EYB 2005-92254 – Texte intégral

Cour d'appel

CANADA
PROVINCE DE QUÉBEC
DISTRICT de Montréal

NO : 500-09-015728-058

DATE : 27 juin 2005

DATE D'AUDITION : 21 juin 2005

EN PRÉSENCE DE :
Marie-France Bich , J.C.A.

English Montreal School Board
Applicant

v.
Beverley Boyle and Brian Gallagher
Respondents
et
Ministre de l#Éducation du Québec and Ministre de la Justice du Québec
Mis en cause

Cour d'appel du Québec

FILE NO.: C.A. Qué. Montréal 500-09-015728-058

DATE: 27 june 2005

HEARING DATE: 21 june 2005

PRESENT: Bich J.C.A.

Marie-France Bich J.A. :–

1 On January 17, 2005, the applicant school board adopted a resolution to close St. Patrick School as of June 30, 2005. In March 2005, the respondents, who are members of the St. Patrick School Governing Board, instituted proceedings for the issurance of a permanent injunction, an interlocutory injunction, a safeguard order and declaratory relief, seeking to annul the resolution of January 17 and to maintain the school open.

2 On the date set for the hearing on the merits, that is, June 9, 2005, no judge apparently being available to hear the case, the parties appeared before the honourable Madam Justice Pierrette Sévigny, who referred them to the Master of the Rolls. The hearing on the merits was then set for Oct. 10 and 11, 2005, after the beginning of the school year. At the request of the respondents and after hearing the parties, Sévigny J. then issued a safeguard order under art. 754.2 C.C.P., maintaining St. Patrick School open for the whole of the 2005-2006 school year and detailing a series of accessory measures. Provisional execution of the safeguard order was also granted.

3 The applicant seeks leave to appeal from this interlocutory judgment and also requests that the order of provisional execution be suspended under article 550 C.C.P.

4 Considering the criteria applicable to such a motion under articles 29 and 511 C.C.P., I am of the

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opinion that leave to appeal should be granted. I will also suspend the provisional execution of the safeguard order.

Leave to appeal

5 This Court has generally recognized that a safeguard order may be subject to an appeal under article 29 C.C.P.: see for example *Société de l'assurance-automobile du Québec c. Durand* , J.E. 2004-1141; *Bell Mobility Cellular Inc. c. Worthware Systems international Inc.* , J.E. 97-1439; *Turmel c. 3092-4484 Québec Inc.* [1994] R.D.J. 530 .

6 In the present case, the safeguard order of the Superior Court is an interlocutory judgment which orders that something be done which cannot be remedied by the final judgment, as contemplated by article 29, sub-par. 2, C.C.P. and may even appear to be deciding the issue (see article 29, sub-par. 1 C.C.P.), at least in part, since it purports to be in force for the whole duration of the 2005-2006 school year. The safeguard order thus potentially renders the final judgment, to be pronounced next fall, ineffective for that year. Moreover, by ordering that St. Patrick school be opened for the whole of the 2005-2006 school year, the order entails the re-direction of substantial human resources which, according to the various collective agreements in force between the school board and its employees, have already been deployed elsewhere. Also, the safeguard order apparently takes no account of the impact of keeping St. Patrick school open on the interests of persons and clienteles who benefit from the decision to close this school. This decision is part of a larger reorganization scheme and one component cannot be affected without the others being consequentially affected. In that sense, if the courts, on the merits, were to decide in favour of the applicant, it would be impossible to undo what will have already been done. It is to be noted that the situation would have been the same had the Superior Court refused to issue the safeguard order: such a refusal would have had an impact, this time on St. Patrick school's students and their parents, that no final judgment could have remedied.

7 A right to appeal therefore lying from this judgment under article 29 C.C.P., the question remains whether or not leave to appeal should be granted in accordance with article 511 C.C.P.

8 I am of the opinion that the motion for leave to appeal raises serious questions which warrant consideration by this Court.

9 The first question relates to the very nature and length of the safeguard order, which is issued within the framework of a summary proceeding: can a judge acting under article 754.2 C.C.P. render such a safeguard order as was issued in the present case, for such a period of time, and to be in effect even after the case is heard on the merits? Can safeguard orders be granted in that manner? Looking at *2957-2518 Québec Inc. c. Dunkin' Donuts (Canada)Ltd.* , J.E. 2002-1108 (C.A.); *Natrel Inc. c. F. Berardini Inc.* [1995] R.D.J. 383 C.A. ; *Bell Mobility Cellular Inc. c. Worthware Systems international Inc.* , cited above, *Turmel c. 3092-4484 Québec Inc.* , cited above, it may appear that safeguard orders of this nature and extent may exceed the acceptable time-limit.

