

**Consultation Paper:  
Potential Changes to the Funeral,  
Burial and Cremation Services Act,  
2002 and/or its Regulations**

June, 2021

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# Introduction

In Ontario, the [Funeral, Burial and Cremation Services Act, 2002](#) (FBCSA) and its regulations set out certain requirements for Ontario's bereavement sector, including cemetery, funeral, transfer service and crematorium operators (bereavement service operators).<sup>1</sup> The requirements in the FBCSA are in place to help protect consumers of bereavement supplies and services as well as to set standards for bereavement service operators.

The [Bereavement Authority of Ontario](#) (BAO) is the administrative authority designated to administer and enforce most provisions under the FBCSA, including those related to the licensing and regulation of bereavement service operators.

The Ministry of Government and Consumer Services (the ministry) is responsible for developing policy and proposing changes to the FBCSA and its regulations, and for overseeing the BAO. The Registrar in the ministry's Consumer Service Operations Division is responsible for administering the provisions under the FBCSA related to burial sites, war graves, abandoned cemeteries and cemetery closures.

On December 7<sup>th</sup>, the Auditor General released her 2020 Annual Report, which included a [value-for-money audit of the BAO](#) and the ministry's oversight of the BAO. Among other recommendations, the Auditor General recommended that the ministry consider proposing potential legislative and/or regulatory changes to address some of the concerns raised in the report.

Following consultations with the public and the bereavement sector, in April, 2021 changes were made to [O. Reg. 30/11](#), the General Regulation under the FBCSA<sup>2</sup> to address issues raised by stakeholders and a key recommendation from the Auditor General's report with respect to price transparency. These changes are intended to:<sup>3</sup>

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<sup>1</sup> Under the FBCSA, "operator" means a person who is licensed to operate a cemetery, crematorium, funeral establishment ... transfer service or any other business for which a licence may be required by regulation and includes a cemetery owner who is deemed to be a cemetery operator under s. 5(2) of that Act.

<sup>2</sup> Consequential amendments were also made to Ontario Regulation 187/09 under the Safety and Consumer Statutes Administration Act, 1996.

<sup>3</sup> See Appendix A for more information on these regulatory changes.

- Provide greater flexibility to non-commercial cemetery operators seeking to increase the capacity of their cemeteries in certain circumstances;
- Help certain cemetery operators generate more income for cemetery care and maintenance;
- Better ensure that prescribed cemetery care and maintenance funds and account (CMF/A) contribution amounts are appropriate;
- Reduce burden on bereavement service operators; and
- Better ensure that consumers can safely access information that they need to make informed decisions about bereavement supplies and services remotely during the COVID-19 pandemic.

The ministry is now soliciting feedback on proposals for potential changes to the FBCSA and/or its regulations to address outstanding concerns raised by stakeholders and other recommendations made by the Auditor General as part of her 2020 Annual Report.

The questions and proposals presented in this paper are intended to facilitate discussion. Should a decision be made to proceed with these proposals, the comments received during consultation will be considered. The content and wording used in this discussion paper are subject to change as a result of the consultation process. The ministry has not made any final decisions regarding proposing potential legislative or regulatory amendments. As such, the proposals included in this paper do not represent the ministry's final policy position or government direction.

## **Privacy Statement**

The collection by the ministry of any information, including personal information, as part of this consultation process is for the purposes of considering whether to develop, or developing, proposals for legislative and/or regulatory amendments as authorized by the Funeral, Burial and Cremation Services Act, 2002, S.O. 2002, c. 33. The collection of this information is necessary for the development of potential proposals for changes to address the issues described in this document. Please note that unless otherwise agreed to by the ministry, if you are participating in this consultation process on behalf of an organization, or as an individual who has indicated an affiliation with an organization, the feedback provided will be considered public information and may be used to assist in developing statutory or regulatory proposals. As such, this information may be disclosed to various stakeholders for that purpose.

If you are participating in this consultation process as an individual, and do not indicate an affiliation with an organization, your feedback will not be considered public information unless

you expressly request otherwise, but your feedback may be used by the ministry to assist in developing the potential proposals for changes under the Funeral, Burial and Cremation Services Act, 2002.

If you have questions about the collection, use and disclosure of personal information in relation to this initiative, you may contact [bereavement@ontario.ca](mailto:bereavement@ontario.ca).

## How to Participate

Please use the following pages to provide feedback on the consultation questions listed below. Please submit any feedback through [Ontario's Regulatory Registry](#) or return a copy of this Feedback Form to [bereavement@ontario.ca](mailto:bereavement@ontario.ca) by **August 9, 2021**. Where possible, please provide concrete examples or evidence when responding to questions.

The Ministry of Government and Consumer Services understands that not all topics are relevant to every individual or organization. Please provide feedback on the topics that are relevant to you or your organization.

## Contact Information

Please provide the following information when submitting your feedback.

Name/Organization Name:

Organization Key Contact Name (If applicable):

Organization Key Contact Email (if applicable):

Which group do you represent (e.g., bereavement sector licensee, bereavement sector association, consumer, consumer association, academic, etc.):

# A. Consumer Protection Measures

## i. Transparency of Price Information

### Context:

#### Auditor General Findings and Recommendations

In the Auditor General's value-for-money audit of the BAO, the Auditor General raised concerns about price transparency in the bereavement sector. Among other findings, the Auditor General found that:

- Most funeral establishments and other bereavement service operators in Ontario do not readily disclose prices to consumers, and prices for essential bereavement-related products and services are not transparent and often difficult to obtain;
- Only 26 out of a sample of 100 licensed funeral, transfer service, cemetery and crematorium operators posted their price list on their websites; and
- Prices for bereavement supplies and services vary significantly across the province and within regions in Ontario.

To protect consumers when making bereavement-related purchases, the Auditor General recommended that the ministry work with the BAO to develop effective strategies to increase the transparency of price information to consumers, such as requiring all licensed operators to provide their price lists online, as well as an electronic copy or a link to the BAO's [consumer information guide](#) (Recommendation #1).

The Auditor General also recommended that the BAO take steps to standardize the presentation of price lists among all licensed bereavement service operators, and clearly identify whether products and services are required by law and in what circumstances, or if they are optional (Recommendation #2).

#### Current Requirements

Currently every licensed bereavement service operator in Ontario is required to provide a price list for the licensed supplies and services provided by the operator. This list must be clearly displayed or provided to consumers upon request. Licensees must also not charge more for a supply or service than what is on their price list.

If a bereavement service operator maintains or makes use of a website where a person may enter into a contract for the sale of a licensed supply or service, they must provide access to an electronic version of the price list in a printable form on that website, without charge.<sup>4</sup>

Bereavement service operators are also required to meet form and content requirements for price lists, including requirements for specific information that must be included on the price list. Operators' price lists must be written in plain language and legibly printed in 10 point or larger type.

Bereavement service operators are required to submit their current price list and any previous price list to the BAO Registrar upon request. The BAO Registrar may disallow a price for a supply or service if:

- The operator requires purchasers to purchase the supply or service from the operator or other person and, in the opinion of the Registrar, the price is excessive or significantly higher than the current market price for the supply or service; or
- The operator is required by regulation to ensure that a supply or service is provided at a price that does not exceed the direct cost to the operator or another person and the price exceeds that direct cost.

Currently the BAO Registrar is able to provide guidance to bereavement service operators on how to prepare the price list and can recommend but not require the use of a standard price list form.

A customer that purchases licensed supplies or services under an unenforceable contract may cancel the contract at any time after it is made with written notice to the operator. A contract is unenforceable if, for example, the contract does not include the price charged for each service and supply to be provided.

## **Stakeholder Consultations**

In February 2021, the ministry consulted with bereavement sector stakeholders<sup>5</sup> on proposals to increase price transparency for consumers of bereavement supplies and services.

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<sup>4</sup> This requirement will change on July 1, 2021. See Appendix A for details about the change.

<sup>5</sup> Consultations included bereavement sector representatives from the BAO's Cemetery, Crematorium and Municipal Advisory Committee and the BAO's Funeral and Transfer Services Advisory Committee, as well as

Following these consultations, on April 6, 2021, regulatory changes were made to address the Auditor General's Recommendation #1. These changes, which come into force on July 1, 2021, will require every bereavement service operator who maintains or makes use of a website to promote, or enter into contracts for, the sale or provision of a licensed supply or service to:

- Ensure that an electronic version of the operator's price list is available, without charge, in a printable form, in a clearly visible place on the website; and
- Ensure that a link to the consumer information guide prepared by the BAO Registrar (i.e., a link to the BAO's webpage where the guide is posted) is available in a clearly visible place on the website.

The ministry is now consulting on additional proposals to improve price transparency for consumers of bereavement supplies and services. As part of the consultation held in February 2021, the ministry received some preliminary feedback on how to further improve price transparency for consumers, including:

- Making changes to further standardize price lists (e.g., require price lists be provided in a form and manner specified by the BAO Registrar);
- Creating new remedies for purchasers where a bereavement service operator fails to meet the price list disclosure requirements under the FBCSA or its regulations (e.g., deeming a contract for bereavement supplies or services unenforceable);
- Requiring a more transparent breakdown of costs within a package of bereavement supplies and services, such as clearly indicating what is included in and excluded from the package (e.g., whether a cremation container is included in the cost of a cremation package); and/or,
- Including additional information in the BAO's consumer information guide about pricing (e.g., examples of price ranges for certain bereavement supplies or services based on geographic region<sup>6</sup>, encouraging consumers to shop around).

## Options Under Consideration:

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small and medium-sized operators identified through the Ontario Association of Cemetery and Funeral Professionals (OACFP) and the Ontario Funeral Service Association (OFSA).

<sup>6</sup> On January 26, 2021, the BAO posted a [Notice to the Consumer](#) on its website which included an analysis of price differences for selected services by region undertaken by the Auditor General, to encourage consumers to shop around.



The ministry is considering proposing all or some of the following potential changes:

- **Standardized Price List and Standardized Contract Templates:** Amend the General Regulation under the FBCSA to require licensed bereavement service operators to present their price lists and provide their contracts using standardized templates specified by the BAO Registrar. The General Regulation would continue to prescribe the minimum content requirements for price lists and contracts. It is proposed that the BAO Registrar would be required to consult with licensees prior to finalizing the initial price list and contract templates and whenever a substantive change to a template is being considered. The ministry is seeking feedback on the circumstances in which such consultations would occur if the government were to proceed with this proposal (see questions below).
- **Disclosure of Items in Packages:** Amend the General Regulation under the FBCSA to require bereavement service operators that offer packages of supplies and/or services to disclose what supplies and/or services that a consumer would likely need that are not included in a package (e.g., when a casket is not included in a burial package). The disclosure would need to be made through the operator's price list and the sales contract. If the government were to proceed with this proposal, any contract that did not include these disclosure requirements would be deemed unenforceable, such that the consumer would be able to cancel the contract at any time after it is made with written notice to the operator.
- **Purchaser Acknowledgements in Contracts:** Amend the General Regulation under the FBCSA to require sales contracts to include a purchaser acknowledgement, such that purchasers, upon entering a contract, must confirm that they have received the required disclosures from the operator before entering the contract (e.g., an explanation of cancellation rights, information on any restrictions contained in the cemetery by-laws, applicable by-laws, the operator's price list, the BAO's consumer information guide). If the government were to proceed with this proposal, any contract where the purchaser did not indicate that they received these required disclosures from the operator would be deemed unenforceable, such that the consumer would be able to cancel the contract at any time after it is made with written notice to the operator.
- **Remove Duplication in Price List Display Requirements:** Remove duplication in price list display requirements in s. 59 of the General Regulation (i.e., information about the operator that must be posted on the price list) and s. 119 (1), (i.e., information about the operator that must appear in promotional material, etc.). Currently these provisions

overlap in that they both require the operator to post key identifiers for the operator on the price list. The proposed change, if approved, would not change requirements for operators, but would simply remove duplicative language.

