

CANADA

PROCÈS-VERBAL D'AUDIENCE CORRIGÉ

COUR SUPÉRIEURE

Pratique

Chambre Civile

PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉALRéféré
deSalle
prévue
16.12

Date

Le 27 octobre 2022

No :
500-17-120468-221

L'HONORABLE GREGORY MOORE, J.C.S.

JM-2711

Partie demanderesse		Procureur(s)
KAHENTINETHA KARENNATHA KARAKWINE KWETIIO OTSITSATAKEN KARONHIATE	Présente Présente Présente Présente Absent Absent	Se représentent seules
Partie défenderesse		Procureur(s)
SOCIÉTÉ QUÉBÉCOISE DES INFRASTRUCTURES	Absente	Me Fabrice L. Coulombe Me Laurence Vallée-Dandurand Me Vicky Berthiaume BCF fabricel.coulombe@bcf.ca laurence.valleedandurand@bcf.ca vicky.berthiaume@bcf.ca Présent Présente Présente
HÔPITAL ROYAL VICTORIA et CENTRE UNIVERSITAIRE DE SANTÉ McGILL	Absentes	Me Véronique Roy LANGLOIS AVOCATS veronique.roy@langlois.ca Présente
UNIVERSITÉ MCGILL	Absente	Me Danielle Marcovitz Me Douglas Mitchell IMK L.L.P. dmitchell@imk.ca dmarcovitz@imk.ca Présente
VILLE DE MONTRÉAL	Absente	Me Simon Vincent BÉLANGER, SAUVÉ svincent@belangersauve.com Présente
PROCUREUR GÉNÉRAL DU CANADA	Absent	Me David Lucas Me Mireille-Anne Rainville MINISTÈRE DE LA JUSTICE CANADA david.lucas@justice.gc.ca mireille-anne.rainville@justice.gc.ca Présent Présente

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PROCUREUR GÉNÉRAL DU QUÉBEC	Absent	Me Daniel Benghozi (TEAMS) Me Pierre-Luc Beauchesne Me Eric Bellemare BERNARD, ROY (JUSTICE-QUÉBEC) pierre-luc.beauchesne@justice.gouv.qc.ca daniel.benghozi@justice.gouv.qc.ca eric.bellemare@justice.gouv.qc.ca	Présent Présent
OFFICE OF THE INDEPENDENT SPECIAL INTERLOCUTOR FOR MISSING CHILDREN AND UNMARKED GRAVES AND BURIAL SITES ASSOCIATED WITH INDIAN RESIDENTIAL SCHOOLS	Présente	Me Donald Worme, KC Me Mark Ebert Me Julian N. Falconer Me Mitchell Goldenberg Me Paul Vincent Marcil (TEAMS) Avocat conseil MARCIL & COOPER	Présents Présent Présent Présent

Nature de la cause

Montant : \$

Cote(s)	Requête (s) Gestion particulière
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Greffier(ière) Carmen Sevillano	Interprète _____	Sténographe _____
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ENREGISTREMENT NUMÉRIQUE

Audition AM :	Début 09 H 04	Fin 12 H 18	Audition PM :	Début 14 H 04	Fin 16 H 56
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Affaires référées au maître des rôles	Résultat de l'audition Judgement rendu sur l'injonction interlocutoire
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HEURE

09 H 04	<u>OUVERTURE DE L'AUDIENCE</u> Identification de la cause des procureurs
09 H 06	Échanges préliminaires de part et d'autre Argumentations en défense (suite) Sur l'objection à la preuve et sur l'injonction interlocutoire
09 H 08	De Me Coulombe

09 H 11 Question du Tribunal

09 H 26 Sur l'objection au rapport de Monsieur Philippe Blouin et à la déclaration sous serment de Madame Kimberly R. Murray

Objection sur l'interlocutrice spéciale

09 H 47 De Me Berthiaume

10 H 04 Question du Tribunal

10 H 15 Questions du Tribunal

10 H 19 Questions du Tribunal

10 H 25 Question du Tribunal

10 H 31 Question du Tribunal

10 H 41 Questions du Tribunal

10 H 45 Intervention de Me Coulombe

10 H 47 **SUSPENSION**

10 H 48 **REPRISE**

10 H 08 Madame Kwetiio s'adresse au Tribunal

10 H 08 Argumentations en défense (suite)

De Me Roy

11 H 09 Question du Tribunal

11 H 10 De Me Vincent

11 H 15 Questions du Tribunal

11 H 28 De Me Rainville

12 H 05 Échanges de part et d'autre (gestion)

12 H 15 **SUSPENSION DE L'AUDIENCE**

12 H 18 **REPRISE DE L'AUDIENCE**

14 H 07

Argumentations en demande

De Me Falconer

14 H 08

De Me Worme

15 H 04

SUSPENSION

15 H 38

REPRISE

15 H 56

Argumentations en demande (suite)

