

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

**D.L. Corbett, M.D. Faieta, M.T. Doi JJ.**

**BETWEEN:** )  
)  
CARMELA TACCONNE ) *Sean Dewart and Ian McKellar, for the*  
and JOSEPH GALEA ) Applicants  
)  
Applicants )  
)  
**– and –** )  
)  
REGISTRAR, FUNERAL, BURIAL, AND ) *Sylvia Davis, for the Respondent*  
CREMATION SERVICES ACT, 2002 )  
)  
Respondent )  
) Heard at Toronto: May 22, 2025

**REASONS FOR DECISION**

**M.T. Doi J.:**

**Overview**

[1] This is an application for judicial review of the April 18, 2024 decision by the registrar appointed under the *Funeral, Burial and Cremation Services Act, 2002*, SO 2002, c.33, (“*FBCSA*”) (the “Registrar”) to not reimburse costs that the landowner Applicants incurred to perform a burial site investigation that was ordered after human remains were found on their land.

[2] Under *FBCSA*, s. 96(1), the Registrar can order the owner of land on which human remains are discovered to undertake an investigation of the burial site to determine the origin of the remains. Should the Registrar find that a s. 96(1) investigation would impose an undue financial burden on the landowner, the Registrar is required under *FBCSA*, s. 96(4) to undertake the investigation. To satisfy the obligation under s. 96(4) to undertake the burial site investigation, the Registrar adopted a practice of reimbursing landowners for proven or reasonably incurred investigation costs to mitigate or relieve the undue financial burden on the landowner.

[3] After human remains were found on the land, the Registrar ordered a burial site investigation under s. 96(1) to determine the origin of the burial site. Thereafter, the Registrar found that the investigation would impose an undue financial burden on the Applicants who

submitted invoices for the investigation totalling \$632,421.64. On reviewing the invoices, the Registrar found that only \$169,528.47 of the invoiced work should be reimbursed as the balance of the claimed work related to a Stage 4 archeological assessment that the Municipality of Trent Lakes had ordered under a separate procedure.

[4] On March 5, 2024, the Registrar decided to reimburse the Applicants \$169,528.47 as their costs for the burial site investigation, and did not pay for any other archeological work on the land. On April 18, 2024, the Registrar declined the Applicants' request to reconsider the reimbursement decision of March 5, 2024.

[5] For the reasons discussed below, the application for judicial review is granted.

### **Burial Site Investigations vs. Stage 4 Assessments**

[6] A central issue on this application is the difference between a burial site investigation and a Stage 4 archaeological assessment. Each is briefly described below.

#### **a. Burial Site Investigations**

[7] The *FBCSA* and its General Regulation O. Reg 30/11 (the "Reg.") govern the process for responding to burial site discoveries. The *FBCSA* is administered by the Registrar on behalf of the Ministry of Public and Business Service Delivery and Procurement.

[8] A "burial site" is land containing human remains that is not a cemetery: *FBCSA*, s. 1(1). A person who discovers or has knowledge of a burial site in Ontario must immediately notify police or a coroner: *FBCSA*, s. 95. If no foul play is suspected, the coroner shall so notify the Registrar and the owner of the land must take necessary steps to preserve the site, the human remains, and any artifacts until a final disposition is made pursuant to the legislation: Reg., s. 175(1).<sup>1</sup>

[9] The Registrar may order the owner of land on which a burial site is found to undertake a burial site investigation, with minimum disturbance to the site as reasonable in the circumstances, to determine the origin of the site: *FBCSA*, s. 96(1), (3). The main purpose of a burial site investigation is to determine the probable cultural origin of the person whose remains are interred, and other information, such as the site's boundaries, to help the Registrar in declaring whether the site is an aboriginal burial ground, a burial ground, or an irregular burial site: *FBCSA*, s. 98(a)-(c). Notice of a declaration by the Registrar under *FBCSA*, s. 98 serves to facilitate the final disposition of the remains: *FBCSA*, s. 97-100. The remains must be interred in a cemetery or the burial site may be established as a cemetery: *FBCSA*, s. 99, 100; Reg., s. 178, 183(3), 184.

[10] If a burial site investigation is ordered, an archaeologist holding a professional licence under Part VI (*Conservation of Resources of Archaeological Value*) of the *Ontario Heritage Act*, RSO 1990, c. O.18 ("*OHA*") shall conduct the investigation and advise the Registrar of the possible cultural origins of the remains within five days after starting the investigation: Reg., s. 174(3). Upon being advised of the possible cultural originals of the remains, the Registrar shall advise those believed to be representatives of the person whose remains are interred of the burial site and the possible cultural origins of the remains. The archaeologist conducting the burial site investigation must report the following information to the Registrar (Reg., s. 174(2)(1.)-(6.)):

1. A determination of the probable cultural origin or religious affiliation of the persons whose remains are interred and the basis upon which it is made.
2. A description of the boundaries of the burial site.
3. Details of the style and manner in which the human remains are interred.
4. A description of any artifacts that, in the opinion of the investigator, form part of the burial site.
5. An opinion as to whether the burial site was set aside with the apparent intention of interring human remains in accordance with cultural affinities and the basis upon which the opinion is made.
6. Information relevant to the preparation of a site disposition agreement.

[11] If the Registrar is of the opinion that the burial site investigation would impose an undue financial burden on the landowner, the Registrar shall undertake the investigation: *FBCSA*, s. 96(4). Incidental to undertaking the burial site investigation, the Registrar may reimburse the landowner for verified costs they reasonably incurred in performing an investigation pursuant to the *Legislation Act, 2006*, SO 2006, c. 21, Sched F, s. 78 that provides:

If power to do or to enforce the doing of a thing is conferred on a person, all necessary incidental powers are included.

[12] Powers conferred by an enabling statute are construed to include those expressly granted and, by implication, all powers practically necessary to achieve the intended outcome of the legislated scheme: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 51; *Green v. Law Society of Manitoba*, 2017 SCC 20 at para 42.