If the government were to decide to proceed with all or some of these proposals, this approach would potentially:

- Respond to the Auditor General's recommendations by requiring licensed bereavement service operators to utilize a standardized price list template;
- Better support consumers in making informed purchasing decisions when entering a contract for bereavement supplies/services by requiring bereavement service operators to utilize a standardized contract template and to obtain purchasers' confirmation that they received the required disclosures before entering the contract;
- Provide consumers with a clearer understanding of what is not included in a package of bereavement supplies and services; and
- Remove duplicative language in the General Regulation under the FBCSA.

### What do you think?

1. Are there any comments, concerns, gaps or alternatives to consider in relation to the potential proposals to:
  - a) Require bereavement service operators to present their price lists and contracts using standardized templates specified by the BAO Registrar? Why or why not? Please explain.
  - b) Require bereavement service operators that offer packages of supplies and/or services to disclose what items are not included in a package that a consumer would likely need in the price list and sales contract? Please explain.
  - c) Require sales contracts to include a purchaser acknowledgement, such that purchasers can confirm that they have received the required disclosures and items from the bereavement service operator upon entering a contract? Please explain.
  - d) Make minor changes to ss. 59 and/or 119 (1) of the General Regulation to remove duplication? Please explain.

### What do you think?

2. If the government were to proceed with the proposals to require bereavement service operators to provide their price lists and sales contracts through standardized templates specified by the BAO Registrar, under what circumstances should the BAO Registrar be required to consult with the sector about proposed changes to these templates? Please explain.

3. If the government were to proceed with all or some of these potential proposals, how much time would the bereavement sector need to implement these changes?

4. What, if any, new costs and/or cost savings for Ontario businesses, organizations or municipalities may be associated with these proposals should the government decide to proceed? Please explain.

5. Other comments?

## ii. Displaying the BAO Logo

### Context:

#### Auditor General Findings and Recommendations

The Auditor General noted that in September 2020, the BAO conducted a survey of about 47,030 Ontarians with a response rate of 0.2 per cent which revealed that close to half of the respondents were not aware of the BAO. The survey also revealed that close to three-quarters of respondents expressed no opinion as to how well the BAO administered provisions of the FBCSA.

The Auditor General recommended that, to improve oversight of the BAO and increase consumer representation, the ministry work with the BAO to increase public awareness of the BAO (Recommendation #19).

## **Current Requirements**

Currently, bereavement service operators are not required to post the BAO logo on websites that they maintain or use for the purposes of selling licensed supplies or services.

In April, 2021, changes were made to the General Regulation under the FBCSA to require every operator who maintains or makes use of a website to promote, or enter into contracts for, the sale or provision of a licensed supply or service to ensure that their licence number and a description of the type of licence are available in a clearly visible place on that website. These changes come into force as of July 1, 2021.

## **Stakeholder Consultations**

In consultations with bereavement sector stakeholders held in February, 2021, some participants suggested that the ministry should consider proposing changes to require every bereavement service operator who maintains or makes use of a website to promote the sale or provision of licensed supplies or services to display the BAO logo in a prominent place on that website. They suggested that this could be a clickable logo that links to the BAO's website.

Based on a jurisdictional scan of the rules for bereavement service operators in other provinces, none of the jurisdictions studied require licensees to display the logo of their respective regulators on their websites.

Based on a scan of the requirements for other sectors in Ontario, other than the bereavement sector, several sectors require prescribed persons to display the regulator's logo or trademarked symbol at their place of business, in contracts or affixed to licensed products. For example, in Ontario, registered motor vehicle dealers are required to display the trademark of the Ontario Motor Vehicle Industry Council in a contract with a motor vehicle purchaser.

## **Options Under Consideration:**

The ministry is considering proposing potential regulatory changes to require every bereavement service operator who maintains or makes use of a website to promote, or enter into contracts for, the sale or provision of a licensed supply or service to display the BAO logo in a prominent place on that website.

If the government were to decide to proceed with this potential proposal, this could potentially help:

- Consumers know that they are dealing with a licensed bereavement service operator prior to making a purchase; and

- Address the Auditor General’s recommendation by helping to increase the public’s awareness of the BAO, at a relatively low cost to licensees.

What do you think?
1. Are there any comments, concerns, gaps or alternatives to consider in relation to the potential proposal to require every bereavement service operator who maintains or makes use of a website to promote, or enter into contracts for, the sale or provision of a licensed supply or service to display the BAO logo in a prominent place on that website? Please explain.
2. If the government were to proceed with this potential proposal, how much time would the bereavement sector need to implement this change?
3. What, if any, new costs and/or cost savings for Ontario businesses, organizations or municipalities may be associated with the proposal should the government decide to proceed? Please explain.
4. Other comments?

### iii. Disclosure Requirements for Promotional Materials

#### Context:

As part of the regulatory changes that were made in April 2021 to strengthen price transparency, changes were made to s. 68 (3) of the General Regulation to require online price list display by bereavement service operators that maintain or make use of a website to promote or enter contracts for the sale or provision of a licensed supply or service. These changes come into force on July 1, 2021.<sup>7</sup> The underlined change is intended to require

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<sup>7</sup> The language “or provision” is also in the new s. 112.2 (i.e., disclosure to public by operator), and was added to s. 119(5) (i.e., promotional material) of the General Regulation for the sake of consistency.

operators that promote the provision of bereavement supplies/services, such as a not-for-profit cemetery operator that promotes interment rights at no cost, to meet the same requirements related to promotional materials as those operators promoting the sale of these supplies or services.

The ministry is now consulting about whether to propose similar changes to ss. 119 (1) and (4) of the General Regulation, which deals with requirements for promotional materials.

### Options Under Consideration:

The ministry is considering proposing the following potential regulatory changes to provisions in the General Regulation which deal with requirements for promotional materials:

- Amend s. 119 (1) to require every operator to ensure that the prescribed information is included in any sign or written advertisement, brochure, price list, contract, letterhead, pamphlet, circular, or other written material, other than business cards, used by the operator to promote the sale or provision of a licensed supply or service.
- Amend s. 119 (4) to apply to audio or video material (at least a minute in duration) that an operator uses to promote the sale or provision of a licensed supply or service.

If the government were to move forward with these proposals, these changes could potentially:

- Help to promote a more level playing field among operators by requiring operators that are promoting the “provision” of licensed supplies and services to meet the same requirements related to promotional materials as those that are promoting the “sale” of these supplies or services; and
- Help consumers receive the same type of information in promotional materials across all operators.

#### What do you think?

1. Are there any comments, concerns, gaps or alternatives to consider in relation to the potential proposals to amend s. 119 (1) and (4) of the General Regulation to require every operator to ensure that the prescribed information is included in any sign or written advertisement, brochure, price list, contract, letterhead, pamphlet, circular, or other written material, other than business cards, and audio or video material (at least a minute in duration) used by the operator to promote the sale or provision of a licensed supply or service? Please explain.

2. If the government were to proceed with all or some of these potential proposals, how much time would the bereavement sector need to implement these changes?

3. What, if any, new costs and/or cost savings for Ontario businesses, organizations or municipalities may be associated with these proposals should the government decide to proceed? Please explain.

4. Other comments?

## iv. Upselling and/or Aggressive Sales Practices

### Context:

#### Auditor General Findings and Recommendations

In the audit of the BAO, the Auditor General raised concerns about upselling and aggressive sales practices in the bereavement sector.<sup>8</sup> For example, the Auditor General found that:

- Funeral selling practices can still include pressure tactics and the provision of misleading information; and
- Mystery shoppers that were engaged by the Auditor General to visit 100 licensed bereavement service operators experienced sales pressure and/or were given misleading information by about half of the sampled operators.

The ministry is now consulting on potential legislative and/or regulatory changes that would help better inform consumers and strengthen the ability of the BAO to take steps to prevent upselling and/or unethical practices.

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<sup>8</sup> The Auditor General's report does not specifically define what is meant by "high pressure sales" or "upselling". However, the report notes that the mystery shoppers felt pressured by an employee to sign a contract or consider a specific product or service. The [Merriam-Webster dictionary](#) defines "upsell" as to try to convince a customer to purchase something additional or at a higher cost.

## **Current Requirements**

Currently, licensees are prohibited from making a false, misleading or deceptive statement in any advertisement or material published or distributed relating to the sale or provision of licensed supplies or services.

Among other rules, licensees are also prohibited from:

- Falsifying, assisting in falsifying, or inducing or counseling another person to falsify or assist in falsifying any information or document relating to the sale or provision of any licensed supplies or services;
- Making a misleading or deceptive statement, or assisting, inducing or counseling another person to make a misleading or deceptive statement, in any information or document relating to the sale or provision of any licensed supplies or services; and
- Furnishing, assisting in furnishing or inducing or counseling another person to furnish or assist in furnishing any false, misleading or deceptive information or documents relating to the sale or provision of any licensed supplies or services.

In addition, the BAO has committed to establishing discipline and appeal committees under [Ontario Regulation 374/18](#) (Discipline and Appeal Committees) that would be responsible for determining whether a breach of [Ontario Regulation 216/18](#) (Code of Ethics) has occurred. The Code of Ethics sets out rules for professional misconduct and incompetence that apply to individuals licensed as funeral directors.

Once established, the discipline committee would have the authority to, among other things:

- Order fines against a licensee of up to \$25,000;
- Order a licensee to attend an educational program or if the licensee is an operator order it to fund education for its employees; and
- Fix and impose costs arising from the discipline process to be paid by the licensee.

Discipline committee decisions could be appealed to an appeal committee, once established.

## **Stakeholder Consultations**

At the consultation session with bereavement service operators in February 2021, the ministry asked some preliminary questions about steps that could be taken to address the Auditor General's findings with respect to upselling and/or aggressive sales practices. Several participants noted that the use of a commission-based sales model by some bereavement service operators may incentivize staff to sell higher priced bereavement supplies or services. Stakeholders suggested potential changes to address these issues, including:



- Requiring salespersons to disclose when they earn a commission on sales of bereavement supplies and services; or
- Prohibiting commission-based sales to discourage high-pressure upselling.

It was also acknowledged that changes to the Code of Ethics to expand its application to all licensees may help address some of the concerns raised by the Auditor General and help to improve consumer experiences when making purchasing decisions.

