



---

## **RESOLVING GRAVE DISPUTES**

---

**Jason Ward**  
**WARDS LAWYERS<sup>PC</sup>**  
[www.wardlegal.ca](http://www.wardlegal.ca)

 **PC**  
**WARDS**  
LAWYERS

**RESOLVING GRAVE DISPUTES**

Jason Ward  
Wards Lawyers <sup>PC</sup>

<b>Bereavement Sector Legislation</b> .....	3
<b>Decision-Making Authority for Disposition of the Deceased</b> .....	5
(a) <i>Prima Facie</i> Valid Will Exists – Primacy of Appointment by the Deceased.....	5
(b) No Will (No Trustee Appointment) or No Capable/Willing Trustee – Judicial Appointment of an “ <i>Administrator</i> ” by the <i>Estates Act</i> .....	6
(c) No Will (No Trustee Appointment) and No Estate Administrator Appointed – the <i>Prima Facie</i> (or Potential) Administrator.....	8
(d) Challenge to Validity of Will or Need to Protect/Preserve Estate – ETDL.....	9
(e) No Will, No Willing Trustee, No Spouse or Next of Kin, No Application Made to be Estate Administrator – Trustee of Last Resort.....	11
(f) Synopsis – Priority of Decision-Makers for Disposition of the Deceased.....	12
<b>Decision-Makers of <i>Prima Facie</i> Equal Standing or Rank</b> .....	12
<b>Qualifications to the Power of the Estate Trustee</b> .....	13
(a) Deceased’s Express Wishes or Directions (Religious and Cultural Issues).....	14
(b) Disposal-Related Duties of the Estate Trustee.....	15
(c) Special Purpose/Transformation – the “ <i>Work and Skill</i> ” Qualification.....	16
(d) <i>Causa Mortis</i> Whole Body and Tissue (Organ Donation).....	17
(e) Death Investigation (Coroner’s Authority).....	20
(f) Interment and Scattering Rights.....	21
(g) Disinterment and Exhumation.....	23
(h) Criminal Responsibility or Wrongdoing Related to the Deceased’s Death.....	24
<b>Places for the Lawful Disposal of Human Remains</b> .....	25
(a) Interment and Burial of Human Remains.....	25
(b) Cremated Remains.....	25
<b>Unclaimed (Abandoned) Bodies</b> .....	27
<b>Payment for Disposition</b> .....	31
(a) <i>Prima Facie</i> Responsibility for Payment.....	31
(b) Bereavement Contracts with Licensed Operators.....	32
(c) Selling Interment and Scattering Rights.....	34
(d) Additional Sources of Financial Assistance for Funeral Expenses.....	34
(i) CPP Death Benefit.....	34
(ii) Ontario Works.....	35
(iii) Local Municipality.....	36
(iv) OPGT – Estates Administration.....	37
(v) Surviving Spouse.....	37
(vi) The Last Post Fund (Veterans).....	37
<b>Alternative and Emerging Disposal Methods</b> .....	38
<b>Bereavement Sector Reform – Flexibility or Certainty?</b> .....	39
<b>Endnotes and Additional Reference and Information</b> .....	41

### **Bereavement Sector Legislation:**

In Ontario, entitlement to decide both the place and manner of disposal of a deceased person's body and cremated remains is governed by common law.

However, Ontario's *Funeral, Burial and Cremation Services Act* ("FBCSA")<sup>1</sup> promulgates certain limitations fettering that decision-making authority both directly and collaterally, by establishing broad parameters for the governance of cemetery, crematorium, funeral home (including funeral directors<sup>2</sup>, preplanners<sup>3</sup> and sales representatives) and transfer service operators<sup>4</sup> and their performance of "licensed services"<sup>5</sup> and delivery of "licensed supplies"<sup>6</sup> and, specifically, for the place and manner of disposal of "human remains"<sup>7</sup> by interment (burial)<sup>8</sup>, cremation<sup>9</sup> or "alternative processes or methods".<sup>10</sup> Effectively the FBCSA establishes the "framework for the regulation of the bereavement sector"<sup>11</sup>, notably by regulating:

- the creation, maintenance and operation of cemeteries, crematoria, funeral establishments, transfer services and burial sites<sup>12</sup>;
- the licensing of any person selling or offering licensed supplies or services, including the operators (and their sales representatives) of cemeteries, crematoria, funeral establishments (including funeral directors), transfer services and other "bereavement activity"<sup>13</sup> and embalming, pre-planning and other sales-related services<sup>14</sup>;
- a code of ethics governing funeral service providers<sup>15</sup>;
- procedures for complaints, inspections and investigations regarding licensed operators<sup>16</sup>;
- bereavement-focused consumer protection<sup>17</sup> for the conduct of, or dealings with, licensed operators, including regarding false advertising, soliciting, disclosure obligations, contract requirements and cancellation rights, including for interment and scattering rights<sup>18</sup>;
- prohibited conduct by licensees and the public regarding the place and manner for the disposal of remains<sup>19</sup>;
- trust funds and accounts required by licensed operators, including a "care and maintenance fund" by cemetery operators (to "generate income for the care and maintenance of the cemetery"), and the duty of operators to apply to pass accounts before the Superior Court, if directed to do so<sup>20</sup>; and

- a “*Funeral Services Compensation Fund*” to benefit those aggrieved if, for example, “*licensees have failed to comply with a code of ethics*”<sup>21</sup>.

The FBCSA is primarily administered and enforced by the Bereavement Authority of Ontario (“BAO”), an independent, not-for-profit, arm’s-length “*Delegated Administrative Authority*”, acting on behalf of and subject to oversight by, the Ministry of Government and Consumer Services.<sup>22</sup> Effectively the BAO is responsible for “*ensuring that funeral, cremation and cemetery licensees comply with the [FBCSA]*”<sup>23</sup>.

Commonly when arrangements for the disposition of a deceased person must be made, uncertainty and disputes potentially arise. For example, an estate trustee may not yet be aware of his or her appointment by the deceased or, if aware, that person may be uncertain of his or her responsibilities generally. There may also be confusion or disagreement about the decision-maker authorized to act, particularly if the validity of the deceased’s will is challenged by a disappointed beneficiary, for example. An appointed trustee may also be incapable or unwilling to act, or he or she may renounce, potentially causing more emotionally-charged incertitude in commonly time-sensitive circumstances.

If a dispute arises regarding the place of, or manner for, the disposition of a deceased person’s body or remains, including about the person having authority to decide, the FBCSA does not offer resolution directly, other than codifying the sector restrictions generally<sup>24</sup>. Rather, the common law is activated and, if necessary, the assistance of the Superior Court may be appropriate. Accordingly, for a dispute of this nature that is not directly resolved by the FBCSA, the BOA will generally recommend the licensed operator, often a funeral establishment, or any other interested party, seek necessary legal assistance.

## **Decision-Making Authority for Disposition of the Deceased:**

### **(a) *Prima Facie* Valid Will Exists – Primacy of Appointment by the Deceased:**

If a validly-executed, last will and testament<sup>25</sup> appointing an estate trustee exists, the authority of the trustee to act is derived from the will.<sup>26</sup> The estate trustee<sup>27</sup> appointed by the *prima facie*, valid will of a deceased person is empowered to exercise dominion over, and the right to control the place, manner and arrangements for the disposal of, the body of the deceased – the trustee assumes not only the duty, or obligation, to dispose of the deceased’s body, but a corresponding, incidental and rightful custody of the body for disposal lawfully, even if there is a surviving spouse<sup>28</sup> - this duty and accompanying possessory right continue after disposition<sup>29</sup>. This entitlement also arises regardless if the will of the deceased is “*probated*” by the Superior Court.<sup>30</sup>

An estate trustee cannot “*own*” a dead human body – generally, there is “*no property in a dead body*”<sup>31</sup>, subject to the narrow exceptions discussed briefly below, which operate to limit or fetter the appointed estate trustee’s *prima facie* duty, custodial power and decision-making authority.

Practically, arrangements for final disposition are commonly made by, or at least involve, the deceased’s family members.<sup>32</sup> However, if a dispute arises, the testamentary trustee appointed by the deceased is lawfully authorized to exercise broad discretion and unilaterally determine the manner, place and arrangements for the disposal of the deceased and, unless that exercise of authority offends the sector restrictions prescribed by the FBCSA or is “*wholly unreasonable*” or capricious<sup>33</sup>, it will not, save for the “*most exceptional circumstances*”, be subject to judicial scrutiny.<sup>34</sup>

Not only the deceased’s dead body, but by extension the disposal of his or her cremated human remains, if any, is subject to the estate trustee’s authority and possessory right. Transforming the corporeal quality of the deceased into remnant ashes inherently creates more opportunity for disputes to arise.<sup>35</sup> However, cremating remains may also offer greater flexibility for resolving disputes “*because ashes can be divided, housed and spread in ways that a body cannot*”<sup>36</sup>,

particularly if a dispute about the disposition of the deceased's ashes arises between equally-ranked, appointed co-trustees, or if a trustee seeks to proactively resolve competing claims by family members. While other jurisdictions, legislatively or at common law, distinguish between the disposal of a body and ashes and the control of each, respectively, no practical difference exists in Ontario – the appointed estate trustee may exercise dominion and exclusive decision-making authority for both.

(b) **No Will (No Trustee Appointment) or No Capable/Willing Trustee – Judicial Appointment of an “Administrator” by the *Estates Act*<sup>37</sup>:**

If a deceased person had no will and no conflict arises among those interested in, or affected by, the deceased's death, or among those entitled to share in the distribution of the estate, if any, any person may apply to be appointed an “*estate trustee without a will*”<sup>38</sup> by filing, among other things:

- a prescribed “*renunciation*” form by “*every person who is entitled in priority to be named as estate trustee*”; and
- a prescribed consent form by “*persons who are entitled to share in the distribution of the estate and who together have a majority interest in the value of the assets of the estate at the date of death*,”<sup>39</sup>

in which case an estate trustee may be appointed by the Superior Court, effectively on consent of those interested, subject to whether this consensually-based process would adequately accommodate the respectful and timely disposition of the deceased, if those interested cannot also agree on disposition of the deceased before the Certificate of Appointment is granted.

However, if, for example:

- the deceased had no will;
- the deceased had a will, but did not appoint an estate trustee; or

- the deceased's will appoints an estate trustee, who refuses to act or prove the will or is incapable of doing so,

and a dispute arises, exacerbated by the need to dispose of the deceased without unreasonable delay, subject to its "*ultimate discretion*" and based on who it "*thinks fit*", any interested person may apply to and request the Superior Court to exercise its discretion, statutorily conferred by the *Estates Act*, to grant the "*administration of the property of the deceased*", without pre-determined priority, to:

- (a) the deceased's married spouse or "*person with whom the deceased was living in a conjugal relationship outside marriage*" immediately before the date of death;
- (b) the next of kin of the deceased, individually or jointly<sup>40</sup>; and/or
- (c) the person in (a) above and the next of kin "*as in the discretion of the court seems best*".<sup>41</sup>

While there is no pre-determined or priority hierarchy, the Superior Court may be inclined to appoint as administrator the person living in a conjugal relationship with the deceased, particularly if that person is a married spouse, rather than next of kin, noting that an Ontario non-resident cannot be appointed.<sup>42</sup> Invariably the Court is likely to consider, for example: (i) if any conflict may exist between the spouse and the estate, such as a potential claim by the spouse against the estate, or if the spouse may have an interest adverse to the estate; (ii) the implications, if any, of the intestacy distribution provisions in the *Succession Law Reform Act*<sup>43</sup>, particularly any preferential share in the estate to which the deceased's spouse may be entitled statutorily; and (iii) any other conflicts that exist, or that potentially may arise, as between the interested parties.<sup>44</sup>

Furthermore, by its "*general power*", the Court may appoint an estate trustee to administer the property of the deceased under "*special circumstances*", which may arise, for example, if:

- the deceased dies "*wholly intestate*" as to his or her property;<sup>45</sup>
- the deceased had a will to administer property, but no estate trustee is appointed, or the appointed trustee is not "*willing and competent to take probate*";

- the estate trustee appointed by the will is resident outside of Ontario at the time of death;
- there is a will, but the authority of the appointed trustee to act is challenged; and/or
- there is a will, but the trustee lawfully renounces, is inactive, unwilling to act or refuses to act or prove the will,

and it appears to the Court to be necessary or convenient to appoint an administrator by reason of the insolvency of the estate of the deceased, or other special circumstances.<sup>46</sup> In this case, the Court may appoint a trustee as set out above, but may also appoint a trust company, on its own or jointly with another appointee.<sup>47</sup>

If an administrator for the estate is appointed by the Court, that person is inherently authorized to “*dispose of and make those decisions as to the disposal of the human remains*”.<sup>48</sup>

(c) **No Will (No Trustee Appointment) and No Estate Administrator Appointed – the *Prima Facie* (or Potential) Administrator:**

A decision for the disposition of a dead body usually must be made without unreasonable delay, to the extent that the judicial process for appointing a trustee on consent or, alternatively, appointing an administrator for the estate pursuant to the *Estates Act*, could not reasonably be accommodated, or the parties to the litigation seeking judicial resolution for the place or manner of disposition of the deceased may not expressly seek such appointment as administrator for the estate.

In this case, when a dispute arises regarding the disposal of the deceased for which a party seeks judicial intervention in a timely manner, it is likely that the person who “*would be most likely to be appointed administrator of the estate without a will*” (or, alternatively, the person who would have the highest entitlement to be appointed administrator of the estate) would be authorized by the Court to dispose of the body, as if that person had been formally appointed as administrator for the estate following the litigation process required by the *Estates Act* and, in such time-sensitive circumstances, *prima facie* deference may be given to the “*lawful spouse to have priority in that regard*”.<sup>49</sup>



Generally, if there is no estate trustee appointed by will and no administrator appointed under the *Estates Act*, when determining who should be appointed *prima facie*, or potential, administrator, the person who consequently assumes the duty of disposal and right to custody of the deceased's body, the Court will likely adopt a narrow view by resisting any assessment of the merits (and trappings) of competing cultural and spiritual beliefs and practices, primarily to avoid judiciously sanctioning any religion or belief over another, especially when the parties' contentions may be equally entrenched, sacred, sincere and justified, respectively. Rather, the Court is likely to identify, to the extent reasonably possible, the person with the highest entitlement to appointment under the *Estates Act* and to bestow authority for final disposition to that person.

Of course, urgency will not arise if the dispute relates to the disposition of previously cremated remains only; rather, the decision could be delayed until an administrator for the estate is properly appointed by the Court, pursuant to the *Estates Act*.<sup>50</sup>

(d) **Challenge to Validity of Will or Need to Protect/Preserve Estate - ETDL:**

If an estate trustee is appointed by the deceased's will, but a dispute arises about the validity of the will and, therefore, the trustee's authority to determine the final arrangements for the deceased, it may be appropriate, or necessary, to appoint an Estate Trustee During Litigation ("ETDL").

Statutorily the Court may, on application by an interested party, appoint "*an administrator of the property of the deceased person*" (i.e., an ETDL) if:

- (a) the validity of the deceased's will is challenged (effectively suspending the estate trustee's decision-making authority, including to determine final arrangements, pending the outcome of the litigation)<sup>51</sup>; or
- (b) in any matter of "*obtaining, recalling or revoking any probate or grant of administration*"<sup>52</sup>.

The prevailing view is that the Court, by both its own, inherent power and pursuant to the *Rules of Civil Procedure*<sup>53</sup>, may appoint an ETDL beyond these specific and limited circumstances, if appointing a neutral, independent third party is necessary to preserve, protect and manage the assets of, or to facilitate a transparent, orderly administration of, an estate, or even to minimize the expenses of and to protect the parties to the litigation, including in the context of a challenge to an estate trustee's authority to act, the removal of a trustee or a dispute regarding disposal of the deceased's remains.<sup>54</sup>

While the appointment of an ETDL will generally be preferred if, for example, the administration of the estate pending the outcome of the dispute may be endangered or at risk, any appointment is subject to the discretion of the Court, depending on the circumstances.<sup>55</sup> Except with the consent of those involved in the dispute, a litigant party is very unlikely to be appointed ETDL.<sup>56</sup> An ETDL has "*all the rights and powers of a general administrator*", except for the "*right of distributing the residue of the property*"<sup>57</sup>, and is "*an officer of the Court and not merely an agent of the parties at whose instance he or she or it, is appointed.*"<sup>58</sup>

In exercising its discretion, the Court will consider and weigh:

- the balance of convenience and ensuring "*fairness to the participants*" of the dispute;
- practicality and the interests of the parties to the dispute, and those potentially effected by the dispute, including the need to immunize the estate from tactics employed by litigating parties;
- achieving a level playing field, including to ensure a litigating party cannot unilaterally take undue advantage of another by wielding control over the estate to benefit themselves or to prejudice another party;
- if the appointment may protect against "*insidious*", inherent conflicts potentially affecting the trustees and, accordingly, their capacity to exercise and maintain neutrality, impartiality and to exercise their fiduciary duty in a balanced, even-handed manner; and
- that the appointment of an ETDL is not extraordinary and, where an estate may be at risk, it ought to be favoured unless the administration of the estate is particularly straightforward and uncomplicated.<sup>59</sup>

For the place and manner of disposal of a deceased, an ETDL may exercise the same power and decision-making authority as would an estate trustee appointed by will or otherwise by the Court.<sup>60</sup>

(e) **No Will, No Willing Trustee, No Spouse or Next of Kin, No Application Made to be Estate Administrator – Trustee of Last Resort:**

If no will exists, or an estate trustee appointed by will is incapable of acting, or refuses to act, and the deceased had no spouse, children or next of kin – the need for a trustee arises.

Subject to statutory guidelines, the Office of the Public Guardian and Trustee (“OPGT”) may be appointed as estate trustee (*i.e.*, be granted “*letters of administration or letters probate*”) by the Court if the deceased: (a) died in Ontario (or was an Ontario resident, but died elsewhere); (b) died intestate (*i.e.*, without a validly-executed will) for part or all of his or her property, or the deceased’s will does not appoint an estate trustee “*willing and able to administer the estate*”; and (c) had no known next of kin of the age of majority residing in Ontario, who are willing and able to administer the estate or, alternatively, nominate another person to do so.<sup>61</sup>

While the OPGT may have an obligation to apply for trusteeship if these conditions exist<sup>62</sup>, it has developed its own policies, ostensibly due to the significant need for its services<sup>63</sup>, including that it will only administer an estate as the trustee of “*last resort*” and if the net value of the estate is at least ten-thousand dollars.<sup>64</sup> The OPGT cannot be appointed without notice to it or without its consent, in writing.<sup>65</sup> If so, the OPGT may seek an order removing it as estate trustee.<sup>66</sup>

Generally, if these conditions exist, before it is appointed the OPGT will expand the investigation to attempt to locate another interested party who may agree to act, such as a creditor, next of kin residing outside Ontario or a person nominated by the deceased’s next of kin.

While conducting this further investigation, the OPGT may “*arrange for [the deceased’s] funeral*”<sup>67</sup>. If subsequently appointed, the OPGT retains authority for decision-making for the deceased’s manner of disposal, as if the OPGT had been appointed by the deceased’s will.<sup>68</sup>

However, if there is no estate or no testamentary trustee is appointed by will, or otherwise acting, and no person applies for authority to dispose of the deceased pursuant to the *Estates Act*, or otherwise, a deceased’s surviving spouse, even if separated at death, may have a duty at common law to dispose of his or her deceased spouse and, if the deceased spouse leaves no estate, or insufficient assets, the surviving spouse may also be responsible for the cost of the disposition<sup>69</sup>.

(f) **Synopsis – Priority of Decision-Makers for Disposition of the Deceased:**

In Ontario, the person with the duty to dispose of the deceased’s human remains, and the corresponding right to possession of the remains for that purpose, is, in order of priority: the estate trustee appointed by the deceased’s validly-executed will, if willing and able to act; the person appointed by the Superior Court as the administrator (or ETDL) of the deceased’s estate, pursuant to the *Estates Act*; if no estate trustee is appointed by will and an administrator is not yet appointed, *prima facie*, the person with the highest entitlement to be appointed administrator (the potential administrator); and, as last resort, the OPGT (or potentially the deceased’s surviving spouse), but where the validity of the deceased’s will is challenged, the appointment of an ETDL is preferred, except if the estate is of modest value, very straightforward and uncomplicated.

**Decision-Makers of *Prima Facie* Equal Standing or Rank:**

Judicial guidance in Ontario is limited for when a dispute arises between two or more people who are equally entitled in rank, statutorily or presumptively, to assume the duty of disposal and associated custody of the body of a deceased person for disposal, such as among co-trustees jointly appointed without qualification by the deceased’s will. Alternatively, the dispute may exist between those with equal entitlement to be appointed administrator of the estate (or the

potential, or *prima facie*, administrator), such as the parents of a deceased child or the adult children of a deceased parent.

If judicial intervention is requested, the Court is very likely to heavily weigh both the need to resolve the dispute promptly and the practicalities of disposal without unreasonable delay<sup>70</sup>. The Court may also consider other practicalities, such as the deceased's place of residence, the length of time of that residency, available disposal options, convenience to the family members and, to the extent reasonably ascertainable, the nature and familial matrix of the competing claimants' relationship with the deceased, but most likely with guarded attention to the "*arcane*" contentions by the competing parties.<sup>71</sup>

Interestingly and unlike in Ontario, British Columbia, for example, has statutorily defined a prescribed hierarchy and, if a dispute arises between those with *prima facie*, equal entitlement to decision-making authority, there is a mechanism for vesting the right to control the disposition of the deceased to a single decision-maker.<sup>72</sup> Under this mechanism, if the right to control the disposition of human remains devolves to people on the same level in the statutory hierarchy, the order of priority is determined in accordance with an agreement between or among them, if any, failing which authority vests with the eldest of the persons or descends in order of age. This mechanism, while advantageous for its operative simplicity, may create the risk of arbitrary and unfair decision-making. For example, in the case of a dispute between the parents of a deceased child, the elder of them would be statutorily deemed the decision-maker for their child's disposition.

### **Qualifications to the Power of the Estate Trustee:**

An estate trustee's decision-making authority for disposal of the deceased and incidental custodial right to the remains for that purpose is subject to, or fettered by, both statutory and common law qualifications:

(a) **Deceased's Express Wishes or Directions (Religious and Cultural Issues):**

A deceased's express wishes or preference regarding the place or manner of his or her disposal do not limit an estate trustee's authority, but may materially influence his or her decision-making.

There is no property in a body - any direction by the deceased relating to the disposition of his or her human remains (by will, pre-need cemetery or funeral planning contract, precatory memorandum<sup>73</sup> or otherwise), including for burial or cremation, delivery of the body to any person other than the duly appointed estate trustee, or specification regarding the place, manner of or any special arrangements for disposal, is neither dispositive nor enforceable, even if expressed due to firmly-entrenched religious or culturally-driven reasons.<sup>74</sup> Spiritual, traditional or axiomatic beliefs and customs do not bind an estate trustee, provided the trustee complies with his or her legal duties and, if a dispute arises, an assessment of the merits of competing emotions, religious beliefs or cultural values will commonly be avoided by the judiciary, as being irrelevant – the place and manner of disposal is a question only of legal obligation<sup>75</sup>.

However, final wishes expressed by a deceased, if any, should be considered and may be followed by an estate trustee, but they do not bind, should not cause unreasonable expense and cannot unfairly prejudice beneficiaries or creditors of the estate.<sup>76</sup> To the extent reasonably possible, “*the wishes of [the deceased] should be respected and honoured in death.*”<sup>77</sup> Practically, adhering to the express wishes of the testator is very likely to bolster the trustee's decision-making and strengthen its defensibility, if challenged.<sup>78</sup>

Comparatively other provincial jurisdictions statutorily mandate that a deceased's express wishes or direction for disposition be followed, except in exceptional circumstances. For example, in B.C. a “*written preference*” by the deceased binds his or her estate trustee in control of disposition, including by a will or “*preneed cemetery or funeral services contract*”, provided that compliance does not offend the applicable tissue donation legislation and “*would not be unreasonable or impracticable or cause hardship*”.<sup>79</sup>

(b) **Disposal-Related Duties of the Estate Trustee:**

An estate trustee's decision-making authority for disposal must also comply with his or her obligations established by common law.

Whether appointed by will or judicially, an estate trustee's fundamental obligation is to manage and dispose of the deceased's human remains in a decent, respectful, dignified, appropriate and timely manner – burial, cremation and reasonable disposition of cremated remains are judicially sanctioned as an acceptable discharge of this duty.<sup>80</sup>

Any interment of a body, scattering of cremated remains at a cemetery and cremation must be carried out in a “*decent and orderly manner*”, with “*quiet and good order*” maintained throughout.<sup>81</sup> A dead human body may also not be cremated without a certificate issued by the coroner authorizing the cremation.<sup>82</sup> Embalming a dead human body is not mandatory, but may be recommended and be completed only by a licensed operator.<sup>83</sup>

An estate trustee's legal obligation to dutifully, respectfully and decently dispose of the deceased is also sanctioned by the *Criminal Code*, which makes it an indictable offence, punishable by imprisonment, not only to neglect a lawful duty to properly care for a dead body, but to improperly or indecently interfere with, or offer any indignity to, human remains, buried or not.<sup>84</sup>

Beyond this fundamental duty, the estate trustee's other responsibilities related to disposal of the deceased are:

- to act with due regard and subject to the reasonable limits of the assets in the testamentary estate and the deceased's financial circumstances generally, consistent with and befitting of the deceased's “*station in life*”<sup>85</sup>; and
- if requested reasonably to do so, to provide to the deceased's family members (next of kin) information practically necessary to inform them about the place and manner of disposal of the deceased's human remains and final arrangements as would be “*appropriate in the*

*circumstances*”, provided doing so would not unreasonably expose the trustee to fear, violence, attack or obstructive tactics<sup>86</sup>,

subject to which, the trustee is obliged to dispose of the deceased’s human remains in his or her discretion, but without acting capriciously.<sup>87</sup> Breach of duty by an estate trustee may expose the trustee to claims for damages, including for infliction of mental distress.<sup>88</sup> An estate trustee may also be challenged, or be exposed to liability to creditors and beneficiaries, if excessive, extravagant or potentially unreasonable expenses are incurred for final arrangements, particularly if those expenses are grossly disproportionate to, or may substantially deplete, the value of the estate.<sup>89</sup>

If an estate trustee, or family member of the deceased, experiences a dispute with, or involving, a licensed operator, but engages only the complaint process codified by the FBCSA and administered by the BAO, damages to the aggrieved party are not an available remedy.<sup>90</sup>

If the trustee dies, becomes incapable or inactive before fulfilling the duty of disposal, his or her own estate trustee may assume the duty and exercise the same powers.<sup>91</sup>

(c) **Special Purpose/Transformation - the “*Work and Skill*” Qualification:**

A trustee’s ancillary, rightful possession of a dead human body for disposal may also be qualified by a narrow exception to the ‘*no property in a body*’ common law rule - if a third party has expended effort, work or applied skill to the body, or its parts, while in that person’s lawful possession, such that the body, or parts, acquire special usefulness, purpose or may be transformed for a specific objective such as, for example, preservation for medical or scientific examination, the benefit of medical science or education generally, lawful exhibition, or in a manner that may create financial value in the body or its parts for the third party, or the body, or its parts, have otherwise “*acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes....*” – if so, a right to possession of the body, or its parts, in priority to the estate trustee may arise.<sup>92</sup>



Notably, cryogenically or medically preserved human reproductive materials, including sperm, ovum and embryos, have been held elsewhere as capable of being “*property*”. However, in Ontario it remains unclear whether a non-trustee could advance a tenable possessory claim to, for example, DNA and other genetic parts and materials preserved medically as of death or within a dead human body, even “*without the acquisition of different attributes, if they have a use of significance beyond their mere existence*”.<sup>93</sup> Such possessory rights, if any, are yet to be judicially scrutinized in Ontario, at least not comprehensively. With respect to human reproductive material, including sperm, posthumously using or removing an *in vitro* embryo “*for any purpose*”, or any human reproductive material “*for the purpose of creating an embryo*”, is statutorily prohibited, absent the donor’s informed, written consent while alive.<sup>94</sup> Presumably if statutory consent by the deceased for the removal of his or her reproductive material “*for the purpose of creating an embryo*” were not established, a viable possessory claim by a non-trustee would seem unlikely, given any other use would be questionable.<sup>95</sup> For posthumous conception with lawful, statutory consent, the deceased’s spouse may also apply to the Superior Court for a declaration that the deceased is a parent of the child conceived after his or her death through assisted reproduction.<sup>96</sup> Subject to this statutory restriction regarding human reproductive material, the ability of a non-trustee to successfully advance a qualifying, possessory claim to genetic or reproductive material within, or medically preserved from, a dead body may exist, but is yet to be judicially determined.

