\C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

№.: 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. Defendants McGill University (**“McGill”**) and Société québécoise des infrastructures (**“SQI”**) have jointly and severally significantly breached the homologated Settlement Agreement, dated April 20, 2023 (the **“Agreement”**) in the following ways:

   a. Unilaterally disbanding the Expert Panel established by the Agreement in the midst of the archaeological investigation and taking exclusive control.

   b. Failing to effectively consult and collaborate with the Kanien’keha:ka Kahnistensera, undermining a significant aspect of the Agreement. This includes basic transparency of objective facts, such as refusing to share the Ground Penetrating Radar (**“GPR”**) data relied on for reports.

   c. Failing to follow best archaeological practices in the implementation of Techniques, contrary to the recommendations of the Expert Panel and the SQI’s own contractors.

   d. Failing to consult the Expert Panel after the discovery of anomalies detected by GPR, which would at minimum trigger s. 17 of the Agreement to engage. Instead, the Defendants are minimizing anomalies by taking swift actions to move the ‘investigation’ forward, and conceal any findings.

   e. Neglecting the appointment of a replacement Expert Panelist to replace Ms. Justine Bourguignon-Tétreault, following her resignation on August 2, 2023.

   f. Failing to implement the binding recommendation of the Expert Panel on July 26, 2023 to appoint a forensic expert to oversee chain of custody issues documented at the Site, causing mistrust, turmoil, and credibility issues with the investigation.

2. Instead, it is clear the Defendants are attempting to move past the Expert Panel by refusing to recognize their mandate to oversee the implementation of their recommendations, refusing to consult them following discoveries of anomalies, and most recently, questioning the impartiality of an Expert Panelist without the opportunity for a response.

3. This Argument Plan ends with proposals for how to get the instant matter back on a reconciliatory path to uncover the truth of what happened at the Royal Victoria Hospital (**“RVH”**) and the Allen Memorial Institute (**“AMI”**).

PART II: ANALYSIS

The spirit and intent of the Agreement has been breached by the Defendants

4. According to **Article 528** of the *Code of Civil Procedure* (the **"*Code*"**), the homologation of the Agreement gives it "the same force and effect as a judgment of the court."

5. **Article 657** of the *Code* provides that this Honourable Court can issue any order to facilitate the execution of a judgment, and, therefore, the Agreement, "in the manner that is most advantageous for the parties and most consistent with their interests."

6. This Honourable Court has recently stated that the power provided under Article 657 is to be interpreted in a broad and liberal manner with the goal of facilitating the execution of a judgment.[1]

7. The Special Interlocutor respectfully submits that the spirit and intent of the Agreement is to follow the Superior Court's direction in its October 27, 2022 decision, which invited parties to establish an appropriate archaeological plan to execute a proper and thorough investigation into the potential of unmarked burials, guided by best practices and in the spirit of reconciliation.

8. The Special Interlocutor has been unsuccessful in attempts to resolve these breaches through direct correspondence with McGill and the SQI.

a) Disbanding of the Expert Panel

9. It is the Special Interlocutor's understanding of the Agreement that the Expert Panel had an ongoing mandate that persisted until the conclusion of the investigation into unmarked burials.

10. The two active members of the Expert Panel share the understanding that their mandate did not end once they submitted their Mapping Report. Following the release of the GPR Report, Dr. Burke stated that "it is imperative that the Panel have a chance to look at the report and make its own informed interpretations." (**Exhibit MM-66**). Dr. Hodgetts added that Expert Panel recommendations "must by necessity also include recommendations regarding best practices for deploying the techniques, since the same technique can be deployed in different ways with very different results" (**Exhibit MM-67**).

11. With regards to the Expert's Panel role following the Mapping Report, even the Defendants' affiant, Justine Bourguignon-Tétreault, stated "we also want to offer our continued support during the ensuing phases of the work to take place,

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[1] *Family law — 22708*, 2022 QCCS 1588 at paras 23-25.

namely the implementation of the recommendations” (**Exhibit MM-67**; emphasis added).

12. Further, the archival and oral history work agreed to in the Agreement has not been completed, as illustrated from the various applications with regards to access to archival documents before this Honourable Court.

13. In s.1 of the Agreement, it is stipulated that “the results of such [archival and oral history] work will be communicated to the Panel (defined below) on an ongoing basis to inform their work.”

