\C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

Nº.: 500-17-120468-221

S U P É R I O R C O U R T

(Civil Division)

KAHENTINETHA

KARENNATHA

KARAKWINE

KWETTIIO

OTSITSATAKEN

KARONHIATE
Plaintiffs

vs.

SOCIÉTÉ QUÉBÉCOISE DES INFRASTRUCTURES

ROYAL VICTORIA HOSPITAL

MCGILL UNIVERSITY HEALTH CENTRE

MCGILL UNIVERSITY

VILLE DE MONTRÉAL

STANTEC INC.

ATTORNEY GENERAL OF CANADA

Defendants
And

OFFICE OF THE INDEPENDENT SPECIAL INTERLOCUTOR FOR MISSING CHILDREN AND UNMARKED GRAVES AND BURIAL SITES ASSOCIATED WITH INDIAN RESIDENTIAL SCHOOLS - 225 & 227 – 50 Generations Drive, Six Nations of the Grand River Territory in the city of Ohsweken and the province of Ontario, N0A 1M0

Intervenor

ARGUMENT PLAN OF THE SPECIAL INTERLOCUTOR

Part I: Overview

1. The Special Interlocutor respectfully proposes to address the following areas as part of its Argument Plan:

2. How the three-part test for mandatory injunction applies in the case at hand. This involves an analysis of the factors in the jurisprudence from *RJR-MacDonald Inc. v. Canada* (Attorney General), 1994 CanLII 117 (SCC) and *R. v. Canadian Broadcasting Corporation, 2018 SCC 5 (CanLII).*

3. Considering the balance of convenience test when public interest issues are at stake.

4. Judicial recognition of the role of reconciliation in weighing Indigenous interests.

5. Addressing inadequacies of a reactive regulatory framework.

Part II: Analysis

Introduction

6. The Special Interlocutor respectfully submits that a determination of the issues in respect of the merits of granting an interlocutory injunction calls for a recognition of the anxiety and trauma caused by the mere prospect that remains of family members face the real risk of being disturbed by excavation authorized and/or undertaken by the defendants.

7. The current legal framework in place and relied on by the defendants was not created to account for the above, as it primarily operates to retrospectively/reactively prescribe the steps to take AFTER remains have been identified and disturbed.

8. Respectfully, the announcement of McGill Counsel on the record before this Honourable Court on the morning of October 27, 2022 that the excavation of the last few days has not uncovered/disturbed child remains, highlights the flaws in the current process. Had the announcement (no matter how well intentioned) been to the opposite effect, the irreparable damage will have been done.

9. Below, the Special Interlocutor offers legal arguments around the granting of an injunction and analysis of the inadequacies of the current legal framework. These

submissions are directed at establishing why it is essential to re-think the conventional route for archaeological digs with a view to understanding and applying current “best practices” for the discovery and protection of the remains of Indigenous people.

A) The test for a mandatory injunction

10. *R v. CBC* outlines that the applicant must demonstrate a strong *prima facie* case where it is likely that the law and evidence will prove the allegations in the originating notice (para 13).

11. It is respectfully submitted that if this Honourable Court determines there is an air of reality to the presence of unmarked graves on the redevelopment site, that this first part of the test is satisfied.

12. *RJR-MacDonald* states second consideration is whether a refusal to grant relief could so adversely affect the applicants’ own interests that harm could not be remedied. In essence, irreparable harm as a result of failing to grant the injunction (para 58).

13. This Honourable Court has heard evidence from McGill that in the last two weeks, excavators have broken ground and development is underway in and around the Hersey Pavilion. This development is characterized by McGill as preliminary work for the purposes of archaeological inventory. The plaintiffs’ case is that this Honourable Court’s intervention was required in a preventive role (injunctive relief) to protect against this precise reality: the possibility that Indigenous persons’, including children’s, remains could be violated.

14. The Special Interlocutor takes the position that there is an air of reality that this scenario will result in irreparable harm due to the site’s association with mistreatment of Indigenous patients in the health care system.

