



REPORT FOR ACTION WITH CONFIDENTIAL ATTACHMENT

Supplementary Report - Friends of Toronto Public Cemeteries v. Mount Pleasant Group of Cemeteries - Report on City's Interest

Date: July 16, 2018

To: City Council

From: City Solicitor

Wards: Wards 22 (St. Paul's) and 23 (Willowdale)

REASON FOR CONFIDENTIAL INFORMATION

This report contains advice or communications that are subject to solicitor-client privilege.

SUMMARY

When this matter came before Government Management Committee ("GMC") on July 3, 2018, representatives from the Friends of Toronto Public Cemeteries ("FTPC") made written and oral submissions, and provided certain documents to members of GMC, that were in addition to documents previously provided to the City Solicitor by lawyers acting for two of the parties in the proceeding.

GMC requested the City Solicitor to prepare a supplementary report to City Council to address the issues raised in the communications from FTPC.

RECOMMENDATIONS

The City Solicitor recommends that City Council:

1. Request that the Province of Ontario review the following legislation:
 - a. An act to authorize certain persons therein named, and their successors, to hold certain land for the purpose therein mentioned, 1826, 7th Geo IV, c. 21,

- b. An Act to amend an Act therein mentioned, and to vest the Toronto General Burying Ground in certain Trustees, and their Successors, 1849, 12 Vict c. 104;
- c. An Act to enable the Trustees of the Toronto General Burying Ground, to close the same, to sell a portion thereof, and to acquire other ground for the purpose of the Trust, 1855 18 Vict c. 146;
- d. An Act to Incorporate the Trustees of the Toronto General Burying Ground, to confirm certain purchases made by them, to authorize them to acquire additional land for the purpose of the said trust, and to amend the Act relating to the said trust, 1871, 34 Vict c. 95;
- e. An Act to authorize the sale of certain lands by the Trustees of the Toronto General Burying Grounds to the City of Toronto, 1876, 39 Vict c. 66; and
- f. An Act to authorize the Trustees of the Toronto General Burying Grounds to sell certain lands, 1888, 51 Vict c. 88;

(the "1800s Mount Pleasant Special Legislation"), and their interaction with the:

- a. Charities Accounting Act, R.S.O. 1990, c. C.10;
- b. Corporations Act, R.S.O. 1990, c. C.38;
- c. Not-for-Profit Corporations Act, 2010, S.O. 2010, c. 15; and
- d. Funeral, Burial and Cremation Services Act, 2002, S.O. 2002, c. 33;

to determine whether any amendment, repeal and/or enactment of new special legislation is necessary and/or advisable to better promote modernization, certainty, clarity, good governance, and sound financial administration of the Mount Pleasant Group of Cemeteries ("MPGC") and its cemetery lands in the City of Toronto.

2. Adopt the confidential instructions to staff in Confidential Attachment 1.

3. Direct that the confidential information contained in Confidential Attachment 1 remain confidential in its entirety, as it contains advice which is subject to solicitor-client privilege.

FINANCIAL IMPACT

There is no financial impact arising from this report.

DECISION HISTORY

The decision of GMC, and the first report from the City Solicitor on this matter, are available here:

COMMENTS

The City Solicitor had contacted lawyers acting for both FTPC and the Mount Pleasant Group of Cemeteries ("MPGC") prior to preparing the report that came before GMC on July 3, 2018, as well as reviewed all documents that were provided by the lawyers acting for those two parties.

In particular, the City Solicitor had been provided with the Amended Notice of Application of FTPC, and the factums for all four parties in the proceeding. A Notice of Application lists the relief that an applicant is asking the Judge to grant, along with a brief summary of allegations in support of that requested relief. Factums are summaries of evidence and legal argument that lawyers for parties prepare prior to the hearing, and file with the Court, for the assigned Judge to review in advance of the hearing date.

The documents which a representative of FTPC provided to GMC on July 3, 2018 that are in addition to documents previously provided to the City Solicitor were the following:

- (a) Audited financial statements for Mount Pleasant Memorial Services;
- (b) Corporation profile report, Mount Pleasant Memorial Services;
- (c) Information handout, Visitation, Chapel and Reception Centre;
- (d) Photograph, Potter's Field Plaque;
- (e) Photograph, Mount Pleasant Cemetery Signage;
- (f) MPGC General By-law 52, March, 2013;
- (g) MPGC By-law 53, June, 2014;
- (h) MPGC By-law 54, June, 2017;
- (h) Notice of Application, April, 2013; and
- (j) Draft Notice of Motion for City to Seek Intervenor Status.

In addition to reviewing these documents, the City Solicitor invited the lawyer acting for FTPC to meet to review these documents and explain however, in FTPC's view, the documents were relevant. This meeting took place on July 12, 2018.

