

**LICENCE APPEAL  
TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE  
DE PERMIS**



**Safety, Licensing Appeals and  
Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en  
matière de permis et des normes Ontario**

Citation: 1868653 Ontario Inc. o/a Newcastle Funeral Home Ltd. v. Registrar, *Funeral Burial and Cremation Services Act, 2002*, 2019 ONLAT FBCSA 11449

Date: 2019-05-23  
File Number: 11449/FBCSA

IN THE MATTER OF the *Funeral Burial and Cremation Services Act, 2002*, S.O. 2002,  
c. 33 and Regulations

Between:

1868653 ONTARIO INC. o/a NEWCASTLE FUNERAL HOME LTD.

Appellant

and

REGISTRAR, *Funeral Burial and Cremation Services Act, 2002*

Respondent

**DECISION AND ORDER**

**Adjudicator:** Richard Macklin, Vice-Chair  
Asad Moten, Member

**Appearances:**

For the Appellant: Nick Tibollo  
Frances Tibollo

For the Respondent: Elizabeth S. Maishlish  
Bernard C. LeBlanc

**Heard in Toronto:** September 6, 7, 13, 17, 18, 21, 24;  
October 3, 5, 10, 11, 22, 25, 2018

## REASONS FOR DECISION AND ORDER

### I. OVERVIEW

- [1] Trevor Charbonneau has been in the funeral business for 19 years. He obtained a Funeral Director – Class 1 licence in 2000. He operates two funeral homes, Morris Funeral Home (since 2014) and Newcastle Funeral Home ("NCFH") (since 2012).
- [2] In the spring of 2017, he attended a conference that showcased a funeral process for disposition of human remains, known as Alkaline Hydrolysis ("AH"). He contacted a manufacturer of AH machines and decided to expand his business and offer AH to his funeral service customers.
- [3] The AH process is regulated by the Bereavement Authority of Ontario ("BAO"). Applications for a licence to operate an AH machine are made under the "Alternative Disposition" category and are treated as applications for a crematorium licence. Mr. Charbonneau, on behalf of NCFH, applied for the "alternative" crematorium licence, on September 5, 2017. NCFH was granted the licence by the BAO on November 16, 2017.
- [4] The Registrar argues that between November 2017 and June 22, 2018, several issues arose with respect to NCFH's AH services. These issues include misleading advertising about the nature of AH, and sub-standard and disorderly operation of the AH process. The Registrar also takes issue with the fact that the NCFH AH process takes place at a temperature slightly below the boiling temperature ("low temperature"). Thus, the Registrar argues there is a lack of evidence on whether the output of NCFH's low temperature AH process poses a risk to public health, and that NCFH failed to disclose to the Registrar that it intended to use and, since licensure did use, the low temperature process (collectively "the allegations").
- [5] On June 22, 2018 the Registrar issued an Immediate Suspension Order and Notice of Proposal to Revoke NCFH's licence based on the allegations. The Registrar asserts that the allegations amount to a breach of the governing legislation and a breach of a condition of NCFH's licence. The Registrar further alleges that there are reasonable grounds for the belief that NCFH will not act within the law and with integrity and honesty and that there are reasonable grounds for the belief that NCFH's low temperature AH process poses a risk to public health.
- [6] NCFH appeals from the Immediate Suspension and Notice of Proposal, and seeks to set them aside. By Case Conference Order, dated July 12, 2018, NCFH

consented to a continuation of the immediate suspension order, pending the conclusion of the appeal hearing. The hearing took place over 13 days between September 6 and October 25, 2018. The Tribunal reserved its ruling.

- [7] For the reasons that follow, the Tribunal finds that the past conduct of NCFH and Mr. Charbonneau do not give rise to reasonable grounds to believe that NCFH will not carry on business in accordance with the law and with integrity and honesty. The Tribunal also finds that there are not reasonable grounds to believe that the operation of NCFH's AH facility creates a risk to public health, safety or decency. With respect to contraventions of the *Funeral Burial and Cremation Services Act, 2002*, S.O. 2002, c.33 ("FBCSA" or "the Act"), its Regulations and the conditions of NCFH's licence, the Tribunal finds that the state of NCFH's operation at the time it was inspected in June 2018 did give rise to a contravention of the Act. This deficiency has since been rectified and no longer presents a consumer protection risk.
- [8] Accordingly, the Tribunal substitutes its opinion for that of the Registrar and directs the Registrar not to carry out its proposal to revoke NCFH's crematorium licence. As per the Case Conference Order dated July 12, 2018, the Immediate Suspension ceases to operate at the conclusion of the Hearing, which is marked by the release of these Reasons.

## II. THE FACTS

### A. THE ALKALINE HYDROLYSIS PROCESS

- [9] The funerary AH process involves placing the deceased in an AH vessel. Flesh and organs are dissolved by adding water and caustic chemicals<sup>1</sup> and subjecting the vessel to heat and/or agitation. Once completed, the effluent is discharged into the waste water system. The body's mineral content remains, is removed from the vessel, dried, crushed in a cremulator and returned to the family.
- [10] AH machines operate at a low temperature, (slightly below the water boiling temperature), or at a high temperature (above boiling-with pressurization). Generally speaking, the length of time an AH process takes is dependent on the amount and concentration of chemicals used, the size of the body being dissolved,

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<sup>1</sup> The chemicals most commonly used are high alkali bases such as sodium hydroxide or potassium hydroxide. These chemicals are corrosive to living tissue.

and the temperature at which the process is conducted. High temperature processes take less time than low temperature processes.

- [11] The AH process, outside of use on humans, is not new. It has been used regularly in dissolving and disinfecting medical, laboratory, and veterinary waste. With respect to the final disposition of human remains, however, it is an emerging line of business. As such, there is not yet consistency across jurisdictions as to whether it is permitted, or how it should be regulated. The AH process is, however, permitted in Ontario.

## **B. HISTORY OF THE BAO AND LICENSING OF ALKALINE HYDROLYSIS IN ONTARIO**

- [12] The BAO came into existence in December 2015. In January 2016, it took over the functions of the Cemeteries Regulation Unit (CRU) of the Ministry of Government and Consumer Services (MGCS), which had regulated cemeteries and cremations. In mid-April of 2016, the BAO took over the functions of the Board of Funeral Services ("BOFS"), which had regulated the funeral profession.

- [13] The BAO administers the Act. The BAO's responsibilities include licensing and inspection of funeral business licensees.

- [14] The Act classifies all Alternative Dispositions (including AH, freeze drying and compost) into the traditional crematorium operators class, under section 1.1(2) of the Act which reads:

### Alternative Dispositions of Human Remains

1.1(2) Subject to the regulations, the provisions of the Act dealing with crematoriums, cremation and crematorium services apply, **with necessary modifications**, to establishments that provide alternative processes or methods of disposing of human remains and to those processes or methods. [Emphasis added]

- [15] When the BAO took over the functions of the CRU and BOFS, it also assumed their prior licensees, including two pre-existing AH licensees. The BAO witnesses acknowledged that it had limited records for the basis on which the two AH operators became licensed. At the time of this hearing, one of these licences had been revoked and the other had been forfeited. There is currently, other than NCFH, one licenced AH operator in Ontario, which operates a high temperature AH machine.

### C. INITIAL BAO REGULATION OF ALKALINE HYDROLYSIS IN ONTARIO

[16] One of the first steps taken by the BAO in relation to AH licensees was to issue a Registrar's Directive dated August 1, 2016 (the "August Directive"). The August Directive was sent to all licensees and was published on the BAO website. The August Directive states:

1. *To ensure the safe and respectful handling of human remains from the time of receiving those remains to commencing the chemical reduction of the human remains, only a Funeral Director- Class 1 or a funeral director intern under the supervision of a Funeral Director - Class 1, may carry out the disposition of human remains using alternative processes or methods, e.g. Alkaline Hydrolysis.*

2. *An accurate and complete description of the process must be provided by the operator to the person contracting the service. Characterizing the process only as "green cremation", "flameless cremation" or "dissolving in water" is not sufficient.*

3. *The licensee acknowledges that as knowledge of the process, equipment or technology evolves, the conditions accompanying this licence may be amended from time to time, which may add additional obligations and documentation requirements"*

[17] FBCSA Registrar, Carey Smith testified that paragraph 1 of the August Directive, which requires Funeral Director supervision of the AH process, was necessary because, amongst other things, the AH process involves a high degree of handling of the deceased's body as part of the disposition process. This is an example of a "necessary modification", under s. 1.1(2) of the Act, in regulating alternative dispositions within a crematoria licence. In the traditional cremation process, there is negligible contact between the crematoria operator and the deceased's body and there is no requirement that a flame based cremation be supervised by a licensed funeral director.

[18] Registrar Smith testified that paragraphs 2 and 3 of the August Directive were necessary in light of the novelty of the AH process. Paragraph 2 was implemented in order to improve the information provided to consumers about the AH process. Through paragraph 3, the Registrar took the proactive step of notifying licensees and prospective licensees that conditions for operating an AH facility were to some extent in flux and might be amended.

[19] Paragraphs 1-3 in the August 2016 directive were later made conditions of NCFH's crematorium licence.

#### **D. BAO ATTENDS CREMATION ASSOCIATION OF NORTH AMERICA ("CANA") CONFERENCE**

[20] The AH process is not without controversy. The main controversy is between proponents of the low temperature as opposed to the high temperature AH process. At the centre of the debate is a funeral director, Dean Fisher, who is the director of a donated body program at the University of California Los Angeles. He is also a part owner of a company that sells high temperature AH machines. Mr. Fisher advocates for the high temperature AH process. Joe Wilson, of Bio-Response Solutions Inc. ("Bio-Response"), is a leading proponent of the low temperature process, although his company sells both types of technology. The debate centres on the safety of the outputs of the process. Mr. Fisher advocates that the higher temperature process (similar to the effect of raising water to the boiling point), is the safest means of ensuring that the product of AH, which ends up in the wastewater system, is clear of infectious disease-causing agents. Advocates for the lower temperature AH process state that the low temperature process is safe, and point to the fact that the low temperature process operates for many hours longer than the high temperature process.

[21] The BAO entered this controversy, unwittingly, in February 2017, when Peter Jordan, Manager of Compliance at the BAO, attended a CANA conference in Las Vegas, USA. At that conference, Mr. Fisher lectured on the benefit of the high temperature AH process and the risks associated with the low temperature process.

