

(Civil Division)

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-17-120468-221

KAHENTINETHA, domiciled and residing at Kahnawake, P.O Box 991

KARENATHA, domiciled and residing at Kahnawake, P.O Box 991

KARAKWINE, domiciled and residing at Kahnawake, P.O Box 991

KWETIIO, domiciled and residing at Kahnawake, P.O Box 991

OTSITSATAKEN, domiciled and residing at Kahnawake, P.O Box 991

KARONHIATE, domiciled and residing at Kahnawake, P.O Box 991

Plaintiffs

vs

SOCIÉTÉ QUÉBÉCOISE DES INFRASTRUCTURES, legal person having an establishment at 445, Saint-Gabriel Street, Montreal, Quebec H2Y 3A2

ROYAL VICTORIA HOSPITAL, legal person duly constituted, having its head office at 337-8300 Decarie Boulevard, City of Montreal, Province of Quebec, H4P 2P5

MCGILL UNIVERSITY HEALTH CENTRE, legal person duly constituted, having its head office at 610-8300 Decarie Boulevard, City of Montreal, Province of Quebec, H4P 2P5

MCGILL UNIVERSITY, legal person having an establishment at James Administrative Building Room 506, located at 845,

Sherbrooke Street W. Montreal, Quebec H3A
0G4

VILLE DE MONTRÉAL, legal person having
an establishment at 800, De Maisonneuve
Blvd E., Montreal, Quebec H2L 4L8

ATTORNEY GENERAL OF CANADA,
representing the Federal Government of
Canada, having its Quebec regional office at
the Department of Justice Canada, Guy-
Favreau Complex, East Tower, 9th Floor, 200
René-Levesque Boulevard West, Montreal,
Quebec, H2Z 1X4

-and-

ATTORNEY GENERAL OF QUEBEC
representing the Provincial Government of
Quebec, having its office at 1, rue Notre-
Dame Est, bureau 8.00, Montreal, Quebec,
H2Y 1B6

Defendants

**INDEPENDENT SPECIAL
INTERLOCUTOR FOR MISSING
CHILDREN AND UNMARKED GRAVES
AND BURIAL SITES ASSOCIATED WITH
INDIAN RESIDENTIAL SCHOOLS**

Intervenor

**MODIFIED APPLICATION OF AUGUST 28th, 2023, FOR DECLARATORY RELIEF
AND TO
OBTAIN A SAFEGUARD ORDER**

(s. 158(5), s 49, s 510 C.C.P.)

TO A JUDGE OF THE SUPERIOR COURT OF QUÉBEC, SITTING IN THE DISTRICT OF MONTREAL, THE PLAINTIFFS ALLEGE THE FOLLOWING:

Introduction and Overview

1. The Plaintiffs are Kanien'keha:ka elders who follow their traditional duties as Kahnistensera (mothers/life-givers), caretakers of their ancestral lands and the children of past, present, and future generations in accordance with the Kaianerehkowa (Great Peace), the Pre-Columbian constitution of the Rotinonshionni (Iroquois) Confederacy.
2. The Plaintiffs filed an application for an interlocutory and permanent injunction with the Quebec Superior Court Montreal District, on March 25th, 2022, and amended the application on September 8th, 2022 (**Exhibit MM-1**).
3. The purpose of the application was to stop the Defendants' excavation work related to the New Vic Project on the site of the former Royal Victoria Hospital in Montreal, so that a search for unmarked burials of Indigenous children who were victims of medical experimentation at the hospital, as alleged by first-hand witnesses and archival evidence, as well as the pre-colonial artifacts and/or remains belonging to the Plaintiff's ancestors, could be undertaken.
4. On October 27th, 2022, Justice Gregory Moore granted a Safeguard Order halting excavation on the former Royal Victoria Hospital site until all parties came to an agreement, in the spirit of reconciliation, on the understanding that an Indigenous-led archaeological plan must be used to search the lands before development work proceeds (**Exhibit MM-2**).
5. On April 20th, 2023, a Settlement Agreement signed by all parties was homologated by the Quebec Superior Court and granted legal status, following several months of negotiations and a series of Judicial Settlement Conferences (**Exhibit MM-3**).
6. The Homologated Settlement Agreement provided that a Panel of three archaeologists jointly selected by the Plaintiffs, the Société Québécoise des Infrastructures (hereafter, "**SQI**") and McGill University (hereafter, "**McGill**") would make recommendations on the techniques to be used to search the site for unmarked burials, and that the recommendations of the Panel would be binding.
7. However, in the months that followed the homologation of the Settlement Agreement, the Plaintiffs have faced many unforeseen challenges and hurdles in implementing the Settlement Agreement.