14. This suggests that the Expert Panel’s work cannot be completed until the archival and oral history work has been completed.

b) Defendants’ inconsistent and narrow interpretation of the Expert Panel’s mandate

15. Para 35 of McGill’s Argument Plan submitted for the September 14, 2023 Emergency Hearing appears to reflect the Defendants’ interpretation of the Expert Panel’s mandate as a whole, which is supposedly limited to making an initial assessment and submitting a report.

16. However, this narrow interpretation defies both common sense and the Agreement. The Defendants themselves admitted that the Expert Panel has an ongoing mandate. SQI affiant, Sophie Mayes, informed the Expert Panel, that if “an unexpected discovery is made during the excavation work, we will seek the panel’s advice as to how to move forward” in accordance with s. 17 of the Agreement (**Exhibit MM-66**).

17. In June 2023, McGill interpreted an alert by the Historical Human Remains Detection Dogs (**“HHRDD”**) to the odour of human remains as an “unexpected discovery” which invoked the Expert Panel’s guidance as per s. 17 of the Agreement. It would follow that a GPR signature indicating a potential burial site fits this definition of an “unexpected discovery.” It would also follow that bones and artifacts found at the excavation site would constitute an “unexpected discovery.”

18. The SQI’s interpretation of the conclusion of the Expert Panel’s mandate is also inconsistent. In **Exhibit SCM-15**, Mr. Ancelevicz, Director of Executive Projects, states in an August 2, 2023 email to GeoScan that “according to the agreement we have with the Mohawks Mothers, we have to share the report with them, as well as with the members of the archaeological panel.” In the affidavit of Sophie Mayes, sworn October 23, 2023 (para 30), she states the end of the Expert Panel’s mandate was July 17, 2023.

19. Sophie Mayes echoed Mr. Ancelevicz's point about the Agreement requiring them to share the GeoScan report in an email dated August 2, 2023 when she shared the report and stated, "As agreed, I am forwarding GeoScan's report of the geophysical survey for archeological investigation of the priority areas which was completed earlier in July." Ms. Mayes' sharing of the GeoScan report with the Expert Panel resulted in Dr. Burke's reply that he assumed that the Expert Panel would have a chance to review and make recommendations, to which Ms. Mayes reiterates her assertion that the Expert Panel's mandate had already ended (**Exhibit MM-7, p.1**).

20. The Special Interlocutor's position, ever since the HHRDD discovery in June, is that the detection dogs and GeoScan anomalies reflect the need for extensive consultation and collaboration amongst all parties, led by the Expert Panel, to determine any updated recommendations, or more significantly, required changes to the course of the investigation as a whole, including Techniques, service providers, and information sharing. Conversely, the SQI and McGill clearly aim to limit and fast track any conversation in favour of relying upon outdated recommendations.

21. If the Defendants' position is that the Expert Panel's mandate ended July 17, 2023 then they were under no obligation to provide the Expert Panel with GeoScan's report weeks later. It is a curious line to draw in sharing the GPR report absent the underlying data while claiming the Expert Panel's work had concluded. It shows a lack of transparency, trust, and collaboration.

22. In this way, the SQI and McGill appear to be selective on when they share information leading to a logical conclusion that they only share information when it is favourable to their legal positions and their continuing development. This is not reconciliation; this is not honourable; and it fails to build trust.

c) Ignoring Expert Panel's recommendations

23. The SQI and McGill have also been selective about what recommendations of the Expert Panel they choose to follow—despite s. 13 of the Agreement stating that the SQI and McGill agree to be bound by the recommendations of the Expert Panel. The examples outlined below are clear breaches of s.13.

24. The Expert Panel recommended the application of soil spectroscopy in their Final Report. Soil spectroscopy is another type of remote sensing used to support GPR surveys. The Defendants appear to have ignored that recommendation.

25. The Canadian Archaeological Association Working Group on Unmarked Graves (the **"Working Group"** or the "**CAAWGUG"**) has offered to assist in the work being done in accordance with the Expert Panel's recommendation for peer-review of the GPR reports. The Working Group are the preeminent experts in this

field. Instead of welcoming this offer, the Defendants have refused their assistance.

26. The Expert Panel expressed its intention to update their recommendations following the analysis of the GPR report data, however the data is being withheld by the Defendants.

