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Disinterment of RCMP Officer may proceed despite parents' wishes

By Jennifer Koshan

Cases Considered:

Johnston v. Alberta (Vital Statistics), 2008 ABCA 188

In a previous post, I reviewed a number of decisions of the Alberta courts relating to the disinterment of Constable Leo Johnston, one of four RCMP officers killed near Mayerthorpe, Alberta in March 2005. The *Johnston* case involves a public death, and an ensuing private dispute now playing itself out in a very public way.

By agreement of his immediate family (his wife and parents), Constable Johnston was buried in his hometown of Lac La Biche, Alberta shortly after his death. Approximately one year later his widow Kelly applied to have his place of burial changed to the special RCMP Cemetery in Saskatchewan after learning of the existence of this cemetery. Her application was governed by s. 11 of the *Cemeteries Act*, R.S.A. 2000, c. C-3, which provides as follows:

> s. 11 Disinterment of a body shall not take place until an application for disinterment in the prescribed form, together with the certificate of death, showing the cause of death, is given to the Director of Vital Statistics, who, in that Director's *discretion*, if that Director considers it *necessary or advisable*, may issue under that Director's signature a permit for disinterment on receipt of the prescribed fee (emphasis added).

In May 2007, the Director of Vital Statistics ("the Director") allowed the application and granted a disinterment permit. More than two months later, Kelly Johnston notified Constable Johnston's parents (Grace and Ronald Johnston) of the decision. Immediately after this event, Grace Johnston filed an objection with the Director. Key to her argument was the existence of a Policy establishing guidelines for the exercise of the Director's discretion to disinter, including an "Objection to Disinterment" guideline. This guideline sets out the requirements for valid objections, and empowers the Director to investigate an objection by obtaining evidence, evaluating the reasons for disinterment and the objection. The Policy also gives the Director the discretion to deny the disinterment, overrule the objection and allow the disinterment, request that the parties resolve the matter themselves, or refer the matter to court. Grace Johnston's objection was dealt with by the Assistant Director of Vital Statistics, who "expressed the hope that the parents and widow would resolve their differences" (*Johnston v. Alberta (Director of Vital Statistics)* 2007 ABQB 597 at para. 16).

Mrs. Johnston applied for judicial review, arguing that the Director's decision to disinter was unreasonable, and that the Director had not made a proper decision on the objection, thus invalidating the permit. Justice D.R.G. Thomas of the Alberta Court of Queen's Bench denied Mrs. Johnston's application, and his decision was upheld by the Court of Appeal.

For the Court of Appeal, Justices Keith Ritter, Frans Slatter and Paul Belzil applied the recent Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 to determine the appropriate standard of review. Picking up on the Supreme Court's approach in *Dunsmuir* that standard of review can be determined by looking to existing case law, the Court of Appeal noted that this case was a first – there were no precedents for reviewing a disinterment decision of the Director of Vital Statistics. Accordingly, the Court resorted to the contextual approach mandated by *Dunsmuir* and earlier decisions, ultimately finding that the correctness standard should apply.

This in itself is an interesting part of the decision, as the reviewing judge, Justice Thomas, found that the appropriate standard of review was reasonableness, noting that "the highly factual and discretionary nature of the Director's decision here makes the patent unreasonable approach a strong contender" (at para. 38). It is unlikely that the courts' different outcomes on standard of review in this case were dictated by *Dunsmuir*, where the patently unreasonable standard was jettisoned, and more likely that the case is simply another example of the malleability of the contextual approach in choosing the appropriate standard of review.

Applying the correctness standard, the Court of Appeal found the Director committed no error in failing to give legal effect to the "Objection to Disinterment" guideline. Here the Court rejected Grace Johnston's' argument that the words "*necessary or advisable*" in s. 11 of the *Cemeteries Act* called for some means of restricting the Director's discretion, such as a policy or guidelines. According to the Court,

> there is nothing in the underlying legislation that compels the formulation of policies in aid of determining what is necessary or advisable respecting the issue of disinterment. In these circumstances, the Policy does not have force of law and no legal rights and obligations arise from it (at para. 18).

The Court also rejected Grace Johnston's contention that the Director's actions were procedurally unfair because the Director failed to provide notice of the disinterment application on a timely basis. Again, because the Policy was the source of the alleged duty to provide notice, and it was found to have no legal effect, Grace Johnston was said to have no procedural rights. Further, the Policy was not publicly available or known to Grace Johnston before the judicial review application, so it did not create any reasonable expectation of notification.

The Court did allow that the Director could not make discretionary disinterment decisions in a vacuum. However, because the Policy provides that spouses have priority over parents in terms of resolving conflicts under the *Cemeteries Act*, the Court found that there was no obligation to give notice or to hear the parents. Only if there was a conflict between 2 persons with equivalent ranking – for example a legal and common law spouse – might the Director be required to

provide notice and receive input. This aspect of the case seems to contradict the Court's earlier reasons – why was the Policy given effect in terms of its priorities, but not when it came to the objection provisions? The Court is careful to refer to the Policy as "non-binding", but that does not seem to be the tenor of its decision. The only explanation in the Court of Appeal's reasons is that the Policy is also said to reflect common law priorities in terms of who is entitled to control human remains. Interestingly, the *General Regulation (Cemeteries Act)*, Alta. Reg. 249/1998, also sets out priorities for control of human remains in s. 11 – the spouse or adult interdependent partner has priority, then adult children, and then parents. These priorities are binding on owners of cemeteries rather than the Director, but they were found to be significant by Justice Thomas in assessing the reasonableness of the disinterment permit.

There is something deeply troubling about the fact that a woman married to a man for less than one year can obtain legal permission to have his remains dug up and moved without his parents being informed or consulted. Ultimately this is an issue that relates to the *Cemeteries Act* and *Regulation*, and the underlying common law priorities it follows. As a society, do we still believe that spousal relationships should be given this kind of priority?

In addition to the parents, another voice missing from the dispute was that of the Métis Nation. Constable Johnston was Métis, and the Métis Nation of Alberta Association Zone One Regional Council sought standing on the judicial review application. As noted in my previous post, Justice Thomas found that it had no standing to be heard on the application. While the Métis Regional Council appealed this decision, it discontinued its appeal before the Court of Appeal hearing. The Métis Nation of Alberta, a different entity than the Regional Council, was denied leave to intervene in the appeal. It would have argued that disinterment is a practice contrary to Métis custom, and that the Director breached its duty to consult with the Métis Nation before issuing the disinterment permit.

Media coverage of this case indicated that Grace Johnston might seek leave to appeal the Court of Appeal decision to the Supreme Court of Canada. One would expect a stay application of the disinterment permit in the meantime. But if the legislation itself is ultimately the problem, it may be that the application for leave to appeal simply prolongs the inevitable at this stage.