

Discussion Paper on Cemetery Management

in the Diocese of Fredericton

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Part 1: A VIEW OF THE PROBLEM

Church cemeteries are important. Cemeteries, particularly in the yards of old churches, are a comfort to the living, and the prospect of burial in consecrated ground among family graves can console the dying. Cemeteries draw the observer into contemplation, suggesting the communion of saints. They may be spaces of natural beauty. A cemetery maintained poorly is a reproach to its neighbourhood.

For over 200 years New Brunswick has had burial grounds recognized as Anglican. Nowadays, one is owned by the bishop and a few have come into Synod ownership via parish closures, but most cemeteries are owned by rural or town parish corporations. As parishes dissolve, the number of cemeteries under Synod ownership will rise.

Cemeteries are forever. Except in very unusual circumstances they remain as consecrated ground. In the absence of a great deal of voluntary labour, financial support for long-term upkeep of a cemetery of even modest size, holding (say) 100 burials, requires a capital sum in the order of \$100,000 invested at 4%, yielding about \$4000 annually. This interest must defray annual upkeep and occasional special projects, plus fund a reinvested reserve for inflation. When such a benchmark is applied, only 6 of nearly 100 NB Anglican cemetery endowments invested in the DCIF are adequate for their perpetual care.¹ Sometimes we hear expressions of regret that Anglicans have so much wealth tied up in cemetery accounts, and one understands the sentiment. But from the perspective of perpetual cemetery care, we have set aside far too little.

¹ As of December 2021, 44 parishes had 97 cemetery trusts or funds invested in the Diocesan Consolidated Investment Fund, totalling \$2,440,000. (Presumably many other parishes have cemetery funds that are held outside the DCIF.) DCIF cemetery accounts ranged from \$293 to \$223,140. Only 6 of these 97 cemetery accounts held more than \$100,000.

NO GUIDANCE FROM THE SYNOD The **Anglican Church Act, 2003** makes no mention of cemeteries. It provides no guidance as to how parishes or the Synod are to handle them. What it does is give the Diocesan Synod a general power to make canons and regulations for the guidance and direction of parish corporations in use of land:

4(2) The Synod may adopt, amend, repeal or re-enact a constitution, canons and regulations for the general management and good government of the Church in the Diocese and, without restricting the generality of the foregoing, with respect to

...

(p) the **oversight, management and control of the real and personal property** of parish corporations ...

To date, the Synod has not used this power to regulate operation of cemeteries. Since 1970 the bishops of Fredericton have maintained an episcopal directive on certain matters connected with the burial service.² However, it does not, and given the nature of a bishop's authority could not, govern cemeteries or their management.

INADEQUATE GUIDANCE FROM THE PROVINCE Unlike Ontario, the New Brunswick legislature remains backward in regulating cemeteries. The main relevant legislation is the **Cemetery Companies Act**, which is a century or more in age.³ Its very title shows the province's haphazard approach to cemeteries, for it reads as if applying only to cemetery "companies", of which the Anglican church has none. However, the actual content of the act moves from provisions that apply only to "the company" to provisions that apply to any "person"; then, seemingly as an afterthought, comes a provision making some "company" provisions applicable to everyone else.

Here are the main provisions of this inadequate legislation as applicable to Anglican cemeteries.

- S. 5 -- Cemetery expansions and new cemeteries require several environmental compliances as well as permission of the Minister of

² The episcopal Directive on Christian Burial is at https://dq5pwpvg1q8ru0.cloudfront.net/2020/10/20/06/34/15/41051444-70b4-434e-b7ff-f7d092ab6511/directive_6_christian_burial.pdf

³ The **Cemetery Companies Act** is at <https://www.canlii.org/en/nb/laws/stat/rsnb-1973-c-c-1/latest/rsnb-1973-c-c-1.html> The **NB Assessment Act** also deals with cemeteries, exempting church cemeteries from real property taxation (s. 4).