[22] Mr. Jordan determined that the BAO should obtain additional information on the AH process. He wrote to Bio-Response Vice President of Research Samantha Seiber, in March 2017, and asked for validation studies related to Bio-Response AH machines. The validation studies were forwarded to Mr. Jordan roughly one month later, and were entered into evidence at the Hearing.

[23] The BAO AH licencing application process does not include an inquiry as to whether the operator is proposing to operate at a high or low temperature. Thus, when NCFH obtained its AH-crematoria licence in November 2017, it was not asked on the application form, or throughout the application process, nor did it advise, which technology it would be using.

[24] By at least February 2018, however, the BAO, through Registrar Smith and Mr. Jordan, determined that the high temperature AH process was acceptable, but had

misgivings about the low temperature process. Indeed, Registrar Smith testified that had he known NCFH was operating a low temperature system, the BAO would have opposed the issuance of NCFH's crematorium licence.

#### **E. BAO LEARNS THAT NCFH OPERATES A LOW TEMPERATURE, AH VESSEL**

[25] On February 6, 2018, the BAO learned that NCFH was operating a low temperature AH unit. This news prompted the following text messaging exchange between Mr. Jordan and Registrar Smith:

Jordan: It's a low temp unit Damn

Smith: Argh

[26] There were other developments in this time period related to the AH process. In February 2018, the Registrar revoked the crematorium licence of a high temperature AH operator. This, and the discovery of the low temperature process being carried out at NCFH, led the BAO to take several steps. First, it started a study of the AH process and communicated this to the profession on February 14, 2018. Second, they asked the manufacturer of NCFH's low temperature vessel for evidence that the low temperature AH process was safe. They were not satisfied with the response. The BAO also held a meeting of funeral directors in April of 2018, to address emerging issues in the regulation of AH operators. Mr. Charbonneau attended that meeting. Finally, the BAO engaged the Ministry of Health, which led to the BAO commissioning a literature review on the AH process, conducted by Public Health Ontario. That report, however, was not completed until August of 2018.

#### **F. SPRING OF 2018- NCFH BEGINS TO ATTRACT INCREASED REGULATORY ATTENTION**

[27] In the meantime, NCFH started to attract increased attention from the BAO. An impetus for this increased attention was an e-mail from a registrant, to Registrar Smith, received on March 11, 2018, which stated as follows:

Hey Carey, further to our recent discussion on the bogus practices of those with resomation [AH] units, you need to see this ad in the Bowmanville, Newcastle area. This guy [NCFH] is not indicating anywhere that he operates a resomation unit is using the word cremation. BS!

If I were to make an assumption, you will be on this one like "stink on a monkey"... LOL

Seriously, this guy needs a trimming!

[28] The concerns raised in this e-mail were satisfactorily resolved by Paul LeRoy, a BAO inspector and Mr. Charbonneau. However, the Registrar continued to follow NCFH's advertising program, which led to a handful of other directions for NCFH to alter its advertising, during the period of March to June 4, 2018. Those directions are discussed in more detail later in these Reasons.

### **G. JUNE 2018 INSPECTIONS**

[29] In June of 2018 Registrar Smith directed inspectors to carry out unannounced inspections of all Ontario AH licensees. On June 12, 2018, NCFH's premises was inspected by Inspectors Paul LeRoy and Andrew Reynolds. At the time of the inspection, an AH process was in progress.

[30] The inspectors testified that the facility was noisy, smelly, dirty, hot, dusty, grimy, and unkempt, like the inside of someone's garage.

[31] The BAO also tendered video and photograph evidence, from the June 12, 2018, inspection, that showed:

- i) Two garage doors with exposed insulation taped to the inside of the doors;
- ii) At least one movable metal table with bags of caustic chemicals stacked upon it;
- iii) A table or other platform with bags of caustic chemicals stored upon it, and the clothes from at least one decedent piled on top of the chemicals;
- iv) Bags of caustic chemicals stored on top of a plastic storage bin;
- v) Various pipes, cords and hoses located on or near the floor of the facility;
- vi) A metal loading table containing bone fragments;
- vii) Shoes and clothes from another decedent stored on or near bags of caustic chemicals;
- viii) Inadequate placement of caustic chemicals including near where they might come into contact with water;

- ix) White chalky residue, similar to caustic chemicals, on top of storage bins;
- x) An inadequate eye-wash station;
- xi) Fabric gardening gloves stored on top of storage bins intended to contain caustic chemicals;
- xii) A small floor mat taped to the window of an exit door to maintain privacy;
- xiii) Metal identification tags with numbers but no name to identify the facility;
- xiv) Residue and bone fragments on tables and the bottom of the oven used to dry decedents' bones;
- xv) Scattered and improperly stored personal protective equipment (PPE);
- xvi) Warped and worn "pizza" pans, used in the convection oven drying process; and
- xvii) Porous floors with cords running through them.

[32] The inspectors shared their photographs and observations with Registrar Smith. On viewing the photographs, Registrar Smith determined that NCFH had to be suspended immediately and he formed his grounds for seeking revocation of NCFH's crematorium licence. The Notice of Proposal of Revocation and the Immediate Suspension Order were issued and served on June 22, 2018.

### **III. ISSUES**

[33] The issues in this proceeding are as follows:

- i. Has NCFH contravened the Act, its Regulations, or a licence condition, in operating its AH facility?
- ii. Does the past conduct of Trevor Charbonneau or of NCFH afford reasonable grounds for the belief that NCFH will not carry on its business in accordance with the law or with integrity or honesty?

- iii. Are there reasonable grounds for the belief that the operation of NCFH's AH facility creates a risk to public health, safety, or decency?
- iv. If one or more of the answers to i), ii) or iii) are yes, should NCFH's crematorium licence be revoked?

#### **IV. STANDARD OF REVIEW**

[34] If a licensee wishes to challenge a Notice of Proposal, it can request a hearing before the Tribunal within 15 days of service of the Notice (see s. 18(2) of the Act). A hearing before the Tribunal is a matter of first instance. No deference is owed to the decision made by the Registrar, who bears the onus of proof in supporting the grounds for the proposal (*Ontario (Registrar, Motor Vehicle Dealers Act) v. Shine Car Sales*, 2003 CanLII 11437 (Div.Ct.), at paras. 9-10). If a hearing is requested, as it was in this case, the Tribunal may, following the hearing, direct the Registrar to carry out the proposal, or substitute its opinion for that of the Registrar, and may attach conditions to its order or to a licence (see s. 18(5) of the Act).

#### **V. ANALYSIS**

##### **Issue #1 - Violation of the Act/Conditions of Licence**

[35] The Registrar may propose to suspend or revoke a licence if the licensee is in contravention of the Act or its regulations (s. 14(1)(a)(i)), or if the licensee is in breach of a condition of the licence (ss. 14(1)(h)).

[36] The BAO alleges that NCFH has contravened the Act and conditions of its licence in the following ways:

- i) It violated the conditions of the Registrar's August 2016 directive which mirrored NCFH's licence conditions;
- ii) It published misleading statements about the nature of AH, contrary to sections 27 and 30 of the Act; and
- iii) It failed to operate its AH facility in the manner required by section 7(1) of the Act.

[37] The standard of proof that the BAO is required to meet, for its allegations of breaches of the Act, is a balance of probabilities. In other words, is it more likely

than not that NCFH has contravened the Act or the Regulations, or a licence condition, in operating its AH facility.

**i) Advertising Issues**

[38] Alleged contraventions i) and ii) above, relate to NCFH's compliance with advertising rules ("advertising issues").

[39] The Registrar submitted that NCFH breached Condition 2 of its conditions of licence and ss. 27 and 30 of the Act. Those provisions are as follows:

Condition 2 (of NCFH licence): An accurate and complete description of the process must be provided by the operator to the person contracting the service. Characterizing the process only as "green cremation", "flameless cremation" or dissolving in water is not sufficient and may be considered misleading.

Section 27 (of the Act): No licensee shall make a false, misleading or deceptive statement in any advertisement, circular, pamphlet or material published or distributed by any means relating to the sale or provision of any licensed supplies or services. 2002, c. 33, s. 27.

Section 30 (of the Act): No licensee shall,

(a) falsify, assist in falsifying or induce or counsel another person to falsify or assist in falsifying any information or document relating to the sale or provision of any licensed supplies or services; or

(b) make a misleading or deceptive statement, or assist, induce or counsel 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. 2002, c. 33, s. 30.

[40] The advertising allegations against NCFH were that it used the word "cremation", or related words in its marketing materials, without further qualification, promoted the environmental benefits of AH and marketed its services with a video showing the operation of a high temperature AH machine (as opposed to NCFH's low temperature unit). The Registrar alleges these acts amount to a breach of the above noted Condition 2, and Sections 27 and 30 of the Act.

[41] The Tribunal notes that there is a distinction between false and misleading advertising, on the one hand, and a difference of opinion on the nature of the relatively novel AH funerary process, on the other hand. The former would amount

to a breach of the advertising conditions of NCFH's licence or, potentially, ss. 27 and 30 of the Act, the latter – in the Tribunal's opinion - would not. This distinction can be illustrated by reference to the disagreements between the Registrar and NCFH in regard to its advertising materials.

- [42] Specifically, on March 11, 2018, the BAO received the above-noted complaint about an advertisement that Mr. Charbonneau had taken out in the local newspaper. The advertisement described the AH service that NCFH offered as “On-Site Cremation”. The ad described NCFH as a crematorium operator (it had a crematorium licence), but nowhere did it specify that alkaline hydrolysis was the service being offered.
- [43] The Registrar instructed Paul Leroy to address this advertisement issue with NCFH. On March 14, 2018, Mr. Leroy advised Mr. Charbonneau that his advertisement was misleading because it did not specify that he was engaging in alkaline hydrolysis, and that he should use a more accurate description so that consumers were not misled. Mr. Charbonneau offered to immediately take the advertisement down, and that day sent in a revised advertisement for Mr. Leroy's approval. The new advertisement described NCFH's services as ‘Bio-Cremation’ and specified that “Bio Cremation is a water based form of cremation, that uses water and alkalinity to produce cremated remains, just like flame cremation but using 90% less energy.”
- [44] Mr. Leroy responded by approving most of the changes, but taking issue with the claim that AH used 90% less energy, which he believed could not be substantiated (although the Registrar has not established that this assertion is false). Mr. Charbonneau again amended the advertisement to indicate that AH used "less" energy than traditional cremation. On March 19, 2018, Mr. Leroy approved this advertisement as written, including use of the term ‘Bio-Cremation’.
- [45] Subsequently, NCFH was challenged by the Registrar for utilizing the term "bio cremation", in its marketing materials, even though that term had been included in material previously approved by the BAO. NCFH dutifully made changes as directed. NCFH was later advised that it was inaccurate to describe the AH process as environmental or "eco" and directed that those references be removed. These terms, "bio cremation" and "eco", however, could reasonably have been inferred as approved, based on the BAO's approval of advertising that stated that the NCFH process used "less energy". Thus, these terms have not been established as being false. Again, nonetheless, NCFH dutifully complied with the direction provided. The Registrar further criticized NCFH for advertising that, in the AH process, caskets are not required (they are not) and that the effluent from the

process is sterile, an assertion for which, as discussed later in these reasons, there is some scientific support. Again, nonetheless, NCFH dutifully complied with the directions provided by the BAO, and removed these advertising claims. All advertising dispute issues were resolved by June 4, 2018.

