

Court of Queen's Bench of Alberta

Citation: Johnston v. Alberta (Director of Vital Statistics), 2007 ABQB 597

Date: 20071015
Docket: 0703 08834
Registry: Edmonton

Between:

**Grace Johnston and Metis Nation of Alberta
Association Zone One Regional Council**

Applicants

- and -

**Director of Vital Statistics of the Province of Alberta, Park Memorial Ltd.,
The Town of Lac La Biche and Kelly Barsness (also known as Kelly Johnston)**

Respondents

**Reasons for Judgment
of the
Honourable Mr. Justice D.R.G. Thomas**

Introduction.	<u>Page: 3</u>
Appearances.	<u>Page: 3</u>
Standing.	<u>Page: 3</u>
Background.	<u>Page: 4</u>
Law and Policy.	<u>Page: 5</u>
Issues.	<u>Page: 7</u>
Analysis.	<u>Page: 7</u>

(1)	What is the standard of review on this application? Is the Director’s decision to issue the Permit invalid?.....	Page: 7
	Characterizing the Decision.	Page: 8
	Factor No. 1: No Privative Clause.	Page: 9
	Factor No. 2: Expertise of the Director.	Page: 9
	Factor No. 3 - Purpose of the <i>Act</i> and the <i>Regulation</i>	Page: 9
	Factor No. 4: Nature of Decision.	Page: 11
	Selecting the Proper Standard of Review.	Page: 11
	Statement of the Reasonableness Test.	Page: 11
	Application of the Standard of Review.	Page: 11
(2)	What is the legal effect, if any, of the words “subject to the order of a court” in s. 11(2) of the <i>Regulation</i> ?.....	Page: 12
(3)	What is the legal effect, if any, of the Director’s policy with respect to objections to disinterment of human remains?.....	Page: 12
	Disposition.	Page: 13

Introduction

[1] The application for an injunction and the quashing of a disinterment permit granted by the Director under the provisions of the *Cemeteries Act*, (“the *Act*”) is dismissed.

Appearances

[2] The Applicants are Grace Johnston, the mother of the deceased Lionide Nicholas Johnston (“Leo Johnston”) and the Metis Nation of Alberta Association Zone One Regional Council (“the Association”). The active Respondents on this application are Kelly Johnston, widow of the deceased Leo Johnston and the Director of Vital Statistics of the Province of Alberta (“the Director”). The Town of Lac La Biche (“the Town”) and the Royal Canadian Mounted Police (“RCMP”) appeared through counsel but took no active position on the application. They spoke to some proposed conditions for inclusion in whatever order I might grant. Park Memorial Ltd. (“Park Memorial”) did not appear.

Standing

[3] At the outset of the hearing I raised the issue of the standing of the Association on this application. The Originating Notice of Motion issued on July 10, 2007 names the Association as an Applicant and an Affidavit was made and filed on behalf of that organization.

[4] Standing in respect to the Association was not addressed in any of the written briefs. Upon the issue being raised, counsel for the Applicants argued that the Association did have a cultural and religious interest in the matter. Counsel was not able to point to any interest which could be considered a legal interest. The question of public interest standing was not addressed.

[5] I am satisfied that Grace Johnston, the mother of the deceased Leo Johnston, would have standing having regard to the reference to parents of a deceased person in s. 11 of the *Cemeteries Act General Regulation*, Alta. Reg. 249/98 (“the *Regulation*”). It was not necessary to include the Association as an Applicant to bring this intensely personal issue before the Court. I am not satisfied on the evidence presented to me that the Association has established standing on either any common-law test which may be applicable or on any public interest basis.

Background

[6] The facts are not contentious and are presented in chronological order as follows.

[7] Leo Johnston was killed while serving as a member of the RCMP on March 3, 2005 near Mayerthorpe, Alberta. Leo and Kelly Johnston had lived together since June 2001 and were married on November 13, 2004.

[8] Shortly after his death the immediate family of Leo Johnston, i.e. the parents and the widow, agreed that his remains would be interred at the Willow Park Cemetery in Lac La Biche, Alberta and the burial took place on March 11, 2005.

[9] Kelly Johnston is the Administrator of the Estate of Leo Johnston.

[10] Approximately two months after the burial Kelly Johnston became aware that there was a special cemetery for members of the RCMP at Depot, Saskatchewan. She decided to move the remains of Leo Johnston to that place. She explained her delay in carrying out her intention as being related to a concern for the feelings of her parents-in-law and also as a result of the illness and recent death of her own father.

[11] Kelly Johnston made arrangements for the disinterment and reinterment of the remains of Leo Johnston at the RCMP Cemetery in Depot. On April 27, 2007 she completed a “disinter/reinter permit application” which was forwarded to the Director. As part of the decision on the application, the Director also had to consider other documents presented to her, namely the Alberta Medical Examiner’s Medical Certificate of Death and the Registration of Death for Leo Johnston (“the Application”).