B) **Balance of convenience test in the context of Indigenous interests and public interest considerations**

15. The final step of the *RJR-MacDonald* guideline is a balance of convenience test, which includes a public interest element to address matters that transcend the interests of the specific parties before the Court (para 66).

16. Case law has established that there is space to appreciate the principles of reconciliation in the context of applying the test for an injunction. This involves recognition that historically, Indigenous people have suffered from the impacts of colonialism through traumatic experiences like racism when seeking treatment in Canada’s health care system.

17. *Henco Industries Limited v. Haudenosaunee Six Nations Confedecary Council,* *2006 CanLII 41649 (ON CA)* is one such application of these principles. This case involved a motion judge deciding to grant an injunction removing First Nation protesters from land slated for development on his view that the rule of law be enforced. In reviewing that decision, Ontario's Court of Appeal stated:

> 141 But the rule of law has many dimensions, or in the words of the Supreme Court of Canada is "highly textured." One dimension is certainly that focused on by the motions judge: the court's exercise of its contempt power to vindicate the court's authority and ultimately to uphold the rule of law. The rule of law requires a justice system that can ensure orders of the court are enforced and the process of the court is respected.
>
> 142 Other dimensions of the rule of law, however, have a significant role in this dispute. These other dimensions include respect for minority rights, reconciliation of Aboriginal and non-Aboriginal interests through negotiations, fair procedural safeguards for those subject to criminal proceedings, respect for Crown and police discretion, respect for the separation of the executive, legislative and judicial branches of government and respect for Crown property rights.

18. In applying *Henco,* the Ontario Court of Appeal stated in *Frontenac Ventures Corp v Ardoch Algonquin First Nation*, 2008 ONCA 534

> 46 Having regard to the clear line of Supreme Court jurisprudence, from *Sparrow* to *Mikisew*, where constitutionally protected aboriginal rights are asserted, injunctions sought by private parties to protect their interests should only be granted where every effort has been made by the court to encourage consultation, negotiation, accommodation and reconciliation among the competing rights and interests. Such is the case even if the affected aboriginal communities choose not to fully participate in the injunction proceedings.

19. *Frontenac* took note of the efforts criminal sentencing courts have undertaken to address reconciliation, namely the *Gladue* principles that consider the estrangement of Indigenous peoples from the justice system (paras 57-59). The ruling considered these principles in the context of a civil court.

C) The role of reconciliation in weighing Indigenous interests

20. In *Southwind v. Canada*, 2021 SCC 28, the Supreme Court recently stated how the Crown's fiduciary duty is rooted in the obligation of honourable dealing and in

the overarching goal of reconciliation between the Crown and the first inhabitants of Canada.

21. *Southwind* described reconciliation of Aboriginal and non-Aboriginal Canadians as an ongoing project that is part of a mutually respectful long-term relationship (para 55). This duty is shaped by the context to which it applies (para 62) and imposes loyalty, good faith, and full disclosure on the part of the Crown (para 64).

22. The Special Interlocutor's role in this hearing is to ensure these principles of the public interest, reconciliation, and minority rights be topics of consideration that are cited and available for application to this Honourable Court's analysis of this application.

D) Inadequacies of a Reactive Regulatory Framework

18. The *Cultural Heritage Act*, CQLR c P-9.002 (the **"CHA"**) and the *Archaeological Research Regulation*, CQLR c P-9.002, r 2.1 (the **"Regulation"**) do not have any real provisions that are responsive to the instant situation involving the investigation of unmarked graves of Indigenous peoples. This is epitomized in the objects of the CHA that speak to a reflection of what society's identity and individual historical importance:

> 1. The object of this Act is to promote, in the public interest and from a sustainable development perspective, the knowledge, protection, enhancement and transmission of cultural heritage, which is a reflection of a society's identity.
>
> It is also intended to promote the designation of deceased persons of historical importance and historic events and sites.
>
> Cultural heritage consists of deceased persons of historical importance, historic events and sites, heritage documents, immovables, objects and sites, heritage cultural landscapes, and intangible heritage.

