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Article abstract

In a test case that the attorney general of Ontario considered of province-wide importance, a small group of citizens in Thunder Bay, who had formed a burial cooperative, took on the province's funeral industry in the courts in the early 1980s. The resulting judgement fundamentally changed how the industry operated in the province of Ontario.

The Cooperative Memorial & Removal Services vs. The Ontario Board of Funeral Services

How A Memorial Society Changed Ontario's Funeral Industry*

by Eleanor Dolores Dickey

Words are important. As building blocks of our stories and songs they narrate events and play on our emotions, and, carefully defined, can have surprising repercussions. This was never truer than in the early 1980s in Thunder Bay, Ontario, during a confrontation between a small group of local citizens, who had formed a burial cooperative, and the Ontario funeral industry. This story, like all good stories, involved a problem to be solved, action and reaction that advanced the plot, and a resolution. As the players in the drama consolidated their positions, the events led to a local court case, an appeal of the decision, and a final judgment from the Ontario Court of Appeal. To everyone's surprise, the outcome of the case rested on the meaning of a single word, and that

judgment led to significant changes in the Ontario funeral industry.

Caring for the dead, in a ceremonial manner, dates back to the earliest human cultures. Through time, this work became the role of undertakers, morticians and/or funeral directors, who adapted their business practices to meet public needs and expectations. No one questioned the fact that when death occurs someone must care for the body, almost immediately, but in the United States, in the 1930s, the cost of funeral services became a matter of debate. Funeral prices were presented as the cost of a casket only; other services that were necessary might not be discussed. People who would normally comparison shop before making a large expenditure, often avoided thinking about a funeral as a commer-

* The Memorial Society of Thunder Bay (MSTB) Minutes and Papers (1964-2003) are located at the Thunder Bay Historical Museum. References to Cooperative Memorial & Removal Services (Co-op) can be found at the Northwest Funeral Alternative (NFA), the new name for the Co-op. A version of this article appeared in the pages of the Thunder Bay Historical Museum Society *Papers & Records* (2008).

Abstract

In a test case that the attorney general of Ontario considered of province-wide importance, a small group of citizens in Thunder Bay, who had formed a burial cooperative, took on the province's funeral industry in the courts in the early 1980s. The resulting judgement fundamentally changed how the industry operated in the province of Ontario.

Résumé: *Au début des années 1980, un cas de jurisprudence considéré d'importance provinciale par le procureur général de l'Ontario opposait un petit groupe de citoyens de Thunder Bay ayant formé une coopérative funéraire à l'industrie des salons funéraires. La décision de la cour a radicalement changé la manière dont fonctionne ce secteur dans la province.*

cial transaction. After the service, they might have second thoughts about the cost, but the money had been spent.

The Memorial Society (MS) movement, established in the United States in 1939,¹ reacted to funeral prices and excessive ceremony by stressing preplanning in terms of dignity, simplicity and moderate expense. Local memorial societies negotiated terms for prearranged burials. The funeral industry saw this as an intrusion on their prerogative of “educating the public in the right paths.”² Almost forty years later, in 1979, the editor of *Canadian Funeral Director* echoed those words.³

¹ MSTB misc. file 1972., *The Progressive*, Madison Wisconsin 1961, “The high cost of dying”; *Maturity*, June – July 1974, “Funerals that make sense”.

² *Ibid*, *Maturity*.

³ MSTB misc. file 1979, *Canadian Funeral Director*, January 1979, “Life with MS”.

⁴ MSTB misc. file 1972, Inventory of Memorial Society of Canada fonds, in Inventory #FO355, York University Archives and Special Collections.

⁵ *Ibid.*, Dr. Philip Hewitt, “The Memorial Society of B.C.: a glance at its early history”.

The American Memorial Society highlighted the desire for simplicity in funeral arrangements and the idea spread quickly after the Second World War. The first Canadian Memorial Society formed in Montreal in 1955. Winnipeg, Edmonton, Toronto, and Ottawa organized in the late 1950s. Between 1971 and 1987, an umbrella group, the Memorial Society Association of Canada (MSAC), had

enrolled 200,000 paying members.⁴ The British Columbia society was the largest in North America in 1971.⁵ Industry opponents of simplified funeral arrangements were forced to realize that public demands for change were fueling the success of the Memorial Society movement. Books and magazine articles kept the dispute before the public.

Organizing a Memorial Society

The memorial society committee that organized in Thunder Bay in 1971, inherited reference books and papers from the Lakehead Unitarian Fellow-

ship's 1963 attempt to establish a mortuary society.⁶ The steering committee members⁷ expected to follow the usual Society pattern of developing a membership that supported the goals of dignity, simplicity, and moderate expense in funerals through advance planning on a nonprofit, voluntary basis. They assumed that the newly formed society would negotiate a contract with one or more of the local funeral homes to provide members with a simple burial service.