#### **b. Stage 4 Archaeological Assessments**

[13] A “Stage 4 archaeological assessment” is the responsibility of the Ministry of Citizenship and Multiculturalism (“MCM”) that administers Part VI of the *OHA*. MCM requires consultant archaeologists to follow the *Standards and Guidelines for Consultant Archaeologists* (“*Standards*”) as a condition of holding a licence to conduct archaeological fieldwork in Ontario: *OHA*, s. 48(4)(d).<sup>2</sup>

[14] Most land use planning and development legislation in Ontario identifies archaeological conservation as a matter of provincial interest. When a proposed land development project likely has archaeological potential, the development proponent is required to retain a licensed consultant archaeologist to undertake an archaeological assessment of the development lands to address the provincial interest in the potential archaeological resources.

[15] The *Standards* set out four stages for the conduct of an archaeological assessment. Stages 1 to 3 use progressively more intrusive methods to identify archaeological sites within development lands to assess the degree of cultural heritage value or interest in the identified sites

and to recommend the most appropriate strategies to mitigate any impact to them from the land development activity: *Standards* at pp. 5-61.

[16] At Stage 4, the consultant archaeologist conducts the recommended strategies to mitigate the impact of the development on the archaeological sites. If avoiding or protecting an archaeological site is not a viable option, the consultant archaeologist conducts an archaeological excavation with a controlled removal that records the site context and cultural features to document the cultural heritage value or interest of the site and to preserve the information for future study: *Standards* at pp. 67-89. The goal of a Stage 4 assessment is to recover as much data as possible from the site to conserve, protect, and preserve its heritage value.

[17] A Stage 4 assessment generally involves the excavation of an archaeological site by hand (i.e., typically with a shovel or trowel) according to a site grid survey by which excavations are to proceed in one-metre square units until the work yields fewer than ten (10) artifacts from grid units at the edge of the block excavation. Excavation work must continue if grid units being excavated include at least two finds of formal tools or diagnostic artifacts, or fire-cracked rock, bone, or burnt artifacts, among other things. In addition, hand excavation work must continue for 2 metres past any cultural features (e.g., post-holes from a building structure) until there are no further high-artifact-yielding units: see Tab 4.1 (*Determining the extent of excavations*) of the *Standards* at pp. 85-87. It follows that the excavation area for a Stage 4 assessment must generally continue to expand until the minimum yield of wide-ranging artifacts is no longer uncovered, the excavation runs at least 2 metres beyond any cultural features, and units in the periphery of the excavation area yield few artifacts.

## **Background**

[18] The Applicants own Lot 14, Fire Route 70, Buckhorn, Trent Lakes, Ontario (the “Property”). In November 2020, they bought the Property for \$482,200.00, with the intention of building a house on the lot. The Property is part of a subdivision called Oak Orchards Estates that is known to contain archaeological sites.

[19] On August 11, 2021, the Applicants began a Stage 4 archaeological assessment of the Property. The Stage 4 assessment implemented a long-term archaeological protection strategy that included an excavation of archaeological sites affected by development work from the home construction project. During the excavation, archaeologists unearthed human remains on the Property. On October 6, 2021, police and the coroner were notified of the remains.

[20] On October 7, 2021, the coroner notified the Registrar of the discovery of human remains and confirmed that the remains were not of recent forensic interest.

[21] On October 8, 2021, the Registrar at the time, Chrystal Forrest, ordered the Applicants to conduct a burial site investigation under *FBCSA*, s. 96(1) for the purpose of determining the origin of the burial site (the “Investigation Order”).

[22] The Applicants retained Michael Henry, a licensed professional archaeologist with AMICK Consultants Limited (the “Archaeologist”), to conduct the burial site investigation. The

Archaeologist previously had worked on the Stage 4 assessment that began about two months earlier and led to the discovery of human remains on the Property.

[23] On October 9, 2021, the Archaeologist advised the Registrar that he was retained by the Applicants to conduct the burial site investigation.

[24] On October 12, 2021, the Registrar sent the Archaeologist a copy of the Investigation Order and provided the following instructions for conducting the burial site investigation:

[A]rchaeological assessment of the balance of the property can continue while you complete the burial site investigation, but [it] would be advisable to stay 10 m away from the area where the human remains were found if possible.

Please begin your investigation by assessing the immediate area within 5 m of where the remains were found using techniques appropriate to the conditions. This includes block excavation and/or mechanical topsoil removal ... Please do not remove the remains from the property, and consult with Curve Lake [First Nation] regarding culturally appropriate handling of the remains.

[25] On or about November 7, 2021, further bone fragments were found on the Property. The coroner confirmed that these fragments were human remains having no recent forensic interest.

[26] These remains were highly fragmentary and disarticulated. The nature of the soil matrix showed that the remains had been moved multiple times, likely by mechanical earth moving.

[27] Due to the onset of winter, the burial site investigation could not be concluded and only a limited amount of archaeological fieldwork at the Property could be completed. Found bones were wrapped and reburied pending warmer weather when the burial site investigation could continue.

[28] On March 2, 2022, the Archaeologist emailed the Registrar and an archaeological review officer tasked with administering Part VI of the *OHA* to submit a proposed strategy for proceeding with the burial site investigation under the *FBCSA* and the Stage 4 archaeological assessment under the *OHA*. On March 11, 2022, the archaeological review officer expressed general support for the Archaeologist's approach for the Stage 4 assessment and asked for clarification of how the burial site investigation would be addressed. On March 18, 2022, the Registrar raised a concern with the proposed strategy that made it seem as if the burial site investigation was "*bleeding into the Stage 4 excavation strategy*" even though each activity was a separate procedure.

[29] On March 24, 2022, the Archaeologist submitted a revised proposal for conducting both the Stage 4 assessment and the burial site investigation. After a clause was removed from the revised proposal, the archaeological review officer and the Registrar agreed on April 1, 2022 that a combined strategy for conducting both the burial site investigation and the Stage 4 assessment had been accepted and finalized (the "Strategy").

[30] Under the terms of the agreed-upon Strategy, work for the Stage 4 assessment generally required the following:

- a. all excavations to be conducted in the form of contiguous block excavation of all archaeological squares adjacent to any squares yielding one or more artifacts;<sup>3</sup>
- b. excavations of subsequent squares should be continued outward until all edge squares yield zero artifacts per unit; and
- c. Stage 4 square excavations to be conducted by hand and all soil screened through 6-millimetre wire mesh until all edge squares yield zero artifacts per unit.