19. The entire orientation of the CHA and the Regulation—including any possible remedies under them—is not flexible enough to speak to or address the instant matter that involves traditional governance structures.

20. What remedies are available, are reactionary—and relies upon notice being provided beyond the *Indian Act* band councils. What possible remedies are available with regards to the excavation currently being done during this hearing are too late: the disturbance of the ground has already begun.

21. The processes for authorizing archaeological investigations are opaque and lack transparency until only the final days before approval—and then what Indigenous

involvement there is, is restricted to the colonial structures imposed by the *Indian Act*. It provides no space nor transparency to traditional governance structures as found in the plaintiffs' communities.

22. The CHA is drafted in a manner that it only implicates the permit applicant and if there is an owner of the property involved. The Plaintiffs therefore do not fall nor are contemplated within the CHA processes—including processes related to remedies.

23. Below is an analysis of the governing legal structure that illustrates and expands on the foregoing.

24. According to Exhibit PM-13, McGill received authorization under section 64 of the CHA to undertake the excavations currently being undertaken.

25. Per section 64, excavations in a heritage site requires ministerial approval:

> 64. No person may, in a land area declared a heritage site or on a classified heritage site, divide, subdivide or parcel out an immovable, change the arrangement or ground plan of an immovable, build, repair or change anything related to the exterior appearance of an immovable, demolish all or part of an immovable or erect a new construction without the Minister's authorization.
>
> In addition, no person may excavate the ground even inside a building on a heritage site referred to in the first paragraph without the Minister's authorization. However, if the purpose of the excavation is a burial or disinterment and none of the acts listed in the first paragraph are carried out, the Minister's authorization is not required.
>
> This section does not apply to the division, subdivision or parcelling out of an immovable on the vertical cadastral plan.

26. The Regulation outlines the conditions required for the issuance of an archaeological research permit:

> 2. An archaeological research permit may be issued by the Minister to a person who applies for it if the following conditions are met:
>
> (1) the applicant provides, in addition to the written consent of the immovable's owner or of any other interested person, an agreement entered into with that owner or interested person concerning the nature and duration of the work, and the measures for conservation of objects that will be uncovered;

(2) the Minister has received every annual archaeological research report related to a permit now expired or revoked that was held by that person;

(3) the applicant submits an archaeological research project that includes

(a) the place of the archaeological operation, including the precise perimeter of the operation and the archaeological sites already known in that perimeter on a plan or topographic map;

(b) the nature of the archaeological operation, including details on the context and its objectives, and a history of the prior archaeological researches in the perimeter of the planned operation;

(c) the planned duration of the archaeological research with the dates scheduled for the beginning and end of the operation;

(d) the composition of the team that will carry out the archaeological operation: the name of all the persons in charge of the archaeological operation, assistants and specialists, and the number of technicians;

(e) except for technicians, the record of qualification of each member of the archaeological operation team, including education or university training and relevant experience and, for all the persons in charge of the archaeological operation, a list of their scientific publications, a list of the bodies to which they have been attached since the end of their training and their position in each body;

(f) the methods that the person plans to use to operate on the site and to record data;

(g) if the application concerns an archaeological site to which a Borden code has been given by the Ministère de la Culture et des Communications, the strategies that the person plans to use, on the site and in the laboratory, to preventively preserve or restore the movable and immovable relics;

(h) the places and circumstances in which collections and data will be treated and analyzed and, in the case of an archaeological operation on land in the domain of the State, the proposed place for the deposit of collections;

(i) a description of the material means for the research, in

particular the equipment and premises; and

(j) the name of the persons and bodies that provided funds, the amounts obtained for the research project and an itemized budget for the financial resources at the person's disposal at each stage of the research, such as on-site operation, the treatment of objects uncovered, the analysis and the drafting of the archaeological research report.