The 'Type A' basic service would arrange for the removal of the deceased from the place of death, and would provide an inexpensive container for the body. There was to be no embalming or cosmetic restoration. The funeral home staff would complete the legal paper work and transport the body to a cemetery, or crematorium. The 'Type B' basic service would include additional elements, selected from a funeral home's itemized price list. Family members were to be free to arrange a memorial service at a time and place of their choosing, or omit a service, if that was their preference.

Each Memorial Society member would receive a designation form that had space to record the vital statistics

needed to register a death, and a place to write personal wishes for a memorial service. Completing the printed form would provide a valuable framework for a family discussion about death and funerals. A member could then visit a cooperating funeral home, discuss arrangements in advance of need, and leave a copy of the form. The family kept a copy and filed the third copy with the Memorial Society.

The steering committee organized its first public meeting on 7 February 1972, to announce its action plan and gauge community interest in a Memorial Society. Those in attendance showed support for the plans, listened attentively to a presentation by an executive member of the Toronto Memorial Society and ended the evening with a spirited discussion about funeral practices.⁸

Encouraged by the enthusiasm shown at this meeting, committee members scheduled appointments to discuss a contract at each of the four Thunder Bay funeral homes.⁹ It quickly became apparent that Thunder Bay was different from other cities. No local funeral director would negotiate; each encouraged people, who wished to pre plan, to make an appointment with the funeral home of their choice. Undeterred, the commit-

⁶ *Ibid.*, Minute Book of the Lakehead Unitarian Fellowship (LUF), 1963-65. Members were: Cecil Blair, Jack Elwert, Marion Julien, A.W. Kallio, George Love, Walter Marcyniuk, Neil Markus, Prue Morton, Mr. & Mrs. M. Redfern, William Sunam, R.H. Reynolds, Don Salo and Bob Stennett.

⁷ MSTB file 1971. First Steering Committee members were: Annette Augustine, Dr. John Augustine, Georhe Breckenridge, Nan Ernewein, Pam Hunt, Batt Lie, Arne Lie, Rev. Keith Lingwall, Rev. Ken Moffatt and Catherine Tett.

⁸ MSTB file 1972, *Newsletter*, February 1972.

⁹ In 1971 the funeral homes in Thunder Bay were: Blake Funeral Chapel, Everest of Thunder Bay, Jenkins Funeral Home and Sargent & Son, Ltd.

tee mailed a membership form to 135 people. Many became members and were among the sixty people who attended the first Thunder Bay Memorial Society (MSTB) meeting, 5 June 1972.¹⁰

The newly elected board of directors dealt with its first challenge in August 1972, when the father of a board member died. Family members wished to have his body flown to Sault Ste. Marie for cremation. The first funeral home they contacted claimed that the body could not be sent by air but must be transported by road, at considerable expense. The MSTB executive members knew that some of the information was not accurate. The family chose a different local funeral home which provided the services requested.¹¹

This experience gave the board an immediate incentive to establish a community education program using newspaper ads, discussion panels on the community TV channel, and small group meetings.¹² The board commissioned a survey to discover attitudes to funerals, especially the wishes and concerns of seniors. One of the five recommendations in the survey report contained the first mention of a

cooperative: “investigate the possibility... of a cooperative funeral parlor, a committee could be composed of representatives of various segments of the community, the initial fundings could be based upon shares and memberships.”¹³

Legislation Pending

Society volunteers used every opportunity to educate the public about the anti-consumer aspects of funeral practices and prices, and board members tried to obtain copies of the legislative changes being proposed for the funeral industry. Rumour indicated that regulations would be tightened so that only licensed funeral directors could arrange for the disposition of the deceased. Memorial Societies were concerned that this monopoly position would make it increasingly difficult for people to choose a simple funeral at moderate expense. Board member, the Rev. G. Daly, in a letter to the editor, asked if it was morally justifiable to spend a lot on funerals. He felt that changes in the law would force consumers to “go through expensive channels that have been set up in a very lucrative business.”¹⁴ But he also constantly

¹⁰ MSTB file 1972, Report of the First Annual MSTB Meeting, 5 June 1972. Executive committee members were: President, Batt Lie; Vice President, Jack McLean; Treasurer, Olav Sundland; Secretary, Catherine Tett; Recording Secretary, Ellen Taylor; Membership Registrar, Dorothy Tarbet; Publicity, Webb Twinem;. Members at Large: Rev Gordon Daly, Sharon Merits and David Smith. Members of the Advisory Committee: Dr. John Augustine, M. Hastings, Dr. N. Mcleod, Rev. Ken Moffatt, S. Lukinuk. Auditor; Eric Gowen.

¹¹ MSTB Binder, vol 1, Lucy Tett to Elly Elder, 9 September 1972.

¹² MSTB file 1972, local newspaper ads, “Does the High Cost of Dying Offend You?”, “Do You Think This Way About Funerals?”

¹³ MSTB file 1973, “Action Research – Survey Results”, in *Action Research Project 1973*.

¹⁴ MSTB Binder, vol 1, Rev. G. Daly to MSTB, 4 March 1975.



