

Response on Behalf of

Council for Consumer and Industry Fairness in Bereavement

to Consultation Paper Re: FUNERAL, BURIAL AND CREMATION SERVICES ACT, 2002

Proposed Changes to O. Regulation 30/11

I. Background

Thank you for the opportunity to comment on these proposals. We are the Council for Consumer and Industry Fairness in Bereavement, an umbrella association comprised of bereavement sector organizations, whose mandate is to represent the interests of consumers and bereavement sector industries which support consumer interests.

Since the passage of the *Funeral, Burial and Cremation Services Act 2002* ("FBCSA") and Regulations under the former Liberal government, it has become clear that a small number of predominant and primarily (but not exclusively) commercial constituents of the bereavement sector have evolved the regulatory oversight structure of the sector to allow for anomalies and workarounds. This has resulted in quasi-monopolistic self-interest, where all aspects of the intended regulatory checks and balances are interpreted, decided upon, controlled and disciplined (or ignored) in accordance with this same self-interest. This structure has richly rewarded these same constituents to the detriment of all others, but most importantly to the detriment of the consumer. In hockey terms these same constituents play forward, defence, and referee. They are the Facebooks and Googles of the bereavement sector. The result for consumers is a lessening of choice, deterioration of the quality of service and goods supplied, and a marked increase in prices, i.e. the very antithesis of the purpose of the FBCSA.

The damage to the sector and the erosion of trust in both the Bereavement Association of Ontario (BAO) and the Ministry of Government and Consumer Services (MGCS) are now severe, and the 'status quo' is untenable. The proposals themselves are evidence of the extent to which the situation has deteriorated, and it is remarkable that some are even being advanced as having any merit at all.

II. Process Concerns

We are concerned that this Consultation Paper was very narrowly distributed just before Christmas 2020, with an artificially urgent deadline of mid-January 2021. This is particularly so given the significant impact such proposals would have on the bereavement sector. We are also disappointed that a number of major industry constituents and stakeholders who are directly affected by these proposals, did not even receive a copy for comment until we provided it to them in mid-December.

Further, where is the in-depth analysis and detailed business case undertaken to support these proposals?

III. Issues Raised

1. Dominant Players

As a matter of policy, more choice means lower cost to the consumer, however the end result of these proposals will be yet greater consolidation in the bereavement sector. Is this the Ministry's policy goal and if so why and at what cost? Only the dominant corporations win, including a publicly traded US company. Why would policy proposals be designed to benefit such players? When an anti-trust investigation is already being conducted by the Canadian Competition Bureau dealing with one of these same players (Service Corporation International), why is this the right time to make a bad situation worse?

Dominant sector constituents already engage in business practices which are anti-consumer, by taking advantage of their market position to drive and keep customers to themselves. Such anti-competitive practices include tied selling, upselling, price manipulation and the use of sales pressure tactics on highly vulnerable customers.

It is said that the BAO receives few complaints, so all must be well. But the purchase of funeral and burial services by a bereaved customer is not a typical business transaction. In most cases, the customer is either emotionally unwilling or unable to return to an operator who they believe has treated them poorly. As a result, operators need to do much more than pay lip service to ethical business practices. Customers are owed a duty of fair and transparent dealing, together with fairness in pricing. As a result, the bereavement sector cannot be purely profit driven, with its goal to enrich company shareholders. There is also the anomaly of Mount Pleasant Group of Cemeteries, which claims to be owned by "no one", yet sets its prices above market rates. Why is this necessary? Mount Pleasant already makes super profits as a result of its tax free trust status, in addition to its cemetery exemption from municipal taxes. High pricing strategies are an abuse of market position, and are of course to the detriment of the consumer.

2. The Auditor General

We also take benefit from several findings of the Auditor General of Ontario.

As a preliminary comment, the December 2020 Value for Money Audit of the BAO of the Auditor General of Ontario reveals that the BAO is still what is known as an 'immature' organization, that is one which has yet to develop systems, practices and procedures sufficient to fulfill its mandate. This may be for any number of reasons including its relative newness, complexity of mandate, lack of clarity of purpose, insufficient staffing model and lack of diversity of experience of Board members. What is clear overall is that it is indeed premature to entertain the prospect of regulatory amendments under current circumstances.

