

**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)

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**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**

Conservatory Intervenor

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## AFFIDAVIT OF KIMBERLY R. MURRAY, SPECIAL INTERLOCUTOR

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I the undersigned, Kimberly R. Murray, carrying on my role as the Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools (“Special Interlocutor”), domiciled at 225 & 227 – 50 Generations Drive, Six Nations of the Grand River Territory in the City of Ohsweken and the Province of Ontario.

### INTRODUCTION

1. I submit this affidavit for the purpose of assisting the Honourable Court with the modified application filed by the Kaniien’keha:ka Kahnistensera (“the Plaintiffs”) on September 8, 2023 regarding breaches of the Rectified Settlement Agreement homologated on April 20, 2023 (“the Agreement”).
2. While I am not a party to the Agreement, I hold standing in the proceedings as an Intervenor for conservatory purposes. Justice Moore stated in his oral reasons on October 27, 2022, that I possess a legitimate interest in the subject matter of the ongoing proceedings, coupled with a unique degree of specialized expertise distinct from other parties involved.
3. I have reviewed the Plaintiffs’ modified Application for Declaratory Relief and to Obtain a Safeguard Order, as well as the accompanying affidavits sworn by Kwettio and Karonhianoron on August 28, 2023. I also reviewed the Plaintiffs’ letter to the Court on September 7, 2023, attached hereto as **Exhibit KM-1**, the correspondence from Société Québécoise des infrastructures (“SQI”) to the Honourable Court dated September 8, 2023, attached hereto as **Exhibit KM-2**, and the Plaintiffs’ reply to the Honourable Court dated September 10, 2023, attached hereto as **Exhibit KM-3**.
4. From my perspective, the Plaintiffs’ urgent concern is that excavations have commenced (as of September 11, 2023) in sensitive areas at the Site without resolving their concerns about breaches to the Agreement, most importantly, without sufficient oversight of the work that involves heavy machinery and irreparable harm to the site.
5. This work is being conducted in close proximity to the areas which have been identified as potentially containing human remains by Historical Human Remains Detection Dogs (“HHRDD”) and a ground-penetrating radar (“GPR”) scan, the results of which are presented in a report titled Geophysical Survey for Archaeological Investigation (“the GeoScan Report”) found in **Exhibit MM-13**.

6. The Application by the Kanien'keha:ka Kahnistensera also takes issue with the Defendants' decision to disband the Expert Panel and end their involvement in the process before completing investigations that are needed in the aftermath of these discoveries.
7. A review of **Exhibit KM-2** indicates that the Defendants' work, which began on September 11, 2023, involves the installation of pads and conduits that are intended to protect sewer and electrical infrastructure from their own construction work at the grounds of the old Royal Victoria Hospital ("the Site"). Me. Berthiaume stated that SQI complied with the Panel's recommendations prior to its disbanding. Me. Berthiaume also asserts that the SQI has completed their due diligence and it would be "impossible" for any burials to be found in these areas. I will outline the lack of evidence supporting these statements.
8. The underlying question to be resolved at the emergency case management conference is whether the excavation work that commenced on September 11 will cause irreparable harm if it proceeds in the current circumstances while the Expert Panel is disbanded and can no longer provide their input on oversight and developments in the investigation.