27. GeoScan claims that they process their GPR datasets “using commercial and internal proprietary software packages” (**Exhibit LB-19, p.8**). No information has been provided that would support the validity and/or accuracy of the “internal proprietary software” used by GeoScan. If GeoScan wishes to have its “internal proprietary software” tested, having others verify their findings using alternate approaches should be welcomed. Instead, refusals are encountered.

28. Sophie Mayes, who hasno discernable knowledge or expertise in remote sensing and other skills required for investigating unmarked graves, has repeatedly made decisions about the investigation. Further, Ms. Mayes claims, after consulting with “Geoscan’s experts”, that “we are confident that they are the most qualified experts to interpret the data in question from a geophysical perspective” (**Exhibit SCM-24**). In other words, Ms. Mayes solely relies upon GeoScan’s representations to conclude that GeoScan “are the most qualified experts” despite no ability to judge the matter for herself.

29. The GPR system used by GeoScan is untested and despite GeoScan’s claims to being the only entity that can interpret the underlying data, that is simply untrue—which is apparent on the face of their reports. The figures included are standard images produced by a GPR. Third parties analyzing the underlying data should be welcomed for a host of reasons, the most significant being that peer review would foster more trust in the investigation. The Defendants, who publicly state they act in the spirit of reconciliation, neglect such basic actions that would build trust amongst the parties.

30. The Expert Panel also recommended adding a panelist with expertise in forensics. This was denied and/or ignored by the Defendants, despite the Plaintiffs and Special Interlocutor communicating concerning inadvertence to following best practices on-site that ultimately jeopardize the credibility of the investigation. This includes artifacts being improperly handled and stored following excavation, and soil being improperly exposed and sifted.

31. The Expert Panel recommended the work done where the HHRDDs independently alerted “should be done under the direction of an archaeologist with experience identifying burials” and that all material removed should be fully screened (**Exhibit SCM-02**). There is no mention of leaving the soil in piles and then moving the piles prior to screening them; and that basic archaeological best practices support that the approach by Ethnoscop in their excavations is ill-suited.

d) Ignoring recommendations of their own contractors

32. In GeoScan's proposal for a subsurface geophysical survey, found at **Exhibit SCM-14A**, includes a recommendation of using a secondary method (similar to what the Expert Panel did):

> We normally also go beyond CAAWGUG recommendations ***by using a second geophysical method at any site with potential unmarked graves***. …. in more urbanized/disturbed sites we favor an electromagnetic induction (EM) device, which measures soil conductivity/resistivity as well as magnetic susceptibility in multiple discrete depth intervals that are appropriate to detecting unmarked graves.
>
> The main reasons we use two methods are: 1) GPR doesn't work well in certain very clay-rich soil conditions, and where GPR fails, EM or magnetometry succeed; 2) EM/mag also give important clues about subsurface materials and past use, whereas GPR excels at determining exact depths and shapes, ***so the two are complementary. For example, if GPR detects a feature that has the right shape and depth to be a grave, we can gain greater confidence in this interpretation if the EM magnetic susceptibility of the feature is high***. [Emphasis added]

33. The claim by GeoScan regarding 'going beyond' the Working Group's recommendations about geophysical methods appears to be wrong: as can be seen in **Exhibit ISI-35** (attached to the Special Interlocutor's October 7, 2022 affidavit). Under the heading of "What technique should be used?" the Working Group's Remote Sensing FAQ states, "While one approach may be enough, the best results are often achieved when multiple techniques are used together."

34. Unless the Defendants are failing to share the results of the execution of a second geophysical method, it appears the Defendants have ignored GeoScan's recommendation or restricted their work to the use of a single technique.

35. In GeoScan's proposal, found at **Exhibit SCM-14A**, Brian Whiting, who signed the proposal and served as the project director, offered to complete an external review of GeoScan's compliance with the Working Group's "parameters". Yet when the Expert Panel sought to review GeoScan's survey, the Defendants (and GeoScan) refused (**Exhibits MM-66 and MM-67**).

36. The HHRDD handler stated that they "are confident that the odour of human remains is in this area" with regards to the spot where three separate dog teams alerted (**Exhibit MM-49, p.3**). The Defendants have ignored this, instead citing to a single 12-year-old study that solely looked at human remains detection dogs—which are differently trained than HHRDD—and their ability to find individual human teeth in a field setting. It did not contemplate a situation where three (3) HHRDD independently alerted to the same spot.

e) *Other breaches*

37. The notion of chain of custody in forensic work involves more than just who has possession of a piece of evidence over time and how it is stored. No details of this investigation have been provided beyond the evidence that is being stored by Ethnoscop.

