

C A N A D A

## S U P E R I O R   C O U R T

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**(Civil Division)**

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**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**KWETIO**, 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

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**AMENDED APPLICATION OF OCTOBER 20, 2023, FOR DECLARATORY RELIEF  
AND TO  
OBTAIN A SAFEGUARD ORDER**

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

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**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, **the Rectified** 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 **Rectified** Settlement Agreement provided **for an Expert** Panel of three archaeologists jointly selected by the Plaintiffs, the Société Québécoise des Infrastructures (hereafter, "**SQI**") and McGill University (hereafter, "**McGill**") **who** 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 **Rectified** Settlement Agreement, the Plaintiffs have faced many unforeseen challenges and hurdles in implementing the **Rectified** Settlement Agreement.
8. In a Case Management Conference on June 29<sup>th</sup>, 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 **Expert** 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 **Expert** Panel that was set up pursuant to **the** Rectified Settlement Agreement; 2) Convening a further judicial settlement conference; and 3) Litigation (**Exhibit MM-4**).

9. On June 29<sup>th</sup>, 2023, the Plaintiffs signaled via email to all parties their decision to negotiate out-of-court an extension of the mandate of the **Expert** Panel instead of using court resources for a judicial settlement conference or litigation (**Exhibit MM-5**). As detailed below, the Defendants waited one month, **until** July 28<sup>th</sup>, 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 **Rectified** Settlement Agreement and problems that arose in implementing the Agreement was dismissed by the Defendants, said problems **continued to worsen** to the point of compromising the integrity of the whole investigation.
11. As detailed below, the **Plaintiffs respectfully submit that the** Defendants explicitly breached both the spirit, **intent** and the **written terms** of the **Rectified** Settlement Agreement. **Specifically, the breaches alleged include, but not limited to,** refusing to implement the Panel's recommendations and unilaterally terminating the Panel's mandate on August 3<sup>rd</sup>, 2023 (**...**) (**Exhibit MM-7**).
12. Following the excavation being conducted in response to the Historic Human Remains Detection Dogs (hereafter, "HHRDD") **independently alerting to** of potential human remains between July 10<sup>th</sup> and 12<sup>th</sup>, 2023, contractors **hired by the Defendants** 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 (**...**) (**Exhibits MM-55 and MM-56**). This led to a recommendation on July 26<sup>th</sup>, 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 **jointly appointed Expert** Panel's recommendation (**Exhibit MM-8**) – **despite the Rectified Settlement Agreement providing that all parties were bound by its recommendations.**
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 25<sup>th</sup>, 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 **Expert** 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 **Expert** Panel's mandate was terminated **by the Defendants** before several other **of their** 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 **Expert** Panel's request to review the Report and provide **updated** recommendations, and the **Expert** 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, **without any appropriate qualifications and expertise**, set out to unilaterally interpret the data and minimize anomalies **discovered through the GPR scan undertaken by contractors hired by SQI and McGill. McGill and SQI began to publicly share** 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 4<sup>th</sup>, 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**). **In so doing, they excluded** a larger number of "unknown" anomalies which GeoScan's report deemed to possibly be burials of children or **burials** 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 **submitted** by the SQI (**Exhibit MM-21**).

**Articles of Homologated Rectified 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 **Rectified 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 **Expert 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 **Expert Panel** by unilaterally terminating their mandate on August 3, 2023;
- d) Article 13: Honouring the recommendations of the **Expert Panel** by unilaterally deciding which recommendations to implement **and which to not**; and
- e) Article 17: Seeking the **Expert Panel**'s input in the event of an unexpected discovery, which is impossible to achieve if the **Expert Panel** has been disbanded.

18. **The Plaintiffs do not agree that the Expert Panel's mandate has concluded and they contest the Defendants' understanding of the Rectified Settlement Agreement as terminating their mandate following the submission of their report.**

19. Further, and as detailed in the attached affidavit of Kwetiio dated August 27, 2023, the Defendants have breached the spirit of the homologated **Rectified 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 **Expert 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 **Expert Panel**'s mandate before unilaterally terminating the **panel**, 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 **Expert** Panel's recommendations such as conducting GPR searches in bad weather, denying requests for extension by the **Expert** 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.

