

Manitoba



Law Reform Commission

Commission de réforme du droit

RESELLING UNUSED CEMETERY PLOTS

September 1995

Report #88

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RESELLING UNUSED CEMETERY PLOTS

A. INTRODUCTION

The Commission was recently asked by a member of the public to consider a change to *The Cemeteries Act*. He proposed that cemetery owners should be allowed to reclaim and resell cemetery plots which had previously been sold but which had not, after a long period of time, been used. This Report responds to that request and examines the need for such a provision.

B. NEED FOR REFORM

In our view, there are three arguments that might justify responding favourably to the suggestion that cemetery owners should be allowed to reclaim and resell unused burial plots. The first of these may be characterized as environmental: the avoidance of waste. Plots which would otherwise not have been used can now be resold and put to use. This may extend the life of existing cemeteries and postpone the need to devote additional productive land to that use.¹

The second argument is emotion. Some people may wish, for personal reasons, to be buried in a particular cemetery or in a particular area of a cemetery. For example, they may wish to be buried near family members or in the cemetery of the religious affiliation to which they belong. The absence of unsold plots may thwart that desire.

The third argument for favouring the proposed reform is financial. Upon the sale of a cemetery plot, a cemetery owner relinquishes all rights of ownership over it; the purchaser of the plot becomes its owner and may deal with it as he or she wishes. For example, the owner of the plot may bequeath it to another individual in a will or may assign his or her rights to the plot while alive. However, the cemetery owner continues to have obligations with respect to the sold plot; these obligations never end. *The Cemeteries Act* requires cemetery owners to keep the cemetery grounds, buildings, walls and fences in good order and repair,² and construct and maintain all necessary sewers and drains to keep the cemetery dry.³ Well-maintained cemeteries often have a park-like appearance, with manicured lawns, trees and shrubs, pathways and flower beds. The maintenance of a cemetery can be quite costly.

Generally, the money received from the sale of cemetery plots is used to pay for the cemetery's maintenance. Most cemeteries have a perpetual care fund, into which a percentage of the purchase money is placed in trust and invested. The result is a permanent endowment for the maintenance of the cemetery. Commercial cemeteries are required by *The Cemeteries Act* to create a perpetual care fund;⁴ however, cemeteries owned by a municipality or a religious

¹An informal survey of cemetery owners which we undertook indicated that there are indeed some cemeteries which have unused plots and which are running out of space. However, most cemetery owners indicated that they had ample space, sufficient to last well into the next century.

²*The Cemeteries Act*, C.C.S.M. c. C30, s. 4.

³*The Cemeteries Act*, C.C.S.M. c. C30, s. 5(1).

⁴*The Cemeteries Act*, C.C.S.M. c. C30, ss. 24 and 28(1). The portion of the purchase price which must be included in the perpetual care fund is set in *Cemeteries, Crematories and Perpetual Care Funds Regulation*, Man. Reg. 382/87R, Part IV.

affiliation are not obliged to create a fund and do so only if they choose.⁵

Older cemeteries without a perpetual care fund and with few new plots to sell may find that they are earning insufficient funds to meet their maintenance costs. Even cemeteries with a perpetual care fund may find themselves with insufficient funds; there are a number of reasons for this.⁶ First, cremations are becoming more popular; this reduces the number of plots sold since more individuals can be buried in a single plot. Second, lower interest rates have reduced the interest earned on the trust funds. Third, the percentage of the purchase price put into a perpetual care fund may be too low (whether set pursuant to *The Cemeteries Act* or voluntarily determined). Finally, the cost of maintenance continues to increase.

One way of addressing this financial problem is to allow cemetery owners to resell plots which have been sold but which are not yet in use and will likely never be used by the original plot purchaser. Such circumstances may arise for a number of reasons; for example, the plot owner may have forgotten about the plot with the passage of time, the family members of the plot owner may be unaware of the plot at the time of the owner's death, or the plot owner may have moved and decided to be buried near his or her new home.

