JB4784

SUPERIOR COURT

(Civil Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-17-131597-240

DATE: 8 October 2024

BY THE HONOURABLE BABAK BARIN, J.S.C.

MCGILL UNIVERSITY
Applicant
v.

STUDENTS FOR PALESTINE'S HONOUR & RESISTANCE MCGILL
Defendant

EX PARTE PROVISIONAL INJUNCTION

(Articles 509 C.c.p. *et seq.)*

INTRODUCTION

[1] An injunction is an equitable and discretionary remedy directing a person to refrain from or cease doing something – prohibitory – or to perform a mandatory specified act principally conceived to preserve *status quo* and the rights of the parties so as to improve the ability of the court to do justice after a determination of the merits at trial.

[2] In an urgent situation, an injunction may be granted on a provisional basis, even *ex parte*, for a period of 10 days. Due to its exceptional nature, the granting of an injunction, especially a provisional one, requires both a strict and rigorous interpretation and application of the facts and the law.

[3] Generally, and subject to a few exceptions, a party seeking a prohibitive injunction, like in this case, is required to demonstrate that it appears to have a right or that there is a serious question to be tried and that such a relief will prevent it from suffering serious

or irreparable harm or avoid creating a factual and legal situation that would render the judgment on the merits ineffective.[1]

[4] In the case of a mandatory injunction that directs a defendant to perform a specified act or to undertake a positive course of action, or to put the situation back to what it should be, which is not at issue here, the applicant must establish a strong *prima facie* case or show that it has a strong and clear chance of success or a great likelihood of success.[2]

[5] In all situations, the fundamental question is whether the granting of an injunction is just and equitable in the particular circumstances of the case at hand.[3] In this case, I am *prima facie* of the view that it is.

CONTEXT

[6] The plaintiff, McGill University, a not-for-profit legal person constituted under the Royal Charter 1821 and recognized as a university in this province pursuant to the *Act respecting educational institutions at the university level*[4] seeks an *ex parte* provisional injunction[5] against the defendant, Students for Palestine's Honour and Resistance McGill (**SPHR**), an unincorporated, unregistered entity operating on the social media platform Instagram under the name "sphrmcgill", in the face of, among others, past and currently planned major disruptions to the university's activities. According to McGill, SPHR is *not* associated with it, and it is *not* authorized to use the university's name or logo.

[7] In its Originating Application, McGill submits that since the attacks of Hamas on Israel on 7 October 2023, SPHR and others have organized protests on the university's campus to, among other things, express their support for the Palestinian people.

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[1] Article 511 C.c.p. See also: *RJR – MacDonald Inc.* v. *Canada* (*Attorney General*), [1994] 1 S.C.R. 311.
[2] *R. v. Canadian Broadcasting Corporation*, [2018] 1 S.C.R. 196 (***CBC***), par. 16. In this case, a unanimous Supreme Court acknowledges that while holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR – MacDonald* test, distinguishing between mandatory and prohibitive injunctions can at times be difficult since an interlocutory injunction framed in a prohibitive language may have the effect of forcing the enjoined party to take positive actions. According to *CBC*, ultimately, "the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, what the practical consequences of the injunction are likely to be."
[3] *Google Inc.* v. *Equustek Solutions Inc.*, [2017] 1 S.C.R. 824 at par. 25.
[4] CQLR c. E-14.1.
[5] In the absence of any recorded address, the plaintiff apparently attempted to serve its Originating Application for the issuance of a provisional, interlocutory and permanent orders of injunction dated 7 October 2024 (**Originating Application**) on the defendant by sending a copy to it via Instagram but due to the size of the file sent, it did not go through. The plaintiff, however, did manage to send a copy of the application to the defendant via Facebook. Despite this, no one presented itself on behalf of the defendant.

According to McGill, while some of SPHR's activities have been peaceful, a number have not, and they have intimidated certain members of the university's community.

