

Cour supérieure

CANADA
PROVINCE DE QUÉBEC
DISTRICT de Montréal
NO : 500-17-024852-058

DATE : 13 juillet 2005

DATE D'AUDITION : 11 juillet 2005

EN PRÉSENCE DE :

Jean-François Buffoni , J.C.S.

Beverley Boyle and Brian Gallagher
Plaintiffs

v.

English Montreal School Board
Defendant

et

Ministre de l'Éducation du Québec et Ministre de la Justice du Québec
Mis en cause

Jean-François Buffoni, J.S.C. :-

1 The plaintiffs attack the defendant school board's decision to close a school. Should an interlocutory injunction be issued to keep the school open until the validity of that decision is determined on the merits?

Background and Proceedings

2 On January 17, 2005, the defendant school board adopted a resolution to close St. Patrick School as of June 30, 2005.

3 On March 14, 2005, the plaintiffs, who are members of the St. Patrick School governing board, took the present proceedings.

4 Alleging that the consultation process leading to the closure of this school was improperly conducted and was a sham, thus violating the law, they instituted an originating motion for the issuance 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 (the Motion).

5 On June 9, 2005, the Superior Court issued a safeguard order 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.

6 On a motion by the defendant, the undersigned was designated on June 23, 2005 to hear the interlocutory injunction by preference on July 11 and 12, 2005.

7 On June 27, 2005, a judge of the Court of Appeal authorized the defendant to appeal the safeguard order and suspended the provisional execution of that order.

Preliminary Remarks as to the Scope of the present Judgment and Applicable Test

8 At this interlocutory stage where the evidence is for the most part limited to affidavit and documentary evidence, it is not for the Court to decide whether

the consultation and decision process was validly held or not;

the January 17, 2005 resolution is valid or not;

the closure of St. Patrick School is valid or not; or

that resolution and that closure should be annulled.

9 Those questions pertain to the merits and will be decided after both sides have had a chance to present all of their evidence and arguments.

10 At this interlocutory stage, rather than making a determination on the merits, the Court is bound to apply the rules that relate to interlocutory injunctions.

11 Those rules are set out in article 752 of the Quebec Code of Civil Procedure:

752. In addition to an injunction, which he may demand by a motion to institute proceedings, with or without other conclusions, a party may, at the commencement of or during a suit, obtain an interlocutory injunction.

An interlocutory injunction may be granted when the applicant appears to be entitled to it and it is considered to be necessary in order to avoid serious or irreparable injury to him, or a factual or legal situation of such a nature as to render the final judgment ineffectual.

12 The caselaw has developed a test based on three questions or issues:

The *appearance of right* issue: Is the plaintiff *prima facie* entitled to the relief sought?

The *irreparable harm* issue: Is the remedy sought necessary to avoid a) a serious or irreparable injury to the plaintiff or b) a factual or legal situation of such a nature as to render the final judgment ineffectual?

The *balance of inconvenience* issue: Does the balance of inconvenience favour the plaintiff?

13 If on the first question the *prima facie* right of the plaintiff appears to be *clear* and if the irreparable harm issue is resolved in favour of the plaintiff, an interlocutory injunction may be issued in the discretion of the Court.

14 If the *prima facie* right of the plaintiff is *doubtful* (i.e. neither clear nor non-existent) and if the irreparable harm issue is resolved in favour of the plaintiff, an interlocutory injunction may be issued, in the discretion of the Court, provided that the balance of convenience is resolved in favour of the plaintiff.

15 Since these issues relate directly to the relief sought at the interlocutory stage, it is important to

outline that relief.

The Relief sought at this Interlocutory Stage and Amendments to the Proceedings

16 The relief which the plaintiffs seek from the Court at this interlocutory stage are outlined in paragraphs 15 to 24 of the corresponding relief section of the Motion.

17 In summary, the Motion asks that the defendant be ordered to keep the school open and fully operational during the upcoming 2005-2006 academic year pending the outcome of the proceedings on the merits.

18 Two or three juridical days prior to the hearing, the plaintiffs served and filed an amended Motion adding several allegations (the Amended Motion). No changes however were made to the relief originally sought.

19 The defendant opposed the amendments. For the reasons given at the hearing, permission was granted to the plaintiffs to file the Amended Motion.

