COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-030806-236, 500-09-030809-230
(500-17-120468-221)

DATE: August 16, 2024

CORAM: THE HONOURABLE FRANÇOIS DOYON, J.A.
SUZANNE GAGNÉ, J.A.
ÉRIC HARDY, J.A.

No.: 500-09-030806-236

MCGILL UNIVERSITY
APPELLANT – Defendant
v.

KAHENTINETHA
KWETIIO
KARENNATHA
KARAKWINE
OTSITSATAKEN
KARONHIATE
RESPONDENTS – Plaintiffs
and

SOCIÉTÉ QUÉBÉCOISE DES INFRASTRUCTURES
ROYAL VICTORIA HOSPITAL
MCGILL UNIVERSITY HEALTH CENTRE
VILLE DE MONTRÉAL
ATTORNEY GENERAL OF CANADA
IMPLEADED PARTIES – Defendants
and

ATTORNEY GENERAL OF QUEBEC
IMPLEADED PARTY – Impleaded Party
and

INDEPENDENT SPECIAL INTERLOCUTOR FOR MISSING CHILDREN AND UNMARKED GRAVES AND BURIAL SITES ASSOCIATED WITH INDIAN RESIDENTIAL SCHOOLS
IMPLEADED PARTY – Intervenor

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JUDGMENT

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[1] The appellants, McGill University ("McGill") and the Société québécoise des infrastructures (the "SQI"), appeal from a judgment rendered on November 20, 2023, by the Superior Court, District of Montreal (the Honourable Justice Gregory Moore), which granted in part the respondents' application for a safeguard order.[1]

[2] The following are the conclusions of the judgment:

> **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.[2]
>
> [Boldface and italics in the original]

[3] It should be noted from the outset that the April 6, 2023 agreement (the "Agreement") terminates the injunctive component of the respondents' legal proceedings; consequently, it has the authority of *res judicata* between the parties.[3]

[4] In the summer of 2023, a disagreement arose regarding the scope of the panel of archeologists' role under the Agreement, which led to the respondents' application for a safeguard order.

[5] The judge was of the view that the criteria needed for such an application – appearance of right, serious or irreparable harm, balance of convenience, and urgency – had been met. As to the appearance of right, he interpreted the terms of the Agreement and concluded that it provides the parties with a clear right to be guided by the panel's ongoing recommendations.

[6] Both appellants submit that the judge erred on the criteria of appearance of right and serious or irreparable harm. They also argue that the judge's safeguard order has no

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1 *Kahentinetha c. Société québécoise des infrastructures*, 2023 QCCS 4436 [judgment under appeal].
2 *Id.*, paras. 45-49.
3 Art. 2633 *C.C.Q.*

correlation to the conclusions sought on the merits, cannot be enforced and, according to McGill, amounts to a structural injunction. Lastly, the SQI disputes the judge's assessment of the urgency criterion.

[7] As for the respondents and impleaded party the Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools (the "Special Interlocutor"), they argue that the Agreement is clear and that the parties' intention was to give the panel an ongoing supervisory and advisory role. They have also raised a ground based on the honour of the Crown. Impleaded party the Attorney General of Quebec (the "AGQ") points out that this latter matter was not raised at trial, such that no evidence pertaining thereto was presented nor was the issue debated. He further adds that the honour of the Crown does not apply in the instant case.

[8] It will not be necessary to address all of these arguments. Indeed, the Court is of the opinion that the judge misapprehended the scope of his power to make safeguard orders. This error led him to interpret the Agreement in a definitive manner and to rule on the parties' rights without a genuine debate on the merits. Moreover, the order he issued is not enforceable. The foregoing is sufficient to allow the appeals and reverse the judgment under appeal.

I. Context

[9] In order to fully understand the discussion below, it is useful to set out the chronology of the procedural steps, which steps are not contested.

[10] Following the relocation of the Royal Victoria Hospital's operations in 2015, the SQI undertook major work to repurpose the site of the former hospital and of the former Allan Memorial Institute (the "Site").