Health, the provincial cabinet (that is, an order-in-council), and any relevant local government authority. These permissions are based on expert studies and tests at the expense of the applicant. The practical upshot is that there will never be a new Anglican cemetery established in NB and none will be expanded lawfully. The regulatory process for doing so is too burdensome. Extending cemeteries *unofficially* is a Category C provincial offence carrying a fine from \$140 to \$1100 on first conviction.

- S. 13 -- No human remains are to be interred within five metres of a building.
- S. 14 - All cemeteries must have “regulations to ensure all burials within the cemetery being conducted in a decent and solemn manner”.
- S. 16 & S. 32 - All cemeteries “shall furnish graves for strangers, and for the poor of all denominations, free of charge, on the certificate in the latter case, of a minister or clergyman of the denomination to which the deceased belonged, that the relatives of the deceased are poor and cannot afford to purchase a grave in the cemetery”.
- S. 30 -- Defacing or damaging any aspect of cemetery is a Category C or Category F provincial offence.

RECURRING CEMETERY ISSUES Here are some recurring questions illustrating the breadth of issues in cemetery management. In the main, they are situations that can be resolved most effectively by, and only by, the terms of the cemetery lot purchase contract.

1. *What does a cemetery lot purchaser buy? Does the purchaser buy the actual soil, or a sort of perpetual lease of a cemetery spot, or a sort of permission (“licence”) to use the lot for interment and a monument?*
 - a. The **Cemetery Companies Act** does not answer this question but in s. 19 it offers a specimen purchase contract for optional use. By this contract the purchaser of a lot would acquire a fee simple interest in the actual soil, just as if buying a house. A cemetery operator that proceeded on this basis would eventually end up owning only the access roads and pathways. This approach to selling cemetery lots is used in some NB parishes *but should be discontinued*.
 - b. The sale contracts, rules or by-laws of well-regulated cemeteries provide invariably that what purchasers acquire is merely

permission to use the lot, with ownership of the soil remaining with the owner of the cemetery.

2. *Who has a right to burial?* The person(s) named in the purchase contract have the right to burial. In theory, this would also extend to anyone to whom the purchaser subsequently conveyed that right. (Cemeteries often prohibit or regulate this.) Depending on whether the purchaser purchased the cemetery soil or a mere permission to use the burial lot and what legal form that permission took (see above), the right to burial might pass under the purchaser's will, either as a specific gift or as part of the residue of the estate. (In practice, makers of wills never remember to deal expressly with the fate of their cemetery lot.)
 - a. Suppose a cemetery plot purchased decades ago had room for five casket burials but only two have ever been used. Suppose some self-identified descendant of the purchaser is now dead and the executor claims right of burial in the ancestral purchaser's under-used lot. What is cemetery management to do?
3. *Can cemetery owners reclaim unused lots?* Suppose decades ago, when families were large, plots in a cemetery were sold that could accommodate five burial lots. Suppose only two have ever been used, most recently in the 1970s. Can the cemetery owner resell the remaining three spaces if it considers that they are likely to remain unused forever? NB's **Cemetery Companies Act** gives *companies* a complicated and expensive path to re-acquire lots that, after 40 years, remain unused. This provision, while acknowledging the problem of sold but unused lots, does not apply to cemeteries that are not operated by *companies* and, in any event, is too burdensome to be practical.
4. *Can cemetery owners restrict cemetery sales to Anglicans? to Christians? to theists? to only the baptised? What if the purchaser ceased to be a Christian after the lot purchase – can burial be refused?* Refusal to sell a cemetery lot, or to inter remains, on the basis of the applicant's or deceased's religious beliefs would at first impression violate s. 4 of the NB **Human Rights Act**.⁴ However, the act allows for some discrimination if, in the determination of the Human Rights Commission, the restriction is based on a good faith qualification. In making this assessment, something might turn on whether the owner of the cemetery had a consistent, communicated policy on the question. Practically, something

⁴ The **Human Rights Act** is at <https://www.canlii.org/en/nb/laws/stat/rsnb-1973-c-h-11/latest/>

would also turn on whether the parish corporation were willing to face adverse publicity and/or a human rights process.