20 Additional affidavit evidence and documents were then filed by both sides as well as transcripts of the examinations held of three of the original four plaintiffs.

21 No oral evidence was presented in open Court.

22 After hearing the representations of the parties, the Court must now determine whether the plaintiffs' recourse for an interlocutory injunction meets the test.

First Issue: Appearance of Right

23 Is the plaintiff *prima facie* entitled to the relief sought?

24 In the well-known *Kanatewat* case,¹ our Court of Appeal stated that the plaintiff must convince the Court that the right he is asserting has a reasonable prospect of being recognized by the final judgment. At the interlocutory stage, continues the Court, this right is either clear, doubtful or non-existent.

25 A somewhat less stringent test was developed whereby the plaintiff is only required to show that he has at least an arguable case or that the proceedings raise a serious issue to be tried. This test is sometimes called the *American Cyanamid* test, after the name of a famous English case.²

26 Commenting on the appearance of right of the present plaintiffs in the above-noted judgment³ granting leave to appeal and lifting the safeguard order, Madam Justice Bich stated:

Moreover, [the order in issue] 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.

1. *La Société de développement de la Baie James v. Kanatewat*, [1975] C.A. 166, at p. 183.

2. *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.); [1975] 1 All E.R. 504 (H.L.).

3. Where the plaintiffs are designated as the respondents and the defendant, as the applicant.

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.).⁴

27 Obviously, the Court is not bound by this comment made in another context and without the benefit of the additional evidence filed and the substantial oral representations made at the present hearing.

28 Nevertheless, the evidence discloses that the defendant has apparently made impressive efforts to put in place a meaningful consultation process starting with a public presentation in August 2004, followed by several public meetings, the supply of information and documents to the plaintiffs' representatives, the presentation of briefs, discussions, questions, answers, analyses of alternatives, further discussions, questions and answers and the final resolution adopted in January 2005.

29 Were those efforts sufficient? Will it be determined on the merits, as the plaintiffs do claim, that those efforts were nothing more than a sham to hide the fact that the decision to close down St. Patrick School was a foregone conclusion? Maybe.

30 The affidavit of Mr. D'Andrea raises doubts as to the sufficiency of the consultation process. On the other hand, the affidavit evidence of the defendant contradicts most if not all of Mr. D'Andrea's allegations. The judge on the merits will therefore need to grapple with credibility issues.

31 However, at this interlocutory stage, only the *appearance* of right is in issue. And on that issue, the right of the plaintiffs, to use the language of the *Kanatewat* case, is neither clear nor non-existent, it is *doubtful*. Or to paraphrase *American Cyanimid*, the plaintiffs' proceedings raise a *serious issue to be tried*.

32 It follows that the first criteria of the test is met.

Second Issue: Irreparable Harm

33 The irreparable harm issue stems from that part of article 752 C.C.P. which states that an interlocutory injunction may be granted if, *inter alia*, one of the following conditions is met: a) it is considered necessary in order to avoid serious or irreparable injury to the plaintiff or b) it is considered necessary in order to avoid a factual or legal situation of such a nature as to render the final judgment ineffectual.

34 Since the latter part # that is the factual or legal situation of such a nature as to render the final judgment ineffectual # can also be considered as *irreparable*, it is common to combine these two conditions in one generic phrase, the irreparable harm issue.

35 Turning to our case, is the relief sought necessary in order to avoid either a serious or irreparable injury to the plaintiffs or to avoid a factual or legal situation of such a nature as to render the final judgment ineffectual?

36 Whether the St. Patrick School is open or closed in the upcoming months pending the trial on

⁴ *English Montreal School Board v. Boyle*, 2005 QCCA 657, AZ-50321872, at par. 20 and 21.

the merits will have an impact more particularly on the 79 students who were enrolled in the 2004-2005 school year and their parents.

37 The uncontested evidence discloses that as of February 9, 2005 (see the Lacroce Affidavit dated May 3, 2005), out of those 79 students,

56 have registered at Bancroft School;

7 have registered at Pierre Elliott Trudeau;

1 has registered at Westmount Park;

4 were moving out of the country;

2 were moving at the end of February 2005;

8 did not know where they would be registered for September 2005;

1 was not accounted for.