[8] The protests have also, apparently, at times, interfered with the rights of McGill students to learn and the employees to work in a peaceful, stable, and harassment-free environment. For example, the university explains, in the past, students, staff, and faculty were barred from entering classrooms and buildings, and classes had to be cancelled or moved to online platforms for safety reasons.

[9] McGill also submits that SPHR has organized a "Week of Rage" from 7 to 11 October 2024, to manifest its discontent with the way in which the university has responded to its calls for divestment of investments and academic activities tied to Israel. Based on SPHR's past behaviour, in particular, the university fears that the so called "Week of Rage" will seriously impede with the delivery of courses and other activities that are essential to the academic program of thousands of students and instructors on its campus.

[10] This is why, McGill adds, on 2 October 2024, it advised students, staff and faculty alike that between 5 and 7 October 2024, the university would temporarily put in place certain security measures – including restricting campus access to current McGill students and employees and essential visitors, moving all classes that do not need to be in person to online platforms, requiring McGill-issued ID card access to enter buildings, and requiring all staff to work from home, whenever possible – so as to, among other reasons, support their well-being, and seek to deter and prevent activities that violate the law and its policies, such as those set out in McGill's *Student Code of Conduct* and the *Charter of Student Rights* that apply only to students.

[11] Nevertheless, concludes McGill, given the rights of students, faculty and staff to learn and work in an environment that is safe, stable, and suitable to teaching, learning, and research, and considering that the prolonged use of the temporary and emergency measures put in place on October 2nd risk impairing these rights, a provisional injunction is justified in this case.

[12] I agree with McGill.

ANALYSIS

[13] For reasons that follow, I am of the view that the plaintiff has succeeded in demonstrating that a provisional injunction is warranted in this case. To be successful, a plaintiff must demonstrate that all criteria required for such a discretionary and equitable relief are satisfied globally. I will examine each of these criteria in turn.

[14] Before doing so, however, I will open two parentheses to explain first, why I accepted to proceed in this case *ex parte*, and second, why even though the positions

put forward by McGill and the conclusions sought by it may at first blush appear as *quia timet*, upon careful scrutiny, they are not.

[15] On the first issue, the directives for both the division and district of Montreal require that unless there are special circumstances, the party intending to present a request to the judge sitting in chambers that requires immediate intervention or that does not require the presentation of evidence must give sufficient notice to the opposing party.

[16] In this case, as already explained earlier, the lawyer for the applicant, McGill University, explained at the hearing that his law firm had tried to serve the defendant on its Instagram account with the Originating Application but that because of its size and perhaps other related reasons, the documents did not get through. The lawyer for McGill also indicated that based on his knowledge, in the past, even though similar documents had been notified to the defendant by others, the defendant had never reacted to them or presented itself to court. In light of these submissions, I accepted to hear the Originating Application, *ex parte*.

[17] As for the second, *quia timet* is a Latin phrase that means "because he or she fears" or, put differently, "because it is feared or apprehended". A *quia timet* injunction is an infrequently granted powerful remedy that prevents a party from carrying out a wrongful act, which is anticipated to be either threatening or harmful. Proof of imminent danger is required.

[18] Usually, a plaintiff resorts to such an application to prevent or stop a harm that it thinks will take place, but has not yet begun. If some harm has been suffered and a plaintiff sues to enjoin further harm, the injunction is not considered *quia timet*. Given the extraordinary nature of such an order, a cautious 'wait and see' approach is often warranted and there must be a high degree of probability that the harm will in fact occur before it is issued. [6]

[19] In this case, the Instagram posting by the defendant on 18 September 2024 filed as an exhibit by the plaintiff, reviews, highlights and even boasts about the events that took place on 12 September 2024 and the harm that was inflicted upon the plaintiff and its community. It is therefore clear that any harm that will follow beginning on this day and going forward as a continuation of what transpired on September 12 will be an ensuing one to the one inflicted earlier.