5. *Can cemetery owners require that burials be accompanied by Christian prayer? Can they require that burials be supervised by the parish incumbent or a parish representative? As noted above, the Cemetery Companies Act imposes a legal obligation on every cemetery to “ensure all burials within the cemetery [are] being conducted in a decent and solemn manner”. This pre-supposes that a representative of the parish or Synod would at least witness the burial. As cemeteries are open spaces, such observation need not be intrusive. Whether the parish or Synod could insert its own proceedings onto the burial, or insist that *only* an Anglican officiate, is probably dependant on the original cemetery lot purchase contract and human rights considerations.*
6. *Given the popularity of cremation, how can cemetery operators prevent the clandestine interment of ashes?*
7. *Can cemetery owners require that only certain approved contractors be engaged to open graves? Can they require that grave monuments be pre-approved for taste or be removed for vulgarity? Can they prohibit gravestones with illumination at night or that play “I did it my way” when people approach within a few feet? Can they prohibit plantings or remove spent natural or artificial flowers? Many cemeteries do these and similar things. Their strongest legal basis for this would be a provision in the original contract of lot sale that permitted such cemetery rules.*
8. *Are cemetery owners responsible for straightening leaning stones? Are they permitted to do so? When a grave has subsided, are they responsible for topping up the soil? Are they permitted to have faded monument lettering repainted and the stones cleaned so as to improve the aesthetics of the cemetery? How often is a cemetery to be mowed and tidied?*
9. *What persons are entitled to sell (in whatever sense) cemetery lots? Do contracts of sale by parishes have to conform to Canon Six (signatures of multiple parish officers and the parish seal)? Does sale of a cemetery lot amount to disposition of parish land so that it requires the assent of the Bishop and Finance Committee? Are burials allowed in lots not yet paid for? Does parish liability insurance cover its cemetery business? Must cemetery funds be held separate from other church funds? What happens if the cemetery is full and there have been no new lot sales for half a century, resulting in insufficient money to pay for the cemetery’s upkeep? If a parish closes down, what happens to cemeteries then?*

10. Some church cemetery operators provide parishioners with lots free of charge or at a discount? *Would this private benefit endanger the parish's federal charitable status?*
11. *As many parishes hold services to bless animal/human relationships, can beloved pets be buried in their cemeteries?*
12. *What happens if someone in the family wants a body disinterred?⁵ What happens if a body is buried in the wrong lot?*

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⁵ See **Mason vs Mason and Anglican Parish of Sussex** (2018)
<https://www.canlii.org/en/nb/nbca/doc/2018/2018nbca20/2018nbca20.html?searchUrlHash=AAAAAQHZXhodW1lZAAAAAAB&resultIndex=1>

Part 2: MOVING FORWARD

LOTS SOLD ALREADY Sale of a cemetery lot necessarily involves a contract. This is so even if the sale in question took place long ago and was merely oral. Most of the problems and uncertainties noted above in Part 1 could be resolved fully only by reference to the terms of the original contract of lot purchase and sale. Once that contract is in place, it's too late -- except by consent of both sides -- to insert things we now wish were in there.

This is the situation in which most owners of church cemeteries are placed in relation to most occupied lots. They have sold cemetery lots in times past without building into the sale contract answers to many issues arising commonly in cemetery management. What can the cemetery owner do? Strictly speaking, owners can do nothing now that would subtract from the legal rights of current lot holders or add to their legally enforceable burdens. In practice, however, an owner that articulated reasonable policies for the management of its cemetery and made them conspicuous on its website and otherwise would find that they would rarely be resisted on the ground that, legally, they could not apply to lots sold in the past.

The upshot is that cemetery owners should start framing reasonable rules, publicizing them and acting prudently in administering them. A suggestion for some such rules appears below in an Appendix.