A jurisdictional scan of the requirements for bereavement service operators in other Canadian jurisdictions revealed that none of the jurisdictions studied require licensed operators to disclose their sales commissions to consumers.<sup>9</sup> Manitoba prohibits funeral directors from paying a commission to persons to sell any supplies or services provided by the funeral director unless that person's name is registered, the prescribed fees are paid, and the person complies with information disclosure requirements, which include the provision of a price list to the consumer. Saskatchewan prohibits persons from paying commissions for recommending that human remains be interred at a particular cemetery or taken to a particular funeral home or crematorium.

A jurisdictional scan of requirements for other sectors, other than the bereavement sector, revealed several examples where persons are required to disclose their sales commissions to consumers. For example, in Manitoba real estate brokers are required to disclose the amount of commission paid to the broker by the offeree, while in Ontario, agreements between a consumer and a real estate brokerage must disclose any remuneration payable to the brokerage, including commissions. Based on this research, it appears that no other sectors in the jurisdictions studied, including Ontario, prohibit commission-based sales.

### Option Under Consideration:

The ministry is considering proposing the following potential change:

- **Disclosure of Incentives and Sales Commissions:** Amend the General Regulation under the FBCSA to require sales staff to disclose any incentives or commissions on sales they may receive, and how those incentives or commissions are calculated prior

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<sup>9</sup> Jurisdictions studied include British Columbia, Alberta, Saskatchewan, Manitoba, Quebec and Nova Scotia.

to entering into a sales contract with a purchaser. The ministry is also proposing to require that sales contracts include a statement about the incentives and/or commissions received in connection with the contract. If the government were to proceed with this proposal, any contract where the purchaser did not indicate that they received these required disclosures from the operator would be deemed unenforceable, such that the consumer would be able to cancel the contract at any time after it is made with written notice to the operator.

If the government were to decide to proceed with this potential proposal, it would help consumers to understand whether sales staff may receive incentives or earn a commission on sales of supplies and services, and how that incentive or commission is calculated, before entering a contract, to help prevent upselling.

Potential content changes to the Code of Ethics will be the topic of future stakeholder consultations to be undertaken by the BAO.

### What do you think?

1. Are there any comments, concerns, gaps or alternatives to consider in relation to the potential proposals to:
  - a. Require sales staff to disclose any incentives or commissions on sales they may receive, and how those incentives or commissions are calculated? Please explain.
  - b. Require contracts to include a statement about the incentives and/or commissions received in connection with the contract? Please explain.
2. What, if any, new costs and/or cost savings for Ontario businesses, organizations or municipalities may be associated with these proposals should the government decide to proceed? Please explain.
3. Other comments?

## v. Not Allowing the Licensing of New Disposition Technology Providers Until Safety of the Technology Can Be Confirmed

### Context:

#### Auditor General Findings and Recommendations

The Auditor General's value-for-money audit of the BAO found that the BAO could be more proactive to stay on top of emerging technologies such as alkaline hydrolysis.<sup>10</sup>

The Auditor General recommended, to protect the public and the environment, the ministry work with the BAO to allow for licensing to be delayed until the safety of the new technology is determined and decide on amendments to the legislation and/or regulations, where needed (Recommendation 17).

#### Current Requirements

It is currently the responsibility of the BAO Registrar to consider any application for licensure that is submitted to the BAO, including any applications from operators of new disposition technologies, and determine whether to issue a licence based on available information and the licensing requirements under the FBCSA (e.g., a consideration of whether there are reasonable grounds to believe that the operation of the business by the applicant creates a risk to public health, safety or decency). Applicants who are denied a licence by the Registrar can appeal that decision to the Licence Appeal Tribunal.

The authority to license establishments that provide certain alternative processes or methods of disposing of human remains is set out in s. 1.1(2) of the FBCSA. Specifically, it allows for such establishments to be licensed/regulated under the FBCSA provisions related to cremation, with necessary modifications. For example, alkaline hydrolysis operators have been licensed under this framework, and certain modifications to cremation-related requirements have been made in the form of licence terms and conditions for alkaline hydrolysis operators.

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<sup>10</sup> Alkaline hydrolysis is an alternative method of disposal of human remains that uses caustic chemicals to break down the body with the resulting liquid effluent draining into the wastewater system.

## Options Under Consideration:

The ministry is considering proposing potential legislative and/or regulatory changes to ensure that providers of any emerging alternative disposition technologies are not automatically eligible to apply for a licence under the FBCSA until the health and safety of the technology has been confirmed through research, without altering current licensing of alkaline hydrolysis operators. The ministry is currently working with the BAO and public health experts to determine a process to undertake such research.

If the government were to decide to proceed with this potential proposal, this approach would potentially:

- Respond to the Auditor General’s recommendation to protect the public and the environment by enabling licensing to be delayed until the safety of a new disposition technology is determined; and/or
- Help ensure a clearer understanding of whether an operator may seek a licence to provide services under the FBCSA using emerging alternative disposition technologies.

### What do you think?

1. Are there any comments, concerns, gaps or alternatives to consider in relation to the potential proposal to require the safety of new disposition technologies to be confirmed before their operators may apply for a licence under the FBCSA? Please explain.

2. Who is best qualified to conduct research studies to confirm the health and safety of new disposition technologies for the public and the environment? Please explain.

3. What, if any, new costs and/or cost savings for Ontario businesses, organizations or municipalities may be associated with these proposals should the government decide to proceed? Please explain.

4. Other comments?

## B. Compliance and Enforcement Tools

### Context:

#### **Auditor General Findings and Recommendations**

The Auditor General's value-for-money audit of the BAO found that the existing enforcement tools available to the BAO are very limited and inflexible. More specifically, the Auditor General found that it is very difficult for the BAO to enforce compliance for matters that are not serious enough to warrant the revocation of licences.

The Auditor General found that since the BAO was created in January 2016, its main enforcement actions have been to impose conditions on licences (e.g., conditions to require a licensee to submit a bank statement monthly rather than annually). This process is usually completed by mutual agreement by both the BAO's Registrar and the licensee.

To help protect consumers against financial harm and increase deterrence, the Auditor General recommended that the BAO work with the ministry to adopt best practices from other jurisdictions to expand enforcement tools, such as the ability to levy an administrative penalty (Recommendation #8). The ministry is now consulting on potential changes to implement this recommendation.

#### **Current Requirements**

Currently, when a licensee fails to comply with the provisions of the FBCSA or its regulations, several courses of action are open to the BAO.

The BAO Registrar may, if they receive a complaint about a licensee, request information in relation to the complaint from any licensee. In handling complaints, the BAO Registrar may also do any of the following, as appropriate:

- Attempt to mediate or resolve the complaint;
- Give the licensee a written warning that if the licensee continues with the activity that led to the complaint, action may be taken against the licensee;
- Require the licensee to attend a specified educational program or require the licensee to ensure that certain persons attend a specified educational program;
- Refer the matter, in whole or in part, to the discipline committee (if any);
- Propose to refuse to issue or renew a licence, or to suspend or revoke a licence, in certain circumstances; and/or
- Take further action as is appropriate in accordance with the FBCSA.

The BAO's Statutory Director may, in certain circumstances:

- Issue a freeze order for money or assets;
- Apply to the Superior Court of Justice for the appointment of a receiver and manager to take possession and control of the operator's business; and/or
- Apply to the Superior Court of Justice for a restraining order.

There are also offences under the FBCSA. Licensees and others may be prosecuted for contravening requirements under the Act.

As noted earlier, the BAO has committed to establishing discipline and appeal committees under the Discipline and Appeal Committees Regulation. Updating the Code of Ethics Regulation will be the topic of future stakeholder consultations.

### **Administrative Penalties**

An administrative penalty is a financial penalty for failing to comply with the law that offers a lower-cost and quicker response than other enforcement actions, such as prosecution or licence suspension or revocation. Administrative penalties are suitable for violations that are easily proven without extensive inspection or investigation (e.g., if a required sign was not posted).

Administrative penalties are a modern regulatory tool that is being used more frequently by regulators in Ontario and in other jurisdictions. Several bereavement service regulators in other provinces are already able to issue administrative penalties, including in British Columbia, Alberta<sup>11</sup>, Saskatchewan, and Quebec<sup>12</sup>. In Ontario, administrative authorities such as the Resource Productivity and Recovery Authority and the Retirement Homes Regulatory Authority can issue administrative penalties.

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<sup>11</sup> Only for contraventions relating to funeral services.

<sup>12</sup> Quebec's Ministère de la Santé et des Services Sociaux (MSSS) can issue offence reports or notices of non-compliance in the event of non compliance with certain provisions of the Act Respecting Arrangements for Funeral Services and Sepultures or its regulations. Fines vary depending on whether they are given to an individual or corporation.

## Compliance Orders

In addition to the ability to issue administrative penalties, another enforcement tool that is commonly used by modern regulators is a compliance order. A compliance order (referred to in some statutes as director's order, safety order or compliance order of the Registrar) is an order directing a person to comply with a legislative requirement, if the issuer believes on reasonable grounds that the person has engaged or is engaging in an activity that contravenes a requirement under the Act.

Some bereavement service regulators in other provinces are already able to issue a compliance order or director's order, including in British Columbia and Alberta. The Nova Scotia Board of Registration of Embalmers and Funeral Directors may also issue a Directive which is signed by the Deputy Registrar, which is similar to a compliance order.

In Ontario, several administrative authorities for other sectors have the ability to issue a compliance order, such as the Retirement Homes Regulatory Authority, the Condominium Authority of Ontario, the Technical Standards and Safety Authority [called a "safety order"] and the Home Construction Regulatory Authority.

Currently the BAO Registrar can issue, what are in effect, some specific compliance orders under the FBCSA such as s. 23(2) (i.e., failure to file information), s. 28(1)(a) (i.e., to cease false advertising), and s. 109(7) of the General Regulation (i.e., failure to meet reporting requirements).

## Options Under Consideration:

To address the Auditor General's recommendation, the ministry is considering proposing potential changes to allow the BAO to utilize additional enforcement tools. The ministry is considering proposing all or some of the following potential changes:

- **Administrative Penalties and Compliance Orders:** Provide the BAO Registrar, the Statutory Director, or a person appointed by the Registrar, with the ability to issue administrative penalties (up to a maximum of \$10,000) and compliance orders under certain circumstances, to be determined (e.g., any contravention under the FBCSA at the discretion of the BAO Registrar; specific provisions such as failure to submit required documents to the BAO Registrar).

- **Appeal Mechanism:** Create an appeal mechanism, for example to the Licence Appeal Tribunal, to give subjects of an administrative penalty or compliance order a way to challenge a penalty or order.
- **Funds from Administrative Penalties:** Provide authority for the Minister of Government and Consumer Services to direct that the funds from administrative penalties go into a fund for the purposes of supporting consumer education.

If the government were to decide to proceed with such proposals, this approach would potentially:

- Respond to the Auditor General’s recommendation;
- Help to deter minor contraventions of the FBCSA and/or its regulations and promote compliance with that legislation, without having to resort more severe measures, such as licence revocation; and
- Provide individuals or entities subject to an administrative penalty or compliance order with an appeal mechanism.