[11] The respondents are Indigenous individuals from the Mohawk Nation. They suspect that the Site may contain the graves of Indigenous children who succumbed to Dr. Ewen Cameron's treatments carried out within the scope of the CIA's Project MK-Ultra, from 1954 to 1963. In March 2022, they sued the appellants as well as impleaded parties the Royal Victoria Hospital, the McGill University Health Centre, the Ville de Montréal and the Attorney General of Canada. In their initial originating application, they sought the following conclusions:

> **FOR THESE REASONS, MAY IT PLEASE THE COURT:**
>
> **GRANT** this Application;

ON AN INTERLOCUTORY BASIS:

ORDER the Defendants Société québécoise des infrastructures, McGill University, Ville de Montreal and Stantec inc. to stop the renovation plans of the Royal Victoria Hospital and Allen 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;

EXEMPT the Plaintiffs from providing a suretyship;

MAKE ANY OTHER ORDER the Court considers appropriate;

ON THE MERITS OF THE CASE:

DECLARE that Defendants McGill University, McGill University Health Center, the City of Montreal, the Royal Victoria Hospital and the Société Québécoise des Infrastructures have illegally bought and sold stolen Indigenous property;

DECLARE that thequenondah (Mount Royal) is the inalienable land of the traditional kanien'keha:ka people, whose caretakers are the kahnistensera, whose permission must be sought for everything concerning the land;

DECLARE that the kahnistensera are the only representatives of the traditional kanien'kehá:ka people following the kaianerehkó:wa. As agents of the Government of Canada, Mohawk Band Councils should not be involved in any way in the current process, as they are in conflict of interest;

DECLARE that the Defendants McGill University and the Attorney General of Canada have funded and conducted crimes against humanity through the MK-Ultra program, whose use of unwitting patients violated the Nuremberg Code, and conducted genocide by targeting Indigenous children funneled through Residential Schools;

ORDER the Defendants Société québécoise des infrastructures, McGill University, Ville de Montreal and Stantec inc. to stop the projected demolition, construction, transformation of buildings, and the repurposing of the surrounding on the site of the Allan Memorial Institute, Ravenscrag gardens, and Royal Victoria Hospital (allotments 1 341 184, 1 341 185, 1 341 182, and 1 354 912), proposed by the City of Montreal in file no. 1217400001;

> **ORDER** all legal costs and costs of archeological and forensic investigations to be borne by the Defendants;
>
> **ORDER** the Defendants McGill University, the Royal Victoria Hospital, the McGill University Health Center and the Attorney General of Canada to release all files concerning medical experiments conducted on Indigenous peoples and make them available to the public;
>
> **ORDER** the Defendants McGill University, City of Montreal, Société Québécoise des Infrastructures and the Attorney General of Canada to provide the records and details of all funds borrowed to the Iroquois Trust Fund and the general Indian Trust Fund, as well as provide a reimbursement plan of these monies plus compounded interests to the appropriate Indigenous peoples, following their traditional protocols;
>
> **MAKE ANY OTHER ORDER** the Court considers appropriate;
>
> **WITH COSTS**.[4]
>
> [Boldface in the original]

[12] On September 8, 2022, the respondents amended their application in order to add a challenge to the constitutionality of the *Cultural Heritage Act*.[5]

[13] On October 27, 2022, the trial judge granted, in part, the application for an interlocutory injunction and ordered the appellants to suspend excavation on the Site until the parties had completed discussions regarding the archaeological investigations to be conducted, which discussions were to be undertaken in a spirit of reconciliation.[6]

[14] On April 6, 2023, after intense negotiations, the parties signed the Agreement, which essentially provides for the following:

- The appointment of an independent and impartial panel composed of three archeologists, namely Dr. Adrian Burke, Justine Bourguignon-Tétreault and Dr. Lisa Hodgetts (s. 6);
- The panel's mandate is to identify the archeological techniques (the "Techniques") to be used in the various areas of the Site for detecting the presence of unmarked graves ("Mapping") and to make recommendations as to specialists who will carry out the Techniques and analyze the data (the "Specialists") (s. 11);

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4 *Originating Application for Declaratory Relief and to obtain an Interlocutory and a Permanent Injunction*, March 25, 2022, pp. 10-11.

5 *Cultural Heritage Act*, CQLR, c. P-9.002.