## **ii) Advertising Findings**

- [46] Based on the above, the Tribunal finds that the Registrar has not established falsity or misleading aspects in the advertising done by NCFH. As the above discussion sets out, the disagreements between the Registrar and NCFH, regarding NCFH's advertising, were in regard to things upon which reasonable people could disagree. They are not matters where the Registrar's assertions were true and NCFH's assertions have been established as being false, misleading, deceptive, or otherwise a breach of a licence condition or the Act. At its root, the Registrar and NCFH disagreed on the nature of the AH process, in terms of whether it is akin to cremation (many jurisdictions equate the processes - including to some extent Ontario by virtue of s. 1.1(2) of the Act), and the environmental benefits of the AH process.
- [47] Finally, there is the matter of the above-noted video that NCFH used for marketing, depicting a high temperature machine. It appears that the Registrar is asserting that NCFH was attempting to sell consumers on a high temperature AH machine, in the video, and then in fact sell them a low temperature machine process for their loved one. It appears to the Tribunal, however, that this video, in all of the circumstances, was not part of an attempt to mislead or state falsehoods in advertising. The Tribunal was not shown anywhere in the video that the viewer is drawn to the machine for its high temperature properties, in an attempt to use the features of a high temperature machine to sell the low temperature AH process to a consumer. The video is likely stock footage of an AH machine, meant to provide viewers with a general impression of AH, rather than falsely sell the viewer on the positive attributes of a high temperature machine, and then sell them a low temperature AH process.
- [48] Based on the above, the Tribunal finds that the Registrar has not established falsity, deception, falsification or misleading in the advertisements at the time they were published, or at all, and – as noted - by June 4, 2018, all advertising concerns had been addressed by NCFH, to the Registrar's satisfaction.
- [49] It follows that NCFH did not breach Condition 2 of NCFH's licence, or ss. 27 or 30 of the Act.

## **iii) Section 7(1) of the Act**

a) Discussion – Section 7(1)

- [50] Section 7(1) of the Act states that a crematorium operator shall ensure that all cremations in the crematorium are carried out in a decent and orderly manner and that quiet and good order are maintained in the crematorium at all times. It also requires that crematoriums be operated in accordance with the Act and Regulations.
- [51] In support of allegations under section 7(1), the BAO relied on the condition of the NCFH premises at the June 12, 2018 inspection (described above), and the metal identifier tags used in the AH process. NCFH's responding evidence, through Mr. Charbonneau and an expert, Dr. Hamid Salsali, was that, whatever the state of the premises was on June 12, 2018, NCFH made significant changes to premises after June 22, 2018. NCFH states that it is in an unwinnable situation. It cannot get credit for the changes it made to the premises after June 22, 2018, because that would amount to an admission of shortcomings on June 12, 2018. Nor, however, could it have taken no corrective steps, because it would then face the allegations that it is incorrigible when it comes to the condition of its premises. NCFH also submits that some disorderliness on June 12, 2018 was to be expected as NCFH was in the midst of an AH process, at which time orderliness is harder to achieve, and is not reasonably required.
- [52] As noted, AH in Ontario is a relatively new funerary process. It has been fit into a legislative scheme in an imperfect way, and does not yet appear to have the same professional standards as other long-standing funerary processes. Moreover, the BAO did not tender expert evidence in terms of any established standards or guidelines, legislative or otherwise, for what decent and orderly looks like in the AH context. In one FBCSA case, expert evidence was held to be highly relevant in defining industry standards in relation to the bereavement industry (see: *11130 v Registrar, Funeral, Burial and Cremation Services Act, 2002*, 2018 CanLII 139935 (Ont. LAT), paragraphs 49-54).
- [53] The Tribunal was not directed to any decisions (Tribunal or Court) analyzing the elements of section 7(1) of the Act, nor do there appear to be any.
- [54] In 2016 the BAO did publish a set of guidelines entitled 'Additional Precautions in the Bereavement Care Setting'. These guidelines provide information to be used in conjunction with bereavement personnel's discretion when handling deceased remains. They contain legislative references that are intended to remind individuals that a number of statutes may apply to their work, and that they have to comply with all of them, even though the BAO does not have jurisdiction to enforce that compliance.

[55] In addition, the BAO has published a checklist for crematorium operators on how they can ensure they are being compliant with the Act and Regulations. Inspector Leroy testified that this checklist would apply, with necessary modifications, to AH facilities. Items in the checklist include a requirement to: carry out cremations in a decent and orderly manner; maintain quiet and good order in the crematorium at all times; accompany each body with a metal tag containing a personal identifier and the name of the operator; and not commingle human remains unless the operator has consent to do so from the family.

[56] The BAO also presented photographs from two other AH facilities that were inspected soon after NCFH. These photos showed facilities that were cleaner and more orderly than NCFH at the time it was inspected. Though the inspection of these facilities was also unannounced, the BAO's evidence suggests, however, that the facilities were not mid-process at the time of the inspection. Therefore, it is not a true 'apples to apples' comparison in many respects.

[57] In addition, Mr. Charbonneau testified that soon after the inspectors from the BAO left his facility he phoned a colleague to inquire whether that facility had been inspected. The owner of the facility told him it had not, but based on NCFH's inspection one might be forthcoming and he would tidy up. This implies that at least one of the facilities, unlike NCFH, had indirectly received advance notice of an impending inspection.

[58] As noted, there was some expert evidence with respect to the condition of the facility, which came from the appellant's expert, chemical engineer and health and safety consultant, Dr. Hamid Salsali. Dr. Salsali provided expert evidence in relation to occupational health and safety. Dr. Salsali was shown photographs from the June 12, 2018, inspection, and conducted his own walk through of the facility. He examined NCFH's AH operation and concluded that it would benefit from improved health and safety practices. He identified several potential hazards in his report:

- a. Inadequate gloves for handling caustic chemicals;
- b. Limited HVAC ventilation;
- c. The single eyewash bottle near the chemical storage cabinet, which is insufficient;
- d. Caustic chemicals stored on the floor of a plastic cabinet, exposed to potential water leaks;

- e. Safety data sheets located on the side of the room farthest from the entrance;
- f. PPE was located next to the AH machine, and not accessible at the entrance; and
- g. Compressed carbon dioxide stored in the room without monitoring carbon dioxide levels.

[59] Among his report's recommendations with respect to health and safety:

- a. Use of durable material gloves and boots appropriately rated for this use;
- b. Storage of PPE at room entrance to reduce risk of personal injury;
- c. Elevating caustic chemicals and storing them away from potential sources of water;
- d. Displaying safety data sheets near the room entrance, both inside and outside the room;
- e. Installing a combination eyewash/shower station near the room entrance;
- f. Ensuring HVAC installation has adequate ventilation; and
- g. Installing carbon dioxide detector.

[60] While Dr. Salsali indicated in his report that, during his visit, NCFH's AH facility "appeared to be clean and in good order", he provided additional commentary during his testimony. Dr. Salsali was shown the images from the June 12, 2018 inspection, and during his cross-examination, stated, unequivocally, that NCFH should not have been operating its AH machine with the facility in that condition.

b) Findings – Section 7(1)

[61] The language of section 7(1) of the Act is broad. Good order is certainly necessary to protect occupational health and safety, but the provision also serves a larger purpose. The Act is consumer protection legislation, and the consumers are families experiencing deeply emotional events. This is reflected in legislature's choice of words in section 7(1) – 'decent' and 'quiet'. These words are not defined in the Act, but they are, in the Tribunal's opinion well understood. They are meant to preserve the dignity and solemnity of the funerary process.

- [62] On the day of the inspection there was scattered debris, human remains out in the open, belongings stored in a less than careful way, and a generally industrial appearance. Were a family to observe their loved one's cremation or AH, and see a facility in the condition that NCFH was in on June 12, 2018, they could not reasonably feel that the dignity of the moment was being preserved.
- [63] Based on the expert evidence of Dr. Salsali with respect to NCFH's occupational health and safety conditions, and the plain and ordinary meaning the Tribunal can ascribe to the words in section 7(1), "decent and orderly manner" and maintain "quiet and good order" at all times, the Tribunal finds that NCFH's AH facility was in violation of section 7(1) of the Act at the time of the inspection.
- [64] In addition, with respect to the deficient metal identifier tags, described in paragraph 31 xiii) above, section 186(1) of Ontario Regulation 30/11 ("the Regulations") states that a crematorium operator, which legislatively includes AH operators, shall ensure that a metal identification tag, containing a personal identifier for the body and the name of the crematorium operator, accompany a dead human body and be placed in the container with the cremated remains. According to the BAO, the purpose of this is to ensure unidentifiable cremated remains can be traced back to the operator and their register of clients.
- [65] The metal tags used by NCFH at the time of the inspection did not have the name of the crematorium operator, only a number. Without more information, this number alone would not permit a family to determine whose remains might be in a given container. NCFH did not meet the requirements of the Regulations in this regard.
- [66] In sum, the Tribunal is of the opinion that NCFH was in contravention of section 7(1) of the Act and its regulations at the time of the June 12, 2018 inspection. A discussion of the appropriate order that flows from this is set out later in these Reasons.