On the other hand, it is valid to argue that the plot purchaser owns the plot and, as its owner, should be free to determine if, and how, the plot will be used. If the plot owner wishes it to lie fallow, that is his or her privilege. Arguably, these ownership rights should not be easily erased, especially where the asset cannot be specifically replaced.⁷ Furthermore, the cemetery owner is not prejudiced by the plot not being used; he or she was paid the same amount of money and is under the same duties to maintain the plot, whether the plot is used or not.⁸

The Commission recognizes that the suggested reform raises sensitive issues. No reform in this area should be undertaken which might have the potential of intruding on the dignity of deceased persons or upsetting their family. However, we note that six other provinces have legislation which allows unused plots to be reclaimed and resold.⁹ On balance, the Commission believes that the benefits of such a provision, both to cemetery owners and the general public, outweigh the arguments to the contrary, so long as adequate restrictions are put in place to ensure that the original plot purchaser and his or her family are not prejudiced.

RECOMMENDATION 1

The owners of cemeteries should be allowed to reclaim and resell unused cemetery plots, subject to the safeguards set out in the following recommendations.

⁵These cemeteries, as well as cemeteries which were not established for gain and at which not more than 15 sales of cemetery plots occur in any year, are specifically excluded from the perpetual care fund provisions of the Act, as are any lease, sale or rental agreement which was made before the enactment of those provisions: *The Cemeteries Act*, C.C.S.M. c. C30, s. 24. Our informal survey of cemetery owners indicated that some, but not all, of the cemeteries which are not obliged to have a perpetual care fund have one nonetheless.

⁶These reasons were suggested to us in our informal survey of cemetery owners and in conversations with a representative of the Public Utilities Board.

⁷However, there are other examples of situations where a lack of use may result in a loss of property rights (though that loss is usually compensable). For example, if a bank account sits dormant, without any transaction or balance inquiries, for 10 years, the bank must forward the unclaimed balance of the account, plus interest, to the Bank of Canada: *Bank Act*, S.C. 1991, c. 46, s. 438(1). Upon a demand from the account holder, the Bank of Canada must pay out the balance of the account, plus interest: *Bank Act*, S.C. 1991, c. 46, s. 438(3).

⁸In fact, maintaining an unused plot may be less costly.

⁹British Columbia, Alberta, Saskatchewan, Ontario, New Brunswick and Prince Edward Island.

C. SAFEGUARDS

1. Unused Plot

We recognize that a distinction must be made between cemetery plots which consist of a single burial site and plots which contain more than one burial site. The former is intended for the interment of a single person in a traditional earth burial. The latter is intended for the interment of more than one person; for example, it is common for the burial sites of family members to be contained in a single "family plot".

In our view, the appropriate level of dignity and respect is accorded only if reclamation and resale is restricted to situations where none of the burial sites in a plot have been used; this is the case in Alberta and Saskatchewan.¹⁰ If a plot contains a used burial site, then the cemetery owner should not be able to reclaim and resell any of the other burial sites within that plot, even if there are a number of burial sites between the one in use and the ones being sought to be reclaimed. Individuals buy a family plot in the expectation that they will be surrounded by their loved ones and the law should not interfere with that.

RECOMMENDATION 2

The reclamation and resale of a cemetery plot should be permitted only if none of the burial sites in the plot have been used.

2. Prior Approval

In order to ensure that the reclamation and resale of cemetery plots is handled with sensitivity, we believe that the prior approval of an independent entity should be required. This is required in British Columbia, Alberta, Saskatchewan and Ontario.¹¹ We suggest that, in Manitoba, that function should be performed by the Public Utilities Board which already has responsibility for licensing and regulating commercial cemeteries under *The Cemeteries Act*.

