SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-17-120468-221

DATE: November 20, 2023

BEFORE THE HONOURABLE GREGORY MOORE, J.S.C.

KAHENTINETHA
and
KARENNATHA
and
KARAKWINE
and
KWETIIO
and
OTSITSATAKEN
and
KARONHIATE
Plaintiffs

v.

SOCIÉTÉ QUÉBECOISE DES INFRASTRUCTURES
and
ROYAL VICTORIA HOSPITAL
and
McGILL UNIVERSITY HEALTH CENTRE
and
McGILL UNIVERSITY
and
VILLE DE MONTRÉAL
and
ATTORNEY GENERAL OF CANADA
Defendants

JM-2711

and

ATTORNEY GENERAL OF QUEBEC
Mis en cause

and

OFFICE OF THE INDEPENDENT SPECIAL INTERLOCUTOR FOR MISSING CHILDREN AND UNMNARKED GRAVES AND BURIAL SITES ASSOCIATED WITH INDIAN RESIDENTIAL SCHOOLS
Intervenor

and

CENTRE INTÉGRÉ UNIVERSITAIRE DE SANTÉ ET DE SERVICES SOCIAUX DE L'OUEST-DE-L'ÎLE-DE-MONTRÉAL
Mis en cause

JUDGMENT
(Plaintiffs' Application for a Safeguard Order to Ensure Compliance with the *Rectified Settlement Agreement*)

OVERVIEW

[1] The plaintiffs apply for a safeguard order to ensure compliance with the *Rectified Settlement Agreement* that the parties signed on April 6, 2023.[1] The settlement agreement creates a three-person panel of archaeologists to advise the parties on the techniques and specialists to identify any unmarked graves on the site of the Royal Victoria Hospital and the Allan Memorial Institute, which is being redeveloped by the *Société québécoise des infrastructures* and McGill University. The plaintiffs are concerned that the SQI and McGill are not involving the panel of archaeologists in the on-going search for unmarked Indigenous graves.

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[1] The homologated settlement agreement is appended to the minutes of the case management conference held on April 20, 2023.

[2] Without the on-going assistance of the panel, the plaintiffs find themselves in the same situation they were in before the safeguard order of October 27, 2022: the excavation and the associated archaeological work will proceed without their knowledge or involvement. That work will identify whether there are any unmarked Indigenous graves on the site, yet the plaintiffs would only be informed of any discoveries after the fact.

[3] If the panel is not to be involved in the project, the plaintiffs ask the Court to order that they play a more active role. They want to be consulted before the SQI, McGill or its professionals apply for further archaeological excavation permits, sign contracts with other suppliers involved in the searches, or communicate with those service providers.

[4] The plaintiffs also seek an order that the cultural monitors be paid regularly, and that the defendants' employees or service providers not speak to or approach the cultural monitors.

[5] The SQI and McGill answer that they comply with the settlement agreement and that the panel of archaeologists has completed its mandate. The SQI and McGill will consult the panel in the future should circumstances warrant. They add that the other relief requested falls outside of the settlement agreement.

[6] The plaintiffs' application is granted in part. The settlement agreement names a panel of archaeologists to: (i) recommend techniques to identify any unmarked graves on the New Vic site; and (ii) recommend firms to carry out the techniques and to analyse the relevant data.

[7] The settlement agreement also provides that the parties will follow the panel's recommendations. The panel recommends that it be provided with the data obtained as the techniques are executed so that it can make further recommendations about the next steps. For example, the data obtained from non-invasive investigative techniques will inform the degree of care required during the subsequent invasive techniques.

[8] The SQI and McGill must be guided by the panel's on-going recommendations about how the search for unmarked graves is to be carried out. The other relief that the plaintiffs request is not provided for by the settlement agreement and will not be ordered.

CONTEXT

[9] The SQI and McGill are redeveloping the former Royal Victoria Hospital and the Allan Memorial Institute. The plaintiffs fear that the site contains the unmarked graves of Indigenous people who were patients at those health institutions.

