

M A N I T O B A) Order No. 108/06
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THE PUBLIC UTILITIES BOARD ACT)
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THE CEMETERIES ACT)
)
THE PREARRANGED FUNERAL SERVICES ACT) July 18, 2006

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

RECONSIDERATION OF ORDER NO. 20/06 WHICH
APPROVED AN APPLICATION FILED BY NEIL BARDAL
INC.

Executive Summary

By this Order, the Public Utilities Board (Board) reconfirms its decisions of Order 20/06 which, among other matters, approved an expansion of Neil Bardal Inc.'s (NBI) Notre Dame crematorium to enclose an existing scattering garden (Rose Garden) for cremated human remains (cremains).

The Board's approval remains subject to a number of conditions set out in Order 20/06; Order 20/06 also provided direction with respect to the storage and disposal of cremains, and these directions are reconfirmed as well. Accordingly, the directions of Order 20/06 remain in place and operative.

This Order follows the *de novo* Board hearing of June 15, 2006, held to reconsider Board Order 20/06. The hearing was held pursuant to Section 44 of *The Public Utilities Board Act* in response to concerns expressed by, in particular, Memorial Gardens Canada Ltd. (Memorial) and Rosewood Memorial Gardens (Rosewood).

This Order should be read in conjunction with Board Order 20/06, which contains detailed and relevant background and rationale. Order 20/06 may be obtained from either the Board's Office or website, www.pub.gov.mb.ca. The oral record of the hearing, which was taped, and the exhibits entered into the record may be accessed through the Board's office.

Reconsideration Hearing

The hearing was held on June 15, 2006 in the Board's Winnipeg hearing room. The following parties were represented, through letters, emails and/or oral presentations:

1. Rosewood, by email of June 7, 2006 and letters dated February 20 and May 3, 2006;
2. Vital Statistics Agency, by letter dated June 13, 2006;
3. Manitoba Funeral Services Association (MFSA), by letter dated June 11, 2006 and a record of a telephone conversation between Board staff and MFSA of June 14, 2006; and
4. Oral and/or written presentations at the hearing provided by representatives of:
 - i) Alderwoods Group (Alderwoods);
 - ii) Memorial;
 - iii) Western Canadian Cemetery Association (WCCA); and
 - iv) NBI.

Mr. Bob Peters of Fillmore Riley LLP represented the Board.

The hearing was taped for future reference; the following Exhibits were accepted into the record:

- a) Notice of Hearing;
- b) name and address list of Notice recipients; and
- c) copies of written presentations submitted at the hearing by Alderwoods, Memorial and WCCA, and letters and emails received by the Board in advance of the hearing.

Copies of the exhibits were shared with those in attendance on June 15, 2006.

During and following oral presentations by those present, the Board facilitated an exchange of views contributing to the Board's reconsideration.

Submissions

Manitoba Funeral Services Association (MFSA):

In advance of the hearing, MFSA advised the Board that it had not received direct notice of the hearing. Though then invited to attend the hearing, MFSA declined and indicated that it would be appreciated if, arising out of the hearing, the Board provided guidelines for the establishment of scattering gardens for cremains.

The Board advised those present at the hearing of MFSA's letter and comments, noting that while the MFSA did not initially receive a copy of the Notice members of the Association had (including members from the firms represented in person at the hearing). No objection was raised to the hearing proceeding in the absence of MFSA.

Alderwoods Group - represented by Mr. Barry Tuck:

Mr. Tuck reported that Alderwoods owned approximately 640 funeral homes, 130 cemeteries and 70 crematories in North America, including five funeral homes, three cemeteries and a crematorium in

Manitoba. Mr. Tuck noted that Alderwoods had responded to the Board's invitation for comments on Order 20/06 within the 45 day suspension period; his presentation on behalf of Alderwoods was consistent with the views then-expressed.

Alderwoods' opposition to Order 20/06 was based on its opinion that NBI's Rose Garden is, in fact, an unlicensed cemetery. Alderwoods opined that the Board erred in approving NBI's application, an action it attributed to an attempt by the Board to address storage problems associated with unclaimed cremains.

Alderwoods accepted that *The Cemeteries Act* (Act) authorizes a crematorium to dispose of unclaimed ashes, but held that the scattering of cremains in the Rose Garden is inappropriate and unlawful, even if authorized by the family of the deceased.