[31] In turn, the Strategy generally set out the following requirements for performing the burial site investigation:

- a. squares to be hand excavated by shovel and screened through 6 mm mesh until human remains are encountered, with all recovered bone fragments treated as human remains until positively identified as non-human as applicable;
- b. once possible human remains are encountered, squares will be excavated by trowel and with the use of wooden clay sculpting tools around any exposed bone, with any soil excavated from any unit containing possible human remains screened through 3 mm mesh and all bone fragments collected;
- c. any square where human remains are positively identified must be followed by investigation through hand excavation of all squares within 5 metres of the original find to determine the extent of the burial; and
- d. all bones and/or bone fragments will be bagged and tagged by provenance, subject to specialist analysis, and inventory taken of any identified human remains. The human remains will be retained on site and secured in a locked location until such time as the Registrar makes a declaration on the nature of the burial site and arrangements can be made for the disposition of the remains at the conclusion of the investigations.

[32] The Strategy defined the scope of the burial site investigation to an area comprising all archaeological grid squares within 5 metres of any found remains that were positively identified as human. The Strategy also limited the scope of the Stage 4 assessment to a contiguous block excavation area comprising all squares adjacent to any squares that yielded any artifacts, with outward excavation until all edge squares yielded zero artifacts per square. Among other things, the Strategy further required the Stage 4 assessment to employ coarser (i.e., 6 mm) screening tools and the burial site investigation to employ finer (i.e., 3 mm) screening tools.

[33] On May 2, 2022, field work resumed for the 2022 season.

[34] Between June 7 and 15, 2022, the Registrar raised concerns over the qualifications of the osteologist retained by the Archaeologist to identify bone during the burial site investigation. As the concerns were not addressed by the Applicants or the Archaeologist, the Registrar continued

to express concern about whether potential human remains were being identified with appropriate osteological analysis. This concern apparently went unresolved.

[35] On November 10, 2022, the Archaeologist submitted a written summary of all excavation activities at the Property that included a site map depicting the completed fieldwork together with possible outstanding work. The summary referred separately to the Stage 4 assessment and the burial site investigation, and outlined a “5 metre limit of Human Remains Investigations” and other areas where “block excavation” was to occur. By doing so, the summary described the burial site investigation as comprising the area within 5 metres of found human remains, and acknowledged that the Stage 4 assessment and the burial site investigation were separate but concurrent processes.

[36] On December 19, 2022, the Applicants submitted an undue financial burden application to the Registrar for consideration. As noted earlier, *FBCSA*, s. 96(4) authorizes the Registrar to undertake the burial site investigation in cases where the investigation would impose an undue financial burden on the landowner. The Applicants claimed that the burial site investigation was imposing an undue financial burden given their Archaeologist’s cost summary for the investigation and their limited financial means and income.

[37] On March 6, 2023, the Archaeologist provided the Registrar with a preliminary report for the burial site investigation that addressed its activities from October 5, 2021 to December 2022.

[38] On March 23, 2023, the Archaeologist emailed the Registrar for direction on how to deal with indeterminate bones found on the Property during the burial site investigation (i.e., bones that initially could not be identified as being of either human or animal origin). The Registrar responded by interpreting paras 8 and 9 of the Strategy as encompassing indeterminate bones:

My reading of #8 above is that if a bone fragment cannot be conclusively identified as non-human, then it will be treated as human. Item #9 seems to suggest that all “possible” human remains will be treated as human remains as well.

[39] On April 18, 2023, the Assistant Registrar requested further information for the undue financial burden application. The Applicants provided the requested information.

[40] On June 22, 2023, the Registrar found that the burial site investigation at the Property would impose an undue financial burden on the Applicants and, therefore, undertook to conduct the investigation pursuant to *FBCSA*, s. 96(4). In doing so, the Registrar stated the following:

I understand that you, the land owners, have retained the services of AMICK consultants Limited (“AMICK”) to undertake the burial site investigation that you now claim would impose an undue financial burden. AMICK’s cost summary provided to you on February 19<sup>th</sup>, 2023 includes \$372,489 for work completed in 2022 and a projected cost of \$117,000 plus \$15,210 in HST for work to be completed in 2023. This brings the estimated cost of completing all the requirements of the burial site investigation to \$504,699.00. This appears to be reasonable to me given that this burial site appears to be associated with an Indigenous archaeological site, the Oak Orchard site (Bc-Go-12), that has been subject to repeated disturbance due to construction activities over the last 70 years. This disturbed context has resulted in fragmentary human remains scattered across the property, which are time consuming to collect and identify. [Emphasis added]

[41] The Applicant subsequently learned that the Registrar's undertaking of the burial site investigation would take the form of a reimbursement for their past and future investigation costs after reviewing records or invoices to support their claimed costs of the investigation.

[42] On June 23, 2023, the Applicants acknowledged the Registrar's decision to grant their claim for undue financial burden. In addition, they advised that further costs beyond the amount in the decision had been incurred totalling \$638,585.38 in costs for the investigation until then.

[43] On June 26, 2023, the Registrar responded:

Thank you for your email. The claim decision was based on the source documents provided by you in your application. If you have additional original source documents that demonstrate that you have incurred additional expenses, please submit these to [the Assistant Registrar] (cc-ed here) for review.

[44] On June 27, 2023, the Applicants asked the Assistant Registrar if further documents about their costs for the burial site investigation were required. The Applicants wrote that, "[t]he costs are mounting and the area for the [burial site investigation] is expanding daily."

[45] On June 28, 2023, the Assistant Registrar responded that the Registrar could only pay for the actual costs of the burial site investigation, and that proving these costs would require detailed invoices and receipts that would be considered in determining the amount to be reimbursed.

[46] On July 3, 2023, the Archaeologist emailed the Assistant Registrar to explain that the burial site investigation encompassed all the previous block excavation work that had been carried out within the Property as human or potential human remains had been found across the *entire* site:

Block excavations associated with the [burial site investigation] since that original discovery have expanded to encompass anywhere that we have conducted block excavations within the property. Simply put, we have found it impossible to expand 5 metres from any discovery of human or potential human remains without encountering further human remains or potential human remains. We have done no block excavation within the property apart from the [burial site investigation]. The attached map shows the state of affairs since the 1<sup>st</sup> of June 2023.

The work we did previously on Stages 1-3 are not connected directly with the [burial site investigation] although the areas investigated in those previous stages are being engulfed within the area of the [burial site investigation]. At present, we fully expect to excavate 100% of the surface area of the property through block excavation as part of the [burial site investigation].