## **Issue #2 - Acting in Accordance with the Law and with Integrity and Honesty (Disclosure of AH Process)**

[67] Section 14 of the Act states:

**14** (1) An applicant is entitled to a licence or to a renewal of the licence unless...

(c) the applicant is a corporation and,

(i) the past conduct of officers or directors of the applicant or of an interested person in respect of the applicant affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty, or

(ii) an officer, director, employee or agent of the applicant makes a false statement or provides a false statement in an application for a licence or for renewal of a licence; ...2006, c. 34, Sched. D, s. 13 (1); 2009, c. 33, Sched. 10, s. 8 (2).

[68] If there are reasonable grounds for the belief that a licensee will not carry on business in accordance with the law, and with integrity and honesty, the Registrar can seek suspension or revocation of a licence (see section 17(2) of the Act).

[69] The standard of proof for establishing reasonable grounds for a belief is lower than a 'balance of probabilities'. It requires, nonetheless, "something more than mere suspicion", and an "objective basis for the belief which is based on compelling and credible information" (see: *Ontario (Alcohol and Gaming Commission, Registrar) v. 751809 Ontario Inc. (c.o.b. Famous Flesh Gordon's)*, 2013 ONCA 157 (*Famous Flesh Gordon's*), at paragraph 18).

[70] The Registrar submits two grounds for his belief that NCFH will not carry on business in accordance with law, and integrity and honesty: i) the advertising issues; ii) the failure of NCFH to disclose to the BAO that it was planning to operate and did operate a low temperature AH unit.

a) Advertising Issues

[71] The BAO submitted that Mr. Charbonneau is incorrigible when it comes to advertising rules, based on the extensive interactions between the BAO and Mr. Charbonneau – where Mr. Charbonneau continued to require BAO supervision over his advertisements. The BAO submits that there are, accordingly, reasonable grounds to believe that Mr. Charbonneau will not act in accordance with the law or with honesty and integrity when it comes to advertising his low temperature AH process.

[72] As noted above, the Tribunal has found that NCFH did not breach its advertising obligations under Condition 2 of its licence, or sections 27 or 30 of the Act. The Tribunal has also found that Mr. Charbonneau was diligent in working with the BAO on any concerns they expressed about the advertising issues. As further noted, all advertising issues were resolved between NCFH and the BAO, by June 2018. Thus, the Tribunal further finds that there are not reasonable grounds to

believe that NCFH will not act in accordance with the law, or with integrity or honesty on advertising issues. Thus, this ground is dismissed.

b) Failure to Disclose

- [73] The Registrar submits that Mr. Charbonneau was aware of the low temperature AH controversy and deliberately failed to disclose his intention to operate a low temperature machine, during the application process and after. As such, the Registrar submits that this lack of disclosure is a further reasonable ground for belief that NCFH's AH business will not be carried on in accordance with the law and with integrity and honesty.
- [74] The Registrar submits that Mr. Charbonneau had to be aware of the controversy as between low temperature and high temperature AH machines because there were publications on the issue going back to 2011. Second, NCFH's application included diagrams of a high temperature machine. Third, the application made no mention that the intended AH machine operated at a low temperature. Fourth, Mr. Charbonneau did not discuss, with any BAO official that he came into contact with during the application process, or after, the fact that his intended machine was low temperature. It was not until an e-mail dated February 7, 2018, that Mr. Charbonneau, in the context of advising the BAO that he intended to apply for a second machine, told the BAO his machine was low temperature. Further, the Registrar submits that Mr. Charbonneau had a positive obligation to disclose relevant information, including the low temperature nature of NCFH's machine.
- [75] NCFH categorically denies that it had any intention of keeping the nature of its AH machine from the BAO. Amongst other proof of this point, NCFH relies on the fact that two weeks prior to its application being granted, Mr. Charbonneau invited all representatives of the BAO to attend his facility and witness an AH disposition. The BAO did not take him up on his offer. The appellant submits that it defies credulity to suggest that Mr. Charbonneau would, on the one hand, deliberately deceive the BAO, who could attend his facility at any time, about the nature of his AH machine, and, on the other hand, cordially invite representatives of the BAO to witness an AH procedure at the outset of the tenure of its licence.
- [76] The Tribunal rejects the suggestion that Mr. Charbonneau deliberately failed to disclose the nature of NCFH's AH machine. The Tribunal notes the following:
- i) BAO witnesses acknowledged that there were no false statements made by Mr. Charbonneau in NCFH's application. Registrar Smith initially made the same admission but then changed his answer and stated that the schematic of the AH machine – included in the

application - was of a high temperature machine. It follows, the Registrar stated, that that schematic was a false statement. NCFH points out that the schematic is clearly labeled as being included in the application solely for "shipping and room size purposes only". In other words, the schematic was not provided to mislead the BAO into thinking that Mr. Charbonneau intended to operate a high temperature AH machine;

- ii) In fact, the entire BAO application for a crematorium licence at no point asks the applicant to disclose the nature of the proposed machine, in regard to temperature at all, or as between high and low temperature;
- iii) Yet, the BAO was aware as early as September 2016, that there were two processes, following a meeting with Joe Wilson of Bio-Response Solutions;
- iv) Further, as noted above, in February 2017, prior to receiving NCFH's application, Mr. Jordan attended the CANA Conference where the low temperature AH versus high temperature AH controversy played out extensively. He was aware that low temperature AH machines were of great concern to some leading members of the funerary industry. He passed that information on to others at the BAO. Yet the BAO did not alter the application process to ask applicants to specify if they intended to employ a low temperature machine, or alert applicants that this was even a concern of the BAO. No Registrar's Directives in regard to this concern were published;
- v) Indeed, it appears Mr. Jordan was sufficiently concerned about the high temperature versus low temperature controversy that he asked Bio-Response for literature that might allay his concerns and he received that literature in March, 2017. Despite this added attention to the issue within the BAO, applicants would have had no notice, based on anything done by the BAO, that the controversy was a concern;
- vi) NCFH's application process took Mr. Charbonneau before a planning meeting of the Municipality of Clarington, in October 2017. BAO employee Christina Sefcik, who had carriage of the NCFH application, attended the meeting on behalf of the BAO. Her notes of the meeting confirm that when asked, by the Municipality, about the temperature of his proposed procedure, Mr. Charbonneau answered, "95 degrees, not boiling". In other words, when drawn to the question, it strongly

appears that Mr. Charbonneau had no hesitation in disclosing the low temperature nature of his proposed AH machine;

- vii) Mr. Charbonneau testified that he was not aware of the high temperature versus low temperature controversy when he applied for the NCFH licence. He was not aware at the time of the application, and for a considerable period after, that the BAO had any concerns about high temperature versus low temperature AH machines;
- viii) On November 13, 2017, before the licence was issued, Michelle Crognale, who was assisting Ms. Sefcik with the application, on behalf of the BAO, received an email from Mr. Charbonneau that contained the wording of NCFH's proposed contracts and included a brochure that Mr. Charbonneau drew to Ms. Crognale's attention. The email states, "[a]lso attached is the brochure we wish to hand out to every family that chooses alkaline hydrolysis". The attached brochure states, "[d]id you know, we are the only funeral home in Ontario **that offers low temperature Bio Cremation**" (emphasis added). In argument, the Registrar suggested that including the brochure in an e-mail to Ms. Crognale was part of NCFH's subterfuge. Mr. Charbonneau planned to send the "tell all" brochure to Ms. Crognale, who was not the primary BAO representative on the application, knowing that she would likely not read it. The application would be granted and then, as here, Mr. Charbonneau would point to the wording in the brochure as exculpatory. The Tribunal rejects this line of argument as highly speculative and contrary to common sense;
- ix) On November 15, 2017, Ms. Crognale sent an e-mail to BAO colleagues Mr. Michael D'Mello (the Licencing Manager), Mr. Jordan, the Registrar, and Ms. Sefcik. She noted that NCFH's AH machine would likely be installed on November 29, 2017, and that she had set that day as a date for her to attend and inspect (which she eventually did not). She then noted that "Mr. Charbonneau welcomes anyone from the BAO who wishes to witness a procedure". The BAO did not take Mr. Charbonneau up on his offer; and,
- x) The email of November 15, 2017, further confirmed Ms. Crognale's knowledge, in the context of whether a pacemaker would have to be removed for the AH process, that "high heat is not a factor in the process".

- [77] The Tribunal accepts that NCFH had a positive obligation to disclose relevant information to the regulator. However, at the time of its application, NCFH was not aware of the controversy surrounding low temperature AH machines. The BAO, on the other hand, was aware of the controversy (having attended the CANA conference) but chose not to amend its application process to ask applicants if they intended to operate at a low temperature. Thus, if the low temperature aspect of the AH machine was not sufficiently relevant to form a question on the application, it would not be fair, in these circumstances, to impose a duty on applicants, such as NCFH, to flag the issue in their application, failing which a penalty will be imposed.
- [78] The Tribunal considered the whole of the evidence of Mr. Charbonneau's actions in the application process and after, what steps the BAO took (or lack thereof) to make known their concerns about the controversy, and what they were told by Mr. Charbonneau during the application process (including the contents of the brochure). The Tribunal finds that, taking NCFH and Mr. Charbonneau's past conduct into account, there are no reasonable grounds, raised by the Registrar, upon which he could reasonably believe that NCFH will not carry on business in accordance with the law, and with integrity and honesty. Moreover, the Tribunal finds as a positive finding, that Mr. Charbonneau acted within the law, and with honesty and integrity in his dealings with the BAO, and others.

### **Issue #3 - Risk to Public Health and Safety**

- [79] The Registrar may propose to revoke a crematorium licence if “the registrar has reasonable grounds to believe that the operation of the business by the applicant creates **a risk to public health, safety or decency**” (s. 14(d)(iii)). [Emphasis added]
- [80] The BAO takes the position that conducting AH at temperatures below boiling has not been proven to be safe, in terms of effluent release, and the Registrar therefore has reasonable grounds to believe that NCFH, in operating a low temperature machine, is operating in a way that creates a risk to public health or safety. NCFH refutes this allegation, arguing that the BAO is being selective in which information they accept to arrive at that conclusion, and that there is no basis on which to conclude that the effluent output of a low temperature machine is any less safe than that of a high temperature machine. NCFH also led some evidence from its health and safety expert regarding the remote risk to public health posed by the AH process, including the release of AH effluent into the wastewater system. Both parties presented extensive expert evidence in addition

to other evidence to support their respective positions. This is a particularly contentious issue between the parties.

