply stands for the proposition that the promotion of reform in methods of disposal of the dead may constitute a charitable purpose.

[180] Even if these cases could be given a broader interpretation, it is fair to conclude that the jurisprudence on the charitable nature of cemeteries is extremely limited. It certainly cannot be characterized as a trend as described in *A.Y.S.A.* In the circumstances of such limited jurisprudence, this court was not referred to any separate anomalous cases: *Vancouver Society*, at para. 177. Moreover, as mentioned, MPGC is a statutory trust. I do not view the above cases as authority for the proposition that a statutory trust created for the operation of a non-denominational cemetery has a charitable purpose under the common law. This is a circumstance where, "[consistent] with the objects declared, the income and property in question can be applied for purposes clearly falling outside the scope of charity": *Vancouver Society*, at para. 177.

[181] In addition to having a purpose that the law regards as charitable, under the basket clause, the charitable purpose of an organization must also be for the benefit of the community or an appreciably important class of the community: *Vancouver Society*, at paras. 175-177; *A.Y.S.A.*, at para. 27. As Iacobucci J. explained in *Vancouver Society*, charitable activity is not concerned with the conferment of private advantage: at para. 147.

[182] The application judge noted that MPGC did not dispute that its activities are intended to benefit the public: at para. 139. MPGC nevertheless emphasizes to

this court that, even if its activities are beneficial to the public, providing a public benefit is not MPGC's primary purpose. As I have found that MPGC does not have a charitable purpose for other reasons, it is unnecessary to further consider this part of the test. I would note, however, that as MPGC is a statutory trust, one would expect there to be a public benefit.

2. Scheme of Statute

[183] In examining the scheme of the statute, I have already addressed this issue. However, I would also observe that the circumstances surrounding MPGC's establishment had a business component. The Legislature's initial focus was to create a vehicle for multiple individuals to hold land together for a non-denominational cemetery. And, as mandated in s. 6 of the *1871 Act*, "the said corporation may sell, convey or otherwise dispose of the said lots to any person or persons on such terms and conditions and subject to such by laws of the corporation, and at such prices as shall be agreed on…". Consistent with such a mandate, MPGC provides services and receives payment for doing so. It charges market and above market rates, and is not limited to cost recovery. Although fees do not preclude charitable status, this is another factor suggesting that MPGC's purpose is not charitable.

[184] Even if one were to accept that MPGC's purpose was charitable in nature, that purpose has become obsolete today. The law of charities is a moving subject: *Vancouver Society*, at para. 146. As the record amply illustrates, there are

numerous cemeteries, denominational and non-denominational alike, some charitable and some not. Any charitable purpose that potentially could have animated MPGC is spent.

[185] MPGC operates as a non-profit organization and has done so for decades, if not centuries. I see no basis to alter this characterization.

[186] Lastly, I recognize that the *ITA* differs from the *CAA* and that Revenue Canada's determination that MPGC is not a charity is not determinative. Nonetheless, it is not unfortunate that MPGC's characterization remains stable and consistent with Revenue Canada's position on the issue.

[187] In conclusion, I am unable to conclude that MPGC falls within the scheme and parameters of s. 7 of the *CAA*.

3. Nature of Proposed Change

[188] Finally, the last consideration identified in *A.Y.S.A.* is readily addressed. Justice Rothstein stated that it is necessary to determine whether what is sought is an incremental change or a reform best left to Parliament, or in this case, the Legislature. This factor is subsumed by the analysis on statutory trusts and clearly favours the appellant's position.

[189] I would allow the appellant's third ground of appeal. In these circumstances, it is unnecessary to address the arguments relating to exclusivity.

ISSUE 4: CROSS-APPEAL

[190] As I have determined that the application judge was incorrect in concluding that MPGC is a charitable trust, the cross-appeal is moot. That said, I would not have allowed the cross-appeal in any event. The PGT is and was opposed to any such investigation. The application judge saw no basis on which to order an investigation. I see no reason to interfere with the exercise of his discretion.

DISPOSITION

[191] For these reasons, I would allow the appeal and dismiss the cross-appeal. If the parties are unable to agree on costs, they may make brief written submissions to this court within 30 days of receiving these reasons.

Released: May 5, 2020

"S.E.P."

"S. E. Pepall JA"

"I agree. K. Feldman J.A."

"I agree M. L. Benotto J.A."