[47] On July 20, 2023, the Assistant Registrar wrote to the Archaeologist to ask for further clarification and to highlight specific concerns with the invoices already submitted that seemed to relate to the entire Stage 4 assessment rather than just the Stage 4 work that overlapped with the burial site investigation. The Assistant Registrar noted that one of the invoices covered a period beginning on September 20, 2021 that preceded the Registrar's burial site investigation order dated October 8, 2021. The Archaeologist responded that day by reiterating that the initial Stage 4

assessment work had been entirely subsumed by the burial site investigation that he believed would occupy the same or identical space as the entire Stage 4 assessment.

[48] On July 28, 2023, and on August 15 and 30, 2023, the Registrar continued to advise the Applicants that the Archaeologist had yet to submit the necessary documents and statements to distinguish the work completed for the burial site investigation from the Stage 4 assessment work. To differentiate between the investigation and assessment costs, the Registrar suggested that the Archaeologist submit a “backdated” project information form (“PIF”) to MCM for the purpose of obtaining a PIF number for the burial site investigation (i.e., as the PIF would identify the stage of the archaeological work, its relationship to the *FBCSA*, when the field work began, and other information about the excavation project) and thus identify that the burial site investigation started before the PIF was issued. According to the Registrar, the practice of obtaining a backdated PIF is commonplace in cases where burials are discovered during ongoing archaeological fieldwork. In response, the Archaeologist advised that it made no sense to seek a separate PIF for the burial site investigation as it was not a separate archaeological investigation but would cover the identical lot space as the initial Stage 4 assessment work under the existing PIF (i.e., because the burial site investigation would occupy the same lot footprint as the Stage 4 assessment). In the circumstances, the Archaeologist declined to take out a backdated PIF.

[49] On August 15, 2023, the Registrar advised the Archaeologist of an intention,

“to reimburse the land owners for the cost of the burial site investigation they have paid, and to directly pay the balance of the cost of the [burial site investigation] once that has been determined.”

[50] The Registrar also wrote that she was unable to reimburse the Applicants using the invoices provided as they did not identify the charges incurred for the burial site investigation.

[51] In response to the Registrar’s concerns, the Archaeologist asked on August 22, 2023 if the invoices could be revised to show that the work claimed related only to the burial site investigation and not the Stage 4 assessment. Thereafter, revised invoices to this effect were submitted. On August 31, 2023 and July 3, 2023, the Archaeologist reiterated that the burial site investigation covered the entire Stage 4 work site.

[52] On September 22, 2023, the Registrar advised the Applicants that she would immediately reimburse \$169,528.47 to cover their invoices that “clearly relate to the [burial site investigation]” because “they pertain to activities in the vicinity of confirmed human remains” as recorded in the Archaeologist’s preliminary report. The Registrar also ordered the Applicants to stop the burial site investigation and provide revised invoices for her “to determine whether there are any additional [burial site investigation] costs to be reimbursed” to them.

[53] On September 26, 2023, the Registrar asked the Archaeologist to clarify which activities constituted the burial site investigation and the extent of the burial site “given the presence of bone fragments across the property that have been identified as indeterminate in origin.”

[54] On October 2, 2023, the Archaeologist advised that all work performed since the burial site investigation order was issued was exclusively devoted to the burial site investigation. He

acknowledged that the original invoices included preliminary Stage 4 assessment work performed before the burial site investigation order. However, he also explained that this preliminary Stage 4 work amounted to burial site investigation work because the Registrar had directed a search for possible human remains within 5 metres around any confirmed human remains. Accordingly, to perform the burial site investigation, the completed preliminary Stage 4 work was required and did not need to be repeated. As he explained, “the BSI subsumed [the] previous Stage 4 field work as it fell within the area of the BSI.” In effect, excluding the initial Stage 4 assessment work would leave a gap in the record for the burial site investigation. He added that the burial site investigation had been conducted in accordance with the Strategy as approved by the Registrar and requested guidance on what criteria to apply if certain costs were to be excluded from the invoices.

[55] On October 10, 2023, the Registrar requested more detailed invoices without providing any further guidance.

[56] On October 31, 2023 the Archaeologist submitted a second preliminary report setting out the steps taken to perform the burial site investigation from October 5, 2021 to September 2023.

[57] On November 17, 2023, the Applicants submitted detailed invoices for the burial site investigation.

[58] On November 24, 2023, the Registrar asked for revisions to the second preliminary report that the Archaeologist made and filed as a revised report on January 18, 2024. This revised report states that it was limited to the area of the Stage 4 excavation that was affected by the burial site investigation.

[59] On February 5, 2024, the Assistant Registrar, Ian Hember, succeeded Dr. Forrest and took up the role of Registrar.

[60] On March 5, 2024, the newly-installed Registrar advised of his decision to not reimburse any more funds beyond the \$169,528.47 that had been paid to the Applicants earlier. The Registrar arrived at this amount for the reimbursement decision based on the following:

- a. the burial site investigation covered only a small portion of the Property, while the archaeological site and associated Stage 4 assessment area was a much larger area;
- b. the Archaeologist used techniques associated with possible human remains in the archaeological squares that contained or were immediately adjacent to confirmed human remains; and
- c. the Archaeologist’s report documents that the burial site investigation took 32 days and the Registrar had already provided reimbursement for 58 days.

[61] On March 26, 2024, the Applicants asked the Registrar to reconsider the March 5, 2024 reimbursement decision by raising the following points they felt had been misunderstood earlier:

- a. the Registrar had ordered the Archaeologist to treat bones found in the excavation site as being human bones if they could not be positively identified as being faunal, that necessarily expanded the area of the burial site investigation;
- b. fragmentary remains had been scattered across the Property;
- c. burnt bones on the Property had not all been identified as being faunal (i.e., and not of human origin);
- d. the Archaeologist had excavated the Property according to the standards outlines in the approved Strategy in which 6-millimetre mesh screens were used for the excavation until any potential human remains (i.e., including bones that were not ruled out as faunal) were found whereupon 3-millimetre mesh screens, trowels, and wooden tools were used to conduct the excavation;
- e. the burial site investigation took longer than 32 days after accounting for the expansion of the investigation related to the indeterminate bones that were found on site, and for the time required for analysis and recording; and
- f. further analysis for the burial site investigation remained outstanding.

