

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-015728-058
(500-17-024852-058)

DATE: June 16, 2006

**CORAM : THE HONOURABLE JOSEPH R. NUSS, J.A.
PIERRE J. DALPHOND, J.A.
JACQUES DUFRESNE, J.A.**

ENGLISH MONTREAL SCHOOL BOARD
APPELLANT

v.

**BEVERLY BOYLE
BRIAN GALLAGHER**
RESPONDENTS

and

**MINISTRE DE L'ÉDUCATION DU QUÉBEC
MINISTRE DE LA JUSTICE DU QUÉBEC**
MIS EN CAUSE

JUDGMENT

[1] THE COURT; on appeal of a judgment of the Superior Court, District of Montreal (the Honourable Pierrette Sévigny), rendered on June 9, 2005, which granted a safeguard order;

[2] Having studied the file, heard the parties through counsel and having deliberated;

[3] For the reasons of Justice Pierre J. Dalphond, with which Justices Joseph R. Nuss and Jacques Dufresne concur:

[4] **ALLOWS** the appeal the whole without costs considering the circumstances;

[5] **SETS ASIDE** the judgement of the Superior Court rendered on June 4, 2005;

[6] **DISMISSES** the motion for a safeguard order without costs.

JOSEPH R. NUSS, J.A.

PIERRE J. DALPHOND, J.A.

JACQUES DUFRESNE, J.A.

Mtre Bernard Jacob
Langlois, Kronström, Desjardins
Attorney of the appellant

Beverly Boyle
Personally

Brian Gallagher
Personally

Date of hearing: November 11, 2005

REASONS OF DALPHOND, J.A.

[7] The respondents have for many years been fierce opponents of the closure of St. Patrick School, one of the establishments of the appellant, the English Montreal School Board (the Board). This is the last and most likely final chapter of the battle since the school was closed in the fall of 2005. Despite the apparent moot character of the issue for the parties, the Court felt it necessary to take the case under advisement in order to release reasons to reiterate the criteria and limits applicable to safeguard orders.

CONTEXTUAL BACKGROUND

[8] On January 17, 2005, the 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 issuance of a permanent injunction, an interlocutory injunction, a safeguard order and an order for declaratory relief, seeking to annul the resolution of the Board of January 17, 2005 and to maintain the school open. They alleged a lack of proper consultation and a biased process.

[9] The parties proceeded diligently to produce their affidavits and exhibits and the motion for an interlocutory injunction was scheduled for hearing on June 9, 2005 (duration: 1 day).

[10] Sévigny, J., to whom the motion was unfortunately referred at only 11:15 am that day, after a perusal of the file, announced that she would not hear it: "*Il est vite devenu évident à la soussignée que l'audition pleine et entière de cette requête d'injonction interlocutoire prendrait au minimum une journée et demie*". After some discussion with the parties, she referred them to the Master of the Rolls for a date. It seems that the next available and convenient opening was only on October 10 and 11, 2005, i.e. more than a month after the beginning of the school year.

[11] These inadequate responses of the judicial system prompted the respondents to seek immediate relief from Sévigny, J. After briefly hearing the parties and reading part of the file ("*Ayant pris connaissance des procédures; ayant pris connaissance de plusieurs des pièces pertinentes*"), she ordered the Board to maintain St. Patrick School open for the whole school year. On June 27, 2005, a judge of this Court granted leave to appeal that order¹ and suspended its provisional execution.

¹ It is well established that a safeguard order of that nature is an interlocutory judgment within the meaning of article 29 C.C.P. and that it may be subject to appeal with leave in exceptional cases if the interests of justice so require (see, for example, *Sobeys Québec Inc. v. Casot*, [2005] J.Q. No.

[12] In the meantime, on a motion by the Board, the Associate Chief Justice of the Superior Court designated Buffoni, J. to hear the interlocutory injunction by preference on July 11 and 12, 2005. This time, the judicial system's response was irreproachable.

[13] In an oral judgment rendered on July 13, 2005, Buffoni, J. dismissed the respondents' motion for an interlocutory injunction. He concluded that, *prima facie*, the right alleged by the respondents was arguable, that there was a lack of irreparable harm to the respondents and that the balance of inconvenience did not favour them. For all practical purposes, the fate of the school was then sealed.

JUDGMENT OF THE SUPERIOR COURT

[14] Sévigny, J. did not explicitly state the reasons for provisional execution being granted. Nor did she discuss the criteria for granting a safeguard order. The reasons for the judgment 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.