(d) ***Causa Mortis* Whole Body and Tissue (Organ) Donation:**

The trustee’s incidental, custodial right for disposal is also qualified by any lawful donation of the deceased’s tissue or whole body. The deceased *inter vivos* or, alternatively, the deceased’s spouse or next of kin immediately before, or after, the death, may consent to and direct for the donation and use of the deceased’s whole body, or parts, for the assistance of another or medical research, training or education, which binds the estate trustee.

A trustee must enquire if the deceased may have registered for organ or tissue donation for either transplant or research<sup>97</sup> through the Trillium Gift of Life Network (the “Network”), which regulates the removal of tissue from a dead body for transplantation into the body of a living

person or for other therapeutic, medical or scientific purposes.<sup>98</sup> Alternatively, a deceased person may have consented to his or her whole body being donated to the custody of an educational or scientific institute for the purpose of medical education or research: (a) by registering the donation directly with a designated, educational facility (by completing prescribed forms offered directly by the educational facility)<sup>99</sup>; (b) in his or her a last will and testament, or other testamentary declaration; (c) verbally; or (d) otherwise, by a written consent.

Specifically, any person who is at least sixteen years of age (or, if younger, there was “*no reason to believe*” otherwise at the time<sup>100</sup>) may consent, by “*a writing*”<sup>101</sup> or orally “*in the presence of at least two witnesses during the person’s last illness*” to donate his or her whole body, or any part, including tissue<sup>102</sup>, for use after death for “*therapeutic purposes, medical education or scientific research.*”<sup>103</sup> This consent, effective upon death, is “*binding and is full authority*” for “*the use of the body or the removal and use of the specified part or parts for the purpose specified*”, unless the person acting on the consent “*has reason to believe that it was subsequently withdrawn.*”<sup>104</sup>

For tissue donation, when a person dies, particularly in a public hospital<sup>105</sup>, the Network will usually be notified by the hospital and will access the registered donor database maintained by the Ministry of Health and Long-Term Care (“MHLTC”) and, even if a deceased person had registered for donation, the common practice of the Network is to reaffirm, or verify, this consent with the deceased’s family.<sup>106</sup> If consent is affirmed, medical tests are completed to determine what organs and tissues are suitable for transplant and, if any, they are matched with the transplant wait list and surgery takes place in an operating room at the hospital. The entire donation process, from the time the family affirms donation to recovery, typically takes about twenty-four to forty-eight hours.<sup>107</sup>

If a person did not, or could not, during life give consent, or “*in the opinion of a physician is incapable of giving consent by reason of injury or disease and the person’s death is imminent*”<sup>108</sup>, consent to the *post-mortem* use of that person’s body, or any part, for “*therapeutic purposes, medical education or scientific research*” may be given in the following, descending priority in writing, orally (with at least two witnesses) or by recording, by:

- a “*spouse*”<sup>109</sup>;
- a child;
- a parent;
- a sibling;
- a next-of-kin;
- a person “*lawfully in possession of the body*”, including a duly-appointed estate trustee<sup>110</sup>,

unless the third party, consenting person “*has reason to believe that the person who died or whose death is imminent would have objected.*”<sup>111</sup> Such consent, if given by the third party in priority, confers “*binding*” and “*full authority*” for: (a) “*the use of the body or for the removal and use of the specified part or parts for the purpose specified*”, unless the person acting on the consent “*has actual knowledge of an objection thereto by the person in respect of whom the consent was given or by a person of the same or closer relationship to the person in respect of whom the consent was given than the person who gave the consent*”<sup>112</sup>; and (b) the collection, use and disclosure of necessary personal information.<sup>113</sup>

If a deceased person’s tissue is donated to a living person, generally the remaining body cannot be donated to an educational facility.<sup>114</sup> If the specific use cannot be achieved “*for any reason*”, the donated remains must be disposed of as if no consent to donation had been given.<sup>115</sup> Before death, a coroner may also direct for tissue to be transplanted after death where a person’s death is imminent and there is reason to believe a death investigation or inquest may be necessary, if consent to donation is also obtained.<sup>116</sup> The Office of the Chief Coroner, the Regional Supervising Coroner, or a designated coroner, may also deliver an unclaimed or abandoned body to “*a teacher of anatomy or surgery in a school*” for “*the purpose of anatomical dissection*”.<sup>117</sup>

Generally, time is of the essence, particularly for whole body donation – a trustee must be mindful that an educational facility may decline the donation if:

- more than forty-eight hours have elapsed since death;
- an autopsy was conducted;

- embalming occurred;
- amputation occurred, or major, surgical operations have been performed; and/or
- the deceased had certain infectious or contagious diseases or was emaciated.<sup>118</sup>

For whole body donation, transportation expense is usually payable by the deceased's estate or consenting third party. However, the educational facility for a donated body must dispose<sup>119</sup> of the body at the expense of the facility "*after it has served the purpose for which it was received.*"<sup>120</sup>

Both the Crown and those employed by both medical and educational facilities are immune from civil liability for damages when tissues and whole bodies are donated through the Network.<sup>121</sup>

(e) **Death Investigation (Coroner's Authority):**

The duty to dispose of a dead human body is also qualified by a coroner's authority, including to conduct a death investigation<sup>122</sup>.

No person may interfere with, or alter, a human dead body or its condition "*in any way*" until the coroner approves, but every person has a duty to immediately notify the coroner or a police officer if the person "*has reason to believe*" that the deceased died because of, for example: violence, misadventure, negligence, misconduct, by unfair means, during or following pregnancy, suddenly and unexpectedly, untreated disease or sickness, any cause other than disease or "*under such circumstances as may require an investigation.*"<sup>123</sup>

Furthermore, certain deaths must be reported to the coroner and be investigated to determine if an inquest is necessary, including a person who dies:

- (a) in a "*children's residence*", a supported or intensive group living residence, a psychiatric facility or a private or public hospital to which the person was transferred<sup>124</sup>;
- (b) in a long-term care facility<sup>125</sup>;

- (c) while a patient at a psychiatric facility or committed to a correctional facility, place of temporary (youth) detention or subject to secure or open (youth custody), even if the death of that person does not occur on the premises or while the person is not in the actual custody of the facility, institution or place<sup>126</sup>;
- (d) while detained in a detention facility or lock-up, temporary (youth) detention, place of secure custody or correctional institution<sup>127</sup>, while detained by a peace officer<sup>128</sup>, while restrained in a psychiatric facility or admitted to a secure treatment program, or because of any workplace accident or at a construction project, mining plant or mine<sup>129</sup>; and/or
- (e) because of medical assistance in dying.

Accordingly, a trustee's rightful possession of the deceased's body for disposal is qualified if, for example, a coroner is informed, or has reason to believe, that a person died in a circumstance described above, in which case the coroner is likely to issue a warrant to take possession of the body to conduct an investigation.<sup>130</sup> A coroner may also: (i) examine or take possession of any dead body, or both; and (ii) enter and inspect any place related to the dead body.<sup>131</sup> A coroner's broad investigative powers also include, if there are reasonable and probable grounds, inspecting places and seizing records or other things believed to be related to the deceased<sup>132</sup> and may, at any time during an investigation, conduct or require *post-mortem* or any other examination as may be appropriate in the circumstances.<sup>133</sup> Even if a body has been interred, the Office of the Chief Coroner may direct for it to be disinterred for an investigation or inquest.<sup>134</sup>

(f) **Interment and Scattering Rights:**

An estate trustee's authority for disposal, at least with respect to a licensed cemetery, is also subject to interment and scattering rights holders.

- **Interment<sup>135</sup> (Burial) in a Cemetery:**

“*Interment rights*” may be purchased by any person from a licensed cemetery operator<sup>136</sup>, which include “*the right to require or direct the interment of human remains in a lot*” (being “*an area*

*of land in a cemetery containing, or set aside to contain, interred human remains and includes a tomb, crypt or compartment in a mausoleum and a niche or compartment in a columbarium and any other similar facility or receptacle*<sup>137</sup>. Correspondingly, an “interment rights holder” is “the person who holds interment rights with respect to a lot whether the person be the purchaser of the rights, the person named in the certificate of interment or such other person to whom the interment rights have been assigned.”<sup>138</sup> Interment rights for a lot may also be sold or assigned to a third party, before exercised, subject to the cemetery’s by-laws.<sup>139</sup>

If interment rights for a lot in a licensed cemetery were purchased by a third party (*i.e.*, the interment rights are not held by the deceased or the estate trustee), the estate trustee cannot dispose of the deceased’s human body in that specific lot without the consent of the interment rights holder.<sup>140</sup> Similarly, an estate trustee cannot unilaterally disinter a human body from that specific lot without the consent of the interment rights holder.<sup>141</sup>

- **Scattering (Cremated Remains in a Cemetery):**

A “scattering ground” is “the land within a cemetery that is set aside to be used for the scattering of cremated human remains”<sup>142</sup>. Only a person licensed as a cemetery operator may “maintain or set aside land to be used for the purpose of scattering cremated human remains” and only if the land is within a licensed cemetery.<sup>143</sup> A cemetery may also establish a “private scattering ground” for related or affiliated remains.<sup>144</sup> No one is permitted to charge a fee for “the use of land for scattering cremated human remains unless the person is a licensed cemetery operator and the scattering takes place on land within a cemetery”.<sup>145</sup> Accordingly, “scattering rights” is “the right to require or direct the scattering of cremated human remains on the scattering ground of a cemetery”.<sup>146</sup> The “scattering rights holder” is, therefore, “the person who holds the scattering rights with respect to a scattering ground whether the person be the purchaser of the rights, the person named in the certificate of scattering or such other person to whom the scattering rights have been assigned”. As with interment rights, scattering rights may also be sold to a third party, unless prohibited by the cemetery’s by-laws.<sup>147</sup>

If scattering rights for a scattering ground in a licensed cemetery were purchased by a third party (*i.e.*, the scattering rights are not held by the deceased or the estate trustee), the estate trustee cannot scatter the deceased's cremated remains on those grounds without the consent of the third party scattering rights holder.<sup>148</sup> By corollary, an estate trustee cannot unilaterally remove cremated, scattered remains in a cemetery without the consent of the scattering rights holder.<sup>149</sup>

Both interment and scattering rights must be exercised within twenty years of the date of purchase, or they may be abandoned.<sup>150</sup>

(g) **Disinterment and Exhumation:**

A trustee's power and authority to disinter a deceased person is statutorily limited. Pursuant to the FBCSA, human remains may be disinterred if:

- directed by an order of the Court for the "*purpose of a proceeding*"<sup>151</sup>;
- directed by the Ontario government (*i.e.*, the Crown) "*in the interest of justice*"<sup>152</sup>;
- directed by a coroner, if a warrant for possession is issued, for a death investigation;<sup>153</sup>
- directed by the "*Chief Coroner*", if necessary for an investigation or inquest<sup>154</sup>;
- directed by the "*registrar*"<sup>155</sup>, if dealing with "*burial sites*"<sup>156</sup> or "*irregular burial sites*"<sup>157</sup>, "*burial grounds*" and "*aboriginal peoples burial grounds*"<sup>158</sup>;
- ordered by the registrar to close a cemetery<sup>159</sup>; and/or
- directed by a "*medical officer of health*", if authorized by the *Health Protection and Promotion Act*<sup>160</sup>, who may attend at, supervise or direct any disinterment or removal of scattered remains.<sup>161</sup>

Except for these circumstances, disinterring human remains and removing scattered, cremated remains is prohibited, unless:

- (a) the prior consent of the "*interment rights holder*" or "*scattering rights holder*" is obtained, respectively<sup>162</sup>; and

(b) except for cremated human remains, prior notice is given to the “*medical officer of health*”<sup>163</sup>,

unless:

- (i) the whereabouts of the rights holder is unknown;
- (ii) the holder is not “*readily ascertainable*”; or
- (iii) the holder is unable to consent,

in which case the registrar may consent on behalf of the holder, subject to the steps prescribed by the FBCSA.<sup>164</sup>

Human remains may only be buried in a cemetery, but a dead human body cannot be removed from a cemetery, even if lawfully disinterred, without certification by a medical officer of health or the licensed cemetery operator.<sup>165</sup>

(h) **Criminal Responsibility or Wrongdoing Related to the Deceased’s Death:**

In Ontario, it is not judicially resolved, at least not clearly, whether a person who is, or may be, criminally responsible for, or otherwise engaged in criminal wrongdoing in relation to, the death of a deceased person, is entitled to exercise the right to control for the disposal of the deceased’s human remains, particularly if appointed by the deceased’s will.

Admittedly it may be unlikely, but nonetheless possible, for the issue of criminal responsibility for the death of a person to be resolved before the deceased’s remains are buried or cremated. For example, the deceased’s remains may not be discovered before the completion of a death investigation or, alternatively, the criminal process of being charged and convicted of an offence relating to the death of the deceased. Alternatively, the deceased’s cremated remains may be held *in specie*, creating the opportunity for criminal responsibility to be determined before disposition.

The issue has been considered directly in other jurisdictions, in which it has been held that a person who is guilty of a “*wrongful homicide*” of a deceased person “*forfeits the right to*



*administration*” and that “*a person may be passed over in relation to a grant of administration because of his or her bad character or other unfitness to act*”<sup>166</sup>.

In Ontario, presumably the common law “*forfeiture rule*”<sup>167</sup> may apply or, alternatively, if the person has been appointed by the deceased’s will, or otherwise, application could be made for removal.<sup>168</sup>

### **Places for the Lawful Disposal of Human Remains:**

#### **(a) Interment and Burial of Human Remains<sup>169</sup>:**

Dead human bodies and cremated remains must be interred<sup>170</sup> in a cemetery established under the FBCSA and operated by a licensed cemetery operator.<sup>171</sup> Cemetery operators<sup>172</sup> do not sell the land, but rather “*interment rights*”<sup>173</sup> to be interred in a grave, lot or a plot within a licensed cemetery. If a change is necessary, subject to the cemetery’s by-laws, an interment rights holder may resell the rights to a third party or, alternatively, to the cemetery from which the rights were initially acquired.<sup>174</sup>

Cemetery grounds must be maintained to ensure the safety of the public and to preserve the dignity of the cemetery<sup>175</sup>. A cemetery must allow for reasonable access by the public at any time, unless restricted by the cemetery’s by-laws.<sup>176</sup> Cemetery operators must ensure the cemetery has an entrance accessible to the public directly from a public thoroughfare or another publicly accessible area.<sup>177</sup> Everyone is prohibited from causing or committing a nuisance in a cemetery or willfully or unlawfully disturbing those assembled to inter human remains in a cemetery.<sup>178</sup>

#### **(b) Cremated Remains:**

A dead human body may only be cremated at an established crematorium by a licensed crematorium operator, unless the deceased had a “*pacemaker or radioactive implant*”<sup>179</sup> or no “*coroner’s certificate*”<sup>180</sup> has been obtained by the operator.<sup>181</sup> All cremations must be

completed in a “*decent and orderly manner*”, ensuring that “*quiet and good order are maintained*”.<sup>182</sup>

While ashes may be unclaimed (in which case the licensed operator possessing the remains may be required to retain the remains for a significant period before lawfully interring them in a cemetery, potentially at its own expense<sup>183</sup>), commonly they are, subject to the authority of the estate trustee, collected, divided *in specie* or disposed of by:

- interment in a columbarium or niche in a cemetery;
- burial in a cemetery; or
- scattering.

If “*scattering rights*” are purchased from a licensed cemetery, the remains must be scattered on a designated “*scattering ground*” within the cemetery.<sup>184</sup> A cemetery operator must ensure scattering grounds are “*reasonably accessible*” to the public<sup>185</sup> and cannot require either an interment or scattering rights holder to provide or install a marker<sup>186</sup>, except for religious reasons or if required by the cemetery’s by-laws.<sup>187</sup> A rights holder may install a marker if permitted by, and installed in accordance with, the cemetery’s by-laws.<sup>188</sup>

Cremated remains may be disposed of lawfully by:

- buying rights to inter or scatter the cremated remains within a licensed cemetery;
- buying rights to inter the cremated remains in a niche within an above-ground columbarium, mausoleum or private structure within a licensed cemetery;
- scattering the cremated remains on private property (*i.e.*, privately – without contracting with a licensed operator and not within a licensed cemetery) with the consent of the land owner<sup>189</sup>;
- entering a contract for licensed supplies or services<sup>190</sup> with a licensed operator of a cemetery, crematorium, funeral establishment (or funeral services provider)<sup>191</sup> or transfer service<sup>192</sup> to scatter the cremated remains<sup>193</sup>, including on private property;

- without prior approval, scattering the cremated remains on land owned by the provincial Crown<sup>194</sup>, including land covered by water, if the land is unoccupied (such as a provincial park, conservation area or reserve, or the Great Lakes), subject to any posted restrictions or designated areas and with an expectation that scattering be undertaken in an environmentally-responsible manner;<sup>195</sup>
- scattering the cremated remains on municipally-owned lands, subject to any by-law prohibiting scattering in certain areas, such as municipal parks; and
- transporting the cremated remains out of Ontario<sup>196</sup>.

### **Unclaimed (Abandoned) Bodies:**

Disturbingly dead human bodies are increasingly unclaimed across Ontario<sup>197</sup>, potentially doubling during the past ten years. The elevated trend is likely attributable to more urbanization, increasing costs for final arrangements, greater geographical displacement of family members (and next of kin) and shifts in societal trends and familial relationships generally. Practically, the deceased may simply have had no next of kin or, if they did, none may be willing to enter a contract with an operator to pay for the cost of final arrangements, or even make the necessary enquiries and apply for social assistance benefits that may be available to pay for disposition, often creating difficult circumstances for the hospital, police or the attending funeral establishment in possession of the dead body – the only choice may be to seek to have the body declared as unclaimed or abandoned.

Generally, the Office of the Chief Coroner (“OCC”)<sup>198</sup> or, alternatively, the Ontario Forensic Pathology Service (“OFPS”)<sup>199</sup>, both of which conduct death investigations in Ontario, must be contacted if a dead human body is potentially abandoned or unclaimed by a relative or friend within twenty-four hours after death<sup>200</sup>, if the body has not been or will not be used for organ or tissue donation<sup>201</sup>, in which case an “*inspector*” is likely to assume control of the body [*i.e.*, the Regional Supervising Coroner (“RSC”), or a designated, local coroner]<sup>202</sup>. If a death investigation must be conducted by the OCC for an unclaimed dead body, final disposition of the deceased may be delayed for a significant period, possibly a year.<sup>203</sup>

The OCC will not assume financial responsibility for retaining, storing or transferring an unclaimed body; rather, the professional or facility in possession must do so initially, usually the hospital at which the deceased died or possibly an attending funeral establishment. The OCC may also require that an unclaimed body be stored or retained in a public or private morgue<sup>204</sup> until final arrangements are resolved, pending which the morgue operator must ensure the body is secure against “*unlawful interference*”.<sup>205</sup>

For example, if death occurs in a hospital and the body is potentially unclaimed, the hospital must notify the OCC, which will initially direct the hospital to store the unclaimed body and to promptly “*take reasonable measures*”<sup>206</sup> to attempt to locate next of kin for the deceased or, in the alternative, a potential claimant for the body.<sup>207</sup> The Ministry of Community Safety and Correctional Services (“MCSCS”) requires that “*due diligence*” be undertaken by the professional or institution in possession of the body before the RSC will declare a body unclaimed and deliver disposition instructions to the responsible, local municipality<sup>208</sup>.

To assist professionals and institutions with identifying next of kin and potential claimants, the MCSCS offers, among other things, a “*Checklist for Claimant Search*”<sup>209</sup>. The OCC may also direct the hospital (or other facility) possessing the potentially unclaimed body to complete and submit to the RSC: (a) a “*Next of Kin and Claimant Search Form*”; (b) a “*Decision Tree*” for the unclaimed body, effectively outlining the OCC’s expectation of the hospital (often with the involvement of the local police service or a funeral establishment) for diligently undertaking reasonable efforts to locate next of kin or an appropriate claimant alternative; and (c) certain additional records or information, if available, particularly to attempt to identify the deceased’s next of kin, if any<sup>210</sup>, to satisfy the RSC such reasonable efforts were discharged by the hospital (or other facility in possession of the unclaimed body) and, if so, the RSC may provide disposition instructions to the local municipality. Often a body is identified, but if not, it is more likely to be declared unclaimed.

Similarly, if the death occurs in the community, the local police service will initially notify the local, investigating coroner (who will notify the RSC), following which the police service will likely be directed by the RSC to promptly take reasonable measures to locate next of kin or a

potential claimant, even if a coroner's investigation may be initiated.<sup>211</sup> For a death in the community, the OCC is likely to issue a "*Coroner's Direction to Transfer and Store*" the unclaimed dead body to a private or public morgue "*for a period not exceeding 14 days*".<sup>212</sup>

If next of kin or an alternative claimant is located by these efforts, that person may claim the body from the OCC and undertake the disposition.<sup>213</sup> If no next of kin or potential claimant is located, or is located but declines to claim the body, the hospital, for example, will initially notify both the local police service and the RSC, following which the RSC will continue to manage the unclaimed body, including directing for storage in a morgue, if further investigation may reasonably be necessary.<sup>214</sup>

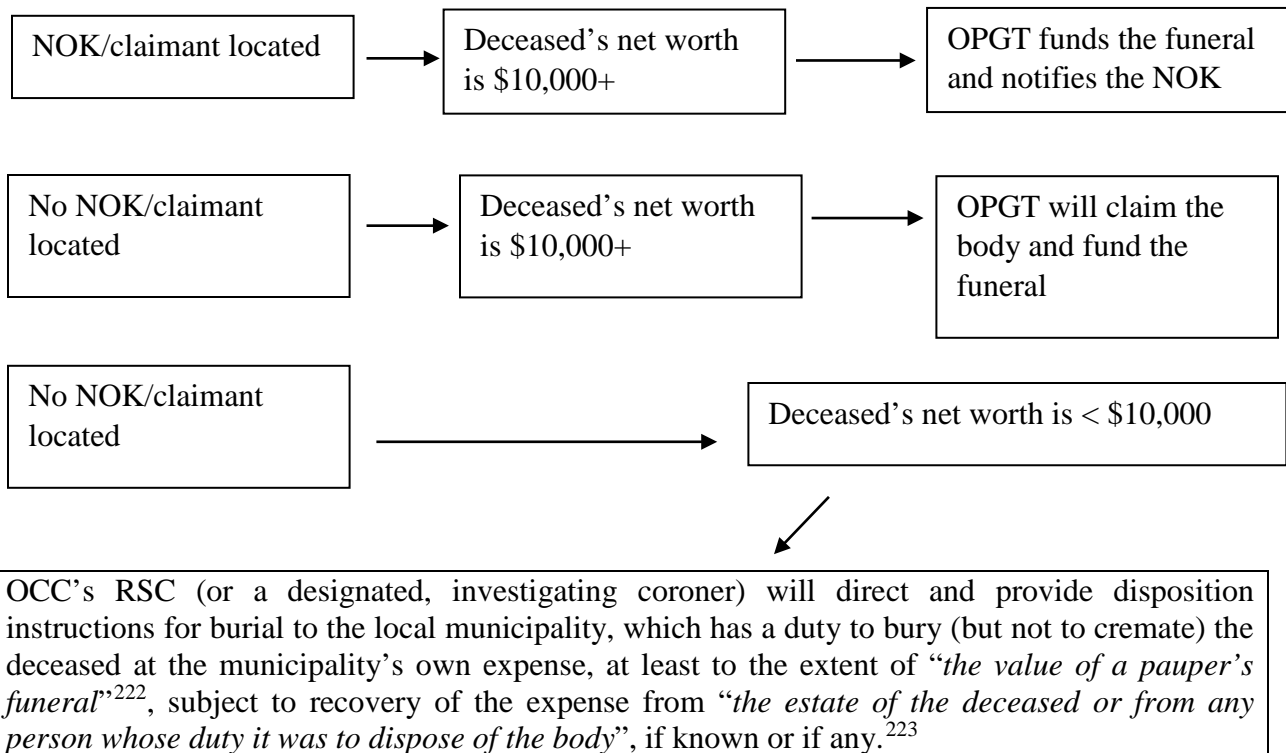
If a body remains unclaimed for a period of fourteen days, and "*despite reasonable efforts to locate a potential claimant*" and "*after all known potential claimants have been reached and given reasonable time to make a decision*", the OCC will usually proceed with disposition of the body unless there are reasonable grounds to extend this period of time.<sup>215</sup> The RSC will deliver a "*Form 6 – Report and Warrant to Dispose of an Unclaimed Body*" to the local municipality, providing known information about the deceased.<sup>216</sup> The RSC may also deliver the unclaimed body to "*a teacher of anatomy or surgery in a school, for the purpose of anatomical dissection*".<sup>217</sup>

When directed to dispose of an unclaimed body, which must be buried unless the OCC directs otherwise<sup>218</sup>, the local municipality will generally arrange final disposition with a local funeral establishment, based on the budget policy set by the local municipality, subject to financial contribution through the OPGT from the deceased's estate, if any. Generally, the local municipality will arrange for an inexpensive grave and casket and apply the balance of the allotted budget to the service for the deceased, if any.<sup>219</sup>

If no next of kin or claimant is located initially, the identity of the deceased is known and there is reason to believe the deceased may have held assets on death, such as real property, the OCC may also refer the unclaimed body to the OPGT, Estates Office, for further investigation. The OPGT may also attempt to identify next of kin or potential claimants through its own, more

extensive resources, while also attempting to ascertain if the deceased had a net worth on death of at least ten-thousand dollars<sup>220</sup>. In fact, since the increase to both the income and asset exemptions for both Ontario Works and the *Ontario Disability Support Program*, effective September of 2017<sup>221</sup>, the OCC (or the RSC) now more commonly, if not routinely, refer an unclaimed body to the OPGT, Estates Office, for further investigation of next of kin, the deceased's assets and to potentially assume responsibility for disposal of the deceased's unclaimed body.

In summary, the common scenarios for an unclaimed body are:



A crematorium service, funeral establishment or other bereavement service provider in possession of unclaimed, cremated remains, is required to retain the remains and may be required to inter those remains at a cemetery, potentially at its own expense, if they remain unclaimed for one year from the date of cremation and the operator has been unable, despite reasonable efforts, to locate the buyer of the cremation service, an estate trustee or next of kin<sup>224</sup>.

**Payment for Disposition:**

(a) ***Prima Facie Responsibility for Payment:***

An estate trustee's duty to dispose of the deceased's human remains incorporates a duty to pay for the disposition - *prima facie* the estate is responsible for the amount reasonably paid.

Engaging a "*funeral establishment*"<sup>225</sup> or "*transfer service*"<sup>226</sup> is not legally required – subject to the consent of the estate trustee, if any, an unlicensed family member, for example, may arrange funeral services if that person receives no payment or benefit for doing so, provided the death is registered with the local municipality to obtain a burial permit, which is necessary for both burial and cremation.<sup>227</sup>

However, if "*cemetery services*"<sup>228</sup>, "*crematorium services*"<sup>229</sup>, "*funeral services*"<sup>230</sup>, transfer services (collectively, "*licensed services*"<sup>231</sup>) or "*licensed supplies*"<sup>232</sup> are arranged with a licensed operator, an estate trustee's duty to dispose of the deceased's human remains extends to paying only reasonable expense for the disposition, having regard to the deceased's "*station in life*" and circumstances on death, including for the purchase of markers, gravestones and the cost of inscription<sup>233</sup>, which must be accurate and dignified.<sup>234</sup> The expense may not be extravagant – effectively, the standard is reasonableness, having regard to all of the circumstances, including consideration of creditors, if any.