38. The goal ensuring a proper chain of custody is to protect the evidentiary value of an item, which extends to how the evidence is handled.

39. **Exhibits MM-55** and **MM-56** attached to the affidavit of Kwetiio, dated August 27, 2023, are clear examples of the improper handling of evidence recovered as part of the investigation. These examples do not even meet basic archaeological standards.

40. The Plaintiffs and Special Interlocutor are not being provided with sufficient information with respect to this investigation. As such, it is hard to determine whether McGill's claim that the dress found during excavation "is likely from the mid-90s and has no value in the current investigation"[2]. This is a unilateral decision by McGill to restrict the flow of information, and as such the Plaintiffs and Special Interlocutor do not have sufficient evidence to rebut such an assertion.

41. As noted above, the treatment of the soil also raises concerns about the quality of research being done and further compounds existing chain of custody issues.

42. The Defendants' own evidence demonstrates the lack of trust and respect for the Plaintiffs and the investigation. **Exhibit SCM-15** evidences both a representative of the SQI and GeoScan speaking in a derogatory way about the Plaintiffs, including that the Plaintiffs are simply 'spinning' what the GeoScan report says.

43. The lack of empathy by the Defendants and their contractors permeates throughout the investigation. Not only do they claim the Plaintiffs are misconstruing things that are explicitly admitted by the Defendants' contractor, their other contractor has claimed that the Plaintiffs are just trying to prolong the investigation to make more money (**Exhibit SCM-29**). This ignores the fact that their community is relying on them to investigate whether their children who were taken away and did not return are buried at the Site.

44. The motives that the Defendants and their contractors impute to the Plaintiffs are ancient racist stereotypes—something the Supreme Court of Canada has rejected in the contexts of understanding the customs and culture of First Nations.[3] This is not reconciliation.

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[2] https://www.mcgill.ca/provost/new-vic-project.

[3] *Calder et al. v Attorney-General of British Columbia*, [1973] SCR 313 at 346.

f) Refusal to share information

45. The Crown is under a fiduciary obligation to Indigenous peoples—including the Plaintiffs. One aspect of those obligations is a duty to disclose:

> The duty to consult and the fiduciary duty to disclose are essential components to the Crown's overarching obligation to act honourably when exercising their considerable discretion over the use of the land and the control of information.
>
> The content of the duty of disclosure is, in general, obvious. It must include sufficient information to allow the parties to calculate net Crown resource revenues. When the Defendants spoke of "transparency", they may have meant the same thing. However, when disclosure is framed as a duty, it creates a corresponding right. The duty to disclose is not the same as the Crown's discretion to disclose.[4]

46. The SQI's affiant, Sophie Mayes, has stated that SQI and McGill have acted "with a view to building trust among all the parties and with the panel members, in a spirit of reconciliation" (**Exhibit MM-66**).

47. Very little if anything done by the Defendants have built the trust they claim they have acted with a view to.

48. The opaqueness of the investigation has only served to exacerbate the mistrust held by the Special Interlocutor and the Plaintiffs towards the Defendants.

49. The continued use of the Court's limited resources and time is a direct product of the Defendants actions and/or inactions.

50. As noted by Expert Panel member, Dr. Lisa Hodgetts, the GeoScan reports are lacking basic and key information: "The parties should be aware that the GeoScan report does not currently include all of the information necessary to allow for its review" (**Exhibit MM-67**).

51. Not only, then, are the Defendants and their contractors refusing to share the underlying data, the reports being provided are inadequate.

52. The Special Interlocutor, the Plaintiffs and even the Expert Panel are having to place their trust in the Defendants. A trust that the Defendants have done little to nothing to earn.

53. Despite continued claims of expertise by GeoScan, and McGill's claim that "Experience allows interpreters to fairly readily pick out common subsurface

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[4] *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at paras 570-71 [footnote omitted] (rev'd on other grounds 2021 ONCA 779); citing *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 and *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40.

features like utilities, tree roots, geology, buried foundations and the like; this is important as these can potentially be confused with graves",[5] GeoScan's Report does not demonstrate a flawless interpretation of the underlying data. They appear to have been unable to "readily pick out" a terracotta pipe and instead identified it as an "unknown" feature—despite having a category for "utility/known feature".