15 H 57

De Madame Kwetiio

16 H 23

SUSPENSION

16 H 27

REPRISE

Réplique

16 H 27

De Me Mitchell

16 H 33

De Me Vincent

16 H 35

Le Tribunal s'adresse aux parties

Le Tribunal rend jugement séance tenante

1 For the reasons explained verbally and recorded digitally, **THE COURT:****DISMISSES** the objection to the admissibility of the sworn statement of Philippe Blouin, dated August 20, 2022;**GRANTS** the application to intervene on a conservatory basis by the Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites Associated with Residential Schools;And for the reasons explained verbally, recorded digitally, and appended to these Minutes, **THE COURT:****GRANTS**, in part, the plaintiffs' application for an interlocutory injunction;**ORDERS** the Société québécoise des infrastructures and McGill University not to conduct, authorize, or allow any excavation in furtherance of the redevelopment of the site of the Allan Memorial Institute or the Royal Victoria Hospital until the parties have completed discussions, undertaken in a spirit of reconciliation, regarding the archaeological investigations that must be conducted;

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INVITES the parties to discuss and to establish the parameters of an appropriate archaeological plan;

DECLARES that this interlocutory injunction is issued without prejudice to a party's right to apply for its revocation once an appropriate archaeological plan has been established;

PLACES the parties' discussion of an appropriate archaeological plan on the agenda of the next case management conference;

WITH legal costs in favour of the plaintiffs.



GREGORY MOORE, J.S.C.

16 H 56

FIN DE L'AUDIENCE.



Carmen Sevillano, g.a.C.S.

**APPENDIX to the Minutes
of the hearing held on October 27, 2022**

Kahentinetha et als. v. Société québécoise des infrastructures, et als.

500-17-120468-221

OVERVIEW

1. The plaintiffs apply for the following interlocutory injunction:

ORDER the Defendants Société québécoise des infrastructures, McGill University (...) and the Ville de Montreal to stop the renovation plans of the Royal Victoria Hospital and Allan Memorial psychiatric hospital site.

ORDER the Defendants McGill University and the Attorney General of Canada to provide funds for a forensic and archeological investigation of the Allan Memorial and Ravenscrag Gardens to be carried out by an independent investigation team led by the Kahnistensera and MK-Ultra survivors.

2. They are concerned that Indigenous patients are buried in unmarked graves on the grounds that will be excavated as part of the site redevelopment. Before that work begins, they insist that an appropriate archeological study be performed to identify any graves and to ensure that they will not be desecrated or destroyed by the excavation. The study must be conducted by archaeologists who are sensitive to Indigenous concerns and who will use ground penetrating radar, lidar, dogs, or other non-invasive techniques to identify unmarked graves before any excavation begins.
3. The defendants respond that they will respect the provincial and municipal laws and regulations that protect Mount Royal as a heritage site. They cannot excavate without a permit, which will not be issued without considering the archaeological impact of the project and which could take account of Indigenous groups' preoccupations. Should the plaintiffs disagree with the issuance of a permit, they could make their concerns known through the regulatory appeal and judicial review processes.
4. Furthermore, the defendants will respect the *Cultural Heritage Act*, which requires that excavation cease as soon as archaeological property is found and that the Minister of Culture and Communications be informed. They add

that the plaintiffs' evidence does not establish the probability that Indigenous patients are buried in unmarked graves on the site.

5. For the reasons that follow, the Société québécoise des infrastructures and McGill University must not excavate the site until an appropriate archaeological plan has been established.
6. The parties are invited to meet out of court to establish how the archaeological work should be conducted. We will follow up during the next case management conference.
7. The second conclusion is moot because McGill University and the Société québécoise des infrastructures admit that they will be responsible for any archaeology investigation that is required.

ANALYSIS

8. The plaintiffs apply to stop the redevelopment work until a final judgment is rendered on the merits. However, their concern lies with the identification of unmarked graves before that work begins. There is no reason to halt the redevelopment project completely, especially when we do not know when the trial will take place nor when final judgment will be rendered. The parties have not begun to ready the case for a trial that will deal with complex factual and legal issues that will take time to prepare, to present, and to decide.
9. The plaintiffs' application will be analysed in terms of a case management safeguard order (article 158(8) *Code of Civil Procedure*).

Serious Issue or Appearance of Right

10. The plaintiffs have a clear right to expect that the defendants will address and attempt to resolve their concerns in a spirit of reconciliation before relying on the adversarial process to advocate their positions.
11. The plaintiffs allege that Indigenous patients of the Allan Memorial Institute and the Royal Victoria Hospital are buried on the site that is scheduled to be redeveloped. In addition, a 2016 archeological report prepared for the defendants (Exhibit PM-11), suggests that Mount Royal was used as a burial site before the arrival of Europeans. The redevelopment of the site will require excavation, which could disturb those burial sites.

