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## **COURT DECLARES NOT-FOR-PROFIT PUBLIC CEMETERY TO BE A CHARITABLE TRUST**

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*By Jennifer M. Leddy and Terrance S. Carter\**

### **A. INTRODUCTION**

On December 31, 2018, the Ontario Superior Court of Justice (“Court”) released its decision in *Friends of Toronto Public Cemeteries Inc v Mount Pleasant Group of Cemeteries*.<sup>1</sup> The case deals with the operation of cemetery lands which began as a statutory trust in 1826, developed over time through subsequent special acts, and is currently a special act corporation known as Mount Pleasant Group of Cemeteries (“MPGC”). It operates ten cemeteries and numerous crematoria, mausoleums, and visitation centres in the Toronto area. In addition, it has an affiliated funeral home business which operates on its cemetery lands. The Court uses the term “director” and “trustee” interchangeably in the decision. This bulletin uses the word “director” for consistency except when the word “trustee” is used in a quote from the decision.

The applicants consisted of an individual, Ms. Wong-Tam, and a non-profit corporation, Friends of Toronto Public Cemeteries Inc, which is comprised of approximately 100 members who are residents in the Mount Pleasant Cemetery area. In finding that MPGC was a charitable trust whose directors had not been validly appointed since 1987, and that some of MPGC’s operations exceeded the terms of the trust, the Court looked to historical trust and corporate documents of MPGC.

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<sup>1</sup> *Friends of Toronto Public Cemeteries Inc v Mount Pleasant Group of Cemeteries*, 2018 ONSC 7711 [*Cemeteries*].

## B. BACKGROUND

The facts of the case are complex, and many special acts were discussed by the Court in its comprehensive analysis. In brief, the applicants alleged that the directors of MPGC had not been validly appointed pursuant to its special acts (“Special Acts”) and that the operation of the funeral homes, visitation centres and crematoria on cemetery lands was outside of the terms of the trust created by the Special Acts. The applicants also sought an order under section 10 of the *Charities Accounting Act* (“CAA”),<sup>2</sup> which would require that the Ontario Public Guardian and Trustee investigate MPGC.

Of the many Special Acts cited, three are particularly significant: the 1826 Act; the 1849 Act; and the 1871 Act. MPGC began with the 1826 Act, which permitted a group of people in the Town of York to purchase a piece of land and use it as a “general burying ground, as well for strangers as for the inhabitants of the town, of whatever sect or denomination they may be.”<sup>3</sup> The group of individuals were described as “trustees” where “their successors” would continue to hold the land “to and for the use and purpose aforesaid, in perpetuity forever.”<sup>4</sup> The 1826 Act also provided the trustees with the power to enact rules and regulations as needed to manage the cemetery land, as long as such rules and regulations were not “repugnant to the laws of this province.”<sup>5</sup>

The 1826 Act was subsequently amended by the 1849 Act, which, among other changes, revised the method by which trustees were elected. It provided that upon the death or resignation of a trustee, the other trustees were to elect a replacement from the “inhabitant householders of the City of Toronto”, but the election would not be valid until notice of the trustee’s election was published in the *Canada Gazette*.<sup>6</sup> The trustee’s election was also subject to the possibility of a public meeting of the inhabitant householders being called within one month of the publication in the *Gazette* to elect a replacement for the individual elected by the existing trustees. The 1871 Act incorporated the trust and provided that its lands were to be “used exclusively as a cemetery or cemeteries or places for the burial of the dead.”<sup>7</sup>

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<sup>2</sup> *Charities Accounting Act*, RSO 1990, c C.10 [CAA].

<sup>3</sup> *Cemeteries*, *supra* note 1 at para 1.

<sup>4</sup> *Ibid*, at para 18.

<sup>5</sup> *Ibid*.

<sup>6</sup> *Ibid*, at para 23.

<sup>7</sup> *Ibid*, at para 30.