[20] Turning back now to the criteria required for the issuance of a provisional injunction I will begin with the issue of urgency, which in the case of an *ex parte* application especially, is a requirement *sine qua non*.

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[6] Robert J. SHARPE, *Injunctions and Specific Performance*, Toronto, Thomson Reuters, 2023, Looseleaf, § 1:20 (***SHARPE***). See also: *Operation Dismantle* v. *The Queen*, [1985] 1 S.C.R. 441.

Urgency

[21] To satisfy this requirement, a plaintiff must show two things. First, that the issue or question before the court requires immediate attention and intervention. The urgency must be real and not merely perceived.

[22] Second, the plaintiff must demonstrate that the urgency is neither self-made nor self-inflicted[7]. This requires an examination of the conduct of the plaintiff under the circumstances. The specific issues or questions before the court will determine the qualification of the second. The absence of the first and the presence of the second are fatal.

[23] In this case, I do not think it is necessary to expend much time on this issue. McGill submits that the need for a provisional injunction is especially justified, given SPHR's "Week of Rage" announcement on 18 September 2024 that is supposed to take place from 7 to 11 October 2024 during the university's general midterm examination period.

[24] McGill also submits that SPHR's past behaviour and its overt assertion on September 18 that there will be "no business or classes as usual", given the background of the September 12 events, require the immediate attention and intervention of the Superior Court.

[25] I agree. The content and message of the video posted by the defendant on Instagram on 18 September 2024 announcing that there will be a "Week of Rage" between 7 and 11 October 2024 make it urgent for the plaintiff to seek some form of redress immediately.

Appearance of right or a serious issue to be tried

[26] The orders requested by the plaintiff in this case are prohibitory in nature and intended to secure, among other things, safe and suitable conditions for working, learning and studying of students, staff and faculty at the university. To that end, McGill asks the Superior Court to:

- Limit protestors from blocking or otherwise obstructing or hindering, in whole or in part, the entrance to any buildings on McGill's campus, as well as any building identified as being used for McGill's operations;

- Limit protestors from engaging in protest activities within 5 metres of any building on McGill's campus, as well as any building identified as being used

[7] *Zaria* v. *Gignac*, 2016 QCCS 85. (This is a decision of Stephen Hamilton, j.c.a., when he was at the Superior Court.)

for McGill's operations;

- Limit protesters from intimidating, harassing, and/or threatening students, faculty, and employees attempting to enter or exit buildings on McGill's campus, as well as any building identified as being used for McGill's operations, and;
- Limit protesters, whether inside or outside any building on McGill's campus or identified as being used for McGill's operations, from disturbing the peace and acting in a manner that obstruct the delivery of courses or disturbs their flow.

Prohibitory injunction

[27] Under the general prohibitory injunction test, McGill, is *stricto sensu* only required to demonstrate that there is a serious question to be determined. Under that test, it suffices that the plaintiff satisfy the court that its claim is not frivolous or vexatious, or said differently, that there is a serious question to be tried.

[28] Historically, this is the test that was initially put forward more than forty years ago by the House of Lords, as it was called then, in *American Cyanamid Co.* v. *Ethicon Ltd.*[8]

[29] In *RJR-MacDonald*, the Supreme Court of Canada adopted the *American Cyanamid* test and described how a court must determine whether there is "a serious question to be tried":

> There are no specific requirements [...and the] threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case [...] Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.
>
> [Underlining is mine]

[30] McGill submits that it has a right at law to control access to and the use of its property. It also submits that its students and community members have a fundamental right to security and to be free from discrimination and harassment under the Quebec *Charter of Human Rights and Freedoms*[9] and its students, in particular, have a right to benefit from safe and suitable conditions for learning and study, free from harassment, intimidation and violence, as set out in the university's *Charter of Student Rights.*

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[8] [1975] A.C. 396 (H.L.) (***American Cyanamid***).
[9] Chapter C-12 (**Quebec *Charter***).