[62] On April 18, 2024, the Registrar released his reconsideration decision in which he declined to reverse or vary the March 5, 2024 reimbursement decision. Among other things, the Registrar held that any further costs the applicants had incurred were not related to burial site investigation but instead to the Stage 4 archaeological assessment that was not subject to being reimbursed:

You have suggested the Registrar, Dr. Forrest, committed to reimbursing you \$504,699 ... for the “estimated cost of completing all the requirements of the burial site investigation.” ... On September 22, 2023, the Registrar agreed to reimburse you \$169,528.47 based on invoices pertaining to activities in the vicinity of confirmed human remains as documented in the preliminary BSI report submitted by AMICK to the Registrar’s office on March 6, 2023.

I appreciate AMICK’s investigation strategy [dated] March 24, 2022 indicated that “all bone fragments recovered will be treated as human remains until positively identified as non-human as appropriate,” “possible human remains ... will be excavated ... with the use of wooden clay sculpting tools” and “soil excavated from any unit containing possible human remains will be screened through 3 mm wire mesh ....” But, while AMICK states in each of its BSI reports to the Registrar that 3mm mesh was used for units containing human remains, and the January 2024 report states that wooden and plastic tools were used to excavate soil containing or adjacent to human remains, there is no indication in any report submitted by AMICK that recovered bone was investigated elsewhere using 3mm mesh or wooden or plastic tools. ... It is reasonable to conclude that AMICK used wooden and plastic tools and 3 mm mesh around human remains and features and not elsewhere.

Your [reconsideration request] includes a map [distinguishing] between the area undergoing or requiring human remains investigation (i.e., burial site investigation) from the areas undergoing or requiring block excavation (i.e., Stage 4). This plan from

November 2022 is consistent with the Registrar's initial instruction to you and AMICK dated October 12, 2021, to begin the burial site investigation within 5 m of the human remains, while allowing the Stage 4 block excavation to continue elsewhere on the property. It is also consistent with the three reports AMICK has submitted to the Registrar that similarly distinguish between the burial site investigation and the Stage 4, and that similarly map a 5 m buffer around human remains. ...

In sum, I am unable to see how any of the points raised in your [request for reconsideration] would justify reimbursing you an amount greater than the \$165,528.47 that you have received as reimbursement for what you paid AMICK for the BSI work to date. The additional costs incurred from AMICK relate to the Stage 4 archaeological assessment and for this reason, I have no statutory authority to reimburse you for these costs.

## Issues

[63] The following two (2) issues arise on this application for judicial review:

- a. What is the applicable standard of review? and
- b. Was the Registrar's reconsideration decision reasonable?

## Standard of Review

[64] The parties agree that the applicable standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras 16, 65-68.

[65] A reasonable decision is one with "justification, transparency, and intelligibility within the decision-making process" and "based on an internally coherent and rational chain of analysis" that is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at para 86; *Metrolinx v. Amalgamated Transit Union, Local 1587*, 2025 ONCA 415 at para 4. The applicants have the onus to prove unreasonableness, that may be shown by proving "shortcomings or flaws in the decision that are sufficiently central or significant to render the decision unreasonable": *Vavilov* at para 100; *Elementary Teachers' Federation of Ontario v. Bluewater District School Board*, 2021 ONSC 631 (Div Ct) at para 20.

[66] A reviewing court's inquiry into the reasonableness of a decision examines the reasons of the decision maker with respectful attention to the reasoning process by which the decision maker made its conclusion: *Vavilov* at para 84 and 101. Among other things, a decision's reasonableness is measured by the reasonableness of the outcome given the legal and factual context: *Vavilov* at paras 85-86 and 99.

[67] A reasonableness review is not a "line-by-line treasure hunt for error" but must be able to trace the decision maker's reasoning without encountering fatal flaws in their overarching logic. In addition, the review must be satisfied that there is a line of analysis in the given reasons that reasonably leads from the evidence to the decision maker's conclusion: *Vavilov* at para 102.

[68] A decision's reasonableness may be jeopardized where the decision maker fundamentally misapprehended or did not account for the evidence before it: *Vavilov* at para 126. A decision

maker need not respond to every argument that is raised, but a failure to meaningfully address central concerns and issues may indicate gaps or flaws in the reasoning: *Vavilov* at para 128; *United Steel Workers (Local 2251) v. Algoma Steel Inc.*, 2022 ONSC 4011 (Div Ct) at para 23.

[69] A decision will be unreasonable if its reasons, when read holistically, reveal an irrational chain of analysis, faulty reasoning on a critical point, or clear logical fallacies such as circular reasoning, false dilemmas, or unfounded generalizations or an absurd premise: *Vavilov* at paras 103-104; *International Union of Operating Engineers, Local 793 v 1476247 Ontario Ltd.*, 2023 ONSC 3481 (Div Ct) at para 61.

[70] Decision-makers may be confronted with multiple possible solutions or choices that may be consistent with the applicable law guiding their decision. Where the law does not identify a single alternative, the ultimate choice from the permissible alternatives will rest with the decision-maker: *Pong Marketing and Promotions Inc. v. Ontario Media Development Corp.*, 2018 ONCA 555 at para 20, leave to appeal denied 2019 CanLII 35204 (SCC). Under a reasonableness review, the court will defer to any reasonable interpretation adopted by the decision maker, even if other reasonable interpretations may exist. It is not enough for an applicant seeking judicial review to show that a competing interpretation is reasonable or preferable, as they must establish that the choice of the decision maker is unreasonable: *Pong* at para 23; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paras 40-41.

[71] Reviewing courts should be attentive to a decision maker's specialized knowledge and expertise: *Vavilov*, at para 93; *Turkiewicz (Tomasz Turkiewicz Custom Masonry Homes) v. Bricklayers, Masons Independent Union of Canada, Local 1*, 2022 ONCA 780 at para 61, leave to appeal refused 2023 CanLII 67201 (SCC).

## Analysis

[72] As set out below, I find that the Registrar's reconsideration decision of April 18, 2024 to not further reimburse the Applicants' burial site investigation costs (i.e., beyond the \$169,528.47 that the Registrar agreed to reimburse on September 22, 2023) was unreasonable.