54. The Defendants have identified no harm that could be caused by the sharing of the underlying data. But their continued refusal to provide it and other information exacerbates the mistrust felt by the parties and does not foster reconciliation, as is claimed by the Defendants.

55. The only reason for refusing to share the underlying data evidenced in the record before this Honourable Court is that the claim of confidentiality of GeoScan's work appears to come from GeoScan itself (**i.e., Exhibit LB-19, pp.14-15**). GeoScan claims that their report and work cannot be externally reviewed for "a number of issues here—the NDA that I/we signed with you, data sovereignty and sensitivity (First Nations don't like their data to be disseminated outside the inner circle)" (**Exhibit SCM-35, p.2**).

56. Further, Sophie Mayes states that GeoScan has objected to the disclosure of the underlying data to the Plaintiffs and the Expert Panel (Affidavit of Sophie C. Mayes, sworn October 23, 2023 at para 25). No reason is provided for this objection and the SQI simply accepts GeoScan's position (Affidavit of Sophie C. Mayes, sworn October 23, 2023 at paras 26-28).

57. There is an irony that GeoScan pushes data sovereignty and, apparently, concerns over First Nations not wishing to share, while the Defendants and GeoScan itself refuse to share underlying data that is the subject of information rightly before the Plaintiffs.

g) Archival Investigation slowed by inaccessible records

58. The Plaintiffs have requested access to hospital records, including the case books and medical registers from the RVH and the AMI during the times of interest to assist in the archival and archaeological investigation.

59. Know History has classified these records as necessary to carry out their mandate. In order to give the allegations of Indigenous patients going missing at RVH or the AMI due diligence, Know History requires information about patients. In all of the records Know History acquired, names and identifying information have been redacted. The records provide no information on ethnicity.

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[5] https://www.mcgill.ca/provost/new-vic-project.

60. For those reasons, thee requested records can offer information on Indigenous patients treated at the RVH or the AMI. The only alternative to acquiring this information necessary for Know History to complete their mandate is to go door-to-door in the community, which represents an extensive process requiring time and resources that are currently not available.

61. Besides the point that Know History has been bounced between McGill University, McGill University Archives, and the McGill University Health Centre to confirm which organization has authority to release the records, the affidavit of Keith Wooley dated October 24, 2023 confirms McGill University is in possession of the records.

62. It is the Special Interlocutor's position that an order by this Honourable Court under s.19 of the *Act respecting health services and social services* will enable Know History to complete its mandate.

h) <u>The issue of partiality and post-disbandment claims</u>

63. The Defendants and their contractors have begun to question the impartiality of some of the Expert Panel members as well as others, such as the Working Group, in offering to assist (i.e., Affidavit of Sophie C. Mayes, sworn October 23, 2023 at para 32; **Exhibit SS-14, p.4**).

64. The claims of bias are notable due to the fact that one of the former Expert Panelists, Ms. Bourguignon-Tétreault, has provided an affidavit in support of the Defendants. Ms. Bourguignon-Tétreault also works for Arkéos Inc.—which the Defendants initially hired to do the archaeological work. But the Defendants do not seem to question her partiality. They have also not questioned the impartiality for Mr. Simon Santerre, whose company, Ethnoscop, was hired by the Defendants.

65. It is of note that GeoScan, unlike Drs. Burke and Dr. Hodgetts, is a for-profit corporation, who have stated that they are unable to send their reports directly to the Plaintiffs as their contract is with the SQI and that they signed a non-disclosure agreement with SQI (**Exhibit SCM-30, p.1**). In Brian Whiting's account of the work on September 9 and 10, 2023, he relates that he told the Plaintiffs that GeoScan's "relationship was with SQI" so that any requests for information had to come through the SQI (**Exhibit SCM-30, p.2**). The Expert Panel, at least Drs. Burke and Dr. Hodgetts, have no ties similar to GeoScan, yet they are portrayed by the Defendants (contrary to the Agreement) that they have concerns about their impartiality.