**20. In addition, as detailed in the affidavit of Lloyd Benedict to be filed, the Plaintiffs respectfully submit that the Defendants have breached the Rectified Settlement Agreement in the following ways:**

- a) **Authorizing drilling and excavation work without cultural monitors between September 11, 2023, and September 26, 2023;**
- b) **Potentially breaching the recommendations of the Expert Panel by allowing excavation in zone 11 without archaeological monitoring, and mishandling potential evidence. The discovery after the fact and by accident of a child's shoe in zone 11 on September 27, 2023, suggests that excavation took place there without archaeological monitoring;**
- c) **Findings that included bones were not announced to the Cultural Monitors, and no proper detailed report had been provided to the Plaintiffs about the investigation of the area where HHRDD alerted and the excavation of GPR anomalies;**
- d) **The Defendants have also authorized non-archaeological work within the Hersey Pavilion inside the 10-meter radius around the area where HHRDD alerted, potentially damaging evidence of human remains. The 10-meter radius was recommended by the Defendants' own contractor and was adopted by the Expert Panel;**
- e) **In addition to refusing to implement many recommendations of the Expert Panel, the Defendants have ignored the recommendations of their own service providers, notably regarding the investigation of unknown anomalies detected by GPR (Exhibit SCM-15).**

- f) The Defendants and their employees have either not informed or have sent contradictory messages to the Plaintiffs and their associates, resulting in the absence of cultural monitors during critical phases of the archaeological investigation, notably when piles of soil potentially containing human remains were moved, and when non archaeological excavation was launched in the area where HHRDD detected the scent of human remains, before its source was established; and
- g) The Defendants have compromised the financial stability of cultural monitors with unjustified delays in payment.

### **Serious and Irreparable Prejudice**

21. By breaching both the spirit and the letter of the Rectified Settlement Agreement, the Defendants' behaviour is further damaging the credibility of the investigation, thus defeating the purpose of the proceedings. In doing so, the Defendants are causing serious and irreparable prejudice to current and future investigations and searches for unmarked graves of Indigenous children in this instance and across Canada.
22. 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.
23. These actions by the Defendants are causing extreme trauma and re-traumatization 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 perpetuating these injustices. Cultural sensitivity and competency is essential.
24. No sum of money or material reparation could compensate for the destruction and/or disturbance of human remains and forensic evidence related to the burials of Indigenous children, which the families of those children who never returned home may wish to rely on to obtain justice in criminal courts, and to obtain closure to their horrific experiences.



## Emergency Treatment

25. In addition to compromising the spirit of reconciliation underscored in the Rectified Settlement Agreement, the continuing behaviour of the Defendants is jeopardizing the investigation and its credibility Their actions serve to marginalize the roles, laws and protocols of Indigenous people, hindering their ability to monitor the archaeological investigation (...), within a space akin to an open-air prison where insensitive security guards patrol, effectively compromising their safety.
26. 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 reassurances s or outright dismissal.
27. (...) Several issues indicate that the Defendants wish to excavate the zone where the HHRDDs independently detected the scent of human remains before the source of the scent is established. The Defendants' refusal to not only allow the HHRDDs to return to the site to further investigate where the smell came from, the fact that they refused to allow investigation inside the building within the 10-meter radius around which the HHRDD alerted, the fact that non archaeological work is currently taking place within the 10-meter radius inside the building, and the fact that the Defendants have moved the piles of soil excavated in the 10-meter radius to clear the zone against the will of the Plaintiffs and in the absence of cultural monitors prove that the Defendants are preparing to excavate the zone in the short term without following any of the related provisions in the Settlement Agreement.
28. Once shovels hit the ground, or evidence is mishandled, the investigation is tainted. The Plaintiffs established in the October 27<sup>th</sup> injunction decision that they face serious and irreparable harm if this occurs without following archaeological best practices.