- [81] The BAO also argued that the state of NCFH's AH facility as at the date of the inspection posed a risk to the safety of individuals involved in carrying out the AH process. This question is dealt with in detail elsewhere in this decision. NCFH has made improvements to its facility and processes. The Tribunal is of the opinion that the current state of the facility does not give rise to reasonable grounds to believe that operating the business creates a risk to safety for any individuals carrying out the AH process.
- [82] Both parties argued on the public health risk of the effluent content broadly, in terms of living organism pathogens, prions, non-organic compounds and pharmaceutical molecules. However, as the hearing wore on, it was clear that the fundamental issue, as emphasized by the BAO, is the risk of prion release into wastewater. Thus, the Tribunal needs to consider whether or not NCFH's low temperature AH process effectively destroys prions before the effluent from the machine is released into the wastewater, what risk prions in the wastewater might pose to public health and safety, and the risk that the NCFH AH process, relatively small as it is, poses to public health and safety.
- [83] Prions are polypeptide chains, folded proteins essentially, that can interact with the central nervous system and cause neurodegenerative disease. They are not living organisms, and are highly resistant to the methods used to kill other infectious organisms. Therefore, they are a proxy for sterility – if a method can destroy prions, then that method can produce sterile, non-infectious product. This was apparent from the expert evidence presented during the Hearing.
- a) The Origins of the Registrar's Belief
- [84] The Notice of Proposal alleges NCFH's use of a low-temperature AH machine as one of the grounds for revocation. It states that besides NCFH, all other AH operators in Ontario are using high temperature machines. It further states that jurisdictions have considered base AH temperature requirements to prevent the release of pathogens in the water system, and that at least one US jurisdiction requires AH to occur at a minimum of 350 degrees Fahrenheit (177 degrees Celsius). There is no mention in the Notice of Proposal that low temperature AH is not safe, only the implication that high temperature AH is the only method that BAO understands to be safe.
- [85] This may be because at the time the Notice of Proposal was issued, the BAO was in the middle of assessing whether low temperature AH was indeed safe. During

cross-examination the Registrar testified that his concerns about the safety of AH broadly and the sterility of its effluent arose sometime between January and June of 2016. The Registrar's concerns about high-temperature AH's ability to kill pathogens and destroy prions were allayed after the BAO began its study in February 2018, and when it met with representatives of the Ministry of Health and Long-Term Care in May 2018.

- [86] According to the Registrar, he learned of the term "prion" in February 2017 when Mr. Jordan returned from the CANA conference. As noted, Mr. Jordan testified that he attended a presentation by Dean Fisher, who suggested that low temperature AH does not sterilize the effluent or air chamber inside the machine. Mr. Jordan returned from the conference and presented a brief report to the Registrar. He also requested information from Bio-Response about research studies that had been mentioned at the conference. Bio-Response sent a letter and several studies about the efficacy of both high and low temperature AH. In a letter sent in March 2017, Joe Wilson of Bio-Response stated:

"I stake my 40 year reputation on this statement and can back it: **"alkaline hydrolysis, both low and high temperature (low being above 90C, and high being below 151C), yields sterile end product, including all liquids, all solids, and any air from within the system."** [emphasis in original]

- [87] This suggests that, at least as early as March 2017 the BAO knew there was some controversy about low temperature AH. The BAO would also have been aware at this point that there were other jurisdictions in Canada and the United States where a low temperature machine was in use for human disposition. The Registrar testified that he does not recall seeing this letter from Mr. Wilson.
- [88] As noted, the BAO only discovered that NCFH was operating a low-temperature AH unit on February 6, 2018. The BAO then contacted Bio-Response Solutions to request more information on the safety and efficacy of the machine. In March 2018 Bio-Response sent the Registrar the same studies that were sent a year earlier, with one additional study that had recently become available. This additional study was described by Bio-Response Vice President Samantha Seiber as a "published, peer-reviewed, validation study of a Bio-Response Low Temp system" in a biological laboratory in Singapore.
- [89] On February 14, 2018, the BAO issued a Notice to the Profession stating that the BAO was undertaking a comprehensive study of AH "to understand fully what modifications may be necessary to safeguard public health, the environment, safety, respectful handling of human remains and consumer protection". The

Registrar testified that he issued this directive because AH in Ontario was a fairly new process, was dangerous and high stakes, and he wanted to know how long AH should take, what concentration of chemicals was required, and how to ensure it was a consistent process -in other words, how the BAO can ensure that there is a complete dissolution of tissue each and every time the process is conducted.

- [90] As part of this study, the Registrar directed his own staff to conduct research, and retained consultants to assist with legal and scientific literature review. It is unclear whether the studies provided by Bio-Response formed part of the research reviewed by the BAO.
- [91] Early on in the research, the BAO found documents by the World Health Organization (WHO) and the European Commission Scientific Steering Committee (European Commission). The WHO document is about safe management of waste from health care activities and is the second edition of what is commonly known as the “Blue Book”. In the section on alkaline hydrolysis, the document describes the technology as a mixture of tissue, alkali and water, heated to between 110 and 127 degrees Celsius or higher, and stirred. According to the document, digestion times range from six to eight hours, and this process has been shown to destroy prion waste. It should be noted that this document cites the European Commission document as its source for claiming that the process destroys prions.
- [92] The European Commission document is an April 2003 published final opinion and report on the “treatment of animal waste by means of high temperature (150C, 3 hours) and high pressure alkaline hydrolysis”. The document was initiated by a commercial company requesting the European Commission’s endorsement of its particular process for safe disposal of animal waste that may be contaminated with prions. The process they were asked to examine was a high temperature, high pressure process. According to the European Commission study, there was some residual prion infectivity after three hours of the process, but no infectivity was detectable after six hours. The European Commission was careful to state that this does not mean there were zero prions in the sample, but that the delta between input prion concentration and detectable output prion concentration was sufficiently high to demonstrate a lack of infectivity.
- [93] The Registrar sought further information and sought the help of the Ministry of Health and Long-Term Care (the Ministry). Through the Ministry, the BAO was connected to Public Health Ontario (PHO). On July 6, 2018, PHO was asked by the Ministry to prepare a response to the BAO’s queries. This response was written by Dr. Ray Copes, who was called by the BAO to provide opinion evidence before the Tribunal.

[94] Therefore, at the time the Notice of Proposal was issued on June 22, 2018, and in fact until Dr. Copes' report on August 9, 2018, the entire basis for the BAO's belief that low temperature AH was a risk to public health and safety rested on two ideas. The first were statements made by Mr. Fisher during a conference presentation, which have their own challenges discussed below. The second was a ten-year-old document by the WHO which stated that high temperature alkaline hydrolysis was an appropriate way to dispose of medical waste, and did not address low temperature alkaline hydrolysis at all.

b) Evidence of Dr. Ray Copes

[95] Dr. Ray Copes is a physician and expert in occupational and environmental health. He is also the Chief of Environmental and Occupational Health at Public Health Ontario. He and his team prepared a response to questions posed by the BAO through the Ministry with respect to alkaline hydrolysis broadly. These questions were:

- a. Does the [alkaline hydrolysis] process pose an infection prevention and control risk to staff handling effluent; and,
- b. Does the process pose a risk to public health when effluent is discharged via drain to the local wastewater treatment authority?

[96] The response was requested July 6, 2018 and completed August 9, 2018. It is entirely a literature review. There was no independent testing done, nor were the methodologies used in any studies analyzed. This response forms the entirety of Dr. Copes' expert report to this Tribunal, which he acknowledged was not a typical one. He described the document as written for a lay audience, providing fair and objective reporting of science to be used by others in policymaking.

[97] His team conducted literature searches using a variety of keywords to find relevant peer-reviewed articles, focusing on the health effects of alkaline hydrolysis effluent and its discharge into the wastewater system. They also looked for grey literature<sup>2</sup> speaking to these same issues. Several sources were also provided to Dr. Copes by the BAO, including the studies sent to the BAO by Bio-Response Solutions. The literature search returned 310 results, which were then narrowed based on relevance to 20 sources. Of these 20 sources, only a few were peer-reviewed

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<sup>2</sup> Grey literature, generally speaking, refers to non-commercially published written works, including reports, technical publications, government documents, academic literature and in some cases self-published studies by companies or organizations.

articles, and it appears that a few relevant sources were missed entirely and not included in Dr. Copes' report.

[98] At a high level, Dr. Copes' report found that:

- a. Alkaline hydrolysis, at low and high temperatures has been shown to be effective in destroying heat-resistant spore-forming bacteria;
- b. High temperature alkaline hydrolysis has been recognized by the WHO as viable means of disposing of human cadavers, body parts, and waste;
- c. High temperature alkaline hydrolysis is an effective method for inactivating prions contained in animal tissues, and is recognized by the US Centers for Disease Control (CDC) and WHO;
- d. A study finding low temperature alkaline hydrolysis to be effective in destroying prions was sponsored by Bio-Response, and no peer-reviewed study was found;
- e. More research is required to confirm the effectiveness of low temperature alkaline hydrolysis for use on human tissue; and,
- f. To reduce worker exposures, appropriate PPE and other protective measures should be used in accordance with the manufacturer's instructions for use and the Occupational Health and Safety Act.

[99] Dr. Copes did not find any study where low temperature AH was found to not yield sterile effluent. Though he concluded that high temperature AH was safe for human tissue, this opinion was not predicated on any studies referenced in his report or testimony wherein high temperature AH was shown to destroy prions in human tissue. In other words, none of the studies that Dr. Copes examined were with respect to AH as a method for human disposition.

[100] The conclusion that Dr. Copes did reach was based on two reports. The first, the WHO document, references the European Commission report, which was a study requested by a particular company of their particular high temperature AH process as used for animal carcasses. The second, a paper by H. Leon Thacker, which also references some of the studies examined by the European Commission. Both these studies arrive at the conclusion that high temperature AH is safe for human use, based on animal tissue studies.

[101] Understandably, human studies of this kind may be difficult to execute. It should be noted that the studies identified are not animal analogs, i.e. animal carcasses

as a stand-in for human cadavers. The goal of these studies was to examine the destruction of prions in animal tissue. Dr. Copes stated that he was not aware of how the CDC and WHO reached their conclusions.