[31] Similarly, McGill argues, its community members have a right not to be intimidated or harassed when attending classes or work, or otherwise seeking to gain access or use the educational institution's buildings and campus.

[32] I agree.

[33] In my view, at this stage and *prima facie*, McGill's claims appear neither frivolous nor vexatious, and the court is certainly before a serious question to be tried. The combination of the university's own *Charter of Student Rights*, *Student Code of Conduct* and article 1457 of the Quebec *Civil code* (**C.C.Q.**), certainly permit McGill to control the use of its property by students and non-students alike in the manner the university deems appropriate.

[34] Article 1457 C.C.Q., requires "<u>every person</u>" in this province to abide by the rules of conduct incumbent on him or her, according to the circumstances, usage or law, so as to not cause injury to another. The rights and obligations encysted in this provision apply to everyone who attends, visits, studies, works, teaches, or even simply passes through the university's property. All of these individuals, regardless of their sex, color, age, origin or background are entitled to the protections offered by law.

[35] McGill submits that it does not intend to and is in no way interested in restricting or infringing upon the ability of anyone to freely express his or her views or beliefs. Indeed, McGill adds, its *Charter of Student Rights* provides in article 38 that "every group of students has a right to organize and promote the interests of its members, provided that the purposes of such a group are lawful and every such group has "the right to publicize and hold meetings, to debate any matter and to engage in lawful and peaceful demonstration".

[36] According to McGill, these are among the reasons why it is asking for an order limiting protestors from engaging in protest activities within 5 metres of any building on McGill's campus, as well as any building identified as being used for McGill's operations.

[37] Again, I do not disagree with McGill. There is certainly nothing unreasonable about McGill's request or the position it adopts in the present circumstances in this particular regard.

[38] The plaintiff, therefore, has *prima facie* satisfied the appearance of right requirement of an injunctive relief and a further or prolonged examination of the merits of this case, at this stage, is neither necessary nor desirable.

Serious or irreparable harm

[39] In the context of a request for an injunction, the word "irreparable", imported into Quebec law from the common law, refers to the nature of the harm suffered and not its magnitude. It is a harm which either cannot be quantified in monetary terms, or which cannot be cured, usually because one party cannot collect damages from the other.[10] It is useful to mention that the availability of monetary damages is *not* necessarily fatal to obtaining a provisional injunction in Quebec. Article 511 C.C.P. explicitly says so and the Quebec Court of Appeal affirms it in *Groupe CRH Canada inc.* v. *Beauregard*[11].

[40] The issue to be examined under this rubric consists of deciding whether McGill, its students, staff and faculty would, unless the injunction is granted, suffer serious or irreparable harm. Said differently, the issue to be decided at this stage is whether the refusal to grant relief could so adversely affect the plaintiff's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the provisional injunction[12]. The risk of harm at this stage must be immediate and not subject to compensation or remedy in any other way than through the injunction.

[41] McGill submits that in addition to it's property rights being irreparably violated, SPHR's actions cause serious and irreparable harm to the university and its community members by consistently and continuously creating public safety threats and an environment of intimidation and harassment.

[42] According to McGill, the intimidation and harassment created by SPHR's protests and demonstrations have caused widespread and irreparable harm both to McGill's learning environment, through interference with the delivery of classes and other academic activities, and to McGill's campus climate through their corrosive effect on institutional norms regarding freedoms of expression and peaceful assembly.

[43] McGill adds that protests and demonstrations organized by SPHR have impeded safe access to the entrances and exits of its buildings and classrooms, and they have damaged the university's property through acts of vandalism, which can create additional safety risks.

[44] McGill also submits that SPHR's announcement of inciting a "Week of Rage" from 7 to 11 October 2024 poses an imminent and major threat to the stability of academic life and the rights of students, staff and faculty at the university.

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[10] *RJR – MacDonald*, p. 341.
[11] 2018 QCCA 1063, par. 31.
[12] *RJR – MacDonald*, p. 341.