10 It is true, of course, that the facts of the case do not lend themselves easily to a short-term safeguard order. In similar situations, courts have sometimes issued or confirmed safeguard orders to last for a whole school year: see, for example, *Parasiuk c. Québec* , J.E. 2004-1713 (C.A., by analogy); *Boyle c. Commission scolaire English Montreal* , J.E. 2000-1782 (S.C.). This simply serves to illustrate that the question is not a simple one and that it deserves to be submitted to this Court.

11 The second question at stake here relates to the criteria applicable to the issuance of a safeguard order.

12 In order to obtain such an order, an applicant must establish 1° that he or she is *prima facie* entitled to the order sought; 2° that he or she will suffer irreparable or serious harm if the safeguard order is not granted; 3° that the matter is urgent; and, 4° that the balance of inconvenience between

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the parties favours relief to the applicant: *Vachon c. Riopelle* , J.E. 2003-1324 (C.A.); *M.F.B. Bancorp Ltd. c. MacDonald Oil Exploration Ltd.* , B.E. 2001BE-990 (C.A.).

13 In the present case, the applicant school board has convinced me that the basis upon which the respondents claim to have a *prima facie* right to the safeguard order is arguable and does not appear clearly from the allegations of their motion to institute proceedings (which was not accompanied by any detailed affidavit), nor from other evidence in the file. This, of course, does not mean that the respondents' claim is without merit or would be dismissed by this Court upon further review, but their *prima facie* right is far from clear considering the preliminary evidence I have before me. I am not stating anything conclusively, since this will be for the Court to decide, but there appears to be, in that respect, a difficulty which justifies leave to appeal being granted.

14 It also appears that the motion does not allege any specific prejudice. At the hearing, I asked the respondents to clarify the nature and extent of the prejudice that they would allegedly suffer if the safeguard order was not granted and the school closed down. One of the respondents, Ms Boyle, explained the inconveniences to which the children would be subject were they forced to change school in 2005-2006, such as the loss of a small and wonderful community, and the hazards of being reassigned to a school located on a very busy and polluted street in contrast to a much quieter and safer area. She also stated that, without a safeguard order, any final judgment would be ineffective, considering what she described to be the past unwillingness of the applicant to submit to court orders, and considering that parents, who registered their children in other schools for the coming year, would most likely not want them to move back to St. Patrick in the middle of the school year, should the school be reopened. She finally declared that the prejudice is to the rights of the parents and children of St. Patrick school, which deserve protection.

15 With all due respect, I am uncertain that this kind of prejudice is sufficient to justify a safeguard order, and I consider that this is also a matter for the Court to examine more closely.

16 Nor am I convinced that the balance of inconvenience favours the respondents, for the reasons set out in the applicant's motion for leave to appeal. I am, of course, not saying that the respondents' concerns are to be dismissed summarily, but the practical consequences of the safeguard order on the applicant are so significant that the very feasibility of the order may be questioned, considering that St. Patrick school was scheduled to be closed in a few days, with all personnel at the school having been reassigned elsewhere for the 2005-2006 school year, and an adult education centre being scheduled to move into the building during the summer.

17 The matter at hand is certainly most urgent, and I would have expected that the Superior Court could have decided it on the merits, and not merely on an interim or interlocutory basis, in as much as all temporary solutions have substantial drawbacks. Considering, however, that serious questions are raised as to the uncertainty of respondents' apparent right to a safeguard order, the undefined nature and extent of the prejudice that they allege, and the balance of inconvenience, I will grant leave to appeal.

Suspension of the order of provisional execution

18 The applicant also seeks the suspension of the order of provisional execution granted by the Superior Court. Such suspension will be granted when there are major and apparent flaws in the judgment appealed from, and when the provisional execution is of such a nature as to cause great or irreparable harm to one of the parties, considering the balance of inconvenience: *Société de l'assurance-automobile du Québec c. Durand* , cited above; *Stevens c. 2552-5577 Québec Inc.* , REJB 2001-24317 (C.A.); *Loblaw Québec Ltée c. Alimentation Gérard Villeneuve (1998) Inc.* , J.E. 2000-689 (where the prejudice has been held to be the preeminent criterion, considering the circumstances); *Carrières régionales Inc.* c. *Boulanger*, J.E. 2003-224 (C.A.); *Pharmascience Inc. c. Binet* , J.E. 2005-22 (C.A.). With respect, I think that these criteria are met in the present case.

