

ONTARIO COURT OF APPEAL OVERTURNS FINDING OF CHARITABLE PURPOSE TRUST

*By Jennifer M. Leddy, Terrance S. Carter, and Adriel N. Clayton**

A. INTRODUCTION

On May 5, 2020, the Court of Appeal for Ontario (the “Court”) released its decision in *Friends of Toronto Public Cemeteries Inc v Public Guardian and Trustee*.¹ The Court allowed the appeal of Mount Pleasant Group of Cemeteries (“MPGC”), a special act corporation, and held that the application judge had erroneously interpreted a statute from 1871 that amended the trust and governance models of MPGC, making the appointment of its current trustees invalid.² In addition, the Court overturned the application judge’s findings that (i) MPGC’s visitation centre and funeral home businesses exceeded its objects, and (ii) MPGC was a charitable purpose trust subject to the provisions of the *Charities Accounting Act* (“CAA”).³ In doing so, the Court denied the cross-appeal made by the applicants, Friends of Toronto Public Cemeteries Inc. and Kristyn Wong-Tam (collectively, the “FTPC”), affirming that an investigation by the Public Guardian and Trustee (“PGT”) into MPGC, which the PGT was never willing to partake in, was not required because the matter had become moot due to the Court’s findings, and also because it would not benefit the public. This *Bulletin* provides an overview of the Court’s decision, which is relevant to charities and not-for-profits (“NFPs”), as it clarifies the distinction between statutory trusts and charitable

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¹ *Friends of Toronto Public Cemeteries Inc v Public Guardian and Trustee*, 2020 ONCA 282 [“*Friends of Toronto*”].

² For the lower court’s decision, see *Friends of Toronto Public Cemeteries Inc v Mount Pleasant Group of Cemeteries*, 2018 ONSC 7711 [“*Cemeteries*”]. For a detailed summary of the *Cemeteries* decision, see also, Jennifer M Leddy and Terrance S Carter, “Court Declares Not-For-Profit Public Cemetery To Be A Charitable Trust”, *Charity & NFP Law Bulletin No. 439* (31 January 2019), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2019/chylb439.pdf>>.

³ *Charities Accounting Act*, RSO 1990, c C-10 [“CAA”].

purpose trusts, in addition to reviewing the concepts of statutory interpretation, especially as they apply to archaic statutes dating back to the 1800s.

B. BACKGROUND

This case arose from an appeal by MPGC, which has a very complicated corporate and trust history, detailed through its various statutes from the 1800s, the most relevant of which for the purposes of this *Bulletin* are the *1826 Act*⁴ (as amended by the *1849 Act*)⁵ and the *1871 Act*,⁶ which deal with the trust and governance models of MPGC. The *1849 Act* fixed the number of trustees at seven. Should a trustee resign or die, it was the duty of the remaining trustees to meet and “elect a replacement from among the ‘inhabitant householders of the City of Toronto’,”⁷ place a notice in the *Canada Gazette*, and if the majority inhabitants of the City at a public meeting (which had to be announced twice in more than one newspaper) agreed to elect an inhabitant, that person would supersede the person chosen by the trustees and become the successor trustee. In contrast, the *1871 Act* introduced “corporation and perpetual succession into the structure,”⁸ and “[u]nlike the 1826 and 1849 Acts, no reference was made to ‘successors’ in the title”⁹ of the *1871 Act*. Further, under the *1871 Act*, “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.”¹⁰

In the *1826 Act* and the *1849 Act*, the term “trustee” was used because of the presence of a trust. Despite the incorporation of MPGC in 1871 and the fact that MPGC, as a corporation, was the trustee holding land in trust under the *1871 Act*, that Act continued to use the term “trustee” in reference of the corporation’s directors. However, this was acknowledged by the Court and the application judge as just being “an issue of nomenclature rather than of legal significance.”¹¹ Thus, the two terms are used interchangeably. Further,

⁴ *An act to authorize certain persons therein named, and their successors, to hold certain lands for the purpose therein mentioned*, 1826, Act of UC 7 G 4, c 21 [“1826 Act”].