Generally, reasonable funeral expenses<sup>235</sup> may be prioritized against other expenses of, or claims against, the estate of the deceased person, as a first charge<sup>236</sup> - an estate trustee is entitled to indemnity from the assets of the estate for such expenses.<sup>237</sup> If an estate trustee is not acting, or fails or neglects to arrange for the disposal of the deceased, and those arrangements must be made by another person, that person is generally entitled to be reimbursed out of the estate.<sup>238</sup>

If the deceased was not an undischarged bankrupt at the time of death, but his or her estate is insolvent, subject to the rights of secured creditors, if any, the proceeds of the bankrupt estate should pay the reasonable funeral expenses in priority to creditors and before the costs of

administration of the bankrupt estate. However, if the deceased died as an undischarged bankrupt, the estate trustee may not be authorized to pay, or be reimbursed, for the funeral and testamentary expenses using estate assets, or at least those expenses may not be payable in priority to creditors.<sup>239</sup> In that case, if there are insufficient assets to pay funeral expenses, particularly if the body is consequently unclaimed or abandoned, the local municipality in which the deceased resided may be responsible for disposing of the deceased using social assistance benefits to which the deceased was entitled, if available, or potentially at its own expense, subject to a right of recovery against the deceased's estate.<sup>240</sup>

(b) **Bereavement Contracts with Licensed Operators:**

The FBCSA does not promulgate bereavement sector self-regulation, but rather codifies strict and comprehensive oversight of operators within the sector, particularly for consumer protection. Specifically designed to offer enhanced protection to potentially vulnerable buyers, the FBCSA incorporates *extensive* protection for consumers in the bereavement sector entering contracts with licensed operators for licensed supplies and services, including for interment and scattering rights.<sup>241</sup>

For example, the FBCSA prohibits every person from contacting, by any means, any “*vulnerable person*”; specifically, a person in a hospital, long-term care home, hospice or such other institution as may be prescribed for the purposes of soliciting the making of, or negotiating, a contract for the sale or provision of a licensed supply or service.<sup>242</sup>

If a contract with an operator is entered, it may be cancelled by the purchaser, in writing, at any time within thirty days of when the contract was made, in which case the operator must fully refund the purchaser, even if the licensed supply or service was previously delivered or performed<sup>243</sup>, except if requested by the purchaser to conduct a funeral, burial or cremation within this period.<sup>244</sup> An operator is also prohibited from performing services or delivering supplies during this “*cooling off*” period, unless requested by the purchaser to conduct a burial or cremation and, if the contract is cancelled by the purchaser within this period, an operator cannot charge an administrative or cancellation fee.<sup>245</sup>



Following this initial period, a purchaser may also cancel the contract and is entitled to refund by the operator for any supplies and services contracted for, but not yet delivered or performed by the operator at the time of cancellation, less a cancellation fee of ten *per cent* of the contract price, to a maximum of \$350.<sup>246</sup> An operator is not required to refund the purchaser for licensed supplies or services requested, received and used by the purchaser as of when the notice of cancellation by the purchaser is made, either during or after the initial “*cooling off*” period.

Operators must by law also provide specific and extensive disclosure to consumers before a contract is entered, including ownership information and a detailed list of current prices for all supplies and services offered by the operator or of interest to the purchaser.<sup>247</sup> Every contract for bereavement services or supplies entered with a cemetery, crematorium, funeral establishment or transfer service operator must also comply with the specific requirements prescribed not only by the FBCSA<sup>248</sup> but also, for example, by the *Accessibility for Ontarians with Disabilities Act, 2005*<sup>249</sup> and, absent such compliance, an operator cannot enforce the contract, even if the licensed supplies and services provided for under the contract have been delivered or performed.<sup>250</sup>

An estate trustee should also consider if the deceased pre-paid for funeral expenses and, if so, the trustee should: (a) review the contract to verify compliance with the requirements of the FBCSA, failing which it is unenforceable by the operator; and (b) ensure the operator has complied with its duties for pre-paid funeral contracts.<sup>251</sup> Pre-paid contracts are guaranteed – the operator must provide the same service or supplies, without additional charge, even if the price has subsequently increased.<sup>252</sup>

Beyond disciplinary sanction, the potential punishment for operators failing to comply with these protective safeguards is severe: a fine of not more than \$50,000 or imprisonment for a term not exceeding “*two years less a day*”, or both. If a corporation fails to comply, the fine could be \$250,000.<sup>253</sup>

Furthermore, at common law, a contract for funeral services is also a “*peace of mind*” contract, a breach of which, such as unreasonable delay by the operator in providing the funeral service, could result at common law in damages payable by the operator for, for example, emotional or mental suffering by family members.<sup>254</sup>

(c) **Selling Interment and Scattering Rights:**

Holders are entitled to sell their unused interment or scattering rights. A cemetery operator may be required to either repurchase those rights from the holder or, alternatively, facilitate the resale of those rights by the holder on the open market. A cemetery’s by-laws must specify if the resale of interment or scattering rights on the open market is prohibited and, if so, the holder may be entitled to cancel the contract with the cemetery operator. If cancelled, the cemetery may be required to repurchase the rights from the holder at the market value identified by the cemetery’s current price list, less the amount deposited by the cemetery into its care and maintenance fund or account when the contract was entered initially. However, a cemetery is not required to repurchase interment rights for an unused grave or lot located in a plot, if one or more graves within the plot were previously used.

On the other hand, if the cemetery’s by-laws permit the resale of the rights by the holder publicly, the rights cannot be sold for more than the market value listed on the cemetery’s current price list. The cemetery operator must be notified in advance of and be involved with the transfer by the holder<sup>255</sup> - the operator may charge an administrative fee but is not required to deposit further into its care and maintenance fund resulting from the resale transaction.<sup>256</sup>

(d) **Additional Sources of Financial Assistance for Funeral Expenses:**

(i) **CPP Death Benefit:**

If the deceased qualified, application should be made for the Canada Pension Plan (“CPP”) death benefit to defray reasonable funeral expenses:

- a one-time, lump-sum payment to the estate on behalf of a deceased CPP contributor;
- the application<sup>257</sup> must be made with sixty days of death, usually by the estate trustee appointed by: (i) the will; or (ii) the Court (to administer the estate);
- if no estate exists, or the estate trustee does not apply, application and payment may be made by, in order of priority:
  - the person or institution that has paid for or that is responsible for paying for the funeral expenses of the deceased, such as a local municipality that is required, or elects, to pay for the disposition;
  - the surviving spouse or common-law partner of the deceased; or
  - the next-of-kin of the deceased<sup>258</sup>;
- the amount of the benefit depends on both the duration and amount of the deceased's contributions to the CPP<sup>259</sup> – Service Canada provides a table to calculate the payment<sup>260</sup>; and
- Service Canada determines the benefit by calculating the amount that the deceased's CPP retirement pension would have been if the deceased had been age sixty-five at the time of death - the death benefit is equal to six months' worth of this calculated retirement pension to a maximum of \$2,500.<sup>261</sup>

(ii) **Ontario Works:**

If the deceased received financial assistance through Ontario Works (“OW”), the Ontario Disability Support Program (“ODSP”) or died as a qualifying, low-income person, firstly, OW health benefits may be available to assist with funeral expenses and, secondly, the local municipality may even pay for the funeral (usually burial only) expenses, unless they are prepaid or the deceased's estate has a net value of ten-thousand dollars, or more:

- OW may approve and pay for expenses for a funeral and burial, not only for a recipient or “benefit unit member” of OW or ODSP, but for non-member Ontario residents, if eligible<sup>262</sup>;
- eligibility is based on financial circumstances of the deceased and/or his or her spouse, if any, on death (*i.e.*, a ‘needs and means assessment’);

- the health benefit may include: (a) for burial expense, transferring the body, the purchase of a burial lot, a marker, as required by a cemetery, and potentially “*perpetual care*” cost charged by a cemetery; and (b) for cremation expense, transferring the body, a standard urn and scattering the remains in a cemetery or burial of the remains in a pre-owned lot<sup>263</sup>;
- the guideline (recommended) maximum amount payable is \$2,250 against the cost of funeral and burial or cremation, but a greater amount may be approved by the “*administrator*” - the person appointed by the “*delivery agent*” (*i.e.*, the local municipality) to “*oversee the administration of [the OWA] and the provision of assistance in the delivery agent’s geographic area*”<sup>264</sup>, subject to the local municipality’s own policy maximums for discretionary benefits for funeral arrangements<sup>265</sup>,

subject to both the Ontario government’s and the “*delivery agent*” municipality’s right to seek recovery of the expense from, for example, the deceased’s estate or potentially by assignment of other social benefit programs received by the deceased immediately before death, including CPP<sup>266</sup> and Old Age Security (“OAS”) pension.<sup>267</sup>

Particularly if an estate for the deceased does not exist, is insolvent, or no estate trustee is acting, alternative sources of assistance for disposition should be considered, including:

(iii) **Local Municipality:**

As discussed above, a local, responsible municipality may also be required to pay for the disposition of:

- an unclaimed or abandoned body<sup>268</sup>, particularly when the deceased cannot be identified or, alternatively, if identified, the deceased’s estate is non-existent or insolvent and no next of kin or alternative claimant can be located or, if located, is unwilling to claim the body or at least pay for funeral expenses; and
- a patient who died in a hospital and who is an “*indigent person*”, or the dependent of an “*indigent person*”,<sup>269</sup>

subject to the municipality's right to seek recovery of the expense against, for example, a deceased's estate or possibly social benefit programs benefitting the deceased immediately before death, including the CPP death benefit, if payable.

Generally, a deceased person will be disposed of by burial, if arranged by the local municipality. However, if a municipality pays for funeral expenses, a crematorium operator must cremate a person's remains if given a "*written direction*" from a "*delivery agent*", unless the crematorium restricts its operation to cremation of "*members of a defined religious organization*".<sup>270</sup>

(iv) **OPGT – Estates Administration:**

The OPGT, Estates Administration may also arrange and pay for a funeral and burial if the OPGT administers the deceased's estate requiring, among other things, that the estate has a minimum value of ten-thousand dollars "*after payment of the funeral and all debts owing by the estate*".<sup>271</sup>

(v) **Surviving Spouse:**

A surviving spouse, even if separated from the deceased at the time of death and entitled to no support, may be responsible at common law for the deceased's "*funeral expenses*" if no estate exists or insufficient assets are available to pay the expense<sup>272</sup>, but if a third party pays, or a funeral service provider is unpaid, recovery must initially be sought against the estate<sup>273</sup>.

(vi) **The Last Post Fund (Veterans):**

This potential source of assistance is a national, non-profit organization, funded mostly by Veterans Affairs Canada, offering funeral, burial and grave marking benefits for eligible Canadian and Allied Veterans "*due to insufficient funds at time of death.*"<sup>274</sup>

### **Alternative and Emerging Disposal Methods:**

Burial and cremation remain the predominant, judicially-approved manner of disposal in Ontario – at approximately the same rate.<sup>275</sup> However, increasing cultural, spiritual and religious diversity, technological innovation, environmentally and ecologically-driven concerns and funeral-related expense continue to challenge the sustainability of both traditional means<sup>276</sup>, creating the opportunity for alternatives to emerge.

These alternatives must: (a) comply with the FBCSA as a lawful manner of disposal; and (b) be consistent with an estate trustee’s duty, particularly to dispose of human remains in a “*decent*”, “*dignified*” and “*appropriate*” manner, which is not comprehensively defined by Ontario law.

These alternative methods of non-conventional disposal are both permitted by the FBCSA and recognized by the BAO:

- *natural or green* burial in licensed cemeteries, generally within designated areas<sup>277</sup>; and
- “*alkaline hydrolysis*” [occasionally referred to as “*Resomation*” (a proprietary tradename), bio-cremation or flameless/ water cremation], a process whereby the body is reduced to sterile water and bone ash by a high-pressure, more chemical-friendly process relative to traditional cremation<sup>278</sup>, which is offered currently by only five crematorium operators in Ontario<sup>279</sup>.

Other alternatives continue to emerge, reportedly being preferable to traditional burial and cremation. These developing alternatives are not yet active or authorized by the BAO in Ontario, but may potentially be permitted by the FBCSA for licensed crematorium operators<sup>280</sup>:

- “*Promession*”, a proprietary tradename, a five-step process involving cryogenic freezing, vibration and freeze drying, rendering the body to powder with ostensibly minimal toxicity and resource consumption<sup>281</sup>; and
- “*Cryomation*”, also a proprietary tradename, involving freezing the body by liquid nitrogen, fragmenting and removing foreign matter to render granular, non-toxic remains.<sup>282</sup>

### **Bereavement Sector Reform – Flexibility or Certainty?**

Unlike in Ontario, in which disputes regarding the disposal of human remains are resolved primarily by common law, other provinces, including British Columbia, Alberta and Saskatchewan, have codified a hierarchical order of priority establishing the right to control the “*disposition*” of the “*human remains*” of a deceased person<sup>283</sup>, including the right to, specifically, control the deceased’s cremated remains (ashes).<sup>284</sup>

For example, in B.C., if the person highest in priority is “*unavailable or unwilling to give instructions*”, that right passes to the person next in priority.<sup>285</sup> As noted above, if the right to control the disposition of human remains devolves to a class of “*equal rank*”, the order of decision-making authority is determined by agreement between them, if any or, alternatively, “*begins with the eldest of the persons or descends in order of age*”.<sup>286</sup>

The legislation in B.C. also codifies a mechanism for a person to seek an order by the Court granting that person the ‘*sole right*’ to control the disposition, in which case the Court is statutorily directed to consider, among other things and contrary to the approach in Ontario: “*the feelings of those related to, or associated with, the deceased...*”; the “*rules, practice and beliefs respecting disposition of human remains and cremated remains followed or held by people of the religious faith of the deceased*”; “*any reasonable directions given by the deceased...*”; and any “*family hostility or a capricious change of mind respecting the disposition of the human remains or cremated remains*” and, if that person successfully obtains the order, he or she is deemed “*to be at the top of the order of priority*”.<sup>287</sup>

On the one hand, Ontario’s current, common law-focused approach to resolving disputes over human remains arguably engenders flexibility, at least in part, as a primary advantage compared to a rigidly set statutory regime. The Superior Court is empowered to adopt a pragmatic approach to resolving disputes about the right of disposal, duly considering the specific facts of the case. Indeed, it may be difficult to conceive of a statutory, rigidly-defined approach, at least without risking the flexibility preserved by a common law approach. Embracing a comprehensive, statutorily-defined approach may also expose estate trustees to potentially greater civil liability,

such as claims for breach of statutory duty, trespass and negligence-based damages for “*wrongful disposition*”.<sup>288</sup>

On the other hand, inherent flexibility, as the case law reveals, may also create a degree of uncertainty and unpredictability, or unintentionally facilitate the opportunity for desperate, grieving family members to litigiously escalate their rancor by usurping very limited judicial resources. Ontario’s current approach might also be questioned, for example, for not fully appreciating or accounting for: evolving and expanding religious, spiritual and cultural diversity, practices, beliefs and customs; an enshrined commitment to environmental and ecological preservation and protection; generally increasing economic costs, or even the testamentary preference of the deceased, if known.

However, if a statutory hierarchy model were to be considered, careful thought must be afforded to whether the order of priority must reflect the existing common law or, alternatively, be focused more generally on the deceased and his or her relations with others. More acute attention may also be warranted for varying and developing cultural and spiritual factors. Moreover, if legislative reform is a possibility, it may also be worthwhile to contemplate directing the judiciary, when exercising discretion in determining disputes about the person entitled to make decisions about disposal, to consider specific factors, as other provinces have promulgated.

In any event, if any reform to the law for the disposal of a dead body is contemplated, due consideration must be given to:

- (a) continuing to emphasize the importance of disposing of human remains in a dignified, decent, respectful and timely manner;
- (b) recognizing and respecting choices made by a deceased with respect to the disposal of his or her own body or cremated remains;
- (c) more effectively facilitating the resolution of disputes, while minimizing the emergence of protracted, contentious or unnecessary litigation or delay; and



- (d) being clear, concise, straightforward, accessible and transparent, not only for surviving family members, but those operating within the bereavement sector and to benefit those who regulate it.

---

**Dated:** April 6, 2018<sup>289</sup>

**By:** Jason Ward, Wards Lawyers<sup>PC</sup> [jason@wardlegal.ca](mailto:jason@wardlegal.ca)

**Jurisdiction:** Ontario

Grateful acknowledgement and gratitude to:

**Karissa Ward, Kelly Westerby and Melissa Wemyss**, Wards Lawyers<sup>PC</sup> – [wardlegal.ca](http://wardlegal.ca)

**Linden Mackey**, Mackey Funeral Home Inc. – [mackeys.ca](http://mackeys.ca)

**Karie L. Draper**, Inspector, Bereavement Authority of Ontario – [thebao.ca](http://thebao.ca)

**Michelle Osborne**, Human Services, City of Kawartha Lakes (OW) – [kawarthalakes.ca](http://kawarthalakes.ca)

**Dierdre Bainbridge**, Nurse Practitioner, Office of the Chief Coroner of Ontario – [mcscs.jus.gov.on.ca](http://mcscs.jus.gov.on.ca)

**Faith Waldron**, Senior Policy Advisor, Ministry of Government and Consumer Services/Consumer Protection Ontario – [ontario.ca](http://ontario.ca)

**Diane Willcox-Ward**

---

*This article is a summary for information and guidance only. It is not exhaustive and should not be relied on as legal advice, which should only be obtained from a qualified lawyer based on specific information. For more information – [www.wardlegal.ca](http://www.wardlegal.ca) or [jason@wardlegal.ca](mailto:jason@wardlegal.ca).*

---

#### **End Notes and Additional Reference and Information:**

<sup>1</sup> 2002, SO 2002, c. 33 (“FBCSA”). Effective July 1, 2012, the FBCSA both modernized and consolidated the *Cemeteries Act (Revised)*, R.S.O. 1990, c. C. 4 (“*Cemeteries Act*”) and the *Board of Funeral Services Act*, R.S.O. 1990, c. F. 36 [formerly the *Funeral Directors and Establishment Act*, R.S.O. 1990, c. F. 36 (“FDEA”)] and imposed new and expanded definitions and scope of regulation for the bereavement sector. The FBCSA “applies

to all transactions relating to licensed supplies and services even if the purchaser in the transaction or the person engaging in the transaction with the purchaser is located outside of Ontario when the transaction takes place” [FBCSA, ss. 1.1].

<sup>2</sup> An “individual licensed to provide or direct the provision of funeral services or to hold oneself out as available to do so” [FBCSA, (General) O. Reg. 30/11, ss. 1(1)].

<sup>3</sup> An “individual who, in respect of contracts made before the death of the intended recipient of supplies and services, is licensed to act under subsection 6 (1) on behalf of a person licensed as a Funeral Establishment Operator – Class 1 or Funeral Establishment Operator – Class 2 or who is licensed to hold oneself out as available to do so” [FBCSA, (General) O. Reg. 30/11, ss. 1(1)].

<sup>4</sup> An “operator” is “a person who is licensed to operate a cemetery, crematorium, funeral establishment, casket retailing business, marker retailing business, transfer service or any other business for which a license may be required by regulation and includes a cemetery owner who is deemed to be a cemetery operator under subsection 5 (2)” [FBCSA, ss. 1(1)].

<sup>5</sup> FBCSA, ss. 1(1): “..cemetery services, crematorium services, funeral services and transfer services and includes interment rights and scattering rights and any other services that are sold or provided by a person licensed under [the FBCSA] in the normal course of a business regulated under [the FBCSA]”.

<sup>6</sup> FBCSA, ss. 1(1): “..caskets and markers and any other supplies that are sold by a person licensed under [the FBCSA] in the normal course of a business regulated under [the FBCSA]”.

<sup>7</sup> “Human remains” means “a dead human body or the remains of a cremated body” [FBCSA, ss. 1(1)].

<sup>8</sup> “Inter” means the burial of human remains and includes the placing of human remains in a lot [FBCSA, ss. 1(1)] and “interment” means the “burial of a corpse in a grave or tomb, typically with funeral rites” [English Oxford Living Dictionaries, [www.en.oxforddictionaries.com/definition/interment](http://www.en.oxforddictionaries.com/definition/interment)].

<sup>9</sup> A “crematorium” is “a building that is fitted with appliances for the purpose of cremating human remains and that has been approved as a crematorium or established as a crematorium in accordance with the requirements of this Act or a predecessor of it and includes everything necessarily incidental and ancillary to that purpose”, at which “crematorium services” are provided, which are “services provided in respect of the cremation of dead human bodies and includes such services as may be prescribed” [FBCSA, ss. 1(1)].

<sup>10</sup> Per the FBCSA, sub-section 1.1(2), the same provisions that apply to cremation, crematoriums and related services apply, “with necessary modifications, to establishments that provide alternative processes or methods of disposing of human remains and to those processes or methods”.

<sup>11</sup> [www.thebao.ca/legislation](http://www.thebao.ca/legislation). For more information about the structure and operation of the FBCSA in the bereavement sector: “Resources for the Bereavement Section – Plain Language Guide for the Funeral, Burial and Cremation Services Act, 2002”, Ministry of Government and Consumer Services - [www.sse.gov.on.ca/mcs/en/Pages/fbcsa9.aspx](http://www.sse.gov.on.ca/mcs/en/Pages/fbcsa9.aspx); “Rules for the bereavement sector and burial sites”, Ministry of Government and Consumer Services - [www.ontario.ca/page/rules-bereavement-sector-and-burial-sites](http://www.ontario.ca/page/rules-bereavement-sector-and-burial-sites).

<sup>12</sup> FBCSA, Part III (*Prohibitions and General Duties Re: Operation of Businesses*) [s. 4 – 13]; Part XI (*Special Provisions Re: Cemeteries, Crematoriums and Burial Sites*) [s. 83 – 105] and (General) O. Reg. 30/11, Part I (*Operation of Business*) - Division D (*Standards of Operation*) [s. 43 – 53] and Part III (*Cemeteries, Burial Sites and Crematoriums*) - Divisions A, B, C and D [s. 146 – 191]. A “burial site” is land, other than a cemetery, containing human remains [FBCSA, ss. 1(1)].

<sup>13</sup> FBCSA, Part IV (*Licensing*) [s. 14 – 26].

<sup>14</sup> FBCSA, (General) O. Reg. 30/11 – Division B (*Additional Prohibited Activities*) [s. 2 – 3].

<sup>15</sup> FBCSA, Part VIII (*Code of Ethics and Discipline*) [s. 62 to 65] and FBCSA, O. Reg. 306/16 (*Code of Ethics*).

<sup>16</sup> FBCSA, Part IX (*Complaints, Inspections and Investigations*) [s. 66 – 71].

<sup>17</sup> The FBCSA, while it contains *comprehensive*, consumer-centric protection provisions, does not limit or restrict the application of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A (“*Consumer Protection Act*”) to the bereavement sector [Faith Waldron, Senior Policy Advisor, Consumer Policy and Liaison Branch, Ministry of Government and Consumer Services/Consumer Protection Ontario]. For more information about the *Consumer Protection Act* – [www.ontario.ca/page/your-rights-under-consumer-protection-act](http://www.ontario.ca/page/your-rights-under-consumer-protection-act). An FBCSA “*Consumer Information Guide*” is available from the BAO at [thebao.ca](http://thebao.ca).

<sup>18</sup> FBCSA, Part V (*Consumer Protection*) [s. 27 – 50] and FBCSA, (General) O. Reg. 30/11, Part II (*Consumer Protection*) – Divisions A, B and C [s. 112 – 144].

<sup>19</sup> FBCSA, Part III (*Prohibitions and General Duties Re: Operation of Businesses*) [s. 4 – 13] and FBCSA, (General) O. Reg. 30/11, Part I (*Operation of Business*) - Division B (*Additional Prohibited Activities*) [s. 2 – 3].

- <sup>20</sup> FBCSA, Part VI (*Trust Accounts*) [s. 51 – 60], s. 59 (*Passing of Accounts*) and FBCSA, (*General*) O. Reg. 30/11, Division F (*Trust Accounts and Trust Funds*) and Division G (*Care and Maintenance Funds and Accounts*).
- <sup>21</sup> FBCSA, Part VII (*Compensation Funds*) [s. 61 – 65] and FBCSA, (*General*) O. Reg. 30/11 (*General*), Part IV (*Compensation Fund*) [s. 192 – 211].
- <sup>22</sup> The BAO was established on January 16, 2016, pursuant to the *Safety and Consumer Statutes Administration Act, 1996*, SO 1996, c 19 and, by administering provisions of the FBCSA, it “regulates and supports licensed funeral establishments, cemetery operators, crematorium operators, transfer service operators, funeral directors, funeral preplanners, transfer service sales representatives, cemetery sales representatives, and crematorium sales representatives across Ontario” [www.thebao.ca]. The BAO is a “delegated administrative authority” corporation, pursuant to sub-section 4(1)(b) of the pending *Delegated Administrative Authorities Act, 2012*, S.O. 2012, c. 8, Sched. 11, responsible for administering provisions of the FBCSA and its regulations [FBCSA, ss. 1(1)]. Amongst other regulation and enforcement of the FBCSA, the BAO is responsible for: (i) licensing cemetery, crematorium, funeral establishment and transfer service operators, sales representatives and funeral directors; (ii) enforcing licensees’ compliance with the FBCSA through inspections and investigations of licensees; and (iii) responding to questions or complaints from the public related to the bereavement sector. Ontario’s Ministry of Government and Consumer Services retains “residual authority to act” and provides oversight for the BAO and is responsible for legislation, regulations and administering certain provisions of the FBCSA [FBCSA, ss. 112(4.1)]. For more information about the BAO and its regulatory role and administrative authority on behalf of the Ministry of Government and Consumer Services – www.ontario.ca/faq/what-do-administrative-authorities-do; www.ontario.ca/page/rules-bereavement-sector-and-burial-sites; www.sse.gov.on.ca/mcs/en/Pages/fbcsa9.aspx; “Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services”, Bereavement Authority of Ontario, March, 2017 – www.thebao.ca/for-consumers/consumer-information-guide/.
- <sup>23</sup> www.thebao.ca/for-consumers/overview/. With respect to “consumer protection”, the BAO defines the FBCSA as “consumer protection legislation respecting funerals, burials, cremations and related services within the province of Ontario”, aimed to “recognize that bereavement related purchases are often made during delicate and emotional times” and to ensure that “consumers are clearly informed of their options and have necessary information on hand when making bereavement related purchase decisions” [www.thebao.ca/legislation/]. The BAO is also authorized to make regulations for the FBCSA [FBCSA, ss. 112(2)].
- <sup>24</sup> Notably the FBCSA prohibits an operator, including a funeral establishment, from providing any licensed supplies or services within thirty days after the contract is made with the purchaser, unless the operator is requested by the purchaser under a contract for the provision of licensed supplies or services, within that thirty-day period after the contract was made, to provide any of those supplies or services, for example, because they are required “for the disposition of human remains” or the “co-ordination and provision of rites or ceremonies in relation to human remains” within that initial, thirty-day period [FBCSA, ss. 43(1); (*General*) O. Reg. 30/11, ss. 139(1)].
- <sup>25</sup> A “will” is a “testament”, “codicil”, “an appointment by will or by writing in the nature of a will in exercise of a power” and “any other testamentary disposition” [Succession Law Reform Act, R.S.O. 1990, c. S. 26 (“SLRA”), ss. 1(1)] and includes “a testament and all other testamentary instruments of which probate may be granted” [Estates Act, R.S.O. 1990, c. E. 21, ss. 1(1) (“Estates Act”)] and “any testamentary instrument of which probate or administration may be granted” [Rules of Civil Procedure, R.S.O. 1990, Reg 194 (“Rules of Civil Procedure”), ss. 74.01]. For the public generally, excluding minors and those in military service, a will is *prima facie* valid if it is executed properly, in compliance with the requirements of the SLRA; specifically: (a) it must be in writing [s. 3]; (b) it must be signed by the testator at its end, or by another person at the direction of, or in the presence of, the testator [ss. 4(1)(b)]; (c) the testator’s signature must be witnessed by two or more people (both of whom witnessed the testator sign) [ss. 4(1)(b)]; and (d) the two or more witnesses must have signed the will in the testator’s presence [ss. 4(1)(c)]. A deceased may have made a “holograph will”, if the will is wholly by his or her own handwriting and is signed, even with no witnesses and/or if undated [SLRA, s. 6]. A holograph will is not invalidated only because it does not appoint an estate trustee: *Laframboise v. Laframboise*, 2011 CanLII 7673 (ONSC) (“*Laframboise*”). For the signature of the testator, a will or holograph will is valid if the signature of the testator (or the person signing for the testator) “is placed at, after, following, under or beside or opposite to the end of the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his or her will” [SLRA, ss. 7(1)]. Anything underneath or that follows

the testator's signature, or that was inserted after the will was signed, is invalid [SLRA, ss. 7(3)(a) and (b)]. A holograph will, to be valid, must also reflect that the testator had the necessary intention that his or her would be a non-variable, final disposition on death, not merely some other expression of his or her wishes, which may be transitory or subject to change – rather, the will must reflect “*a deliberate or fixed and final expression of intention as to the disposal of property upon death*”: *Bennett v. Toronto General Trust Corp.*, [1958] S.C.R. 392 (“*Bennett*”), para. 5; *Niziol v. Allen*, 2011 CanLII 7457 (ONSC) (“*Niziol*”), para. 11. A will is not invalidated only because: the testator's signature does not follow, or is not immediately after, the end of the will; a blank space intervenes between the concluding words of the will and the signature; the signature: (i) is placed among the words of a testimonium clause or of a clause of attestation; (ii) follows or is after or under a clause of attestation either with or without a blank space intervening; or (iii) follows or is after, under or beside the name of a subscribing witness; the signature is on a side, page or other portion of the paper or papers containing the will on which no clause, paragraph or disposing part of the will is written above the signature; or there appears to be sufficient space on or at the bottom of the preceding side, page or other portion of the same paper on which the will is written to contain the signature [SLRA, ss. 7(2)]. If a witness to the will is a beneficiary or appointee named in the will, the spouse of that person, or a person claiming through that person, the bequest or appointment of that person by the will may be void, but the will is not necessarily invalidated [SLRA, ss. 12(1)]. If a beneficiary or an ‘*executor*’ is an attesting witness to the will, they are deemed competent witnesses to prove the execution of the will or its validity or invalidity [SLRA, ss. 12(1), s. 14]. The authority of an estate trustee appointed by a will should not be relied on if there is notice to, or knowledge by, the estate trustee appointed by the will, or any other interested party, that the validity of the will has been challenged, particularly by the filing of a “*Notice of Objection*” at the Superior Court of Justice, pursuant to sub-Rule 75.03(1) of the *Rules of Civil Procedure*.