8. In a Case Management Conference on June 29th, 2023, the Plaintiffs voiced a number of cultural, technical, and safety concerns. This included the lack of consistent and transparent communication from the Defendants, the role of Indigenous knowledge holders in the investigation, deficient security on the site, the extension of the Panel's mandate, and the need for forensic care in treating evidence resulting from the investigation. Justice Moore suggested three options to the Plaintiffs: 1) Extending the contracts of the Panel that was set up pursuant to Rectified Settlement Agreement; 2) Convening a further judicial settlement conference; and 3) Litigation (**Exhibit MM-4**).
9. On June 29th, 2023, the Plaintiffs signaled via email to all parties their decision to negotiate out-of-court an extension of the mandate of the Panel instead of using court resources for a judicial settlement conference or litigation (**Exhibit MM-5**). As detailed below, the Defendants waited one month, on July 28th, 2023, to formulate a response to these concerns, which amounted to rejecting all of the Plaintiffs' requests (**Exhibit MM-6**).
10. While the Plaintiffs' offer to negotiate solutions to address legal "gray areas" in the Settlement Agreement and problems that arose in implementing the Agreement was dismissed by the Defendants, said problems worsened to the point of compromising the integrity of the whole investigation.
11. As detailed below, the Defendants explicitly breached both the spirit and the letter of the Settlement Agreement, refusing to implement the Panel's recommendations and unilaterally terminating the Panel's mandate on August 3rd, 2023, in an attempt to control the investigation (**Exhibit MM-7**).
12. Following the excavation being conducted in response to the Historic Human Remains Detection Dogs' (hereafter, "HHRDD") discoveries of potential human remains between July 10th and 12th, 2023, contractors were observed improperly leaving soil unprotected and exposed to elements, as well as their concerning treatment of artifacts discovered on the site, such as a young woman's dress and children's boots from the first half of the 20th century (**Exhibits MM-55 and MM-56**). This led to a recommendation on July 26th, 2023, to add a forensic expert to the Panel to oversee chain of custody matters (**Exhibits MM-8 and MM-9**). The Defendants have so far refused to implement the Panel's recommendation (**Exhibit MM-8**).
13. Moreover, the Defendants' disregard for the Plaintiffs' concerns regarding security led to a shocking, racially charged assault of Mohawk Elders and Cultural Monitors on July 25th, 2023, by an individual identifying herself as the chief of security for a firm contracted by the SQI known as Commissionaires (**Exhibit MM-10**). The

trauma caused by this incident and the SQI's refusal to hire Indigenous security guards to ensure the safety of Cultural Monitors and Elders on the site (**Exhibit MM-11**) caused archaeological work to stop indefinitely in the zone where HHRDD detected the scent of human remains.

14. In the wake of the attack on the Cultural Monitors and the SQI's refusal to implement the recommendations of the jointly-selected Panel, Panel member Justine Bourguignon-Tétrault tendered her resignation via email on August 3rd, 2023 (**Exhibit MM-12**). Instead of responding to this development with a collaborative approach, SQI immediately disbanded the Panel despite knowing this was strongly opposed by the Kahnistensera (**Exhibit MM-7**).
15. The Panel's mandate was terminated before several other recommendations were implemented regarding the report on the Ground Penetrating Radar (hereafter, "**GPR**") scan which was performed on July 26th, 2023, by GeoScan in the "Priority Zone" where the Defendants are pressing to start construction work for the New Vic Project (**Exhibit MM-13**). The SQI refused (**Exhibit MM-14**) the Panel's request to review the Report and provide recommendations, and the Panel's recommendation to share the data with members of the Canadian Archaeological Association (hereafter, "**CAA**") for peer review (**Exhibit MM-15, p.11**). The SQI and McGill set out to unilaterally interpret the data and minimize anomalies without proper qualifications to do so, sharing faulty information with the public in newsletters. These newsletters were published on August 3, 2023, without the knowledge of the Plaintiffs. This was the day after GeoScan shared their report with the Parties (**ExhibitS MM-16 and MM-17**).
16. On August 4th, 2023, the SQI sent an email (**Exhibit MM-17**) to the Plaintiffs indicating that an application for an archaeological permit to excavate nine potential unmarked burials detected by GPR (**Exhibit MM-18**), excluding a larger number of "unknown" anomalies which GeoScan's report deemed to possibly be burials of children or without coffins (**Exhibit MM-13, p.8**). The Kahnistensera replied the same day, voicing their opposition to this unilateral decision, and asking the SQI to "rescind your email to the Panelists terminating their mandate, and rescind your application for the permit until we can discuss these issues in depth" (**Exhibit MM-20**). The SQI did not respond to this email, and the Plaintiffs had to write to the Minister of Culture and Communications (hereafter "**MCC**") to learn that the permit application had already been sent by the SQI (**Exhibit MM-21**).