## Remedies Sought

29. 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.
30. Given the intervening developments, the Plaintiffs respectfully submit that the Rectified Settlement Agreement homologated by the Quebec Superior Court requires intervention by this Honourable Court to enforce it, including an

explicit order that compel the Defendants to respect the wording and spirit of the Agreement.

31. 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 **Expert Panel be immediately reformed, with a third member with expertise in forensic sciences and security appointed to replace the one who resigned, and providing that the Expert Panel's work shall continue until the site has been investigated properly and fully according to the best practices in the pertinent fields as determined by the Expert Panel. The expert in forensic science must 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.**
- c) That the Defendants must respect and implement all the recommendations of the **Expert Panel as agreed to in the Rectified Settlement Agreement.**
- d) That the Defendants must cease all work in areas under investigation, **including a five (5) meter buffer**, so as to not tamper with the evidence or risk destroying human remains. **That the Defendants must pay an appropriate number of cultural monitors in a timely way.**
- e) **That the Defendants must pay an appropriate number of cultural monitors in a timely manner.**

**(...)**

- f) **Costs.**
- g) Such other orders as this Honourable Court may make.

32. These orders, **in part, seek** to ensure the safety of the Plaintiffs and Indigenous Cultural Monitors who must be protected from aggression, assault, and intimidation from the Defendants, **their employees and contractors** 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.

### ON AN 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 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 Expert 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 Expert Panel at any time until the completion of the investigation;

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

**ORDER the Defendants to allow access inside the buildings for the needs of the archaeological investigation.**

**EXTEND** the involvement and oversight of the Expert 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 and the Expert Panel in all communications with third parties, including service providers, as it pertains to the investigation of the site, and to provide all available reports and data to the Plaintiffs and the Expert Panel;

**ORDER** the Defendants to inform the Plaintiffs of the service provider being hired prior to contract, and if the Plaintiffs disagree, to ask the Expert Panel to make final determination of whether hiring should not proceed;

**ORDER** the Defendants to provide payment for Cultural Monitors on a monthly basis, and to pay for a maximum of three (3) cultural monitors for each active archaeological site, both in the future and retroactively, including 3-hour compensations for unannounced cancelled workdays and mileage within 150 kilometers from the site;

**ORDER** the Defendants to replace security staff active in archaeological sites by TD Security, so Cultural Monitors must only report to and interact with TD Security only (...);

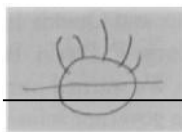
**ORDER** the Defendants and their staff not to disturb, harass, or intercept Cultural Monitors and the Plaintiffs on the site. The Defendants and their staff should not approach the Plaintiffs and Cultural Monitors closer than 20 meters. The Defendants can communicate messages to Indigenous people present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

**EXEMPT** the Plaintiffs from providing a suretyship;

**ORDER** costs in favour of the Plaintiffs and against the Defendants jointly and severally; and

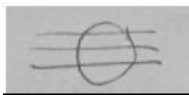
**MAKE ANY OTHER ORDER** the Honourable Court considers appropriate;

Kahnawake, October 20, 2023



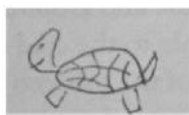
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KAHENTINETHA  
Plaintiff



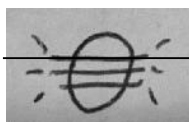
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KARENATHA  
Plaintiff



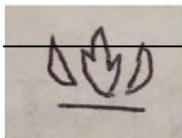
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KARAKWINE  
Plaintiff



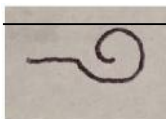
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KWETIIO  
Plaintiff



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OTSITSATAKEN  
Plaintiff



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KARONHIATE  
Plaintiff

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No: 500-17-120468-221

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SUPERIOR COURT (CIVIL DIVISION)  
DISTRICT OF MONTREAL

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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  
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COPY FOR NOTIFICATION

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