[102] In the Tribunal's opinion, Dr. Copes is correct that so far the only AH method generally accepted for human tissue disposition is high temperature AH. However, none of the documents examined by Dr. Copes make a distinction between high temperature and low temperature alkaline hydrolysis. Dr. Copes acknowledged during cross-examination that he does not know if low temperature has been considered by either the CDC or WHO, or if they were unaware of it. In addition, the scientific foundation for high temperature alkaline hydrolysis in human disposition appears to be similar to that of what is currently available with respect to low temperature alkaline hydrolysis, namely animal tissue studies.

[103] Dr. Copes correctly identified that one study had been completed in which low temperature alkaline hydrolysis was successful in destroying prions in animal tissue. This study was sponsored by Bio-Response, and was not published. Therefore, it was not subject to the scrutiny of the authors' peers for its scientific merit. However, Dr. Copes did not address whether he saw any issues with the methodology employed in the study. He also stated during his testimony that he believes low temperature alkaline hydrolysis can destroy prions by reducing the length of their polypeptide chains. In his opinion, however, there was not a sufficient peer-reviewed evidence base to arrive at this conclusion.

[104] In sum, Dr. Copes' evidence did not move the needle in any meaningful way with respect to reasonable grounds for believing that low temperature alkaline hydrolysis presents a risk to public health or safety. It merely confirmed what was already known, that respected public organizations have found alkaline hydrolysis done above the boiling point to be an effective way of disposing of human tissue and destroying prions.

c) Evidence of Dr. Hamid Salsali

[105] Dr. Hamid Salsali has a doctorate in chemical engineering. He is the Managing Director of Environmental and Power Solutions Inc., which provides environmental engineering consultancy services to the public and private sector. Dr. Salsali has 14 years' experience in wastewater engineering. He is not a microbiologist, nor does Dr. Salsali have a background in the funerary industry. He has, however, completed studies on wastewater discharge from funeral homes, hospitals, and slaughterhouses.

[106] Dr. Salsali prepared a report that addressed two main questions:

- a. Are there any occupational health and safety concerns to the operator of NCFH's low temperature AH system?
- b. Is the effluent from low temperature AH processes a danger to public health and safety since it is discharged into the sanitary sewer?

[107] Dr. Salsali also provided his opinion on Dr. Copes' report, specifically discussing some of the studies considered by Dr. Copes.

[108] The contents of Dr. Salsali's report with respect to the first question have been addressed in the relevant section above.

[109] With respect to the second question, Dr. Salsali used embalming as a base case comparison for alkaline hydrolysis. The purpose of this, as the Tribunal understands it, was to show that embalming is as significant a risk, if not more so, than low temperature alkaline hydrolysis by releasing bodily fluids, tissue and embalming fluid into the wastewater system. While this may be the case, embalming is not on trial here. Embalming as a comparator did not add significantly to this discussion. The primary reason for this is because though prions can be found in bodily fluids and thoracic organs, they are concentrated in the central nervous system. In alkaline hydrolysis, the central nervous system, along with the rest of the non-mineral content of the body is dissolved, and prions are no longer concentrated. In embalming, most commonly the central nervous system is left undisturbed and does not form part of what goes into the wastewater.

[110] Dr. Salsali notes that wastewater treatment processes have been noted not to deactivate prions, instead resulting in prions partitioning into the sludge phase. He recommends treating embalming discharge with alkaline hydrolysis before releasing it into the public sewer system. According to Dr. Salsali's report, studies using animal prions show that these prions survive common treatments in the sludge and biosolid phase, and the treatments that do deactivate prions are not presently used in Ontario. From there, the sludge or biosolids may be used in land applications, and the prions, depending on the soil makeup, can leach into the water supply.

[111] Dr. Salsali also provided some assessment of the risk that prions might pose to the public in the wastewater. The assessment is not perfect, given that it is based on estimates of prions entering the sewage system from processing infected cattle. A study quoted by Dr. Salsali noted the annual risk of prion infection in humans to be  $1.32 \times 10^{-7}$  per person per year when consuming unwashed produce grown in soil and biosolids from wastewater treatment plants where discharge from culling

prion-infected cattle is collected. Another study estimated the risk of prion infection through drinking water to someone living near a rendering plant processing infected cattle to be  $1.5 \times 10^{-8}$  per person per year.

[112] As a point of reference, Dr. Salsali described the definition of a '*de minimis*' risk to be one in one hundred thousand to one in one million; this is anywhere from 10 to 100 times more probable than the risk of prion infection. Dr. Salsali provided no reference for his statement as to what constitutes a *de minimis* risk.

[113] Dr. Salsali also examined the relationship between temperature, time, and ability to sterilize of both high and low temperature alkaline hydrolysis. He stated in his report that there was no example of a study conducted on the effluent from human alkaline hydrolysis, and he looked at animal carcass digestion studies as a proxy. The studies Dr. Salsali cites in his report appear to utilize high temperature alkaline hydrolysis to generate sterile effluent. From this, Dr. Salsali applied the Arrhenius equation<sup>3</sup> to show that as temperature decreases, processing time increases, and the result remains the same.

[114] Dr. Salsali provided analysis of the Bio-Response sponsored study conducted in 2008. That study looked at polypeptide chain length after a low temperature AH process, and concluded that because all the chain lengths present after the process were many times smaller than the smallest known prion, the effluent from low temperature alkaline hydrolysis was in effect sterile. Dr. Salsali states that this does not accord with the findings of the European Commission study, where the researchers took high temperature AH effluent and injected it into mice to determine whether there were any prion effects in the mice. Some mice in that study did contract prion disease, despite the alkaline hydrolysis process being conducted at a high temperature.

[115] On the other hand, another study similar to the European Commission study found no mice with prion disease, after they had been injected with effluent from high temperature alkaline hydrolysis.

[116] Beyond applying the Arrhenius equation it is not clear how Dr. Salsali arrives at his conclusion that low temperature alkaline hydrolysis effluent is the same with respect to prion infectivity as high temperature alkaline hydrolysis. Even among high temperature studies there are conflicting and debated results.

d) Evidence of Dr. Charles A. Denys

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<sup>3</sup> The Arrhenius equation is a formula describing the temperature dependence of chemical reactions.

[117] Dr. Charles Denys is the Senior Research Professor in the division of Clinical Microbiology at the Indiana University School of Medicine. He was asked, in the course of this litigation by NCFH, to conduct a series of experiments using a low temperature Bio-Response alkaline hydrolysis machine, just like the one NCFH owns. The objectives of the these experiments was to test whether the low temperature machine:

- a. Achieves sterilization of *Geobacillus sterothermophilus* in actual process conditions;
- b. Achieves sterilization of *Bacillus thuringiensis* in actual process conditions;
- c. Yields an effluent with peptide sizes no larger than 10,000 Da in actual process conditions; and,
- d. Poses any occupational health and safety concern to the operator and to the public health and safety.

[118] Of the experts, Dr. Denys is the only one to design and conduct a trial specific to the issues at hand in this case. Dr. Denys used a pig carcass as a proxy for human tissue, which is a commonly accepted scientific practice. The two strains of bacteria indicated above were used because they are common indicator bacteria in such experiments, and they are highly resistant. This means that if a process is able to kill these bacteria it is likely to be able to kill any infectious organisms (which are different from the prions discussed later in Dr. Denys' study). As a proxy for prions, Dr. Denys proposed to study resulting pig tissue protein fragments to determine if the process broke down protein fragments into pieces smaller than the smallest known prions.

[119] Dr. Denys ran his trial according to Bio-Response's instructions for both caustic chemical makeup and run-time. He used control vials kept at room temperature, and inserted the experimental vials containing bacteria, alkali and pig tissue into the pig carcass. The pig carcass was put through a low temperature AH process. The total run-time for the trial was over 17 hours, with 14 of those hours at a steady state temperature of 204F (96C). Dr. Denys testified that this run-time was determined according to manufacturer specifications.

[120] After the trial, effluent samples from the vials were diluted and plated on agar plates to determine if any bacteria remained alive. The effluent from the pig carcass was collected and subjected to a mass spectrometry analysis to determine the sizes of the polypeptide chains that remained in the effluent.

[121] Dr. Denys' results found a complete inactivation of all bacterial samples in the trial vials, along with positive bacterial growth in the control samples that were not put through the AH process. Dr. Denys concluded that the low-temperature AH process was sufficient in killing all infectious organisms, including resistant bacteria.

[122] With respect to prions, Dr. Denys found no polypeptide fragments larger than 2,500 Da in the effluent. The smallest infectious prion particles are at least 10,000 Da in size. Based on the result of the study, Dr. Denys concluded that the process was successful in breaking down proteins, including prions, thereby eliminating prion infectivity.

[123] The study, while rigorous and based on accepted scientific methods, is not without its flaws. For one, only one trial was completed, and only a total of nine vials were used. The sample size of the experiment is small, and it is difficult to determine the statistical significance of Dr. Denys' results based on the one trial.

[124] In addition, the study suffers from the same limitation as the Bio-Response sponsored study conducted in 2008. Namely it uses polypeptide chain size as a proxy indicator for the presence of prions. Dr. Denys did not use tissue or samples known to contain prions. He therefore could not have mimicked the prion-infectivity focussed studies considered in the European Commission report where animals were injected with prion-containing effluent. This methodological choice may be as a result of the time required to cultivate animals after injecting them with effluent. Previous studies monitored mice for between 100 and 500 days, whereas this study had to be completed in the much shorter course of litigation.

[125] Counsel for NCFH sent Dr. Denys' study to two scientists for their review of the study and its results. One reviewer is a laboratory safety scientist with the CDC, and the other is a biological safety officer with the United States Army Medical Research Institute of Infectious Diseases. Both reviewers found flaws with Dr. Denys' experiments using bacterial cultures. However, both were satisfied that the low polypeptide fragment size in the mass spectrometry indicated that the low temperature AH process would destroy prions.

e) The current state of knowledge

[126] In sum, none of the expert evidence is determinative. Because of the novelty of using low temperature AH machines for human disposition, or even high temperature machines for that matter, and the difficulty of studying AH as a method of human disposition, no studies were introduced showing the efficacy of either method in destroying pathogens, including prions, when used in the funerary

context. All of the science uses animal models, under laboratory conditions, and proxy measures to determine whether effluent from alkaline hydrolysis processes are sterile.