[10] On October 27, 2022, the Court issued a safeguard order to prevent the SQI and McGill from excavating on the site until an appropriate archaeological plan is developed to identify whether any unmarked graves are present.

[11] The parties met seven times to discuss an archaeological plan, followed by a three-day judicial settlement conference, which resulted in an agreement.

[12] The settlement agreement names a panel of impartial and independent archaeologists composed of Dr. Adrian Burke, Justine Bourguignon-Tétreault, and Dr. Lisa Hodgetts (article 6). The panel's mandate is: (i) to assess and identify archaeological techniques to detect whether there are unmarked graves, and (ii) to recommend specialists who will carry out the techniques and analyse the data (article 11).

[13] The panel will report to the SQI, McGill, and the Kanien'keha:ka Kahnistensera (article 12) who agree to be bound by the panel's recommendations regarding the techniques and to be "guided by the Panel's recommendations as to the specialists to carry out the techniques and analyse the relevant data" (article 13).

[14] The panel will issue its recommendations for a priority zone before May 8, 2023 (article 14), and for the rest of the site before July 17, 2023 (article 15).

[15] On April 15, 2023, McGill sent service contracts to panel members Justine Bourguignon-Tétreault and Dr. Lisa Hodgetts, which set out their mandate, hourly rate,

and deliverables.[2] The contracts stipulate that they will end "*à la fin du mandat le 17 juillet 2023*." On April 27, McGill sent a similar service contract to Dr. Adrian Burke, which would remain "*en vigueur jusqu'au 17 juillet 2023*".[3]

[16] On May 8th, the panel sent its report regarding the priority zone to the SQI, McGill, and the plaintiffs.[4] For certain areas within the priority zone, the panel recommends that the search for unmarked graves use historic human remains detection dogs, ground-penetrating radar, and monitoring of the planned excavation by archaeologists. The panel also recommends that the Canadian Archaeology Association's Working Group on Unmarked Graves be contacted to review the GPR data.[5]

[17] The SQI hired the Ottawa Valley Search and Rescue Dog Association to search for unmarked graves using historic human remains detection dogs. Three dogs identified the odour of historic human remains in the same location in front of the Royal Victoria Hospital.[6]

[18] The SQI also hired Geoscan Subsurface Surveys Inc. to investigate the site using ground-penetrating radar[7] and Ethnoscop Inc. to perform archaeological excavation and to supervise the non-archaeological excavation.[8]

[19] On July 17th, the panel sent its report on the non-priority zone to the SQI, McGill, and the plaintiffs.[9] At section 5.3, the panel repeats its recommendation for historic human remains detection dogs and ground-penetrating radar to determine whether there might be any graves on the site. The panel adds that it is impossible to foresee the results and to recommend follow-up techniques, so the panel must therefore receive the data from

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2 Exhibit MM-25 and MM-35.
3 Exhibit MM-34.
4 The report is found at Exhibit MM-50. Its date is found on the first email in the chain produced as Exhibit MM-67.
5 Exhibit MM-50, section 5.2.B.
6 Exhibit MM-49.
7 Exhibit KA-22.
8 Sworn Statement of Simon Santerre, signed October 20, 2023, paragraph 6.
9 Exhibit MM-15.

the preliminary techniques, review them, and provide recommendations for the next steps. The panel repeats this recommendation at section 5.4, which is titled "Ongoing Review of Recommendations."