### **a. The Registrar's Prior Direction on March 28, 2023**

[73] In declining to reimburse any further burial site investigation costs, I find that the Registrar unreasonably did not consider the prior March 28, 2023 direction that defined the approach for the investigation and unreasonably limited the scope of the investigation in this case. Based on the Archaeologist's reports confirming that human remains were discovered at two locations that occupy only a small portion of the Property, the Registrar limited the burial site investigation to just the vicinity of those remains (i.e., as documented in the preliminary investigation report that the Archaeologist submitted on March 6, 2023), and held that all other excavation at the Property constituted Stage 4 assessment work. Referring to the January 2024 report in which the Archaeologist referred to the burial site investigation area as "a portion of the much larger site area subject to stage 4 investigations", the Registrar applied this part of the report out of context to unreasonably find that the burial site investigation comprised only a small part of the Property when in fact the Archaeologist clearly stated otherwise, as further explained below.

[74] The Registrar's direction on March 28, 2023 interpreted paras 8 and 9 of the Strategy and expanded the scope of the burial site investigation well beyond the two initial locations where human remains were found. The Registrar's direction required the Archaeologist to treat all indeterminate bone and all "possible" human remains (i.e., that could not be conclusively identified as non-human) as being of human origin until positively identified as non-human:

8. Given the disturbed context in which human remains have been found, there is no requirement to trowel squares until possible human remains are encountered. Squares can be hand excavated by shovel and screened through 6 mm wire mesh until human remains are encountered. All bone fragments will be treated as human remains until positively identified as non-human as applicable.

9. Once possible human remains are encountered squares will be excavated by trowel and with the use of wooden clay sculpting tools around any exposed bone. Any soil excavated from any unit containing possible human remains will be screened through 3 mm wire mesh and all bone fragments collected.

[75] By giving the March 28, 2023 direction, the Registrar expanded the scope of the burial site investigation to 5 metres around any indeterminate or human bones that were found on the Property, based on the terms of para 10 of the Strategy:

10. As part of the burial investigations directed by [the] Registrar, Funeral Burial and Cremation Services Act any square where human remains are positively identified must be followed by investigation through hand excavation of all squares within 5 metres of the original find to determine the extent of the burial.

[76] These directions by the Registrar were grounded in the context of this case: the Property, along with the full Oak Orchard (BcGo-12) site (i.e., that appeared to be associated with an Indigenous archaeological site), had been repeatedly disturbed over the past 70 years by construction activity that resulted in fragmentary human remains being scattered across the burial site, as the Registrar expressly acknowledged in the June 22, 2023 undue hardship decision. The disturbed context of the burial site explains why, when the archaeology team performed the excavation work for 5 metres from any discovery of indeterminate or human remains, they discovered additional indeterminate or human remains, all of which the Archaeologist confirmed on July 3, 2023. In turn, the initial Stage 4 assessment work was subsumed by the burial site investigation, as the Archaeologist confirmed on July 20, 2023. The Registrar's direction for interpreting the requirements under the Strategy and the disturbed context of the Property significantly expanded the scope of the burial site investigation to cover an excavation area extending well-beyond both initial locations where the confirmed human remains were discovered.

**b. The Registrar's March 28, 2023 Direction Caused the Burial Site Investigation to Include the Entire Field Site**

[77] At the Registrar's direction, the Archaeologist initially conducted the Stage 4 assessment in other parts of the Property while concurrently performing the burial site investigation. But as the burial site investigation progressed, the Archaeologist and his team continued to unearth remains and indeterminate bones across the Property while performing the Stage 4 assessment. Over time, the initial Stage 4 assessment work necessarily became part of the burial site

investigation based on the Registrar's direction to the Archaeologist that indeterminate bones be treated as human until "positively identified as non-human" (i.e., based on lab-testing) while the burial site investigation was conducted.

[78] On March 6, 2023, the Archaeologist submitted a preliminary report for the burial site investigation that described the excavation work performed from October 2021 to December 2022. The report detailed the archaeological work that had uncovered "identified human remains" and "indeterminate bone", and included a schematic of the excavation work area clearly showing that scattered indeterminate bone had been discovered throughout the entire study area for the Property.

[79] Given the disturbed context of the Property that had fragmentary and disarticulated bones scattered across the study area, and to follow the Registrar's direction for conducting excavation work around indeterminate bones, the Archaeologist emailed the Registrar on July 3, 2023 to share his view that 100% of the surface area of the Property would need to be assessed through block excavations to complete the burial site investigation. As a result, the burial site investigation came to encompass the original area for the Stage 4 assessment as the investigation unfolded.

[80] In my view, the Registrar unreasonably disregarded prior directions for conducting the burial site investigation in deciding the Applicants' request for reimbursement. By disregarding the prior directions by which the burial site investigation progressed to effectively subsume the entire study area of the Property, I find that the Registrar engaged in flawed reasoning without proper regard to the factual context that led to an unreasonable outcome: *Vavilov* at para 86.

[81] The Registrar's prior directions to the Architect for conducting the burial site investigation clearly expanded the nature and scope of the excavation work required for the investigation, and impacted the request for reimbursement by the Applicants. Given these prior directions, I find that it was unreasonable for the Registrar to disregard the history of this case by arriving at fresh or different assessments about the required excavation work after the work had been performed and associated expenses had been incurred. The Registrar knew, or should have known, about all the conditions that informed the nature and scope of the burial site investigation activities. In my view, the remarks in the denial letter dated April 18, 2024 suggesting otherwise reveal "clear logical fallacies" in his reasoning that led to an unreasonable decision: *Vavilov* at paras 103-104.

**c. The Registrar's Tool-Based Analysis was Faulty**

[82] In my view, the Registrar's decision to determine the reimbursement claim by using a tool-based analysis was faulty. The Registrar sought to differentiate between work performed for the burial site investigation and the Stage 4 assessment by relying on the type of tool that was used. The Registrar held that the use of 3 mm mesh and trowels or wooden tools was indicative of work performed for the burial site investigation, whereas the use of other tools showed that Stage 4 assessment work had been performed. Similarly, he found that so-called "block excavation" work related only to the Stage 4 work and, therefore, did not form part of the burial site investigation.