#### **SIGNIFICANCE OF THE PANEL'S PARTICIPATION**

9. As per Paragraph 6 of the Agreement, the Expert Panel consisting of Dr. Lisa Hodgetts, Dr. Adrian Burke, and Justine Bourguignon-Tétreault was established to "act impartially and independently" in overseeing the archaeological search, and to issue binding recommendations which the parties would be expected to act upon.
10. The technical expertise offered by the Expert Panel was a central tenet of the Agreement and a strong safeguard to balancing the need to proceed efficiently with the planned excavation and credibly investigate the Plaintiffs' concerns of unmarked burials at the Site.
11. It is therefore of significant concern that the SQI undermined the Expert Panel's recommendations regarding the GeoScan Report and disbanded the Panel immediately upon their request to review the report and make recommendations. In particular, the Expert Panel requested to see the raw GPR data and to have the data and report peer-reviewed by archaeological experts in its Preliminary Report released on May 8, 2023 (**Exhibit MM-50**, pg. 11) and again in its Final Mapping Report released on July 17, 2023 (**Exhibit MM-15**, pg. 11).
12. When the SQI did not comply with these recommendations, the Expert Panel again asked to review and provide recommendations on the GeoScan Report (reflected in communications in **Exhibit MM-7**).
13. Following the termination of the Expert Panel's mandate, Dr. Burke and Dr.

Hodgetts continued to follow up on what they saw as their professional duty to acquire and analyze the raw GPR data and provide recommendations on the GeoScan Report (reflected in communications in **Exhibit MM-63**). In his August 6, 2023, email, Dr. Burke clearly noted that no one from GeoScan, McGill University, the SQI, or Ethnoscop had proper training to complete this task, and that their actions were “contrary to what the Panel recommended.”

14. McGill University (“McGill”) and the SQI went a step further and issued public statements indicating that the GPR scan resulted in no findings of unmarked burials (reflected in **Exhibits MM-16** and **MM-17**).

15. In a letter through my legal counsel dated August 10, 2023, and attached to the Plaintiffs’ application as **Exhibit MM-73**, I expressed my serious concerns regarding various breaches of the letter and spirit of the Agreement, first and foremost the unilateral decision of the SQI to terminate the Expert Panel effective August 3, 2023.

#### **EFFECT OF THE DEFENDANTS’ ACTIONS:**

16. Nonetheless, McGill and the SQI are continuing to press ahead with excavation work without addressing my main concerns. To summarize, these include my view that McGill and the SQI have:

- Prematurely disbanded the Expert Panel on August 3, 2023;
- Deviated from the Expert Panel’s recommendations in respect of their mapping reports of May 8, 2023 and July 17, 2023;
- Rejected recommendations by the Expert Panel aimed at ensuring the GPR data is interpreted and acted upon properly;
- Issuing public bulletins mischaracterizing the GPR Report as conclusive that there are no burials on the Site (**MM-16** and **MM-17**); and
- Neglected the Expert Panel’s recommendation for a chain-of-custody expert to be appointed to oversee the handling of evidence for a potential forensic investigation (**Exhibit MM-9**).

17. These actions of McGill and the SQI have had the effect of:

- Jeopardizing the integrity of the investigation by continuing the excavation without regard for compliance with best archeological practices;
- Causing harm to the relationship between the parties to the Agreement by unilaterally making decisions, rather than collaborating and addressing concerns together as is contemplated; and
- Causing irreparable harm and trauma to the Kanien’keha:ka Kahnistensera by excavating sites absent the oversight of the Expert Panel, which was instituted to uphold best archeological practices and provide independent recommendations with respect to the investigation.