6 That same day the judge authorized the Special Interlocutor to intervene on a conservatory basis.

- The panel will report to the parties (s. 12), who agree to be *bound* by its recommendations regarding the Techniques and to be *guided* by its recommendations regarding the Specialists (s. 13);

- The panel will provide its recommendations before May 8, 2023 for the priority zone and before July 17, 2023 for the non-priority zone (ss. 14 and 15);

- As soon as the Mapping has been completed in a given area, the appellants may commence executing the Techniques (s. 16);

- If, following the execution of the Techniques, no graves are identified in a given area, the excavation work can begin on a rolling basis; in the event of an unexpected discovery, the parties will seek the panel's advice on how to proceed (s. 17);

- The injunctive component of the proceedings is discontinued as of April 6, 2023 (s. 18);

- The Agreement constitutes a transaction within the meaning of arts. 2631 and following *C.C.Q.* (s. 19).

[15] On April 15 and 27, 2023, McGill sent the panel's members service contracts setting out their mandate, their hourly rate, the deliverables and the termination date, namely July 17, 2023.

[16] In the interim, the judge homologated the Agreement. On April 24, 2023, the respondents discontinued their proceedings as regards the following conclusions:

> ON AN INTERLOCUTORY BASIS:
>
> 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 Allen 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;
>
> EXEMPT the Plaintiffs from providing a suretyship;
>
> MAKE ANY OTHER ORDER the Court considers appropriate;

> ON THE MERITS OF THE CASE:
>
> ORDER all legal costs and costs of archeological and forensic investigations to be borne by the Defendants;[7]
>
> [Underlining in the original]

[17] After reading the contracts sent to the panel's members, the respondents emailed the appellants on April 30, 2023, indicating their disappointment at not having been included in the process and stating that they did not agree with the termination date of the contracts.

[18] On May 8, 2023, the panel delivered its report regarding the priority zone, in which it recommended the Techniques to be used – namely, historic human remains detection dogs ("HHRDD"), ground-penetrating radar ("GPR") and monitoring by archeologists ("monitoring") – as well as the Specialists whose services could be retained. The panel also recommended that the Canadian Archaeological Association Working Group on Unmarked Graves (the "CAA Working Group"), if available, be asked to provide a peer review of the GPR data.

[19] Following this report, the SQI retained the services of the Ottawa Valley Search and Rescue Dog Association (historic human remains detection dogs), GeoScan Subsurface Surveys Inc. (ground-penetrating radar) and Ethnoscop Inc. (monitoring).

[20] On June 29, 2023, at a case management conference, the respondents expressed their dissatisfaction with the implementation of the Agreement. The judge summarized the situation as follows:

> **THE COURT NOTES**:
>
> Following today's conference, 3 options are identified for the continued discussion of the security, technical and cultural issues that have emerged as the settlement agreement has been implemented:
>
> 1. Extending the mandate of the panel that was set up pursuant to Rectified Settlement Agreement;

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[7] *Notice of Discontinuance without Costs of Conclusions regarding Injunction*, April 24, 2023, p. 2.

2. Convening a further judicial settlement conference; and

3. Litigation.[8]

[Boldface in the original]

[21] The respondents replied that same day, indicating that they favoured the option of broadening the panel's mandate: "we agree with expanding the mandate, members and timeline of the Panel rather than use mediation or litigation".

[22] On July 17, 2023, the panel delivered its report regarding the non-priority zone. It reiterated its previous recommendation to ask the CAA Working Group to provide a peer review of the GPR data.

[23] On July 21 and 28, 2023, the appellants informed the respondents that they did not see a need to amend the Agreement.

[24] This was followed by a number of exchanges between the SQI and doctors Burke and Hodgetts dealing with progress in the implementation of the Techniques and with the updating of the panel's recommendations. On August 3, 2023, the SQI informed Dr. Burke that it considered the panel's mandate to have ended on July 17, with the panel's submission of its final report. That same day, the SQI emailed the panel to inform it that its recommendation to proceed with a peer review of the GPR data was not part of the mandate that had been entrusted to it.