27. Nothing in the archaeological research project application outlined in section 2(3) of the Regulation requires any consultation with or permissions from impacted and/or potentially impacted Indigenous peoples.

28. The non-exhaustive considerations for issuing an authorization under section 64 of the CHA are outlined in section 67.2:

> 67.2. For the purpose of analyzing an application for the issue of an authorization under section 64 or 65, the Minister may consider the following elements, among others:
>
> (1) in the case of a classified heritage site, its category;
>
> (2) the effect of the act on the heritage value of the site;
>
> (3) the effect of the act on the elements that characterize the site, including the natural setting, road network, land division system, built environment, landscape units and visual qualities;
>
> (4) the effect of the act on any potential or confirmed archaeological property or site; and
>
> (5) the effect of the act on the conservation and enhancement of the buildings that contribute to the heritage value of the site.

29. Per section 67.2 Indigenous peoples are entirely at the whims of the Minister for whether or not their laws, protocols and views of the project are considered.

30. The Minister also has discretion to enter into agreements for the purposes of administering the CHA with Native communities in order to develop knowledge of cultural heritage and protect, transmit or enhance that heritage. Reflecting the colonialism of the *Indian Act*, entering into such agreements can only be done with such communities "represented by its band council":

> 78. The Minister may
>
> …

> (7) enter into agreements for the purposes of the administration of this Act with any person, including a local municipality, a regional county municipality, a metropolitan community or a Native community represented by its band council, in order to develop knowledge of cultural heritage and protect, transmit or enhance that heritage; and

31. The link between the *Indian Act* and the CHA with regards to “band councils” is explicit in paragraph 2 of section 118 of the CHA:

> The powers conferred by this chapter may also be exercised by a Native community on the lands of a reserve or on the lands to which the Naskapi and the Cree-Naskapi Commission Act (S.C. 1984, c. 18) applies, with the necessary modifications, and for that purpose, “local municipality” includes Native communities represented by their band council within the meaning of the Indian Act (R.S.C. 1985, c. I-5) or the Naskapi and the Cree-Naskapi Commission Act.

32. In the instant matter, Exhibit PM-13 includes three conditions. The first condition is of note in the current context:

> Advenant la découverte de sépulture ou de restes humains, arrêter l'intervention archéologique à l'emplacement de la découverte et informer la ministre de la Culture et des Communications sans délai.
>
> [In the event of the discovery of burials or human remains, stop the archaeological work at the site of the discover and inform the Minister of Culture and Communications without delay.]

33. In other words, it is not until a shovel is in the bones, that the archaeological work will stop—it is a purely reactive process that requires a violation of Indigenous dignity before any measures are taken.

34. Exhibit SC-1 encloses letters dated August 3, 2022 from the Minister of Culture and Communications and addressed to the Chiefs of the Mohawk Council of Kahnawà:ke and of the Mohawk Council of Kanesatake. The letters inform the Chiefs that the Minister of Culture and Communications “is currently analyzing a request for an archaeological research permit”. Given the inclusion of Figure 22 from the 2016 Arkeos report, it is clear that reliance was placed on that report.

35. The Minister states that they expect to issue the permit within ten (10) working days of the letter.

36. Exhibit SC-1 states that the work “will take place over a five (5)-day period.” The work to be done during that period is described thusly:

> The planned intervention consists of carrying out an archaeological inventory including collection, visual inspection, evaluation, survey, and sampling activities. Two trenches (4 to 5 meters wide and 30 to 35 meters long) will be excavated to a maximum depth of 3.1 meters. The surface will first be mechanically stripped to allow access to the layers of archaeological interest. The intervention strategy calls for manual 1 meter-square test pits, laid out every 5 meters, to ensure adequate coverage of the area. It is possible that as part of this work, samples of lithic material and soil will be taken for analysis if deemed relevant. Depending on project development, it is possible that a second work phase consisting of archaeological monitoring of excavation activities will be undertaken.