Alderwoods opined that the Act's failure to specifically define cremains as "other human remains" within the phrase "dead human bodies or other human remains" contained within the Act does not allow for cremains to be scattered in NBI's Rose Garden, which is not licensed as a cemetery. Alderwoods noted the Act's reference to "land that is set apart" as constituting an element of a cemetery and opined that the definition of cemetery pertains to the Rose Garden.

Alderwoods stated that Order 20/06 inappropriately provided NBI with the rights and privileges of a cemetery, without the responsibilities - an exception Alderwoods opined was not permitted in law.

Alderwoods also opined that Order 20/06 is not in the public interest, claiming, notwithstanding NBI's pledge to inform its clients and prospective clients of the impermanence of the Rose Garden, families of cremated deceased expect permanency from a "final resting place". Alderwoods held that families of deceased humans whose cremains had been spread in the Rose Garden would not understand the Rose Garden's impermanent status and, believing the Rose Garden to be a cemetery, may later launch lawsuits if and upon the Rose Garden being relocated.

Alderwoods sought the revocation of Order 20/06, suggesting the Act be revised to bring clarity to many issues, including the matter of cremains and the disposal of cremains, and called for the involvement of the funeral and cemetery industry in a preceding review.

Memorial Gardens Canada Ltd. - represented by Mr. Andrew Earle:

Mr. Earle advised that Memorial owns one crematorium, three cemeteries and four funeral homes in Manitoba. Mr. Earle stated that cremains placed within its cemeteries are dealt with in accordance with *The Cemeteries Act*, with a portion of the price charged for the service deposited within the perpetual care trust account to meet the needs for future grounds maintenance. Mr. Earle noted that as NBI will not be allowed to charge a fee for scattering cremains in the Rose Garden, pursuant to Order 20/06, there will be no funds required to be set aside for perpetual care.

Memorial indicated no opposition to NBI's Rose Garden, per se, but only if it is licensed as a cemetery subject to *The Cemeteries Act*.

Memorial contested Order 20/06 on the following grounds, opining the Board erred:

- (a) in its interpretation of the definition of "cemetery" as found in *The Cemeteries Act (Act)* and *The Cemeteries, Crematories and Perpetual Funds Regulation 382/87* (regulation). In particular, Memorial submitted that the Board erred in concluding that the term "human remains" does not include cremains and, also, in determining that NBI's Rose Garden is not a cemetery;
- (b) in concluding that the Rose Garden is not land "set apart or used" as a place for the burial of dead human bodies or other human remains, or in which dead human bodies or other human remains have been buried; and
- (c) in concluding that the Act authorizes a crematory to dispose of ashes anywhere at its discretion two years after cremation.

While Memorial granted that cremains are not specifically identified as "human remains" in the Act, Memorial held that the Board's contention in Order 20/06 that "human remains" as defined in the Act does not include cremains is inconsistent with the overall language and intent of the Act. Memorial supported its opinion with a reference to Sub-section 6(2) of the Regulations.

"Disposal of unclaimed remains

6(2) Where, within a period of two years after the cremation of a dead human body,

- (a) the remains are not claimed by the person arranging for the cremation of any other person entitled to claim them;
- (b) no person has paid for any other disposal of the remains; and
- (c) no written agreement, containing a specific provision as to the disposal of the remains, has been made between the

owner or operator of the crematory and either the person arranging for the cremation or any other person entitled to claim the remains;
on the expiration of that period the owner or operator of the crematory may, at his or her discretion, dispose of the remains."

Memorial opined that 6(2) links cremains to "human remains", and this supports its argument that cremains are human remains and should not be interred or spread in NBI's Rose Garden. Memorial further supported its argument by referencing the provincial legislation of other provinces, thereby suggesting that such legislation made cremains synonymous with human remains.

Memorial supported Alderwoods' contention that the repeated and intended repeated use of NBI's Rose Garden with respect to the spreading of cremains establishes the Rose Garden as "land that is set apart" for the purpose of operating a cemetery. Memorial noted Ontario practice, where, it claimed, land used for multiple dispositions must be established as a cemetery.

Memorial stated that the conditions and expectations placed on NBI by Order 20/06, including the required commitment to relocate the Rose Garden to a cemetery if crematorium operations cease, suggest the Rose Garden is considered a cemetery by the Board and that Order 20/06's requirements with respect the long term care of the Rose Garden are tantamount to the Board's recognizing that NBI is operating a cemetery with its Rose Garden.

For Memorial, the conditions established by the Board by Order 20/06 do not sanction the Rose Garden operating as a cemetery.