[25] On August 26, 2023, the respondents notified their *Application for Declaratory Relief and to Obtain a Safeguard Order*,[9] in which they sought various orders to compel the appellants to comply with their interpretation of the Agreement. More specifically, they argued that the appellants' interpretation of the Agreement regarding the scope of the panel's role was too narrow and that the appellants had breached both the spirit and the letter of the Agreement. This application was heard on October 27, 2023, resulting in the judgment under appeal.

II. Analysis

[26] The Court will begin with a brief overview of the principles respecting safeguard orders and will then apply them to the case at bar.

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[8] Minutes of case management hearing, Montreal Sup. Ct., No. 500-17-120468-221, June 29, 2023, 11:25 a.m., p. 4 (Gregory Moore, J.S.C.).

[9] An amended version was filed on October 20, 2023.

A. Principles respecting safeguard orders

[27] Based on well-established precedent, a safeguard order is [TRANSLATION] "a discretionary judicial measure, issued for conservatory purposes, in an emergency situation, for a limited period and in a matter in which the respondent has not yet been able to present all its grounds".[10] It is a provisional and temporary measure that does not rule on the parties' rights.[11] It is designed to prevent the loss of rights or the creation of a situation that weakens or destroys the balance between the parties.[12]

[28] Safeguard orders are akin to provisional injunctions because, in the same manner as the latter, their [TRANSLATION] "purpose is to preserve the status quo pending the hearing on the merits, thereby ensuring that the judgment is not rendered in vain".[13] They must therefore satisfy the same criteria – namely, appearance of right, serious or irreparable harm, the balance of convenience, and urgency.[14]

[29] Under the former *Code of Civil Procedure*, in addition to the general powers set out in art. 46, art. 754.2 conferred the power on courts to make safeguard orders if, on the presentation of an application for an interlocutory injunction, the record was incomplete.

[30] In the new *Code of Civil Procedure*, the power of courts to issue safeguard orders is set out in art. 49 (general powers) and art. 158 (case management measures).

[31] Article 49 *C.C.P.* states the general principle that, in all matters and at any stage of proceedings, courts and judges may, even on their own initiative, grant injunctions or issue orders to safeguard the parties' rights, including in situations for which no solution is provided by law.[15] As for art. 158 *C.C.P.*, it confers the specific power on courts to issue safeguard orders, effective for not more than six months, as a case management measure:

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10 *Turmel c. 3092-4484 Québec inc.*, J.E. 1994-1280, 1994 CanLII 8888, para. 10 (C.A.), cited in *Tremblay c. Cast Steel Products (Canada) Ltd.*, 2015 QCCA 1952, para. 10 (additional reasons of Marcotte and Hogue, JJ.A.).

11 *Sanimal c. Produits de viande Levinoff Ltée*, 2005 QCCA 265, para. 26, application for leave to appeal to the Supreme Court dismissed, October 11, 2005, No. 30913.

12 *Lortie c. Cloutier*, 2016 QCCA 181, para. 2, citing *Association québécoise de lutte contre la pollution atmosphérique (AQLPA) c. Compagnie américaine de fer et de métaux inc. (AIM)*, 2006 QCCA 1372, paras. 19-21, application for leave to appeal to the Supreme Court dismissed, May 3, 2007, No. 31778.

13 *FLS Transportation Services Limited c. Fuze Logistics Services Inc.*, 2020 QCCA 1637, para. 23.

14 *Tremblay c. Cast Steel Products (Canada) Ltd., supra,* note 10, para. 10.

15 Art. 49 *C.C.P.*; *Limouzin c. Side City Studios Inc.*, 2016 QCCA 1810, para. 49. See also: Marc-André Landry and Joël Larouche, "Injonction interlocutoire", in *JurisClasseur Québec*, coll. "Procédure civile", vol. 2, fasc. 10, Montreal, Lexis Nexis, 2015 (loose-leaf, release No. 17, November 2023), p. 10-39, No. 64.

158. For case management purposes, at any stage of a proceeding, the court may decide, on its own initiative or on request, to	**158.** À tout moment de l'instance, le tribunal peut, à titre de mesures de gestion, prendre, d'office ou sur demande, l'une ou l'autre des décisions suivantes:
[...]	[...]
(5) rule on any special requests made by the parties, modify the case protocol or authorize or order provisional measures or safeguard measures as it considers appropriate;	5° statuer sur les demandes particulières faites par les parties, modifier le protocole de l'instance ou autoriser ou ordonner les mesures provisionnelles ou de sauvegarde qu'il estime appropriées;
[...]	[...]
(8) issue a safeguard order, effective for not more than six months.	8° prononcer une ordonnance de sauvegarde dont la durée ne peut excéder six mois.