[83] Under this analysis, if possible human remains were found during Stage 4 assessment work, paras 6 through 15 of the Strategy came into play. Specifically, para 9 of the Strategy required the use of trowels, wooden sculpting tools, and 3 mm wire mesh to excavate any possible human remains. In addition, para 10 of the Strategy required all squares within 5 metres of positively

identified human remains to be excavated by hand for the purpose of determining the extent of the burial. Relying on these terms of the Strategy, the Registrar reasoned that it was only when any such work was recorded that it could be found with any certainty that burial site investigation work had been performed. However, this approach was inconsistent with the Registrar's initial direction for the investigation.

[84] On October 12, 2021, the Registrar initially instructed the Archaeologist to conduct the burial site investigation by assessing the immediate area within 5 metres of where human remains were found using techniques appropriate to the conditions, including block excavation and/or mechanical topsoil removal. As set out in the January 18, 2024 preliminary report for the burial site investigation, the Archaeologist followed the Registrar's instruction and used techniques that he believed were appropriate to the conditions. To this end, he directed the archaeology team to use 6 mm mesh until potential human remains were found. This approach was consistent with the procedure set out under para 8 of the Strategy. Once fragmentary bones were found by using 6 mm mesh, the team switched to using 3 mm mesh and trowels or wooden tools to recover further bones. There is no evidence or reason to believe that the use of trowels or wooden tools was required for bone already found by using 6 mm mesh screens. Accordingly, I am not persuaded that it was reasonable for the Registrar to find that indeterminate bone discovered with 6 mm mesh would not have been analyzed for the burial site investigation (i.e., on the basis that it constituted only Stage 4 assessment work) and, therefore, was non-reimbursable in respect of the burial site investigation on this basis. In any event, the term "block excavation" simply refers to digging continuous squares and the Registrar's original October 12, 2021 order expressly states that block excavation and mechanical topsoil removal were appropriate methods for performing the burial site investigation. In my view, the Registrar relied on a faulty chain of analysis that did not account for all the evidence and led to an unreasonable decision: *Vavilov* at paras 103-104, 126.

[85] The Registrar notes that the October 12, 2021 order predated the Strategy that was finalized on April 1, 2022 (i.e., after which burial site investigation work began in earnest). Based on this, the Registrar submits that this earlier order was replaced by the Strategy as finalized. However, unlike the October 12, 2021 order, the Strategy itself does not specifically address the use of appropriate excavation techniques, such as block excavation and/or mechanical topsoil removal, based on the conditions of the burial site investigation. In any event, there is no indication in the record to explain how or why block excavation or mechanical topsoil removal techniques would somehow be inappropriate for conducting the burial site investigation. As a result, I find that it was unreasonable for the Registrar to disregard the October 22, 2021 order that approved the use of block excavation and/or mechanical topsoil removal techniques for the burial site investigation: *Vavilov* at paras 103-104, 128. I also find that it was unreasonable for the Registrar to not consider any block excavation or mechanical topsoil removal work for reimbursement in relation to the burial site investigation by excluding this work as relating only to the Stage 4 assessment: *Ibid.*

[86] Taking everything into account, I do not find that the reimbursable burial site investigation work should necessarily be limited to just that work involving the use of trowels or wooden tools, or that the reimbursement of investigation-related work should be limited on this basis.

**d. The Registrar Reasonably Relied on the Applicants' Documents in Deciding the Reimbursement Request**

[87] I am satisfied that it was reasonable for the Registrar to rely on various documents provided by the Applicants in making the reimbursement decision that relied heavily on the Archaeologist's reports in determining what expenses formed part of the burial site investigation. In my view, the Registrar reasonably relied on the participation of the Applicants and the Archaeologist who submitted records and information as requested before the reimbursement decision was made. By requesting this information, I find that the Registrar sought to have objective and reliable evidence of the costs that the Applicants incurred in carrying out the burial site investigation.

[88] The Applicants submit that the Archaeologist's reports were submitted to satisfy requests for information by the Registrar, including information required by legislation (i.e., related to the probably cultural origin or religious affiliation of the person whose remains are interred, a description of the boundaries of the burial site, details of the style and manner in which the human remains are interred, a description of any artifacts forming part of the burial site, and an opinion of whether the burial site was set aside with an intention of interring human remains according to cultural affinities, and information relevant to preparing a site disposition agreement), and not strictly for cost recovery purposes: Reg., s. 174(2). An initial report is provided to the Registrar within five days after beginning a burial site investigation to advise of the possible cultural origins of the human remains: Reg., s. 174(3). The report is used by the Registrar to identify potential cultural representatives of the person whose remains are interred to advise them of the burial site and the possible cultural origin of the human remains, including whether the site is a possible burial ground for Indigenous peoples: Reg., s. 174(4). The information in such reports does not include the cost of the work performed to discover the bones. There is no indication in the *FBCSA* or regulations to suggest that reports under s. 174(2) will be used to assess the costs of the burial site investigation.

[89] Despite the prescribed purposes for the reports, I am satisfied that the Registrar could reasonably use the reports, and any other information that was provided, in considering the nature of the expenses captured in the various invoices that the Applicants submitted for reimbursement. In my view, it was open for the Registrar to exercise discretion by considering various documents provided by the Applicants in determining whether to reimburse their expense claims. Among other things, I accept that the Registrar reasonably considered the Archaeologist's reports for the purpose of interpreting his invoices underlying the Applicants' expense claims.

**e. The Archaeologist's Invoices and Reports**

[90] I find that the Registrar acted unreasonably by declining to reimburse the Applicants' costs by taking the position that the Archaeologist's invoices did not sufficiently detail or particularize the burial site investigation work or specifically identify where the claimed work was performed on the Property. In my view, any omissions in the invoices were satisfactorily addressed in the narrative to the reports that, when read collectively with the invoices, sufficiently explained how and where the burial site investigative work was performed, apart from one exception as discussed below. By considering the invoices in isolation to the narrative in the reports, I find that the Registrar placed undue emphasis on the invoices without adequately considering the information in the reports that described the nature of the burial site investigative work that was performed.

[91] That said, I find that the Registrar reasonably excluded the Applicant's claim for the period between November 7 and 25, 2023 when fieldwork ostensibly was conducted *after* the Registrar asked the Applicants to immediately cease the burial site investigation and after the Archaeologist asked to pause this work.