In particular, the Auditor General's Audit is revealing in that a number of its primary concerns and targets for improvement are *the same* as those being proposed here for relaxation. It would not only be high risk to pursue such proposals, but counterproductive given the Auditor General's mandated requirements for greater not lesser oversight in these same areas.

The solution offered by these proposals is to lower standards to accommodate inadequate performance.

IV. Response to Proposals

We will now address the points in the same order as they are presented in the Consultation Paper.

Our comments are the result of a canvass of most of the industries covered under the mandate of the BAO, and are presented from a consumer protection standpoint. We have also taken the opportunity to incorporate, where appropriate, current anti-competitive concerns raised by others, including industry associations who were not consulted prior to the development and release of these proposals. Our comments include input from consumers' groups (Friends of Toronto Public Cemeteries, Memorial Societies), independent funeral home operators, independent monument suppliers, funeral directors, and not for profit cemeteries.

An over-arching and preliminary observation is that the proposals included in the Consultation Paper are not accompanied by transparent reasons or evidence as to why they should be implemented. Who is advocating for these recommended changes and why? In what way do these proposals benefit the consumer or lead to a more even playing field within the bereavement sector? Who is harmed by these proposals? Where are the protections for smaller, independent suppliers?

Cemetery Categories

Comments

Division of the various types of Cemeteries into arbitrary categories makes it virtually impossible to understand which cemetery belongs where, especially in cases where a cemetery may belong to several categories. This then draws an unnecessary veil over the identity of the various constituents, giving the distinct impression that the categories are a kind of 'code' decipherable only to those in the know. In particular where, as the case is here, there is a proposal affecting only "commercial cemeteries", a category which is not defined, we must guess as to who the ultimate beneficiaries may be. This is counter-productive to meaningful dialogue and feedback.

For regulatory purposes, there are four categories of cemetery:

- 1) Commercial i.e. for-profit;
- 2) Not for profit;
- 3) Municipal; and
- 4) Religious.

These categories speak to the mandate and purpose of an organization as opposed to specific and in some cases irrelevant or redundant aspects of its governance (e.g. a private corporation may be for-profit or not-for-profit).

The categories require even further refinement as at least one constituent calls itself a not-for-profit, yet carries on business as a commercial operator.

Combinations

A category which is missing altogether and yet which is crucial to understanding the impact of these regulatory change proposals, is cemeteries which own or are owned by a related business such as a funeral home or crematorium. These are sometimes called “combinations” or “combos”. Such businesses have the unique capability to cross-subsidize their business lines, reduce operating costs and hedge business risk. The needs and requirements of combination operators are wholly different than those of stand-alone operators given the economic advantages of this business model, yet there is no distinction made in these proposals. How can this be?

Proposal 1.

Permit All Types of Cemetery Operators to Access the Capital Portion of CMF/As to Expand Interment/Scattering Capacity in a Cemetery, or to Buy Land Adjoining a Cemetery to Enlarge it, Subject to the BAO Registrar’s Authorization

Comments

For policy purposes it is hard to understand how opening up access to the capital portion of CMF/As to commercial operators has any validity as a proposal other than to further enrich those constituents who already have ready access to capital outside of these Trust Funds. The primary policy reason for excluding them in the first place was to level the playing field between commercial entities who can tap capital markets or a deep pocketed shareholder/investor, and the smaller not-for-profit entities who are the affordable providers of an essential service.

In addition, many commercial operators are Combination operators (see above), whose business lines are cross-subsidized and who are able to adjust their pricing model as required. Our immediate and very real concern is that implementation of this proposal would enable a series of purchases/takeovers by commercial operators of smaller not for profit cemeteries, and their subsequent privatization and conversion to the unaffordable high-price profit-driven model which is anti-competitive and highly detrimental to the consumer. As with Facebook, operators such as Arbor Memorial have already been quietly buying up smaller operators in order to protect and expand their dominant market position.

Is the slow obliteration of the ‘local business’ nature of the bereavement sector the Ministry’s policy goal? We do not believe this to be the case.