⁵ *An Act to amend an Act therein mentioned, and to vest the Toronto General Burying Ground in certain Trustees, and their Successors*, 1849, SC 12 Vic, c 104 [“1849 Act”].

⁶ *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, SO 34 Vic, c 95 [“1871 Act”].

⁷ *Friends of Toronto*, *supra* note 1 at para 20.

⁸ *Ibid* at para 36.

⁹ *Ibid* at para 26.

¹⁰ *Ibid* at para 32.

¹¹ *Ibid* at para 89.

the parties also conceded before the Court that “a statutory trust was established by the Legislature and no appeal is taken in that regard.”¹²

The four issues on appeal before the Court were the following: (1) did the application judge err in his interpretation of the *1871 Act*; (2) are the visitation centre and funeral home businesses outside MPGC’s legislative objects; (3) is MPGC a charitable purpose trust, subject to the provisions of the *CAA*; and (4) did the application judge err in refusing to order an investigation by the PGT?

C. ANALYSIS

1. Statutory Interpretation of the 1871 Act

On the first issue regarding the interpretation of the *1871 Act*, the Court stated that both the *Interpretation Act*¹³ (relied upon in the *1871 Act*), as well as the current *Legislation Act, 2006*¹⁴ provide that “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.”¹⁵ The modern principle of statutory interpretation requires a purposive and contextual approach, where wording of the legislation alone cannot be relied upon. The Court also recognized that the archaic statutes involved were challenging to interpret because they are products of their time, and are not models of legislative clarity.

Citing *Ruth Sullivan*,¹⁶ the Court agreed that legislative changes “may be effected by amendment or express or implied repeal”¹⁷ of a statute, but there is also a “general presumption against implied repeal.”¹⁸ While MPGC argued that the changes in its governance were effected by the amendment, as reflected in the title of the *1871 Act*,¹⁹ this was found to be a mischaracterization because MPGC was essentially relying on “implied repeal” for the changes of governance implemented by the *1871*

¹² *Ibid* at para 88.

¹³ *An Act Respecting the Statutes*, SO 1867-1869, c 1.

¹⁴ *Legislation Act, 2006*, SO 2006, c 21, Sch F.

¹⁵ *Friends of Toronto*, *supra* note 1 at para 91.

¹⁶ *Ruth Sullivan*, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada Inc, 2014) (QL), at para 24.30.

¹⁷ *Friends of Toronto*, *supra* note 1 at para 94.

¹⁸ *Ibid* at para 102.

¹⁹ The full title of the *1871 Act* is *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, SO 34 Vic, c 95

Act. However, given the standard of correctness that applies to statutory interpretation, this mischaracterization was not determinative. The Court further noted that Sullivan’s comment on legislative amendments 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”²⁰ – is merely “addressing temporal operation of amendments rather than providing a stand-alone interpretive principle.”²¹

Further, regardless of the generalized presumption against implied repeals, or the fact that repeals under modern statutes are now done through “the enactment of stylized provisions”²² under current Canadian practice, the Court held that:

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.²³

The application judge had overlooked certain elements in the language of the Preamble of the *1871 Act* which clearly supported the assertion for the establishment of a corporation, along with the presence of language explaining MPGC’s corporate objects as including its better management and also addressing concerns, which were evident in the *1849 Act*, regarding perpetual succession. Contextually speaking, the presence of other statutes that came about, such as the *Corporations Act, 1953*,²⁴ reinforced the corporate model, contrary to the application judge’s determination.

2. Do The Visitation Centre and Funeral Home Operations Exceed MPGC’s Objects?

On the second issue of whether or not the visitation centre and funeral home operations were outside the MPGC’s legislative objects, the Court overturned the application judge’s decision for two main reasons. First, this issue was never pleaded, since there was no mention of it in FTFC’s Amended

²⁰ *Friends of Toronto*, *supra* note 1 at para 95.

²¹ *Ibid* at para 96.

²² *Ibid* at para 101.

²³ *Ibid* at para 103.

²⁴ *Corporations Act, 1953*, SO 1953, c 19.