12. The plaintiffs have a right to bring these concerns to Court and to be listened to and heard. They are exercising these rights at the beginning of an era of reconciliation in Canada, which the Truth and Reconciliation Commission defines as an ongoing process of establishing and maintaining respectful relationships.
13. The identification of unmarked Indigenous burial sites is a priority for discovering the truth and working towards reconciliation. The TRC's Call to Action 76 encourages public and para-public institutions like McGill University and the Société québécoise des infrastructures who are
 - ... engaged in the work of documenting, maintaining, commemorating, and protecting residential school cemeteries to adopt strategies in accordance with the following principles:
 - i. The Aboriginal community most affected shall lead the development of such strategies.
 - ii. Information shall be sought from residential school Survivors and other Knowledge Keepers in the development of such strategies.
 - iii. Aboriginal protocols shall be respected before any potentially invasive technical inspection and investigation of a cemetery site.
14. This call to action is drafted in terms of residential schools but the plaintiffs and the Special Interlocutor have demonstrated the possible parallels between that system and the health services offered to Indigenous peoples.
15. Although these issues are raised in the adversarial court process, the parties must be mindful of opportunities to speak out of court to settle their differences on an amicable basis. Indeed, article 1 of the *Code of Civil Procedure* requires that parties consider private prevention and resolution processes before referring their dispute to the courts.
16. The adversarial process does not appear best-suited to resolve the issue that divides the parties at this interlocutory stage, especially when they are not far apart. They agree that archaeological work must be conducted on the site and that best practices should be followed. The defendants do not challenge the plaintiffs' assertion that archaeological best practices include the principle that "any work to locate missing Indigenous children must be led by Indigenous communities" (Exhibit K-7).
17. Despite how close the parties' positions are, they have not spoken out of court since the judicial application was filed in March 2022 nor since July when they began preparing for this interlocutory injunction.

18. An out of court discussion, undertaken in the spirit of reconciliation, could resolve the issue more comprehensively than litigation.

Serious or Irreparable Harm

19. Continuing excavation will harm the plaintiffs and those who share their concerns. This satisfies the definition of irreparable harm because it cannot easily be compensated by the author(s) of that harm.
20. The plaintiffs speak of the trauma that results from not knowing what happened to their family and community members, from the possibility that they were mistreated and suffered, and from the threat that their remains will be disturbed. They refer to the ceremonies that must be conducted at burial sites but that aren't part of the redevelopment plans.
21. The plaintiffs' and some of the people who came to support them reacted emotionally during their presentation in court. They described their anguish at being prevented by the redevelopment project from fulfilling their obligations to look after generations past, present, and future. They expressed their frustration about having to fight every level of government to receive help in discovering the truth about what happened to their ancestors.
22. The plaintiffs do not trust the defendants' claims that they will be respectful of Indigenous concerns. McGill University allowed an archeological excavation to begin on October 24th, two days before this hearing.
23. The plaintiffs proved the serious or irreparable harm that they will suffer unless an injunction is ordered.
24. The order sought also refers to the Ville de Montréal but the City is not conducting the redevelopment and is not responsible for the harm caused by excavating the site before any unmarked graves are identified.

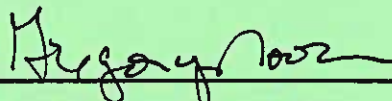
Balance of Convenience

25. The balance of convenience favours the plaintiffs. They will suffer irreparable harm if the excavation work is not suspended for the time it takes to develop an appropriate archaeological plan to identify any unmarked graves.

26. McGill University and the SQI did not suggest that establishing or executing an appropriate archaeological plan will cause any inconvenience.
27. The evidence does not show that the redevelopment will be delayed. The start date is not known and the timetable for its completion has not been established. There is no evidence that meeting with the plaintiffs, establishing, and conducting an appropriate archaeological plan will add to the cost of project, either.
28. Indeed, the redevelopment cannot begin until the Minister of Culture and Communication issues a permit to conduct archaeological work, which suggests that this is the most convenient time to address the plaintiffs' concerns.

Urgency

29. McGill has applied for a permit to conduct archaeological excavation and conducted related excavation this week. The development of an appropriate archaeological plan in the short term can inform those processes and ensure that the work proceeds in a manner that respects the plaintiffs' legitimate concerns about identifying any unmarked graves before they are disturbed. Otherwise, the plaintiffs and those who share their concerns will continue to face the trauma that comes from not knowing whether, when, or how their community members' graves might be disturbed.



GREGORY MOORE, J.S.C.