38 It is also uncontested that Bancroft School, which falls under the authority of the defendant, is located 1.5 kilometres away from St. Patrick's. Both schools are situated in the Plateau Mont Royal area.

39 Have the plaintiffs proven irreparable harm within article 752 C.C.P.?

40 The evidence advanced by the plaintiffs in support of the claim of irreparable harm is scarce.

41 On that issue, Madam Justice Bich remarked at paragraph 14 of her June 27, 2005 judgment:

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.

42 Since then, in the Amended Motion, the plaintiffs added a new paragraph 74 which specifically addresses the issue of prejudice:

Specifically with regards to the prejudice to the children of St. Patrick School, it will involve removing the students of St. Patrick's from their familiar geographical and community surroundings, an element which the Ministry of Education views as an important contributing factor to the development of the child; it will involve the removal

of students from a residential setting (St. Patrick's) to that of an industrial zone with all its encumbrances and dangers, it will involve longer bussing time as well as loading and unloading from busses and private cars in the heavily congested area where Bancroft School is located, it will involve lunch time supervision and additional costs for children unable to return home for lunch, it will involve possible health problems related to industrial pollution, noise pollution, traffic pollution and other concentrated types of pollution as per Exhibit P-30 en liasse;

43 As a preliminary comment, it is highly doubtful that the facts contained in the above representations made to Madam Justice Bich which are summarized in her paragraph 14 and those alleged in paragraph 74 of the amended Motion were validly put in evidence.

44 Firstly, representations made as part of argument are not testimony.

45 Secondly, those representations and the allegations of paragraph 74 are not supported by detailed affidavits or by oral testimony.

46 Thirdly, many of those representations and allegations, for example those dealing with different types of pollution, appear to be based on personal opinions not supported by expert evidence.

47 In spite of these evidentiary shortcomings, and assuming these representations and allegations to be true, the facts put forward suggest that the closing of the school shall cause some inconvenience to some of the students and their parents.

48 Is that type of inconvenience sufficient to meet the irreparable harm standard of article 752 C.C.P.?

49 In 1995, this Court was asked to issue an interlocutory injunction prohibiting the implementation of a resolution of Commission scolaire Taillon to radically change the mission of Arc-en-Ciel School, the practical effect of which was to oust from that school the whole of its students and teachers. On the issue of irreparable harm, the Court noted:

Certes, des parents sont-ils malheureux de la fermeture temporaire de leur école. Cette fermeture temporaire, si ceux-ci devaient avoir gain de cause au mérite. Les élèves subissent certainement des inconvénients tels l'obligation de voyager qu'ils n'avaient pas, et autres, mais ces inconvénients signalés ne peuvent dans les circonstances être assimilés à des torts irréparables tel que l'a déterminé la jurisprudence.⁵

50 As a result, the interlocutory relief was refused.

51 In 1999, an interlocutory injunction was requested to prevent the merger of two schools of the Riverside School Board and the closure of Penfield School. On the issue of irreparable harm, the judgment held:

De la preuve soumise par les deux parties, le tribunal retient que les étudiants de Penfield seront certes touchés par la fusion de leur école avec Chambly High School. Le tribunal est par ailleurs convaincu que les parents sont malheureux de cette décision : il ne pourrait en être autrement. Il n'y a jamais de solution parfaite quand il s'agit de fermer une école ou de déterminer le moment où cette fermeture devrait se faire. Cependant même si ces inconvénients sont importants, il ne peuvent pas être assimilés à des torts irréparables tels que déterminés par la jurisprudence.

D'autre part, l'atmosphère chaleureuse de l'école Penfield et le cadre de qualité du milieu

⁵. *Côté v. Commission scolaire Taillon, S.C. Longueuil, 505-05-000542-958, July 14, 1995, Arsenault J., at p. 9.*

de vie actuel des étudiants pourraient être préservés puisqu'ils ne seront pas dispersés mais relocalisés à une autre école. Quant à leur déplacement, bien qu'il puisse être appelé à se faire sur une distance plus longue, il ne peut pas causer un préjudice irréparable à des étudiants de leur niveau académique.⁶

52 Again, the interlocutory relief sought was denied.

53 In 2002, this Court was asked to issue an interlocutory injunction to prevent the Commission scolaire de l'Amiante from merging two schools. The effect of the merger was to transfer all the students of one school to another school. On the irreparable harm issue, the Court stated:

Le seul préjudice résultant de la décision de l'intimée consiste, pour les enfants, à faire un trajet d'autobus scolaire un peu plus long que celui qu'ils devraient normalement faire s'ils avaient été maintenus à Saint-Nom de Marie. Ces inconvénients ne peuvent entraîner l'octroi de l'injonction interlocutoire qui ne peut être le remède approprié.⁷

54 Here again, the interlocutory relief sought was refused.

55 It follows from that line of cases # and no authorities supporting a contrary view were brought to the Court attention # that the foreseeable inconvenience flowing from the closure of a school and the necessity to travel to a different one pending the adjudication of the merits falls short, *per se*, of meeting the irreparable harm standard of article 752 C.C.P.

56 Hence, the type of inconvenience claimed by the plaintiffs resulting from the necessity to travel to Bancroft School, 1.5 kilometres away from St. Patrick School, does not constitute irreparable harm.

57 The second branch of the test not being met, the relief cannot be granted.

Third Issue: Balance of Inconvenience

58 Since the relief cannot be granted, it is not necessary to consider the balance of inconvenience.

59 However the following general comments on that issue might be of interest.

60 The issue here may be framed as follows: Which of the plaintiffs or the defendant would suffer the greater inconvenience, should the relief be granted or refused?

61 If the relief is denied, the plaintiffs would suffer the inconvenience mentioned under the irreparable harm issue.

62 If the relief is granted, the defendant would have to backtrack on a series of measures taken since the adoption of the Jan. 17, 2005 decision.

63 Those measures, which are detailed in the affidavit and documentary evidence adduced by the defendant, include those summarized in paragraph 6 of the judgment of Madam Justice Bich as follows:

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

⁶. *Parents Committee of Penfield Academy High School v. Riverside School Board, S.C. Longueuil, 505-05-005182-990, June 16, 1999, Poulin J., at pp. 14 and 15.*

⁷. *Alexandre v. Commission scolaire de l'Amiante, 2002 IIJCan 12833 (QC C.S.), at par. 28.*

persons and clientele 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 [school board], it would be impossible to undo what will have already been done.

64 It is true that this excerpt dealt with the effect of the safeguard order, object of the appeal, but according to the evidence before this Court, the inconvenience to the defendant, should an interlocutory injunction issue, would be just the same. The fact is that the hardship imposed on the defendant would largely exceed the inconvenience to the plaintiffs.

65 This means that had the relief not been denied for lack of irreparable harm, it would have been denied because the balance of inconvenience favours the defendant.

Comments as to the Conduct of the Proceedings

66 It is unfortunate that the initial resolve of the parties to proceed swiftly on the merits (as reflected in their agreement as to the conduct of the proceedings executed March 29 and 30, 2005) seems to have weakened over the past few months.

67 For example, as of mid-July 2005, the defendant had still not filed its contestation on the merits which was due April 19, 2005. Its explanation that it wanted to «concentrate» on the interlocutory injunction is no valid excuse. Had the defendant complied with its obligation and filed its contestation in due course, the parties could have «concentrated» their energies on the merits.

68 On the other hand, the filing by the plaintiffs of the Amended Motion on the eve of the present hearings and the addition of several paragraphs and documents, while they have not delayed these hearings, will have the side effect of further delaying the trial on the merits. The plaintiffs having consented to give the defendant until September 30, 2005 to file its contestation on the merits on the Amended Motion, they will likely need a further month to make the file ready for trial.

69 In the meantime, the peremptory time limit to file the inscription on the merits will have expired on September 13, 2005 if nothing is done about it.

70 After discussion with both sides, in view of the particularity of the situation and to relieve the parties from the necessity of making a formal application, the Court finds it appropriate to prolong that time limit to October 31, 2005.

FOR THESE REASONS, THE COURT

71 *DENIES* the plaintiffs' amended motion for the issuance of an interlocutory injunction, costs to follow;

72 *EXTENDS* the peremptory time limit to inscribe the matter for proof and hearing to October 31, 2005, without costs.

Jean-François Buffoni, J.S.C.
Beverley Boyle, Plaintiff, personally
Brian Gallagher, Plaintiff, personally
Me André Sasseville, Me Bernard Jacob, for Defendant

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Date de dépôt : 3 août 2005