LOT SALES FROM NOW ON Today and for the future, no burial rights in an Anglican cemetery should be sold without a written contract of sale. To assist in bringing about so great a change, here below is the draft of a Synod regulation governing, at a fairly high level, how parishes and the Synod are to manage their cemeteries. The authority underpinning it is the Synod's power under s. 4 of the **Anglican Church Act** to regulate how parish corporations manage property. The gist of the draft regulation is to require that certain types of provisions be built into every future lot sale contract. Parishes could draw up their own sales contract so long as it complied with the Regulation. However, to ease the burden on parishes, a specimen lot sale contract is provided below that incorporates the required terms, with flexibility for some local variation in asserting a cemetery's Anglican character. First below is the draft regulation, then follows the draft of a specimen lot sale contract.

[Draft] Cemetery Management Regulation
to be enacted by Diocesan Council

1. In this Regulation,
 - “burial” means the inhumation of human remains, including ashes;
 - “cemetery” means land used for inhumation of human remains, whether a church yard or detached land; and
 - “owner” means the Bishop, the Diocesan Synod, the Cathedral of Christ Church or a parish corporation in its capacity as owner of land on which a cemetery is situate.
2. The Bishop, the Diocesan Synod, the Cathedral of Christ Church or a parish corporation may maintain a cemetery only on land owned by the Bishop, the Diocesan Synod, the Cathedral of Christ Church or a parish corporation.
3. No Owner may transfer freehold title of a cemetery to an entity that is not the Bishop, the Diocesan Synod, the Cathedral of Christ Church or a parish corporation.
4. An Owner may grant permission to manage or maintain a cemetery to an entity that is not the Bishop, the Diocesan Synod, the Cathedral of Christ Church or a parish corporation.⁶
5. Where the Bishop, the Diocesan Synod, the Cathedral of Christ Church or a parish corporation contracts aspects of management or maintenance of a cemetery to a third party, it shall require the third party to conform to the relevant provisions of this Regulation.

Cemetery Records

6. Immediately on the coming into force of this Regulation, and thereafter at the request of the Secretary of the Diocesan Synod, every Owner shall transmit to the Secretary of the Diocesan Synod a plan of each cemetery, showing the lot and row numbers of lots in use and lots for sale.
7. Every parish corporation owning a cemetery shall exhibit for inspection at its annual meeting a copy of the current lot plan of each cemetery.

⁶ Taken together, what sections 3 and 4 mean is that an Anglican cemetery, as consecrated ground, must always be owned by some entity of the church (a parish, the Synod or the diocesan bishop) but that non-Anglican entities may become involved in cemetery management.

- ~~8. For every cemetery owned by the Bishop or the Diocesan Synod with lots available for sale the Secretary of the Diocesan Synod shall exhibit for inspection at the first meeting of the Diocesan Council in each calendar year a copy of the current lot plan for each cemetery. Lot plans for closed cemeteries shall be held in the archives.~~
9. Every parish corporation in its reporting to the parish annual meeting shall include a written statement of the segregated funding set aside for each cemetery, specifying what funds are available for current upkeep, what funds are held in trust for perpetual care and any restrictions pertaining to the use of the latter.
- ~~10. For every cemetery owned by the Bishop or the Diocesan Synod the Secretary of the Diocesan Synod shall report in writing at the first meeting of the Diocesan Council in each calendar year on the funds set aside for each cemetery, specifying what funds are available for current upkeep, what funds are held in trust for perpetual care and any restrictions pertaining to the use of the latter.~~
11. For each cemetery the Owner shall maintain or cause to be maintained a separate register identifying the persons who have purchased burial rights in lots, the date of purchase and the persons whose remains are permitted to be buried in the lot.
12. For each cemetery the Owner shall maintain or cause to be maintained a separate register showing the persons whose remains have been interred in each lot and the date of interment.