If the government were to proceed with these potential proposals, these enforcement tools would complement, not replace, the existing tools that the BAO has available to help an individual or entity achieve compliance as part of a risk-based compliance framework.

In addition, the ministry would consult at a later date on the details of the administrative penalties framework (e.g., the penalty amounts, what is a violation to which an administrative penalty or compliance order may apply, etc.).

### What do you think?

1. Are there any comments, concerns, gaps or alternatives to consider in relation to the potential proposals to:
  - a. Provide the BAO with the ability to issue administrative penalties for minor contraventions under the FBCSA? Please explain.
  - b. Provide the BAO with the ability to impose compliance orders? Please explain.
  - c. Entitle the subject of an administrative penalty or compliance order to appeal the action, for example to the Licence Appeal Tribunal? Please explain.



2. What, if any, new costs and/or cost savings for Ontario businesses, organizations or municipalities may be associated with these proposals should the government decide to proceed? Please explain.

3. Other comments?

## C. Priority of Persons with Legal Authority to Make Decisions Regarding Decedents

### Context:

The ministry has heard from bereavement sector stakeholders that the issue of who has the right to control the final disposition of a deceased's remains has become an increasingly important issue for the bereavement sector in recent years. Over the past 10 years, there has been an increase in family disputes related to determining who has the right to control the final disposition, likely due to changing family units, increased life expectancy, and the fact that approximately 56 per cent of Canadians, based on surveys, do not have a valid will and/or estate executor named. The main concern is largely about identifying the authorized representative of the deceased and moderating dispute resolution.

Additionally, the ministry heard that hospitals have increasingly had to deal with situations where the estate executor and/or next of kin are unavailable or unwilling to provide instructions regarding the final disposition (i.e., resulting in bodies being unclaimed or abandoned). This entails hospitals having to locate the next of kin and/or contact the Office of the Chief Coroner (OCC) or the Office of the Public Guardian and Trustee (OPGT), as described by the OCC Guidelines<sup>13</sup>.

Currently, the FBCSA does not set out a hierarchy or priority of persons (POP) authorized to generally control the disposition of the deceased's remains. In contrast, respective bereavement statutes in British Columbia, Alberta, and Saskatchewan set out a POP (e.g., Part 3 of B.C.'s Cremation, Interment and Funeral Services Act or CIFSA).

Some bereavement sector stakeholders have suggested that Ontario should adopt provisions similar to those found in British Columbia's CIFSA, especially Part 3 of that Act, and that the amending legislation should address the following:

- Definitions (e.g., spouse);

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<sup>13</sup> OCC Guidelines provide hospitals and long-term care facilities in Ontario with a process for managing unclaimed bodies that are not under the jurisdiction of a coroner (i.e., where death of a patient/resident is natural or expected), and clarify the respective roles of OCC and OPGT in this process.

- A priority of persons as “authorized representative of the deceased”, and a corresponding requirement on licensees to obtain that person’s written authorization before carrying out a disposition;
- Disposition in accordance with written preference (i.e., if the deceased indicated reasonable/practicable disposition directions in a will or other written document, they must be followed);
- Directions for assigning responsibility for the disposition of human remains where no proxy exists (i.e., when a body is abandoned/unclaimed);
- Limitation of licensees’ liability for acting on a written authorization; and
- Priority dispute resolution.

Currently, disputes regarding who has the right to control the final disposition of the deceased’s remains may have to be resolved through the judicial system if the parties cannot come to an agreement. Bereavement sector stakeholders have noted that establishing a POP in the FBCSA may not solve all disputes among next of kin (e.g., some families may not be truthful about the existence of other family members), and some disputes may still need to be resolved through the courts. However, some feel that there is broad-based sector support for the proposed changes, as they would provide more clarity to bereavement service operators and some relief for next of kin from disputes and delays during a difficult time. Notably, the CIFSA recognizes that disputes may still arise despite having an established POP and sets out a mechanism where one can apply to British Columbia’s Supreme Court for an order to be given the sole right to control the final disposition.

### **Current Requirements**

In general, the FBCSA requires a contract to be made to provide licensed supplies and services, and that contract must meet certain requirements. For example, the contract must include a description of when, under what circumstances and in what manner the supplies or services will be provided as well as, as applicable, the name and address of the purchaser, the holder or intended holder of interment or scattering rights<sup>14</sup> and/or the recipient of the supplies or services.

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<sup>14</sup> Under the FBCSA, “interment rights holder” means the person who holds the 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. “Scattering rights holder” means the person who holds the scattering rights with respect to a scattering ground whether the person be the purchaser of the rights,

The interment rights holder or scattering rights holder has the right to direct the interment or scattering of human remains in a cemetery and, subject to the cemetery by-laws, erect a marker in association with the disposition.<sup>15</sup> Alternatively, these rights may be exercised by “a person authorized to act on the holder’s behalf.” The FBCSA does not define the latter person, nor does it specify who is authorized in general to acquire or, apart from a purchaser, direct funeral, cremation or transfer services.

The by-laws of a crematorium must specify the documentation required by the crematorium operator for a cremation to be carried out, and a cemetery’s by-laws must specify the documentation required to carry out an interment, scatterings or the installation of a marker.

As a matter of common law, the executor named in a will is responsible for directing and authorizing the disposition (e.g., for purchasing and/or exercising interment rights). If there is no executor or none able/willing to act, then an administrator appointed under s. 29 of the Estates Act would be responsible. Additionally, provisions under other statutes (e.g., Trustee Act, Crown Administration of Estates Act, Substitute Decisions Act, 1992, Courts of Justice Act) may be applicable to the process of identifying the estate trustee or otherwise arranging the final disposition. Furthermore, the responsibility to dispose of unclaimed bodies in various circumstances is set out under statute, such as the Anatomy Act.

Under the common law in Ontario, a deceased’s wishes relating to their manner of final disposition set out in a will or other testamentary instrument are not legally binding. In contrast, written preferences respecting bodies and body parts caught by the Gift of Life Act are binding (as well as oral consent, subject to certain conditions)<sup>16</sup>.

Lastly, the FBCSA does not set out provisions to limit licensees’ liability for taking instructions regarding the final disposition, nor does it set out a mechanism for priority dispute resolution.

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the person named in the certificate of scattering or such other person to whom the scattering rights have been assigned.

<sup>15</sup> Cemetery operators cannot inter or scatter remains in a cemetery other than those of the rights holder without the written consent of the rights holder. A delivery agent as defined in the Ontario Works Act, 1997, can authorize interment or scattering under the FBCSA in certain circumstances.

<sup>16</sup> Ontario’s Gift of Life Act, as well as the General Regulation under the Coroners Act, also set out hierarchical schemes of who can provide consent on behalf of another person for use of that person’s body or certain body parts, or who can claim that person’s tissues after death after death, respectively, in certain circumstances.

## Options Under Consideration:

The ministry is considering proposing all or some of the following potential changes:

- **Priority of Persons:** Establish a POP setting out who has the right to control the final disposition of the deceased's remains. If the person at the top of the POP is unavailable or unwilling to provide instructions for the final disposition, the right to control the final disposition would pass to the person who is next in priority. If this right passes to persons of equal rank, the order of priority would be determined in accordance with an agreement between them or, in the absence of an agreement, it would begin with the eldest of the persons and descend in order of age. The proposed POP is:
  - (a) A person authorized to act on the interment or scattering rights holder's behalf;
  - (b) The "personal representative" of the deceased, as defined in the Estates Administration Act;
  - (c) The spouse of the deceased;
  - (d) An adult child of the deceased;
  - (e) If the deceased was a minor, a person who had legal custody of the deceased at the time of death;
  - (f) A parent of the deceased;
  - (g) An adult sibling of the deceased;
  - (h) A grandparent of the deceased;
  - (i) An adult grandchild of the deceased;
  - (j) An adult uncle or aunt of the deceased;
  - (k) An adult nephew or niece of the deceased;
  - (l) An adult next of kin of the deceased, determined on the basis provided by ss. 47(6) and 47(8) of the Succession Law Reform Act;
  - (m) An adult person having a personal or kinship relationship with the deceased, not based on blood ties or affinity, other than those referred to in paragraphs (b) to (c) and (e) to (k).
  
- **Definitions:**
  - Set out a definition of a "person authorized to act on the interment or scattering holder's behalf" to ensure that it is clear how such an authorization may occur and how it may differ from the "personal representative" definition, set out in the Estates Administration Act.
  - Set out a definition of "spouse" in the context of the POP to ensure that it is clear which individuals would be eligible to take control of the final disposition as a spouse. The proposed definition of "spouse" is consistent with that in Ontario's

Gift of Life Act and Coroners Act, each of which sets out a priority scheme for the purposes of those Acts.<sup>17</sup> The proposed definition is:

- “spouse” means a person,
  - (a) to whom the deceased was married immediately before his or her death, or
  - (b) with whom the deceased was living in a conjugal relationship outside marriage immediately before his or her death, if the deceased and the other person,
    - (i) had cohabited for at least one year,
    - (ii) were together the parents of a child, or
    - (iii) had together entered into a cohabitation agreement under s.53 of the Family Law Act.

- **Directions Where No Proxy Exists:** Include in the POP, in addition to the above, those persons or entities who may take control of the final disposition in a situation where an estate executor, next of kin or anyone else that had a personal relationship with the deceased (e.g., friend) is unavailable or unwilling to provide disposition instructions (e.g., Public Guardian and Trustee).
- **Written Authorization:** In addition to having a contract for the sale or provision of a licensed supply or service under the FBCSA, require that bereavement service operators obtain written authorization from the person who has control of the final disposition of a deceased, prior to carrying out the disposition.
- **Visual Identification:** Prior to carrying out the final disposition, allow bereavement service operators to require visual identification of human remains by the person who has control of the final disposition of the deceased or by another person who is qualified to identify the human remains.

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<sup>17</sup> Please note that the proposed POP, if established, would only be used for the purposes of determining who has the right to control the final disposition of the deceased’s remains under the FBCSA. Priority schemes set out in the Gift of Life Act, the Coroners Act or any other legislation would continue to apply for the purposes of those Acts..

- **Disposition in accordance with written preference:** Require that a written preference by a deceased person respecting the disposition of his or her remains is binding on the person who has the right to control the disposition of those remains if:
  - The preference is stated in a will or in a prepaid contract made under the FBCSA;
  - Compliance with the preference is consistent with the Gift of Life Act; and
  - Compliance with the preference would not be unreasonable or impracticable or cause hardship.
  
- **Priority Dispute Resolution:** Establish a mechanism for resolving disputes about who should be authorized to control the disposition. It would allow a person to seek a court order to grant that person the sole right to control the disposition of the deceased's remains. It would also provide directions to the court about what it should consider when making this decision (e.g., the feelings of those related to/associated with the deceased, religious faith of the deceased). As such, the court's decision would override the established POP. It would also provide directions to the court about what it should consider when making this decision as proposed below:
  - When hearing an application related to a priority dispute, the court must have regard to the rights of all persons having an interest and, without limitation, give consideration to:
    - The feelings of those related to, or associated with, the deceased, giving particular regard to the spouse of 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 respecting the disposition of his or her human remains or cremated remains, and
    - Whether the dispute that is the subject of the application involves family hostility or a capricious change of mind respecting the disposition of the human remains or cremated remains.
  