[20] On July 24th, the SQI sent a progress report on the implementation of the techniques to the parties and to the panel. Two days later, Dr. Lisa Hodgetts, a panel member, answered that the panel had updated its recommendations to account for recent developments.[10]

[21] The SQI answered the panel on August 1st. It stated that the panel was not mandated to direct, lead, or interfere with the work of the professionals hired to carry out the techniques.[11]

[22] On August 2nd, the SQI forwarded Geoscan's July 26th report to the panel members. In its summary, Geoscan reports having identified nine potential graves and a significant number of "unknown source features" that could not be ruled out as graves. Dr. Adrian Burke, a panel member, wrote back asking for time to review the report and to make recommendations.[12]

[23] The SQI responded the next day, saying that the panel's mandate ended when it provided its July 17th report.[13]

[24] Dr. Burke wrote back on August 6th, repeating the recommendations from the panel's reports on the priority zone and the non-priority zone that the data obtained from the non-invasive techniques must be reviewed by specialists other than Geoscan, be it the panel or outside archaeologists. He added that the SQI was acting contrary to the panel's recommendations.[14]

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10 Exhibit MM-8.
11 Exhibit MM-8.
12 The emails are produced as Exhibit MM-7 and Geoscan's report is MM-13.
13 Exhibit MM-7. The SQI, and later McGill, take issue with the term "peer review", however, that is a simplistic and uninformed dismissal of the panel's recommendation rather than an attempt to understand and to be guided by it.
14 Exhibit MM-66.

[25] On August 17th, Dr. Hodgetts addressed the SQI's reluctance to have Geoscan's results reviewed by the panel or by other archaeologists. She points out that the search for unmarked graves is a new and evolving area of expertise and that archaeologists must collaborate to ensure the quality of their data and interventions: "No single team, no matter how qualified, can have all the answers at this juncture, so we all need to draw on others' experience to avoid inadvertently missing targets of interest in our data."[15]

ANALYSIS

[26] The plaintiffs request a safeguard order to force the SQI and McGill to respect the commitment they made in the settlement agreement to be guided by the panel's recommendations about which specialists should analyse the data.

[27] As stated in the judgement issued on September 18th, a safeguard order is an exceptional remedy that a court will only issue when it is convinced that the applicant appears to assert a valid right, that irreparable harm will occur if the order is not issued, that the balance of convenience favours the applicant, and that the Court must act urgently.

Appearance of right

[28] The settlement agreement provides the plaintiffs, the SQI, and McGill with a clear right to be guided by the panel's on-going advice.

[29] The words of the settlement agreement are clear.[16] Article 11 states that the panel will "assess and identify the appropriate archeological techniques ("the Techniques") to be used on different areas of the site to detect whether there are unmarked graves." Article 13 states that the SQI, McGill, and the plaintiffs will "be guided by the recommendations of the Panel as to the specialists to carry out the Techniques and analyse the relevant data."

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15 Exhibit MM-67.

16 The Supreme Court of Canada explains the rules of contract interpretation in *Uniprix* c. *Gestion Gosselin et Bérubé*, 2017 SCC 43, paragraphs 34 to 44.

[30] The plaintiffs claim that the SQI and McGill refuse to comply with the panel's recommendation, found in its reports of May 8th and July 17th and in subsequent emails, that it needs access to Geoscan's data to make informed recommendations about the appropriate on-going Techniques.

[31] The SQI and McGill answer that they accepted the panel's recommendations about which specialists to hire. Geoscan is specifically mentioned in the panel's recommendations and Ethnoscop fits the description of the archaeologists who should be hired to conduct archaeological excavation and to monitor the non-archaeological excavation. They are competent firms that should be trusted to collect and to evaluate their data, to report their discoveries, and to fulfil their contracts responsibly.

[32] The panel recommends that specialists other than Geoscan analyse the data, but the SQI and McGill insist that only Geoscan should do so.

[33] Their interpretation of article 13 is too limited. The words "as to" at article 13 mean "related to", "regarding" or "about". Recommendations about the specialists who will carry out the Techniques and analyse the relevant data need not be limited to an initial identification of the specialists. The panel recommends that Geoscan share its data with them or with other archaeologists so that the accuracy of the data may be confirmed. This will allow the panel to make further recommendations about the appropriate Techniques based on verified information as the panel's understanding of the site evolves. These recommendations are "related to", "regarding", and "about" the specialists and their work.