<sup>26</sup> *Silver Estate*, 1999 CarswellOnt 4217, (1999) O.J. No. 5026, 31 E.T.R. (2d) 256, 93 A.C.W.S. (3d) 935 (“*Silver*”); *Re Hollwey v. Adams* (1926), 58 O.L.R. 507 (Ont. H.C.) (“*Hollwey*”).

<sup>27</sup> Sub-Rule 74.01 of the *Rules of Civil Procedure* defines “*estate trustee*” as being an “*executor*” or an “*administrator*”. “*Personal representative*”, if referred to, also means an executor or an administrator [SLRA, ss. 1(1)].

<sup>28</sup> *Catto v. McKay*, 2016 CanLII 3025 (ONSC), 2016 CarswellOnt 8846, 20 E.T.R. (4<sup>th</sup>) 324 (ONSC), para. 44, additional reasons 2016 CarswellOnt 12956 (ONSC) (“*Catto*”), per Smith, J., at paragraph 43: “...because Donna is entitled to be the administrator of the Estate, I find that she also had the right to decide on the location and manner of the burial of Mark Catto’s ashes”; *Saleh v. Reichert*, 1993 CanLII 9394 (ONSC), (1993) CarswellOnt 567, (1993) 50 ETR 143, 104 DLR (4<sup>th</sup>) 384 (Ont. Gen. Div.) (“*Saleh*”) [dispute among the deceased’s family members regarding cremation or burial, based on “*the fundamental tenets of the Muslim faith*”, per Bell, J., at paragraph 8: “*It is not disputed that, upon the death of a person, a duty arises to bury or otherwise dispose of the remains in a decent and dignified fashion*”; *Carter v. Thompson*, Court File Number CV70-1809-ES (Unreported) (“*Carter*”), per Bielby, J.: “...the law is well established that the executors or estate trustees are the one entitled to deal with the remains and have possession of same”; *Lajhner v. Banoub*, 2009 CarswellOnt 1745, 49 E.T.R. (3d) 87 (ONSC) (“*Lajhner*”), per Gunsolus, J., at paragraph 22: “*There is no legal right in a corpse. Rather than rights, there are only obligations. This is an obligation that the law places on the estate administrator*”; *Abeziz v. Harris Estate* (June 17, 1992), Doc. Re 1171/92, 1992 CarswellOnt. 3803, 3 W.D.C.P (2<sup>nd</sup>) 499, [1992] O.J. 1271 (Ont. Gen. Div.) (“*Abeziz*”) [parent of the deceased seeking authority to determine final arrangements], per Farley, J., at paragraph 28: “...I understand that there is no legal right in a corpse (absent possibly some interim element under the Anatomy Act, R.S.O. 1990, c.A.21 for medical research). Rather than rights there are only obligations. This is an obligation the law places on the executor if there is one.....[The estate trustee]...does have the legal obligation to attend to this using estate funds”; *Hunter v. Hunter* (19230) 65 OLR 586, [1930] 4 D.L.R. 255 (Ont. H.C.) (“*Hunter*”), p. 265; *Declava (Re)*, 2008 CanLII 15896 (ONSC), 2008 CarswellOnt 2106, 42 C.B.R. (5<sup>th</sup>) 80, 40 E.T.R. (3d) 144 (“*Declava*”), para. 13 [the duty of disposal is not imposed on other, such as bankruptcy, trustees]; *Schara Tzedek v. Royal Trust Co.*, [1953] 1 S.C.R. 31, [1952] 4 D.L.R. 529 (SCC), affirming (1952), 5 W.W.R. (N.S.) 279 (BCCA), affirming (1951), 1 W.W.R. (N.S.) 760 (BCSC) (“*Schara*”), para. 12; *Mouaga v. Mouaga*, 2003 CarswellOnt 2128, [2008] O.J. No. 2030, 50 E.T.R. (2d) 253 (“*Mouaga*”), para. 6; *Heafey v. McCrae*, 1999 CarswellOnt 5263, 5 E.T.R. (3d) 121, para. 10; affirmed 2000 CarswellOnt 4415, 5 E.T.R. (3d) 125 (Ont. C.A.) (“*Heafey*”); *Sopinka (Litigation Guardian of) v. Sopinka*, 2001 CanLII 27996 (ONSC), 2001 CarswellOnt 3234, (2001), 55 O.R. (3d) 529, 42 E.T.R. (2d) 105 (“*Sopinka*”), para. 31; *Johnston v. Alberta (Director of Vital Statistics)*, 2008 CanLII 188

(ABCA), 2008 CarswellAlta 644 (Alta. C.A.), affirming 2007 CanLII 597 (ABQB), 421 AR 336, leave to appeal refused, 2008 CanLII 59059 (SCC), 2008 CarswellAlta 1754, 2008 CarswellAlta 1755 (SCC.) (“*Johnston*”) [refusal to quash the issuance of a disinterment permit by the Alberta government to the deceased’s spouse, challenged through judicial review by the deceased’s mother; Court has discretion to determine the right of control of the estate trustee for cremated remains, regardless of the priority prescribed by statute]; *Jaworenko Estate (Re)*, 2013 CanLII 517 (ABQB) (“*Jaworenko*”), para. 40. [estate trustee entitled to determine the disposition of the deceased’s cremated remains, despite the objection of the deceased’s surviving spouse]; *Bedont Estate, Re*, 2004 CarswellOnt 2107 (Ont. S.C.J.), additional reasons at 2004 CarswellOnt 1930 (Ont. S.C.J.) (“*Bedont*”) [no interference with trustee’s decision to bury the deceased in foreign country – trustee is responsible for burial and has the right to determine “the place and manner of such event”]; *Waldman v. Melville (City)*, 1990 CanLII 7808 (SKQB), (1990), 5 E.T.R. (3d) 121 (“*Waldman*”), para. 16, citing with approval *Pettigrew v. Pettigrew*, (1904) 207 Pa. 313, 64 L.R.A. 179 (Supreme Court of Pennsylvania) (“*Pettigrew*”) [wife held to have no right or control over the body of her deceased husband after burial; the responsibility for disposition of the remains belonged exclusively to his next of kin], citing *Wynkoop v. Wynkoop*, 42 Pa. 293, in which the Pennsylvania Supreme Court held, on appeal and at paragraph 21: “When a man dies, public policy and regard for the public health, as well as the universal sense of propriety, require that his body should be decently cared for and disposed of. The duty devolves upon some one, and must carry with it the right to perform.....But inasmuch as there is a legally recognized right of custody, control and disposition, the essential attribute of ownership, I apprehend that it would be more accurate to say that the law recognizes property in a corpse, but property subject to a trust and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise”; *R. v. Fox* (1841) 2 QB 246, 114 ER 95 (“*Fox*”); *R. v. Scott* (1842) 2 QB 248, 114 ER 97 (“*Scott*”); Cappon, Donna C., Hawkins, Robyn M and Therieault, Carmen S., *Widdlefield on Executors and Trustees*, (2018) 6<sup>th</sup> Ed. – 1.1 – The Corpse, WestlawNext, Thomson Reuters Canada (“*Widdlefield*”); *Theobald on Wills*, 13<sup>th</sup> ed. (1971), p. 111.

<sup>29</sup> *Waldman, supra*, note 28, para. 2; *Popp Estate, Re.*, 2001 CanLII 183 (BCSC), 2001 CarswellBC 221, 37 E.T.R. (2d) 295 (BCSC) (“*Popp*”) [on the deceased’s sister’s application to disinter the remains, the husband estate trustee was held to be entitled to control disposition of his spouse’s cremated remains, “provided he did not act capriciously”]; *Widdlefield, supra*, note 28.

<sup>30</sup> “*Probating*” a deceased’s will may otherwise be necessary in order to verify the validity of the will and authorize the appointed estate trustee to represent the deceased’s estate, such as: (a) for dealing with third parties who may require the will be probated before accepting the lawful validity and authority of the will and the power of the estate trustee, such as for transfers of real property, or dealing with financial institutions requested to release or transfer funds or debtors owing money seeking verification of the proper party for repayment; (b) proceedings in which the estate trustee represents the estate as a party, in which case the Court may require the will be probated to satisfy an evidentiary issue, pursuant to section 49 of the *Evidence Act*, R.S.O. 1999, c E. 23 (“*Evidence Act*”); and/or (c) if a foreign estate trustee intends to establish his or her rights in Ontario, in which case ancillary letters probate may be necessary [*Carmichael Estate, Re*, 2000 CanLII 22320 (ONSC) (“*Re Carmichael*”) [per Haley, J.’s extensive review of the historical development of the requirement for probate judicially].

<sup>31</sup> *Lajhner, supra*, note 28, para. 22; *Abeziz, supra*, note 28, para. 28; *Miner v. Canadian Pacific Railway*, 1911 CarswellAlta 23, 3 Alta L.R. 408, (1910), 15 W.L.R. 161 (Alta. S.C.) (“*Miner*”), p. 167; *Williams v. Williams*, (1882) 20 Ch. D. 659, 51 L.J. Ch. 385, 46 L.T. 275, 46 J.P. 726, 15 Cox 39 (Eng. Ch. Div.) (“*Williams*”), per Kay, J., at page 665: “It is quite clearly the law of this country that there be no property in the dead body of a human being....after the death of a man, his executors have a right to the custody and possession of his body (although they have no property whatever in it) until it is properly buried”; *Hunter, supra*, note 28, per McEvoy, J., at page 265: “It has been repeatedly held that there can be no property in a dead body, but, where there has been a duty to bury, it has been held that there is, a right of possession of the body for that purpose”; *Halsbury’s Laws of England*, Vol. 3, “*Burial and Cremation*”, p. 405: “The law in general recognises no property in a dead body”; *Yearworth, et al. v. North Bristol NHS Trust*, [2009] EWCA Civ. 37, [2010] QB 1, [2009] WLR (D) 34, (2009) 107 BMLR 47, [2009] LS Law Medical 126, [2009] 2 All ER 986, [2009] 3 WLR 118 (CA) (“*Yearworth*”); *R. v. Sharpe*, 169 ER 959 (1856-7) (“*Sharpe*”) [son convicted for disinterring his mother without consent of the cemetery]; *Foster v. Dodd*, (1867) LR 3 QB 67, p. 77 (“*Foster*”), per Byles, J.: “A dead body by law belongs to no one, and is, therefore, under the protection of the public”. For a comprehensive review of the historical development of the common law ‘no property in a body’ tenet: Whaley, Kimberly and Stigas, Dina

(Whaley Estate Litigation), *“The Body, Ashes & Exhumation – Who Has The Last Word?”*, April 6, 2009, The Six-Minute Estates Lawyer, LSUC.

<sup>32</sup> *Meier v. Bell* (Unreported, Supreme Court of Victoria, March 3, 1997) (“*Meier*”), per Ashley, J., at page 6: “*Although in practice the immediate family of a deceased person often make funeral arrangements, it is, strictly, for the executor to decide where burial is to be effected*”.

<sup>33</sup> *Grandison v. Nembhard* (1989) 4 BLMR 140 (Eng. H.C.) (“*Grandison*”) [no interference in the exercise of the estate trustee’s discretion unless exercised in a manner that is “*wholly unreasonable*”]; *Sullivan v. Public Trustee* (NT) (Unreported, Supreme Court of the Northern Territory, Gallop, A.J., 24 July, 2002) (“*Sullivan*”).

<sup>34</sup> *Re Bellotti v. Public Trustee*, Unreported, Supreme Court of Western Australia, November 11, 1993 (“*Bellotti*”) [only in exceptional circumstances should a court interfere with the manner in which the person entitled to dispose of a deceased person’s body exercised that discretion], per Franklyn, J., at page 13: “*What is a proper and decent burial in any particular case must depend on all of the relevant circumstances. It seems to me that it is a matter to be determined at the discretion of the person whose obligation it is to attend to and provide for that burial. In my view, it would be inappropriate for a Court save in the most exceptional circumstances to direct such a person as to how he should exercise that discretion*”.

<sup>35</sup> “*The physical change caused by cremation has enabled people to bring disputes before the courts that would be inconceivable if the deceased was still in bodily form.....The physical form of ashes allows them to be carried, moved and generally treated with an ease that is not possible for bodies....the physical transformation caused by cremation lessens their corporeal quality, or perhaps even extinguishes that quality. It is, therefore, not surprising that ashes are moved about and argued over in ways that do not occur with bodies*” [Groves, M, “*The disposal of human ashes*” (2005) 12 *Journal of Law and Medicine* 267, pp. 270-272].

<sup>36</sup> Rodriguez-Dod, Eloisa, “*Ashes to Ashes: Comparative Law Regarding Survivors’ Disputes Concerning Cremation and Cremated Remains*”, (2008) Florida International University College of Law, p. 320. In the United States, dividing cremated remains among family member claimants appears to be a common remedy for resolving the dispute: *In re Estate of K.A.*, 807 N.E.2d 748, 749 (Ind. Ct. App. 2004), p. 751 (“*K.A.*”)[cremated remains of child divided among the parents]; *In re Estate of Puckett*, PB 2006-000799, slip op. at 4 (Ariz. Super. Ct. Oct. 23, 2006) (“*Puckett Estate*”) [Minnesota Twins’ outfielder Kirby Puckett’s cremated remains divided among his children]; *Stewart v. Schwartz Bros.-Jeffer Mem’l Chapel, Inc.*, 606 N.Y.S.2d 965, 969 (N.Y. Sup. Ct. 1993) (“*Stewart*”): “*Displaying the wisdom of King Solomon, who when confronted with two women both claiming to be the mother of a child decided that he would “Divide the living child in two, and give half to the one, and half to the other” (1 Kings 3:16), the parties agreed....to cremate [the deceased] and split the ashes*”.

<sup>37</sup> R.S.O. 1990, c. E. 21 (“*Estates Act*”).

<sup>38</sup> Pursuant to the *Rules of Civil Procedure*: (a) an “*estate trustee without a will*” is defined as an “*administrator*” [sub-Rule 74.01], while “*administration*” of an estate “*includes all letters of administration of the effects of deceased persons, whether with or without a will annexed, and whether granted for general, special or limited purposes*” [*Estates Act*, s. 1], including for the appointment of an “*administrator*” [*Estates Act*, s. 29]; and (b) application may be made to be appointed, subject to the requirements of sub-Rule 74.05.

<sup>39</sup> *Rules of Civil Procedure*, ss. 74.05(1).

<sup>40</sup> *Buswa v. Canzoneri*, 2010 CanLII 7137 (ONSC), 2010 CarswellOnt 988, 65 E.T.R. (3d) 312 (“*Buswa*”) [intestate deceased’s daughter (his closest next of kin – related by blood in the first degree) granted appointment as estate trustee during litigation only for the purposes of disposing of the deceased’s remains in priority to the deceased’s siblings (related by blood in the second degree), pursuant to sub-section 29(1)(b) of the *Estates Act*, as the deceased had no spouse including, at paragraph 24, decision-making authority for the manner of disposal (cremation) and arrangements for final disposition in a dignified manner]. “*Next of kin*” means: “*In the law of descent and distribution, this term denotes the person’s nearest of kindred to be decedent, that is, those who are most nearly related by blood*” [*Buswa, supra*, para. 19] and “*degree of kindred*” means: “*The relationship between a deceased person and her relatives to determine who are most nearly related by blood. For example, parents and children of a decedent are related to the decedent in the first degree. Grandparents, grandchildren, brothers and sisters are related to the decedent in the second degree*” [*Buswa, supra*, para. 20].

<sup>41</sup> *Estates Act*, s. 29; *Lajhner, supra*, note 28, per Gunsolus, J., at para. 18: “*Such a priority scheme would fetter or be a constraint upon the court’s role and would detract from the court’s parens patriae jurisdiction*”; *Catto, supra*, note 28, para. 35; *Mohammed v. Heera*, [2008] O.J. No. 4176 (ONSC) (“*Mohammed*”), per Warkentin, J., at paragraph 28: “*I agree with counsel for the Applicants that a plain reading of s 29(1) does not provide spouses or those living in a conjugal relationship with the deceased at the time of death priority to the appointment over*

next of kin”. Comparatively, in British Columbia, the right of a person to control the disposition of human or cremated remains statutorily vests, and devolves, pursuant to a hierarchy, prioritizing “the personal representative named in the will of the deceased” [*Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, ss. 5(1)].

<sup>42</sup> *Estates Act*, s. 5; *Catto*, *supra*, note 28, per Smith, J., at paragraph 40: “...the usual practice is to appoint the married spouse as administrator of the Estate.”; *Mohammed*, *supra*, note 41, per Warkentin, J., at paragraph 30: “...it may be the usual practice of the Court to appoint the spouse or person living in a conjugal relationship over the next of kin particularly when the person is married to the deceased. In those circumstances the spouse is entitled to a preferential share of the estate and one third of the estate where there are two or more children of the deceased”; Schnurr, B, *Estate Litigation* (Vol. 2, 2<sup>nd</sup>, Thomson Carswell, c. 18.6, p. 23).

<sup>43</sup> *SLRA, Intestate Succession*, s. 44 to 49.

<sup>44</sup> *Catto*, *supra*, note 28, para. 42.

<sup>45</sup> *Lajhner*, *supra*, note 28, per Gunsolus, J., at para. 18: “Sub-section 29(3) clearly indicates that the court has the ultimate discretion to appoint the administrator when a person dies intestate.”

<sup>46</sup> *Estates Act*, ss. 29(3).

<sup>47</sup> *Estates Act*, ss. 29(4).

<sup>48</sup> *Saleh*, *supra*, note 28; *Mouaga*, *supra*, note 28, para. 6; CED (2009) *Burial and Cremation* 1.8(a) (Ontario), 1.8(a) 52-53; *Widdlefied*, *supra*, note 28.

<sup>49</sup> *Mouaga*, *supra*, note 28, para. 6; *W. (L.A.) v. Children’s Aid Society of Rainy River (District)*, 2005 CarswellOnt 1428, [2005] 3 C.N.L.R. 113, [2005] W.D.F.L. 2673, [2005] W.D.F.L. 2680, [2005] O.J. No. 1446, 139 A.C.W.S. (3d) 309, 254 D.L.R. (4<sup>th</sup>) 179 (ONSC) (“CAS Rainy River”); *Saunders v. Saskatoon Funeral Home Company Limited*, 2016 CanLII 217 (SKQB) (“*Saunders*”), per Meschishnick, J., at paragraph 15: “No doubt that upon death there is an immediate need to have someone authorized to direct the disposal of the human remains”; *Catto*, *supra*, note 28, para. 40; *Mohammed*, *supra*, note 41, para. 30; *Bellotti*, *supra*, note 34, per Franklyn, J., at page 16: “In my opinion, it is in the public interest that bodies are not left unburied for long periods”; *Meier*, *supra*, note 32, per Ashley, J.: “I consider it to be entirely understandable and appropriate that a court should approach a matter such as the present by seeking to identify a person with the best claim in law to the responsibility of making burial arrangements. Such identification might not always be straightforward, but it is likely to be very much easier than attempting to resolve what I have called the ‘merits’ [of competing claims to place of burial]. The matter before me illustrates the complex factual issues that could arise for determination if a decision was required to be made upon the merits – issues the subject of hot debate and much emotion”; *Doherty v. Doherty*, [2007] 2 Qd R 259 (QLSC) [right of disposal for cremated remains held by the potential administrator] (“*Doherty*”).

<sup>50</sup> *Saunders*, *supra*, note 49, para. 33; *Lewisham Hospital NHS Trust v. Hamuth*, [2006] All ER (D) 145 (“*Lewisham*”) [hospital, where the deceased had died, ordered to arrange the funeral as the dispute regarding the right to determine the manner of disposal of the deceased was not resolved within a reasonable time].

<sup>51</sup> Any person who appears to have a financial interest in the deceased’s estate may, before a certificate of appointment of estate trustee (with a will) has been issued, challenge the validity of the will by filing a prescribed notice of objection (Form 75.1) – *Rules of Civil Procedure*, sub-Rule 75.03.

<sup>52</sup> Section 28 of the *Estates Act*: “Administration pending action. 28. Pending an action touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any probate or grant of administration, the Superior Court of Justice has jurisdiction to grant administration in the case of intestacy and may appoint an administrator of the property of the deceased person, and the administrator so appointed has all the rights and powers of a general administrator, other than the right of distributing the residue of the property, and every such administrator is subject to the immediate control and direction of the court, and the court may direct that such administrator shall receive out of the property of the deceased such reasonable remuneration as the court considers proper.” If the appointment of an Estate Trustee During Litigation is ordered, the appointee must file with the Superior Court an application, which must include: (a) the order of appointment; (b) security required by the *Estates Act*, if any, unless dispensed with by the order; (c) any other material that may be directed; and (d) the prescribed form – *Rules of Civil Procedure*, sub-Rule 74.10(1).

<sup>53</sup> Sub-Rules 75.06(1) and (3)(f) of the *Rules of Civil Procedure* provide that any person “who appears to have a financial interest in an estate may apply for directions....as to the procedure for bringing any matter before the court”, for which the Court may direct, among other things, “that an estate trustee be appointed during litigation, and file such security as the court directs”.

- <sup>54</sup> *Mayer v. Rubin*, 2017 CanLII 3498 (ONSC) (“*Mayer*”) [ETDL appointed in a contested passing of accounts], per Myers, J., at paragraph 28: “*The inherent jurisdiction of the court most readily deals with issues concerning the court’s own processes. It is used to fill gaps where the legislature has not provided an answer such as when it is appropriate to appoint an officer of the court to preserve and protect the assets of an estate which may be at risk during litigation*” and, at paragraph 31, “...*In my view, the power to appoint an estate trustee during litigation is to ensure that the playing field is kept level*”; *Catto, supra*, note 28, per Smith, J, at paragraph 30: “*Rule 74.10(1) also allows the Court to appoint an Estate trustee during litigation...*” [dispute between deceased’s spouse and mother for appointment as administrator and request for exhumation of cremated remains]; *Dempster v. Dempster*, 2008 CanLII 59588 (ONSC) (“*Dempster*”), para. 24 [ETDL appointed to achieve a level playing field]; *McCull v. McCull*, 2013 CarswellOnt 13589 (ONSC) (“*McCull*”) [ETDL appointed in an application for dependent’s relief, pursuant to Part V of the SLRA], per Greer, J., at paragraph 25: “*In addition, the Court has the power under subrule 75.06(3)(f) of the Rules of Civil Procedure R.R.O. 1990, Reg. 194 to appoint an estate trustee during litigation, and file such security as the court directs*”; *Groner Estate, Re*, 1994 CarswellOnt 2478 (Ont. Gen. Div.) (“*Groner Estate*”); *Marilyn Dietrich, et al. v. Matthew Playfair, et al.*, June 24, 2013, Toronto Court File Number 2012-272 (Unreported, Greer, J) (“*Playfair*”) [alleged misconduct by appointed estate trustees], per Greer, J.: “*I have the jurisdiction under R75.06(3)(f) to appoint an ETDL...The Trust Company will bring its expertise in administering the estate during litigation as a neutral party who will ready the documentation needed and protect the assets...*”; *Henia Gefen v. Arie Gaertner, et al.*, January 27, 2017, Toronto Court File Number CV-13-486451 (Unreported; Newbould, J.) (“*Henia*”) [ETDL appointed to protect the estate from the trustees’ animosity]; *Kalman v. Pick, et al.*, 2013 CanLII 304 (ONSC) and *Kalman v. Pick*, 2014 CanLII 2362 (ONSC), 2014 CarswellOnt 5584 (collectively, “*Kalman*”) [ETDL appointed in the context of a dependent’s relief claim and a contentious passing of accounts], per McEwen, J., at sub-paragraph 5(ii): “*I am aware that a court should not lightly interfere with the Testator’s choice of Estate Trustee or Trustees but the simple fact of this case is that, as noted, a level of dysfunction has arisen that requires the appointment of the ETDL*” and “...*the appointment of an ETDL will likely result in savings to the parties in that the administration of the Estate can be done in an orderly fashion, without acrimony and suspicion*”; *Buswa, supra*, note 40 [ETDL appointment to next of kin, pursuant to sub-section 29(1)(b) of the *Estates Act*, including decision-making for final arrangements]; *Potrzebowski v. Potrzebowski*, 2016 CanLII 6981 (ONSC), 2016 CarswellOnt 17918, (2016) 273 A.C.W.S. (3d) 223 (“*Potrzebowski*”) [ETDL appointed in the context of a dispute between family members regarding authority to act as estate trustee]; *Langston v. Landen*, 2006 CanLII 15755 (ONSC), 2006 CarswellOnt 2932, 24 E.T.R. (3d) 110, appealed on other grounds: 2008 CanLII 321 (ONCA) (“*Langston*”) [ETDL appointed in the context of the resignation, removal and replacement of estate trustees], per Greer, J., at paragraph 20: “*The Court, however, does not necessarily have to replace these Trustees at the moment. It may appoint an Estate Trustee during Litigation pursuant to s.28 of the Estates Act, R.S.O. 1990, c. E.21. Such a Trustee is subject to the immediate control and direction of the Court, and takes over the administration of the deceased’s property and is entitled to reasonable remuneration as fixed by the Court*”; *Consolidated Practice Direction Concerning Estates List in the Toronto Region* (July 1, 2014), Part V – *Scheduling Matters on the Estates List*, sub-part B. *Passing of Accounts Applications*, para. 21 and sub-para. 46(d): “*Draft orders giving directions should address, where applicable, the following matters:...d. whether an estate trustee should be appointed during litigation and the amount of security, if any, such an estate trustee should file*” [www.ontariocourts.ca/scj/practice/practice-directions/toronto/estates/#B\_Passing\_of\_Accounts\_Applications]. However, in *Forbes v. Gauthier Estate*, 2008 CanLII 41574 (ONSC), 2008 CarswellOnt 4912, 168 A.C.W.S. (3d) 1119, 43 E.T.R. (3d) 143 (“*Forbes*”), involving a claim made by the deceased’s sibling against the estate for a constructive or resulting trust, Power, J. held the jurisdiction of the Court to appoint an ETDL is limited to only when the validity of a will is challenged, pursuant to section 28 of the *Estates Act*, whereas sub-Rule 75.06(3)(f) does not confer such authority for appointment until a passing of accounts is at issue before the Court.
- <sup>55</sup> *Mayer, supra*, note 54, para. 31; *McCull, supra*, note 54, para. 26.
- <sup>56</sup> *Hull and Hull, Probate Practice*, 4<sup>th</sup> ed., p. 263; *Langston, supra*, note 54, para. 20; *Re Bazos*, 1964 CanLII 258 (ONCA), [1964] 2 O.R. 236 (“*Re Bazos*”); *Salisbury v. Dell*, [1993] O.J. No. 920 (Ont. Gen. Div.) (“*Salisbury*”); *Commander Leasing Corp. Ltd. v. Aiyede*, 1983 CanLII 1649 (ONCA), 4 D.L.R. (4<sup>th</sup>) 107 (“*Commander*”).
- <sup>57</sup> *Estates Act*, s. 28 – the right to distribution of property of the estate, particularly if the dispute is resolved, may be permissible with Court approval and the consent of those with a financial interest in the estate. Further



reference – Wagner, Charles, “*Distribution of estate by an Estate Trustee During Litigation*”, April 14, 2014 - [www.wagnersidlofsky.com/distribution-of-estate-by-an-estate-trustee-during-litigation](http://www.wagnersidlofsky.com/distribution-of-estate-by-an-estate-trustee-during-litigation).