- **Limiting Licensees' Liability:** Protect bereavement service operators from liability in situations where there is either an error/omission in an authorization for the disposition of human remains or where the person who signed an authorization did not have authority to do so, unless the operator knew, or ought to have known, that the facts stated in the authorization were not true or the person giving the authorization did not have the authority to do so.

If the government were to decide to proceed with such proposals, this approach would potentially:

- Address an issue that is of high priority for the bereavement sector;
- Provide more clarity to bereavement service operators and some relief for next of kin from disputes and delays during an already difficult time;
- Facilitate the resolution of priority disputes.

<b>What do you think?</b>
1. Are you in favour of establishing a POP authorized to control the disposition of the deceased's remains in legislation? Please explain.
2. Have you encountered any disputes related to determining who has the right to control the final disposition?  a. If yes, how frequently do they occur?  b. What is the nature of the disputes?
3. If the government were to proceed with a potential proposal to establish a POP, would it be an effective method for resolving the types of disputes you have encountered or have been part of, related to determining who has the right to control the final disposition? Please explain.
4. Are there any comments, concerns, gaps or alternatives to consider in relation to the potential proposals to:  a. Create a POP (i.e., type of priority persons and their respective order)? Please explain.  i. Should the POP also apply to disinterment decisions in the FBCSA? Please explain.  ii. Should the POP place a person who has legal custody of a minor higher than a parent (e.g., where a deceased minor was the subject of a child welfare proceeding and was in the care of a Children's Aid Society or had a court-appointed guardian at the time of death)? Please explain.  b. Set out that the priority is passed to the eldest person of equal rank, in case of a disagreement? Please explain.



## What do you think?

- c. Set out a definition of a “person authorized to act on the interment or scattering holder’s behalf” in the FBCSA? Please explain.
  - i. How should it be defined (e.g., written consent provided to a bereavement service operator, power of attorney, etc.)?
- d. What are your views on the proposed definition of “spouse”? What alternative definition, if any, would you suggest?
- e. Should any other definitions be included to ensure that the POP is sufficiently clear? Please explain.
- f. Include in the POP those persons or entities who may take control of the final disposition in a situation where no proxy exists? Please explain.
  - i. Have you encountered situations where the deceased had no estate trustee or next of kin? If yes, who authorizes and/or pays for the disposition of the deceased in such situations? Please explain.
- g. Require a written authorization as described above? Please explain.
- h. Allow bereavement service operators to require visual identification of human remains as described above? Please explain.
  - i. Should the ability to require visual identification apply to all human remains or only cremated remains?
- i. Require that a written preference by a deceased person is legally binding in respect of the disposition of his or her remains? Please explain.
- j. Set out in legislation a judicial mechanism for resolving priority disputes? Please explain.
- k. Limit bereavement service operators’ liability as described above? Please explain.

5. If the government were to proceed with all or some of these potential proposals, how much time would the bereavement sector need to implement these changes?

6. What, if any, new costs and/or cost savings for Ontario businesses,

**What do you think?**

organizations or municipalities may be associated with these proposals should the government decide to proceed? Please explain.

7. Other comments?

## D. Cemetery Care and Maintenance Funds/Accounts (CMF/As)

### i. Interest Payment Requirements on Funds Borrowed from the Capital Portion of CMF/As

#### Context:

#### Current Requirements

All cemetery operators are subject to the duty to maintain cemetery grounds to ensure the safety of the public and to preserve the dignity of the cemetery. The FBCSA and its regulations set out specific requirements related to CMF/As which are trust funds used to generate income for the care and maintenance of a cemetery over the medium- to long-term. The FBCSA requires cemetery operators to pay prescribed amounts into a CMF/A in various circumstances, unless the regulations provide otherwise. The interest generated from the CMF/A can only be used to maintain the cemetery, in accordance with the FBCSA's regulations (e.g., to stabilize markers).

The FBCSA prohibits the use of the capital portion of a CMF/A<sup>18</sup>, subject to limited exceptions. Currently, only a non-commercial cemetery operator<sup>19</sup> may seek to use any of the capital portion of the CMF/A to purchase land adjoining the cemetery in order to enlarge it, subject to the BAO Registrar's authorization. If released, this amount must be paid back into the trust fund.

#### Stakeholder Consultations

Between November 20, 2020 and January 19, 2021, the ministry posted a consultation paper regarding proposed changes to CMF/A requirements under the FBCSA on Ontario's Regulatory Registry for comment. This consultation contributed to regulatory changes made in April 2021, which come into force on January 1, 2022. The changes will:

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<sup>18</sup> The capital portion refers to the funds in a CMF/A other than the amount of money that is earned, including its compounding, from the investment of funds. The latter can be referred to as the interest portion.

<sup>19</sup> A "commercial cemetery" is a cemetery operated for the purpose of making a profit for the owner.

- Permit non-commercial cemetery operators, including municipalities that operate cemeteries, that meet certain criteria<sup>20</sup> to access the capital portion of a CMF/A to increase the capacity of a cemetery subject to approval from the BAO Registrar, under the condition that the capital is paid back into the trust fund;
- Increase minimum CMF/A contribution amounts<sup>21</sup>; and
- Require the Minister to review the prescribed CMF/A contribution amounts at least once every five years.

As part of these consultations, the ministry also asked if cemetery operators<sup>22</sup> who receive approval to obtain an amount from the CMF/A capital should be required to pay back into the CMF/A an amount representing the interest that would have been earned on the capital portion had none of that portion been paid to the cemetery operator (foregone interest).

Most individuals that responded to this question felt that cemetery operators who receive approval from the BAO Registrar to borrow funds from the capital portion of CMF/As should be required to pay back an amount into the trust representing this foregone interest.

However, there was no consensus among respondents about how this forgone interest should be accounted for. Suggestions ranged from requiring a low interest rate or tying the interest to the Consumer Price Index, to using the same interest rate as financial institutions use on loans for the same purpose. The ministry also heard that it is challenging to accurately estimate the amount of forgone interest in a given period because the accrual of interest depends on many variables (e.g., market conditions, types of investments, new contributions to a CMF/A).

The two other provinces in Canada that allow for borrowing from CMF/A-equivalents in certain circumstances (British Columbia and Saskatchewan), do not prescribe an interest payment framework with respect to repaying the fund/account.

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<sup>20</sup> See Appendix B for the required criteria to qualify for authorization to borrow from the capital portion of CMF/As.

<sup>21</sup> See Appendix C for CMF/A contribution amount increases.

<sup>22</sup> In the consultation paper, respondents responded to this proposal to permit all types of cemetery operators (including commercial cemetery operators) to access the capital portion of CMF/As under certain circumstances. The ministry decided to proceed with the proposed regulatory changes only with respect to non-commercial cemetery operators in response to stakeholder feedback.

The ministry is now consulting on potential additional regulatory amendments related to CMF/As to address feedback from stakeholders related to paying interest on the borrowed capital portion of a cemetery's CMF/A.

### Options Under Consideration:

The ministry is considering potential changes to require cemetery operators who receive approval to obtain an amount from the CMF/A capital to pay back into the CMF/A an amount representing foregone interest. The ministry is considering prescribing the following interest payment requirements:

- **Interest rate:** Prescribe an interest rate in regulation, that would be the average prime rate<sup>23</sup> as calculated based on the prime rates set by 5 major commercial banks in Canada<sup>24</sup>, plus 2 per cent, and which is required to be paid in all circumstances (rather than at the Registrar's discretion).
  - As of May 5, 2021, the average prime rate was 2.45 per cent<sup>25</sup>. So, for example, as of May 5, 2021, the resulting prescribed interest rate would be 4.45 per cent.
  - For comparison purposes, if approved, the prescribed interest rate would be lower than the current average interest rate for a conventional 5-year mortgage posted by the major chartered banks of 4.79 per cent.

The ministry is proposing this potential interest rate in order to achieve a balanced approach in comparison to the interest payment requirements that a non-commercial operator would presumably be required to pay if they were to seek a loan to fund cemetery expansion from a traditional financial institution. Setting the interest payment requirements too high could negate the potential cost savings that a non-commercial cemetery operator would receive from borrowing from the capital portion of the CMF/A, by avoiding more costly financing options (e.g., loans with high interest rates). Setting

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<sup>23</sup> For example, s. 1 (1) of [Ontario Regulation 310/97](#) under the Land Transfer Tax Act defines "average prime rate", on a particular date, means the mean, rounded to the nearest whole percentage point, of the annual rates of interest announced by each of the Royal Bank of Canada, The Bank of Nova Scotia, the Canadian Imperial Bank of Commerce, the Bank of Montreal and The Toronto-Dominion Bank to be its prime or reference rate of interest in effect on that date for determining interest rates on Canadian dollar commercial loans by that bank in Canada.

<sup>24</sup> Source: [BMO](#), [CIBC](#), [RBC Royal Bank](#), [Scotiabank](#) and [TD](#). Accessed: May 5, 2021.

<sup>25</sup> Bank of Canada. Interest Rates Posted for Selected Products by the Major Chartered Banks. Source: <https://www.bankofcanada.ca/rates/banking-and-financial-statistics/posted-interest-rates-offered-by-chartered-banks/#footnote-1>. May 5, 2021. Accessed: May 5, 2021.

the interest rate payment requirements too low could create a disincentive for cemetery operators to pay back the capital that they borrowed from the CMF/A in a timely manner. The ministry is proposing that this interest rate would be fixed over the term of the loan.

- **Term of loan:** The term of the loan would remain up to the discretion of the BAO's Registrar. This would allow the Registrar to have flexibility to account for the circumstances of the application submitted by the cemetery operator (e.g., type of capacity increase, cost thereof, amount in the CMF/A, number of new interments resulting from the increase).

If the government were to decide to proceed with this potential proposal, these changes could potentially provide clarity about the interest payment requirements for non-commercial cemetery operators repaying the capital portion of CMF/As to fund cemetery capacity increases by prescribing these requirements within the General Regulation.

The ministry is proposing that if approved, any potential regulatory amendments related to interest on borrowed CMF/A capital would come into force on January 1, 2022 to align with the in-force date for the regulatory changes related to CMF/As that were made in April 2021.

### What do you think?

1. What are your views on the potential proposal to require a non-commercial cemetery operator, such as a municipality, that is permitted to borrow capital from CMF/As, to pay interest on the repayment of the capital? Please explain.
2. Are there any comments, concerns, gaps or alternatives to consider in relation to the proposed prescribed interest payment requirements? Please explain.
3. If the government decides to proceed with a potential proposal to prescribe the interest payment requirements in the regulation, are there any challenges expected with implementing this proposal by the proposed January 1, 2022 in-force date? If yes, please explain. How could any challenges be mitigated or addressed?
4. What, if any, new costs and/or cost savings for Ontario businesses, organizations or municipalities may be associated with these proposals should

**What do you think?**

the government proceed? Please explain.