[4] Donc ayant considéré le tout, et plus précisément l'ensemble de la jurisprudence soumise, le Tribunal ACCUEILLE en partie la requête :

(emphasis added)

[15] For these reasons, she issued the following order:

9462 (C.A.); *English Montreal School Board v. Boyle*, 2005 QCCA 657, J.E. 2005-1343 (C.A.); *Société de l'assurance automobile du Québec v. Durand*, J.E. 2004-1141 (C.A.); *Gestion Cribert Inc. v. H. & R. Block Canada Inc.*, J.E. 2000-29 (C.A.); *Bureau v. Fédération des caisses d'économie Desjardins du Québec*, J.E. 2002-2155 (C.A.); *Quebec (Attorney General) v. Lord*, J.E. 2000-886 (C.A.); *Bell Mobility Cellular Inc v. Worthware Systems International Inc.*, J.E. 97-1439 (C.A.); *Quebec (Attorney General) v. Mathers*, J.E.97-1015 (C.A.); *Quebec (Attorney General) v. 1509-8783 Québec Inc.*, [1995] R.D.J. 504 (C.A.); *Turmel v. 3092-4484 Québec Inc.*, [1994] R.D.J.530 (C.A.); *Première Nation de Betsiamites v. Kruger Inc.*, 2005 QCCA 724).

[5] ORDONNE à la défenderesse, Commission scolaire English Montréal, de maintenir ouverte l'école élémentaire St-Patrick pour l'année 2005/2006.

[6] ORDONNE à la défenderesse de s'assurer d'embaucher le personnel enseignant et administratif nécessaire afin de maintenir ouverte en tant qu'école élémentaire publique l'école St-Patrick;

[7] ORDONNE à la défenderesse de pourvoir à l'embauche du personnel enseignant nécessaire pour prodiguer l'enseignement aux élèves régulièrement inscrits à l'école St-Patrick pour l'année scolaire 2005-2006.

[8] ORDONNE à la défenderesse de s'assurer d'embaucher le personnel nécessaire au maintien de l'école St-Patrick pour l'année scolaire 2005-2006.

[9] ORDONNE à la défenderesse de mettre à la disposition de l'école St-Patrick un budget d'opération calculé selon les mêmes critères que ceux appliqués aux budgets des autres écoles élémentaires incluses à son réseau.

[10] ORDONNE à la défenderesse d'effectuer les adaptations nécessaires à l'école St-Patrick afin d'être en mesure de respecter la totalité de la présente ordonnance.

(emphasis added)

ISSUE AT STAKE

[16] Can a judge acting under article 754.2 C.C.P. render a safeguard order as was issued in the present case?²

GOVERNING PRINCIPLES

[17] Art. 754.2 C.P.P. defines in what circumstances a safeguard order can be issued:

754.2. If on presentation of the application for an interlocutory injunction the record is complete, the court hears the parties.

In addition to proof by affidavit, any party may present oral proof, if he so wishes.

If on presentation of the application for an interlocutory injunction the record is incomplete, the court fixes the date for the proof and hearing and issues any

² The main issue identified by Bich, J.A. in her judgement authorizing the appeal.

order necessary to safeguard the rights of the parties for the time and on the conditions it determines.

(emphasis added)

[18] An order to safeguard the rights of a party issued pursuant to article 754.2 *C.C.P.* is a provisional interlocutory injunction; it is a discretionary judicial remedy of limited duration, issued for the purpose of preservation, in urgent situations, of the *status quo* in cases where the respondent has not yet presented all its grounds (*Attorney General of Quebec v. Lord*, REJB 2000-28262 (C.A.)).

[19] Commenting on this provision, my colleague Gendreau wrote in *Turmel c. 3092-4484 Québec inc.*, [1994] R.D.J.530 (C.A.):

Par ailleurs, si l'ordonnance de sauvegarde est de la même nature que l'injonction provisoire, il va de soi que le requérant devra rencontrer pour son émission les mêmes critères d'apparences de droit, d'urgence et de balance des inconvénients.