[34] The SQI and McGill assert that the panel's mandate ended on July 17th, at the expiry of the contracts they sent without informing the plaintiffs. This position is also too restrictive. The settlement agreement provides that the panel must submit its report on the non-priority zones by July 17th; it does not set a term for the panel's involvement in the on-going search for unmarked graves.

[35] The plaintiffs' interpretation of article 13 is more reasonable. The panel's mandate is not limited to making initial recommendations about search techniques and the specialists who will carry them out.

[36] It will not be necessary to rule on the other relief that the plaintiffs request because it is premised on the assumption that the panel will not play an on-going role in the archaeological search for unmarked graves.

Serious or irreparable harm

[37] The plaintiffs face the same irreparable harm as they did when the first safeguard order was issued last fall. The relevant paragraphs of that judgement are reproduced and incorporated here:

> ***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.

Balance of convenience

[38] The SQI and McGill are striving to complete the excavation and demolition work so that the New Vic project will be finished by the end of 2028. They add that any delay will compromise that objective and will increase the project's costs. Every month of delay will increase costs by $2M and cause an exponential impact on the cost of the overall project.[17] The SQI points out that the Techniques are almost finished in the priority zone and have not revealed any unmarked graves.

[39] The delay and costs of the overall project cannot justify the SQI's and McGill's unilateral reduction of their obligations under the settlement agreement, especially when doing so will cause irreparable harm to the plaintiffs. Neither the plaintiffs nor the panel are attempting to frustrate the progress of the redevelopment project, only to ensure that it does not proceed at the expense of any unmarked graves that might be on the site.

[40] The balance of convenience favours the plaintiffs.

Urgency

[41] The plaintiffs brought this matter to court quickly after realizing that the SQI and McGill consider that the panel's mandate is over. If a safeguard order does not issue, the on-going archaeology work will progress without the panel's oversight, thus depriving the plaintiffs of the advantage that they negotiated and agreed to in the settlement agreement.

Conclusion

[42] McGill argues that a safeguard order is not warranted because it is intended to protect a party's rights during the period between a provisional injunction and the hearing of an interlocutory injunction, but the plaintiffs do not seek either remedy.[18] McGill relies

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17 See the sworn declaration signed by Pierre Major on September 13, 2023.
18 See *Limouzin* v. *Side City Studios Inc.*, 2016 QCCA 1810.

on the *Limouzin* case, however, those parties were not subject to special case management. The Court of Appeal's reasoning can nevertheless be applied by analogy to the present case. A safeguard order will issue until a future case management conference early in 2024. At that point, the parties will have a better idea of the progress and results of the archaeological excavations, as well as their respective ability to abide by their settlement agreement, and whether and for how long a further order might be required.

[43] One of the panel members has resigned. The settlement agreement does not specify whether or how to replace her. The parties will have to discuss whether to replace her or to continue with a two-person panel.

[44] Finally, the plaintiffs ask that excavation at the New Vic site be suspended until the panel recommends that it be resumed. This will not be necessary. This judgment acknowledges the panel's role in recommending specialists to analyse the data as the Techniques are executed. As work progresses, the panel and the specialists may come to an arrangement about how to advise the parties that "there are no graves identified in a given area" (article 17).

FOR THESE REASONS, THE COURT:

[45] **GRANTS** in part the plaintiffs' *Amended Application of October 20, 2023, for Declaratory Relief and to Obtain a Safeguard Order*;

[46] **ORDERS** the *Société québécoise des infrastructures* and McGill University to abide by the *Rectified Settlement Agreement* they signed on April 6, 2023, and to be guided by the recommendations of the panel of archaeologists;

[47] **ORDERS** that this safeguard order remain in effect until Friday, March 1, 2024;

[48] **DISMISSES** the application for the other relief sought by the plaintiffs;

[49] **WITHOUT** legal costs given the divided success.

Gregory Moore

THE HONOURABLE GREGORY MOORE, J.S.C.

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Hearing date: October 27, 2023