Sale of Burial Rights

13. Every contract made for the sale of burial rights in a cemetery shall be in writing, signed by the Owner's representative and by the purchaser, with a duplicate copy for each. It shall identify, with reference to the cemetery plan, the lot and row number of the lot in which burial rights are being purchased. It shall state the names of, or otherwise identify, the persons whose remains are permitted to be interred in the purchased lot.
14. Every contract for the sale of burial rights in a cemetery shall include provisions to the effect that:
- a. the purchaser acquires permission to use the identified lot for the interments specified in the purchase contract, including the right

of reasonable seasonal access to the lot and the right to erect a single upright stone marker and/or flush-to-the-ground stone marker that identifies the person interred;

- b. the purchaser or the purchaser's legal representative may surrender an unused lot to the Owner for a refund of the original purchase price without interest;
- c. the Owner may re-sell the lot if there has been no interment in the lot within [50] years of the date of purchase; and
- d. the purchaser consents to being bound by the reasonable rules for cemetery management that the Owner may make from time to time, including rules for burial rites permitted in the cemetery, rules for markers of acceptable size and style and for removal of non-conforming items, rules for features and installations permitted on the burial lot and for removal of non-conforming items, and rules for the care and maintenance of the cemetery grounds.

15. Contracts for the sale of burial rights in cemetery lots may be in accordance with the specimen contract in the Schedule.

Cemetery Management

16. Every Owner shall designate for each cemetery a committee of two or more people, one of whom is identified as cemetery manager, with responsibility (subject to the Owner's oversight) to sell burial rights in cemetery lots in conformity with this Regulation and to receive, deposit and account for sale proceeds in accordance with established protocols, to maintain cemetery maps and registers of sales and interments, and to superintend day-to-day activities in the cemetery.

17. Interments in the cemetery shall take place only by advance arrangement with the cemetery manager.

18. No buried remains may be exhumed except by public authority or permission of a court.

19. Every Owner shall make or cause to be made rules for the good management and upkeep of the cemetery and its lots.

New Cemeteries

20. No one may create new cemeteries or expansions of cemeteries except by permission of the Bishop and the Diocesan Synod and in accordance with the laws of New Brunswick.

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Schedule

[Draft] Specimen Sale Contract for Burial Rights

[Where the Owner is the Bishop, the Diocesan Synod or the Cathedral, the contract is modified accordingly]

Anglican Parish of XXX

**Contract for the Purchase and Sale of Right of Burial in XXX
Cemetery**

1234 Route 333, Edgecomb Falls, NB

made in duplicate

between **Anglican Parish of XXX** and its successors in title, the contact particulars of which are XXXX, referred to as the **Owner**

and **CCCC**, the contact particulars of whom are XXXX, referred to as the **Purchaser**

What Is Sold and Purchased

1. Subject to paragraph 3, the Owner sells to the Purchaser, and the Purchaser buys from the Owner, the burial rights specified below in lot XX of row XX in XXX cemetery ("the Lot"). *[Note: where rights of burial in multiple lots are being purchased, a separate contract is made for each lot.]*
2. The purchase price for burial rights in the Lot is \$XXX. *[Note: Is the price a fixed rate per lot or does it vary according to the number of permitted burials?]*
3. The Purchaser acknowledges that this contract becomes effective only when the purchase price is paid and that, until then, the Owner may sell the right of burial in the Lot to another.
4. The Purchaser acknowledges that until the purchase price is paid, there may be no interment in the Lot and no grave marker placed on the Lot.
5. The Purchaser acknowledges that legal title to the Lot remains at all times with the Owner, and that what the Purchaser acquires is a permission (licence) to use the Lot for the interment(s) specified in this contract, including the right of reasonable seasonal access to the Lot and the right to place on the Lot a single upright and/or flush-to-the-ground stone marker of a type and in a situation approved by the Owner that identifies the person(s) interred.

6. Subject to the Owner's rules of management for the cemetery (a copy of which the Purchaser acknowledges having received and assented to), the remains permitted burial in the Lot are of the following person(s): XXX.
7. The Purchaser acknowledges that the Purchaser may not transfer a right of burial without written permission of the Owner.
8. Should the Purchaser or the Purchaser's legal representative choose to surrender the right of burial in an unused lot, the Owner will refund the purchase price without interest.
9. Should the Lot remain unused for 50 years from the date of purchase, the Owner may resell the right of burial and thereby extinguish the rights of the Purchaser in the Lot, and it may do so without notice to the Purchaser.

