

CANADA

**PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL**

**COURT OF APPEAL**

(Civil Division)

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**No.: 500-09-030806-230**

500-17-120468-221

**SOCIÉTÉ QUÉBÉCOISE DES  
INFRASTRUCTURES**

APPLICANT –  
Defendant

Vs.

**KAHENTINETHA  
KARENNATHA  
KARAKWINE  
KWETTIIO  
OTSITSATAKEN  
KARONHIATE**

RESPONDENTS –  
Plaintiffs

And

**McGILL UNIVERSITY  
CENTRE UNIVERSITAIRE DE SANTÉ McGill  
HÔPITAL ROYAL VICTORIA  
VILLE DE MONTRÉAL  
PROCUREUR GÉNÉRAL DU CANADA**

IMPLEADED PARTIES –  
Defendants

And

**PROCUREUR GÉNÉRAL DU QUÉBEC**

IMPLEADED PARTY-  
Impleaded party

And

**OFFICE OF THE INDEPENDENT SPECIAL  
INTERLOCUTOR FOR MISSING CHILDREN AND  
UNMARKED GRAVES AND BURIAL SITES  
ASSOCIATED WITH INDIAN RESIDENTIAL  
SCHOOLS – KIMBERLY MURRAY**

IMPLEADED PARTY –  
Third-Party Intervenor for Conservatory Purposes

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**OUTLINE OF ORAL ARGUMENT**

**INDEPENDENT SPECIAL INTERLOCUTOR FOR MISSING CHILDREN AND UNMARKED  
GRAVES AND BURIAL SITES ASSOCIATED WITH INDIAN RESIDENTIAL SCHOOLS**

**("SPECIAL INTERLOCUTOR"),**

**INTERVENOR FOR CONSERVATORY PURPOSES**

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## **PART I: OVERVIEW**

1. The Applicant, SQI, fails to establish grounds of appeal or irremediable injury.

## **PART II: FACTS**

2. This pursuit of investigating potential unmarked burials of Indigenous children is not based on merely testimonial evidence.<sup>1</sup> Rather, the investigation undertaken by the Settlement Agreement has directly led to discoveries of potential burials by specially trained Historic Human Remains Detection Dogs, ground-penetrating radar results, and the uncovering of bone fragments at the site.<sup>2</sup>
3. These developments at the construction site are discoveries that strengthen the Respondents' prima facie right and urgency to a Safeguard Order, and demonstrate the importance of having the Expert Panel oversee the archaeological investigation.
4. The Applicants had ample opportunity to raise concerns with the protocol that all parties and the Superior Court abided by in Special Case Management, specifically during the two months between the Breach of Agreement application and the hearing.
5. There is no ambiguity in the Superior Court's order: The Expert Panel is to provide recommendations in regards to the execution of archaeological techniques identified in their Mapping Report, as per Articles 11, 13 and 17 of the homologated Agreement. The order interprets that the Expert Panel's mandate did not end on July 17, 2023.
6. The execution of archaeological techniques has not been completed to a stage where the presence of burials can be ruled out. In light of the detection dogs and radar discoveries, the homologated Settlement Agreement mandates that the Expert Panel's recommendations are required to oversee follow-up techniques.

## **PART III: ARGUMENTS**

### **a) *The archaeological investigation does not create a new legislative regime***

7. The Superior Court's order to reform the Expert Panel to guide recommendations at the redevelopment site does not create a new legislative regime. Rather, it is the

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<sup>1</sup> As alleged in the Leave to Appeal application at para 4.

<sup>2</sup> See Exhibit PM-5 of the Applicant McGill University's De Bene Esse Application, paras 12 and 15.

enforcement of a homologated Settlement Agreement, which is protected by law.<sup>3</sup>

8. All parties agreed to follow recommendations based on the best practices in archaeology for the purposes of lifting the Superior Court's October 27, 2022 Safeguard Order that suspended construction on site.
9. The Expert Panel's authority does not offend the *Cultural Heritage Act*. The Superior Court is merely enforcing a homologated Agreement where the parties agreed to safeguards to address concerns for the archaeological investigation. One of the most important safeguards was an impartial Expert Panel to oversee best practices.

**b) Purposes of the Application for Breach of Settlement Agreement**

10. The *raison d'être* of the Superior Court's Safeguard Order was in line with its procedural function, to maintain the status quo of a court order. The status quo was the archaeological investigation, as per the homologated Agreement, with the oversight of the Expert Panel.
11. The Respondents have a genuine right, by virtue of the Agreement's homologation, to have any breaches enforced by the Superior Court,<sup>4</sup> both broadly and liberally.<sup>5</sup>
12. The Applicant alleges that it was denied the right to present evidence at the hearing without clarifying what more they would have wanted at the hearing. In fact, they had opportunities to make full arguments to support their interpretation of the Agreement.
13. The resulting Safeguard Order is akin to a declaratory order for enforcing the Agreement with the Expert Panel's oversight, the same arrangement the Applicant agreed to. There is no ambiguity in this stopgap measure, nor a threat of future applications for Breach **so long as** the Applicant upholds its duties in the Agreement.
14. Indeed, extensive efforts were taken to negotiate out-of-court resolutions to the Applicant's narrow interpretation of the Expert Panel's mandate starting in April 2023, and intensifying in August 2023 when they terminated the Panel's mandate.

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<sup>3</sup> *Code of Civil Procedure*, [CQLR c C-25.01](#), Article 528 (CCP).

<sup>4</sup> *Supra Note 3*, CCP, Article 657.

<sup>5</sup> *A.M. vs M.B.* 2018 QCCS 1905 at para 9.

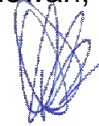
Toronto, Ontario, January 11, 2024



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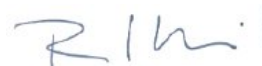
Saskatoon, Saskatchewan, January 11, 2024



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Pointe-Claire, January 11, 2024



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**QUEBEC COURT OF APPEAL**

**SOCIÉTÉ QUÉBÉCOISE DES INFRASTRUCTURES**

APPLICANT – Defendant

c.

**KAHENTINETHA et al**

RESPONDENTS – Plaintiffs

et

**MCGILL UNIVERSITY et al**

IMPLEADED PARTIES – Defendants

et

**PROCUREUR GÉNÉRAL DU QUÉBEC**

IMPLEADED PARTY – Mis en cause

et

**OFFICE OF THE INDEPENDENT SPECIAL INTERLOCUTOR FOR  
MISSING CHILDREN AND UNMARKED GRAVES AND BURIAL  
SITES ASSOCIATED WITH INDIAN RESIDENTIAL SCHOOLS –  
KIMBERLY MURRAY**

IMPLEADED PARTY – Intervenor for conservatory purposes

**OUTLINE OF ORAL ARGUMENT  
OF OFFICE OF THE INDEPENDENT SPECIAL INTERLOCUTOR**

**ORIGINAL**

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