Clearly, a cemetery owner should not be able to reclaim a plot if the plot owner intends to make use of it (either personally or indirectly through an assignee). Consequently, it is essential that the cemetery owner attempt to determine whether the plot will be used. We believe that, as in Alberta and Saskatchewan, the cemetery owner should demonstrate to the Public Utilities Board that reasonable efforts were made to contact the plot owner or his or her personal representative prior to making the application.¹² At a minimum, the cemetery owner should be required to publish a notice of the reclamation and resale application in a local newspaper. If the cemetery owner succeeds in contacting the plot owner or his or her personal representative, the

¹⁰*Cemeteries Act*, R.S.A. 1980, c. C-2, s. 18(a); *The Cemeteries Act*, R.S.S. 1978, c. C-4, s. 13.1, as en. by S.S. 1979-80, c. 74, s. 3. In New Brunswick and Prince Edward Island, the unused and used portion of the plot can be viewed separately, with the unused portions of the plot being subject to reclamation: *Cemetery Companies Act*, R.S.N.B. 1973, c. C-1, s. 24(6); *Cemeteries Act*, R.S.P.E.I. 1974, c. C-2, s. 18(1).

¹¹*Cemetery and Funeral Services Act*, S.B.C. 1989, c. 21, s. 37(1); *Cemeteries Act*, R.S.A. 1980, c. C-2, s. 18; *The Cemeteries Act*, R.S.S. 1978, c. C-4, s. 13.1, as en. by S.S. 1979-80, c. 74, s. 3; *Cemeteries Act (Revised)*, R.S.O. 1990, c. C.4, s. 30(1). The legislation in New Brunswick and Prince Edward Island does not require any prior approval: *Cemetery Companies Act*, R.S.N.B. 1973, c. C-1, s. 24(6); *Cemeteries Act*, R.S.P.E.I. 1974, c. C-2, s. 18.

¹²*Cemeteries Act*, R.S.A. 1980, c. C-2, s. 18; *The Cemeteries Act*, R.S.S. 1978, c. C-4, s. 13.1, as en. by S.S. 1979-80, c. 74, s. 3. The legislation in British Columbia, Ontario and New Brunswick specifies that the cemetery owner must send a notice of the reclamation to the last known address of the plot owner or his or her personal representative: *Cemetery and Funeral Services Act*, S.B.C. 1989, c. 21, ss. 34(2) and 37(1); *Cemeteries Act (Revised)*, R.S.O. 1990, c. C.4, s. 30(3); *Cemetery Companies Act*, R.S.N.B. 1973, c. C-1, s. 24(6)(a). In New Brunswick, if the address of the plot owner is not known, the cemetery owner must also advertise the notice of the sale in the *Gazette* and in a newspaper published in the area where the plot is located: *Cemetery Companies Act*, R.S.N.B. 1973, c. C-1, s. 24(6)(b), as am. by S.N.B. 1983, c. 7, s. 3.

application for reclamation and resale should proceed no further; the Public Utilities Board should hear the matter only if the plot owner cannot be contacted.

In order to protect the purchaser and demonstrate that the plot is unlikely to be used, most legislation requires that a specific period of time should have elapsed before an application for reclamation and resale can be made. Unfortunately, a wide disparity exists in the specified time periods. Prince Edward Island allows a plot to be resold 5 years after the cost of maintenance of the plot or headstone has fallen due and remained in arrears.¹³ Alberta and Saskatchewan require that 20 years elapse from the last contact with the plot owner or his or her personal representative.¹⁴ Ontario requires that 20 years elapse from the date of the purchase of the plot,¹⁵ while British Columbia requires a period of 50 years from that date; furthermore, British Columbia requires that the plot owner, if living, would have been at least 90 years of age.¹⁶ On balance, in light of the fact that cemetery plots are often pre-purchased and, with increasing life expectancies, are often held for many years, we believe that the approach taken in British Columbia is the most appropriate.