<sup>58</sup> *Langston, supra*, note 54, para. 22; *Re Bazos, supra*, note 56, p. 238.

<sup>59</sup> *Mayer, supra*, note 54, paras. 34, 35 and 36.

<sup>60</sup> *Buswa, supra*, note 40, para. 24, in which Stinson, J., pursuant to sub-section 29(1)(b) of the *Estates Act*, appointed the deceased’s next of kin as ETDL for the deceased’s estate, being the only order sought by the next of kin, and “*authorized and empowered*” the ETDL to “*dispose of [the deceased’s] remains in a dignified manner*”.

<sup>61</sup> *Crown Administration of Estates Act*, R.S.O. 1990, c. C. 47, ss. 1(1) and 2(2) (“*Crown Administration of Estates Act*”); *Public Guardian and Trustee Act*, R.S.O. 1990, c. P. 51, ss. 7(1) (“*Public Guardian and Trustee Act*”).

<sup>62</sup> *Crown Administration of Estates Act*, ss. 2(2): “*For greater certainty, subsection (1) does not affect the obligation of the Public Guardian and Trustee to apply for letters of administration or letters probate*”.

<sup>63</sup> The OPGT is appointed as estate trustee for approximately 225 estates per year and administers approximately 1,400 estates at any given time [[www.attorneygeneral.jus.gov.on.ca/english/family/pgt/estatesadmin.html](http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/estatesadmin.html)].

<sup>64</sup> According to the OPGT’s own policy, it will administer an estate if: (a) the deceased was an Ontario resident or owned real estate in Ontario; (b) the deceased did not make a will or the deceased did make a will, but the estate trustee has died or become incapable; (c) there are no known next of kin living in Ontario or the next of kin are minors or mentally incapable adults; and (d) the estate is valued at a minimum of \$10,000.00 after payment of the funeral and all debts owing by the estate [Ministry of the Attorney General, The Office of the Public Guardian and Trustee Estates Administration, “*Estates Administration: The Role of the Public Guardian and Trustee*”, ISBN 0-7794-5752-8, 2014 - [www.attorneygeneral.jus.gov.on.ca/english/family/pgt/estatesadmin.html](http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/estatesadmin.html)].

<sup>65</sup> *Public Guardian and Trustee Act*, ss. 7(1.1); *Potrzebowski, supra*, note 54, para. 3.

<sup>66</sup> *Potrzebowski, supra*, note 54.

<sup>67</sup> *Crown Administration of Estates Act*, ss. 2(1).

<sup>68</sup> *Public Guardian and Trustee Act*, ss. 7(1): “*The Public Guardian and Trustee may be granted letters probate or letters of administration and, subject to subsection (1.1), may be appointed as a trustee under any Act or as trustee of any will or settlement or other instrument creating a trust or duty in the same manner as if he or she were a private trustee*”.

<sup>69</sup> *Anderson v. Walden*, 1959 CanLII 152 (ONCA) (“*Anderson*”), paras. 18 and 21 (per Schroeder, J.A.).

<sup>70</sup> *Calma v. Sesar* (1992) 2 NTLR 37; (1992) 106 FLR 446 (NTA H.C.) (“*Calma*”) [dispute among parents about place of burial of adult son; both equally entitled to apply for “*letters of administration*” and treated on an equal footing; solution could not be based on competing religious beliefs and values; practical issue was burial without unreasonable delay], per Martin, J., at paragraph 13: “*The conscience of the community would regard fights over the disposal of human remains such as this as unseemly. It requires that the Court resolve the argument in a practical way paying due regard to the need to have a dead body disposed of without unreasonable delay, but with all proper respect and decency*”; *Smith v. Tamworth City Council* (1997) 41 NSWLR 680 (“*Smith*”), per Young, J.: “*Where two or more persons have an equally ranking privilege, the practicalities of burial without unreasonable delay will decide the issue*”; *Burrows v. Cramley*, [2002] WASC 47, Pullin, J. (“*Burrows*”); *Keller v. Keller*, [2007] VSC 118 (“*Keller*”) [deceased’s daughter closer to her mother and preferred over the deceased’s son], per Hargrave, J., at page 671: “*I have come to the view that I should exercise my discretion in favour of the child in whom the deceased reposed her principal trust and confidence concerning the significant issues which she faced in her later years*”.

<sup>71</sup> *A.B. v. C.D.*, [2007] NSWSC 1474 (“*AB*”) [dispute between parents over the place of burial of their deceased child], per Harrison, J., at paragraph 59: “*...arguments in support of [the parents’] respective contentions inevitably invited a consideration of significantly more arcane matters such as love, sentiment, grief, responsibility and even anger. It would in my opinion have been curious if these matters had not become prominent in the present proceedings, and wrong to exclude consideration of them when they did. It seems to me to be presently beyond doubt that each of the child’s mother and father feels the need to pursue her or his respective claims for relief for reasons not necessarily entirely associated with the ultimate outcome. This is also completely understandable. However, such factors are usually evenly balanced and not productive of satisfying or comfortable persuasion. This case is no exception*”.

<sup>72</sup> *Cremation, Interment and Funeral Services Act*, SBC 2004, c. 35, ss. 5(3).

<sup>73</sup> Also referred to as a “*memorandum of wishes*”, a document made by a testator that may or may not be specifically identified or referenced by his or her will, but is an expression of wishes made by the testator or settlor regarding the manner in which his or her trustee(s) exercise their discretionary powers conferred by a will [uslegal.com].

<sup>74</sup> *Hunter, supra*, note 28, p. 265; *Schara, supra*, note 28; *CAS Rainy River, supra*, note 49; *Williams, supra*, note 31, p. 665 [Court refused to enforce the deceased’s direction for cremation in a codicil]: “*It follows that a man cannot by will dispose of his dead body. If there be no property in a dead body it is impossible that by will or any other instrument the body can be disposed of*”; *Saleh, supra*, note 28, paras. 7 and 27 [unsuccessful challenge by the deceased’s father to the trustee’s decision to cremate, based on Islam doctrine], per Bell, J, at paragraph 25: “...*religious law had no bearing on the case.....there are only legal obligations*”; *Lajhner, supra*, note 28, per Günsolus, J., at paragraph 20: “*Even in circumstances where a deceased expresses the wish to be cremated that is not dispositive of the issues, as an expressed wish of a person directing the disposition of his or her body cannot be enforced in law. Rather, the duty to dispose of the remains falls upon the administrator of the deceased’s estate.....*” and, at paragraph 29: “*The court is cognizant of the religious beliefs that motivate the Applicants and the Respondent Ms. Banoub in relation to this matter. The law is clear, however, that such religious laws or beliefs are not a factor that the court may take into consideration. Ultimately, it is up to the estate administrator or trustee to assume the obligation to dispose of the deceased’s remains in an acceptable and dignified fashion*”; *Abeziz, supra*, note 28 [unsuccessful challenge by the deceased’s mother to cremation directed by the estate trustee, based on Orthodox Jewish doctrine], para. 23.; *Buchanan v. Milton*, [1999] 2 FLR, 855 (Hale J.) (Eng. H.C.) (“*Buchanan*”) [Court acknowledged the deeply-held cultural beliefs of the deceased’s birth family, but determined it was inappropriate to base a decision about disposal on the cultural or spiritual beliefs of the parties]; *Meier, supra*, note 32, per Ashely, J.: “...*There cannot be departure from principle in order to accommodate particular factual disputation, whether it be founded on matters religious, cultural or some other description*”. Notably, other jurisdictions have statutorily conferred the right to a deceased person to direct for his or her own disposition of remains – for example: (i) *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, s. 6: “*A written preference by a deceased person respecting the disposition of his or her remains or cremated remains is binding on the person who under section 5 [control of disposition of human remains or cremated remains], has the right to control the disposition of those remains if (a) the preference is stated in a will or preneed cemetery or funeral services contract, (b) compliance with the preference is consistent with the Human Tissue Gift Act, and (c) compliance with the preference would not be unreasonable or impracticable or cause hardship*”; and (ii) *Civil Code of Quebec*, CQLR c CCQ-1991, s. 42: “*A person of full age may determine the nature of his funeral and the disposal of his body; a minor may also do so with the written consent of the person having parental authority or his tutor. In the absence of wishes expressed by the deceased, the wishes of the heirs or successors prevail. In both cases, the heirs or successors are bound to act; the expenses are charged to the succession*”.

<sup>75</sup> Disputes often arise based on religion, custom or tradition. For example, the Jewish faith considers cremation an act of desecration and humiliation of the dead; *Abeziz, supra*, note 28 [nothing inherently undignified about cremation, a judicially-accepted manner of disposal in Ontario]; Rabbi Yitzchok Breitowitz, “*The Desecration of Graves in Eretz Y Israel: The Struggle to Honor the Dead and Preserve Our Historical Legacy*”, Jewish Law Articles – [www.jlaw.com/Articles/heritage.html](http://www.jlaw.com/Articles/heritage.html). Similarly, cremation may offend fundamental tenets of the Islamic faith – *Saleh, supra*, note 28. Inter-faith conflict may also arise, such as differences between the manner of Protestant and Catholic burial: *Hunter, supra*, note 28; *Keller, supra*, note 70, per Hargrave, J., at page 669: “*The authorities establish that the court ought not, in an application such as this, embark on a lengthy adversarial hearing to resolve the various claims and counterclaims. This would delay the decision for an unacceptable period while the body remained undisposed of*”.

<sup>76</sup> *Abeziz, supra*, note 28, per Farley, J., at paragraph 23: “...*While it is true that [a] testator cannot force his executor to comply with his or her wishes there is nothing to prevent a valid executor from carrying out a testator’s lawful wishes concerning the disposal of the testator’s body*”; *Widdlefield, supra*, note 28.

<sup>77</sup> *Heafey, supra*, note 28, para. 15.

<sup>78</sup> An estate trustee should review the drafting lawyer’s file and notes to discern if the deceased expressed any preferences for final arrangements, which may not be expressed in, or fully expressed by, the will or a precatory memorandum, and to determine if the deceased had arranged any funeral-related pre-planning, such as purchasing a lot or pre-paying any funeral-related expenses.

<sup>79</sup> *Cremation, Interment and Funeral Services Act*, SBC 2004, c. 35, s. 6.

- <sup>80</sup> *Buswa, supra*, note 40, para. 24; *Abeziz, supra*, note 28, per Farley, J., at paragraph 28: “...*The fundamental obligation is that the body be appropriately dealt with – that is disposed of in a dignified fashion. Burial and cremation come to mind as being specifically sanctioned in Ontario.*”; *Saleh, supra*, note 28, per Bell, J., at paragraph 25: “...*the fundamental duty or obligation is that the remains be disposed of in a decent and dignified fashion. Further, as burial and cremation are both specifically sanctioned in Ontario, disposal by either means would meet the requirement for disposal in a decent and dignified fashion.*...”; *Lajhner, supra*, note 28, paras. 21 and 22; *Bastien v. Ottawa Hospital (General Campus)*, 2001 CanLII 28016 (ONSC), 2001 CarswellOnt 3561, 56 O.R. (3d) 397 (“*Bastien*”) [despite a lack case law on the meaning and scope of the obligation, the standard of care for burial is in a decent and dignified manner]; *Saunders, supra*, note 49, para. 16.
- <sup>81</sup> FBCSA, ss. 5(3)(a) and 7(1).
- <sup>82</sup> FBCSA, (General) O. Reg. 30/11, ss. 31(2)(a).
- <sup>83</sup> FBCSA, (General) O. Reg. 30/11, ss. 4(1). Embalming dead human bodies means “*to preserve and disinfect all or part of a dead human body by any means other than by refrigeration, but does not include religious rites relating to the washing of a body*” [FBCSA, ss. 1(1)]. Practically, it is the process of replacing blood and bodily fluids with a chemical solution to temporarily preserve the body. In Ontario, embalming is not required by law, but in some circumstances may be recommended by an operator, particularly if there may be delay between death and the visitation, burial or cremation [“*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*”, Bereavement Authority of Ontario, March, 2017 – [www.thebao.ca/for-consumers/consumer-information-guide/](http://www.thebao.ca/for-consumers/consumer-information-guide/), p. 8]. However, embalming (or making “*any alteration to the body*” or applying “*any chemical to the body, internally or externally*”) of a human dead body is prohibited if a person “*has reason to believe that a dead body will be shipped or taken to a place outside Ontario*” until a certificate is issued by the coroner [Coroners Act, R.S.O. 1990, c. C. 37, ss. 13(3) (“*Coroners Act*”)].
- <sup>84</sup> *Criminal Code*, RSC 1985, c C-46, s. 182 (“*Criminal Code*”): “*Dead Body - Every one who (a) neglects, without lawful excuse, to perform any duty that is imposed on him by law or that he undertakes with reference to the burial of a dead human body or human remains, or (b) improperly or indecently interferes with or offers any indignity to a dead human body or human remains, whether buried or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years*”; *R. v. Murray*, 2007 CarswellNB 268, 2007 NBQB 214, 829 A.P.R. 177, 322 N.B.R. (2d) 177 (N.B.Q.B.) [funeral director convicted of “*offering an indignity*” to human remains for improperly storing a body pending disposition].
- <sup>85</sup> *Declava, supra*, note 28, para. 13; *Schara, supra*, note 28, paras. 12 and 14; *Mouaga, supra*, note 28, para. 3; *Saunders, supra*, note 49, para. 16: “...*and if the disposition is to be done in a dignified manner, it must be done in a timely fashion*”.
- <sup>86</sup> *Sopinka, supra*, note 28 [estate trustee breached the duty to inform, but no damages were awarded to the deceased’s former spouse for intentional infliction of “*mental suffering*”, or otherwise], per Quinn, J, at paragraphs 35 and 36: “*Although I was not provided with any authority on point, I am prepared to hold there is a duty on an estate trustee, upon request, to provide particulars to the next of kin of the deceased regarding his or her burial. I would define next of kin generally to include the mother, father, children, brothers, sisters, spouse and common law spouse of the deceased. Where next of kin happen to be minors, I think that the duty is owed to them through their custodial parent or guardian...The specific request must be reasonable and the nature of the particulars provided must be appropriate in the circumstances*”.
- <sup>87</sup> *Popp, supra*, note 29, para. 23; *Widdlefield, supra*, note 28.
- <sup>88</sup> For example, in *Sopinka, supra*, note 28 [deceased’s former spouse’s action against the estate trustee alleging, *inter alia*, breach of the duty to inform of final arrangements was dismissed for lack of supporting evidence], Quinn, J. held at paragraph 41: “*Although the statement of claim seeks damages for the intentional infliction of “mental suffering”, I take this to be the tort more commonly known as the intentional infliction of “nervous shock”. This tort has three elements: (1) an overt act by the defendant; (2) intention to produce harm; and (3) resultant nervous shock sustained by the Plaintiff and consequent injury. The gist of the authorities is that the overt act must be flagrant and extreme. Intention is proved by the express statement of such or by facts permitting intention to be imputed. Once intention is established, motive is irrelevant. Finally, the overt act must produce a visible and provable injury or illness*”.
- <sup>89</sup> Trudelle, Paul, Hull and Hull LLP, “*Dealing with the Body, and Other Estate Issues That Arise Immediately Upon Death*”, October, 2008, p. 4 (“*Dealing with the Body*”).

<sup>90</sup> FBCSA, Part IX (*Complaints, Inspections and Investigations*) [s. 66 – 71]; “*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*”, Bereavement Authority of Ontario, March, 2017 – [www.thebao.ca/for-consumers/consumer-information-guide/](http://www.thebao.ca/for-consumers/consumer-information-guide/), p. 12.

<sup>91</sup> *Sopinka*, *supra*, note 28; *Trustee Act*, R.S.O. 1990, c. T. 23, s. 3 (“*Trustee Act*”).

<sup>92</sup> *Abezziz*, *supra*, note 28, para. 28; *Miner*, *supra*, note 31 [damages claimed by a mother for, *inter alia*, transferring her deceased son’s remains to an incorrect location], in which Beck, J., at paragraph 19, recognized potential qualifications to ‘*no property in a dead body*’, effectively balancing the duty to dispose of the body and conditions that may exist: “...*the law recognizes property in a corpse, a property, of course, which is subject, on the one hand, to the obligations, e.g. of proper care and prima facie of decent burial appropriate to its condition and the condition of the individual in his lifetime...and to the restraints upon its voluntary or involuntary disposal and use provided by law (e.g. the existence of the conditions authorizing its use for anatomical purposes) or arising out of the fact that the thing in question is a corpse...and, on the other hand, the nature and extent of the right or obligation of the person for the time being claiming property (e.g. an executor, a husband, wife, next of kin, medical institute, etc.)*” and, specifically, at paragraph 18, for example: potentially historically-significant remains of interest to society (i.e., mummification) and “*skeletons or anatomical preparations of bodies or parts of bodies; and I shall take the liberty of adding – outside the range of the ecclesiastical law of the Church of England – bodies or parts of bodies preserved and venerated as the relics of saints*”, the basis of which would not apply in Canada; *Doodeward v. Spence*, [1908] 6 CLR 40 (H.C.) (“*Doodeward*”), cited by Beck, J. in *Miner*, *supra* [the purchaser of a preserved two-headed, still-born fetus, which the purchaser exhibited publicly, was held liable for indecently displaying human remains, but conversely was also granted possession of, or property in, the fetus], in which Griffith, C.J. held for the majority (with Higgins, J. dissenting on the basis that there can be no property in a human body, dead or alive): “*If, then, there can, under some circumstances, be a continued rightful possession of a human body unburied, I think, as I have already said, that the law will protect that rightful possession by appropriate remedies. I do not know of any definition of property which is not wide enough to include such a right of permanent possession. By whatever name the right is called, I think it exists, and that, so far as it constitutes property, a human body, or a portion of a human body, is capable by law of becoming the subject of property. It is not necessary to give an exhaustive enumeration of the circumstances under such right may be acquired, but I entertain no doubt that, when a person has by the lawful exercise of a work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances*”; *Dobson and Dobson v. North Tyneside Health Authority and Newcastle Health Authority*, [1997] 1 WLR 596, [1996] EWCA Civ. 1301, (1997) 33 BMLR 146, [1997] 1 FLR 598, [1996] 4 All ER 474 (CA) (“*Dobson*”) [damages claimed by family members after discovering not all body parts had been returned for burial following the post-mortem, being retained for medical research] at page 479, at which the Court of Appeal held that the neuropathologist who had removed the brain during an autopsy and preserved it did not create an actionable proprietary claim, such as “*stuffing or embalming a corpse or preserving an anatomical or pathological specimen for a scientific collection or with preserving a human freak such as a double-headed foetus that has some value for exhibition purposes*”; *AB, et al. v. Leeds Teaching Hospital NHS Trust, Cardiff and Vale NHS Trust*, [2004] EWHC 644, (2004) 77 BMLR 145, [2004] 2 FLR 365, [2005] 2 WLR 358, [2005] QB 50 (QB) (“*Leeds*”) [damages claimed against hospitals and medical practitioners for removal of organs from deceased children without parental, informed consent]; *Yearworth*, *supra*, note 31 [damages claimed against the defendant hospital with custody of sperm samples given by the claimants during fertility treatment, which were destroyed by equipment failure]; *R. v. Kelly and Lindsay*, [1999] QB 621, [1999] 2 WLR 384, [1998] 3 All ER 741 (“*Kelly*”) [criminal conviction of artists upheld for theft for depicting anatomical specimens, or human body parts used for training purposes, held by the Royal College of Surgeons], in which Rose, L.J., at pages 630 to 631, citing *Doodeward*, *supra*, with approval, held that, as an exception to the longstanding common law rule of ‘*no property in a corpse*’, parts of body are capable by law of becoming the subject of property, particularly if those parts have been preserved for medical or scientific examination, or for the benefit of medical science, or such parts have otherwise “*acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes...*” – a right to retain possession may arise.

<sup>93</sup> *Kelly*, *supra*, note 92, p. 750: “...*the common law does not stand still. It may be that if, on some future occasion, the question arises, the courts will hold that human body parts are capable of being property for the purposes of*

section 4, even without the acquisition of different attributes, if they have a use of significance beyond their mere existence. This may be so if, for example, they are intended for use in an organ transplant operation, for the extraction of DNA or, for that matter, as an exhibit in a trial. It is to be noted in *Dobson*, there was no legal or other requirement for the brain, which was then the subject of the litigation, to be preserved”; *C.C. v. A.W.*, [2005] A.J. No. 428, 2005 CanLII 290 (ABQB) (“C.C.”) [genetic materials; specifically, fertilized embryos, were ordered returned to the female partner as her property]; *J.C.M. v. A.N.A.*, 2012 CanLII 584 (BCSC) (“J.C.M.”); *Lam v. University of British Columbia*, 2013 CanLII 2094 (BCSC), 2013 CanLII 2142 (BCSC) and 2015 CanLII 2 (BCCA) (“Lam”) [frozen sperm held to be property (for the purpose of warehouse legislation)]; *K.L.W. v. Genesis Fertility Centre*, 2016 CanLII 1621 (BCSC) (“K.L.W.”) [human sperm or ovum stored for reproductive purposes are property]; *Kate Jane Bazley v. Wesley Monash IVF Pty. Ltd.*, [2010] QSC 118 (Queensland SCTD) (“Bazley”); *Jocelyn Edwards: Re the Estate of the late Mark Edwards*, [2011] NSWSC 478 (“Edwards”); *Hecht v. Superior Court*, 16 Cal. App. 4th 836 (1993), 59 Cal. Repr. 2d 222 (Cal. CT. App 1996) (“Hecht”) [deceased had a proprietary interest in his own frozen sperm sufficient to direct for its disposition]; *Yearworth, supra*, note 31 [damages awarded against a hospital arising from destruction of frozen sperm]; Weber, Bryce, *et al.*, “Postmortem Sperm Retrieval: The Canadian Perspective” (2009) *Journal of Andrology*, Vol. 30, Issue 4, pp. 407-409; Shapiro and Sonnenblick, “The Widow and the Sperm: The Law of Post-Mortem Insemination” (1986) 1. *J. Law & Health* 229, 243-244; Whaley, Likwornik, “Genetics and the Estate Claim: Life After Death?”, OBA Institute, February, 2008.

<sup>94</sup> *Assisted Human Reproduction Act*, SC 2004, c. 2 (“Assisted Human Reproduction Act”), s. 8: “Use of reproductive material without consent. 8 (1) No person shall make use of human reproductive material for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose. Posthumous use without consent. (2) No person shall remove human reproductive material from a donor’s body after the donor’s death for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its removal for that purpose. Use of in vitro embryo without consent - (3) No person shall make use of an in vitro embryo for any purpose unless the donor has given written consent, in accordance with the regulations, to its use for that purpose”; Snow, Dave, Baylis, Francoise and Downie, Jocelyn, “Why the Government of Canada Won’t Regulate Assisted Human Reproduction: A Modern Mystery” (*McGill Journal of Law and Health*), 2015 CanLIIDocs 116.

<sup>95</sup> The statutory requirements to establish consent by the deceased donor for the posthumous removal of his or her reproductive material “for the purpose of creating an embryo” are prescribed by the *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137, Part 2 – *Consent Given Under Subsection 8(2) of the Act* [s. 6 – 9].

<sup>96</sup> *Children’s Law Reform Act*, R.S.O. 1990, c. C. 12, ss. 12(1) (“CLRA”).

<sup>97</sup> “Transplant” means “the removal of tissue from a human body, whether living or dead, and its implantation in a living human body, and in its other forms it has corresponding meanings” [TGLNA, *infra*, s. 1]. Organs or tissue not suitable for transplantation can be used for organ and tissue research (if consented to by the donor upon or after registration in the Network) - this research is specific to the field of organ and tissue donation, and is not the same as whole body donation - [www.giftoflife.on.ca/en/faq.htm](http://www.giftoflife.on.ca/en/faq.htm).

<sup>98</sup> The TGLN is a “not-for-profit agency of the Government of Ontario”, established by the *Trillium Gift of Life Network Act*, R.S.O. 1990, c. H. 20 (“TGLNA”), pursuant to the *Human Tissue Gift Amendment Act (Trillium Gift of Life Network)*, 2000, S.O. 2000 c. 39 – Bill 142, “dedicated to the planning, promotion, coordination and support of organ and tissue donation and transplantation. Its mission is to save and enhance lives through the gift of organ and tissue donation in Ontario.” - [www.giftoflife.on.ca/en/faq.htm](http://www.giftoflife.on.ca/en/faq.htm).

<sup>99</sup> *Anatomy Act*, R.S.O. 1990, Chapter A. 21, s. 1 (“Anatomy Act”), defines a “school” as “an institution designated as a school by the regulations”, and sub-section 14(a) authorizes making regulations “designating schools for the purposes of this Act”, which are identified by O. Reg. 21 (*General*). Ten education institutions in Ontario are designated currently and many operate body donor programs, with prescribed consent and other forms. For example, Queen’s University, School of Medicine, Department of Biomedical and Molecular Sciences, “Human Body Donor Program” - [https://dbms.queensu.ca/home/human\\_body\\_donor\\_program](https://dbms.queensu.ca/home/human_body_donor_program); University of Guelph, Human Health & Nutritional Sciences, “Human Anatomy Body Donation Program” - <https://www.uoguelph.ca/hhns/human-anatomy-body-donation-program>; University of Toronto, Surgery, “Willed Body Program” - <https://surgery.utoronto.ca/willed-body-program>; Branswell, Helen, *The Canadian*

Press, Toronto Star, Nov. 24, 2008, “How to donate your body to science” - [https://www.thestar.com/life/health\\_wellness/2008/11/24/how\\_to\\_donate\\_your\\_body\\_to\\_science.html](https://www.thestar.com/life/health_wellness/2008/11/24/how_to_donate_your_body_to_science.html).

<sup>100</sup> TGLNA, ss. 4(2).

<sup>101</sup> In 2008, TGLN ended the use of paper donor cards, by adopting an online registry stored by The Ministry of Health and Long-Term Care (“MHLTC”) for consent to donate organs and tissue. Any person who is sixteen years of age or older, with a valid Ontario health card, may register their consent for organ and tissue donation at [www.BeADonor.ca](http://www.BeADonor.ca) or in person at any Service Ontario centre. Service Ontario also delivers an “Organ and Tissue Donor Registration” form when, for example, a driver’s license or health care is renewed or replaced, which may be mailed or delivered in person to any Service Ontario location for registration as a donor. By registering as an organ and tissue donor, a person can consent to the use of his or her organs and tissues for transplant only, or transplant and organ and tissue research. The donor is also given the opportunity to consent to any needed organs and tissues, or exempt organs and tissue from a specified list – these decisions are affirmed by the codes on the back of the person’s photo health card. Organ donation is rare in Ontario – only two-to-three *per cent* of hospital deaths occur in a manner allowing for organ donation; specifically, when the deceased passes in a hospital and on a ventilator. Tissue donation (particularly eyes, bone, skin and heart valves) offers greater opportunity – a deceased person may donate tissue after passing in a hospital (but without being on a ventilator) or at home [[www.giftoflife.on.ca/en/faq.htm](http://www.giftoflife.on.ca/en/faq.htm)].

