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Leave to Intervene Denied to Métis Nation in Case Involving Disinterment of RCMP

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Cases Considered:

Johnston v. Alberta (Vital Statistics), 2008 ABCA 2,
Johnston v. Alberta (Director of Vital Statistics, 2007 ABCA 394,
Johnston v. Alberta (Director of Vital Statistics), 2007 ABQB 597

The case concerning Constable Lionide (Leo) Johnston's place of burial has been before the Alberta courts a number of times, and has received a fair degree of media attention. Constable Johnston was one of four RCMP officers killed in the line of duty on March 3, 2005 near Mayerthorpe, Alberta.

Constable Johnston, who was Métis, was buried in the Willow Park Cemetery in Lac La Biche, Alberta shortly after his death. Approximately one year later his widow Kelly Barsness (who was also the Administrator of his estate, and who had originally agreed to his burial in Lac La Biche) sought to have his place of burial changed to the special RCMP Cemetery in Depot, Saskatchewan. She had only learned of this option some months after Constable Johnston's burial in Lac La Biche. In May 2007 her application under the Cemeteries Act, R.S.A. 2000, c. C-3, for a "disinter/reinter permit" was allowed by the Director of Vital Statistics ("the Director"), and only two months later did Barsness notify Constable Johnston's mother, Grace Johnston, of the decision.

Immediately afterwards, Mrs. Johnston and her husband Ronald filed an objection to the disinterment of their son with the Director, and eventually brought an application to quash the disinterment permit. That application was dismissed by Mr. Justice D.R.G. Thomas of the Alberta Court of Queen's Bench on October 15, 2007 (Johnston v. Alberta (Director of Vital Statistics), 2007 ABQB 597). Justice Thomas's decision was a fairly standard application of administrative law principles. Finding that the appropriate standard of review of the Director's decision was one of reasonableness, Justice Thomas went on to find that the Director's decision to grant a disinter/reinter permit met that standard – it was "a simple and straightforward decision to allow exactly what was applied for, namely permission to the wife of the deceased to relocate the remains of Leo Johnston to a different cemetery" (at para. 41).

Another aspect of the Court of Queen's Bench decision is of interest. The Métis Nation of Alberta Association Zone One Regional Council ("the Métis Regional Council") was named as an applicant on the judicial review application along with Grace Johnston, and Justice Thomas questioned its standing (i.e. its entitlement to stand before the court). Generally, standing may be granted to private interest litigants where their own rights are at issue, or it may be granted to public interest litigants where they raise a serious legal issue, are either directly affected or have

a genuine interest in the outcome of the case, and there is "no other reasonable and effective manner in which the issue may be brought before the Court" (see Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575). Given that the Métis Regional Council had not shown a legal interest in the case, nor had it come forward as a public interest litigant, Justice Thomas found that it had no standing to be heard on the application. On the other hand, Grace Johnston was found to have standing, given the legal interests granted to parents of deceased persons under the Cemeteries Act.

Grace Johnston filed an appeal of Justice Thomas's decision to the Alberta Court of Appeal, and on December 5, 2007 the disinterment permit was stayed pending the appeal by Mr. Justice Jack Watson: see Johnston v. Alberta (Director of Vital Statistics), 2007 ABCA 394. In addition, the Métis Regional Council appealed the decision of the Court of Queen's Bench to deny it standing. However, the Regional Council was not permitted to make submissions on the stay application, although its counsel also represented Grace Johnston. In fact, there was some discussion at the end of Justice Watson's reasons to the effect that the Métis Regional Council would file a discontinuance of its appeal on the standing question.

The most recent decision of the courts involved an application by the Métis Nation of Alberta for leave to intervene in the appeal. The Métis Nation, which is a different entity than the Métis Regional Council, also sought to support Grace Johnston in opposing the disinterment of Constable Johnston's remains on the basis that this practice is contrary to Métis custom. The Métis Nation also alleged that the Director had a duty to consult with the Métis Nation before issuing the disinterment permit, and that it had breached that duty. The duty to consult is a matter of constitutional law grounded in the guarantee of Aboriginal rights under s. 35 of the Constitution Act, 1982 (see Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511; Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550; Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388).

In a brief memorandum of judgment written by Justices Keith Ritter, Jack Watson and Frans Slatter, the Métis Nation's application for leave to intervene was denied on January 4, 2008. The Court cited its earlier decision in Papaschase Indian Band v. Canada (Attorney General), 2005 ABCA 320 as authority for the proposition that in order to be granted intervener status, the proposed intervener must be "specially affected by the decision facing the Court", or must have "some special expertise or insight to bring to bear on the issues facing the court" (at para. 5). The Court also referred to Lameman v. Canada (Attorney General), 2006 ABCA 43, which held that "[i]nterveners are rarely permitted to raise issues or arguments that have not been raised by the parties" (at para. 7).

Turning to the Métis Nation's application, the Court noted that the Originating Notice of Motion seeking judicial review of the Director's decision did not raise any constitutional issues, and no Notice of Constitutional Question had been filed. The Court also noted that no constitutional issues had been presented to Justice Thomas, nor were constitutional issues listed as those to be argued on appeal. The Court thus found that "it would be inappropriate to permit those issues to be raised now by the intervener in what the trial judge correctly termed an 'intensely personal issue'" (at para. 7).

In the end, the Court of Appeal was not persuaded that the Métis Nation met the test for intervener status, finding that it had no special interest in the proceedings, and that it would not

bring forward arguments that the parties would not otherwise make. The application to intervene was thus dismissed.

The Métis Regional Council was still listed as an appellant at the time of the Court of Appeal's decision to deny intervener status to the Métis Nation, but no mention was made of the Regional Council in the Court's decision. Given that the Regional Council has no standing at this point, and in fact may discontinue its appeal of that ruling, it is unlikely that the Court of Appeal considered the possible role of the Regional Council as a basis for denying intervener status to the Métis Nation. At this stage, it appears that there will be no collective Métis voice at the Court of Appeal when the review of the disinterment issue is heard on its merits. While it may be that Grace Johnston can present that perspective to the Court, it would have been beneficial to have a representative Métis organization before the Court to do so.

It may still remain open for the Métis Nation to initiate separate proceedings challenging the Director's failure to consult, but this might result in a further delay on the determination of the disinterment question. On the other hand, this is a result that Grace Johnston and the Métis Nation may not disagree with.