[45] According to McGill, the coming week, in other words, the week of 7 to 11 October 2024, is peak midterm examination period during the Fall semester, and therefore, in addition to regularly scheduled classes, some of which will hold exams during class hours, midterm examinations are scheduled during the evenings outside of class hours.

[46] For example, McGill explains, midterms for forty-four (44) classes are scheduled in the evenings of the coming week alone and others are scheduled during regular daytime class hours. This represents more than 13,600 midterms being written by McGill students this week. These midterm examinations are, McGill argues, vitally important for the students' learning and assessment. They have consequences that may affect a student's future.

[47] Once again, I can not disagree.

[48] Like my colleague, Justice Daniel Urbas, j.s.c.,[13] I am of the view that disruptions in academic learning and evaluation are intangible, irreparable and certainly time sensitive and they cannot equitably and fairly be remedied at a later date or be possibly compensated by any money.

[49] The plaintiff, therefore, has been able to satisfy this part of the *RJR – MacDonald* test as well.

Balance of convenience

[50] This brings me to the last and final criterion that McGill must, *prima facie*, satisfy before its application can be granted. As explained by the Supreme Court, this criterion requires a determination of which of the parties will suffer the greater harm from the granting or refusal of an injunction pending a decision on the merits.

[51] As a general rule, the factors which may be considered in this regard are many and they will vary from case to case.[14] The questions of irreparable or serious harm and balance of convenience are often intertwined and closely connected.

> [Balance] of convenience [...] relates to matters difficult to quantify in monetary terms. Apart from, and in addition to, the risks of monetary loss and gain, <u>what will be the relative impact upon the parties of granting or withholding the injunction</u>? Does the benefit the plaintiff will gain from preliminary relief outweigh the convenience to the defendant of withholding relief? Is the convenience to the defendant, should the injunction be granted, more substantial than the inconvenience the plaintiff will suffer if relief is withheld? Which of the two parties

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[13] *Zorchinsky et al* v. *SPHR Concordia et al*, 500-17-131589-247, 3 October 2024, par. 59 (Quebec Superior Court) (***Zorchinsky***)

[14] *RJR – MacDonald*, p. 342.

> will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits? [...] Would withholding the injunction result in an injustice?[15]
>
> [Underlining is mine]

[52] Here, the plaintiff has been able to satisfy the irreparable harm criterion for the issuance of a provisional injunction.

[53] I am also of the view that the balance of convenience is in favour of McGill. In this case, again like my colleague, Justice Urbas in *Zorchinsky*[16], I am of the view that the defendant will suffer no inconvenience by abiding by basic rules of civility and good faith conduct, either as enshrined in the Quebec *Charter* or as set out in articles 6, 7 and 1457 C.C.Q. that apply to all citizens in this province, regardless of their sex, color, age, culture, faith, belief, political orientation or other.

[54] In my view, the criteria of irreparable harm and balance of convenience would have also under the present facts supported McGill's request for a *quia timet* provisional injunction had the request been lodged in that way. But again, it was not.

CONCLUSION

[55] Finally, one must not lose sight of the fact that the terms 'irreparable harm', '*status quo*' and 'balance of convenience' do not have etched-in-stone and precise meanings associated to them. They are not stagnant notions. They are not separate and water-tight containers that do not communicate with one another. Rather, they are watermarks that take color, shape, and define each other each in their own way, in order to, when examined together and globally, shed light on the overall circumstances of each case.[17]

[56] Here, based on the overall circumstances presented, and given the important issues at stake, I am of the view that the interests of justice militate in favour of issuing a provisional injunction to be in force for a period of ten (10) days from the date of this judgment.

[57] I am also of the view that the circumstances of this case favour the granting of the special mode of service application filed by the plaintiff. Given the defendant's unknown legal status and in the absence of any place of business for its activities, it is important that the defendant be notified and apprised of the content of this judgment without any delay via its active Instagram account.