## C. DECISION

While the Court made several declarations, an overview of the four main ones is given below: 1) the appointment of MPGC's current directors were invalid; 2) MPGC is a charitable trust; 3) MPGC is a charitable trust subject to the CAA, and 4) MPGC has exceeded the terms of its trust.

### 1. Appointment of MPGC's Current Directors Invalid

The Court found that the 1849 Act was still in effect with respect to the number of trustees, and election and replacement of trustees because the 1871 Act, which incorporated MPGC, did not repeal the 1849 Act, and was silent on the number and election of trustees. Other general legislation at the time and subsequent general and special legislation was also silent on the issue of appointment or election of directors or trustees.<sup>8</sup>

The Court declared that MPGC was to be governed by not more than seven trustees as fixed by the 1849 Act and that they were to be appointed pursuant to the 1849 Act. Because MPGC had ceased complying with the requirements of the 1849 Act since 1987, and because all of the current directors of MPGC had been appointed after 1987, the Court declared that none of the current directors had been validly appointed, and therefore did not have authority to appoint new or replacement directors.

To remedy the invalid appointment of directors, the Court exercised its powers under subsection 288(4) of the *Corporations Act*<sup>9</sup> to appoint directors and appointed the seven "most senior existing directors of MPGC as trustees of the corporation," and required the appointments to be validated pursuant to the terms of the 1849 Act.<sup>10</sup> The Court further directed that, should the applicants wish to call a public meeting pursuant to the 1849 Act to replace the directors appointed by the Court, that both parties negotiate a protocol for the calling and holding of the meeting.

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<sup>8</sup> *Ibid*, at para 11.

<sup>9</sup> *Corporations Act*, RSO 1990, c C.38, s 288(4).

<sup>10</sup> *Cemeteries*, *supra* note 1 at para 16.

## 2. MPGC is a Trust

The Court found that MPGC is a trust that holds all of its lands and the proceeds from them as a trust. The Court concluded that the trust was clearly established in the 1826 Act, and subsequent legislation had not terminated the trust. The Court found that MPGC was incorporated under the 1871 Act with “the specific and limited object of carrying out the statutory, perpetual trust created in 1826.”<sup>11</sup> Since no language in the 1871 Act was interpreted by the Court to revoke or vary the objects of the trust, and because subsequent legislation “continuously and consistently thereafter referred to the lands of the corporation as being held subject to a single, continuing trust,” the Court found that the perpetual trust extended to “*all* of the lands of MPGC and *all* proceeds thereof.”<sup>12</sup>

The Court commented on whether a charitable corporation could hold its assets in trust, citing *Victoria Order of Nurses for Canada v Greater Hamilton Wellness Foundation*,<sup>13</sup> which suggested, according to the Court, that a charitable corporation holds its property “beneficially to be used and applied solely to fulfill its charitable objects.”<sup>14</sup> In response, the Court stated:

Whether the corporation holds its property as trustee of a statutory trust that was continued in 1871 in corporate form or holds the same property beneficially for the sole purpose of carrying out the objects of the trust would appear to me to be a distinction without a practical difference.<sup>15</sup>

The Court further commented that:

It seems to me that a blanket statement that *no* charitable corporations hold their assets in trust is simply too broad to be sustained. Care must be taken to examine the corporate and trust history to determine what conclusion best fits the facts.<sup>16</sup>

The Court went on to conclude, based on the language of the 1871 Act, that MPGC was in fact a corporation that held its assets as trustee of the statutory trust.

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<sup>11</sup> *Ibid*, at para 130.

<sup>12</sup> *Ibid*, at paras 129-130 [emphasis by the Court].

<sup>13</sup> *Victoria Order of Nurses for Canada v Greater Hamilton Wellness Foundation*, 2011 ONSC 5684.

<sup>14</sup> *Cemeteries*, *supra* note 1, at para 131.

<sup>15</sup> *Ibid*, at para 132.

<sup>16</sup> *Ibid*, at para 135 [emphasis by the Court].