5. Other comments?

## **ii. Potential to Exempt Municipal Cemetery Operators from CMF/A Requirements**

### **Context:**

Since 2019, the ministry has heard from some municipal stakeholders that municipal cemetery operators should be exempt from the requirements to establish and contribute to CMF/As, while remaining subject to operators' duties regarding cemetery maintenance (e.g., the duty to ensure that cemetery grounds are maintained to ensure the safety of the public and to preserve the dignity of the cemetery). As of March 31, 2020, 19 per cent of all CMF/As were held by municipal cemetery operators, accounting for \$161 million in total held in municipal cemetery CMF/As.

The ministry's consultation paper posted on the Ontario Regulatory Registry from November 2020 to January 2021 sought feedback on proposals for changes to the CMF/A framework under the FBCSA, including seeking preliminary feedback on the potential option of exempting municipal cemetery operators from CMF/A requirements. The ministry is now seeking feedback on options that would implement such an exemption, if it were pursued.

Certain recent changes that were made to the CMF/A framework<sup>26</sup> in April 2021, respond to stakeholder feedback, including from municipal stakeholders, that non-commercial cemetery operators should be provided with more opportunities to access the capital portion of their CMF/As. These changes come into effect on January 1, 2022.

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<sup>26</sup> See Appendix A for an overview of the regulatory changes that were made in April, 2021.

## Feedback from Previous Consultations

Since the ministry began consulting on this potential proposal, the ministry has heard from several municipal stakeholders. Many have expressed that municipal cemetery operators should be considered differently from non-municipal cemetery operators when it comes to the framework for maintaining their cemeteries. Common reasons that were cited include:

- Municipalities are subject to certain transparency and accountability requirements and mechanisms as a result of being accountable to the public;
- Some municipalities are forced to rely on municipal revenues (e.g., tax base) to supplement the income earned on CMF/As, if they have CMF/As, in order to have enough funds to pay for cemetery maintenance costs; and
- Municipalities may be required under the FBCSA to assume ownership and maintenance responsibilities of cemeteries that have been abandoned within their geographic boundaries under certain circumstances. Abandoned cemeteries often have depleted CMF/As or, in some cases, no CMF/As (see Section E, below for potential changes regarding the cemetery abandonment process).

In response to the consultation paper posted from November 2020 to January 2021, over half of those who responded in respect of this potential proposal to exempt municipalities from CMF/A requirements indicated that they were opposed, while just under half were supportive. Almost all (92 per cent) of the support was from municipal stakeholders.<sup>27</sup>

Non-municipal cemetery operators raised concerns that exempting municipal cemetery operators from CMF/A requirements would result in a competitive disadvantage for non-municipal operators, as the exemption would allow for municipal operators to charge less for certain supplies/services. Some noted additionally that this could lead to the more frequent abandonment of cemeteries and/or an unfavourable market to establish new cemeteries in the long-term.

Most respondents felt that if an exemption were to be pursued:

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<sup>27</sup> “Municipal stakeholders” refers to the Association of Municipalities of Ontario and municipal cemetery operators.



- The money that is in existing municipal cemetery operator CMF/As should continue to be used for the purpose of cemetery maintenance. It was commonly stated that consumers who have contributed to these CMF/As, for instance upon purchasing interment rights, expect their contributions to be used for cemetery maintenance;
- Municipalities should have to meet certain conditions or eligibility requirements to be exempt; and
- Exempt municipalities should have to meet certain reporting requirements (e.g., annual reporting on how moneys from existing municipal CMF/As are being spent).

In April and May 2021, the ministry also consulted with Association of Municipalities of Ontario and municipal stakeholders about this proposal.

Some provinces (Alberta, Saskatchewan, Manitoba, and Nova Scotia) exempt municipal cemeteries from CMF/A-equivalent requirements. The ministry is not aware of any province that transitioned to an exemption from a previous framework that required municipalities to establish CMF/A-equivalents.

### Options Under Consideration:

The ministry is considering proposing the following options for potential changes:

- **Option 1:** Permit municipal cemetery operators that meet certain criteria to be exempt from the requirements to contribute to and maintain existing CMF/As. Existing CMF/A funds (capital and income) would be required to continue to be used for their intended purpose of funding cemetery care and maintenance only, in keeping with the current regulatory requirements for using the income. Interested municipal cemetery operators with existing CMF/As would be required to provide an attestation to the BAO that they meet the following prescribed criteria:
  - a. The operator has met the CMF/A reporting requirements for its cemetery/ies over a period of 5 years immediately preceding the attestation, or a lesser amount of time if the operator has had a CMF/A for less than 5 years;
  - b. The municipal cemetery operator has never contravened the rules with respect to accessing the capital portion of the CMF/A;
  - c. The municipal cemetery operator agrees to fulfil prescribed reporting requirements (see below); and,

- d. The municipal cemetery operator provides notice to the public via the municipality's website and, if applicable, the cemetery/ies website/s, of the transition to the exemption, at least 60 days prior to such a change coming into effect.
- **Option 1A:** Upon attesting to meeting the prescribed criteria, allow the municipal cemetery operator to move and hold any and all existing CMF/A funds in a reserve fund<sup>28</sup> established by the municipality, and require that monies in that fund be spent only on cemetery care and maintenance.
  - **Option 1B:** Upon attesting to meeting the prescribed criteria, require the municipal cemetery operator to continue to hold any and all existing CMF/A funds in CMF/As. Both the interest and capital portions may be spent only on cemetery care and maintenance.
  - **Option 2:** Permit only municipal cemetery operators that have inactive cemeteries<sup>29</sup> to be exempt from the CMF/A requirements for maintaining existing CMF/As associated with those inactive cemeteries. The money (both capital and income) from those CMF/As may be moved into a reserve fund established by the municipality and would be required to be used only for cemetery care and maintenance. See below for proposed reporting requirements.
  - **Option 3:** Do not immediately create an exemption for municipal cemetery operators from CMF/A requirements. Monitor and evaluate the impact of the recent changes that are intended to provide additional flexibility in the CMF/A framework by permitting access to the capital portion of a CMF/A to increase a non-commercial cemetery's capacity in certain circumstances.

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<sup>28</sup> Municipalities may establish reserve funds that are for specific purposes under legislation or contractual agreements. Money held in this type of reserve fund can only be used for prescribed purposes and are segregated from the general revenues of the municipality. An example of this type of reserve fund is the reserve fund provided for under the Development Charges Act, 1997.

<sup>29</sup> The FBCSA and its regulations do not currently define 'active' or 'inactive' cemeteries. However, the Auditor General's report considers an "active" cemetery to mean that the cemetery has had activities such as burials of bodies or scatterings of ashes or sale activities since 1995.

## CMF/A Reporting Requirements for Option 1 and Option 2

The ministry proposes that, if the government were to decide to proceed with either Option 1 or Option 2, the following reporting requirements would apply to municipal cemetery operators that obtain such an exemption:

- a. The municipal cemetery operator would need to continue to fulfill the current CMF/A reporting requirements under ss. 108 and 109 of the General Regulation under the FBCSA while they still have funds in their CMF/As.
- b. If CMF/A funds were to continue to be required to be kept in CMF/As (Option 1B), the municipal cemetery operator would need to report to the BAO Registrar any amount that was withdrawn from the capital portion of the existing CMF/A for cemetery care and maintenance, on an annual basis.
- c. If CMF/A funds were to be permitted to be transferred to a reserve fund established by the municipality (Options 1A and 2), the municipal cemetery operator would be required to report to the BAO Registrar all withdrawals for cemetery care and maintenance, on an annual basis.

Under Option 1 and Option 2, it is proposed that after a municipal cemetery operator had spent all of the CMF/A funds (if applicable), municipal cemetery operators would be funding cemetery maintenance entirely through their own means (e.g., general municipal revenues).

### What do you think?

#### General Questions – For Municipalities:

1. If your municipality owns/operates cemeteries:
  - a. Would your municipality prefer to fund cemetery maintenance entirely by its own means (e.g., through taxes and/or other municipal revenue) rather than through the CMF/A framework? Why or why not?
  - b. If your municipality does prefer this, what benefits do you anticipate?
  - c. If municipal cemetery operators were exempt from CMF/A requirements, how would your municipal cemetery operator fund maintenance in the absence of getting income from CMF/As?
  - d. If municipal cemetery operators were exempt from CMF/A requirements,

## What do you think?

would your municipality continue to charge consumers for maintenance?  
If yes, how would maintenance fees/charges be set?

2. If your municipality currently does not own/operate cemeteries:
  - a. If your municipality became responsible for a cemetery (e.g., through the abandonment process), would your municipality prefer to fund those cemetery/ies through general municipal revenues and outside of the CMF/A framework? Why or why not?

## Options 1A and 1B

3. What criteria would you recommend that a municipal cemetery operator should have to meet, if different than the proposed criteria, in order to be exempt from the CMF/A requirements?
4. What are your views on allowing municipalities that have attested to meeting the proposed criteria to transfer their CMF/A funds to a municipal reserve fund, subject to the requirement that the money in the reserve fund continue to be used on cemetery care and maintenance only?
  - a. What are the benefits or challenges associated with moving money out of CMF/As to municipal reserve funds? Please explain.
5. What are the benefits or challenges associated with continuing to hold money in CMF/As and allowing both the interest and capital portions to be spent on only cemetery care and maintenance? Please explain.
6. What process should be in place, if any, to verify or confirm that attestations to meeting the proposed criteria by the municipal cemetery operator are accurate?
  - a. What recourse should be in place for those municipal operators who have submitted false attestations? Please explain.
7. What other comments do you have in relation to these options?

## Option 2

8. If your municipality has inactive cemeteries, what impact would this option have on your municipality, if pursued?
9. If this option were pursued, how should 'inactive cemeteries' be defined (e.g., a

**What do you think?**

cemetery that has not had any interments or scatterings in the past 10 or 20 years)?

10. What other comments do you have in relation to this option?

**Option 3**

11. How are the recent regulatory changes that come into effect on January 1, 2022 expected to mitigate concerns with, and address requests for more flexibility in, the CMF/A framework for municipalities?

12. What other comments do you have in relation to this option?

**Potential CMF/A Reporting Requirements for Options 1 – 2:**

13. What reporting requirements would you recommend that a municipal cemetery operator should have to meet, if different than the proposed reporting requirements? Please explain.

14. Once a municipal cemetery operator no longer has CMF/A funds to use for maintenance, what reporting, if any, should the municipal cemetery operator be required to do in relation to maintenance of its cemeteries? Please explain.

15. What, if any, new costs and/or cost savings for municipalities may be associated with these proposals should the government decide to proceed? Please explain.