Memorial agreed with Alderwoods that though it is lawful for a crematorium to dispose of unclaimed ashes after two years, this does not justify NBI operating its Rose Garden as a cemetery. As well, Memorial held that Order 20/06 fails to protect the final resting place for cremains - a protection the general public is entitled to expect and *The Cemeteries Act* provides for.

Western Canada Cemetery Association (the WCCA) - represented by Mr. Paul Welechenko:

Mr. Welechenko advised that WCCA is comprised of cemetery operators from the four western provinces, and that in Manitoba, the Association has 28 cemetery members. The WCCA opined there are legal, moral and religious laws and traditions requiring human remains, including cremains, to be afforded dignity and respect.

Notwithstanding Order 20/06's requirement that NBI advise clients and prospective clients there is no permanency assurance with the Rose Garden, WCCA expects families will still expect permanency. The sense of expected permanency would be reinforced if memorials were allowed and placed. For WCCA, NBI's Rose Garden is a cemetery, as it is the method of disposition of human remains and the "memorialization" of the deceased that distinguishes a cemetery.

WCCA sees the relocation of the Rose Garden as inevitable, and views Order 20/06 as worsening the scenario of limited perpetual care funds, since no funds are required to be set aside for the eventual Rose Garden relocation or for the future cost of perpetual care at a cemetery once the relocation occurs.

Similarly to the positions of Alderwoods and Memorial, WCCA opined the only way to provide permanency of the final resting place is through the scattering of cremains in cemeteries. WCCA held that NBI should only operate the Rose Garden as a cemetery, subject to *The Cemeteries Act*. WCCA argued that there is no public benefit in providing this disposal option, and suggested that NBI alone will benefit.

As to the problem of unclaimed ashes, WCCA holds that proper management can occur through good relationships with the families of the deceased, and that unclaimed ashes is not a justification for Order 20/06's sanction of NBI's Rose Garden.

Rosewood Memorial Gardens (Rosewood):

By an email dated June 7, 2006, Rosewood advised of its inability to attend the hearing and summarized concerns previously expressed in letters dated February 20 and May 3, 2006, as quoted verbatim below:

1. *Regardless of how anyone may define "other human remains" most Manitoban's (sic) who choose cremation feel cremated human remains deserve the respect given to other human remains and freely choose to inter or place them in permanent public or private cemeteries.*
2. *The Cemeteries Act was established to, among other things, protect the permanency of privately operated burial grounds.*
3. *Neil Bardal Incorporated is a private business that by its own admission is seeking to establish a "sacred resting place" for the burial and memorialization of cremated remains, as established private and public cemeteries provide, without the*

burden of the permanency, perpetual care, and other requirements of the Cemeteries Act.

4. *The Board's claim that the Order was necessary to provide reasonable options to consumers is invalid in that there already exists in the public, charitable, and private sectors numerous low and no cost options for the burial, storage, scattering or disposal of cremated remains.*
5. *Contrary to the public interest the Order opens the door for other private enterprises to provide nonpermanent burial grounds for cremated remains without regulation and oversight provided by The Cemeteries Act.*

Rosewood suggested the Board's determinations of Order 20/06 were driven by inexperience and a bias against private cemeteries, and inferred the manner of appointments to the Board did not provide for a qualified tribunal.

Rosewood suggested that the effect of Order 20/06 is that any unregulated business may bypass *The Cemeteries Act* and the jurisdiction of the Board and simply operate a commercial enterprise for the burial of cremated human remains on an area of land without the obligations imposed on for-profit cemeteries.

In short, Rosewood opposed Order 20/06 and sought its reversal. Rosewood supported a comprehensive legislative review of all enactments pertaining to these matters.

Vital Statistics Agency (Agency):

By letter, the Agency advised that Order 20/06 was consistent with the manner registrations of death and requests for disinterment are

handled under The Vital Statistics Act and the Regulations of *The Public Health Act*, stating verbatim:

"Death registration after cremation includes information on the funeral director and crematorium but does not require information on disposition of cremated remains. Information on disposition of non-cremated bodies is provided through the registration of death and through cemetery returns.

Approval for disinterment of cremated remains is not restricted through any process. A request for approval for disinterment of bodies is required before a body can be moved."

Though Notice of the reconsideration hearing and previously the issuance of Order 20/06 were circulated to other government departments, Vital Statistics provided the only response from government.