For ease of comment, certain of the above-mentioned documents have been grouped together by subject matter.

Financial Statements and Corporate Profile Report of Mount Pleasant Memorial Services, Photographs & Information Handout

Allegations and Issues Raised by FTPC Regarding Mount Pleasant Memorial Services

The written and oral submissions by representatives of FTPC to GMC include the allegations that there has been a "stealth privatization" of cemetery lands in the City of Toronto. These allegations concern a corporation entitled Mount Pleasant Memorial Services ("MPMS").

FTPC alleges in its factum that in 2011, the assets of "Cemetery Trust" were transferred to MPMS, and then in 2012, further transferred to "Trustees of the Toronto General Burying Grounds."

FTPC alleges that the audited financial reports of MPMS, information handout, and photographs are evidence that MPMS owned the real property assets of MPGC, and are therefore evidence of what it alleges was an improper transfer.

Response of MPGC

MPGC states in its factum that its real property, which would include the Mount Pleasant Cemetery, is held in a "statutory trust." It is subject to the oversight of, among others, the Public Guardian and Trustee. Section 58 of the Funeral, Burial and Cremation Services Act, 2002 provides that the Public Guardian and Trustee may require it to provide audited financial statements, or any information, on any trust account or trust fund required to be established under that Act.

MPGC states in its factum that the legal name of the entity which owned the Mount Pleasant Cemetery as of 1871 was the "Trustees of the Toronto General Burying Ground." It states that the name of that legal entity has since changed twice, in 1991, to Commemorative Services Ontario, and then again in 1997, to MPGC.

It further states in its factum that in 1997, it underwent a corporate re-organization to create MPMS as a "service company". It states the purpose of that service company was to provide centralized administrative services such as financial, marketing, and human resources. It states these services were provided at cost both to MPGC, and also an entity entitled Canadian Memorial Services, which was a not-for-profit corporation which was created in 1989 to provide simple, low-cost funeral services, while contributing to MPGC's perpetual care obligations.

It also states that all real property assets remained with MPGC notwithstanding this corporate re-organization. MPGC further states that as a result of legislative changes after MPMS was created (presumably the introduction of the Funeral, Burial and Cremation Services Act, 2002) it re-organized again in 2013, thereby dissolving MPMS and transferring its assets (and liabilities) to MPGC.

Finally, MPGC states that it has always owned and managed the cemetery properties at issue. It states that while "financial statements were consolidated by [their] auditors in the name of [MPMS]," this was for "accounting purposes" only and that "cemetery assets (including the land and various trust funds) have always been owned and managed by [MPGC]."

Evaluation of MPMS by Public Guardian and Trustee (PG&T)

As noted in the first report to GMC about this matter, it is the position of the PG&T in its factum that MPGC is charity, and therefore falls under the jurisdiction of the PG&T under the Charities Accounting Act, 1990. In addition, MPGC falls under the jurisdiction of the PG&T under the Funeral, Burial and Cremation Services Act, 2002. This latter point is not disputed as between MPGC and PG&T.

The PG&T concurs in its factum with the position of MPGC (as stated in its factum) that MPGC holds its assets in trust.

Specifically, as it relates to MPMS, the PG&T concludes the following in its factum:

- a. it was created by MPGC to carry out related purposes to those of MPGC in a cost effective manner, enabling MPGC to achieve "economies of scale" in relation to financing, marketing, human resources and technology;
- b. transfers of funds from MPGC to MPMS were pursuant to service agreements, not gifts;
- c. initial transfers of goods (such as computers) were rented or leased from MPGC;
- d. services provided by MPGC to MPMS were "at cost";
- e. MPMS funded its own operations and capital expenditures; and
- f. MPMS's investments were kept separate from those of MPGC.

The PG&T concluded that MPGC's former control over MPMS is "no longer an issue" because it was dissolved in 2013, with all its assets transferred back to MPGC.

On review, the PG&T concluded "[MPMS] does not disclose financial improprieties on the part of MPGC" and no further inquiry was warranted.

Further Investigation by the City Solicitor

The City Solicitor has reviewed the parcel registers of the Ontario Land Registry Office for the parcels of property which comprise the Mount Pleasant cemetery.

These parcel registers confirm that all parcels of property which make up the Mount Pleasant Cemetery are still owned by MPGC.

None of the Mount Pleasant cemetery properties have ever been owned by MPMS.

As far back as 1874, none of the Mount Pleasant cemetery properties have ever been owned by anyone other than either the Trustees of the Toronto General Burying Ground, or MPGC. The change from Trustees of the Toronto General Burying Ground to MPGC took place via a name change, not a change in ownership.