37. Though there is no identification of the depth the surface will be "mechanically stripped", and the actual application for the permit has not been provided, it is not possible for a proper excavation of two trenches to a depth of 3.1 meters to be done in the stipulated five (5) days. What is required is a scalpel and not the sword-like approach that has been authorized. Excavating to a depth of 3.1 meters suggests a focus on older dates, whereas it has been found that unmarked graves and burial sites tend to be between 0.5 and 1 meter in depth. There is real concern how deep the "mechanically stripped" will go before more measured excavation techniques are introduced—potentially digging up unmarked burials before they can be properly excavated.

38. The letters exhibited at SC-1 are not an invitation to provide input into the proposed investigation but merely provides a 'commitment' to notifying whether any "significant elements are discovered" and allowing the Chiefs to view the completed archaeological research report.

39. The entire project is based on the 2016 Arkeos report—a report that relies almost entirely on the written record and maps (but does not appear to include any archival work). No evidence has been provided of further research being done in light of claims of unmarked graves and burial sites.

40. The areas identified in the 2016 Arkeos report are areas identified as ones with potential of prehistorical or historical occupation sites. Such an approach is ill equipped to investigating potential unmarked graves and burial sites as historical and prehistorical occupation are immaterial to the investigation. Neither the defendants nor Arkeos has provided any evidence to support their assumptions about where potential unmarked graves and burial sites could be located. In fact, the only acknowledgement in terms of methodology is to claim that the excavations—spaced five (5) meters apart—will suffice. This was the original plan; there are no changes in response to the claims about potential unmarked graves and burial sites.

41. The investigative process outlined in Exhibit SC-1 and in other affidavits is not translatable to areas beyond the limited sites identified in the 2016 Arkeos report nor within the time frames identified. Remote sensing, along with the other suggestions by the Canadian Archaeological Association (**"CAA"**), provides an approach that would preserve the dignity of Indigenous peoples impacted—both those alive and those potentially buried at the redevelopment site—as well as be more thorough and time efficient. Those guidelines would also allow a reasonable time frame to undertake any excavations of sites identified as potentially containing unmarked graves or burial sites.

42. Paragraph 48 of Sophie Mayes' affidavit, filed on behalf of the Société québécoise des infrastructures (the **"SQI"**), claims that the SQI "will not compromise on the means to ensure that the archaeological inventory and the location of potential unmarked graves are completed in accordance with best practices". The offhanded rejection of remote sensing techniques is contrary to the best practices identified by the CAA—the leading archaeological organization in Canada.

43. Similarly, McGill's affiant, Pierre Major states in his affidavit at paragraphs 35-36 that McGill "intends to follow the standard industry practice of involving the Aboriginal community" and that "McGill respects the Aboriginal community and has no intention of proceeding in a manner that would endanger Aboriginal artifacts or burials." The lack of relying on anything but shovels in dirt is a clear endangerment to burials—it is like trying to find a needle in a haystack blindfolded—and to the dignity of those potentially buried and their families and communities.

44. In conclusion, the Special Interlocutor's evidence and submissions aim to assist this Honourable Court in applying the test for mandatory injunction, ensuring the objectives of reconciliation are respected in assessing the merits of this application, and addressing the challenges and inadequacies of the current legal framework being applied to this dispute.

All of which is respectfully submitted on the 27th day of October, 2022.

Nº.: 500-17-120468-221

SUPERIOR COURT
DISTRICT OF MONTREAL

KAHENTINETHA, et al
Plaintiffs
vs.

SOCIÉTÉ QUÉBÉCOISE DES INFRASTRUCTURES, et al
Defendants
and

OFFICE OF THE SPECIAL INTERLOCUTOR
Intervenor

- **ARGUMENT PLAN**

Original

Falconers LLP
Barristers-at-Law
10 Alcorn Avenue, Suite 204
Toronto, ON M4V 3A9
Tel: 416-964-0495
julianf@falconers.ca
Julian N. Falconer (LSO #29465R)
Counsel for the Applicant