[92] Respectfully, I find that the Registrar acting reasonably ought to have raised any concerns with the conduct of the burial site investigation and the Archaeologist's work to support the investigation by exercising greater oversight over the course of the investigation work as it was unfolding. Ultimately, it was the Registrar who was "undertaking" the burial site investigation: *FBCSA*, s. 96(4). However, the Registrar waited until June 15, 2022 (i.e., when the Applicants had incurred significant costs to perform the investigation) before raising concerns with the physical anthropologist's qualifications to identify human bones (i.e., without a credible basis for the concerns). In addition, the Registrar waited until much if not most of the work had been completed before questioning the sufficiency of the particulars recorded for the work performed that the Applicants submitted for their reimbursement claim.

[93] Among other things, the Registrar decided that the Archaeologist did not find indeterminate bone across the Property as most of the indeterminate bone was burned and, therefore, likely was not human. It may be the case that burnt bones are unlikely to be human. However, the record for decision gave no indication that burnt bones cannot be human, particularly where the burial site had been subject to "*repeated disturbance*" from development or construction-related activity. As a result, the burnt indeterminate bones were still treated as potential human remains without any qualifications pursuant to the direction that the Registrar gave for the burial site investigation. The direction did not provide for indeterminate bones to be treated as human in origin unless burned. Accordingly, I find that it was unreasonable for the Registrar to retroactively seek to apply this additional qualification to the investigation after the fact: *Vavilov* at para 104.

**f. The Registrar's Reconsideration Analysis was Flawed**

[94] In my view, the Registrar's decision to reimburse the Applicants only \$169,528.47 was flawed by not offering a chain of analysis to reasonably explain the departure from a previously agreeable cost projection for completing the burial site investigation: *Vavilov* at para 103. The Registrar's undue hardship decision dated June 22, 2023 clearly acknowledged that the Applicants' projected costs of \$504,699.00 (i.e., based on a cost summary by the Archaeologist provided on February 19, 2023 that included \$372,489.00 for work completed in 2022 and a projected cost of \$117,000.00 plus \$15,210.00 in HRS for work to be completed in 2023) to fully complete the burial site investigation appeared to be reasonable as the site was associated with an Indigenous archaeological site that had been repeatedly disturbed for over 70 years and resulted in fragmentary human remains scattered across the Property making it time consuming to collect and identify the remains. However, on March 5, 2024 and on April 18, 2024, the Registrar determined that only \$169,528.47 of the Applicants' investigation-related expenses would be reimbursed by attributing the balance of their claim to Stage 4 assessment work without addressing the earlier cost projection. In my view, the Registrar's failure to meaningfully address the earlier undue hardship analysis in arriving at the reconsideration decision was unreasonable.

[95] I find that the Registrar acted unreasonably by deciding that the burial site investigation took only 32 days without accounting for the expansion of field work related to indeterminate bone that was outside the scope of work performed for the Stage 4 assessment: *Vavilov* at para 103.

[96] Other than field work, the Registrar did not account for other activities such as analysis and illustration that formed part of the investigation even if they occurred outside of any excavation dates. However, the Applicants did not explain these extra days or otherwise indicate how this work appears on the invoices. Given the lack of any meaningful explanation to account for this work, I am not persuaded that the Registrar acted unreasonably by declining to reimburse this activity on the record for decision in this matter.

**g. Costs Associated with Requests by the Curve Lake First Nation**

[97] Given my finding that the Registrar's decision is unreasonable due to their instructions for conducting the burial site investigation, it is unnecessary to address the Applicants' alternative argument that the scope of the investigation expanded due to requests by the Curve Lake First Nation. That said, and so long as any such work requested by the First Nation fell within the scope of what the Registrar had directed and authorized for the investigation, I would have found any such investigative work performed to reasonably be subject to reimbursement.

**Disposition**

[98] For these reasons, I find that the Registrar acted unreasonably by declining the Applicants' claim for further reimbursement of their expenses related to the burial site investigation on the Property. I find that it is just to quash the Registrar's decision dated April 18, 2024 and remit the matter to the Registrar for reconsideration in accordance with these reasons.

[99] In my view, the record on the application does not sufficiently allow the court to determine all amounts reasonably incurred by the Applicants: a particular outcome is not inevitable in this case: *Vavilov* at para 142; *Thales DIS Canada Inc. v. Ontario (Transportation)*, 2023 ONCA 866 at paras 102-103.

[100] Remitting a matter to an administrative decision-maker for reconsideration will entail some further delay, but this case does not fall within one of the limited scenarios in which it would be appropriate for the court to make its own determination on the merits: *Vavilov* at para 142; *Thales DIS Canada Inc. v. Ontario (Transportation)*, 2023 ONCA 866 at para 10, leave to appeal refused 2024 CanLII 101526 (SCC).

[101] The Applicants shall have their costs of the application in the agreed amount of \$10,000, inclusive, payable within thirty days.

[102] This application required the panel to immerse itself deeply in a complex record. Unless this panel or an administrative judge of the Divisional Court directs otherwise, this panel shall be seized of any subsequent application for judicial review from the Registrar’s fresh decision on reconsideration.

“M.T. Doi J.”

I agree: “D.L. Corbett J.”

I agree: “M.D. Faieta J.”

**Released:** December 10, 2025

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<sup>1</sup> If the coroner declares that foul play is suspected in relation to the discovered human remains, the land ceases to be a burial site: Reg., s. 175(2).

<sup>2</sup> <https://www.ontario.ca/page/standards-and-guidelines-consultant-archaeologists>.

<sup>3</sup> An archaeological square is a standardized grid square area used for systematic excavation of an excavation site that is used to record the location of artifacts and features so every discovery within the site can be recorded and documented for maintaining context of the archaeological activity and findings.

**CITATION:** Taccone et al. v. Registrar, Funeral, Burial and Cremation Services Act, 2002,  
2025 ONSC 6879  
**COURT FILE NO.:** DC-24-300-JR  
**DATE:** 20251210

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**DIVISIONAL COURT**

**D.L. Corbett, M.D. Faieta, M.T. Doi JJ.**

**BETWEEN:**

Carmela Taccone and Joseph Galea

Applicants

and

Registrar, *Funeral, Burial and Cremation Services Act,*  
*2002*

Respondent

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**REASONS FOR DECISION**

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**M.T. Doi J.**

**Released:** December 10, 2025