[32] Article 158 *C.C.P.* is considered to be a variant of art. 49 *C.C.P.*; it [TRANSLATION] "does not completely exhaust the latter's field".[16] As decided in *Limouzin c. Side City Studios Inc.*, in injunction matters, safeguard orders are a case management tool [TRANSLATION] "whose sole purpose is to allow the parties to quickly progress from the provisional injunction stage to the interlocutory stage".[17] And while the legislature may not have reproduced art. 754.2 f.*C.C.P.* in the chapter on injunctions, the case law on this provision is still applicable: [TRANSLATION] "The way in which it is to be used remains the same [...], it must be a short-term order serving as a bridge to the interlocutory stage".[18]

[33] Lastly, a safeguard order should not be the equivalent of a judgment on the merits, nor should its scope be such that it effectively seals the fate of the dispute.[19]

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16 *Devimco Immobilier inc. c. Garage Pit Stop inc.*, 2017 QCCA 1, para. 8 (Bich, J.A.), commenting on *Limouzin c. Side City Studios Inc.*, *supra*, note 15, para. 54.

17 *Limouzin c. Side City Studios Inc.*, *supra*, note 15, para. 57.

18 *Id.*, para. 58.

19 *9189-6092 Québec inc. c. Commerce universel Canada inc.*, 2015 QCCA 1691, para. 20; *2957-2518 Québec Inc. c. Dunkin' Donuts*, J.E. 2002-1108, 2002 CanLII 41132, para. 19 (C.A.). Save, exceptionally, in very limited cases: *Gestion Segi ltée c. 8277346 Canada inc.*, 2014 QCCS 4113, para. 56 (Hamilton, J.S.C., as he then was).

B. Application to the case at bar

[34] In granting the respondents' application in part, the judge, who was tasked with special case management, distinguished the ruling in *Limouzin* as follows:

> [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. McGill relies 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.[20]
>
> [Reference omitted]

[35] To the extent that the judge may have considered that the power to issue a safeguard order applies differently in the context of case management, certain clarifications are required. The fact that the judge was seized of the respondents' application in his capacity as case management judge does not mean that his decision is a case management measure, nor does it have the effect of granting him powers he would not otherwise have.[21] It is the substantive nature of a judgment, not the procedural framework within which it is rendered, that determines its characterization.[22]

[36] In reality, the judge's ruling goes well beyond a case management measure. Faced with an application resulting from a dispute between the parties on the scope of the panel's role, he interpreted the Agreement and ordered the appellants to comply therewith. In so doing, he decided the parties' rights under the Agreement.

[37] Even if the duration of the order does not exceed six months (although it could be renewed[23]), his decision is, in practice, final because the respondents' originating application did not address the interpretation of the Agreement.[24] The lack of a [TRANSLATION] "direct correlation" with the case on the merits is fatal to the respondents'

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20 Judgment under appeal, para. 42.

21 *Pop c. Boulanger*, 2017 QCCA 1009, paras. 33 and 39; *J.G. c. Nadeau*, 2016 QCCA 167, para. 31, application for leave to appeal to the Supreme Court dismissed, March 2, 2017, No. 36924.

22 *Amaya inc. c. Derome*, 2018 QCCA 120, para. 66, application for leave to appeal to the Supreme Court dismissed, August 9, 2018, No. 38038.