It is also no argument to suggest there is a looming shortage of land available for burial, or that increasing the amount of land available will somehow solve the CMF/A funding problem. Burial is and has been on a steep decline in favour of cremation, with less than 30% of funerals resulting in burial in 2018 in Canada, projected to decline further to 20% by 2023.

Further, by way of example, one major Combination operator hasn't opened a new cemetery since 1993, yet has bought and subsequently sold numerous parcels of land since that time for purposes not required for burial.

Importantly, the fact that this proposal has found no acceptance elsewhere in Canada is further proof of its inappropriateness here.

The "Registrar as gatekeeper" concept for these proposals is also of little value, as that Office cannot possibly be held responsible for every derogation from compliance with the FBCSA and its Regulations. From a regulatory risk perspective, there are already today insufficient checks and balances on the Office of the Registrar to ensure the fair exercise of exceptions and controls, and there is at best a tenuous line of accountability to the Ministry and to the public in the Registrar's exercise of its discretion. The Office remains susceptible to the possibility that a dominant constituent or group of constituents may exercise inappropriate influence or simply ignore censure.

In conclusion, this proposal will exacerbate existing industry and sector imbalances and encourage anti-competitive mischief. Most importantly, it will create decidedly consumer-unfriendly outcomes. The Consultation Paper states: "The ministry has heard from stakeholders that other types of cemetery operators (e.g. commercial cemetery operators) should be permitted to access the capital portion" (of the CMF/As), but nowhere does it explain *why*, when other better alternatives exist.

Proposal 2.

Increase Minimum CMF/A Contribution Amounts

Comments

The Auditor General, in her Report, wrote at length about the problems experienced by the BAO to ensure that CMF/As were properly funded. Once again it is premature to suggest changes to these accounts pending the correction of the many problems discovered in their administration by the BAO to date. In addition, there would appear to be inadequate control mechanisms in place to even allow for such changes to be properly implemented.

The Consultation Paper advocates for increasing the minimum required payments into the CMF/As for all operators even though only a subsector (small, volunteer-run municipal cemetery operators) is identified as problematic. However even for this subsector the Paper acknowledges: "these specified dollar amounts are referred to as "minimum" CMF/A contribution amounts, as an operator may choose to contribute more than is required". If in fact that is the case, an analysis is required to identify those cemeteries needing remedial action, and the precise nature of action required in order to address the problem.

How can it be a desired outcome to require higher contributions to the CMF/As in order to provoke price increases in smaller cemeteries for the sake of doing so? Or do these smaller cemeteries become more desirable as potential acquisition targets once their prices are forcibly increased? Or are lower priced alternatives simply undesirable in the marketplace? Is American style credit card healthcare the right model for the bereavement sector? Regardless, a regulatory increase will simply create another pretext for further price increases across the board, even if they are not called for, and once again, the consumer loses. It is also worth noting that increasing the minimum contribution amounts will also increase the 'free capital' available to commercial cemeteries in Proposal 1.

If return on investment with the CMF/As is the primary problem, there are more efficient, consumer friendly ways of addressing it. Or, as is more likely, the funding model for perpetual care is itself the problem, which would require more study.

Increase Marker Contributions

The proposal with respect to minimum contribution amounts associated with the installation of markers should only be considered after a full audit on cemetery operators to determine to what extent monies held in trust for marker repair have in fact been used, and are required for this purpose.

In addition, this proposal has been developed in the absence of critical input from the Ontario Monument Builders Association. How would the increase in the cost of monuments be absorbed? Who pays? Will this then simply become a form of levy or tax to be passed on to consumers? There is no explanation as to why this increase is needed or what standards have determined the need for monument reparations. Who will oversee this, the BAO or the cemeteries themselves?

In addition those cemeteries which allow predominantly flat markers (e.g. Arbor Memorial) have limited need for this fund. There is evidence that, for some cemeteries, these funds have been allowed to accumulate over the years and, far from being insufficient, have grown into a multi-million dollar slush fund for the industry, which these proposals now want to open up.

Coupled with the proposal for increased access to CMF/As by commercial cemeteries, this proposal will only help grow the availability of free capital for these constituents, to enable them to engage in the predatory pursuit of further unwanted consolidation in the bereavement sector, to the detriment of the smaller not for profit cemeteries and the consumer.