[127] As noted, at the time the Notice of Proposal was issued, the only basis for believing that low temperature AH did not kill or destroy all pathogens was the presentation by Dean Fisher in Las Vegas in 2017. This presentation is problematic for several reasons. First, Mr. Fisher is not a scientist. He is a funeral director, and he has an ownership interest in Bio-Response's primary competitor, which manufactures only high temperature machines. Second, evidence presented during the hearing indicated that Mr. Fisher misrepresented some of the information in his presentation, impacting how much this information can be relied upon. Lastly, even a cursory reading of the content of Mr. Fisher's presentation shows that there are no references provided for his claims, and the language of the presentation is mostly presented as rhetorical salesmanship.

[128] To the Registrar's credit, he undertook his own review of the literature upon discovering that NCFH was operating a low temperature unit. This review pointed him towards one highly respected source stating that high temperature AH was acceptable for human use, and adequately eliminated pathogens. The Registrar's own research did not suggest that low temperature AH was not effective. The Registrar also examined what other jurisdictions had done. Though some had permitted only high temperature AH, others had allowed low temperature AH, and others banned AH altogether. There was no deeper information presented as to the reasons for the choices made by these jurisdictions.

[129] Again, in an effort to get a conclusive answer, the Registrar requested the assistance of PHO. The Registrar began seeking this assistance prior to issuing the Notice of Proposal, but ultimately did not know Dr. Copes' conclusions until nearly two months after NCFH was inspected. And again, Dr. Copes' report shed no new light on the matter. Dr. Copes' arrived at the conclusion that high temperature AH had been deemed safe. He provided no evidence to suggest that low temperature was not. Indeed Dr. Copes concluded that both low and high temperature AH are equivalent at killing microorganisms. With respect to prions he merely concluded that because of a paucity of research, more research was required as to the effectiveness of low temperature AH.

[130] Therefore, by the time the hearing began, the only source of information to suggest that low temperature AH was a risk to public health and safety was still Mr. Fisher's presentation.

[131] Dr. Salsali and Dr. Denys both concluded, though using different methods, that low temperature AH killed all microorganisms. Both experts also concluded that the process destroys prions. While the former conclusion is agreed upon by all the experts, the Tribunal has already pointed out the difficulty in drawing the latter positive conclusion from Dr. Salsali and Dr. Denys' work. But neither expert's work pointed to any evidence to the contrary - that low temperature AH does not destroy prions.

[132] Therefore, even by the time the hearing had concluded, the only evidence available to the Tribunal or to the Registrar to suggest that low temperature AH does not yield sterile effluent was, again, the presentation by Mr. Fisher.

[133] The evidence before the Tribunal supports a finding that there is sufficient science demonstrating the efficacy of high temperature AH in destroying all pathogenic material, including bacteria, viruses, and prions, though this is not a finding that has any bearing on the issues in this appeal. With respect to low temperature AH, the Tribunal finds that there is ample evidence, of a similar quality to that of high temperature AH, to demonstrate that low temperature AH kills pathogenic organisms, including bacteria and viruses. There is also some evidence to suggest that low temperature AH breaks down polypeptides into fragments smaller than the smallest known prion, though this evidence has not been published in a peer-reviewed journal. Low temperature AH has not, however, been explicitly recommended by any recognized body (such as the CDC or WHO) as a method for disposing of human medical waste.

[134] The Tribunal also finds that there was no scientific evidence to suggest that low temperature AH does not yield sterile effluent, including with respect to prions.

f) Analysis

[135] Section 14(1)(d)(iii) of the Act, combined with section 17(2), holds that the Registrar may revoke a licence where the "registrar has reasonable grounds to believe that the operation of the business by the applicant creates a risk to public health, safety or decency". This test has not been considered before.

[136] What is clear is that the onus is on the Registrar. The provision to be considered in this instance also requires some assessment of the risk that the operation of the business poses.

[137] The BAO argues that the precautionary principle applies. Specifically, the Registrar, not knowing if low temperature AH is safe, proposes to revoke the licence of a facility operating a low temperature AH machine. The Registrar is,

according to the BAO, operating out of precaution, as not to unnecessarily jeopardize public health by releasing non-sterile effluent into the wastewater system. Therefore, even if there is no evidence to show that low temperature AH does not destroy prions, the evidence only shows that high temperature is acceptable, and the Registrar is exercising his responsibility of protecting the public interest in allowing only the process that has been deemed safe. In other words, the Registrar is presuming that low temperature is not safe, and seeking to have that process prohibited until it can be determined to be safe. The Registrar did not put forward any authority on the precautionary principle or how it might apply in this case.

[138] The precautionary principle is a principle of international environmental law, and has been incorporated into Canadian environmental law. It functions as both an interpretive aid and a policy consideration for environmental decision-making. Its basic tenet was adopted by the Supreme Court of Canada in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 (*Spraytech*). At paragraph 31:

Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

[139] Since then, the precautionary principle has been expressed and applied in a limited number of environmental cases, and some other cases in which a public health or environmental health consequence is at stake.

[140] In *Canadian Blood Services v. Freeman* 2010 ONSC 4885 (*Freeman*), the court considered whether a 33 year deferral period for male blood donors who had sex with other men would be constitutional, and, under section one of the *Canadian Charter of Rights and Freedoms*, what a more appropriate deferral period might be to balance individual rights against the safety of the blood supply from transmissible diseases such as HIV. The Court did not find an infringement on Freeman's rights and therefore, the analysis under section one was *obiter*. In any event, the court did not conclude what the right deferral period would be, or how to apply the precautionary principle in that case. The Court did state that being precautionary in the face of a "complex area with limited research data and such divergent expert opinions" would be prudent (see para. 608).

[141] In *Weir v. Canada (Minister of Health)*, 2011 FC 1322 (*Weir*), the applicant sought judicial review of a decision by the Minister of Health to not conduct a special review of a particular pesticide after the applicant had submitted information to scientists at the relevant regulatory agency. The Minister of Health is required,

under the *Pest Control Products Act* (PCPA), to initiate a special review of a pest control product “if the Minister has reasonable grounds to believe that the health or environmental risks of the product are, or its value is, unacceptable” (*Weir*, para. 60; section 17(1) of the PCPA). The court, in granting the application, found, at para. 101:

With opinions within the Regulatory Agency on both sides of the question as to whether the pesticide presents an unacceptable environmental risk to amphibians in ephemeral wetlands, the precautionary principle would require that the Minister initiate a special review into that issue. [emphasis added]

- [142] Other cases have interpreted the precautionary principle to mean that where evidence indicates a risk, the harm in question should be presumed to be occurring until there is sufficient evidence that it is not. This was how the principle was applied in *Concerned Citizens Committee of Tyendinaga and Environs*, [2012] O.E.R.T.D. No. 17 (Ont E.R.T.), at para. 38 (*Concerned Citizens*), and in *Davidson v. Ontario (Director, Ministry of the Environment)* (2006), 24 C.E.L.R. (3d) 165 (Ont. E.R.T.), at para. 44 (*Davidson*).
- [143] In the current instance, the Tribunal is of the opinion that the precautionary principle is useful as an interpretive aid in understanding the test to be met under section 14(1)(d)(iii). While this matter is not directly an issue of environmental law or harm, it is about discharge into wastewater, and whether that discharge is sterile. There is, in other words, an environmental nexus that necessitates the inclusion of the precautionary principle. Application of the precautionary principle in this manner would be in line with customary international law and obligations (see: *Castonguay Blasting v. Ontario (Environment)* 2013 SCC 52; *Morton v. Canada (Fisheries and Oceans)*, 2019 FC 143).
- [144] The starting point in interpreting section 14(1)(d)(iii) is the test in *Famous Flesh Gordon's*. As noted above, the Court of Appeal for Ontario, in *Famous Flesh Gordon's*, in relation to liquor licencing, stated that reasonable grounds for belief are to be established at a standard below a balance of probabilities. That standard still requires that the belief be founded on "more than mere suspicion" and "an objective basis", "based on compelling and credible information" (see paragraph 18 of that case). These represent reasonable standards for a test to be applied to allegations posed under section 14(1)(d)(iii) of the FBCSA.
- [145] On this the precautionary principle is layered in a manner consistent with the statutory standard. A precautionary approach is triggered where the reasonable grounds for belief demonstrate some risk or threat of a potential harm or conflicting

opinions as to a potential harm (see: *Weir*). Scientific certainty is not required where there are such grounds.

[146] Turning to the evidence in this case, the Registrar relied exclusively on the literature review conducted by PHO in asserting that low temperature AH does not destroy prions. The sum total of the Registrar's evidence is that high temperature AH is effective at destroying prions and while there is no evidence to indicate low temperature AH does not destroy prions, there is insufficient evidence to conclusively say it does.

[147] NCFH put forward Dr. Denys, who, through conducting a scientific trial, concluded that the low temperature AH machine used by NCFH did destroy prions. Dr. Denys' evidence, although not without some limitations, was consistent with the results of another sponsored study, which similarly validated low temperature AH as effective in prion destruction. Two scientists reviewed Dr. Denys' study and found it acceptable in methodology and outcome with respect to prion destruction. In addition, Dr. Copes testified that he has no reason to believe low temperature AH would not be successful in destroying prions, but he cannot conclusively say this based on a lack of evidence.

[148] The Tribunal finds that there is no evidence that low temperature AH, as carried out by NCFH, does not destroy prions.

[149] Further, it is not sufficient for the Registrar to believe that low temperature AH does not destroy prions. There must be some evidentiary basis for what risk the NCFH business poses to public health or safety. Risk involves probabilities, and though they need not be exact, the Tribunal would have expected some evidence indicating a risk of harm and some evidence as to the likelihood of prion-contaminated effluent being discharged into the wastewater system, by NCFH, and if so discharged, the likelihood of harm.

[150] In this case, however, not only was no evidence beyond the literature review presented by the Registrar, the Registrar's case was not supported by evidence about the prevalence of prion-related infectious disease or prion infection in humans, the incidence rate of prion-related infections during a given period of time, the likelihood of coming into contact with prions through various sources, or the morbidity and mortality rates due to prion-related infectious disease when one comes into contact with prions.

[151] The only information with respect to the likelihood of prion-related disease came from a single source in Dr. Copes' bibliography, and Dr. Salsali's above-noted risk assessment. The source included in Dr. Copes' bibliography stated that sporadic

Creutzfeldt-Jacobs Disease (CJD), which is the most common form of prion disease in humans, has a worldwide death rate of about one case per million people each year. Sporadic CJD is not caused by infectious particles. Dr. Copes did not discuss this source, or the incidence rate contained therein, during his testimony. He did state that he has no idea how many people die with prions in them. He did mention a recent cluster of prion-related deaths, but provided no further information about that cluster, including whether it was the result of infectious agents, genetic line, or of a sporadic nature.