Neil Bardal Inc. (NBI) - represented by Mr. Neil Bardal and Counsel, Mr. Cyril Labman:

NBI referenced Section 19 of *The Cemeteries Act* and Section 5 of the Regulations, as support for its view that the Board had the appropriate jurisdiction to hear and adjudicate its application. NBI cited Section 19 of *The Cemeteries Act*, which sets out the licensing requirements of owners of crematoriums, and noted Section 5 of the Regulation, quoting as follows:

"Changes to be approved

5. No owner or operator of a crematory shall alter or vary

- (a) the crematory or the equipment in the crematory; or
- (b) the method of operation of the crematory or the facilities or equipment for the cremation of human

bodies or the disposal of ashes remaining from the cremation of human bodies; unless he or she has obtained approval therefor from the board."

NBI suggested that it was evident from Order 20/06, a 43 page decision, that the Board had carefully considered NBI's application and the implications related thereto. NBI also held that Order 20/06 serves the public interest. NBI also opined the Board was correct in determining that the Rose Garden was not a cemetery, stating that NBI's proposal represented no more than a private landowner providing permission for the scattering of cremains on its land.

NBI suggested that industry opposition to Order 20/06, as evidenced by Memorial, Alderwoods and Rosewood, related to the view that NBI's plans represent an unfair business practice. In short, approval of the expansion provides NBI with a competitive advantage over licensed cemeteries. Contrarily, for NBI, Order 20/06 represents the Board's overriding concern for the public interest, not the financial interest of cemeteries, or NBI. NBI observed that opposition to Order 20/06 as represented at the hearing comprised only the cemetery industry; no other party was present to raise an objection.

NBI argued that the conditions set out in the Order protect the public interest and respond appropriately to concerns expressed in opposition to the Order. NBI submitted that the Board made no error with respect to its interpretation of the law, that the Board had the authority to make the Order, and opined the Order should neither be vacated nor varied.

Background

In December 2005 NBI requested the Board's approval of plans to expand its Notre Dame crematorium, enclose an outdoor Rose Garden, and erect of a "wall of remembrance" to commemorate deceased individuals whose cremains were to be scattered in the Rose Garden.

NBI has operated the crematorium since 1973 pursuant to a licence issued by the Board under *The Cemeteries Act*. The crematorium serves funeral homes and does not provide direct service to the community. However, NBI also owns a licensed funeral home based at another location, and the funeral home utilizes the crematorium. It is the funeral home "side" of NBI that contracts with families with respect to the funerals and the disposition of human remains.

Prior to Order 20/06, the Board's understanding was that:

1. Cremains had been scattered in the Rose Garden in the past;
2. NBI encouraged families to arrange for the interment of cremains in a cemetery, and planned to allow scattering in the Rose Garden only upon the insistence of families; and
3. Though NBI would advise its clients that no permanency of location was assured for the Rose Garden, the location would be operated with the intention of continued operations and visitations to the Rose Garden facilitated.

The Board was required to consider NBI's December 2005 application, which was reflective of NBI's intention to offer cremain scattering

as a regular service offering supported by plans for a significant investment to enclose the Rose Garden to facilitate memorialization and family visitations.

Following background research as to legal and other constraints and considerations, and a meeting with NBI, the Board approved NBI's application by way of Order 20/06, establishing a number of conditions including the requirement for an undertaking.

Order 20/06 required the following undertaking of NBI:

"NBI and its related companies shall provide the Board with an undertaking:

- i) committing NBI to, as best as possible, preserve and continue in perpetuity the Rose Garden as a "final resting place"; and
- ii) assuring the Board that should the Rose Garden and/or the facility enclosing cease operations, NBI or its successor companies will relocate the Rose Garden, along with the "wall of remembrance", commemorative plaques and related records to the care and management of a suitable operating Winnipeg-area cemetery property, and notify known next of kin;"

The Board suspended the application of Order 20/06 for 45 days to facilitate circulation of the Order to industry and other interested parties, so as to allow for public input. The Board mailed copies of Order 20/06 to Manitoba cemeteries, crematoriums and funeral homes, and others including government that the Board believed would have an interest. The Board also posted the Order on its website, www.pub.gov.mb.ca. Shortly thereafter, both Winnipeg newspapers published lengthy and favourable reports on the Order and NBI's plans.

During the 45 day suspension period, the undertaking required of NBI was provided to the Board. Within that period, a small number of critical views were received, including from Rosewood and the Catholic Church. In a short communication, the Catholic Church indicated the Church's general disapproval of cremations and a preference for, given cremation, interment of cremated remains.