[12] On May 1, 2007 the Director made a decision on the Application and issued the disinter/reinter permit (“the Permit”) which was then transmitted to Park Memorial.

[13] On July 6, 2007 Kelly Johnston advised Grace Johnston that the remains of Leo Johnston would be disinterred from the Willow Park Cemetery and reintered in the RCMP Cemetery at Depot.

[14] On or about July 6, 2007 Grace Johnston and her husband, Ronald Johnston, forwarded a three page handwritten letter to the Director in which they objected to the disinterment of their son’s remains.

[15] This proceeding was commenced by Originating Notice of Motion on July 10, 2007.

[16] On July 12, 2007 the Assistant Director of Vital Statistics wrote to Grace Johnston *et al.* explaining the role of the Director and noting that the Town had issued a stay (which was not entirely correct) and expressed the hope that the parents and widow would resolve their differences.

[17] The Town has confirmed that the requirements of the *Act* and the *Regulation* have been complied with and that the disinterment of the remains of Leo Johnston can now proceed. The Court was also advised by counsel for the Town that no stay in relation to disinterment exists at this time.

Law and Policy

[18] Section 11 of the *Act* reads:

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.

[19] This provision is mirrored in s. 39 of the *Regulation* which reads:

39 No person shall disinter or remove a dead human body from a cemetery or mausoleum for any purpose unless that person first obtains a permit for disinterment issued by the Director of Vital Statistics and delivers it to the owner of the cemetery.

[20] Section 11 of the *Regulation* deals with disputes over human remains and reads, in part, as follows:

Who may control disposition

11

...

(2) Where the owner of a cemetery, crematory or mausoleum or a columbarium operator is faced with a dispute among a deceased's family or others concerning who has the right to control the disposition of the deceased's remains, the owner of the cemetery, crematory or mausoleum or the columbarium operator shall, **subject to the order of a court**, recognize a person's right to control the disposition of those remains in the following **order of priority**:

- (a) the personal representative designated in the will of the deceased;
- (b) the **spouse** or adult interdependent partner of the deceased if the spouse or adult interdependent partner was living with the deceased at the time of death;
- _____ (c) an adult child of the deceased;
- (d) a **parent** of the deceased;

...

(Highlighting added)

[21] A policy document relevant to this litigation is found in the original Return filed by the Director and reads:

Objection to disinterment

Policy

To prevent a body from being disinterred, an objection **must**:

- Be in writing.
- State the reason for the objection.
- Contain the objector's name, address and relationship to the deceased.
- Be sent to Vital Statistics.

Acknowledge an objection with the client; confirm its receipt and that it will be held on file.

An objection may only be removed/overruled by:

- The person who made the objection.
- A court order.
- Someone with a higher priority than the person who registered the objection (see the priority list of eligible applicants) with the Director of Vital Statistics' approval after an examination of discovery has been conducted.

Examination of Discovery

When investigating an objection to the issuance of a disinter/reinter permit, the Director of Vital Statistics may:

- request confirmation/evidence regarding the disinter applicant and objector's identity and/or relationship to the deceased.
- evaluate the reason(s) for disinterring the deceased.
- evaluate the reason(s) for objection.
- request the objector and disinter applicant resolve the matter between themselves.
- deny the disinterment of the deceased.
- over rule the objection and allow the disinterment.
- request a court order be obtained.

Each case will vary and the decision is at the discretion of the Director. Always acknowledge the outcome with the parties involved.

Issues

[22] The following issues arise:

- (1) **What is the standard of review on this application? Is the Director's decision to issue the Permit invalid?**
- (2) **What is the legal effect, if any, of the words "subject to the order of a court" in s. 11(2) of the *Regulation*.**

- (3) **What is the legal effect, if any, of the Director's policy with respect to objections to disinterment of human remains?**

Analysis

- (1) **What is the standard of review on this application? Is the Director's decision to issue the Permit invalid?**

[23] Counsel for the Director referred to my decision in *Vo v. Alberta (Workers' Compensation Board Appeals Commission)* 2006 Carswell Alta. 1726, 2006 ABQB 899, 68 Alta LR (4th) 261, [2007] AWLD 661, [2007] AWLD 660, 52 Admin LR (4th) 138 at para. 45, which provides a summary of the approach to determining the appropriate standard of review on this type of application:

... the pragmatic and functional approach ... requires, first, that a reviewing judge characterize the question as law, mixed law and fact, or fact and then determine whether the matter may be considered through the statutory right of appeal or judicial review process. Once the reviewing judge has characterized the question, then the Court will proceed to apply the other parts of the pragmatic and functional test to determine the appropriate standard of review. Pursuant to the direction of the Alberta Court of Appeal in *Davick* the application of the pragmatic and functional test of the Appeals Commission should be applied in the following sequence:

- a. characterize the question;
- b. examine the privative clause or statutory appeal provision;
- c. consider the expertise of the Appeals Commission;
- d. examine the purpose of the statute and the particular provision;
- e. select the standard of review; and
- f. apply the standard of review.