[152] Dr. Salsali presented some information about the probability of contracting prions from unwashed produce or from drinking water. This evidence is shaky at best, given that it is based on highly extrapolative animal culling scenarios, and Dr. Salsali is not an epidemiologist or infectious disease expert.

[153] Nonetheless, the overarching point drawn by Dr. Salsali – and supported by the single source in Dr. Copes’ report – remains valid. The risk of contracting prion-related illness, either from infectious or non-infectious sources, appears to be very low.

[154] On the evidence presented, NCFH had conducted 165 AH processes in just over six months. Doubling this, NCFH would conduct approximately 330 AH processes in a year. Unless NCFH purchases and is approved for additional machines, this is not scalable to much more because of the amount of time each low temperature process takes. There were roughly 100,000 deaths in Ontario in 2017<sup>4</sup>. The likelihood of a person whose body contains transmissible prions dying and being one of NCFH’s clients is slim.

[155] As a result, with no evidence to suggest that prions are not destroyed by low temperature AH, and insufficient evidence to determine what the risk might even be in such a situation, the Tribunal finds that the precautionary principle is not triggered.

[156] Given the onus on the Registrar, the Tribunal finds that in the absence of evidence to suggest that NCFH's low temperature AH business does not destroy prions **and** the absence of evidence that even if it does not, that – on its scale- it does create a risk to public health and safety, the Tribunal cannot conclude that there are reasonable grounds to believe that the operation of NCFH’s AH business creates a risk to public health, safety or decency. Thus, the Tribunal is not in a position, on

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<sup>4</sup> See: Statistics Canada, Deaths by Month, Table 13-10-0708-01 (accessed at: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1310070801&pickMembers%5B0%5D=1.7>). The Tribunal takes judicial notice of this fact pursuant to section 16 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

the evidence before it to make a finding under section 14(1)(d)(iii) of the Act that there are reasonable grounds to believe that there is a risk to public health, posed by NCFH's low temperature system, and is not in a position to apply section 17(2) of the Act and revoke NCFH's crematorium licence on this ground.

[157] This case is not a referendum on low temperature AH as a broad based funeral services application. The case is about the extent of the risk to public health created by one operator, utilizing one machine.

**Issue #4 - Should NCFH's crematorium licence be revoked based on the operation of sections 14(1)(a)(i) and 17(2) of the Act?**

[158] The Tribunal has rejected most of the allegations of the Registrar, however, as noted, the Tribunal has found a breach of s. 7(1) of the Act, and s. 186(1) of the Regulations. As also noted, by virtue of sections 14(1)(a)(i) and 17(2) of the Act, a breach of the Act or its regulations, entitles the Registrar to seek a suspension or revocation of a licensee's licence. The Tribunal is of the opinion, however, that, despite the Tribunal's finding, NCFH's crematorium licence should not be revoked. NCFH's deficiencies, which put them in contravention of the Act and regulations, have been rectified. There is no evidence to suggest the deficiencies are ongoing, or that NCFH will return to a deficient state when no longer subject to the scrutiny of litigation. Moreover, NCFH has been suspended since June 22, 2018, and has thus been under a "time served" suspension of 11 months. This suspension will have a deterrent effect, thereby tending to reduce the risk of future noncompliance.

[159] The Tribunal heard evidence that NCFH has made significant efforts to rectify its deficiencies under section 7(1) of the Act. NCFH showed many of the witnesses video and photos of the facility after what appeared to be a renovation to address concerns. All of the witnesses agreed, though to different extents, that the facility was much improved. In particular:

- a. Mr. Jordan said that the facility looked cleaner, but he would want to see a full body shower instead of a bottle eye-wash station (he conceded that there was no requirement for this);
- b. Inspector Leroy testified that the room looked very different from a compliance perspective, and that items no longer appear scattered. He could not say, however, whether the processes engaged in were any better;

- c. Inspector Reynolds said the videos of the facility after some upgrades allay some of his concerns, but he wondered what the facility would look like at the next random inspection.

[160] It should be noted that no one from the BAO has attended NCFH since the suspension on June 22, 2018. When asked why, Mr. Jordan advised that the BAO does not have the manpower to continually visit a facility, and in this case, the operator was suspended so there was no need to re-attend. This is understandable. Mr. Jordan also stated that NCFH would likely have complied with any request to rectify deficiencies if they were given a chance.

[161] NCFH, for its part, did hire Dr. Salsali as a safety consultant after the Notice of Proposal was issued. As described above, Dr. Salsali visited NCFH's AH facility in August 2018 and identified several occupational health and safety concerns. He made recommendations as to how the facility can be improved, and outlined the costs of implementing those changes. Mr. Charbonneau testified that he implemented all of Dr. Salsali's recommendations.

[162] In September 2018, Dr. Salsali was provided with photographs of changes that had been made to NCFH's AH facility. With these photographs he published an addendum to his expert report, highlighting the fact that the concerns he identified had been addressed. During the hearing, Dr. Salsali was shown the same updated videos and photos that were shown to the BAO witnesses. He testified that the facility showed a marked improvement.

[163] The Tribunal agrees. While again, there is no defined standard for what a facility should look like, there is the plain and ordinary meaning of what is required for something to be orderly. The images of the facility post-renovations show the following:

- a. Safety shower and eyewash station (installed after the hearing started);
- b. Sealed garage doors with no exposed insulation;
- c. Plastic bins of chemicals elevated above ground level;
- d. Properly placed and labeled safety data sheets;
- e. Appropriate PPE, stored in a dedicated bin;
- f. Flooring that appeared to be sealed;
- g. In-depth safety protocols placed in an accessible binder;

- h. Higher-lipped trays for drying bone fragments;
- i. Upgraded storage cabinet for storing bags of caustic chemicals;
- j. New ventilation hood and air exchange system;
- k. Cleaned cremulator;
- l. Privacy seal applied to door window; and,
- m. A personal effects log sheet to keep track of items accompanying bodies.

[164] The facility no longer has the unkempt, cluttered and industrial appearance that it had at the time of the inspection of June 12, 2018. To the Tribunal, the facility appears to be maintained in good order. With respect to carrying out AH in a decent and orderly manner, the Tribunal is satisfied that NCFH has implemented equipment for handling human remains that contributes to the dignity of the deceased person. This includes deeper trays when drying bone fragments in order to prevent scattering of fragments in the oven, and the personal effects log that helps return belongings to the decedent's family, or dispose of them as appropriate. While there was no evidence that an AH process was ongoing at the time these images were taken, there is also no evidence to suggest that this good order would not be maintained when a process is underway.

[165] In addition, Mr. Charbonneau testified that once he learned the metal tags he used did not meet the legislated requirements, he remedied it by ordering new tags the very next week. This was not challenged by the BAO. As far as the Tribunal can tell, the metal tags used by NCFH are now compliant.

[166] There is the question of whether the facility will continue to remain in good condition, or whether it might deteriorate to the condition it was in on June 12, 2018. The Tribunal finds this speculative question is not a reason for revoking a licence for the following reasons.

[167] First, there is no evidence that NCFH, or Mr. Charbonneau, would allow the condition of the facility to fall below what is expected. Neither have a history of violating legislation or conditions (other than the breach of s. 7 of the Act found in this case) that might indicate a possible future pattern of behaviour.

[168] Second, the Registrar is entitled to continue inspecting NCFH's AH facility. While BAO is of the position that frequent or regular inspections are difficult due to human resource limitations, this does not preclude them from occasional unannounced inspections. NCFH is now on notice.

[169] Lastly, there is also no evidence that Mr. Charbonneau has carried out these renovations for any other purpose than a good faith effort to remain on the right side of the Act. The above-noted renovations were completed during the course of litigation, but the course of this litigation was the first instance of Mr. Charbonneau receiving any input from the BAO or elsewhere as to what was deficient about his premises in the first place. Mr. Jordan also stated that NCFH would likely have complied with any request to rectify deficiencies if it was given a chance, and while it depends on the deficiency, a chance to rectify is often the course of action the Registrar takes with licensees.

[170] The language of section 17(2) is permissive. It uses the word 'may' when referring to actions that the Registrar can take with respect to contraventions. The Tribunal sees that permissive approach as providing the Registrar or Tribunal with discretion in determining the appropriate course of action. The BAO's position is that the condition of NCFH at inspection was so grave that the Registrar has no choice but to revoke NCFH's licence. Assuming without deciding that that was the case on June 12, 2018, it is no longer the reality, and the Registrar does have options that are less drastic than revocation.

[171] NCFH has addressed concerns about its facility, and as described above, any arguments about future contraventions are speculative at this point. The purpose of the Act, as described by the BAO, is consumer protection. It is not intended to be punitive towards licensees, particularly where both licensees and the Registrar are treading new ground as in this case. Where a licensee has shown that it can comply with the legislation, and that consumers can be adequately protected, the Tribunal can substitute its own opinion for that of the Registrar.

[172] In this case, the Tribunal is of the opinion that NCFH's crematorium licence should not be revoked on the grounds that it has contravened the section 7(1) of the Act or section 186(1) of the Regulations.

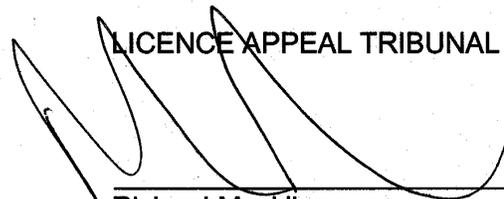
[173] Moreover, as noted, NCFH's cremation licence was suspended on June 22, 2018, and NCFH remained suspended until the release of these reasons. In other words, to the extent the public interest warrants a remedy for NCFH's violation of the Act, either in order to deter future behaviour or protect the public from the consequences of a substandard operation, NCFH has already served a suspension of 11 months. In all of the circumstances, no further remedial action is required.

## VI. CONCLUSION AND ORDER

[174] Based on the above, the Tribunal substitutes its opinion for that of the Registrar and directs the Registrar not to carry out its proposal dated June 22, 2018 to revoke NCFH's crematorium licence.

[175] As this proceeding has now concluded, the immediate suspension on NCFH's licence has now expired.

LICENCE APPEAL TRIBUNAL



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Richard Macklin,  
Vice-Chair



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Asad Moten, Member

*Released: May 23, 2019*