Eric Gowen, a member of the Thunder Bay Memorial Society board of directors since the early 1970s, was the Society's principal advocate and public face throughout its long struggle with the funeral industry. Photo courtesy of the author.

reminded the board members that their goal was to enlist the understanding and cooperation of funeral directors.¹⁵

In 1975, *Canadian Funeral Director* acknowledged “the success of Memorial Societies and ways that the funeral industry might combat nontraditional funerals.”¹⁶ At the same time, the Thunder Bay membership was growing steadily. New board members tried repeatedly to overcome the intransigence of the local funeral directors, while volunteers were always ready to assist people in preparing their designation forms, and to listen to stories and complaints about experiences in arranging funerals. Society activities

were often reported in the press. Eric Gowen, board president in 1975, in a letter to the editor stated: “Memorial Society members opt for a simple service that costs as little as \$235 in some places.” The average cost of a funeral that year was \$600. Gowen wrote that the difference in cost “would be better spent on a charity or given to medical research.”¹⁷

Gowen, a member of Wesley United Church, had joined the Memorial Society board as treasurer in 1973. In March, 1974, his article in the *Wesley Quarterly* drew attention to the simplicity of burial practices in many denominations. He encouraged the United Church to reissue its 1956 pamphlet *On Christian Burial* which had stressed simplicity in funeral arrangements. The United Church did not reprint it but he had it retyped and printed for Wesley members.

Gowen's concern about the proposed new funeral legislation and his frustration with the Thunder Bay situation found a sympathetic hearing in the political arena. As Public Relations Officer of MSAC,¹⁸ he presented a brief, stressing the anti-consumer parts of the proposed new regulations, to the third New Democratic Party caucus meeting

¹⁵ Letter to the editor, *Chronicle Journal*, 15 November 1975.

¹⁶ MSTB 1975, Minutes file. Article in *Canadian Funeral Director* attached to Minutes of meeting, 28 March 1975.

¹⁷ E. Gowen to Editor, *Chronicle Journal*, 31 October 1975

¹⁸ *Chronicle Journal*, 9 July 1976.

in Thunder Bay in September 1976.¹⁹ MSAC sent a similar brief to the Liberal Party in November, but these efforts were too little and too late to affect the legislation.

On 26 November 1976, the Ontario Government introduced Bill 171, *Funeral Services Act 1976*, with little advance notice. It was approved in principle on 8 December 1976. When Gowen complained about the lack of time to study Bill 171, Premier Davis assured him that there had been adequate consultation. Davis also stated: "It should be noted that funeral directors are required to provide a simple disposal if requested to do so."²⁰ This left memorial societies uncertain about the simple removal and burial (or cremation) of an unembalmed body. Such a minimal service was often called a convenience service; the word 'disposal' presented a less attractive image when a funeral director was discussing arrangements with a client.

A decision by the board of Thunder Bay's Riverside Crematorium resolved



Despite Premier Bill Davis's soothing words, the Funeral Services Act of 1976 created uncertainty about the simple removal and burial of an unembalmed body.

Photo: Thunder Bay Chronicle Journal.

the question of embalming by passing a motion that all bodies received at the crematorium, after 10 January 1977, must be embalmed. The board had adopted this idea, used in other Ontario centres, in consultation with local undertakers.²¹ At this time, Ontario law required forty-eight hours to elapse before cremation. Bodies had been held at the hospital or between the hospital and the crematorium, without embalming, during this waiting period. Now all bodies would have to be removed by a licensed funeral director and embalmed, regardless of a family's wish. This new

Riverside Cemetery rule would prevent anyone, not just MSTB members, from arranging for a 'Type A' or 'Type B' basic service. The ruling was not always enforced.²²

Founding a Cooperative

In response, Gowen, and other MSTB members, began a serious study of a cooperative as a means to provide a basic service without breaking the *Funeral*

¹⁹ MSTB, "Briefs to Ontario Legislature and Political Parties" file.

²⁰ NFA Archives, vol 1. Letter of Premier Davis, 9 February 1977.

²¹ *Ibid.*, Riverside Shareholders' Meeting, 6 February 1977.

²² *Ibid.*, P. Bolt obituary and letter, 7 May 1977.

Services Act 1976. The term ‘basic service’ would offer members direct burial or cremation without the use of a funeral home, with no embalming or cosmetic restoration of the deceased.

While interested Society members explored the details of such a service, the board invited Mr. Farand, manager of the cooperative Funeral Home of Sudbury, to be the guest speaker at the Society’s Annual Meeting in September 1977. Representatives of the four local funeral homes were in the audience, as was Mr. Donald Steenson, Registrar, Ontario Board of Funeral Services (OBFS), Toronto, to hear Mr. Farand describe the successful operation of the Sudbury Cooperative.