RECOMMENDATION 3

The reclamation and resale of a cemetery plot should be permitted only with the prior approval of the Public Utilities Board. Such approval should be given only if the cemetery owner demonstrates that:

- (a) reasonable efforts (including publication of notice of the application in a local newspaper) have been made to locate the plot owner or his or her personal representative and have not succeeded;*
- (b) at least 50 years have passed since the plot was purchased; and*
- (c) the plot purchaser, if living, would be at least 90 years of age.*

3. Compensation to Plot Owner

Despite the best efforts of a conscientious cemetery owner to contact him or her, it is possible that an original plot owner, or his or her personal representative, may come forward after the plot has been reclaimed. In such a case, he or she should clearly be compensated for the loss of the plot and restored, as much as possible, to the position he or she would have been in if the reclamation had not taken place. If the plot has not yet been resold, it should be revested in the purchaser (or his or her personal representative). If the plot has been resold, the cemetery owner should provide, at his or her option, either another plot of comparable value or an amount equal to the fair market value of the original plot (so that another plot can be purchased elsewhere).¹⁷

¹³*Cemeteries Act*, R.S.P.E.I. 1974, c. C-2, s. 18(2). Section 18(1) also allows plots to be resold if, either due to death, removal from the province or failure of the heirs, all or part of the plot is likely to remain permanently unused.

¹⁴*Cemeteries Act*, R.S.A. 1980, c. C-2, s. 18(b); *The Cemeteries Act*, R.S.S. 1978, c. C-4, s. 13.1, as en. by S.S. 1979-80, c. 74, s. 3.

¹⁵*Cemeteries Act (Revised)*, R.S.O. 1990, c. C.4, s. 30(2).

¹⁶*Cemetery and Funeral Services Act*, S.B.C. 1989, c. 21, s. 37(1).

¹⁷Similar provisions exist in British Columbia, Alberta and Saskatchewan: *Cemetery and Funeral Services Act*, S.B.C. 1989, c. 21, s. 37(4); *Cemeteries Act*, R.S.A. 1980, c. C-2, s. 18; *The Cemeteries Act*, R.S.S. 1978, c. C-4, s. 13.1, as en. by S.S. 1979-80, c. 74, s. 3.

RECOMMENDATION 4

If the original plot owner, or his or her personal representative, appears after the plot has been reclaimed, the reclamation order should be rescinded and the plot reverted in him or her. If the original plot has been resold, the cemetery owner should provide another plot of comparable value or an amount equal to the fair market value of the plot.

4. Reclamation Provision in the Sale Contract

A reclamation order will obviously have important consequences for the owner of a plot; he or she will lose its ownership. For this reason, the Commission believes that future plot owners should be made aware of the law respecting the reclamation and resale of unused cemetery plots when they are purchasing the plot. In British Columbia, cemetery owners are required to include in every plot sale contract a provision notifying purchasers of the cemetery owner's right to reclaim the plot.¹⁸ Although the absence of such provisions in existing contracts should not prevent cemetery owners from applying for a reclamation order in respect of those plots, we believe that this is an appropriate safeguard for sales in the future.

RECOMMENDATION 5

Every contract for the sale of a cemetery plot entered into after these reforms come into effect should contain a provision notifying the purchaser of the right of the cemetery owner to apply for the reclamation and resale of the plot and the circumstances in which such an application can be made.

D. LIST OF RECOMMENDATIONS

In this Report, we have made the following recommendations:


1. The owners of cemeteries should be allowed to reclaim and resell unused cemetery plots, subject to the safeguards set out in the following recommendations.
2. The reclamation and resale of a cemetery plot should be permitted only if none of the burial sites in the plot have been used.
3. The reclamation and resale of a cemetery plot should be permitted only with the prior approval of the Public Utilities Board. Such approval should be given only if the cemetery owner demonstrates that:
 - (a) reasonable efforts (including publication of notice of the application in a local newspaper) have been made to locate the plot owner or his or her personal representative and have not succeeded;
 - (b) at least 50 years have passed since the plot was purchased; and
 - (c) the plot purchaser, if living, would be at least 90 years of age.

¹⁸*Cemetery and Funeral Services*, S.B.C. 1989, c. 21, s. 37(3).