Rosewood provided two letters of objection to Order 20/06, Alderwoods another, and Memorial requested an extension of the suspension period through its solicitors, by way of a letter received by the Board the last day of the suspension period. Memorial's letter gave no assurance as to when its comments would be forthcoming.

The Board refused the extension, taking the view that Memorial had sufficient time to outline its objections to Order 20/06, and that it was cognizant of Rosewood's criticisms, which proved subsequently to be reflective of the positions taken by industry at the June 15, 2006 reconsideration hearing. As well, the Board was mindful of the implications for NBI of an extension on its crematorium renovation plans and the potential deleterious effect on families with respect to not having the new option available due to construction delays.

Following careful consideration of the responses, including Memorial's request for an extension, the Board lifted the suspension of the application of Order 20/06, which became fully operative. In advance of lifting the suspension of the Order, Board staff replied to every comment provided from industry and the

public through the comment period, with responses reflecting the Board's decision, perspective and views on each submission.

Remaining dissatisfied with the Order, Memorial, pursuant to Section 58 of *The Public Utilities Board Act*, sought leave to appeal the Board's Order to the Court of Appeal. Section 58 of *The Public Utilities Board Act* provides for an Order of the Board to be appealed to the Court of Appeal only upon leave granted by the Court, such appeal to be based on a question of law or the Board's jurisdiction, or upon facts expressly found by the Board relating to a matter before the Board.

Having considered Memorial's reference to the Court, and indications of continued dissatisfaction with Order 20/06 expressed by Rosewood, the Board determined that pursuant to Section 44 of *The Public Utilities Board Act*, and on its own motion, it would reconsider Order 20/06. Section 44 of *The Public Utilities Board Act* provides for the Board, on its own motion, to alter, change or vary any decision made by it.

The Board determined to reconsider the Order by means of a oral hearing, and at that hearing receive and consider both oral and written submissions from the public. In order to ensure parties with an interest in the matter had an opportunity to present, the Board, on June 2, 2006, circulated notice of its reconsideration hearing to industry members and other parties.

Approximately 100 members of the industry, including cemetery owners, funeral directors, and trade associations; religious denominations; government agencies, including the Province and

municipalities, were apprised of the Board's decision to hold an oral hearing to reconsider Order No. 20/06.

Board Findings

As part of its reconsideration of Order 20/06, the Board reviewed Order 20/06 in its entirety as well as the presentations and written submissions received and/or considered at the reconsideration hearing of June 15, 2006.

In this Order, the Board will summarize, elaborate, clarify and expand on its findings and rationale as first provided in Order 20/06, which, as previously indicated herein, should be read in conjunction with this Order.

To begin with, the Board rejects Rosewood's suggestion that the determinations of Order 20/06 were driven by the inexperience of the Board's members and a bias against private cemeteries. As well, the source of the appointments to the Board should not infer Board members are unqualified for their responsibilities.

Two members of the panel adjudicating NBI's application have been members of the Board for over six years, and one of these members also served on the Board twenty-years ago. The other member of the Board has direct past experience within the industry, both as a regulator and as an owner of a funeral home. Board staff includes a professional accountant with twenty-five years of experience regulating the industry. As well, Board Advisors include lawyers and professional accountants, well qualified to consider legal and accounting issues related to the industry. As to the inference of

bias, the Board categorically rejects the claim. The Board functions in an independent and objective way, and has no bias against any component of the industry.

Also, the Board rejects the assertion that Order 20/06 was issued as a result of the Board's concern with respect to unclaimed cremains. While unclaimed cremains were an issue considered by the Board and responded to in Order 20/06, the main reasons for Order 20/06 was NBI's application and the Board's conclusion that NBI's plans would be in the public interest.

The Board considers the following matters as being key support of its reconfirmed determinations of Order 20/06:

- a) an application was received by the Board from NBI, a licensed crematorium, requiring a decision respecting the change of facilities and planned expansion of the crematorium, and the Board is the administrative tribunal charged with responsibility to review and potentially authorize changes to crematoriums;
- b) the Board's decision with respect to NBI's Rose Garden, its enclosure, and related operations did not represent a precedent binding the Board with respect to applications that may subsequently be presented by other crematoriums. NBI's application was considered on its own merits and the specific factual circumstances and plans of NBI were very much taken into account in the ultimate decision;
- c) legislation and regulations related to cemeteries and crematoriums do not prohibit the spreading of cremains on private property, given the approval of the owner;

- d) changes in the frequency and practices surrounding cremation and the disposal of cremains;
- e) the wholesale nature of NBI's crematorium operation being that clients are funeral homes and there is no direct selling of NBI's Rose Garden option to the public;
- f) there is no charge for scattering cremains in the Rose Garden;
- g) NBI's undertaking with respect to a possible future relocation of the Rose Garden to a cemetery;
- h) the reality of perpetual care trust funds; and
- i) the public interest.