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[15] *SHARPE*, page 2.83-2.84.
[16] *Zorchinsky,* par. 63.
[17] *Ibid.*, page 2-17.

FOR THESE REASONS, THE COURT:

GRANTS the plaintiff's Originating Application for the issuance of a provisional, dated 7 October 2024;

ISSUES a provisional injunction to be valid for a period of ten (10) days from the date of this judgment;

ORDERS the defendant, Students for Palestine's Honour and Resistance, as well as any person having knowledge of or having received service of this judgment to cease, desist and refrain from blocking or otherwise obstructing or hindering, in whole or in part, the entrance or exits to any buildings and streets or walkways directly connected to entrances or exits of buildings on McGill University's campus, as well as any buildings identified as being used for McGill's operations, including but not limited to offices, classrooms and research labs;

ORDERS the defendant, Students for Palestine's Honour and Resistance, as well as any person having knowledge of or having received service of this judgment to cease, desist and refrain from engaging in protest activities within 5 metres any building on McGill's campus, as well as any building identified as being used for McGill's operations, including but not limited to offices, classrooms and research labs, with protest activities being understood as, but not limited to, blocking or otherwise obstructing or hindering, in whole or in part, any entrances or exits to buildings and streets or walkways directly connected to entrances or exits of buildings, setting up tents or other structures, and making excessive noise;

ORDERS the defendant, Students for Palestine's Honour and Resistance, as well as any person having knowledge of or having received service of this judgment to cease, desist and refrain from intimidating, harassing and/or threatening, any student, employee, contractor or visitor of McGill while they attempt to enter or exit any buildings on McGill University's campus, as well as any buildings identified as being used for McGill's operations, including but not limited to offices, classrooms and research labs;

ORDERS the defendant, Students for Palestine's Honour and Resistance, as well as any person having knowledge of or having received service of the present judgment to cease, desist and refrain from disturbing the peace or engaging in public disturbance, whether inside or outside a building on McGill's campus, as well as any building identified as being used for McGill's operations, including but not limited to offices, classrooms and research labs, and acting in a manner that obstructs the delivery of courses or disturbs their flow;

ORDERS the defendant, Students for Palestine's Honour and Resistance, to publish the present judgment on its Instagram, Facebook, TikTok and "X" social media pages;

AUTHORIZES the bailiffs tasked with serving this judgment to call upon any peace officer to assist them with such service and **AUTHORIZES** any peace officer called upon by the bailiffs to provide them with the requested assistance;

AUTHORIZES any peace officer to enforce this judgment, and to arrest and remove any person who the peace officer has reasonable grounds to believe is contravening or has contravened this judgment;

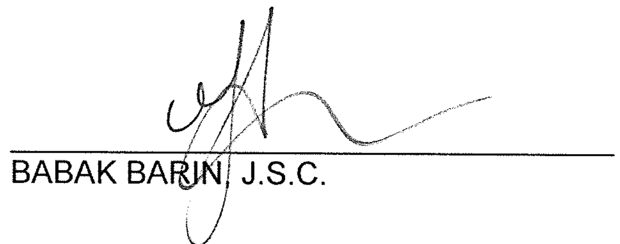
DISPENSES the plaintiff, McGill University, from furnishing any suretyship;

AUTHORIZES the service of this judgment any time, including between 9:00 pm and 7:00 am;

AUTHORIZES the plaintiff, McGill University, to serve this judgment on the defendant, Students for Palestine's Honour and Resistance, by electronic means to its Instagram account;

ORDERS the provisional execution of this judgment notwithstanding appeal, given the nature of the issues raised by the plaintiff and the importance of this judgment for the students, staff and faculty at McGill University during the, in particular, coming week;

WITHOUT LEGAL COSTS.



BABAK BARIN, J.S.C.

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Attorneys for Plaintiff

Hearing date: 7 October 2024 at 2 p.m.