Interments

10. The Purchaser acknowledges that the Lot is consecrated ground and that the *NB Cemetery Companies Act* requires the Owner to ensure that burials are conducted in a "decent and solemn manner".
11. The Purchaser acknowledges the Owner's right to approve how, when and by whom graves are opened and closed.
12. The Purchaser acknowledges that the Owner forbids the scattering of ashes. *[Note: Where an Owner offers scattering rights for human ashes in a common scattering ground, this contract is altered accordingly.]*
13. The Purchaser acknowledges that the Owner requires at least 48 hours advance notice of a proposed interment in the Lot.
14. *[Optional]* The Purchaser acknowledges that no burial may take place without the presence of the Owner's representative.
15. *[Alternate Optional]* The Purchaser acknowledges that no interment may take place unless accompanied by the burial liturgy of the *Book of Common Prayer*, the *Book of Alternate Services* or as otherwise approved by the Bishop of Fredericton.
16. *[Alternate Optional]* The Purchaser acknowledges that no burial and no rite or ceremony may take place within the cemetery except by, or under the supervision of, or by permission of, XXX.

Owner's Continuing Obligations

17. The Owner will, at its discretion and subject to its financial means but without further charge to the Purchaser, perform reasonable and customary maintenance so that the cemetery is kept in good order, including mowing, removal of leavings (for example, mementoes, spent or degraded flowers), soil levelling, **grave marker levelling** where in the Owner's opinion the condition of the marker permits it, path and roadway maintenance, and the like.

Owner's Legal Liability Limited

18. The Purchaser acknowledges that the Owner disclaims all responsibility, and is not liable, for injury, loss or damage to persons or property in the cemetery or in connection with the Lot, **except for any direct personal injury, loss or damage caused by the gross negligence of the Owner.**

Owner's Right to Make and Amend Cemetery Rules

19. The Purchaser consents to the Owner making or altering rules for the management of the cemetery and the Lot, and the Purchaser acknowledges being bound by those rules.

Appendix – Some Suggested rules for managing cemetery grounds

[The purpose of these rules is not to duplicate provisions of the lot sales contract but to address some points of day-to-day cemetery management. Some cemeteries post such rules, or most of them, as a public notice. Examples of more elaborate cemetery rule packages are provided by St John's Cemetery Halifax <https://stjohnscemetery.ca/regulations.html> , St John's Cemetery Mississauga <https://stjohnsdixie.com/cemetery/cemetery-by-laws/>, and Ontario's Bereavement Authority <https://thebao.ca/wp-content/uploads/2020/09/BAO-Sample-Cemetery-By-Laws-April-2018.pdf>]

Parish of XX Cemetery Rules

Cemetery Manager – [name and contact co-ordinates]

Secondary contact in cases of urgency: [name and contact co-ordinates]

1. For **lot sales and interments** – Contact the Cemetery Manager
2. Burials of human remains/ashes may take place only by prior notice to, and with permission of, the Cemetery Manager.
3. Installation of grave markers may take place only by prior notice to, and with permission of, the Cemetery Manager. No marker that has not been paid for may be placed in the cemetery.
4. Management has full control over the cemetery land and operation. Visitors must conduct themselves in a quiet manner and must not disturb any service being held.
5. The Anglican Parish of XXX disclaims legal liability for injury to persons present in the cemetery and for loss or damage to property in the cemetery, except for direct injury, loss or damage caused by the gross negligence of cemetery management.
6. Management is not liable for damage to grave markers incidental to cemetery maintenance.
7. Management may remove cut flowers (natural or artificial), rocks and other leavings in the cemetery when in its opinion they become spent, unsightly or dangerous.
8. No glass containers are permitted within the cemetery.
9. Plantings permitted in the cemetery are those placed by cemetery management. Others will be removed without notice.
10. Lots may be marked by a stone that is upright and/or flush-to-the-ground. Nothing else may be affixed to or rest on the soil of a lot.
11. Lots and grave markers must be restrained in design and may not include features that emit illumination or sound.