The Board is required to deal with matters in the public interest and the issues before the Board surrounding NBI's application were broader than the protection of the pecuniary interests of the industry. That is not to say the financial interests of the industry are not important, as the solvency and future prospects of cemeteries and crematoriums have public importance, only that the public interest is much broader than the industry's financial interests.

The Board considered carefully the position of all parties and is not prepared to rescind, alter or vary its Order. Specific faith based objections to cremations are known to the Board and while taken into account in the Board's consideration of NBI's application do not over-ride the rights of individuals in Manitoba to avail themselves of lawfully provided services. The Board holds that NBI's planned enclosed Rose Garden does not offend nor lead to a deterioration of legal, moral and religious laws and traditions with respect to the disposition of human remains, including

cremains. The Board has determined that NBI's application does afford dignity and respect to the disposition of cremains scattered in the Rose Garden. Further, the Board held in Order 20/06 that the proposed changes represent an improvement on the existing situation.

The written and oral presentations reviewed at the reconsideration hearing, or in responses to the Board's circulation of Order 20/06, provided no compelling evidence that the decisions of the Board reflected in Order 20/06 should be vacated or varied.

Accordingly, the Board will reconfirm the directions and conditions of Board Order 20/06. With respect to the approval of NBI's expansion plans, the directions of Order 20/06 provide an option that may prove attractive for some families served by NBI's funeral home clientele consistent with the increased preference of Canadians and Manitobans to select cremation following the death of a family member.

Assuming NBI follows through on its plans, funeral homes served by NBI will be able to offer to their clients, following the death of their family members, the option of spreading the cremains of their loved ones in the enclosed Rose Garden accessible to year-round visits. No party, either a funeral home or families served by funeral homes, need choose cremation or, having chosen cremation, the spreading of cremains as opposed to interment in a cemetery.

Cremation is an option, and the disposal of the cremains is largely at the voluntary discretion of the family of the deceased. The Board understands that cremation is generally less costly than

interment in a cemetery, though the cost of products and services associated with both cremation and "traditional" burial range widely.

The Board concludes that the provision of as wide a range of options as possible to the public, with respect to cremains, is desirable, and a key issue for the Board and the industry relates to clear communications of options to families.

For the Board, NBI's application provided another option to the wide range of options already available, although the option to use NBI's Rose Garden may be chosen by only a small proportion of those using NBI's crematorium facilities.

Approval for NBI's expansion does not require the Board to approve all or other expansion or amendment plans for other crematoriums. In the case before the Board with NBI's application, the Board was dealing with a pre-existing scattering garden for cremains; a licensed crematorium for which no complaints were outstanding and owned by a licensed funeral home of good reputation. Scattering would not carry a charge, records would be kept and the enclosed Rose Garden would be available for future visits. As well, the Board's approval is not unconditional, and the conditions are significant:

- a) scattering is to occur at no charge and take place only, with the exception of cremains unclaimed for two years, on the request of clients and after the clients have been informed of other options;
- b) visits to the Rose Garden are to be permitted to the general public during the normal hours of business of the crematorium;

- c) the use of the Rose Garden is to be restricted to cremains resulting from cremation at NBI's crematorium;
- d) cremations resulting in cremains being scattered in the Rose Garden must only occur at the crematorium through the facility of a licensed funeral home - no direct sales of services with respect to cremain spreading or cremations to the public is permitted;
- e) records must be kept of both cremations and cremains spread in the Rose Garden, and be available to the public during normal hours of business for the crematorium; and
- f) if for any reason the crematorium and/or the Rose Garden cannot continue in operation at the current site, NBI or any successor company or owner to or NBI must relocate, at its expense, the Rose Garden, records and any plaques or other evidence of remembrance with respect to the cremains scattered in the Rose Garden, to a licensed cemetery.

Written and oral presentations to the Board at the reconsideration hearing by cemetery industry representatives advanced the position that Order 20/06 contains an error in law in that the Rose Garden, used as planned by NBI, fits the definition of a cemetery, yet has not been licensed. Cremains are spread, interred and buried in cemeteries, and charges are prescribed by the cemeteries for the service, with a portion of the charge set aside for perpetual care.