Articles of Homologated Settlement Agreement Breached by Defendants

17. As detailed in the attached affidavit of Kwetiio dated August 27, 2023, the Defendants have breached the following provisions of the Homologated Settlement Agreement:

- a) Articles 1-4: The agreement to conduct archival and testimonial work, having failed to allow this work to be completed before terminating the panel, and facilitate access to records necessary to complete Know History's search;
- b) Article 9: Facilitating the presence of Kanien'keha:ka Kahnistensera Cultural Monitors at the site by failing to address safety and security concerns, ultimately leading to the assault of July 25, 2023;
- c) Article 11: Honouring the mandated task of the Panel by unilaterally terminating their mandate on August 3, 2023;
- d) Article 13: Honouring the recommendations of the Panel by unilaterally deciding which recommendations to implement; and
- e) Article 17: Seeking the Panel's input in the event of an unexpected discovery, which is impossible to achieve if the Panel has been disbanded.

18. Further, and as detailed in the attached affidavit of Kwetiio dated August 27, 2023, the Defendants have breached the spirit of the Homologated Settlement Agreement in the following ways:

- a) Not honouring the agreement in the spirit of reconciliation due to continued denialism;
- b) Not collaborating with the Plaintiffs in disclosing contracts with the Panel and service providers, and no collaboration before applying for permits for excavation;
- c) Misleading or delaying communication with the Plaintiffs in discussing an extension to the Panel's mandate before unilaterally terminating the mandate, as well as assuring the Plaintiffs no security issues existed in the leadup to the July 25 assault;
- d) Unilaterally making strategic logistical decisions regarding the implementation of the Panel's recommendations such as conducting GPR searches in bad weather, denying requests for extension by the Panel for mapping reports, disregarding a large number of "unexpected discoveries" resulting from the HHRDD and GPR reports;
- e) Refusing to communicate with the Plaintiffs following the receipt of results from the GPR scan. Instead, McGill and SQI immediately selected favourable lines from the report and issued press releases to spin the results in their favour; and

- f) Breaching the fundamental tenet of the Agreement that the archaeological search would be overseen by an impartial Panel of experts.

Serious and Irreparable Prejudice

19. By breaching both the spirit and the letter of the Settlement Agreement, the Defendants' behavior is destroying the credibility of the investigation, thus defeating the purpose of the proceedings. In doing so, the Defendants are causing serious and irreparable prejudice to all investigations and searches for unmarked graves of Indigenous children in this instance and across Canada.
20. The Defendants' ignorance of the credibility and the very necessity of the investigation detailed above has caused Indigenous people to question whether the commitment of Canadian institutions and society to reconciliation is a public relations message, or if they are partners committed to action.
21. These actions by the Defendants are causing extreme trauma amongst the Kanien'keha:ka Kahnistensera and the greater Indigenous community, especially the survivors, family members, and victims of these past crimes. The Defendants represent colonial institutions that the Kanien'keha:ka associate with these injustices. Cultural sensitivity is essential.
22. No sum of money or material reparation could compensate for the destruction of human remains and forensic evidence related to the burials of Indigenous children, which the families of deceased victims of medical experiments at the Royal Victoria Hospital may wish to rely on to obtain justice in criminal courts, and to obtain closure to their horrific experiences.

Emergency Treatment

23. The behavior of the Defendants provides multiple examples of the credibility of this investigation being jeopardized. Their actions are reducing the role of Indigenous people to performing ceremonies within a space akin to an open-air prison where insensitive security guards patrol, effectively compromising their safety.
24. The Defendants have been notified countless times by the Plaintiffs of their various concerns regarding technical, safety, and cultural competency issues, and the Defendants have offered either empty reassurance or blatant dismissal.
25. The fact that the permit application for excavating nine of the targets detected by GeoScan was filed two days after having received its report, and without the

consent of the Plaintiffs nor the advice of qualified archaeologists, proves that the Defendants are preparing to excavate the zone in the short term without following any of the related provisions in the Settlement Agreement.

26. Once shovels hit the ground, or evidence is mishandled, the investigation is tainted. The Plaintiffs established in the October 27th injunction decision that they face serious and irreparable harm if this occurs without following archaeological best practices.

26A. On September 7, 2023, we submitted a letter to the Court (Exhibit MM-00) emphasizing the importance of bringing this motion before the Honourable Court before excavation on the site proceeds any further. The letter establishes that a hearing is urgent because of the irreversable nature of the excavation planned on site, which is proceeding without the Panel's ongoing involvement.

Remedies Sought

27. The Plaintiffs respectfully submit that the Settlement Agreement homologated by the Quebec Superior Court must be enforced with explicit orders that compel the Defendants to respect the wording and spirit of the Agreement.