4. If the original plot owner, or his or her personal representative, appears after the plot has been reclaimed, the reclamation order should be rescinded and the plot revested in him or her. If the original plot has been resold, the cemetery owner should provide another plot of comparable value or an amount equal to the fair market value of the plot.
5. Every contract for the sale of a cemetery plot entered into after these reforms come into effect should contain a provision notifying the purchaser of the right of the cemetery owner to apply for the reclamation and resale of the plot and the circumstances in which such an application can be made.

In recommending that a reclamation provision be added to *The Cemeteries Act*, the Commission has attempted to balance the needs and desires of cemetery owners and prospective plot purchasers with the rights of plot owners. The reforms which we propose would allow cemetery owners to reclaim and resell previously sold but unused cemetery plots. However, they would also put in place safeguards which would ensure appropriate respect for the feelings of plot owners and their families.

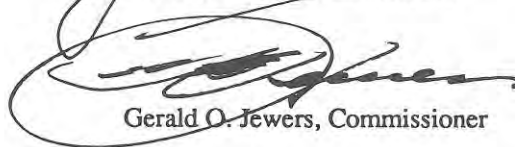
This is a Report pursuant to section 15 of *The Law Reform Commission Act*, signed this 21st day of September 1995.¹⁹



Clifford H.C. Edwards, President



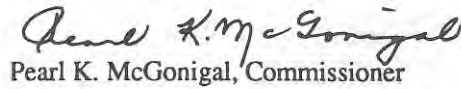
John C. Irvine, Commissioner



Gerald O. Jewers, Commissioner



Eleanor R. Dawson, Commissioner



Pearl K. McGonigal, Commissioner

¹⁹This Report was assisted by a grant from the Manitoba Law Foundation; although the Commission is primarily funded by the provincial government, additional grants from the Foundation allow us to expand the scope of our work.

**EXECUTIVE SUMMARY OF
REPORT ON RESELLING UNUSED CEMETERY PLOTS**

EXECUTIVE SUMMARY

From time to time, a cemetery plot which has been purchased by an individual is never actually used by that person. The purchaser may forget about the plot because of the passage of time or because he or she has moved elsewhere; his or her family may simply be unaware of the plot. Where the purchaser (or his or her personal representative) can be contacted by the cemetery owner, it is possible to determine whether he or she intends to make use of the plot. However, where the purchaser (or his or her personal representative) cannot be located, the plot remains his or her property and, even though it may never be used, the cemetery owner cannot resell it to someone else.

In six other Canadian provinces, the law allows cemetery owners to resell the unused cemetery plot in such cases. Three arguments justify such a provision. First, it reduces land waste, modestly extends the life of existing cemeteries and postpones the need to devote additional productive land to that use. Second, it may make it possible for people to be buried in a particular cemetery or in a particular part of a cemetery. Finally, it may improve the financial position of older cemeteries with few new plots to sell and with an insufficient perpetual care fund (or no fund at all) to meet the cemetery's maintenance costs.

On balance, the Manitoba Law Reform Commission agrees that cemetery owners should, in appropriate circumstances, be able to resell cemetery plots which were previously sold but which have not been and will not be used. However, safeguards should be put in place to ensure that there is no prejudice to the original plot purchaser and that the dignity of the purchaser and his or her family is respected.

First, the cemetery owner should be required to apply to an independent entity for permission to resell the plot; the Commission suggests that this be the Public Utility Board, which already has responsibility for licensing and regulating commercial cemeteries under *The Cemeteries Act*. Such an application should be considered only if the cemetery owner can establish that he or she has been unsuccessful in locating the plot purchaser, despite reasonable efforts which should include, at a minimum, notice in a local newspaper. Furthermore, the application should be considered only if at least 50 years have passed since the plot was sold and the plot purchaser would be at least 90 years of age, if still living. Secondly, to protect the sanctity of family plots and other plots with multiple burial sites, the provision allowing applications to resell a plot should apply only to plots in which none of the burial sites have been used. Finally, in the unlikely situation where the plot purchaser or his or her personal representative comes forward after the plot has been reclaimed, there should be provision for compensation. Where possible, the reclamation order should be rescinded and the plot reverted in him or her. However, if the original plot has been resold, the cemetery owner should provide another plot of comparable value or an amount equal to the fair market value of the plot.