While all parties to the hearing did not object to the contention that families may dispose of cremains as they see fit, as long as permission has been received from the property owner, the industry spokespersons appearing at the hearing objected to the intended multiple use of the Rose Garden. The Board understands the

cemetery industry does not object to the scattering of remains outside of a cemetery with the property owner's permission as long as there is no multiple use of the site.

The Board understands that the industry has not objected to the multiple use of certain non-cemetery church properties for the spreading of cremains, and infers the objections relate to the nexus between multiple use and commercial enterprise. As well, the Board notes that the industry is well aware of the spreading of cremains in public and private non-cemetery locations, and the retention of cremains in urns at family residences, and yet has not voiced an objection.

Section 2(b) of The Cemeteries Act states:

"Cemetery" means land that is set apart or used as a place for the burial of dead human bodies or other human remains or in which dead human bodies or other human remains have been buried.

The Board considered whether the scattering of cremains within a plot of land enclosed within a crematorium constitutes burial of dead human bodies or other human remains. The Board does not accept that the definition applies such as to constitute the Rose Garden as a cemetery. On a plain reading of the term "burial" within the definition of "cemetery", the Board does not think it reasonable to suggest that the scattering of cremains constitutes burial within that definition.

While the Act and related Regulations do impose specific duties and responsibilities on the interment of dead human bodies and human

remains in permanent facilities, including cemeteries, mausoleums, and columbariums, and pose greater duties for maintenance and future care on for profit entities, there is no law in Manitoba governing the disposal of cremains where the cremains are not to be interred in one of these facilities.

The discretion afforded to crematoriums under the Regulations to dispose of unclaimed cremains after 2 years is consistent with the difference in treatment, under the current law, between the burial of dead human bodies or other human remains and the final disposition of cremated human remains where neither permanent burial nor permanent interment options have been selected.

The Board further notes that subsection 39(e) of the Act allows for regulations to be created:

"39...

(e) respecting the interment or other disposition of the ashes of the human bodies cremated in a crematory;"

No such regulations (beyond Subsection 6(2)) have been established in this Province.

Further, on review of the legislation and regulations in force in Ontario, Saskatchewan, Alberta and British Columbia, the Board is satisfied that there is currently no regulation in these jurisdictions of the final disposition of cremains outside of permanent site specific interment facilities (cemeteries, mausoleums, and columbariums). In Order 20/06, the Board addressed at length its background investigations respecting the application

of the laws in these jurisdictions by the respective provincial regulators and will not repeat those comments here.

Until further legislative review, the Board is required to carry out its jurisdiction in accordance with the specific jurisdiction afforded it under *The Cemeteries Act*, and Regulations. In Order 20/06 upon a review of the Act as a whole the Board determined that the scheme of the Act was not created to address, nor can it reasonably be interpreted to extend to, scattering of cremated human remains in private locations where permanence and perpetual maintenance are not required.

The submissions opposing Order 20/06 in essence urge the Board to extend the existing definition of cemetery to the scattering of human cremains in a lot which has no legislated permanence. If the legislature had intended to regulate the disposition of cremains outside of defined permanent facilities, such regulations would be in place. The Board has made it clear that it supports legislative review in this area and that the application of Order 20/06 may in future be impacted by such review.

Vital Statistics reinforced the different approach to cremains as opposed to dead human bodies, in its letter advising that Order 20/06 was consistent with the manner in which registrations of death and requests for disinterment are handled under The Vital Statistics Act and the Regulations of *The Public Health Act*. As previously indicated, the Agency stated in part:

"Death registration after cremation includes information on the funeral director and crematorium but does not require information on disposition of cremated remains. Information

on disposition of non-cremated bodies is provided through the registration of death and through cemetery returns; and

Approval for disinterment of cremated remains is not restricted through any process. A request for approval for disinterment of bodies is required before a body can be moved."

The Board also looked for guidance, as to the differences between burial and cremation and the treatment afforded cremains, in *The Prearranged Funeral Services Act*. Cremation is specifically excluded from the definition of "funeral services" as defined in *The Prearranged Funeral Services Act*. *The Cemeteries Act* provides for the licensing and regulation of crematoriums, it seems clear that the legislature viewed cremation as an alternative to burial.