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19 The judgment of Sévigny J. does not explicitly state the reasons for provisional execution being granted. Nor does it discuss the criteria for granting a safeguard order, criteria which are simply referred to in a very general, unspecific manner. The reasons for the judgment seem to rest in the following paragraphs :

> [2] Ayant pris connaissance des procédures, ayant pris connaissance de plusieurs pièces pertinentes au présent litige; ayant entendu les représentations qu'ont formulées les deux Parties, il est évident que la situation que vise la requête principale des demandeurs demandant l'émission d'une injonction interlocutoire est très importante pour les Parties. Cette procédure est vivement contestée par la défenderesse.
>
> [3] Ayant considéré les arguments avancés de part et d'autres, le Tribunal estime que sans l'émission d'une ordonnance de sauvegarde, la situation factuelle et réelle qui sera alors en vigueur lors de l'audition de l'injonction interlocutoire créera un état de fait de nature à rendre le jugement final inefficace.

20 With respect, these paragraphs seem to ignore the fact that although the matter is indisputably urgent, this fact alone cannot justify the granting of a safeguard order. In the present case, this order creates an imbalance which, as I explained earlier, is certainly as important as the one it seeks to obviate. Moreover, it appears to ignore the problem raised by the lack of a *prima facie* right of the respondents. In their motion, the respondents generally contend that the consultation process leading to the closure of St. Patrick School was improperly conducted and was a sham, thus violating the law. The allegations of the motion, however, do not in themselves establish that such is the case, although that is certainly the respondents' perception. It is not enough, however, to allege that the consultation process was flawed or that it was conducted only for appearances' sake. The fact that it resulted in a decision that was not what the respondents would have wanted does not in and of itself mean that the process was a sham.

21 According to the various motions, affidavits and documents before me, on the contrary, the applicant *prima facie* appears to have conducted the consultation process in accordance with the principles set out by the Superior Court in *Boyle c. Commission scolaire English Montreal* , J.E. 2003-1597 (S.C.). One must also remember that school boards have great latitude in their decisions to open, close and generally manage their schools, and that courts will not interfere with these decisions unless the proper procedure is not followed or the law is violated: *Boyle c. Commission scolaire English Montreal* , J.E. 2003-1597 (S.C.); *Flook c. Lester B. Pearson School Board* , J.E. 2001-1795 (S.C.), *Mount Royal Academy School Committee c. Commission scolaire Ste-Croix* [1988] R.J.Q. 2201 S.C. ; *Arsenault c. Commission scolaire de Montréal* , J.E. 2004-1711 (C.A.).

22 The judgment of the Superior Court also ignores the fact that the motion does not allege any specific prejudice, nor does it discuss the seriousness and sufficiency of the prejudice alleged by the respondents during the hearing, which seems to be based on honest but unsubstantiated representations rather than evidence in the file.

23 On the questions of the prejudice resulting from the safeguard order and the balance of inconvenience, I refer to what I have discussed earlier (paras. 6 and 16).

24 I will therefore order the suspension of the provisional execution of the safeguard order.

25 In doing so, I am fully aware that the present case is a difficult and delicate one, where any provisional order creates some prejudice or inconvenience to one party or the other. I am also fully aware of the fact that the suspension of the safeguard order may render the appeal ineffectual, considering that, in all likelihood, the latter will not be heard this summer. The applicant has informed me that it is seeking to have the hearing on the merits held as soon as possible this

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summer, instead of the fall, and that a motion has been addressed for that purpose to the Associate Chief Justice André Deslongchamps of the Superior Court. This motion was presented on June, 23, 2005. If, indeed, the hearing is held this summer rather than in October, then the present appeal will become moot. This, however, might be the for the best, considering that all parties are interested in the expeditious and definitive settlement of the case.

26 FOR THESE REASONS, I

27 GRANT the applicant's motion for leave to appeal the safeguard order issued by the Superior Court on June 9, 2005, and

28 SUSPEND the provisional execution of the said safeguard order;

29 THE WHOLE with costs to follow in this Court and the Superior Court.

Marie-France Bich J.A.
Me Bernard Jacob, Me André Sasseville, for Applicant
Berverley Boyle, Respondent, personally
Brian Gallagher, Respondent, personally

ANNEXE

Clerk : Marc Leblanc

Date de mise à jour : 4 août 2005
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