Notice of Application for declaratory relief and the PGT had never issued a separate Notice of Application. Here, the Court emphasized the importance of fairness and how fundamental it is to the “litigation process that lawsuits be decided within the boundaries of the pleadings.”²⁵

At the same time, the Court did acknowledge that this issue could not have come as a surprise given that FTPC had requested an investigation by the PGT into MPGC’s compliance with its legal obligations as a trustee due to the operation of the funeral businesses, the visitation centres, and crematoria. However, on this point, the Court reasoned that there is a material difference between a request for a PGT **investigation** and a request for **declaratory relief, i.e. a declaration** “that the operation of the visitation centres and the CMS funeral home business are beyond the scope of the trust.”²⁶ Under section 10 of the CAA, a PGT “investigation must first examine the allegation of illegality. In contrast, a declaration pronounces on the illegality of these operations.”²⁷ Further, the application judge had himself acknowledged the inadequacy of the evidentiary foundation to render a decision on the crematoria issue, which in itself was sufficient to overturn the application judge’s decision on the presumption that, if declaratory relief had been sought on these three lines of businesses, there would have been a more extensive evidentiary record, especially given at least some of the business lines (such as the visitation centre) are operational.

Regardless, the Court still considered MPGC’s objects, and while the parties had been focusing on the corporate objects’ elasticity, *i.e.* “whether an Act should be interpreted as a fixed-time Act or an on-going Act,”²⁸ the real question to be considered was “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 [the Court’s] view, that power is included within the ambit of cemeteries or places for the burial of the dead.”²⁹ The trust’s object in the *1826 Act* was as “a general burying ground,”³⁰ while the *1871 Act* stated that lands acquired were to be used

²⁵ *Friends of Toronto*, *supra* note 1 at para 135.

²⁶ *Ibid* at para 137.

²⁷ *Ibid* at para 139.

²⁸ *Ibid* at para 143.

²⁹ *Ibid* at para 145.

³⁰ *Ibid* at para 17.

exclusively as “a cemetery or cemeteries or places for the burial of the dead.”³¹ In order to meet this objective, and with cremation becoming an increasingly popular alternative to burial in the late 1980s, of which the application judge had evidence, MPGC was placed under financial pressure to meet its obligations. Thus, “[t]he 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.”³² Further, not only did the Legislature itself start to permit cemeteries to operate funeral homes and crematoria, but “treating these ancillary operations as incidental to the cemetery aligns with this court’s decision in *Humphrey Funeral Home*³³ [... and the] operation of visitation centres and funeral homes are associated uses of operating the cemetery.”³⁴ Thus, the Court found that it was well within MPGC’s objects to operate a visitation centre and funeral home.

3. Is MPGC A Charitable Purpose Trust?

On the issue of whether MPGC is a charitable purpose trust, the Court found that it is not and therefore, it is not subject to the CAA. It had already been established that MPGC was a statutory trust, which is a “flexible device”³⁵ and as such, “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.”³⁶ However, the Court found that there was no use of the word “charitable” or “charity” in the relevant Acts, and indicated that since statutory trusts are creatures of statute, they can be changed by the Legislature. In this regard, the Court reasoned that, had the Legislature “wished to make MPGC a charitable purpose trust, it could have done so. Indeed, presumably it still could.”³⁷ Adopting a similar approach to that taken by the court in *Re Centenary Hospital Association*,³⁸ which excluded public hospitals from the CAA because the *Public Hospitals Act*³⁹ provided an exclusive statutory regime to govern and regulate them, the Court further

³¹ *Ibid* at para 146.

³² *Ibid*.

³³ *Humphrey Funeral Home v Toronto (City)* (2007), 32 MPLR (4th) 124 (ONSC), aff’d by *Humphrey Funeral Home – A.W. Miles Chapel v Toronto (City)*, 2007 ONCA 828.

³⁴ *Friends of Toronto*, *supra* note 1 at para 148.

³⁵ *Ibid* at para 164.

³⁶ *Ibid* at para 165.