Characterizing the Decision

[24] The language of s. 11 of the *Act* makes it clear that the Director's decision on whether to issue a disinterment permit is a discretionary one. However, such discretionary decisions by a statutory officer must still be subjected to the functional and pragmatic test eventhough the wording of the governing statute reveals a clear intent that a high degree of deference should be paid to an official, such as the Director, who makes a discretionary decision to issue or not issue a permit such as the one under examination here.

[25] Section 11 of the *Act* requires an application in the prescribed form, along with some official documentation showing the cause of death and a prescribed fee. In this case, some of these requirements involve purely factual considerations namely, the fact that a death has occurred (as shown by the Death Certificate) and the cause of death (as shown by the Certificate from the Medical Examiner). In some applications there may be other factual matters for the Director to consider such as issues related to public health, e.g. a plague, the existence of which could go to the advisability of disinterring human remains. No such other factual considerations are present here.

[26] The matters which the Director had to consider in the context of the wording of s. 11 of the *Act* and in the making of her decision to issue or not issue a permit, suggests a mixture of both factual and legal considerations. The Director had to have a factual basis for making the decision and could then apply her discretionary powers granted by the *Act* in respect to those facts to reach a decision. While this is an instance of a decision involving a question of mixed fact and law, it is primarily a factual determination. However, a judicial review application is the appropriate method for reviewing this sort of decision making process because there is no clear and obvious statutory appeal provided for in the *Act*.

[27] Having characterized the nature of the Director's decision making process, I now turn to review the four factors set out in *Vo, supra*.

Factor No. 1: No Privative Clause

[28] The *Act* has no privative clause but that is not determinative. See *Canada (Director of Investigation and Research) v. Southam*, 1 S.C.R. 748, [1996] S.C.J. No. 116 at paras. 28 - 30. The absence of a privative clause tends to suggest that less deference is due to the decisions of the Director made under this *Act*.

Factor No. 2: Expertise of the Director

[29] The Director is the sole licensing authority under the *Act* and, in particular, with respect to disinterments in Alberta. The Director should be presumed to have some expertise related to that function. Further, I agree with the observations of Veit, J. in *Polack v. Muccelli*, [1993]

A.J. 357, which noted that decisions under this legislation are for the Director to make, not the Court.

[30] On the expertise factor, I conclude that some level of deference is suggested in respect to the permitting decisions of the Director.

Factor No. 3 - Purpose of the *Act* and the *Regulation*

[31] The purposes of the *Act* are to, *inter alia*, ensure the proper establishment and operation of cemeteries, crematory, etc. and provide for the respectful and appropriate disposal of human remains in those places.

[32] To achieve these purposes, the *Act* requires that:

- all cemeteries be licensed [s. 3] and be kept in good repair [s. 7];
- burial only take place in a cemetery [s. 5], and in a decent manner [s. 10];
- cemeteries, mausolea and columbaria only be established by religious organizations or municipalities [s. 3];
- alternate forms of disposition (e.g. cremation) only take place in licensed facilities [ss. 6, 26, 27];
- cemeteries are exempt from seizure and land titles encumbrances [ss. 14, 15] and are restricted in how they may be sold [s. 22]; and
- there are also provisions for chapels, vaults, the performance of religious rites, the burial of indigent people, War Graves, perpetual care funds, pre-arranged cemetery plots.

The Director, appointed by the Minister, is empowered to carry out the licensing/permitting functions assigned to the Director. Clearly, the Director has an important role in carrying out the objectives of the *Act*.

[33] Having specific reference to the wording of s. 11 of the *Act*, the Director is given the power to make decisions in respect to disinterment. That is a clear expression of legislative intent.

[34] To the extent s. 11 of the *Regulation* is relevant, the purpose of that subordinate legislation is to provide a dispute resolution mechanism. It also sets out an order of priority to be observed in resolving disputes. Its purpose appears to relate more to the initial disposition of human remains rather than the disinterment of a body. It appears that the use of the words “a

court” as referred to in that provision suggests that our institution should only become involved in resolving disputes as a last resort.

[35] In looking at the purpose of the overall statutory scheme represented by the *Act* and *Regulations* on the subject of a disinterment, the wording of the legislation suggests some considerable degree of deference in respect to decisions which the Director may be called upon to make.

Factor No. 4: Nature of Decision

[36] I have already determined that the decision which the Director was called upon to make on the Application resulting in the issuance of the Permit involved a mixture of factual and legal considerations. More specifically, the clear legislative intent arising from the words used indicates that the decision is a discretionary one and the discretionary nature of that decision suggests a high level of deference is due to the Director when carrying out that statutory function.