28. Specific orders sought by the Plaintiffs include:

- a. For the Defendants to release all files that may assist the search for unmarked graves at the former Royal Victoria Hospital and Allen Memorial Institute site and allow families to know the truth.
- b. That the contracts of the Panel be extended until the site has been investigated properly according to the professional standards and expertise of Panel members, and that they are allowed to make recommendations at all times to adjust to the reality of the investigation.
- c. That the Defendants must respect and implement all the recommendations of the Panel.
- d. That the Defendants must cease all work in areas under investigation, so as to not tamper with the evidence or risk destroying human remains.
- e. That a third member of the Panel be selected to implement forensic precautions that will preserve the evidence and artifacts uncovered on the site and work with TD security to implement proper security protocols in archaeological zones. If possible, this member should be Indigenous.

f. Such other orders as this Honourable Court may make.

29. These orders are to ensure the safety of the Plaintiffs and Indigenous Cultural Monitors who must be protected from aggression, assault, and intimidation from the Defendants and their employees, in order to accomplish their traditional duties in accordance with their ancestral law.

Exemption to Provide a Suretyship

30. Considering the standing of the Plaintiffs and the nature of the issues which we respectfully submit are in the public interest, the Plaintiffs request to be exempted from the suretyship provided in s.511 C.C.P.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT this Application as a safeguard order, and on a provisional and interlocutory basis.

(.....)

ORDER the Defendants to stop filing archaeological permit applications and contracts with service providers without review and approval by the Plaintiffs;

ORDER the Defendants to collaborate with the Plaintiffs regarding all appointments and contracts related to the searches;

ORDER the Defendants to halt all excavation, renovation, and/or construction work in zones under archaeological investigation until said investigations are completed;

ORDER the appointment of a forensic expert, Indigenous if possible, who has experience identifying and protecting unmarked graves, to be appointed as a third member of the Panel, and as a replacement for the position vacated by Mrs. Justine Bourguignon-Tétreault;

ORDER the Defendants to comply with all the recommendations made by the Panel at any time until the completion of the investigation;

EXTEND the involvement of the Panel until the completion of the investigation of all zones on the Allan Memorial and Royal Victoria Hospital grounds as outlined in their Final Mapping Report;

ORDER the Defendants to release all files requested by *Know History* immediately as an issue of public interest, with appropriate redactions to protect patient confidentiality;

ORDER the Defendants to include the Plaintiffs in all communications with third parties, including service providers, as it pertains to the investigation of the site;

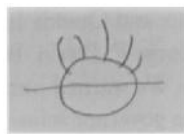
ORDER the Defendants to hire TD Security and ensure that they are the only security firm that Cultural Monitors report to and interact with, and the only security firm present in active archaeological zones at all times;

ORDER the Defendants and their staff not to disturb, harass, or intercept Cultural Monitors and the Plaintiffs on the site. The Defendants and their staff should not approach the Plaintiffs and Cultural Monitors closer than 20 meters. The Defendants can communicate messages to Indigenous people present on the site by addressing them to TD Security.

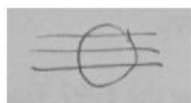
EXEMPT the Plaintiffs from providing a suretyship; and

MAKE ANY OTHER ORDER the Honourable Court considers appropriate;

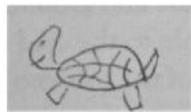
Kahnawake, August 26th, 2023



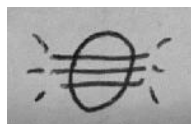
KAHENTINETHA
Plaintiff



KARENNATHA
Plaintiff



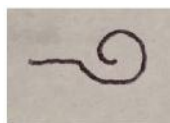
KARAKWINE
Plaintiff



KWETIIO
Plaintiff



OTSITSATAKEN
Plaintiff



KARONHIATE
Plaintiff

P.O. Box 991, Kahnawake, Quebec, J0L 1B0
Email : kahnistensera@riseup.net

No: 500-17-120468-221

SUPERIOR COURT (CIVIL DIVISION)
DISTRICT OF MONTREAL

KAHENTINETHA,
KARENNATHA,
KARAKWINE,
KWETIIO,
OTSITSATAKEN,
KARONHIATE,
Plaintiffs

vs.

SOCIÉTÉ QUÉBÉCOISE DES INFRASTRUCTURES,
ROYAL VICTORIA HOSPITAL,
McGILL UNIVERSITY HEALTH CENTRE,
McGILL UNIVERSITY,
VILLE DE MONTRÉAL,
ATTORNEY GENERAL OF CANADA
-and-
ATTORNEY GENERAL OF QUEBEC
Defendants

-and-

INDEPENDENT SPECIAL INTERLOCUTOR FOR MISSING CHILDREN AND
UNMARKED GRAVES AND BURIAL SITES ASSOCIATED WITH INDIAN
RESIDENTIAL SCHOOLS
Intervenor

APPLICATION OF AUGUST 28th, 2023, FOR DECLARATORY RELIEF AND TO
OBTAIN A SAFEGUARD ORDER

COPY FOR NOTIFICATION