16. Other comments?

## E. Other Cemetery-Related Proposals

### i. Neglected or Abandoned Cemeteries

#### Context:

#### Auditor General Findings and Recommendations

The Auditor General found that, as of August 2020, 277 cemetery operators at 366 sites in the province had not renewed their licences, representing 12 per cent of the provinces' 2,368 cemetery operators and 7 per cent of its 5,217 sites. Of these 277 cemetery operators:

- 207 had not filed any reports since the inception of the BAO in 2016, and 51 of the 207 had not renewed their licences nor filed the required reports with a regulator since 1992;
- The majority (representing 142 or 51 per cent of cemetery operators that had not renewed their licences) are not-for-profit religious organizations, followed by volunteer boards (representing 48 or 17 per cent of cemetery operators that had not renewed their licences).

The Auditor General recommended that, so that all cemetery operators that conduct business in Ontario are licensed to do so, and cannot be licensed if they are not operating appropriately, the BAO make arrangements with local municipalities to take over those cemetery operators with expired licences that cannot be located or are unable to continue managing their cemeteries in perpetuity (Recommendation #3).

#### Current Requirements

Under the FBCSA and its regulations, the BAO Registrar currently cannot make a court application for cemetery abandonment to require a municipality to take over the ownership and operation of a cemetery within its municipal boundaries if the cemetery operator is unlicensed and there is no licensed cemetery operator, if the operator cannot be found or is unknown or if the operator is unable to continue managing the cemetery. However, there are several measures in the FBCSA and the General Regulation for dealing with a cemetery that is neglected or appears abandoned, or where the operator is unlicensed or unable to maintain the cemetery, such as:

- **A local municipality can order a cemetery operator to restore the cemetery to good order and repair:** Under the General Regulation of the FBCSA, a local municipality may order a cemetery operator that does not keep the cemetery in good order and repair to restore it to good order and repair within a reasonable time period

specified in the order. If the cemetery operator does not restore the cemetery as specified in the order, the municipality may have the work done and recover the costs from the cemetery operator. The cemetery operator can appeal the order from the municipality to the BAO Registrar within 15 days of being served with the order.

- **The BAO Registrar can require a cemetery operator that has an interest in a cemetery to maintain the cemetery:** The General Regulation provides that a cemetery operator that has an interest in a cemetery shall maintain the cemetery if the BAO Registrar is of the opinion that:
  - The cemetery appears to be abandoned or neglected; and
  - The interest of the operator is significant enough to warrant requiring the operator to maintain the cemetery.
  
- **The BAO director can appoint a manager to operate the cemetery:** The FBCSA provides that the BAO's statutory director may appoint a manager to operate a cemetery in place of the licensed operator if:
  - The director has reasonable and probable grounds to believe that the person licensed to operate the cemetery is doing or is about to do something in the operation of the cemetery that:
    - Creates or is likely to create a risk to public health, safety or decency; or
    - Is causing or is likely to cause financial loss to members of the public; or
  - The licence of the person who operates the cemetery is suspended or revoked.
  
- **In certain circumstances the BAO director can apply to the Superior Court of Justice for the appointment of a receiver and manager to take possession and control of an operator's business:** The court may order the appointment if it is satisfied it is in the public interest.
  
- **A municipality in which a cemetery is located can apply to the BAO Registrar for a licence to operate the cemetery.**
  
- **A municipality in which the cemetery is located can agree to purchase the land on which the cemetery is located from the property owner:** The FBCSA provides that a council of a municipality may pass by-laws authorizing, among other things, the purchase of a cemetery or part of it that is situated within the municipality. The purchased cemetery would still need to be operated by a licensed cemetery operator. If there is no licensed operator, the cemetery owner has the duties of an operator under the FBCSA, subject to the regulations.

- **Certain persons can apply to a judge of the Superior Court of Justice to have a cemetery declared abandoned:** Under the FBCSA, certain persons can apply to a judge of the Superior Court of Justice to have a cemetery declared abandoned, where the owner of the cemetery:
  - Cannot be found or is unknown;
  - Is unable to maintain the cemetery; or
  - Is not a licensed operator and there is no licensed operator for the cemetery.

The persons who may apply to a judge of the Superior Court of Justice are:

- The Crown if the cemetery is on land that is situated in territory without municipal organization;
- The local municipality within whose geographic boundaries the cemetery is located;
- The owner or operator of the cemetery; or
- The Registrar at the ministry's Consumer Services Operations Division.

When an order declaring that a cemetery is abandoned is registered in the appropriate land registry office, the local municipality, or the Crown in the absence of a local municipality, becomes the owner of the cemetery. The new owner assumes all the rights and obligations in respect of the cemetery and the assets, trust funds and trust accounts related to it that the previous owner or operator had. But the court order may exempt the new owner from any provision of the FBCSA and its regulations to which it would be inappropriate in the circumstances for the new owner to be subject.

Applicants to the Superior Court of Justice for a declaration of abandonment are required to notify certain persons of their intention to apply to have a cemetery abandoned. This includes the ministry's Registrar. Between 2011 and March 2021, the ministry's Registrar received approximately 21 abandonment application notices. It is unclear how many of these applications were successful.

### **Stakeholder Consultations**

The ministry has heard a number of considerations from stakeholders with respect to the Auditor General's recommendations related to neglected or abandoned cemeteries, including:

- **Small, volunteer-run cemeteries:** As the Auditor General pointed out, the majority of those cemetery operators that are not in contact with the BAO are not-for-profit religious organizations or volunteer boards. The ministry heard from some stakeholders that:



- **Reliance on community volunteers:** Such operators tend to rely on volunteer staff in the community to maintain the cemetery. These volunteers often have little to no understanding of the rules for cemeteries under the FBCSA and its regulations. In addition, constantly changing volunteer staff can impact the ability of the BAO to educate not-for-profit religious organizations and volunteer boards about the rules or to enforce compliance with the licensing requirements.
- **Limited online presence:** Small cemeteries in rural or northern communities often have little to no online presence, impacting the ability of the BAO to identify the appropriate contact person if the current person in charge of the operator's day-to-day functions retires, moves or passes away. This further impacts the ability of the BAO to locate cemetery operators in order to maintain compliance and keep them apprised of changes to the FBCSA or its regulations.
- **Depleted or no CMF/As:** Small volunteer-run cemeteries may either have no CMF/A or have little to no funds in their CMF/As (e.g., because they were established around the time of historical European settlement in the province and have not been used for new interments or scatterings in a long time, before CMF/A requirements came into effect). This may impact the ability of operators of such cemeteries to pay for cemetery maintenance.<sup>30</sup>
- **Concerns from municipalities:** While some municipalities may be comfortable assuming responsibility for neglected or abandoned cemeteries located within their municipal boundaries, some municipal stakeholders have raised a number of considerations, including:
  - **Financial burden of care and maintenance:** Neglected or abandoned cemeteries often have no or depleted CMF/As, which creates a financial burden on municipalities that are required to assume ownership and maintenance

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<sup>30</sup> The regulatory changes made in April, 2021 to increase the CMF/A contribution amounts, which will come into force on January 1, 2022, are intended in part to help those cemetery operators who charge little for the cost of interment to collect and thus generate more money to support cemetery care and maintenance.

responsibilities of these cemeteries.<sup>31</sup> Reliance on community volunteers, charity and municipal revenue to maintain such cemeteries may be viewed as unsustainable. As noted earlier, some municipalities would like to be exempt from the CMF/A requirements if they are required to assume responsibility for neglected or abandoned cemeteries.

- **Burdensome cemetery abandonment process:** The time and cost associated with applying to the Superior Court of Justice to have a cemetery declared abandoned falls with the person who is applying for such a declaration, which is often a municipality. For example, some stakeholders have suggested that such costs may be between \$15,000 and \$20,000. As a result, a municipality that wants to own and operate a cemetery that appears abandoned may resist filing an application for abandonment because of the cost this could entail.

### Option Under Consideration:

The ministry is considering potential changes based in part on suggestions by the BAO, to:

- **Streamline the process to require municipalities to assume operation of cemeteries under certain circumstances:** Allow the BAO Registrar to order a municipality to assume responsibility for the operation of a cemetery in the municipality's geographic boundaries, effective at the time that the order is issued, under the following circumstances:
  - The cemetery meets the following conditions:
    - It is not a commercial cemetery<sup>32</sup>; and
    - There is less than \$50,000 in total in the CMF/A(s) in respect of all cemeteries that the cemetery operator operates, or there is no CMF/A;
  - The BAO Registrar has requested that the municipality voluntarily assume responsibility for operating the cemetery as the licensed operator and the municipality has declined to do so;

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<sup>31</sup> If a cemetery is "inactive" then a municipality does not need to establish a CMF/A where none exists. However, a municipality may use the income generated from a CMF/A of another cemetery to maintain the cemetery it assumes.

<sup>32</sup> Under s 1(1) of the General Regulation, "commercial cemetery" means a cemetery operated for the purpose of making a profit for the owner.

- The BAO Registrar has determined that the cemetery operator is not in compliance with the licensure report requirements or, in the Registrar’s opinion, the cemetery owner cannot be found or is unknown, is unable to maintain the cemetery or not licensed to operate it, or there is no licensed operator for the cemetery (e.g., the BAO Registrar was unable to locate the cemetery operator after taking reasonable measures to try to locate them); and
  - The BAO Registrar has determined that the municipality assuming operation of the cemetery would be in the public interest.
- **Provide an appeal mechanism:** As part of the streamlined process, the impacted cemetery owner or operator or the municipality could appeal the Registrar’s order, for example to the Licence Appeal Tribunal.

This potential proposal is not intended to remove existing measures under the FBCSA for dealing with abandoned or neglected cemeteries; it is intended to add to those measures.

This potential proposal is also intended to help provide a simpler process for municipalities to be required to assume responsibility for the operation of neglected or abandoned cemeteries within their municipal boundaries.

### What do you think?

1. Are there any comments, concerns, gaps or alternatives to consider in relation to the potential proposal to allow the BAO Registrar to require municipalities to assume responsibility for the operation of a cemetery in the above-noted circumstances? Please explain.
  - a. If the government were to consider moving forward with proposing these changes, what is your view of the circumstances in which the BAO Registrar would be able to require a municipality to assume responsibility for the operation of a cemetery?
  - b. How should the appeal mechanism be structured, if you agree one should be proposed?

2. Other comments?

## ii. Cemetery Closure Process

### Context:

#### Current Requirements

The provisions of the FBCSA that relate to cemetery closure (mainly, ss. 88-93 of the Act and ss. 165 and 172-73 of the General Regulation) are administered by the Registrar in the ministry's Consumer Services Operations Division.

The FBCSA currently allows a cemetery owner to apply to the ministry's Registrar for an order to close a cemetery or part of a cemetery.<sup>33</sup> The public and certain persons must be notified about the proposed closure unless:

- There have been no interments or scatterings in the cemetery; and
- The consent of all affected interment and scattering rights holders has been obtained.

The ministry's Registrar may issue an order to close a cemetery, or part of a cemetery, upon being satisfied that:

- The proper notice has been given, if applicable;
- The closing is in the public interest;<sup>34</sup> and
- All other applicable requirements under the FBCSA have been met.

If made, the Registrar's order must include certain requirements (e.g., declare that no other interments shall be carried out in the cemetery). Some of these requirements will depend on the circumstances (e.g., order a person to disinter all human remains in the cemetery and reinter them in a specified place or to do whatever other things the ministry's Registrar determines are necessary to ensure the dignity and respect of the human remains).