Enfin, la formulation de l'ordonnance devrait être faite de manière à minimiser les inconvénients de celui contre qui elle est prononcées car, au risque de me répéter, elle s'inscrit dans le cadre d'un dossier incomplet et se veut le redressement nécessaire d'une situation qui devra, plus tard mais tout de même dans un court délai, être réévaluée. » (Nos soulignements)

(emphasis added)

[20] In *Natrel Inc. c. F. Berardini Inc.*, [1995] R.D.J. 383 (C.A.), speaking for the Court, my colleague Otis stated that the reasonableness of such an order depends essentially on its length and scope:

Ainsi, selon la volonté du législateur, l'ordonnance de sauvegarde intervient dans le cadre de la présentation de la requête en injonction interlocutoire lorsque le dossier ne peut être soumis au tribunal, par adjudication, vu son caractère imparfait. Ainsi, même si l'ordonnance de sauvegarde participe de l'injonction interlocutoire provisoire en ce qu'elle constitue une mesure temporaire émise en l'absence de présentation d'une preuve complète, elle s'en distingue, toutefois, par le cadre dans lequel elle s'inscrit et l'absence de limitation législative quant à sa durée.

L'ordonnance de sauvegarde revêtira les couleurs du litige qui la suscite. Tantôt elle sera de nature purement administrative, tantôt elle contiendra des conclusions mandatoires ou prohibitives susceptibles de déterminer provisoirement les droits des parties jusqu'à ce que le sort de la requête soit définitivement scellé. L'appréciation du caractère raisonnable de l'ordonnance

de sauvegarde dépendra de la nature de la protection qu'elle assure et de la durée de ses effets.

Ainsi, lorsque l'ordonnance de sauvegarde affecte judiciairement des sujets de droit qui n'y consentent pas, le tribunal devra se montrer extrêmement circonspect dans la limitation de la durée de ses effets. Quoique cette ordonnance ne soit pas restreinte à une durée de dix jours, elle s'apparente à une ordonnance interlocutoire provisoire rendue sans que les parties n'aient été véritablement entendues. Conséquemment, le tribunal saisi de la requête pour jugement interlocutoire devra indiquer clairement, dans l'ordonnance de sauvegarde, la date rapprochée où il pourra disposer de la requête après une audition complète.

(emphasis added)

[21] In the present instance, all these principles seem to have been overlooked.

[22] Firstly, the file was ready for hearing and it was up to the judge to find a way to accommodate the parties since in her view, the matter was so urgent that she felt the need to issue a safeguard order. In fact, she should have begun the hearing and completed it the following day if not possible, or at another early date. In the latter situation, a safeguard order quite limited in scope might have been needed, such as ordering the Board to refrain from doing anything that could prevent the reopening of the school in September 2005.

[23] Secondly, the trial judge did fix a date for proof and hearing for the interlocutory injunction, as requested by art. 754.2 *C.P.P.*, but only in October, once the school year had started; that was poor case management and was contrary to arts. 4.1, 151.6 and 754.3 *C.P.P.* and the *Rules of Practice of the Superior Court*. As pointed out by Otis, J.A. in *Natrel*: "...toutes les règles procédurales concernant l'injonction sont édictées afin d'accélérer le débat de sorte qu'il soit acheminé, le plus rapidement possible, vers sa résolution finale...".

[24] Thirdly, the length of the safeguard order, for the full school year and not until the hearing on the interlocutory injunction then scheduled for October 10 and 11, 2005, by far exceeded the acceptable time-limit (2957-2518 *Québec Inc. c. Dunkin' Donuts (Canada)Ltd.*, J.E. 2002-1108 (C.A.); *Natrel Inc. c. F. Berardini Inc.*, cited above; *Bell Mobility Cellular Inc. c. Worthware Systems international Inc.*; cited above; *Turmel c. 3092-4484 Québec Inc.*, cited above).

[25] Fourthly, the safeguard order by its scope precluded the hearing on the merits. Whatever would be decided then, would have no impact, because the Board was ordered to keep the school open for the whole year whatever happened.

[26] Fifthly, by acting as she did (postponement until October 2005 and ordering the opening of the school for the full year), the motion's judge showed no consideration for the serious hardships that the safeguard order would likely cause to the Board (for example re-direction of substantial human resources that, according to the various collective agreements in force between the Board and its employees, had already been deployed elsewhere) and took no account of the impact of keeping St. Patrick school open on the interests of persons who relied on the decision to close this school.

[27] To sum up, the motion's judge opted for an inappropriate and unjustified remedy, considering that there was sufficient time remaining to hold a hearing on the motion for an interlocutory injunction at which each party would have the opportunity to adduce relevant evidence and properly argue the case. It is noteworthy that once that was done in July 2005, the Superior Court refused to issue an interlocutory injunction.

CONCLUSION

[28] For these reasons, I propose to allow the appeal, to set aside the judgement of the Superior Court rendered on June 4, 2005, and to dismiss the motion for a safeguard order, the whole without costs considering the circumstances.

PIERRE J. DALPHOND, J.A.