66. Similarly, Mr. Simon Santerre has alluded to how they do not respond to requests from the Plaintiffs, their archaeologist, Dr. Burke or anyone else. This is because Ethnoscop has been hired to carry out the mandate provided by SQI and, as a result, that they should not be disturbed during their work in the context of

discussing the Plaintiffs and Dr. Burke (Exhibit SS-14, p.2).

67. It is notable that Mr. Santerre admits that Dr. Burke provided useful assistance during the excavation despite the other claims Mr. Santerre has made (i.e., Affidavit of Simon Santerre, sworn October 20, 2023, at para 62).

68. Despite this, Sophie Mayes, as part of her concerns about Dr. Burke's impartiality, frames her discussion of her concerns by referring to how the Expert Panel has interfered ("immixtion") with the archaeological excavation (Affidavit of Sophie C. Mayes, sworn October 23, 2023 at the heading appearing before para 29).

69. Highlighting that Ethnoscop has only allegiances to the SQI, Mr. Santerre has stated that Ethnoscop is against anyone but the SQI evaluating their report—taking particular note of the Defendants' position that the Expert Panel's mandate is over (**Exhibit SS-14, p.3**).

70. Ethnoscop's allegiances to SQI can be reasonably inferred from Ethnoscop's pure speculation that the dress discovered during investigations could be the source of the HHRDD alerts (**Exhibit SS-3, p.3**). Mr. Santerre includes further wild speculations about the source of the HHRDD alerts. Given that the speculations are then qualified by Mr. Santerre as being unlikely, questions should be raised about why Mr. Santerre is mentioning these hypotheses at all.

71. The Defendants were the party who hired the HHRDD technician and, according to the evidence presented, they have not sought the technician's and/or the Expert Panel's advice as to what to do with the results of the excavation of the outside area in which the HHRDDs alerted to. The Defendants have refused to consult those individuals despite Mr. Santerre, one of the Defendants' contractors, stating that the HHRDD technician should be consulted (**Exhibit SS-3, p.4**). Instead, the Defendants question the HHRDD expert that they hired, pointing to a dated and inapplicable study. This is pure denialism, presupposes a conclusion, and is not in the spirit of reconciliation and the Agreement.

72. Moreover, while both Drs. Burke and Hodgetts have raised concerns about how the investigation has been progressing and the Expert Panel's role therein (i.e., **Exhibits MM-66 and MM-67**), SQI appears to be selectively choosing whom to paint as lacking impartiality (i.e., Affidavit of Sophie C. Mayes, sworn October 23, 2023 at para 32).

73. Pierre Major expands on the questions about impartiality in his September 13, 2023 affidavit at paragraph 55, where he identifies two (2) supposed "challenges" with the suggestion that the Working Group review the underlying GPR data and interpretations:

> There are thus two challenges with their suggestion of the CAAWGUG specifically. A first is that reference to the CAAWGUG stood to extend the

duration and scope of these Panel members involvement with the project in a way that exceeded the mandate set by the Agreement. A second is that the involvement with the CAAWGUG is an indicator that a review by that body could not be impartial.

74. The above provides an example of how the Defendants and their contractors see biases everywhere. This has implications for how they respond to reasonable questions, often imputing aggressive, threatening, or bullying intentions in the questioning (i.e., Affidavit of Simon Santerre, sworn October 20, 2023, at para 119(e); **Exhibit SCM-30, p.2**).

75. For example, GeoScan complains of “an academic ‘bubble’ problem” with regards to comments made by the Expert Panel that the Defendants agreed to be bound by. GeoScan further adds that “there may also be some regional bias at work” and claims that the Expert Panel members have feelings of prejudice against GeoScan “as an outsider” (**Exhibit SCM-35, p.2**). GeoScan’s seeming denigration of academia contrasts with how Mr. Brian Whiting relies upon his academic credentials to burnish his reputation and work (i.e., **Exhibit SCM-14A**, p.10 referring to Mr. Whiting’s curriculum vitae (**Exhibit SCM-01A**) which notes at the top and at various other points his appointments to various university departments).

76. Based on the evidence before this Honourable Court, it appears that the partisan criticisms by the Defendants and their contractors only began after the Defendants disbanded the Expert Panel. A reasonable inference, the Special Interlocutor respectfully submits, is that the Defendants are attempting to retroactively justify the disbanding of the Expert Panel. This inference must also be framed by the fact that Ms. Bourguignon-Tétreault resigned shortly before the disbanding.