In April 1978, the Thunder Bay funeral directors again rebuffed the Society’s approach for a contract, disregarding the *Canadian Funeral Director* caution that “The arrogance of the funeral directors in Vancouver [caused] their own downfall.... They refused to serve Memorial Society members... in this manner they thought they could stop the Memorial Society.”²³ Gowen’s personal registered letter requesting a meeting with the funeral directors was rejected, although one establishment did offer him a ‘Type A’ service free of charge.²⁴ This last failure to negotiate encouraged Eugenie Curtis,

Eric Gowen, Donald Prodanyk, Melvin Redfern and Lucy Catherine Tett to sign the application forms to register Cooperative Memorial & Removal Services Inc. on 6 June 1978.²⁵

The five signatories realized that their proposal might be rejected. A month before they mailed the forms, they had received a letter from the legal department of the Ontario Ministry of Health stating that the plan would be a violation of the Funeral Services Act. A copy of that opinion had gone to the Cooperative Services Branch, Ministry of Consumer and Commercial Relations.²⁶ The decision was based on the interpretation of the Funeral Services Act that only licensed funeral directors could serve the public. Although Gowen recognized the Health Department’s position, he continued to research the legality of a cooperative. At the Ontario Memorial Society’s conference in September 1978, he asked Mr. Gaylord Watkins, Chairman of the Board of the Public Interest Advocacy Centre in Ottawa, for his views on the legal questions involved.²⁷

Mr. Watkins, co-author of the 1973 *Neilson Watkins Report* (Proposals for Legislative Reform Aiding the Consumer of Funeral Industry Products and Services) was an expert on Funeral legislation.²⁸ He considered the Thunder Bay

²³ “A Look at Funeral Trends”, *Canadian Funeral Director*, February 1978.

²⁴ NFA Binder, vol 2, letter of 17 April 1978.

²⁵ *Ibid.*, copy of registration form, 6 June 1978.

²⁶ *Ibid.*, letter of Ontario Ministry of Health, 7 May 1978.

²⁷ MSTB file 1978, Ontario MS Regional Meeting at Bolton, Ontario, 29 September 1978.

²⁸ Mr. Watkins, an Ottawa lawyer employed by the Law Reform Commission of Canada, was a member of the team that prepared the *Neilson Watkins Report* (Proposals for Legislative Reform Aiding the

situation a priority, and requested copies of all correspondence. He felt that the *Funeral Services Act 1976* did not clearly define what was meant by funeral services. At the time, no one realized that the definition of the word 'funeral' would later become very important.

The funeral industry's concern about new public attitudes was news,²⁹ and the January 1979 *Canadian Funeral Director* editorialized that it was time to find common ground with memorial societies. At the Legislature, Jim Foulds, NDP member for Port Arthur, submitted a private member's bill to amend the *Funeral Services Act 1976*. His proposals were an attempt to reform the Act to provide consumer protection. The amendments, however, would have upset the monopoly position enjoyed by the funeral industry. The changes would:

1. Move responsibility for the Act from the Ministry of Health to the Ministry of Consumer and Commercial Relations.

2. Increase the number of consumer representatives on the Board of Funeral Services, including a representative of the Ontario Region of the Memorial Society

of Canada.

3. Make it mandatory for funeral directors to provide an itemized price list of supplies and services to the purchaser.

4. Embalm a body only if it is specifically requested by the purchaser, or if the body needs to be transported out of the province.

5. Funeral directors would no longer have the exclusive right to provide removal services and funeral supplies.³⁰

The Bill was defeated but a funeral trade magazine wrote that this was an attempt "to introduce into Ontario, the same sort of harsh restrictions which the [American] Federal Trade Commission has been trying to foist on American Funeral Service."³¹ The July/August *Canadian Funeral Director* remarked: "Mr. Foulds represents an area that is a hotbed of discontent when it comes to funeral service."³²

The publicity about funeral reform was slight comfort to those who had waited almost a year for the Co-op registration papers. The Legal Branch, Ministry of Health, confirmed again that the cooperative would be breaking the law even though "it restricted its offering of funeral

Consumer of Funeral Industry Products and Services) in 1973. A. W. Neilson was a law professor at York University. MSAC, headquartered in B.C. at that time, commissioned the study in conjunction with its United States counterpart, the Continental Association of Funeral and Memorial Societies, with the purpose of "preparing a Model Act for funeral services in our country", *Canadian Funeral Director*, February 1974: MSTB file 1974, Briefs to the Ontario Government; NFA, vol 5.

²⁹ MSTB file 1979, Press reports, January to March 1979: *Toronto Globe and Mail*, "Woman's Attempts to Rearrange Funeral Led to Frustration, Complaints to the Board"; *Macleans*, "Florists Losing Business"; *Chronicle Journal*, an article concerning a mortician in Trail B.C. and cremation containers covered with reusable wooden shell; *Times News*, several articles and Letters to the Editor.

³⁰ *Ibid.*, New Democratic Party press release, 17 April 1979.

³¹ *Ibid.*, *Casket & Sunnyside*, July/August 1979.