23 Judgment under appeal, para. 42.

24 It should be noted that on May 3, 2024 – that is, not only after the safeguard order was made, but after it expired – the respondents filed a re-amended originating application in which they added conclusions based on their interpretation of the Agreement.

application for a safeguard order, as Kasirer, J.A., as he then was, explained in *9151-8340 Québec inc. c. Syndicat des copropriétaires du 2010 de la Montagne*:

> [TRANSLATION]
>
> [9] Since a safeguard order is designed to preserve the status quo with respect to the litigation between the parties, it follows that this lack of "direct correlation" is fatal to the application submitted by the applicant to the judge. Although the co-owners may well have rights to assert against the administrator of the co-ownership, this in and of itself does not mean that a safeguard order is appropriate in the context of the principal action for cancellation brought before the Superior Court.[25]

[38] Moreover, McGill is not mistaken in arguing that the judge's order is akin to a structural injunction, [TRANSLATION] "a remedy in which judges supervise the application of their orders and revise them occasionally so that the orders achieve the ultimate relief intended".[26] Supreme Court jurisprudence instructs that such a remedy will be granted only in compelling circumstances and only after a final ruling on the scope of the rights in question.[27] In the present matter, however, the scope of the panel's role under the Agreement has not been adjudicated on the merits. The judge, therefore, could not – in reliance on a mere appearance of right, without the parties truly having been heard and having had the opportunity to present complete evidence – appropriate the power to supervise the application of the Agreement as and when the archaeological investigations progressed and yielded results.[28]

[39] The respondents and the Special Interlocutor point out that the Agreement, which the judge homologated, has the same force and effect as a judgment of the Superior

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25 *9151-8340 Québec inc. c. Syndicat des copropriétaires du 2010 de la Montagne*, 2012 QCCA 1119, para. 9 (Kasirer, J.A.). See also: *Droit de la famille — 231324*, 2023 QCCS 2945, paras. 15-18; *Lunettes Dépôt inc. c. 9323-8897 Québec inc.*, 2022 QCCS 2957, paras. 54-59; *Comeau Technique Ltd. c. Dundee Industrial 1624-1692 50 th Avenue Inc.*, 2022 QCCS 484, paras. 32-33; *Craig Packaging Ltd. c. Montcorr Packaging Ltd.*, 2020 QCCS 4348, paras. 44-47, application for leave to appeal dismissed, January 12, 2021, 2021 QCCA 44; *11145215 Canada inc. c. Placements Par inc.*, 2020 QCCS 2509, paras. 45-46; *Liu c. Moraitis*, 2019 QCCS 5279, paras. 3, 71 and 79, affirmed in *Bricka c. Trottier*, 2021 QCCA 1429; *Boutin c. Municipalité de Boileau*, 2019 QCCS 5814, paras. 9-11; *Goldwater c. Télé Publique Studios inc.*, 2016 QCCS 3800, paras. 17 and 27-29; *Stablex Canada inc. c. Tribunal administratif du Québec*, 2014 QCCS 5060, paras. 9 and 12.

26 *Commission scolaire des Samares c. Québec (commission des droits de la personne et des droits de la jeunesse)*, [2000] R.J.Q. 2542, 2000 CanLII 22315, para. 27 (C.A.) (reasons of Gendreau, J.A.) [reference omitted].

27 *Thibodeau v. Air Canada*, 2014 SCC 67, paras. 126-128; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, paras. 79-80.

28 By analogy: *Natrel inc. c. F. Berardini inc.*, J.E. 1995-584, 1995 CanLII 5326, pp. 7-8 (C.A.).

Court.[29] Relying on art. 657 *C.C.P.*, they claim that the judge was entitled to issue any order to facilitate its execution, whether forced or voluntary.

[40] Even assuming the judge could have relied on this provision in order to rule on the Agreement's interpretation – an assumption on which the Court will not opine – that is not the procedural path he followed. Contrary to what the respondents and the Special Interlocutor suggest, a safeguard order cannot functionally amount to an order facilitating the execution of a judgment. As we have seen, the former's [TRANSLATION] "purpose is to preserve the status quo pending the hearing on the merits",[30] while the latter's purpose is to resolve problems regarding the execution of a judgment after it has been rendered.[31] If such a problem arises, a court cannot resolve it definitively by applying the criteria for a safeguard order.

[41] Lastly, the Court is of the view that the judge's order is not enforceable.

[42] Indeed, the judge ordered the parties "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".[32] The first part of the order violates the rule that courts should avoid ordering parties to comply with a contract as a whole, unless the obligations resulting therefrom are clearly defined.[33] As for the second part, the expression "to be guided by the recommendations of the panel of archaeologists" is overly general and too vague to be enforceable. What exactly do the words "to be guided by" mean? The appellants could argue that they retain a degree of latitude, like s. 13 of the Agreement provides with respect to the Specialists.