77. Again, there appears to be no concerns over the partiality or impartiality of those who have a direct and contractual relationship with the Defendants, but only with those who do not have such a relationship. The Defendants rely upon pure speculation and innuendo—particularly in the contexts of the Working Group—of the motives of various individuals and appear to take the goal of ensuring a proper and transparent investigation to be evidence of partiality.

<u>Moving forward in the spirit of reconciliation</u>

78. Beyond the Defendants, it is generally accepted that the search for unmarked graves should be Indigenous led and done in a trauma-informed manner.

79. It is the Special Interlocutor’s position that the assumption should be that there are unmarked graves present until proven differently.

80. The benefit of such an assumption is that the improper archaeological investigation and preservation of evidence discussed above would not have occurred.

81. The Defendants, meanwhile, have rejected that there are any unmarked graves, illustrated by correspondence exhibited by the Defendants between SQI and GeoScan (**Exhibit SCM-15**).

82. In the following, the Special Interlocutor will outline solutions for this Honourable Court's consideration in executing the Agreement.

a) Forensic expert and reforming Expert Panel

83. As per the Expert Panel's recommendation on July 26, 2023, a new Panelist should be appointed to oversee the forensic investigation at the Site and ensure impartial and proper handling of artifacts and soil, and continuity of evidence.

84. The members of the Expert Panel who have not resigned should be reinstated, along with the appointment of an appropriately qualified forensic expert. The Expert Panel's mandate should reflect what all other parties, other than the Defendants have understand based on the Agreement: that the Expert Panel's mandate includes a continuing and ongoing role in monitoring and overseeing the investigation so that it meets the currently accepted standards for investigations into potential criminality.

b) Indigenous led investigation

85. The dispute over what Indigenous led means continues and, quite frankly, debates about this are getting tiresome as the Defendants seem unable to understand what Indigenous led means and requires—despite what their own GPR technician has written about the necessity for these investigations to be Indigenous-led.

86. Recently, the Ontario Court of Justice considered what "the public interest" meant in the contexts of section 730 of the *Criminal Code* and incorporated Haudenosaunee legal traditions while sentencing the accused. Similar to the current situation, the accused was a land protector under Haudenosaunee law and the Court therefore concluded that the "public interest" at stake is the Haudenosaunee people. As a result, the accused was granted an absolute discharge because, the Court concluded, their actions would be considered as protecting their land by the Haudenosaunee people and so the actions were in the public interest.[6]

[6] *R v Williams*, 2023 ONCJ 393.

87. In the instant matter, the Plaintiffs, according to Mohawk law, are the individuals with the responsibilities and jurisdiction to oversee and lead the investigation. The “public interest” at stake here are the missing Indigenous children that are potentially buried at the Site. This may entail relying upon those with the appropriate expertise such as the Expert Panel.

88. The Special Interlocutor notes that, despite the Agreement noting that the appointed Cultural Monitors will conduct appropriate ceremonies, GeoScan demanded that “Non-GeoScan people must stay completely out of the area where survey is taking place and need to maintain substantial distance away from my crew, not engaging them in filing, questions, etc. while they are trying to work” and stating that this is “non-negotiable” for the investigation to proceed (**Exhibit SCM-15, p.1**). Surely, there must be some level of compromise that would allow for the proper cultural ceremonies to take place, while at the same time maintaining the credibility of the investigation.

89. The Defendants and, apparently, their contractors fail to appreciate the traditional sociopolitical organization of the Mohawk peoples and continue to deny the Plaintiffs their traditional role and responsibilities in terms of this investigation.

PART III: CONCLUSION

90. It is the position of the Special Interlocutor, based on her observations, that the investigation is in shambles because of the actions of SQI and McGill as outlined in the foregoing. The Defendants seem to be saying one thing to this Honourable Court and then another thing outside of the Court, or acting in a way contrary to their submissions to this Honourable Court.

91. The Defendants have claimed that they too want to find the truth, but very little if anything they have done supports that claim.

92. This Honourable Court, through its powers under the *Code* and its inherent jurisdiction, can make orders to get the investigation on a correct path that promotes reconciliation and trust. This includes access to records.

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OFFICE OF THE SPECIAL INTERLOCUTOR
Intervenor

- **ARGUMENT PLAN**

Original

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