Proposal 3.

Additional Burden Reduction Regulatory Proposal – Licence Display

Comments

The FBCSA requires every operator licensed under the Act to display their licence to the public in a clearly visible manner near the main entrance of their business establishments. The Auditor

General found in its December 7 2020 Audit report that “as of August 2020, out of a total of 2,368 cemetery operators in Ontario, 277, or 12 % were operating without their licenses renewed, and 207 of these operators had not renewed their licenses nor filed any other reports with the Bereavement Authority since its inception in 2016.”

The recommendation to remove the requirement for operators under the FBCSA to display their licences is antithetical to ensuring consumer protection for consumers. If a licence does not have to be displayed, why have a licensing requirement? The consumer may not even be aware of such a requirement, and it is unfair to ask the newly bereaved to ‘look it up’ on a website, when the relative burden on the operator is so low. How does the consumer know whether the establishment should be licenced and following FBSCA guidelines? Is this transparency and accountability not essential to the intent of the legislation?

This also raises a larger question and that is why it is that so many operators carry on business without a licence? If being a licence holder in good standing is not a prerequisite to the provision of fair priced and compassionate customer service by an operator (which is the implication if licensing is not strictly enforced), why does this requirement exist?

For regulatory purposes much has been made about the difference between bereavement sector licensees and non-licensees. When the new FBCSA and Regulations were developed, a decision was made to omit several major players in the sector (e.g. monument builders) from the licensing scheme, which has resulted in a two tier system of regulatory oversight, where non-licensees’ and consumers’ voices are absent, and their concerns are ignored by the BAO and MGCS alike. These proposals are an excellent example, where non-licensees, who are directly impacted by these proposals, were both excluded from the process of creating them and then not invited to comment, despite their identities being known.

Most importantly from the consumer’s perspective, ‘bad actors’ may be allowed in some cases, to simply prevail if they are licensees and hold sway with the regulator. This is made possible by the fact that conflicts of interest are endemic to the sector. As an example, the Chair of the BAO and a founding member, was until recently an almost 50 year employee of Mount Pleasant Group of Cemeteries. How can we expect objective regulatory oversight of that organization in the face of such a blatant conflict?

This situation cannot be allowed to continue, and these Consultation Paper proposals are another symptom of the depth and scope of dysfunction in the sector.

Other Concerns and Potential Non-Regulatory Actions

The issues raised concerning small volunteer run cemetery operators are a clear call to action to the BAO to be more proactive in developing investment advice and options. The BAO can become a source of expertise to address the revenue generation problems raised earlier. Note

that lack of availability of high speed internet outside of major urban centres means that educational programs delivered online will have limited benefit.

Creative thinking is required.

PART 2: Potential Proposal under Consideration

We support the exemption of municipal cemetery operators from the requirement to establish and contribute to CMF/As. These municipal operators continue to meet the basic human need of safe, affordable burial, which has been recognized to be a charitable purpose since the settling of Ontario (and remains the case in most jurisdictions in the world). It is disturbing to read that commercial cemetery operators believe this exemption might unfairly disadvantage them, when the budget of at least one major commercial player dwarfs the revenue generating capacity of most Ontario municipalities. In addition municipalities already have a legal (and arguably moral) obligation as a backstop funder of cemeteries in their jurisdiction (including failed cemeteries) so the consumer is protected.

Aside from Part 2 above, these proposals are potentially harmful and should be withdrawn.

The bereavement sector is a playing field of local, small businesses and international, commercial behemoths, and none of us has a choice about being a 'consumer' at the most vulnerable point in our lives. The current trend of takeovers of the valued family-run local service providers by dominant Combination players can spell nothing but disaster for grieving consumers. The role of MGCS is to provide sufficient regulation and oversight to ensure consumer protection in the bereavement sector. Now more than ever, the Ministry must develop and implement an over-arching vision and clear strategy to both level and referee the bereavement sector playing field in Ontario, or risk potentially irreversible damage.

Thank you for the opportunity to provide these comments.

Respectfully submitted,

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