[43] In short, the order does not clearly indicate to the appellants what they must do in order to comply with it.[34] This could lead to difficulties in interpreting and applying the order, in addition to exposing the appellants to a finding of contempt of court.[35] This risk

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29 Art. 528 *C.C.P.*

30 *FLS Transportation Services Limited c. Fuze Logistics Services Inc.*, *supra*, note 13, para. 23.

31 *SNC-Lavalin inc. (Terratech inc. et SNC-Lavalin Environnement inc.) c. Souscripteurs du Lloyd's*, 2020 QCCS 2058, para. 29 (Hardy, J.S.C, as he then was), appeal discontinued, December 10, 2020, No. 200-09-010197-207.

32 Judgment under appeal, para. 46.

33 By analogy: *Société du Vieux-Port de Montréal inc. c. 9196-0898 Québec inc. (Scena)*, 2013 QCCA 380, paras. 42-43, citing *Sporting club du sanctuaire inc. c. 2320 4365 Québec*, [1989] R.D.J. 596, 1989 CanLII 1210 (C.A.) and *Varnet Software corporation c. Marcam Corporation*, [1994] R.J.Q. 2755, 1994 CanLII 6096 (C.A.).

34 *Sporting club du sanctuaire inc. c. 2320 4365 Québec*, *supra*, note 33, para. 57; *Picard c. Johnson & Higgins Willis Faber ltée*, 1987 CanLII 891, [1988] R.J.Q. 235 (C.A.) (LeBel, J.A.).

35 *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, para. 24; *Sporting club du sanctuaire inc. c. 2320 4365 Québec*, *supra*, note 33, paras. 31, 57 and 58.

is far from hypothetical: indeed, 11 days after the order was made, the respondents filed proceedings of that nature.[36]

III. Conclusion

[44] The judge misapprehended the scope of his power to make safeguard orders. Under the guise of a case management measure, he decided the parties' rights under the Agreement and appropriated the power to supervise the application of the Agreement without a genuine debate on the merits. Moreover, the order he issued is not enforceable. This is therefore one of the rare instances in which the Court is justified in exercising its jurisdiction as a reviewing court in respect of a safeguard order.

FOR THESE REASONS, THE COURT:

[45] **ALLOWS** the appeal, with legal costs;

[46] **REVERSES** the judgment rendered on November 20, 2023, by the Superior Court, District of Montreal (the Honourable Justice Gregory Moore);

[47] **DISMISSES** the respondents' *Amended Application of October 20, 2023, for Declaratory Relief and to Obtain a Safeguard Order*, with legal costs.

FRANÇOIS DOYON, J.A.

SUZANNE GAGNÉ, J.A.

ÉRIC HARDY, J.A.

Mtre Doug Mitchell
Mtre John Chedid
IMK
For McGill University

Mtre Vicky Berthiaume
Mtre Simon Pelletier
BCF
For Société québécoise des infrastructures

[36] *Application of December 1st, 2023, for Declaration of Further Breach of the Settlement Agreement*, December 1, 2023.

Kwetiio
Unrepresented

Kahentinetha
Unrepresented

Karennatha
Unrepresented

Mtre Meena Mrakade
Mtre Daniel Baum
LANGLOIS LAWYERS
For Royal Victoria Hospital and McGill University Health Centre

Mtre Simon Vincent
BÉLANGER SAUVÉ
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Mtre Mireille-Anne Rainville
Mtre Jessica Pizzoli
Mtre David Lucas
DEPARTMENT OF JUSTICE OF CANADA
For Attorney General of Canada

Mtre Daniel Benghozi
Mtre Eric Bellemare
Mtre Mathieu Jacques
BERNARD ROY (JUSTICE-QUÉBEC)
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Mtre Julian N. Falconer
Mtre Shelby Percival
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Mtre Paul Vincent Marcil
For Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools

Mtre Mark Ebert
SEMAGANIS WORME BARRISTERS & SOLICITORS
For Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools

Date of hearing: June 11, 2024