Selecting the Proper Standard of Review

[37] Having set out my conclusions on deference on the four factors listed above I now turn to select the appropriate standard of review in this case. In terms of the standards available, the choices are correctness, reasonableness and patent unreasonableness.

[38] In my view, taking into consideration my conclusions on the factors just examined, the appropriate standard of review is one of reasonableness, although the highly factual and discretionary nature of the Director’s decision here makes the patent unreasonable approach a strong contender. During oral argument, the Applicants appeared to shift from suggesting a review on the reasonableness standard to an assertion of the correctness approach. However, no convincing arguments or analysis were presented to me as to why that would be appropriate.

[39] In the end result, I select the reasonableness test as the applicable standard for the review of the Director’s decision to issue the Permit.

Statement of the Reasonableness Test

[40] In order to set aside the Director’s decision to issue the Permit, the Applicant must satisfy me that there is no line of analysis that could reasonably have led the Director, based on the factual information placed before her, to reach a decision to issue the Permit.

Application of the Standard of Review

[41] It has not been shown to my satisfaction that the Director was unreasonable in deciding to issue the Permit. Kelly Johnston, in her capacity as the spouse of the deceased and the Administrator of his Estate, was eligible to apply for the Permit and had priority to apply under s. 11 of the *Regulation*. The application presented to the Director for decision was in the prescribed form. It is a simple application form and it was a complete application in the sense that the Director also had available for consideration the Death Certificate and the Certificate from the Medical Examiner. There is nothing unusual on the face of the application or in any of the supporting materials. In the end, the Director made 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. This decision by the Director was not unreasonable.

[42] In closing on this portion of my decision, I note that during the course of argument an assertion was made as to a lack of fairness in the process followed by the Director. However, no procedural errors amounting to such a lack of fairness have been made out on this application.

(2) What is the legal effect, if any, of the words “subject to the order of a court” in s. 11(2) of the *Regulation*?

[43] I turn now to deal with the language in s. 11(2), namely the words “subject to the order of a court”. Clearly this is not an express appeal provision, but was argued as providing some sort of implied right of statutory appeal. In the *Revised Statutes of Alberta* rights of appeal to this Court and the Court of Appeal are typically found in the parent statute, not in a subordinate regulation. In my view, the wording here does not create an implied statutory right of appeal. Rather, I agree with the submission of the Director’s counsel that the wording may confirm some sort of overriding power on a court in certain circumstances. If that is what it does, I see no such special circumstance present here which would cause me to intervene to substitute my decision for that of the Director. Even if it does operate to create some sort of statutory appeal right, such an appeal would engage the standard of review analysis prescribed by the Supreme Court of Canada in *Southam, supra*. Therefore, if I am wrong on my conclusion as to the true effect of s. 11 of the *Regulation*, I have already concluded on the standard of review analysis that the decision of the Director to issue the Permit was not unreasonable.

(3) What is the legal effect, if any, of the Director’s policy with respect to objections to disinterment of human remains?

[44] The Applicants assert that the Director failed to deal with Grace and Ronald Johnston’s objection in respect to the disinterment of their son’s remains and that this alleged breach of policy constitutes some sort of legal error.

[45] The Director submits that the policy has no legal effect and that the Court should avoid remaking policy.

[46] It is doubtful that the policy in respect to objections was ever meant to be applicable in a situation where the disinterment permit had already issued. Rather, the policy seems geared to situations where the initial burial of human remains has not yet taken place, some sort of disagreement has arisen between members of the family and an owner of the cemetery requires resolution of the dispute. Here the objection to disinterment made by the parents of the deceased Leo Johnston occurred after the Permit had issued and therefore is completely irrelevant to the challenge to the decision to issue that Permit.

[47] In the result, the policy on objections formulated by the Director has no legal effect in the circumstances of this case. The lack of a decision on the objection by the Director does not create any legal basis for requiring the Director to take some sort of action, nor does it invalidate the Permit.

Disposition

[48] The judicial review application is dismissed and costs are awarded in favour of Kelly Johnston against both Applicants. No other costs are awarded.

[49] Counsel for the Town and the RCMP spoke to a form of order. I have reviewed their request and the proposed conditions. In my view, the relief suggested in their draft order is not appropriately granted on a judicial review application. The conditions, as proposed, could affect many persons who are not parties to this Application and who are not before the Court on this motion. For those reasons I am not prepared to make an order on such terms. My Order shall be limited to dismissing the judicial review application and the awarding of costs.

Heard on the 18th day of September, 2007.

Dated at the City of Edmonton, Alberta this 15th day of October, 2007.

D.R.G. Thomas
J.C.Q.B.A.

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