³² *Ibid.*, *Newsletter*, December 1979

Jim Foulds, NDP member for Port Arthur, seen here in the early 1980s, submitted a private member's bill to amend the the 1976 Funeral Services Act to provide consumer protection. Photo: Thunder Bay Historical Museum Society.



services and supplies to its membership.”³³ But eight days later a letter from Corporate and Consumer Relations stated “your certificate of incorporation will be issued within the next few days. I understand that you have also received communications from the Ministry of Health outlining the requirements of the Funeral Services Act as they may apply to the Cooperative.”³⁴ The Co-op charter, dated 18 May 1979, appeared to be a mixed blessing if the Co-op’s operation would be breaking the law.³⁵

Not all Ontario memorial societies supported the idea of a Co-op that might be prosecuted for breaking the law since a guilty verdict, and the publicity surrounding it, might damage the cooperation that others had achieved with the funeral industry. Mr. N. Schultz, a lawyer with the Public Interest Advocacy Centre had proposed a different approach.

He wanted the Co-op to plan its first basic service with a family that would agree to allow the event to become a test case. The decision of a court would determine if Section 5 (1) [*Funeral Services Act 1976*] had been contravened.³⁶

The Co-op directors decided that such a trial would involve lengthy delaying tactics by the industry. They were confident that, if prosecuted, they could rely on a double membership to avoid breaking the funeral industry regulations, because only Memorial Society members could become Co-op members. The Co-op would provide services only to its own members and not to the general public. Co-op members also signed a membership form that stated a rejection, in principle, of the embalming and cosmetic

³³ NFA vol. 3, “Opinion on proposed incorporation”, Ministry of Health, 9 May 1979.

³⁴ *Ibid.*, letter of Ontario Ministry of Consumer and Corporate Affairs, 17 May 1979

³⁵ *Ibid.*, Registration confirmation, 18 May 1979.

³⁶ *Ibid.*, E. Gowen to Steven W. Lukinek, 14 November 1980.

restoration of dead bodies. They wanted direct cremation or burial. The directors were also relying on the fact that no local funeral home would stock the combustible corrugated cremation container they would use.³⁷ The simplest container stocked by the funeral homes was a gray cloth covered wooden casket.

These assumptions were enough for the Co-op directors and volunteers, without experience or professional support, to organize the nonprofit business during the summer months of 1979. They were prepared to assist Co-op member families by removing the deceased, completing the paper work necessary to register the death, and arranging for direct burial or cremation. The work was to be done by volunteers, and the cost to a member was a fee set by the directors to cover the business operating costs and the charges of the crematorium or cemetery. The family was to be responsible for arranging a memorial service and no Co-op volunteer could help with the planning of a ceremony. Only licensed funeral directors could organize a traditional, ceremonial funeral service and no Co-op volunteers had such a license.

At the first official board meeting, 12 September 1979, the directors established an office on James Street in Thunder Bay and planned to have a volunteer

answer the phone from 9 to 5, Monday to Friday.³⁸ Gowen informed Mr. Shultz that, in the opinion of Mr. Lukinuk, the lawyer who had helped MSTB with its incorporation, "It would be a foolish attorney-general who would... prosecute a bunch of do-gooders up in Thunder Bay.... The group will not be serving the public, but only people who are members of both MSTB and the Co-op."³⁹

There were 134 Co-op members when MSAC met for its National Convention at Avila Centre in Thunder Bay on the weekend of 8 June 1980. Delegates represented 85,000 Canadian MS members.⁴⁰ Following the successful convention, everyone seemed ready for a quiet summer. It was the calm before the storm.

On 30 June 1980, the daughter of a Co-op/Memorial Society member phoned Gowen; her father had been found dead beside his bed. Gowen went to the residence, met with family members, one of the executors, and the coroner, who told him to pick up the medical and coroner's certificates the next day. Gowen left to arrange for the storage of the body for the 48-hour waiting period before cremation and, during his absence, someone at the house called a funeral director to come for the body and await instructions.

³⁷ *Ibid.*, E. Gowen to J.D. Campbell, 10 September 1979

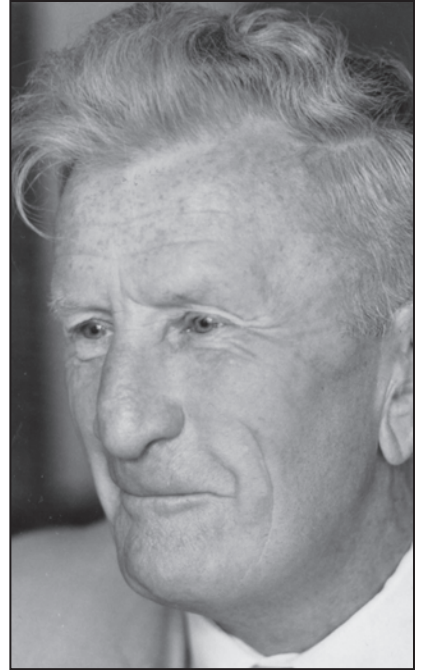
³⁸ *Ibid.*, Co-op Minute Book, September 1979 to December 1983: first board meeting, 12 September 1979. The first Board of Directors members were: Mel Redfern, Eugenie Curtis, Patton Brown, Louise Chmarny, Eric Gowen and Donald Prodanyk.