<sup>102</sup> “Tissue” is defined as “a part of a living or dead human body and includes an organ but, unless otherwise prescribed by the Lieutenant Governor in Council, does not include bone marrow, spermatozoa, an ovum, an embryo, a foetus, blood or blood constituents” [TGLNA, s. 1]. Section 2 reads: “A transplant from one living human body to another living human body may be done in accordance with this Act, but not otherwise”, permitting tissue donation from a deceased human body by other means. According to the Network, organs and tissue that can be donated include the heart, kidneys, liver, lungs, pancreas, small intestines, eyes, bone, skin, and heart valves [[www.giftoflife.on.ca/en/faq.htm](http://www.giftoflife.on.ca/en/faq.htm)].

<sup>103</sup> TGLNA, ss. 4(1).

<sup>104</sup> TGLNA, ss. 4(3).

<sup>105</sup> “Hospital” is defined as a “hospital approved as a public hospital” under the *Public Hospitals Act*, R.S.O. 1990, c. P. 40 (“*Public Hospitals Act*”). Unless the Network determines otherwise, every “designated facility” must notify the Network as soon as possible when a patient at the facility has died, or a physician is “of the opinion that the death of a patient at the facility is imminent by reason of injury or disease” [TGLNA, ss. 8(1) and (2)]. The Network “shall” determine, in consultation with the facility, whether the facility is required to contact the patient, or the patient’s substitute, regarding consent for tissue donation [TGLNA, ss. 8(3)]. A “designated facility” may be a hospital, health facility or other entity “engaged in activities related to tissue donations or transplants” or “designated as a member of a prescribed class of facilities” [TGLNA, s. 1 and ss. 8(2)]. Class designations and members of a class are defined by O. Reg. 179/05 (General).

<sup>106</sup> To reaffirm an individual’s consent to donate, the Network considers the appropriate legal authority to be, in descending order of priority: “1. the patient’s spouse or same-sex partner; 2. a child of the patient; 3. a parent of the patient; 4. a brother or sister of the patient; 5. any other relative of the patient; and 6. any person who is lawfully in possession of the body (e.g., an executor of the will, or administrator of the estate).” In there is no next of kin for the deceased, donation can proceed when registered consent has been recorded with the MHCTC’s database [[www.giftoflife.on.ca/en/faq.htm](http://www.giftoflife.on.ca/en/faq.htm)].

<sup>107</sup> [www.giftoflife.on.ca/en/faq.htm](http://www.giftoflife.on.ca/en/faq.htm).

<sup>108</sup> TGLNA, ss. 5(2).

<sup>109</sup> Consent may be obtained by the next in priority if the that person is “not readily available” [TGLNA, ss. 5(2)]. Sub-section 5(1) defines “spouse” as a person: (a) to whom the person is married; or (b) with whom the person is living or, immediately before the person’s death, was living in a conjugal relationship outside marriage, if the two persons: (i) have cohabited for at least one year; (ii) are together the parents of a child; or (iii) have together entered into a cohabitation agreement under section 53 of the *Family Law Act*, R.S.O. 1990, c. F. 3 (“*Family Law Act*”), notably a definition of “spouse” different from the definition at sub-section 1(1) and section 29 of the *Family Law Act*.

<sup>110</sup> Except for the following: (a) the Chief coroner, or coroner in possession of the body, for purposes of the *Coroners Act*; (b) the Ontario Public Guardian and Trustee in possession for burial of the body, pursuant to the *Crown Administration of Estates Act*; (c) a licensed operator under the FBCSA, particularly an embalmer or

funeral director in possession “for the purpose of its burial, cremation or other disposition”; and (d) a crematorium in possession for purposes of cremating the body [TGLNA, ss. 5(5)].

<sup>111</sup> TGLNA, ss. 5(3).

<sup>112</sup> TGLNA, ss. 5(4).

<sup>113</sup> TGLNA, ss. (4.1).

<sup>114</sup> [www.mcscs.jus.gov.on.ca/english/DeathInvestigations/WholeBodyDonation/DI\\_body\\_donation.html](http://www.mcscs.jus.gov.on.ca/english/DeathInvestigations/WholeBodyDonation/DI_body_donation.html).

<sup>115</sup> TGLNA, s. 8.

<sup>116</sup> TGLNA, s. 6 - Coroner’s direction: “Where, in the opinion of a physician, the death of a person is imminent by reason of injury or disease and the physician has reason to believe that section 10 of the Coroners Act may apply when death does occur and a consent under this Part has been obtained for a post mortem transplant of tissue from the body, a coroner having jurisdiction, despite the fact that death has not yet occurred, may give such directions as the coroner thinks proper respecting the removal of such tissue after the death of the person, and every such direction has the same force and effect as if it had been made after death under section 11 of the Coroners Act”.

<sup>117</sup> *Anatomy Act*, ss. 4(1).

<sup>118</sup> Ministry of Community Safety & Correctional Services, “Whole Body Donation” - [www.mcscs.jus.gov.on.ca/english/DeathInvestigations/WholeBodyDonation/DI\\_body\\_donation.html](http://www.mcscs.jus.gov.on.ca/english/DeathInvestigations/WholeBodyDonation/DI_body_donation.html).

<sup>119</sup> Per section 1 of the *Anatomy Act*, the body may be disposed of by any disposition permitted by the FBCSA.

<sup>120</sup> *Anatomy Act*, s. 7. A donor’s remains are commonly and respectfully cremated and interred in a plot owned by the medical or educational facility, or may be returned to the deceased’s family, upon request. The designated facilities commonly arrange an annual service of gratitude, to which the deceased’s family and friends are invited, to honour and extend gratitude to donors and for their donative generosity [“Whole Body Donation”, Ministry of Community Safety and Correctional Services, November 29, 2017 – [www.mcscs.just.gov.on.ca](http://www.mcscs.just.gov.on.ca)].

<sup>121</sup> TGLNA, ss. 9(1) and (2) read: “No action or other proceeding for damages or otherwise shall be instituted against any of the following individuals for any act done or performed in good faith in the performance or intended performance of any duty or function or in the exercise or intended exercise of any power or authority under this Act or for any neglect, default or omission in the performance or execution in good faith of any duty, function, power or authority under this Act: 1. A member of the board of directors of the Network. 2. A member of the medical or other staff of a designated facility. 3. Any other person employed in a designated facility”; and “Despite sections 5 and 23 of the Proceedings Against the Crown Act, no action or other proceeding for damages or otherwise shall be instituted against the Crown, the Minister or an officer, employee or agent of the Crown for any act done or performed in good faith in the performance or intended performance of any duty or function or in the exercise or intended exercise of any power or authority under this Act or for any neglect, default or omission in the performance or execution in good faith of any duty, function, power or authority under this Act”.

<sup>122</sup> In Ontario, coroners are medical doctors with specialized training in the principles of death investigation, who investigate approximately 15,000 deaths per year, pursuant to section 10 of the *Coroners Act* - [www.mcscs.jus.gov.on.ca](http://www.mcscs.jus.gov.on.ca).

<sup>123</sup> *Coroner’s Act*, s. 10 and 11.

<sup>124</sup> *Coroner’s Act*, ss. 10(2).

<sup>125</sup> *Coroner’s Act*, ss. 10(2.1).

<sup>126</sup> *Coroner’s Act*, ss. 10(3).

<sup>127</sup> *Coroner’s Act*, ss. 10(4), (4.1), (4.2) and (4.3).

<sup>128</sup> *Coroner’s Act*, ss. 10.1(1).

<sup>129</sup> *Coroner’s Act*, ss. 10(4.6), (4.7), (4.8) and (4.9).

<sup>130</sup> *Coroner’s Act*, ss. 15(1).

<sup>131</sup> *Coroner’s Act*, ss. 16(1).

<sup>132</sup> *Coroner’s Act*, ss. 16(2).

<sup>133</sup> *Coroner’s Act*, ss. 28(1) and (2).

<sup>134</sup> *Coroner’s Act*, s. 24.

<sup>135</sup> “Inter” means “the burial of human remains and includes the placing of human remains in a lot” [FBCSA, ss. 1(1)].

<sup>136</sup> Pursuant to the FBCSA, ss. 4(2): “No person shall sell or offer to sell interment rights, scattering rights or cemetery services to the public, or hold themselves out as available to sell such rights or services to the public,

unless, (a) the person holds a prescribed license and is acting on behalf of a cemetery operator; or (b) the person is licensed as a cemetery operator.” Prior to a consumer purchasing interment rights, a cemetery operator must provide, *inter alia*, the cemetery’s: current price list, by-laws and an explanation of any restrictions on the rights being purchased (such as, for example, restrictions on memorialization options, monuments, etc.). The purchase contract must specify the number of interments (bodies or cremated remains) or scatterings to which the purchase is contractually entitled with each interment or scattering right. A portion of the contract price paid for interment and scattering rights must be deposited to a care and maintenance fund. Income earned from this fund is used to maintain the cemetery. The care and maintenance contribution depends on the type and cost of the interment rights purchased [“*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*”, Bereavement Authority of Ontario, March, 2017 – [www.thebao.ca/for-consumers/consumer-information-guide/](http://www.thebao.ca/for-consumers/consumer-information-guide/), p. 7].

<sup>137</sup> FBCSA, ss. 1(1). A “plot” means “two or more lots in respect of which the rights to inter have been sold as a unit” [FBCSA, ss. 1(1)] and a “mausoleum” is “a structure, other than a columbarium, used as a place for the interment of human remains in tombs, crypts or compartments”, whereas a “columbarium” is “a structure designed for the purpose of interring cremated human remains in niches or compartments” [FBCSA, ss. 1(1)]. A “private structure” is a mausoleum or columbarium “situated on a cemetery set aside for the interment of human remains of only those persons who are related or affiliated in a manner specified in the contract at the time the interment rights are sold” [FBCSA, ss. 1(1)].

<sup>138</sup> FBCSA, ss. 1(1).

<sup>139</sup> FBCSA, ss. 47(1). A cemetery operator is permitted to make by-laws [defined as the “rules under which the cemetery or crematorium is operated”, per FBCSA, ss. 1(1)] “governing the operation of the cemetery and, in particular, governing rights, entitlements and restrictions with respect to interment and scattering rights” [FBCSA, (General) O. Reg. 30/11, ss. 150(1)]. If sale to a third party is permitted, the cemetery must be notified before interment rights may be sold, or purchased from, a third party and the transfer must be completed through the licensed cemetery operator, for which the cemetery operator will verify that the seller is the *bona fide* interment rights holder and update the public register and issue a new interment rights certificate, while charging an administrative fee for this service. If the cemetery’s by-laws prohibit a rights holder from selling the interment rights to a third party, the rights holder may cancel the contract of purchase, in which case the cemetery is required to refund an amount equal to the market price, excluding any amount that was paid into the cemetery’s care and maintenance fund or account prior to that time. Cemeteries are not required to repurchase interment rights for an unused grave or lot that is located in a plot, where one or more of the graves or lots have already been utilized [FBCSA, s. 47; Consumer Protection Ontario, “*Funeral, burial, cremation or scattering: your rights*” – [www.ontario.ca/page/funeral-burial-cremation-or-scattering-your-rights](http://www.ontario.ca/page/funeral-burial-cremation-or-scattering-your-rights)].

<sup>140</sup> FBCSA, (General) O. Reg. 30/11, ss. 161(1): “No cemetery operator shall inter human remains in a lot, other than the remains of the interment rights holder, without the written consent of the interment rights holder”. Furthermore, an interment rights holder has the right to: (a) inter any human remains in the lot to which the interment rights relate in accordance with the cemetery by-laws; (b) erect a marker on the lot, or other receptacle for human remains, to which the interment rights relate if doing so does not contravene the cemetery by-laws; (c) have reasonable access to the lot to which the interment rights relate at any time, except as prohibited by the cemetery by-laws; and (d) when the interment rights have been paid in full, receive a certificate of interment rights from the operator [FBCSA, ss. 48(1)] An interment rights holder and the relatives of any person whose remains are interred in a cemetery also have the right to decorate the lot in which the remains are interred if the decoration does not contravene the cemetery by-laws [FBCSA, ss. 48(2)].

<sup>141</sup> FBCSA, (General) O. Reg. 30/11, ss. 162(3)(a) and (6); *Heafey, supra*, note 28, per O’Neill, J., at paragraph 12: “It is clear from these sections of the act, that the rights of the interment rights holder with respect to the disinterment of human remains supersede those of the executor at common law” and, at paragraph 13: “While this court has jurisdiction to order disinterment pursuant to subsection 2(a), there is, in my view, no provision in the act allowing the court to dispense with the consent of the interment rights holder.....”.

<sup>142</sup> FBCSA, ss. 1(1).

<sup>143</sup> FBCSA, ss. 4(5).

<sup>144</sup> A “private scattering grounds” is defined as “land within a cemetery that is set aside to be used for the scattering of cremated human remains of only those persons who are related or affiliated in a manner specified in the contract at the time the scattering rights are sold” [FBCSA, ss. 1(1)].

<sup>145</sup> FBCSA, ss. 5(6).



<sup>146</sup> FBCSA, ss. 1(1).

<sup>147</sup> FBCSA, s. 47; Consumer Protection Ontario, “*Funeral, burial, cremation or scattering: your rights*” – [www.ontario.ca/page/funeral-burial-cremation-or-scattering-your-rights](http://www.ontario.ca/page/funeral-burial-cremation-or-scattering-your-rights).

<sup>148</sup> FBCSA, (General) O. Reg. 30/11, ss. 161(2): “*No cemetery operator shall scatter cremated human remains in a scattering ground, other than the remains of the scattering rights holder, without the written consent of the scattering rights holder*”. Furthermore, a scattering rights holder has the right to: (a) scatter any cremated human remains on the scattering ground to which the scattering rights relate in accordance with the cemetery by-laws; (b) erect a marker on the scattering ground to which the scattering rights relate if doing so does not contravene the cemetery by-laws; (c) have reasonable access to the scattering ground to which the scattering rights relate at any time, except as prohibited by the cemetery by-laws; and (d) when the scattering rights have been paid in full, receive a certificate of scattering rights from the operator [FBCSA, ss. 48(3)]. A scattering rights holder and the relatives of any person whose cremated remains are scattered in a cemetery also have the right to decorate the scattering ground on which the remains are scattered if the decoration does not contravene the cemetery by-laws [FBCSA, ss. 48(4)].

<sup>149</sup> FBCSA, (General) O. Reg. 30/11, ss. 162(4).

<sup>150</sup> FBCSA, ss. 49(1).

<sup>151</sup> A Court is likely to be “*extremely cautious in making these types of orders and should only do so in the face of clear, cogent and compelling reasons*” [Mason v. Mason, 2017 NBBR 132, 2017 NBQB 132, 2017 CarswellNB 350, 2017 CarswellNB 351 (NBQB) (“Mason”), para. 16]; Heafey, supra, note 28; Catto, supra, note 28 [deceased’s mother’s request to exhume cremated remains and reinter the ashes denied, as married spouse had been appointed estate trustee and objected to exhumation]; Johnston, supra, note 28 [refusal to quash the issuance of a disinterment permit by the Alberta government to the deceased’s spouse (estate trustee), challenged through judicial review by the deceased’s mother; deceased’s body disinterred in Alberta and reinterred in Saskatchewan].

<sup>152</sup> R. v. Polimac, (2006) 149 C.R.R. (2d) 161 (“Polimac”) [Crown granted order to disinter the deceased from a lot owned by the deceased’s common law partner (the interment rights holder), who was subsequently charged with her murder]; FBCSA, ss. 102.1(2) reads: “*Powers of Attorney General or Solicitor General (2) If the Attorney General, the Solicitor General or a lawful delegate of either of them considers it in the interest of justice for the purpose of an inquiry as to the cause of death or for the purpose of a criminal investigation or proceeding that human remains should be disinterred or removed, the Attorney General, the Solicitor General or the delegate, as the case may be, may exercise the powers of direction mentioned in subsection (1)*”, but such direction may be given without the consent of the interment rights holder [FBCSA, (General) O. Reg. 30/11, ss. 162(5)].

<sup>153</sup> FBCSA, ss. 102.1(1), (2) and (3).

<sup>154</sup> Coroner’s Act, s. 24.

<sup>155</sup> A “*registrar*” is a person(s) appointed by the Ministry of Consumer and Government Services or other “*Executive Council*” to which administration of the FBCSA is assigned [FBCSA, ss. 1(1) and 3(1)].

<sup>156</sup> “*Burial site*” means “*land containing human remains that is not a cemetery*” [FBCSA, ss. 1(1)]. Pursuant to sections 94 and 95 of the FBCSA: “*No person shall disturb or order the disturbance of a burial site or artifacts associated with the human remains except, (a) on instruction by the coroner; (b) pursuant to a site disposition agreement; or (c) if the disturbance is carried out in accordance with the regulations*” and, if a burial site is unmarked, any “*person discovering or having knowledge of a burial site shall immediately notify the police or coroner*”.

<sup>157</sup> FBCSA, (General) O. Reg. 30/11, ss. 162(1), 178 and 179.

<sup>158</sup> FBCSA, (General) O. Reg. 30/11, ss. 162(1) and 184.

<sup>159</sup> FBCSA, (General) O. Reg. 30/11, ss. 162(1) and FBCSA, ss. 88(7) and 173(1).

<sup>160</sup> R.S.O. 1990, c. H. 7, pursuant to FBCSA, (General) O. Reg. 30/11, ss. 162(17).

<sup>161</sup> FBCSA, (General) O. Reg. 30/11, ss. 162(16) and (17). Comparably, in British Columbia, for example, exhumation, disinterment and removal of human remains may be arranged by the person statutorily entitled, by defined hierarchy, to control the human remains, subject to approval by the “*director*” and the “*medical health officer*”, if the deceased “*was known to have had an infectious or contagious disease or other disease dangerous to public health*” [Cremation, Interment and Funeral Services Act, SBC 2004, c. 35: Part 4 – Exhumation, Disinterment and Removal of Human Remains, ss. 16(1)].

<sup>162</sup> FBCSA, (General) O. Reg. 30/11, ss. 162(2), (3) and (4).

<sup>163</sup> FBCSA, (*General*) O. Reg. 30/11, ss. 162(3), provided that these requirements do not apply to a disinterment or removal that is: (a) directed under sub-section 102.1 FBCSA (specifically, directed by Court order, the Attorney General (Crown) or a coroner); or (b) ordered by the registrar for the purpose of a cemetery closure, pursuant to sub-section 88(7) of the FBCSA [FBCSA, (*General*) O. Reg. 30/11, ss. 162(5) and 173(1)].

<sup>164</sup> FBCSA, (*General*) O. Reg. 30/11, ss. 162(6).

<sup>165</sup> FBCSA, (*General*) O. Reg. 30/11, ss. 162(18).

<sup>166</sup> *A.B. v. C.D.*, [2007] NSWSC 1474 (Aust. H.C.) (“*AB*”), para. 39, citing *Re Crippen*, [1911], p. 108 (“*Crippen*”); *Re G*; *M v. L*, [1946], p. 183 (“*M v. L*”); *Re Arden*, [1898], p. 147 (“*Arden*”); *Joseph v. Dunn* (2007) 35 WAR 95, pp. 99-100 (“*Joseph*”); *Re JSB (A Child)*, [2010] 2 NZLR 236 (“*JSB*”), per Heath, J., at page 253: “...an understandable community sentiment that those who have been complicit in causing serious injury to their children through violent behaviour ought to be regarded as having forfeited the right to make decisions about the child’s remains, on death”; *Re Pedersen* (Unreported, Supreme Court of New South Wales, 17 June 1977) (“*Re Pedersen*”) [person unlawfully killed the deceased; disentitled to executorship].

<sup>167</sup> *R. v. Millard*, 2017 CanLII 4548 (ONSC) (“*Millard*”), per Code, J., at paragraph 15: “*I appreciate that counsel for the Estate Trustee of Wayne Millard’s estate may have advised Millard and his mother that the approximately \$1 million in proceeds of the hangar sale that was being held by the Estate Trustee, was not available to Millard due to the “forfeiture rule” and the outstanding allegation that Millard had murdered his father*”; *Cleaver v. The Mutual Reserve Fund Life Assurance*, [1892] 1 QB 147 (“*Cleaver*”) [potential beneficiary under a life insurance policy], per Fry, LJ, at page 156: “*It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from a crime of that person*”; *Hilton v. Allen* (1940) 60 CLR 691 (“*Hilton*”), per Dixon, Evatt and McTiernan, JJ.: “*the principle that by committing a crime no person could obtain a lawful benefit to himself*”; *The Estate of Hall*, [1914] P1 (“*Hall*”) [the application of the “forfeiture rule” is not limited to circumstances where the killing was a murder, nor to circumstances relating to the operation of the rule]; Hardingham, I. J., Neave, M.A., Ford, H.A.J., “*Wills and Intestacy in Australia and New Zealand*” [Sydney: Law Book Co., 1983]: “*Finally, the exclusionary principle is not limited to cases where the person killed is the testator or the intestate. For instances, in a wider context, it can apply where a person entitled to an interest in property in remainder, whether under a Will or settlement, causes a premature vesting in possession of that interest by killing the holder of the prior interest. Thus, if the grandchild of an intestate, for example, kills her or his (that is the grandchild’s) father before the intestate’s death, it is submitted that the grandchild will not be entitled to share, by representation, in that part of the estate which would have passed to the father had he or she not pre-deceased the intestate*”; *Troja v. Troja* (1994) 33 NSWLR 269 (NSWCA) (“*Troja*”). In New South Wales, for example, the *Forfeiture Act 1995* provides potential relief for those guilty of unlawful killing, and other persons, from forfeiture of benefits caused by the automatic application at common law of the “forfeiture rule”, such as for certain individuals found not guilty on the grounds of mental illness, for example. This legislation confers broad discretion to the Supreme Court of NSW to modify, where justice requires, the operation of the “forfeiture rule”, which would otherwise apply at common law, including mechanisms to apply for “forfeiture modification orders” within twelve months of the death of the deceased person or, alternatively, for a late application. The Supreme Court may also modify the effect of the “forfeiture rule” where justice requires (such as, where the person who committed the unlawful killing had been subjected to severe domestic violence by the victim over a long period of time). In a recent decision by the High Court in the United Kingdom, the Court was requested to exercise discretion to grant relief from the “forfeiture rule” to a husband who had suffocated the testator, his spouse, pursuant to the *Forfeiture Act 1982* (“FA 1982”) [*MacMillan Cancer Support v. Hayes and Long*, [2017] EWHC 3110 (Ch) (14 June 2017) (“*MacMillan*”)]. The U.K. legislation recognizes the “forfeiture rule” as, among other things, “*the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing*”. In the U.K., the “forfeiture rule” generally applies to perpetrators who have committed manslaughter, aided and abetted unlawful killing and aided and abetted suicide. Section 2 of the FA 1982 empowers the Court to modify the effect of the rule on the person who unlawfully killed, thereby enabling that person to benefit with respect to an estate that materialized because of, or in relation to, the criminally wrongful act. Generally, the Court in the U.K. will exercise discretion, where appropriate, particularly in cases of domestic violence and diminished responsibility.

<sup>168</sup> A co-trustee, or any person with a financial interest in an estate, may apply to have an estate trustee passed over or removed, pursuant to sub-section 37(3) of the *Trustee Act*. Sub-rule 14.05(3)(c) of the *Rules of Civil Procedure* further authorizes an application for the “*removal or replacement of one or more executors,*

*administrators or trustees, or the fixing of their compensation*"; *Johnston v. Lanka Estate*, 2010 CanLII 4124 (ONSC) ("*Lanka*") [summarizing principles for removal of a trustee].

<sup>169</sup> "*Inter*" means "*the burial of human remains and includes the placing of human remains in a lot*" [FBCSA, ss. 1(1)]. "*Human remains*" means a "*dead human body or the remains of a cremated human body*" [FBCSA, ss. 1(1)].

<sup>170</sup> Generally, for burial in Ontario, and subject to the cemetery's by-laws, the deceased is placed in a grave with or without a casket [FBCSA, ss. 1(1) – a casket is "*a container intended to hold a dead human body for funeral, cremation or interment purposes and that is not a vault, burial container or a grave liner*"]. A rigid container may be required to transport the body. A casket is required when placing the body in a crypt. The body or cremated remains must be buried in a licensed cemetery. For burial in a grave, a vault or outer liner to further protect the body in the casket may be purchased. This container is placed in the ground and is commonly fabricated from concrete or fiberglass. Generally, it is not mandatory to use a vault or outer liner, unless directed by the medical officer of health. For burial in a crypt (entombment), the casket is placed in a sealed crypt in a mausoleum. A mausoleum is commonly an above-ground structure made of concrete, stone or marble, containing several crypts. Not all cemeteries have mausoleums [*"Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services"*, Bereavement Authority of Ontario, March, 2017 – [www.thebao.ca/for-consumers/consumer-information-guide/](http://www.thebao.ca/for-consumers/consumer-information-guide/), p. 8].

<sup>171</sup> FBCSA, ss. 4(1), (2) and (3). A "*cemetery*" is: (a) land that has been established as a cemetery under the FBCSA, other legislation (or a predecessor that related to cemeteries); or (b) land that was recognized by the appointed registrar as a cemetery under a predecessor of the FBCSA that related to cemeteries, and includes: (i) land that, in the "*prescribed circumstances*", has been otherwise set aside for the interment of human remains; and (ii) a mausoleum or columbarium intended for the interment of human remains [FBCSA, ss. 1(1)].

<sup>172</sup> Cemetery operators may establish and approve by-laws governing the operation of the cemetery, including governing rights, entitlements and restrictions regarding interment and scattering rights, provided the cemetery is operated in accordance with those by-laws, which must comply with the FBCSA and be filed with, and approved by, the "*registrar*", which may approve, refuse or revoke any by-law [FBCSA, s. 150].

<sup>173</sup> A person may purchase "*interment rights*" from a licensed cemetery operator, which include "*the right to require or direct the interment of human remains in a lot*" (being "*an area of land in a cemetery containing, or set aside to contain, interred human remains and includes a tomb, crypt or compartment in a mausoleum and a niche or compartment in a columbarium and any other similar facility or receptacle*") [FBCSA, ss. 1(1)]. Correspondingly, an "*interment rights holder*" is "*the person who holds interment rights with respect to a lot whether the person be the purchaser of the rights, the person named in the certificate of interment or such other person to whom the interment rights have been assigned*" [FBCSA, ss. 1(1)]. Interment rights may be sold or assigned to a third party, before exercised, subject to the cemetery's by-laws [FBCSA, ss. 47(1)].

<sup>174</sup> FBCSA, Part V (*Consumer Protection*), *Interment and Scattering Rights* [s. 47 – 50]. The rights holder may resell interment or scattering rights to a third party if the cemetery by-laws permit. If resold, the rights holder must inform the cemetery operator, which must transfer the rights to the new holder. A rights holder is prohibited from reselling rights for a price greater than the price on that cemetery's current price list. If the cemetery's by-laws do not permit the holder to resell the rights to a third party, the cemetery operator must buy them from the rights holder at the price on the cemetery's current price list, less any payments that were made to the cemetery's care and maintenance fund. A cemetery operator may charge an administration fee when a holder resells the rights. The cemetery is not required to buy back rights for a grave in a plot (which is a group of graves initially purchased as a unit) if one of those graves has been used by the rights holder [*"Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services"*, Bereavement Authority of Ontario, March, 2017 – [www.thebao.ca/for-consumers/consumer-information-guide/](http://www.thebao.ca/for-consumers/consumer-information-guide/), p. 7].

<sup>175</sup> FBCSA, ss. 5(1)(b).

<sup>176</sup> FBCSA, ss. 5(3)(c).

<sup>177</sup> FBCSA, (*General*) O. Reg. 30/11, ss. 30(2).

<sup>178</sup> FBCSA, s. 102.

<sup>179</sup> FBCSA, (*General*) O. Reg. 30/11, ss.125(1)(a).

<sup>180</sup> FBCSA, (*General*) O. Reg. 30/11, ss. 125(1)(b).