The Board also considered and rejected the premise that NBI's application as related to the Rose Garden represented an application to operate a columbarium. If NBI were held to be operating a columbarium, then a license would be required for the sale, lease or renting of space or a compartment in a columbarium.

Cremains are to be scattered with other cremains within the Rose Garden. Thus the spreading of cremains neither involves a sale nor a lease of space, nor results in a separate space where the specific cremains of a particular dead human body are segregated from other cremains. Thus, the Board concludes NBI is not operating a columbarium and does not need a license.

While NBI's Rose Garden may not prove a permanent location for the cremains scattered, NBI intends that to be the case. The expansion of the crematorium to enclose the Rose Garden is an expensive

venture, and will result in a single-purpose building. With the magnitude of the investment required and involved, it is difficult to imagine a future NBI owner choosing to abandon the business and the location.

However, if despite expectations, circumstances are such that the Rose Garden cannot be preserved and visited at the present site, there is NBI's undertaking to the Board. The undertaking is a pledge that if the Rose Garden is not continued as a final resting place for cremains, NBI will move the Rose Garden, records and any other signs with respect to the cremains spread in the Rose Garden to a cemetery. This is an expensive commitment that NBI has made, one that does not enhance the market value of its property.

Nonetheless, the Board will investigate the possibility of placing a caveat on the property, to further support the undertaking to transfer the Rose Garden to a cemetery in the case the Rose Garden is not operational.

Presentations made at the reconsideration hearing suggested that a major defect of NBI's plans is that there is no provision for the establishment of a perpetual care account to ensure the future maintenance of the Rose Garden, a small plot of land to be enclosed within a crematorium. However, it is in NBI's commercial interests to maintain the Rose Garden properly, as a poorly maintained Rose Garden would not serve NBI's commercial interests any more than a poorly maintained cemetery attracts future customers.

And, there being no charge for scattering cremains in the Rose Garden, unlike the charges accompanying burial in a cemetery, the

establishment of a perpetual care fund would necessarily be at the sole cost of NBI. The Board's requirement for an undertaking from NBI with respect to the risk of future relocation of the Rose Garden provides for a level of assurance similar to that of perpetual care. As well:

- a) it is the Board's observation that private cemeteries licensed by the Board supplement perpetual care fund investment income with operating funds to meet cemetery maintenance requirements, as, generally speaking, perpetual care funds are insufficient to provide for adequate revenue to meet maintenance needs; and
- b) if NBI were to fail to maintain the small plot of land used for the scattering of cremains adequately, and the inadequate maintenance was brought to the Board's attention, the Board has the right to vary the requirements of NBI pursuant to Order 20/06 and/or to place conditions on the operating license for the crematorium.

Past experience suggests that families are not only choosing cremation more frequently but also choosing to either keep the cremains in their possession or spread them on land or over water, public and private.

Spreading cremains over land or water can be problematic. Firstly, there is the question of approval; in order to spread cremains on private property, permission of the property owner is required. From the Board's perspective a bigger problem associated with the spreading of cremains over water or on public or private land, pertains to the lack of record keeping pertaining to such disposal and reduced opportunities for future visitations.

The Board also notes there is a trend in Canada for cremation rather than burial of the body following death; over the ten years ending 2004, the percentage of cremations relative to total deaths rose from below 40% to 56%, and to 52% in Manitoba (Source: Cremation Association of North America's, (CANA)). CANA's projection suggests cremations will represent over 60% of deaths in Canada in 2010.

CANA published a 1997 survey of North American cremation practices. The survey disclosed that only 40% of the 492,434 cremation experiences reported resulted in direct delivery of cremains to a cemetery. With respect to the cremains delivered to a cemetery, 56% were buried, 26% placed in a columbarium, 16% scattered on dedicated property, and 2% placed in a common grave. The survey showed that another 36% of the cremains were provided to the contracting family member and "taken home", 18% were scattered as directed by the family, and 6% of the cremains were left with the crematorium or funeral home. Of the 18% that were scattered as directed, 73% were scattered over water and the remainder, 27%, over land. (Source: *Cremation Association of North America, Special Report, 1996/97 Cremation Container, Disposition and Service Survey*)

In closing, the Board notes Order 20/06's reference to future revisions to *The Cemeteries Act*. Nothing in Order 20/06 or this Order arising out of the reconsideration of Order 20/06 impairs the legislature's ability to amend the Act and affect the directions then and now provided. As well, and as previously indicated, the Board is not bound by its decisions in Order 20/06 in considering