³⁷ *Ibid* at para 168.

³⁸ *Re Centenary Hospital Association* (1989), 69 OR (2d) 1, 59 DLR (4th) 449.

³⁹ *Public Hospitals Act*, RSO 1980, c 410.

indicated that “MPGC is already heavily regulated under the Bereavement Authority of Ontario, the [Funeral, Burial and Cremation Services Act, 2002⁴⁰], 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.”⁴¹ The Ontario Government in 2010, in addition to the PGT on multiple occasions, had declined to take any such action to consider MPGC as a charitable purpose trust, and thus, the Court concluded that it was not up to the application judge to do so.

Lastly, the Court also applied the three-part test from *A.Y.S.A. Amateur Youth Soccer Association v Canada (Revenue Agency)* (“A.Y.S.A.”)⁴² in concluding that MPGC was not a charitable purpose trust. The same four categories that apply in the context of the *Income Tax Act* (“ITA”)⁴³ to determine charitable purpose are incorporated in the CAA, which include “(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).”⁴⁴ Category (d) is the only one of relevance in this case. Regarding this, the Court stated the following:

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. Second, it is necessary to consider the scheme of the statute in question (in *A.Y.S.A.*, the *ITA*, 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.

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.⁴⁵

On the first part of the test, the Court found no compelling jurisprudential trend because, while there were some older cases under common law supporting the proposition that non-denominational

⁴⁰ *Funeral, Burial and Cremation Services Act, 2002*, SO 2002, c 33.

⁴¹ *Friends of Toronto*, *supra* note 1 at para 167.

⁴² *A.Y.S.A. Amateur Youth Soccer Association v Canada (Revenue Agency)*, 2007 SCC 42 [“A.Y.S.A.”]. For further information on this case, see Karen J Cooper and Terrance S Carter, *Charity Law Bulletin No. 126*, “Supreme Court of Canada Confirms the Common Law with Respect to Charity and Sports Organizations” (17 October 2007), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2007/chylb126.pdf>>.

⁴³ *Income Tax Act*, RSC 1985, c 1 (5th Supp).

⁴⁴ *Friends of Toronto*, *supra* note 1 at para 172.

⁴⁵ *Ibid* at paras 175-176.

cemeteries may have a charitable purpose, these were very limited, and even if given a broader interpretation, would not support the trend as required under the *A.Y.S.A.* test for the charitable nature of cemeteries. MPGC's primary purpose was not for the benefit of the public.

For the second part of the *A.Y.S.A.* test regarding the scheme of the statute, the Court found that MPGC's establishment and even mandate in the *1871 Act* had a business component that includes providing services for payment. While charging fees is not preclusive of charitable status, the Court found that MPGC's fees, which were charged at market or above-market rates, as permitted by the *1871 Act*, further suggested a conclusion that MPGC's purpose, which the applicant judge had held as being a "non-profit, non-denominational public cemetery,"⁴⁶ was not of a charitable nature. In this regard, the Court reasoned that:

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.⁴⁷

With regard to the final part of the test relating to the nature of proposed change, the Court held that it is the Legislature, as opposed to the Parliament, who should be left to determine whether an incremental change or a reform is being sought here. As such, no finding of a charitable purpose trust was made.

4. PGT Investigation

Finally, on the issue of whether the application judge erred in failing to order an investigation by the PGT, the Court held that since MPGC was not a charitable trust, FTPC's cross-appeal was moot. However, in any event, the Court indicated that it would not have allowed the cross-appeal, as the PGT was opposed to the investigation, and as the Court found no basis to interfere with the application judge's discretion not to order an investigation.

⁴⁶ *Ibid* at para 80.

⁴⁷ *Ibid* at para 184.

D. CONCLUSION

This case is long and complex, but will be of importance to charities and NFPs because of its application of established law to a highly complex fact situation, as well as its analysis of the interpretation of ancient statutes, the difference between a statutory trust and charitable purpose trust, in addition to its reasoning for the non-application of the *CAA* in this particular instance. As always, the important role that an organization's governing documents play in its operations is underscored in this decision.



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