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<sup>33</sup> Closing a cemetery results in land no longer being considered a cemetery for the purposes of the FBCSA. That makes it possible to seek to use the land for other purposes.

<sup>34</sup> The term "public interest" does not have a fixed definition under the FBCSA. However, in determining whether ordering closing is in the public interest, the ministry's Registrar considers at least the following factors:

- 1) Compliance with the FBCSA;
- 2) Maintenance of a cemetery, including its markers and features;
- 3) The safety of the public; and
- 4) The preservation of the dignity, quiet and good order of the cemetery.

An order of the Registrar to close a cemetery, or a refusal to issue such an order, can be appealed to the Licence Appeal Tribunal before the order takes effect.

Between 1992 and 2020, the ministry's Registrar received 39 applications for cemetery closure. In most of these cases the order for closure was issued by the Registrar (representing 28 applications or 72 per cent). In addition, 7 of the 39 applications (18 per cent) are under review/being revised, 2 of these applications (5 per cent) resulted in orders that were directed not to be carried out by the Licence Appeal Tribunal, 1 application (2.5 per cent) was denied, and 1 application (2.5 per cent) was withdrawn.

Currently neither the FBCSA nor its regulations set out requirements with respect to information that must be submitted to the ministry's Registrar as part of the application for a closing order. The ministry's Registrar has found that applicants completing the [Application to Close a Cemetery or Part of a Cemetery](#) often do not provide the information that the Registrar needs to determine if the closure is in the public's interest. For example, the Registrar has found that applicants often do not provide an archaeological assessment, which is typically recommended to be undertaken to provide information about the property to help determine if there are human burials on the property. However, completing this assessment is not required.

In the absence of a mechanism to require the applicant to undertake or arrange for an archaeological assessment as part of the cemetery closure application process, it is often more difficult for the ministry's Registrar to obtain appropriate information to assess the application, and it is more likely that closing the cemetery or part of it risks resulting in future disturbance to human remains. For various reasons, cemeteries, particularly historic ones, may have incorrect boundaries or unknown or unmarked burials within or immediately outside their boundaries. An archaeological assessment may help to clarify the cemetery boundaries, the cultural heritage value or interest of the cemetery or the presence of unmarked or unknown burials.

The closing application process can take anywhere from a few days to several years, depending on the responsiveness of the applicant. When applications are incomplete, the ministry's Registrar will send a request for additional information to the applicant and often will receive no response. Approximately 23 per cent of the applications for cemetery closure that were received by the ministry's Registrar between 1992 and 2020 were either withdrawn, postponed or denied for incompleteness or are still under review.

## Archaeological Assessment

In Ontario, under various land use development processes an archaeological assessment is required when the land proposed for development or site alteration contains archaeological resources or areas of archaeological potential.<sup>35</sup> Archaeological assessments must be carried out by professionally licensed archaeologists. The technical requirements for archaeological fieldwork and Stage 1 to 4 assessment is specified in the Ontario Heritage Act and the Ministry of Heritage, Sport, Tourism and Culture Industries' (MHSTCI's) 2011 [Standards and Guides for Consulting Archeologists](#).

During the first three stages of the archaeological assessment, the archaeologist will:

- Discover any archaeological resources, including human burial features, on the lands that are being developed;
- Determine the degree of cultural heritage value or interest of any archaeological resources found on the property; and
- Recommend the most appropriate strategies for further assessment of archaeological sites.

Where warranted, the archaeologist will also recommend a fourth stage: mitigation of development impacts which can include long-term avoidance and protection. Not all stages will be necessary for all projects.

In the context of the cemetery closure process, an archaeological assessment can provide the detailed land use history and in some cases the location of graves that better allows the ministry's Registrar to assess the potential for the existence of unmarked burials in and around the cemetery. The cost of an archaeological assessment will vary depending on the stages that will need to be undertaken.

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<sup>35</sup> [Provincial Policy Statement \(PPS\), 2020](#), s. 2.6.2. Also see PPS definition of areas of archaeological potential. If no development or site alteration (i.e., change) is proposed, then no archaeological assessment would be required.

Typically, if made, an order of the Registrar to close a cemetery or part of a cemetery happens prior to initiating a separate application process to sever the land<sup>36</sup> on which the cemetery is located for the purposes of its sale. Under other provincial statutes such as the Planning Act or the Environmental Assessment Act, for example, approval authorities may also require an archaeological assessment as a condition of a proposed development or site alteration affecting lands containing archaeological resources or areas of archaeological potential.

Therefore, depending on the circumstances, the cemetery owner who is submitting the closure application may need to get an archaeological assessment if they plan to sever the land that is the subject of the application. If the owner sells the severed land they may be able to recoup the costs of an archaeological assessment through the sale.

### Options Under Consideration:

The ministry is considering proposing potential changes to:

- Permit the ministry's Registrar to require an archaeological assessment to be completed and the assessment report submitted as part of the application to close a cemetery or part of a cemetery; and
- Provide that an application for an order to close a cemetery or part of one is deemed to be withdrawn if the Registrar has requested additional information to complete the application and it is not completed within a timeline specified by the ministry's Registrar (e.g., within 120 days).

If the government were to decide to proceed with these potential proposals, they could potentially help:

- Ensure that the application for an order to close a cemetery or part of one is reviewed by the ministry's Registrar in a timely manner, based on the best available information; and
- Avoid disturbance to unmarked/unknown remains in or near land that is a cemetery being closed or that was closed.

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<sup>36</sup> A land severance is the common term for an authorized separation of a piece of land to form a new lot or a new parcel of land. This occurs through the giving of a consent under s. 53 of the Planning Act. A consent is required if you want to sell, mortgage, charge or enter into any agreement (for at least 21 years) for a portion of your land.

## What do you think?

1. Are there any comments, concerns, gaps or alternatives to consider in relation to the potential proposals to:
  - a. Permit the ministry's Registrar to require an archaeological assessment to apply for an order to close a cemetery or part of one? Please explain.
  - b. Provide that an application for an order to close a cemetery or part of one is deemed to be withdrawn if the ministry's Registrar has requested additional information to complete the application and it is not completed within a timeline specified by the ministry's Registrar? Please explain.
2. Are there any other requirements that should be established with respect to deeming a closing application to be withdrawn? Please explain.
3. Other comments?



## **APPENDIX A: Changes made in April 2021 to Ontario Regulation 30/11 Under the FBCSA and Ontario Regulation 187/09 under the Safety and Consumer Statutes Administration Act, 1996**

Changes to the cemetery CMF/A framework, which come into force on January 1, 2022, will:

- Permit non-commercial cemetery operators that meet certain criteria to access the capital portion of a cemetery CMF/A to increase the capacity of a cemetery subject to approval from the Registrar of the BAO, under the condition that the capital is paid back into the trust fund or account;
- Increase minimum CMF/A contribution amounts (see Appendix B); and
- Require the Minister to review the prescribed CMF/A contribution amounts at least once every five years.

Changes related to licence display and price transparency, which come into force on July 1, 2021, will, among other things:

- Remove the requirement that cemetery, crematorium, funeral establishment, and transfer service operators (bereavement service operators) display their licence or a copy of it near the main entrance of their establishment;
- Require that every bereavement service operator who maintains or makes use of a website to promote, or to enter contracts for, the sale or provision of a licensed supply or service to make available in a clearly visible place on that website:
  - A free, printable electronic version of the operator's price list;
  - A link to the consumer information guide prepared by the Registrar of the BAO; and
  - Their licence number and a description of their type of licence.

These regulatory changes can be found on the e-Laws website, found here: [O. Reg. 30/11: GENERAL \(ontario.ca\)](#)

## **APPENDIX B: Criteria for Non-Commercial Cemetery Operators to Qualify to Borrow from the Capital Portion of Cemetery Care and Maintenance Funds/Accounts**

Beginning January 1, 2022, authorization for non-commercial cemetery operators to borrow from the capital portion of care and maintenance funds/accounts must be given if, in the BAO Registrar's opinion, each of the following criteria are met:

- a) The cemetery operator does not have enough money to increase the capacity of the cemetery;
- b) The payment of the amount from the capital of the fund or account will enable the cemetery operator to increase the capacity of the cemetery;
- c) The cemetery operator will continue to provide adequate care and maintenance for the cemetery; and
- d) The increased capacity will promote the cemetery's economic viability and strengthen the fund or account.

## APPENDIX C: Cemetery Care and Maintenance Fund/Account Contribution Amount Increases (Effective January 1, 2022)

Contribution Type	Current Contribution Amount	Contribution Amount (effective January 1, 2022)
In-ground graves that are 2.23 m <sup>2</sup> (24 ft <sup>2</sup> ) or larger	\$250 or 40 per cent of price (whichever is greater)	<b>\$290</b> or 40 per cent of price (whichever is greater)
In-ground grave that is smaller than 2.23 m <sup>2</sup> (24 ft <sup>2</sup> )	\$150 or 40 per cent of price (whichever is greater)	<b>\$175</b> or 40 per cent of price (whichever is greater)
Tomb, crypt or compartment in a public mausoleum	\$500 or 20 per cent of price (whichever is greater)	<b>\$830</b> or 20 per cent of price (whichever is greater)
Niche or compartment in a public columbarium	\$100 or 15 per cent of price (whichever is greater)	<b>\$165</b> or 15 per cent of price (whichever is greater)
Scattering ground for which there will be only one scattering rights holder	\$100 or 40 per cent of price (whichever is greater)	<b>\$115</b> or 40 per cent of price (whichever is greater)
Scattering ground for which there will be more than one scattering rights holder	\$25 or 15 per cent of price (whichever is greater)	<b>\$30</b> or 15 per cent of price (whichever is greater)
Scattering ground for which there will be no scattering rights holder	\$25	<b>\$30</b>
A private mausoleum provided or constructed by a person other than the cemetery operator is installed in a cemetery	\$500 multiplied by the number of tombs, crypts, compartments or 20 per cent of the sum of specified prices (whichever is greater)	<b>\$575</b> multiplied by the number of tombs, crypts, compartments or 20 per cent of the sum of specified prices (whichever is greater)
A private columbarium provided or constructed by a person other than the cemetery operator is installed in a cemetery	\$100 multiplied by the number of niches and compartments or 15 per cent of the sum of specified prices (whichever is greater)	<b>\$115</b> multiplied by the number of niches and compartments or 15 per cent of the sum of specified prices (whichever is greater)
To establish a cemetery	\$100,000	<b>\$165,000</b>
Flat marker measuring less than 1,116.13 cm <sup>2</sup> (173 in <sup>2</sup> )	\$0	<b>\$0</b>
Flat marker measuring at least 1,116.23 cm <sup>2</sup> (173 in <sup>2</sup> )	\$50	<b>\$100</b>
Upright marker measuring 1.22 m (4 ft) or less in height and 1.22 m (4 ft) or less in length, including the base	\$100	<b>\$200</b>
Upright marker measuring more than 1.22 m (4 ft) in either height or length, including the base	\$200	<b>\$400</b>