## **GEOSCAN REPORT AND RECOMMENDATIONS**

18. As the Agreement sets out, the Parties agreed to conduct a scan of the Site and GeoScan was contracted to perform this work. The results of the GeoScan Report were shared with all parties on August 2, 2023. GPR is one of many techniques that can be used to identify anomalies in the land that exhibit characteristics of unmarked burials.
19. The GeoScan Report concluded that “nine (9) geophysical signatures were identified across the Site that display attributes allowing us to categorize them as “potential” grave type features,” (page 11 of **Exhibit MM-13**) in addition to dozens of other “unknown” discoveries that could potentially be unmarked burials.
20. As detailed Dr. Burke’s communication with the SQI (**Exhibit MM-7**, August 2, 2023 email) and (**Exhibit MM-66**, August 6, 2023 email) the Expert Panel clearly did not intend for the SQI to make their own interpretations of the data. Before the Expert Panel was disbanded, both the Preliminary and Final Mapping Report stated “we recommend that if they are available, the Canadian Archaeological Association Working Group on Unmarked Graves be asked to provide a peer review of the processed GPR data and interpretation.” (**Exhibit MM-50 and MM-15**).
21. The timing of this request, which was rejected by the SQI, is extremely concerning to me. It came directly after Ms. Bourignon-Tétreault resigned from the Expert Panel on August 3 (**Exhibit MM-12**).
22. In light of the SQI’s continued refusal to allow the GeoScan Report to be reviewed by an appropriate archaeologist, I have independently retained an expert to interpret the GeoScan Report. Had the SQI not withheld the raw data from the Plaintiffs and the Panel, I would have sought to have that analyzed as well.
23. In this emergency hearing, this analysis serves the purpose of determining what stage the investigation is at in terms of proceeding with heavy machinery drilling and excavation in areas near “likely” or “unknown” discoveries.
24. From my understanding, areas that the GeoScan Report identified as “unknown” features have been neglected from any follow-up investigation since the SQI and McGill unilaterally took charge of the investigation following their disbanding of the Expert Panel. This is concerning because the GeoScan Report states:

“features that do not meet criteria to be labeled as suspected graves (“likely” or “potential”) and not of clear human or natural origin may be labeled as “unknown”. It is possible that some of the unknown features may be

unmarked graves, particularly in the case of older burials without coffins and also possibly child-size graves.”

GeoScan Report, pg 8, Exhibit **MM-13**

25. I have retained Dr. Scott Hamilton, a specialist in Indigenous archaeology and ethnohistory who has authored dozens of publications on unmarked burial investigations, including for the Truth and Reconciliation Commission. His CV is attached hereto at **Exhibit KM-4**. His report is attached hereto as **Exhibit KM-5**. His expert credential is attached hereto as **Exhibit KM-6**.
26. Dr. Hamilton described GeoScan’s identification approach as “conservative,” meaning it used stringent criteria to identify “likely” burial sites to reduce false positives. Consequently, any area identified as “potential” and “unknown” should be treated as unmarked burials until proven differently. Dr. Hamilton’s report states at pg. 1 that the GeoScan Report runs the risk of “incorrectly indicating no grave shafts.”
27. Dr. Hamilton concluded that a follow-up investigation is required for each one of the nine potential burial discoveries to ensure the findings are interpreted properly. He also said that “consideration of some of the “unknown” reflections using other validation methods might also be warranted” (pg. 3). He said this requires a “multi-proxy” approach spearheaded by individuals with both archaeological and geophysical expertise. This clearly shows the need for the Expert Panel’s guidance and ongoing involvement in the next steps of the investigation.
28. It is therefore concerning that the SQI has relied on GPR operators and their own conclusions to determine that excavation can proceed throughout September and October, contrary to the recommendations of the Expert Panel. It is even more concerning that drilling commenced on September 11, 2023, before this Honourable Court had the chance to resolve these issues.

### **ADDITIONAL BREACHES OF THE AGREEMENT**

29. In their application, the Kanien’keha:ka Kahnistensera also address security challenges on the Site, as well as the Expert Panel’s July 26, 2023, recommendation to appoint a chain of custody expert to assist with proper treatment of artifacts discovered during excavation for forensic investigation.
30. For example, Exhibits **MM-55** and **MM-56** demonstrate that artifacts excavated during the investigation were being handled improperly and contrary to best practices in archaeology, leading to the Expert Panel’s recommendation for an additional expert to oversee the chain of custody.
31. These issues are relevant in this Emergency Motion to illustrate the lack of collaboration the Defendants have afforded the Indigenous Plaintiffs in working

towards solutions in the spirit of reconciliation. Without addressing these concerns, the Defendants have pushed through to the next phase of excavation for development purposes.