<sup>181</sup> FBCSA, ss. 6(3). Absent the signed consent of the "*purchaser of the cremation services*", a body may not be cremated: (a) with another body; or (b) with animal remains, and the cremated remains may not be co-mingled [FBCSA, (*General*) O. Reg. 30/11, ss. 186(2)].

<sup>182</sup> FBCSA, ss. 7(1).

<sup>183</sup> FBCSA, (General) O. Reg. 30/11, section 53, reads: “Unclaimed cremated human remains 53. (1) An operator having possession of unclaimed cremated human remains that were not in the possession of the operator for the purposes of interring or scattering shall retain them until they are claimed or interred in a cemetery, whichever is earlier. (2) If cremated human remains are not claimed within one year from the date of cremation and if the operator has made reasonable efforts to contact the purchaser of the cremation service or the personal representative or family member of the deceased, as applicable, the operator may have the remains interred in a cemetery, including in a common lot in a cemetery. (3) If cremated human remains are claimed before they are interred under subsection (2), the operator shall refund any refundable deposit charged for the interment”.

<sup>184</sup> FBCSA, ss. 1(1) defines: (a) a “scattering ground” as “the land within a cemetery that is set aside to be used for the scattering of cremated human remains”; (b) “scattering rights” as “the right to require or direct the scattering of cremated human remains on the scattering ground of a cemetery”; and (c) a “scattering rights holder” as “the person who holds the scattering rights with respect to a scattering ground whether the person be the purchaser of the rights, the person named in the certificate of scattering or such other person to whom the scattering rights have been assigned”. Pursuant to sub-section 4(2): “No person shall sell or offer to sell interment rights, scattering rights or cemetery services to the public, or hold themselves out as available to sell such rights or services to the public, unless, (a) the person holds a prescribed license and is acting on behalf of a cemetery operator; or (b) the person is licensed as a cemetery operator.” Only a person licensed as a cemetery operator may “maintain or set aside land to be used for the purpose of scattering cremated human remains” and only if the land is within a licensed cemetery [FBCSA, ss. 4(5)]. No one is permitted to charge a fee for “the use of land for scattering cremated human remains unless the person is a licensed cemetery operator and the scattering takes place on land within a cemetery” [FBCSA, ss. 5(6)]. Similar to interment rights, scattering rights may also be sold to a third party, unless prohibited by the cemetery’s by-laws [FBCSA, s. 47; Consumer Protection Ontario, “Funeral, burial, cremation or scattering: your rights” – [www.ontario.ca/page/funeral-burial-cremation-or-scattering-your-rights](http://www.ontario.ca/page/funeral-burial-cremation-or-scattering-your-rights)].

<sup>185</sup> FBCSA, s. 156.

<sup>186</sup> A “marker” is “any monument, tombstone, plaque, headstone, cornerstone or other structure or ornament affixed to or intended to be affixed to a burial lot, mausoleum crypt, columbarium niche or other structure or place intended for the deposit of human remains” [FBCSA, ss. 1(1)].

<sup>187</sup> FBCSA, s. 158. However, a cemetery by-law may be made to require a rights holder to provide a marker if, for example: (a) it is required for religious reasons or is a cornerstone; (b) the cemetery’s by-laws require markers; or (c) the by-law had been approved and was in force when the rights were purchased [FBCSA, ss. 158(2)].

<sup>188</sup> FBCSA, ss. 158(4).

<sup>189</sup> Provided that the private land owner does not: (a) “maintain or set aside” the private land “to be used for the purpose of scattering cremated human remains”; and/or (b) charge a “fee for scattering” or for the use of the private land for scattering the human remains [FBCSA, ss. 4(5) and (6) – “No person shall charge a fee for the use of land for scattering cremated remains unless the person is a licensed cemetery operator and the scattering takes place on land within a cemetery”]. If the land owner allows, or intends to allow, multiple scatterings on a specific piece of the land, the owner may be required to establish the land as a cemetery, with a licensed cemetery operator [Consumer Protection Ontario, “Arrange a funeral, burial, cremation or scattering – Handling cremated remains”, December 5, 2017 – [www.ontario.ca/page/arrange-funeral-burial-cremation-or-scattering](http://www.ontario.ca/page/arrange-funeral-burial-cremation-or-scattering)].

<sup>190</sup> The requirements for a “contract for the provision of licensed supplies or services” with a licensed operator are defined by sub-section 121(1) of the FBCSA and the corresponding (General) O. Reg. 30/11.

<sup>191</sup> A “funeral establishment” means “premises established for the purpose of temporarily placing dead human bodies, and in prescribed circumstances cremated human remains, so that persons may attend and pay their respects” [FBCSA, ss. 1(1)]. “Funeral services” means “the care and preparation of dead human bodies, the coordination and provision of rites and ceremonies with respect to dead human bodies and the provision of such other services as may be prescribed, but does not include cemetery or crematorium services” [FBCSA, ss. 1(1)].

<sup>192</sup> A “service to the public with respect to the disposition of dead human bodies, including the transportation of dead human bodies and the filling out of necessary documentation with respect to the disposition of dead human bodies” [FBCSA, ss. 1(1)].

<sup>193</sup> If a licensed operator is, by contract, to scatter cremated human remains, sub-section 28(1) of the FBCSA imposes requirements on the scattering operator: “Scattering cremated human remains. 28. (1) An operator that

*scatters cremated human remains for consideration shall fulfil the following requirements: 1. If cremated human remains are to be stored before they are scattered, the operator shall store them, or arrange for them to be stored by another person, in a respectful and dignified manner free from exposure to the elements. 2. The operator shall ensure that cremated human remains are not co-mingled with other cremated remains when in storage or when being scattered, unless the operator's contract with the purchaser authorizes it. 3. Whenever cremated human remains are received by the operator, the operator shall prepare a record setting out, i. the name of the deceased person whose cremated remains were received, ii. the date the operator received the cremated remains, iii. the name and address of the person who authorized the scattering of the cremated remains, and iv. the date, manner and place of scattering of the cremated remains. 4. If the purchaser, personal representative or a family member of a deceased person requests disclosure of the record prepared under paragraph 3 with respect to the deceased person, the operator shall disclose the record free of charge to the person making the request. 5. The operator shall ensure that cremated human remains are scattered only in areas to which no prohibition against the scattering of cremated human remains applies and shall comply with all rights and obligations of the scattering rights holder if the scattering is to take place in a cemetery. 6. The operator shall maintain a record setting out the following current information: i. The locations where the operator is storing cremated human remains if the operator is doing it directly. ii. The name of each person storing cremated human remains under an arrangement with the operator under paragraph 1, the address of the storage facility and the address of the person storing the cremated human remains, if it is different from the address of the storage facility. iii. For each storage facility listed under subparagraph i or ii, the position and telephone number of an individual at the storage facility who may be contacted for information about the stored cremated human remains. (2) Subsection (1) does not apply to a cemetery operator in respect of cremated human remains that the operator receives for scattering in the cemetery and who scatters the remains in the cemetery”.*

<sup>194</sup> Permitting scattering on both private and Crown land (including land covered by water) was initially announced on June 25, 2009, by Harinder Takhar, (then) Minister of Government Services: “Government consent is not needed in those areas [Crown land] but those wishing to scatter ashes on private land should get the owner's approval, he said” [Oshawa This Week, “Ashes rules spread out of Pickering”, July 3, 2009 - [www.durhamregion.com/news-story/3466776-ashes-rules-spread-out-of-pickering/](http://www.durhamregion.com/news-story/3466776-ashes-rules-spread-out-of-pickering/)]. Such permission is intended to recognize and support religious diversity, faith-based rituals and customs and the plurality of ceremonial and burial beliefs in Ontario communities. For example, scattering ashes is a sacred ritual for Sikhs, Hindus and other faiths [Armstrong, Laura, Toronto Star, “Provincial park in Oakville first to advertise as a scattering garden for cremated loved ones.”, May 15, 2015 - [www.thestar.com/news/gta/2015/05/15/provincial-park-in-oakville-first-to-advertise-as-a-scattering-garden-for-cremated-loved-ones.html](http://www.thestar.com/news/gta/2015/05/15/provincial-park-in-oakville-first-to-advertise-as-a-scattering-garden-for-cremated-loved-ones.html)]; “It is important for many families of various cultures to scatter the ashes of a loved one as part of the ceremonial practices of their faith,” said Mississauga East-Cooksville MPP Dipika Damerla. “The Ministry of Natural Resources recognizes that the practice of scattering cremated remains is an important part of the religious beliefs of many families” and “According to the Ministry of Natural Resources, scattering ashes is allowed in all Ontario provincial parks both on land and in waters because the government recognizes that the practice is an important part of the religious beliefs of many families” [Khalil, Nouman, Brampton Guardian, “New park sign guides how to scatter cremated ashes in responsible way”, July 09, 2015 - [www.bramptonguardian.com/news-story/6005086-new-park-sign-guides-how-to-scatter-cremated-ashes-in-responsible-way/](http://www.bramptonguardian.com/news-story/6005086-new-park-sign-guides-how-to-scatter-cremated-ashes-in-responsible-way/)].

<sup>195</sup> A “Crown Land Use Policy Atlas” is available at: [www.ontario.ca/page/crown-land-use-policy-atlas](http://www.ontario.ca/page/crown-land-use-policy-atlas).

<sup>196</sup> Consumer Protection Ontario, “Arrange a funeral, burial, cremation or scattering. What you need to know before you arrange a funeral, burial, cremation or scattering service” - [www.ontario.ca/page/arrange-funeral-burial-cremation-or-scattering#section-5](http://www.ontario.ca/page/arrange-funeral-burial-cremation-or-scattering#section-5). A deceased person's body may be moved beyond Ontario if a requisite certificate has been obtained from a coroner, usually by an operator. If a deceased person is to be transported to another country, embalming and a sealed casket or container may be required by the receiving country or the transportation company. If human remains are to be transported outside of Ontario, the transporting party must comply with the applicable law in the receiving jurisdiction [[www.catsa.gc.ca/cremated-remains-0](http://www.catsa.gc.ca/cremated-remains-0); “Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services”, Bereavement Authority of Ontario, March, 2017, p. 8 – [www.thebao.ca/for-consumers/consumer-information-guide/](http://www.thebao.ca/for-consumers/consumer-information-guide/), p. 8].

<sup>197</sup> Young, Leslie and Russell, Andrew, “Dying Alone: Hundreds of bodies are going unclaimed in Ontario and Quebec”, Global News, February 22, 2017 – <https://globalnews.ca/news/3262664/dying-alone-more-peoples-remains-going-unclaimed-in-ontario-and-quebec/>.

- <sup>198</sup> The Office of the Chief Coroner for Ontario, Ministry of Community Safety and Correctional Services “*serves the living through high quality death investigations and inquests to ensure that no death will be overlooked, concealed or ignored*” [[www.mcscs.jus.gov.on.ca/english/DeathInvestigations/office\\_coroner/coroner.html](http://www.mcscs.jus.gov.on.ca/english/DeathInvestigations/office_coroner/coroner.html)]. In Ontario, coroners are medical doctors with specialized training in the principles of death investigation, who investigate approximately 15,000 deaths per year in accordance with section 10 of the *Coroners Act* [[www.mcscs.jus.gov.on.ca/english/DeathInvestigations/AboutDeathInvestigationsinOntario/DI\\_intro.html](http://www.mcscs.jus.gov.on.ca/english/DeathInvestigations/AboutDeathInvestigationsinOntario/DI_intro.html)].
- <sup>199</sup> The OFPS provides forensic pathology services in accordance with the *Coroners Act*, including medicolegal autopsy services for public death investigations under the legal authority of a coroner – it performs approximately 6,000 autopsies per year [[www.mcscs.jus.gov.on.ca/english/DeathInvestigations/AboutDeathInvestigationsinOntario/DI\\_intro.html](http://www.mcscs.jus.gov.on.ca/english/DeathInvestigations/AboutDeathInvestigationsinOntario/DI_intro.html)].
- <sup>200</sup> No person is, by law, required to claim a dead human body, except a local municipality acting on a direction of The Office of the Chief Coroner, the Regional Supervising Coroner, or a designated, local coroner, pursuant to section 11 of the *Anatomy Act* [Office of the Chief Coroner, *Investigating Coroners Best Practice Guideline No. 3 – Management of Unclaimed Body*, Memorandum No. 10-04, Issued: March 11, 2010, p. 5 (“*OCC Guidelines*”)].
- <sup>201</sup> Pursuant to the *Trillium Gift of Life Network Act*, R.S.O. 1990, c. H. 20.
- <sup>202</sup> The *Anatomy Act*: (a) at section 1, defines both a “*general inspector*” and “*local inspector*”; and (b) at sub-section 3(1), reads: “*Subject to the Coroners Act, the person having possession of the body of a deceased person that, (a) is unclaimed by a relative or friend within twenty-four hours after the death; and (b) has not been or will not be used for a purpose authorized under the Human Tissue Gift Act, shall notify the local inspector and shall furnish the local inspector with such information respecting the deceased person as is within the knowledge of the notifier and as the local inspector may require.*” Sub-section 3(2) deems the “*local inspector*” to assume control of the unclaimed body on such notice and, if so, the body may still be claimed by “*a relative for disposition or by any other person who gives an undertaking to dispose of the body*”, per sub-section 3(3). If “*doubt exists*” whether a relative or friend, who has given an undertaking to dispose of the body, is entitled to claim a body, the claimant may apply for a prescribed order by the Ontario Court of Justice [*Anatomy Act*, s. 6; O. Reg. 263/99, s. 1].
- <sup>203</sup> A “*death investigation*” may be undertaken if, pursuant to section 10 of the *Coroners Act*, any person has reason to believe the deceased died as a result of, or under, those prescribed conditions or circumstances.
- <sup>204</sup> *Anatomy Act*, ss. 12(1) and (2). A “*private morgue*” is a “*place where bodies are customarily retained before their disposition, other than a public morgue*” [*Anatomy Act*, s. 1], defined as a “*place under the control and management of a municipal corporation where bodies are retained before their disposition*” [*Anatomy Act*, s. 1].
- <sup>205</sup> *Anatomy Act*, ss. 12(1) and (2). If an unclaimed body is, by the initial direction of the Regional Supervising Coroner, stored in a public or private morgue for a period of fourteen days or more, the morgue must contact the Regional Supervising Coroner for further direction [*OCC Guidelines*, p. 2].
- <sup>206</sup> *OCC Guidelines*, p. 2.
- <sup>207</sup> Pursuant to the hospital’s authority under the *Public Hospitals Act*. The MCSCS defines a “*claimant*” as “*a person or organization that is prepared to assume responsibility for disposition i.e. friend, colleague, neighbour, charitable organization, religious institution*” and may be “*anyone who wants to claim the body for burial or cremation*”, provided that a claimant is not necessarily responsible for financially incurring the expense of the funeral, burial or cremation - claimants need not be blood relatives, either [[www.mcscs.just.gov.on.ca/English/DeathInvestigation/UnclaimedBodies/unclaimedbodies.html](http://www.mcscs.just.gov.on.ca/English/DeathInvestigation/UnclaimedBodies/unclaimedbodies.html)]. The MCSCS also defines a “*potential claimant*” as “*a person who could lawfully claim the body but has not given an undertaking as per Section 3(3)*” [*OCC Guidelines*, p. 2].
- <sup>208</sup> *Anatomy Act*, s. 11: “*Duty of municipality to bury 11. Subject to this Act, any unclaimed body found within the limits of a regional municipality or of a local municipality that is not situated within a regional municipality shall, at the request of the local inspector or, where there is no local inspector appointed under subsection 2 (2), of a coroner, be disposed of at the expense of the corporation, but the corporation may recover the expense thereof from the estate of the deceased or from any person whose duty it was to dispose of the body*”; [www.mcscs.jus.gov.on.ca/English/DeathInvestigations/UnclaimedBodies/unclaimedbodies.html](http://www.mcscs.jus.gov.on.ca/English/DeathInvestigations/UnclaimedBodies/unclaimedbodies.html).
- <sup>209</sup> [www.mcscs.just.gov.on.ca/sites/default/files/content/mcscs/docsec095460.pdf](http://www.mcscs.just.gov.on.ca/sites/default/files/content/mcscs/docsec095460.pdf). The “*Checklist*” will be provided to the Regional Supervising Coroner “*in case where, despite best efforts, no claimant could be located*” and to “*assist the Regional Supervising Coroner with the necessary information when considering municipal disposition*” [[www.mcscs.jus.gov.on.ca/English/DeathInvestigations/UnclaimedBodies/unclaimedbodies.html](http://www.mcscs.jus.gov.on.ca/English/DeathInvestigations/UnclaimedBodies/unclaimedbodies.html)].

- <sup>210</sup> For example, records and information from: social workers, family or attending physicians, medical clinics, the municipality in which the deceased resides, or has resided (through the “*Social Services department*”), pharmacies, foreign consulates, religious affiliations and other “*hospitals, facilities or agencies which may have provided services to the deceased*”, such as veterans’ and aboriginal/First Nations’ affairs, the Children’s Aid Society, police or EMS, social services (Ontario Works, ODSP, etc.), The Office of the Public Guardian and Trustee and community organizations, including for mental health or shelter services [OCC Guidelines, p. 5; [www.mcscs.jus.gov.on.ca/English/DeathInvestigations/UnclaimedBodies/unclaimedbodies.html](http://www.mcscs.jus.gov.on.ca/English/DeathInvestigations/UnclaimedBodies/unclaimedbodies.html)].
- <sup>211</sup> Upon being notified of an unclaimed body, the Regional Supervising Coroner or designated, local coroner will assess whether a coroner’s death investigation will be initiated based on the manner of death being within the criteria established by section 10 of the *Coroners Act*, noting that a body merely being unclaimed does not, without more, meet the test in section 10 for a death investigation [OCC Guidelines, p. 2].
- <sup>212</sup> *Anatomy Act*, ss. 12(1).
- <sup>213</sup> *Anatomy Act*, ss. 3(3). The OCC defines an “*undertaking*” as “*a solemn and binding promise to perform an act within a specified time frame. A declaration of interest or a statement of intent, without subsequent action to claim the body, is not an undertaking*” [OCC Guidelines, p. 1].
- <sup>214</sup> The Regional Supervising Coroner will manage the disposition of the unclaimed body, including: (a) reporting to the OCC; (b) directing for the transfer or storage of the unclaimed body; and (c) delegating responsibility in the case, or specific requirements, to the local, investigating coroner [OCC Guidelines, p. 3].
- <sup>215</sup> OCC Guidelines, p. 4.
- <sup>216</sup> The OCC’s internal guidelines for unclaimed bodies stipulate that the time period for the process, from being initially notified by the local police or hospital, for example, that no known potential claimant has been located to the time when the Regional Supervising Coroner directs the local municipality to dispose of the body, is “*expected to take 1-2 business days; and, the municipality is expected to act within 1-2 business days of receipt of the Form 6 – Report and Warrant to Dispose of an Unclaimed Body*” [OCC Guidelines, p. 4].
- <sup>217</sup> *Anatomy Act*, ss. 4(1). The school must dispose of the body at its own expense after it has served the purpose for which it was received, but must notify the OCC, or its designate, before the disposal [*Anatomy Act*, ss. 7]. The “*schools*” approved to receive an unclaimed body for anatomical dissection are prescribed by the *Anatomy Act*, (General) O. Reg. 21.
- <sup>218</sup> OCC Guidelines, p. 4.
- <sup>219</sup> In the City of Kawartha Lakes, Ontario (“CKL”), for example, the average expense paid by the municipality for disposing of an identified, unclaimed body (burial only) is \$2,500, generally comprising the purchase of a lot, casket, burial service and a brief gravesite service by the attending funeral establishment, which expense the CKL will attempt to recover if the deceased’s identity is known and subject to discovery of any assets held by the deceased. If the deceased’s identity is unknown, the municipality may be unable to recover any expense, including by applying for the CPP death benefit utilizing the death certificate for the deceased.
- <sup>220</sup> While the OPGT may not be required to claim a body and/or manage arrangements for the disposition of the unclaimed body, if the OCC contacts or refers the body to the OPGT, which does not claim the body, the OCC will designate the body as unclaimed, notwithstanding “*any role the OPGT may have in the disposition of the estate of the deceased*” [OCC Guidelines, p. 6].
- <sup>221</sup> The increased income and asset exemptions for both Ontario Works and the *Ontario Disability Support Program* are summarized at <https://www.mcscs.gov.on.ca/en/mcss/programs/social/ow/improvingOW2017.aspx>, such as the increased asset limits for cash and other assets for individuals from \$2,500 to \$10,000.
- <sup>222</sup> *Decleva, supra*, note 28, para. 19.
- <sup>223</sup> *Anatomy Act*, s. 11. Per Scott W. Nettie, Registrar in Bankruptcy, in *Decleva, supra*, note 28, at paragraphs 13 and 14: “*This seems all the more correct when one considers the provisions of the Anatomy Act, R.S.O. 1990, c. A.21, and in particular s. 11 thereof. That section provides that a municipal corporation has the obligation to bury any unclaimed body within its limits, and may only look to recover the expense thereof from the estate of the deceased or any person whose duty it was to dispose of the remains. The reference to estate must be taken, in my view, to mean testamentary estate, as that would be the usual and expected context when dealing with corporeal remains... Thus, in Ontario, if there are insufficient assets to bury an undischarged bankrupt, and no person, consequently, steps forward to claim the remains, and become burdened with burial costs, the city will provide a pauper’s funeral*”.
- <sup>224</sup> FBCSA, (General) O. Reg. 30/11, ss. 53. (1) reads: “*An operator having possession of unclaimed cremated human remains that were not in the possession of the operator for the purposes of interring or scattering shall*

retain them until they are claimed or interred in a cemetery, whichever is earlier. (2) If cremated human remains are not claimed within one year from the date of cremation and if the operator has made reasonable efforts to contact the purchaser of the cremation service or the personal representative or family member of the deceased, as applicable, the operator may have the remains interred in a cemetery, including in a common lot in a cemetery. (3) If cremated human remains are claimed before they are interred under subsection (2), the operator shall refund any refundable deposit charged for the interment”.

<sup>225</sup> “Funeral establishment” is defined as a “premises established for the purpose of temporarily placing dead human bodies, and in prescribed circumstances cremated human remains, so that persons may attend and pay their respects” [FBCSA, ss. 1(1)].

<sup>226</sup> “Transfer service” means “a service to the public with respect to the disposition of dead human bodies, including the transportation of dead human bodies and the filling out of the necessary documentation with respect to the disposition of dead human bodies” [FBCSA, ss. 1(1)].

<sup>227</sup> FBCSA, (General) O. Reg. 30/11, ss. 7(2). A family member of the deceased may carry out the funeral and transfer services (except for arterial embalming), if those services are provided at no charge and/or benefit. Any burial or cremation must involve a cemetery or crematorium, respectively [“Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services”, Bereavement Authority of Ontario, March, 2017 - <https://thebao.ca/for-consumers/consumer-information-guide/>, p. 7]. To register a death, the municipal clerk must be provided: (a) a medical certificate of death (completed by the attending doctor or a coroner, identifying the cause of death); and (b) a statement of death (completed by a funeral director or family member, including personal information about the deceased, if known (e.g., family history, age at death, place of death). This may be used for medical and health research or statistics and to apply for the CPP death benefit, for example [“What to do when someone dies”, Ontario Ministry of Consumer and Government Services, February 8, 2018 - [www.ontario.ca/page/what-do-when-someone-dies#section-4](http://www.ontario.ca/page/what-do-when-someone-dies#section-4)].

<sup>228</sup> “Cemetery services” are “services provided by a cemetery operator in respect of the interment of human remains or the scattering of cremated human remains at a cemetery and includes such services as may be prescribed” [FBCSA, ss. 1(1)].

<sup>229</sup> “Crematorium services” are “services provided in respect of the cremation of dead human bodies and includes such services as may be prescribed” [FBCSA, ss. 1(1)].

<sup>230</sup> “Funeral services” are “the care and preparation of dead human bodies, the co-ordination and provision of rites and ceremonies with respect to dead human bodies and the provision of such other services as may be prescribed, but does not include cemetery or crematorium services” [FBCSA, ss. 1(1)], which are “services provided in respect of the cremation of dead human bodies and includes such services as may be prescribed” [FBCSA, ss. 1(1)].

<sup>231</sup> “Licensed services” is defined as “cemetery services, crematorium services, funeral services and transfer services and includes interment rights and scattering rights and any other services that are sold or provided by a person licensed under [the FBCSA] in the normal course of a business regulated under [the FBCSA] [FBCSA, ss. 1(1)].

<sup>232</sup> “Licensed supplies” means “caskets and markers and any other supplies that are sold by a person licensed under [the FBCSA] in the normal course of business regulated under the [FBCSA]” [FBCSA, ss. 1(1)].

<sup>233</sup> *Schara*, *supra*, note 28; *Chernichan v. Chernichan Estate*, 2001 ABQB 913, 2001 Carswell Alta 1730 (Alta. Q.B.) (“*Chernichan*”); *Hancock v. Podmore* (1830), 1 Barn. & Adol. 260 (“*Hancock*”); *Edwards v. Edwards* (1834) 2 Cr. & M 612 (“*Edwards*”); *Miller, Re* (1963), 43 W.W.R. 83 (BCSC) (“*Miller*”); *Shields Estate, Re* (1994), 6 E.T.R. (2d) 25 (PEITD) (“*Shields*”); *Oldfield, Re*, [1949] 1 W.W.R. 540 (Man. Q.B.) (“*Oldfield*”).

<sup>234</sup> *Sopinka*, *supra*, note 28.

<sup>235</sup> Funeral expenses should be appropriate to the estate of the deceased: *Hancock*, *supra*, note 230; *Edwards*, *supra*, note 230.

<sup>236</sup> *Estates Administration Act*, R.S.O. 1990, c. E. 22, s. 5: “Subject to section 32 of the Succession Law Reform Act, the real and personal property of a deceased person comprised in a residuary devise or bequest, except so far as a contrary intention appears from the person’s will or any codicil thereto, is applicable ratably, according to their respective values, to the payment of his or her debts, funeral and testamentary expenses and the cost and expenses of administration”; *Catto*, *supra*, note 28, paras. 51, 52 and 59; *McDougall & Brown Ltd. v. Breckon*, [1943] O.W.N. 705 (Ont. Co. Ct.) (“*McDougall*”); *Declava*, *supra*, note 28, para. 13; *Anderson*, *supra*, note 69, para. 20, per Schroeder, J.A.: “In the case at bar, if instead of being insolvent the deceased wife had left an estate sufficient to provide for payment of her funeral expenses, I would be disposed to take the view that the



foundation for the application of the old Common Law rule did not exist and that the husband should not be held liable”; *Gibbons, Re* (1899), 31 O.R. 252 (Ont. H.C.) (“*Gibbons*”); *Pearce v. Diensthuber* (1977), 81 D.L.R. (3d) 286 (Ont. C.A.) (“*Pearce*”), per Weatherston, J.A.: “From the earliest times it has been held that it is the power and duty of a rightful executor or administrator to bury the deceased in a manner suitable to the estate which he or she leaves behind, and the cost of so doing is a first charge against the estate”.

<sup>237</sup> *R. v. Wade* (1818) 5 Price 621, 146 ER 713 (“*Wade*”); *Sharp v. Lush* (1879) 10 Ch. D 468, at 472 (“*Sharpe*”).

<sup>238</sup> *Pearce, supra*, note 234.

<sup>239</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, ss. 136(1); *Decleva, supra*, note 28, per Reg. S.W., at paragraph 19: “Thus, in Ontario, if there are insufficient assets to bury an undischarged bankrupt, and no person, consequently, steps forward to claim the remains, and become burdened with burial costs, the city will provide a pauper’s funeral”.

<sup>240</sup> *Decleva, supra*, note 28.

<sup>241</sup> For more detailed information regarding these extensive consumer protections incorporated into the FBCSA: Webb, Graham, “*An Overview of the Funeral, Burial and Cremation Services Act*”, Advocacy Centre for the Elderly, 2013 – [www.ancelaw.ca/appimage/file/Funeral\\_Burial\\_&\\_Cremation\\_Services\\_Act-2013.pdf](http://www.ancelaw.ca/appimage/file/Funeral_Burial_&_Cremation_Services_Act-2013.pdf); BAO, “*Consumer Information Guide, Funeral, Burial, Cremation & Transfer Services*”, March, 2017 – [www.theboa.ca](http://www.theboa.ca).