³⁹ *Ibid.*, letter to N.J. Schultz, 30 November 1979

⁴⁰ *Ibid.*, Press releases, Newspaper accounts, June 1980.



Both Eric Gowen and MPP for Fort William Mickey Hennessy (right) lobbied Ontario's Minister of Health Dennis Timbrell (left) for changes to the *Funeral Services Act*. Photos: Thunder Bay Chronicle Journal.



The family members resolved their differences and asked Gowen to inform the funeral home that the deceased did not want to be embalmed and that the family agreed. The funeral director replied that either he would embalm the body or the family could come and pick it up. At this point the family asked the Co-op to take charge and arrange for minimal service [embalming only] by the funeral home. The following day, Gowen and one volunteer, with the reluctant help of a funeral home employee, removed the body from the funeral home, while another employee, on instruction from the funeral director, took pictures of the removal.

In a letter of complaint to the Hon.

Dennis Timbrell, Minister of Health, Gowen emphasized that he was not targeting an individual [funeral director] but rather the *Funeral Services Act* for the events that had taken place.⁴¹

Mickey Hennessy, the well known MPP for Fort William, had politely acknowledged, but quietly filed, previous MSTB correspondence. This time, breaking party ranks, he wrote to the Hon. Dennis Timbrell: "I offer my support to the Society and would appreciate if their concerns should be looked into."⁴²

A Summons to Court

The Ontario Board of Funeral Services acted. The Co-op, and Gowen, each received a summons to appear

⁴¹ *Ibid.*, Eric Gowen to Hon. Dennis Timbrell, 8 July 1980.

⁴² *Ibid.*, Mickey Hennessy to Hon. Dennis Timbrell, 14 July 1980.



Cooperative Memorial & Removal Services Inc. engaged Arthur Maloney Q.C. of Toronto to defend them of the charge of breaking the Funeral Services Act. Photo: Thunder Bay Chronicle Journal.

in court on 30 September 1980, to answer the charge that: "between Jan. 9, 1980, and July 2, 1980, at Thunder Bay Ontario, not being licensed as a funeral director, [the accused] did engage in providing funeral services and funeral supplies to the public... contrary to the Funeral Services Act."

The names of four deceased persons were listed in the summons.⁴³

Mr. Lukinuk advised the directors to obtain senior legal counsel from Toronto. "It may be that you, as well as the OBFS, may wish to appeal the decision in the initial Court."⁴⁴ Acting on Lukinuk's suggestion, the Co-op engaged Arthur Maloney Q.C. of Toronto, who recommended that Mr. Gilbert Labine

act as local counsel.⁴⁵

The case opened on 16 January 1981 before His Honour, Provincial Court Judge R.B. Mitchell. Crown Counsel was B. Swadron (Toronto) and Defense Counsel, G. Labine, (Thunder Bay). Gowen and the Co-op were being tried together for breaking the *Funeral Services Act, 1976*, with Gowen speaking for himself but also answering questions on behalf of the Co-op.

The court heard only a small amount of evidence that day. The funeral director witness agreed that written permission was required to embalm a body, but he also remarked "we never get it."⁴⁶ In reference to the 30 June 1980 removal from a residence, he claimed not to know who called the funeral home to remove the body although one of his employees later testified that the coroner had given the order. This same employee had been instructed to take pictures when the Co-op volunteers removed the body from the funeral home.

After day-long testimony, Court closed for the day and resumed five months later on 19 May 1982.⁴⁷ The crown called five witnesses in an attempt to prove that the Co-op volunteers were providing services normally done by a licensed funeral director. To prove this point, a funeral director gave lengthy testimony about the training required to

⁴³ *Ibid.*, Initial Summons and Notice for Adjournment, September 1980.

⁴⁴ *Ibid.*, Lukinek and Halabisky to E. Gowen, 31 October 1980.

⁴⁵ *Ibid.*, Arthur Maloney to Co-op, 7 January 1981.

⁴⁶ MSTB, Court Transcript Binder; NFA vol. 4, Transcript, 16 January 1981.

⁴⁷ *Ibid.*, Trail transcript, 19, 20 May 1981.

obtain such a license but Labine, in cross examination, introduced another factor, establishing that no funeral home carried any type of corrugated cremation container like the one used by the Co-op.

The next three witnesses described the paper work required to release a deceased body from the hospital, to register the death at city hall and to arrange for cremation. In all cases there was no requirement for a funeral director to complete the forms. All witnesses agreed that Gowen, as a representative of the Co-op, always had the paper work completed and at no time did he refer to himself as a funeral director. The words 'funeral director' had been crossed out on the forms he presented.

The final crown witness, a funeral home employee, answered questions about his understanding of the difference between a funeral and a memorial service. He indicated that embalming the deceased was customary prior to a funeral service. When questioned about a disposal service he referred to it as a convenience service, a name change made about two years previously by the management of the funeral home where he was employed. The witness also confirmed that the cremation container used by the Co-op, was not available at his place of employment.