32. Security concerns were apparent throughout the Spring of 2023, and were raised at the June 29, 2023, case management conference. The Kanien'keha:ka Kahnistensera attempted to engage the Defendants in subsequent letters on June 29, 2023 (**Exhibit MM-5**), and my legal counsel followed up after the Defendants' lack of action on July 26, 2023 (**Exhibit MM-30**).
33. Ultimately, security concerns escalated when the Kanien'keha:ka Kahnistensera cultural monitors were confronted by the SQI's security firm on July 25, 2023, at the Site. The Indigenous cultural monitors were observing work at the Site as permitted in the Agreement. This confrontation was described in the affidavit of Karonhianoron as "traumatic" (para 12) and an "attack" (para 21).
34. The July 25, 2023 incident is relevant to this motion because a central component of the Agreement was for the Kanien'keha:ka Kahnistensera cultural monitors to be present during excavations at the Site to ensure standards and protocol are followed.
35. It is very concerning to me that "the Kahnistensera, Cultural Monitors and TD Security personnel are highly concerned for their safety. They will not be able to be present to monitor non-archaeological drilling and excavation starting on September 11, 2023" (**Exhibit KM-3**).
36. On September 10, 2023, I was informed that cultural monitors saw two of the security guards who aggressed the Kanien'keha:ka Kahnistensera at the Site. The Defendants had said they would no longer be permitted on-site. While the Defendants apologized for this on September 11, 2023, it validates the concerns expressed by the Plaintiffs about their fears of being at the Site.
37. Another Expert Panel recommendation neglected by the SQI and McGill is apparent in **Exhibit MM-9**, a letter sent by Panelist Lisa Hodgetts on July 25, 2023. The recommendation calls for the appointment of a forensic expert to oversee issues raised about the proper treatment of artifacts recovered during excavation. As this has been neglected by the Defendants thus far, it validates the Plaintiffs' concerns that they are being excluded from an investigation process that was supposed to be Indigenous-led and collaborative.

## **CONCLUSION**

38. In paragraph 7, I outlined several justifications the SQI put forward in Exhibit **KM-2** for work that began on September 11, 2023. I trust that the evidence relied upon in this affidavit clearly expresses the inaccuracies in the SQI's correspondence, namely that they are not in compliance with the Expert Panel's

recommendations, and they have not completed the requisite steps to begin excavation at the Site.

39. Inaccurate statements justifying the drilling and excavation at the Site are also being released to the general public. Attached hereto in **Exhibit KM-7**, McGill circulated an email on September 11, 2023 to all staff and students stating they have been in full compliance with the Panel's recommendations, and the work has "not produced any evidence of human remains or unmarked graves." They neglect the fact that the Expert Panel was unilaterally disbanded, recommendations to follow-up on the GeoScan Report were ignored, and their conclusion on evidence of no human remains is objectively premature.

40. In light of the circumstances, I do not see how work can proceed without;

- Reinstating the Expert Panel with a replacement for Ms. Bourguignon-Tétrault;
- Providing the Expert Panel with the raw data from the GPR survey;
- Allowing the Expert Panel to make recommendations based on the GPR data and the GeoScan Report;
- Addressing the Expert Panel's recommendation to add a forensic expert; and
- Addressing the Plaintiffs' concerns about their safety on Site.

AND I HAVE SIGNED:



**Kimberly R. Murray, Independent Special Interlocutor**

SOLEMNLY AFFIRMED BEFORE ME  
at Toronto, ON  
this 12<sup>th</sup> day of September, 2023



**Mitchell Goldenberg, Commissioner of Oaths  
for the Province of Ontario, LSO# 85215T**



**N<sup>o</sup>.: 500-17-120468-221**

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**SUPERIOR COURT  
DISTRICT OF MONTREAL**

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**KAHENTINETHA  
et al**  
Plaintiffs  
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**SOCIÉTÉ QUÉBÉCOISE DES  
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Defendants  
and

**OFFICE OF THE SPECIAL INTERLOCUTOR**  
Third Party Intervenor

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▪ **AFFIDAVIT OF KIMBERLY MURRAY**

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Original

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