<sup>242</sup> FBCSA, ss. 29(2).

<sup>243</sup> FBCSA, s. 42 reads: “30-day cooling-off period - 42 (1) If a purchaser enters into a contract for the provision of licensed supplies and services and all of the requirements in subsection 40 (1) are met, the purchaser is entitled to cancel the contract at any time within 30 days after the day on which the last of the requirements described in subsection 40 (1) is met. Notice - (2) A purchaser may cancel a contract under subsection (1) by giving the operator written notice of the cancellation. Refund - (3) An operator who receives a notice of cancellation under subsection (2) shall, within 30 days after receiving the notice, refund to the purchaser all money received under the contract together with the amounts that are prescribed. Where contract performed - (4) Subject to section 43, subsections (1), (2) and (3) apply even though the licensed supplies and services provided for under the contract have been delivered or performed. Repossession or return of supplies - (5) Subsections 41 (4) and (5) apply with necessary modifications to a purchaser who cancels a contract under this section”; “*Consumer Protection*”, Bereavement Authority of Ontario, 2018 – <https://thebao.ca/for-professionals/cemeteries-crematoriums/consumerprotection/>.

<sup>244</sup> If the purchaser requests the operator, pursuant to a contract for the provision of licensed supplies or services and within that thirty-day period after the contract was made, to provide any of the specified supplies or services because they are required “for the disposition of human remains” or the “co-ordination and provision of rites or ceremonies in relation to human remains” [FBCSA, ss. 43(1); (*General*) O. Reg. 30/11, ss. 139(1)].

<sup>245</sup> FBCSA, ss. 43(1); “*Consumer Protection*”, Bereavement Authority of Ontario, 2018 – <https://thebao.ca/for-professionals/cemeteries-crematoriums/consumerprotection/>.

<sup>246</sup> FBCSA, ss. 44(1) reads: “Further cancellation rights - 44 (1) The purchaser under a contract for the provision of licensed supplies or services, other than interment rights and scattering rights, may cancel the contract at any time if a right to cancel under section 42 or 43 no longer applies and if the operator has not fully performed the contract”.

<sup>247</sup> FBCSA, Part V (*Consumer Protection*) [s. 27 – 50]; FBCSA, (*General*) O. Reg. 30/11, Part II (*Consumer Protection*), Division C (*Miscellaneous Consumer Protection Matters*) [s. 134 – 144]; “*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*”, Bereavement Authority of Ontario, March, 2017 - <https://thebao.ca/for-consumers/consumer-information-guide/>, p. 8; “*Consumer Rights Under the FBCSA*”, Bereavement Authority of Ontario, 2018 – <https://thebao.ca/for-consumers/647-2/>; “*Consumer Protection*”, Bereavement Authority of Ontario, 2018 – <https://thebao.ca/for-professionals/cemeteries-crematoriums/consumerprotection/>.

<sup>248</sup> FBCSA, ss. 40(1) “*Contract requirements*”; FBCSA, (*General*) O. Reg. 30/11, Division B (*Contract Requirements*) [s. 120 – 144]. For example, among other requirements, the contract with the operator must be in writing and be signed by both parties. It must be written in plain language and legibly printed in ten-point font or larger type. Any written materials must be provided in accessible formats, such as large print or audio, at no additional cost when needed to accommodate a person with disabilities. In addition, the contract must include: the name of the person who is paying for the contract (the purchaser); the name of the person for whom the supplies or services are to be provided (the recipient/the deceased); the name of the licensed operator; a

description of the supplies or services being considered and details of when and how they are to be provided by the operator; the price of each supply or service, taxes and the total price; all payment, cancellation and refund policies, including the right to cancel the contract and, for interment rights, a detailed location and description of the grave, crypt or niche and, for scattering rights, the location and description of where the scattering may occur. For both rights, the purchaser must also be provided by the operator a copy of the cemetery's or crematorium's by-laws and a certificate of interment rights or scattering rights following payment in full by the purchaser. The specific disclosure required by the operator to the purchaser "*before a contract for the sale of licensed supplies or services is entered into*" is prescribed by section 112 of the FBCSA, (General) O. Reg. 30/11. The certificate must include the name of the person who can legally authorize an interment or scattering. When an operator provides to the purchaser a detailed and current price list of the licensed supplies and services offered [FBCSA, ss. 33(1) and (2) – "*Every operator shall maintain a price list of the licensed supplies and services that are provided by the operator...*", which must also be made "*available to the public*"; (General) O. Reg. 30/11, Division E (*Price Lists and Pricing*), s. 54 and 55], it must include any package prices, minimum prices and the range of prices for interment and scattering rights, among other things. The contract must include a statement if the operator (or a representative) is receiving a commission for recommending certain supplies or services. [FBCSA, (General) O. Reg. 30/11, Division B (*Contract Requirements*) [s. 120 – 133]; Division E (*Price Lists and Pricing*) [s. 54 – 75]; "*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*", Bereavement Authority of Ontario, March, 2017 - <https://thebao.ca/for-consumers/consumer-information-guide/>, p. 8].

<sup>249</sup> S.O. 2005, c. 11.

<sup>250</sup> FBCSA, ss. 41(1) reads: "*Cancellation, unenforceable contract - 41 (1) A purchaser under a contract that is not enforceable by the operator under subsection 40 (1) may cancel the contract at any time after it is made by giving the operator written notice of cancellation. Refund - (2) An operator who receives a notice of cancellation under subsection (1) shall, within 30 days of receiving the notice, refund to the purchaser all money received under the contract together with the amounts that are prescribed. Where contract performed - (3) Subject to the regulations, subsections (1) and (2) apply even though the licensed supplies and services provided for under the contract have been delivered or performed. Repossession or return of supplies - (4) If licensed supplies were delivered under a contract that is cancelled under this section, the purchaser shall, subject to the regulations, (a) permit the supplies to be repossessed by the operator who delivered them; (b) return the supplies to the operator; or (c) deal with them in such manner as may be prescribed. Reasonable care - (5) If a purchaser cancels a contract under this section, the purchaser shall take reasonable care of the licensed supplies delivered to the purchaser under the contract for the prescribed period.*" With respect to payment options, a purchaser may preplan final arrangements without prepaying. Generally, providers will maintain a record of the plans without cost.

<sup>251</sup> If a purchaser elects to prepay, a contract must be entered with the operator. There are two ways to prepay for final arrangements: firstly, the purchaser may pay the operator and the payment must be held "*in trust*" by a bank, trust company or independent trustee (whereby the prepaid money will earn income until the final arrangements are needed, which accumulated income will be used to offset any increase in the cost for the final arrangements) or, secondly, the purchaser may buy insurance from an insurance company, which may include an operator. The operator must give the purchaser a contract specifying the total amount of money paid by the purchaser and the terms of payment for any balance owed by the purchaser - if a purchaser prepays with a licensed funeral home, funeral establishment or transfer service, the funds are protected by a prescribed compensation fund, available to "*compensate a person who suffers a financial loss due to a failure on the part of a licensee to comply with this Act or the regulations or with the terms of an agreement made under this Act*" [FBCSA, Part VII, ss. 51(1) and (2)]. If money is deposited in trust for prepaid services or supplies, the operator is required by law to only have it in very safe investments (and the purchaser is entitled to request the operator once each year where and how the money is invested and how much money the purchaser holds in the trust account). If a purchaser buys an insurance policy to fund a contract and pays the insurance company directly, the money is protected under the *Insurance Act*, R.S.O. 1990, c. I.8 ("*Insurance Act*"). If the purchaser elects to buy an insurance policy, generally the purchaser will be required to enter both: (a) an insurance contract with an insurance company; and (b) a prepaid contract with the operator. The insurance contract must specify manner of cancellation, fees payable and refund rights, among other things. For prepaid supplies or services, if prices increase, the income generated by the prepayment will be applied to offset any increase in costs. At the time of death, funeral establishments, cemetery and crematorium operators must provide a statement showing either: (a)

how much money an insurance policy will pay for the costs of final arrangements; or (b) how much money is held in trust (including income earned) and the cost of the supplies or services requested by the purchaser at the time they are delivered. For prepaid contracts made on or after July 1, 2012, a purchaser's estate trustee will not be required to pay more for the services or supplies the deceased purchaser requested, except for any balance that may still be owing under the contract. However, any services or supplies that are requested, but not included in the prepaid contract, will require payment. For prepaid contracts made before July 1, 2012, the purchaser's estate trustee may be required to pay more money due to increased prices, subject to the terms of the specific contract. As of July 1, 2012, all prepaid contracts must be guaranteed — the provider cannot request more money, even if the cost of delivering the supplies and services increases. If prices decrease, the cost of the supplies or services must be based on the most current price list. If that cost is lower than the amount pre-paid by the purchaser (together with the interest earned since the contract was made), entitlement to the excess depends on the date the contract was made and the laws in effect on that date. Excess funds (including accumulated interest) must be paid to the deceased person's estate or the person specified in the contract to receive the refund if: (a) the contract was signed on or after April 1, 1992 for cemetery or crematorium services; or (b) the contract was signed on or after June 1, 1990 for funeral or transfer services. Contracts made before these dates do not require any refund by the operator. A prepaid contract may be cancelled or modified by the purchaser or estate trustee at any time before the services or supplies are provided. Notice of cancellation or change must be given to the operator, in writing. The refund to which the purchaser is entitled in the event of cancellation or change to the contract depends on the amount paid, any cancellation fees and whether any supplies and services have been previously provided. As of July 1, 2012, if the purchaser cancels within thirty days of entering the contract, a full refund is required. After thirty days, the operator may keep a cancellation fee of ten *per cent* of the amount in trust, up to a maximum of \$350. If the purchaser buys, but cancels, an insurance contract, the cancellation fee or refund, if any, will depend on the terms of the insurance contract – both the *Insurance Act* and *Consumer Protection Act* may apply, including by prescribing a “cooling-off” period to cancel the insurance contract within a specified period of time [FBCSA, O. Reg. 30/11, Division B, *Contract Requirements*, s. 120 to 128; Consumer Protection Ontario, “*Pre-plan and pre-pay final arrangements. Know your rights before you preplan and prepay for final arrangements, like a funeral, burial, cremation or scattering*” - [www.ontario.ca/page/pre-plan-and-pre-pay-final-arrangements](http://www.ontario.ca/page/pre-plan-and-pre-pay-final-arrangements)].

<sup>252</sup> FBCSA, s. 38; “*Pre-plan and pre-pay final arrangements*”, Consumer Protection Ontario, July 21, 2016 - [www.ontario.ca/page/pre-plan-and-pre-pay-final-arrangements](http://www.ontario.ca/page/pre-plan-and-pre-pay-final-arrangements). However, if a licensed supply or service is no longer available, either: (a) the operator may make a reasonable substitution, but at no extra charge, where substitutions must be similar in value, style, design and construction to what is included in the pre-paid contract; or (b) the estate trustee may cancel that part of the contract by providing written authorization or may enter into a new contract with the operator [“*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*”, Bereavement Authority of Ontario, March, 2017 - <https://thebao.ca/for-consumers/consumer-information-guide/>, p. 9].

<sup>253</sup> FBCSA, ss. 79(1), (2) and (3).

<sup>254</sup> *Tsekhman v. Spero*, 2017 CanLII 1718 (ONSC) (“*Tsekhman*”), para. 30, citing with approval *McLoughlin v. Arbor Memorial Services Inc.*, [2004] O.J. No. 5003 (“*McLoughlin*”).

<sup>255</sup> The cemetery must, for example, verify the identity of the interment or scattering rights holder, update the “*Public Register*” and issue a replacement rights certificate to the new purchaser.

<sup>256</sup> FBCSA, Part V (*Consumer Protection*) [s. 27 – 50]; FBCSA, (*General*) O. Reg. 30/11, Part II (*Consumer Protection*), Division C (*Miscellaneous Consumer Protection Matters*) [s. 134 – 144]; “*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*”, Bereavement Authority of Ontario, March, 2017 - <https://thebao.ca/for-consumers/consumer-information-guide/>, p. 8; “*Consumer Rights Under the FBCSA*”, Bereavement Authority of Ontario, 2018 – <http://thebao.ca/for-consumers/647-2/>; “*Consumer Protection*”, Bereavement Authority of Ontario, 2018 – <https://thebao.ca/for-professionals/cemeteries-crematoriums/consumer-protection/>; “*Funeral, burial, cremation or scattering: your rights*”, Consumer Protection Ontario, December 5, 2017 – [www.ontario.ca/page/funeral-burial-cremation-or-scattering-your-rights](http://www.ontario.ca/page/funeral-burial-cremation-or-scattering-your-rights).

<sup>257</sup> The applicant must submit to a Service Canada Centre the “*Application for Canada Pension Plan Death Benefit (ISP1200)*” at <https://catalogue.servicecanada.gc.ca/content/EForms/en/Detail.html?Form=ISP1200>, with certified true copies of “*required documentation*”. Payment is made approximately six to twelve weeks from the date of submission.

- <sup>258</sup> [www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-death-benefit.html](http://www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-death-benefit.html). To be eligible, the deceased must have made contributions to the Canada Pension Plan (“CPP”) in the lesser of: (a) one-third of the calendar years in their CPP contributory period, but no less than three calendar years; or (b) ten calendar years.
- <sup>259</sup> The average death benefit amount paid: (a) as of January, 2016, was \$2,296.85; and (b) as of October, 2017, was \$2,299.03 and the maximum payment amount was \$2,500. For more detailed information on CPP death payments, refer to the Information Card (Rate Card) at [www.canada.ca/en/employment-social-development/programs/pensions/pension.html](http://www.canada.ca/en/employment-social-development/programs/pensions/pension.html).
- <sup>260</sup> [www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-benefit/amount.html](http://www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-benefit/amount.html).
- <sup>261</sup> Within ninety days of being notified in writing of the decision by Service Canada, an applicant may, in writing, request a reconsideration by Service Canada of a deceased’s eligibility for the death benefit or the amount paid. If the reconsideration decision is disputed, the applicant may appeal the decision to the Social Security Tribunal of Canada [[www1.canada.ca/en/sst/index.html](http://www1.canada.ca/en/sst/index.html)].
- <sup>262</sup> *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sched. A (“OWA”), s. 8 and ss. 74(4), O. Reg. 134/98, s. 55 and 59 and Directive 7.2: Health Benefits (*Funerals and Burials and Recovery of Funeral, Burial and Cremation Costs*) (“OWA, Directive 7.2”) – [www.mcass.gov.on.ca/en/mcass/programs/social/directives/ow/7\\_2\\_OW\\_Directives.aspx](http://www.mcass.gov.on.ca/en/mcass/programs/social/directives/ow/7_2_OW_Directives.aspx). The responsible municipality (or “*delivery agent*”), as territorially and geographically identified by section 2 of the OWA and O. Reg. 136/98 (*Designation of Geographic Areas and Delivery Agents*), Schedule 1, is where the recipient or benefit unit member ordinarily resided and received assistance. A “*transient or homeless person*” is deemed to reside in the municipality in which the person received assistance. The municipality in which the transient person died may be responsible for the “*costs of preparing the body and any transportation costs*”, where the family requests burial in another municipality. The municipality receiving the body is responsible for the funeral and burial and cremation costs.
- <sup>263</sup> OWA, Directive 7.2, *supra*, note 259.
- <sup>264</sup> OWA, *supra*, note 259, s. 2 and 43, subject to cost-sharing of the amount exceeding the (recommended) guideline amount, per OWA Directive 11.3: Cost Sharing.
- <sup>265</sup> In the CKL, for example, the municipality will usually pay (for an OW, ODSP or qualifying, low-income deceased) for the purchase of a cemetery lot, grave opening and closing and a service for the deceased (in consultation with the family and the funeral establishment), subject to the OWA and the municipality’s own policy for discretionary funeral benefits – the average cost of a funeral paid for by the CKL for an OW, ODSP or qualifying, low-income deceased is \$4,500. However, other municipalities have their own policies, which may provide for more or less paid on average for funeral expense.
- <sup>266</sup> If the deceased’s identity is known, his or her body is claimed and the funeral expense is both arranged by and paid for by the responsible “*delivery agent*” municipality, funded through OW, the municipality (being an “*institution that has paid for or that is responsible for paying for the funeral expenses of the deceased*” [[www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-death-benefit.html](http://www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-death-benefit.html)]), may withhold the death certificate for the deceased until Service Canada determines if the deceased is eligible for the CPP death benefit, in which case the municipality may assign or claim the benefit for itself to defray the funeral expense.
- <sup>267</sup> OWA, Directive 7.2 - both the Province of Ontario and the municipality (delivery agent) may seek recovery of the disposal expenses from “*any person or organization liable for the payment of these expenses*”, which are “*payable out of the deceased’s person’s estate in priority to any other charge on the estate.*” In addition to seeking recovery from “*the person responsible for administering the estate (i.e., the executor if one is appointed under a will or a court appointed administrator)*”, the delivery agent may also seek recovery by assignment of benefits from CPP or Old Age Security (“OAS”) benefits for which the deceased is eligible.
- <sup>268</sup> *Davey v. Cornwallis* (1930), 39 Man. R. 259 (Man. C.A.) (“*Davey*”) [coroner recovered funeral expenses for an unclaimed body from the local municipality].

- <sup>269</sup> The *Public Hospitals Act*, section 25 reads: “*In the event of the death in a hospital of a patient who is an indigent person, or the dependent of an indigent person, the municipality in which the patient was a resident at the time of the patient’s admission shall pay to the hospital any expenses of his or her burial that it incurs*”, subject to, by section 27, the municipality’s right to recovery “*from the patient, or, in the event of the patient’s decease, from his or her estate or personal representatives, or, in the case of a dependent, from any person liable in law with respect to the dependent, the amount of the payment so made, and the same may be recovered as a debt in any court of competent jurisdiction*”.
- <sup>270</sup> FBCSA, (*General*) O. Reg. 30/11, ss. 188(1) and (2). A “*delivery agent*”, for a geographic area, is the delivery agent designated by the Ministry of Community and Social Services to administer the OWA and provides assistance in that area [OWA, s. 2].
- <sup>271</sup> The *Crown Administration of Estates Act* confers the right to the OPGT to apply to administer certain estates.
- <sup>272</sup> *Anderson, supra*, para. 21; *Chernichan, supra*, note 230; *Pierce, supra*, note 233; *Routta v. Routta*, [1955] 1 D.L.R. 627 (N.B. Co. Ct.) (“*Routta*”); *Hunter, supra*, note 28.
- <sup>273</sup> *Pearce, supra*, note 233; *Taymaz v. Enache, Pescar and Marius Enache (Estate of)* (September 28, 2017), Doc. SC-16-00140902-0000; SC-16-00140902-00D1 (ONSC) (“*Taymaz*”); *Catto, supra*, note 28, para. 59.
- <sup>274</sup> The Last Post Fund (“LPF”) is supported financially by Veterans Affairs Canada and private donations. The LPF aims to “*ensure that no Veteran is denied a dignified funeral and burial, as well as a military gravestone, due to insufficient funds at time of death*” by delivering the *Veterans Affairs Canada Funeral and Burial Program*, which provides funeral, burial and grave marking benefits for eligible Canadian and Allied Veterans. The LPF has also created the *Unmarked Grave Program*, intended to provide military markers for unmarked Veterans’ graves. The LPF national office is located at Montreal and it also operates from centres located in Halifax and Toronto [www.lastpostfund.ca].
- <sup>275</sup> The best information available from the BAO is based on license renewals, whereby licensed operators declare the total number of services undertaken in the preceding year, categorized by: (a) cremations; (b) body (casket) burial; and (c) burial of cremated remains or scatterings at cemeteries. This BOA statistical data does not account, for example, for: (i) cremated remains retained by family members/claimants (*i.e.*, not buried or scattered at cemeteries); (ii) cremated remains buried or scattered not within cemeteries; and (iii) remains cremated outside Ontario, but buried within Ontario. The BOA’s most recent data indicates that, in 2016, 58,001 non-interment cremations were undertaken and, with respect to cemeteries: (a) there were 33,416 body burials; and (b) 27,803 cremation interments (a total of 61,219) – comparatively: 49% by cremation only and 51% by burial of a body or cremated remains at cemeteries.
- <sup>276</sup> Burial, for example, results in significant formaldehyde-based embalming fluid, steel, concrete and hardwood deposited in cemeteries annually. Alternatively, cremations require high energy and resource consumption and emit toxicity, such as carbon monoxide, fine soot, sulfur dioxide, heavy metals and mercury from dental fillings [“*Burying dead bodies takes a surprising toll on the environment*”, Julia Calderone, Tech Insider, Nov. 4, 2015 - www.businessinsider.com/burying-dead-bodies-environment-funeral-conservation-2015-10/#the-embalming-process-is-toxic-1; “*Could the Funeral of the Future Help Heal the Environment?*”, Erin Blakemore, Smithsonian.com, Feb. 1, 2016 - www.smithsonianmag.com/science-nature/could-funeral-future-help-heal-environment-180957953/].
- <sup>277</sup> A “*natural burial*” is the act of returning a body as naturally as possible to the earth. The body is neither embalmed nor cremated, but rather interred by non-conventional, “*low impact*” (simple, biodegradable) casket or shroud in a protected green space, aiming to reduce energy, resource consumption and toxicity, ordinarily without a fabricated, individual marker, but rather communal memorials or natural markers. Interred remains are located by GIS, GPS or trackable microchip. Only three natural burial services in Ontario are recognized by the Natural Burial Association in Cobourg, Pickering and Brampton [naturalburialassoc.ca; greenburialcanada.ca].
- <sup>278</sup> For both cremation or alkaline hydrolysis, the deceased’s body or skeletal remains are reduced to an ash or granular substance. Commonly the remains are placed in a small receptacle or urn, together with a metal identification tag. The consumer may provide the urn or purchase it from the operator, subject to the crematorium and cemetery by-laws for the type and size of container allowed. An operator is permitted to store remains for up to one year and may charge a deposit for this service. If the remains are claimed within one year, the deposit will be refunded in full. After one year, the operator may use the deposit to inter the remains in the common grounds of a cemetery [“*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*”, Bereavement Authority of Ontario, March, 2017, p. 8 - https://thebao.ca/for-consumers/consumer-information-guide/]. Specifically, alkaline hydrolysis ultimately yields: (a) sterile liquid (subject to provincial

and, in particular, municipal requirements for disposal); and (b) bone ash, which is intended to avoid potentially harmful airborne particle emissions, mercury release from dental amalgam and high energy consumption (carbon emission) caused by conventional flame cremation. [McClurg, Lesley (July 24, 2017) “*Want to Cut Your Carbon Footprint? Get Liquefied When You're Dead*”; Cohen, Jeremy (November 17, 2015) “*Bio Cremation: A Greener Way To Die?*”; resomation.com; en.wikipedia.org/wiki/Alkaline\_hydrolysis\_(body\_disposal); beyond.life/blog/everything-need-know-resomation/].

<sup>279</sup> One of the five crematoria operators in Ontario currently offering this alternative disposal method is under suspension by the BOA pending a hearing [<https://theboa.ca/immediate-license-suspension-hiltons-aquagreen-dispositions-inc/>]. The process may also be referred to as “*resomation*”, being merely a brand name or trademark developed by Resomation Ltd., a business originating in Scotland.

<sup>280</sup> These alternative methods, if permitted, would have to be conducted in a “*crematorium*”, which is “*a building that is fitted with appliances for the purpose of cremating human remains and that has been approved as a crematorium or established as a crematorium in accordance with the requirements of this Act or a predecessor of it and includes everything necessarily incidental and ancillary to that purpose*”, at which “*crematorium services*” are provided, which are “*services provided in respect of the cremation of dead human bodies and includes such services as may be prescribed*” [FBCSA, ss. 1(1)]. Sub-section 1.1(2) of the FBCSA also stipulates that the same provisions applying to cremation and related services apply to “*alternative processes and methods of disposing of human remains*” and the licenced establishments offering those alternatives.

<sup>281</sup> “*Promession*” (also a trade name only), another process not expressly contemplated by the FBCSA, but which could potentially comply, involves freeze-drying the body with liquid nitrogen, using high-amplitude vibrations to shatter it, creating a dry powder, which is sifted through a metal separator that removes mercury and metal parts. [en.wikipedia.org/wiki/Promession; “*The green final frontier: eco-burial*”, The Globe and Mail, Mar. 3, 2010 - [theglobeandmail.com/report-on-business/small.../sb.../article4309322/](http://theglobeandmail.com/report-on-business/small.../sb.../article4309322/); promessa.se].

<sup>282</sup> The body is frozen by liquid nitrogen, fragmented and foreign matter is removed, yielding sterile, granular, non-toxic powdered remains, a process which reportedly reduces, or minimizes, carbon dioxide, mercury and other conventional effluents, while creating granular remains capable of being disposed with minimal space and toxicity impact [irtl.co.uk].

<sup>283</sup> Saskatchewan – *Funeral and Cremation Services Act*, RSS 1999, c F-23.3, s. 91; Alberta – *General Regulation (Funeral Services Act)* Alta Reg. 226/1998, s. 36 and *General Regulation*, Alta Reg. 249/1998, “*Who may control disposition*”, s. 11; British Columbia – *Cremation, Interment and Funeral Services Act*, SBC 2004, c. 35, “*Control of disposition of human remains or cremated remains*”, ss. 5(1) – (3), which also, at section 1, defines “*spouse*” to include *de facto* spouses and common law spouses. In a 1991 report on a review of the law governing the administration of estates of deceased persons, the Ontario Law Reform Commission recommended that, as a general rule, the duty of disposal should fall upon the estate trustee appointed by the deceased [Ontario Law Reform Commission, *Administration of Estates of Deceased Persons, Report* (1991) 37, Rec. 22(1)]. Interestingly, the Commission also recommended [at 37-8, Rec. 22(2)] that, if no estate trustee has been named in the will or appointed by the Court, or if the estate trustee is unavailable or unwilling to act, the family members should have the duty to dispose of the body of the deceased in accordance with the following order of priority: the surviving spouse with whom the deceased was living at the time of death; an adult child of the deceased; the parents of the deceased; an adult brother or sister of the deceased. These recommendations have not been enacted in Ontario.

<sup>284</sup> *General Regulation*, Alta Reg 226/1998, ss. 36(2); *Cremation, Interment and Funeral Services Act*, SBC 2004, c. 35, ss. 5(1). For example, in Alberta, a crematorium operator is prohibited from delivering cremated remains in more than a single container or to more than one person without the written authorization of the person the operator believes on reasonable grounds has authority to control the disposition of the cremated remains [*Crematory Regulation*, Alta Reg 248/1998, ss. 5.2(2)]. In Saskatchewan, the deceased’s ashes must not be disposed of by the crematorium in any manner other than as directed by the person who has the right, under the statutory order of priority, to control the disposition of the deceased’s human remains: *Funeral and Cremation Services Regulations*, c F-23.3, Reg. 1, ss. 29(1)(b); *Funeral and Cremation Services Act*, RSS 1999, c F-23.3, s. 91.

<sup>285</sup> *Cremation, Interment and Funeral Services Act*, SBC 2004, c. 35, “*Control of disposition of human remains or cremated remains*”, ss. 5(2).

<sup>286</sup> *Cremation, Interment and Funeral Services Act*, SBC 2004, c. 35, “*Control of disposition of human remains or cremated remains*”, ss. 5(3).

---

<sup>287</sup> *Cremation, Interment and Funeral Services Act*, SBC 2004, c. 35, “Control of disposition of human remains or cremated remains”, ss. 5(4), (5).

<sup>288</sup> *Edmonds v. Armstrong Funeral Home Ltd.*, [1931] 1 D.L.R. 676 (A.C.A.) [action for trespass and damages for wrongful disposition of the deceased]; Larsen, Michael, “*Can an Executor be Held Liable for Not Following the Burial Wishes of a Deceased Person?*”, September 21, 2017 – [www.cwilson.com](http://www.cwilson.com).

<sup>289</sup> Fortuitously the same day as the 2018 *Qingming Festival*, also known as “*Ancestors Day*” or “*Tomb-Sweeping Day*”, a Chinese national holiday believed to have originated in A.D. 732 during the reign of Tang emperor Xuanzong, to honour and respect the dead, particularly those who died during significant events in China’s history, often by attending and cleaning their burial sites and tombs and offering foodstuffs, tea and joss paper.