Gowen, the last witness for the day, in answer to his lawyer's question, described Memorial Society members as

people who preferred simple rather than ornate caskets and moderate costs rather than great expense in funeral services. He emphasized this view by remarking that "our Lord went to his tomb in a clean linen shroud, and many people are quite willing today to face the fact that it doesn't take tremendous expenditure to do honour to a life that was lived."⁴⁸ This statement was consistent with Gowen's support for the 1956 United Church statement on Christian burial. However, as later reported in *Maclean's*, Gowen's words upset the judge who "cited Gowen for his contemptuous attitude" when he passed sentence in September 1981.⁴⁹

In his continuing testimony, Gowen alluded to problems that some families encountered at funeral homes and added "the Cooperative seeks to meet that need of people seeking simplicity without getting a put-down in a licensed funeral home."⁵⁰ But Judge Mitchell had only one concern; he wanted to know if the Co-op was licensed.⁵¹

On the second day of the trial, Gowen described the removal of the body of the Co-op member from the funeral home (June 1980) and agreed that he and his volunteer helper needed the assistance of the funeral home staff to complete the removal. Swadron's cross examination established the fact that the Co-op was not licensed under the *Funeral Services Act, 1976*.

All the testimony to this point was

⁴⁸ Transcript, p. 105

⁴⁹ *Maclean's*, 21 September 1981.

⁵⁰ Trial transcript, p.114, 19 May 1981.

⁵¹ *Ibid.*, p.115.

about the 30 June 1980 death. There was no question that two other deceased named in the summons had been Co-op members but membership for the fourth named deceased was open to question. In this case, the widow of an MSTB member signed the Co-op membership a few hours after her husband's unexpected death in an accident. Was the deceased a Co-op member or did the Co-op provide a service for a member of the public? This question was important since the Co-op was depending on double membership to avoid serving the public.

The argument could not be presented that day; the case was put over to September. Thunder Bay's *Chronicle Journal* reported the trial on 20 and 21 May 1981. *Canadian Funeral Director* described the case in detail, and *Maclean's* 1 June 1981 edition printed:

"Dust to Dust Without Frills" "...as Gowen puts it. 'I'm a freedom fighter, and all we're doing is defending the right to simplicity. We're not trying to push on people who have the abiding belief that looking on a corpse in a funeral parlor is good for their grief. What we're trying to stand for is the right of people who want to spend their money while they're living instead of on funeral trappings when they're dead.'"⁵²

At the third and final court hearing, 9 September 1981, the argument was brief and sharply defined. Labine presented three points: (1) Did the Co-op and Gowen provide a funeral service? (2) Did they provide a funeral supply? (3)

Did they serve the public?

Crown Counsel Swadron insisted that: (1) Co-op members were the public, (2) Gowen had done the things normally done by funeral directors, (3) the Co-op's cremation container was not a special supply.

After a brief recess Judge Mitchell pronounced the Co-op and Gowen guilty, fined Gowen personally \$1,000 and the Co-op \$3,000, with six months to pay. The Co-op was to "cease and desist." *Maclean's* printed "Back To The Only Game In Town," an article that profiled Gowen as unrepentant and prepared to appeal the decision.⁵³

Before filing an appeal, Gowen and the Co-op Board had to wait until the written reasons for judgment were issued on 17 December 1981. In this document, Judge Mitchell wrote that neither the Co-op nor Gowen were licensed under the Funeral Services Act and claimed that both defendants had engaged in providing funeral services or funeral supplies [the cremation container] to the public. In conclusion, he added "...I am informed that this case has attracted some great deal of notoriety and media response. The judgment, herein, is in no way to be interpreted as a criticism of the morality of either of the defendants."⁵⁴

The Appeals

Gowen worked with lawyer Doug Shaw, who was now to represent the Co-op, to prepare for an appeal by list-

⁵² *Macleans*, 1 June 1981

⁵³ *Ibid.*, 21 September 1981 (article by local CBC reporter, Rosalie Woloski).

⁵⁴ NFA vol.5; MSTB Court Transcript Binder, Reasons for Judgment, 17 December 1981.

ing the errors in the original trial. One point was that the transcript had shown the witnesses in the wrong order. This was important because of contradictory testimony about embalming.

The Rev. Karl Sauer, MSTB board member, also outlined another error repeated throughout the trial. MSTB was not on trial although there had been repeated references to the Memorial Society when Co-op would have been the correct term. He emphasized that over 1,200 MSTB members had not joined the Co-op and were certainly not on trial. The Memorial Society “advocates, plans and does publicity, but never provides funeral services or supplies to the public.”⁵⁵

Judge Patrick Fitzgerald presided at the first appeal on 23 March 1982. He clarified the confusion about the terms Co-op and Memorial Society and then dealt with the meaning of the word ‘funeral’, and the word ‘usually’ as used in describing the work of a funeral director. He reviewed the question of embalming (a major distinction in the case), and the dispute about caskets and the Co-op’s cremation container. He reserved judgment but thought that he would exonerate Gowen.⁵⁶