The Commission also recommends that, in order to make persons purchasing a cemetery plot in the future aware of these provisions, cemetery owners should be required to include in every plot sale contract a provision notifying purchasers of the cemetery owner's right to reclaim the plot in these circumstances.

SOMMAIRE DU RAPPORT SUR LA REVENTE DE CONCESSIONS FUNÉRAIRES

SOMMAIRE

Il arrive que des concessions funéraires ne soient jamais utilisées, et ce, pour diverses raisons : les acheteurs ont oublié les avoir acquises, sont déménagés ou n'ont pas informé leur famille de leur acquisition. S'il parvient à communiquer avec les acheteurs (ou leur représentant personnel), le propriétaire du cimetière peut déterminer s'ils ont l'intention ou non d'utiliser leur concession. Par contre, s'il n'y parvient pas, les acheteurs demeurent propriétaires des concessions, celles-ci ne pouvant être revendues même si elles ne sont jamais utilisées.

Dans six autres provinces canadiennes, la loi permet aux propriétaires de cimetière de revendre les concessions non utilisées. Trois arguments le justifient. Premièrement, cette mesure permet de réduire le gaspillage des sols, de prolonger jusqu'à un certain point la vie des cimetières existants et de repousser à plus tard la nécessité d'affecter d'autres sols productifs à ce genre d'occupation. Deuxièmement, elle fait qu'il est possible pour des personnes de se faire enterrer dans un cimetière particulier ou dans un endroit particulier d'un cimetière. Enfin, elle permet d'améliorer la situation financière des vieux cimetières qui disposent de très peu de nouvelles concessions à vendre et de fonds insuffisants (ou inexistant) pour l'entretien.

Tout compte fait, la Commission de réforme du droit du Manitoba estime que les propriétaires de cimetière devraient, dans certaines circonstances, pouvoir revendre les concessions qui n'ont pas été et ne seront jamais utilisées. Il faudrait toutefois mettre en place des mesures visant à garantir l'élimination de tout préjudice à l'endroit des acheteurs initiaux et le respect de leur dignité et de celle de leur famille.

D'abord, il faudrait obliger les propriétaires de cimetière à demander à un organisme indépendant la permission de revendre la concession. Comme organisme indépendant, la Commission suggère la Régie des services publics qui est déjà chargée, en vertu de la Loi sur les cimetières, de l'établissement des permis et de la réglementation des cimetières commerciaux. Une telle demande ne devrait être considérée que si le propriétaire du cimetière peut établir qu'il a fait des démarches sérieuses, notamment la publication d'un avis dans un journal local, pour retrouver l'acheteur de la concession et que ces démarches se sont révélées infructueuses. De plus, elle ne devrait être prise en considération que si 50 ans se sont écoulés depuis l'acquisition de la concession et que dans le cas où l'acheteur aurait au moins 90 ans s'il était encore vivant. Deuxièmement, pour protéger le caractère sacré des concessions familiales et des concessions à plusieurs emplacements, la disposition législative permettant la revente ne devrait s'appliquer qu'aux concessions dont aucun emplacement n'a été utilisé. Enfin, il faudrait également prévoir une disposition de dédommagement dans l'éventualité peu probable où l'acheteur ou son représentant personnel viendrait réclamer la concession une fois qu'elle a été revendue. Dans la mesure du possible, la concession devrait être rendue à l'acheteur initial. Toutefois, si la concession a été revendue, le propriétaire du cimetière devrait donner une autre concession de valeur comparable ou une somme correspondant à la juste valeur marchande de la concession.

De sorte que les personnes qui achètent une concession funéraire soient au courant de ces dispositions, la Commission recommande d'obliger les propriétaires de cimetière à inclure dans chaque contrat de vente d'une concession une disposition informant les propriétaires de cimetière de réclamer la concession dans les circonstances susmentionnées.