### 3. MPGC is a Charitable Trust Subject to *Charities Accounting Act*

In declaring that MPGC was a charitable trust subject to the CAA, the Court turned to section 7 of the CAA to determine whether MPGC has a charitable purpose. Section 7 “faithfully replicates” the common law test for determining whether a corporation has a charitable purpose by defining charitable purpose to mean: 1) the relief of poverty, 2) education, 3) advancement of religion, and 4) any purpose beneficial to the community, not falling under categories (1) to (3).<sup>17</sup>

The Court found that MPGC fit into the fourth category of charitable purposes, as it had the purpose of benefiting the public. While the Court agreed with MPGC that not all corporations that provide a benefit to the public have a charitable purpose, such as in the case of airports or transit systems, the Court turned to existing jurisprudence from Canada, the United Kingdom, and Scotland, which were “quite unanimous” in concluding that a not-for-profit non-denominational public cemetery was “pursuing a charitable purpose.”<sup>18</sup> As such, the Court declared the trust administered by MPGC to be a charitable trust and therefore under the scope of CAA.

However the Court declined to order a formal investigation of MPGC under section 10 of the CAA for the reason that it would not be in the public interest to do so, as there was no evidence that the directors of MPGC had conducted themselves in bad faith, misappropriated funds, or that the trustees would not follow the directions of the Court. It is interesting that the Public Guardian and Trustee was also not in favour of conducting an investigation even though the directors had been invalidly appointed and MPGC had not operated within its statutory objects.

### 4. MPGC Exceeded the Objects of the Trust

In determining whether MPGC had exceeded the objects of the trust, the Court referred to the objects as they were at the time of incorporation, which had not been modified by subsequent legislation. Such objects were to use the lands “as a cemetery or cemeteries or places for the burial of the dead.”<sup>19</sup> One subsequent Special Act specified that the burial of the dead was in fact the “sole purpose” for which the

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<sup>17</sup> *Ibid*, at para 137; also see CAA, *supra* note 2, s 7.

<sup>18</sup> *Ibid*, at para 140.

<sup>19</sup> *Ibid*, at para 32.

lands of the trust were held.”<sup>20</sup> As such, the Court also concluded that the burial of the dead must be the exclusive purpose of the trust.

The Court also acknowledged that the object of “the burial of dead” included “at least some ancillary activities” and went on to examine whether MPGC’s visitation centres, funeral home business, and crematoria were considered to be ancillary activities of burying the dead.<sup>21</sup> With respect to the visitation centre and funeral home business, the Court found that such activities exceeded the terms of the trust because the lands and proceeds of either of these operations could not be considered as being used “exclusively” for the burial of the dead. However, the Court held that there was insufficient evidence available to conclude whether the operations of the crematoria fell within the terms of the trust. Accordingly, the Court declared that MPGC had exceeded the terms of the trust by funding and operating the funeral home business and visitation centres.

#### D. CONCLUSION

In finding that MPGC was a charitable trust and subject to its governing legislation, the Court looked to the corporation’s trust and corporate history to establish that MPGC was still in fact a trust, and to determine the scope of trust as well as other procedural aspects, such as the election and replacement of trustees.

Recent legislation that came into force in 2012, the *Funeral, Burial and Cremation Services Act, 2002*,<sup>22</sup> allows cemeteries to own funeral homes and have them on their lands. However, what was important in this case were the objects in MPGC’s governing Special Acts. This was underlined by the Court’s statement that:

Care must be taken to avoid an overly “frozen in time” view of what a cemetery is while at the same time avoiding the mistake of inferring that the intention of the legislature in one time frame can be inferred by subsequent regulatory changes in an entirely different time frame.<sup>23</sup>

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<sup>20</sup> *Ibid*, at para 146.

<sup>21</sup> *Ibid*, at para 147.

<sup>22</sup> SO 2002, c 33.

<sup>23</sup> *Cemeteries*, *supra* note 1, at para 152.

This case was ultimately determined by the objects and governance provisions in its Special Acts and underscores, not for the first time, the importance of directors knowing and operating within their organization's objects/purposes and governance structure, whether they be set out in governing documents created by special acts or general legislation.



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