On 16 April 1982, Judge Fitzgerald released his *Reasons for Judgment* which focused on the accepted meaning of the

word funeral, and the work of a funeral director. In comparing the work of the Co-op with that ‘usually done’ by a funeral director he stated that not only was the Co-op’s service not ‘usually provided’ by the funeral director, it was not provided at all. In conclusion, the Judge cited three dictionary definitions of the word funeral: “By these definitions, one English, one Canadian and one American, published in Canada, the simple collection, packaging and conveyance of a dead human body to a crematorium, without accompanying rites, ceremonies, or a procession, would not constitute a funeral whether or not a memorial service is later held.”⁵⁷

Within days, OBFS won leave to appeal in the Ontario Court of Appeal on the grounds that: “The learned District Court Judge [Fitzgerald] erred in law in his interpretation of ‘funeral services’ and ‘funeral supplies’ and as a result of this interpretation, improperly found that the defendants had not contravened the provisions of the *Funeral Services Act 1976*.”⁵⁸

Mr. Justice McKinnon [Office of the Attorney General] was of the view that: “this was a test case of Province wide importance that therefore the matter should be dealt with by the Ontario Court of Appeal, rather than being left at the District Court Level.”⁵⁹ This case was

⁵⁵ NFA vol.5; MSTB 1982 file, Rev. Karl Sauer to Judge Mitchell, 9 March 1982.

⁵⁶ NFA vol. 5, E. Gowen’s hand-written notes of Hearing, 23 March 1982.

⁵⁷ NFA vol. 5; MSTB Court Transcript Binder, Reasons for Judgment, 16 April 1982.

⁵⁸ NFA vol. 5, Leave to Appeal, 16 April 1982.

⁵⁹ *Ibid*, D. Shaw to E. Gowen, 29 May 1982; Co-op Minutes, 7 June 1982; Official Minute Book 1979-83 (in NFA office).

the first challenge to the recently enacted Ontario statute and as such needed scrutiny by the highest court in the Province.

And so the case proceeded to the Ontario Court of Appeal on 7 October, 1983.⁶⁰ In a brief session, the Judges determined that Judge Fitzgerald was not in error and dismissed the appeal, with costs assigned to OBFS, which had initiated the proceedings. Funeral service in the Province of Ontario would never be the same again!

Reactions to the Judgment

The funeral industry expressed concern that the outcome of this case could usher in storefront disposal services, but also admitted in *Canadian Funeral Director* that the industry had some responsibility for stirring up the issue with its unwillingness to accept the ideas of change in the services it offered.⁶¹

The Co-op was now free to find suitable business premises and hire staff. The board members learned how to move from a volunteer organization to a community business. Later there was even a business relationship with one funeral home to rent space in its cool room.

Storefront burial services did not appear. Removal services opened in several cities, but there was minimal disruption to the industry as a whole. The government proclaimed a new Funeral Services Act in 1990, making transfer services a part of the funeral industry and Humber

College developed a training course for transfer service operators. OBFS grandfathered the Co-op from the new regulations until the staff had completed this training.

The five people who had applied to register the Co-op in 1978, and the many people who made it work, could not have imagined that their volunteer business would operate as part of the industry, under the Funeral Services Act. Nor could they have known how their actions would change that industry.

In 1997, the board of the Co-op, acting on legal advice, left the Cooperative Corporations Act and registered as the Northwest Funeral Alternative under the Ontario Corporations Act. In Thunder Bay, the Alternative and the Memorial Society continue to hold back-to-back annual meetings to elect new board members. The Federation of Ontario Memorial Societies was represented on two Ontario government committees, the Ministerial Advisory Committee and the Bereavement Services Advisory Committee. This was especially important because funeral customs were changing rapidly with Ontario demographic shifts, the introduction of new technology, and consumer concern over the environmental impact of past funeral practices. The Ontario Federation continued to represent consumer opinion to the Ministry of Government Services and advocates for more consumer choices in the supply and provision of Death Care

⁶⁰ NFA vol. 6; MSTB 1983 file, Trial Transcript 7 October 1983.

⁶¹ NFA vols 5 and 6; MSTB 1982 file. Series of articles from *Canadian Funeral Director*, May and October 1982.

Goods and Services.

The conflict between a very small part of the Ontario funeral industry and a group of determined Thunder Bay citizens escalated gradually. The Co-op supporters thought they were building a case on the strength of common sense; their opponents in the funeral industry viewed the confrontation as more nuisance than threat. But this case, and its resolution, had considerable implications for, and effects upon, the funeral industry in Ontario. The fact that the final judgment depended on the meaning of that one

word—‘funeral’—surprised everybody. Yet none of this would have happened if the Memorial Society of Thunder Bay had been able to follow the usual pattern of Memorial Society activity. There would have been no Co-op, no court cases and probably very little change in funeral legislation. That it happened is a tribute to the courage and tenacity of Eric Gowen in particular, and to those who shared his determination to spread the Memorial Society message of simplicity, dignity, and moderate expense in final arrangements.