The City Solicitor has also reviewed the results of a Terraview search and/or ownership records from the Municipal Property Assessment Corporation ("MPAC") which indicates that the following cemeteries in the City of Toronto are also still owned by MPGC:

- a. York, north-west of Yonge and Sheppard;
- b. Pine Hills, St. Clair East and Birchmount;
- c. Prospect, St. Clair West and Caledonia; and
- d. Toronto Necropolis, Bayview Avenue, south of Wellesley Street East.

MPGC's Corporate By-laws

No relief is sought in the Amended Notice of Application in relation to any of MGPC's corporate by-laws. The matter of these by-laws is addressed only in passing in the factum of one of the four parties in the proceeding, the PG&T.

The submissions of FTPC to GMC on July 3, 2018 appears to be that one of the by-laws provided, by-law 52, creates a City interest in the outcome of the litigation.

The sections of this bylaw which FTPC appears to rely states:

2.8 Dissolution

Upon the dissolution of the Corporation [defined as MPGC] ... each cemetery of the Corporation, together with all the property, assets, Care and Maintenance Fund and other trust funds and trust accounts relating to each cemetery ... shall be transferred to the local municipality...

FTPC is not seeking relief in its legal proceeding that would result in the dissolution of MPGC.

FTPC is not alleging in the legal proceeding that MPGC intends to repeal this by-law, dissolve itself, or transfer its real property assets to anyone other than the allegations as against MPMS, which are discussed above.

Regardless of any intention of MPGC to transfer real property assets to the City upon any hypothetical future dissolution pursuant to this by-law, City Council has not authorized accepting such a hypothetical future transfer.

Finally, and in any event, s. 101.1(7) of the Funeral, Burial and Cremation Services Act, 2002 already provides that upon a declaration of abandonment, a cemetery, along with any assets, trust funds and trust accounts, becomes the property and responsibility of the respective municipality. The provisions referenced by FTPC in the bylaw at issue repeat the legal impact of currently prevailing Ontario legislation.

Notice of Application

The City Solicitor was previously provided with the Amended Notice of Application. The original version of this document provides nothing in addition to what is contained in the subsequently amended version.

Draft Notice of Motion

This is a sample, draft form of a legal document to bring a motion to seek to intervene in a legal proceeding as an added party.

REQUEST FOR PROVINCE TO REVIEW LEGISLATION APPLICABLE OR POTENTIALLY APPLICABLE TO MPGC

The parties to the legal proceeding disagree about whether or not MPGC's directors have been appointed in compliance with 1800s Mount Pleasant Special Legislation and/or whether those pieces of legislation apply. The parties also disagree about whether the supervision and oversight provisions in the Charities Accounting Act, 1990, apply to the MPGC. These disputes will be decided by the Judge who decides the matter.

Regardless of the Judge's decision, almost 200 years have passed since the first of the 1800s Mount Pleasant Special Legislation was enacted. In addition, since their enactment, statutes of general application have been enacted, such as the:

- a. Charities Accounting Act, 1990, (which governs charities),
- b. Corporations Act, 1990, (which governs corporations without share capital, including not-for-profit corporations), and
- c. Funeral, Burial and Cremation Services Act, 2002 (which governs cemeteries, funeral homes and cremations).

In particular, the City understands one of the concerns of FTPC to be that while there is external oversight of MPGC's trust assets which are "required to be established" under the Funeral, Burial and Cremation Services Act, MPGC holds significant assets which are in addition to those required by that Act.

Should MPGC's submission that it is not a charity be accepted by the presiding Judge, and therefore MPGC not fall under the Charities Accounting Act, the proportion of MPGCs assets which are other than trust assets as required by Funeral, Burial and Cremation Services Act, 2002 would appear to not fall under the oversight of the PG&T.

In light of:

- a. the passage of time since the enactment of the 1800s Mount Pleasant Special Legislation;
- b. the interaction between the 1800s Mount Pleasant Special Legislation and provisions of general application that have since been enacted;
- c. the size and extent of MPGC's real property and financial assets; and
- d. potential municipal responsibility under s. 101.1(7) of the Funeral, Burial and Cremation Services Act, 2002 for abandoned cemeteries;

City Council may wish to consider asking the Province of Ontario to review the 1800s Mount Pleasant Special Legislation, and its interaction with new legislation of general application, to determine if any amendment, repeal and/or enactment of new special legislation is necessary and/or advisable to better promote modernization, certainty, clarity, good governance, and sound financial administration of MPGC and its cemetery lands in the City of Toronto.

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SIGNATURE

Wendy Walberg

City Solicitor

ATTACHMENTS

Confidential Attachment 1 - Confidential Information