

ONTARIO COURT OF JUSTICE  
(GENERAL DIVISION)

<b>B E T W E E N:</b>	)	<b>Appearances:</b>
	)	
<b>THE ATTORNEY GENERAL FOR</b>	)	<b>L. McIntosh and</b>
<b>ONTARIO</b>	)	<b>S. Kraicer</b>
	)	<b>for the Plaintiff</b>
<b>Plaintiff</b>	)	
	)	<b>William Markle.</b>
<b>-and-</b>	)	<b>for the Ontario Teachers' Federation</b>
	)	
<b>ONTARIO TEACHERS' FEDERATION</b>	)	<b>M. Green and B. Chercover</b>
<b>("OTF"), EILEEN LENNON,</b>	)	<b>for the Ontario Secondary School</b>
<b>PRESIDENT AND ITS OFFICER,</b>	)	<b>Teachers' Association</b>
<b>DIRECTORS AND AFFILIATES,</b>	)	
<b>ONTARIO SECONDARY SCHOOL</b>	)	<b>E. Shilton</b>
<b>TEACHERS' FEDERATION ("OSSTF")</b>	)	<b>for the Federation of Women Teachers'</b>
<b>EARL MANNERS, PRESIDENT AND ITS</b>	)	<b>Associations of Ontario</b>
<b>OFFICERS, DIRECTORS, BRANCH</b>	)	
<b>AFFILIATES AND MEMBERS, ONTARIO</b>	)	<b>P. Cavalluzzo</b>
<b>ENGLISH CATHOLIC TEACHERS'</b>	)	<b>for the Ontario English Catholic Teachers'</b>
<b>ASSOCIATION ("OECTA"), MARSHALL</b>	)	<b>Association</b>
<b>JARVIS, PRESIDENT AND ITS OFFICERS,</b>	)	
<b>DIRECTORS, BRANCH AFFILIATES AND</b>	)	<b>H. Goldblatt</b>
<b>MEMBERS, ONTARIO PUBLIC SCHOOL</b>	)	<b>for the Ontario Public School Teachers'</b>
<b>TEACHERS' FEDERATION ("OPSTF"),</b>	)	<b>Association</b>
<b>PHYLLIS BENEDICT, PRESIDENT AND ITS</b>	)	
<b>OFFICERS, DIRECTORS, BRANCH</b>	)	<b>A. O'Brien</b>
<b>AFFILIATES AND MEMBERS, FEDERATION)</b>	)	<b>for the L'Association des Enseignantes</b>
<b>OF WOMEN TEACHERS' ASSOCIATIONS</b>	)	<b>et Enseignants Franco-Ontariens</b>
<b>OF ONTARIO ("FWTAO"), MARET SADEM-</b>	)	
<b>THOMPSON, PRESIDENT AND ITS</b>	)	
<b>OFFICERS, DIRECTORS, BRANCH</b>	)	
<b>AFFILIATES AND MEMBERS,</b>	)	
<b>L'ASSOCIATION DES ENSEIGNANTES ET</b>	)	
<b>ENSEIGNANTS FRANCO-ONTARIENS</b>	)	
<b>('AEFO'), DIANE CHENIER, PRESIDENT</b>	)	
<b>AND ITS OFFICERS, DIRECTORS, BRANCH</b>	)	
<b>AFFILIATES AND MEMBERS</b>	)	
	)	
<b>Defendants</b>	)	<b>HEARD: October 31 and November 1, 1997</b>

MOTION UNDER Rule 40 of the Civil Rules Procedure and s. 101 of *Courts of Justice Act*, R.S.O. 1990, c. C.43

**MacPherson J. (Orally)**

This is a motion by the plaintiff, the Attorney General for Ontario, in an intended action. The principal relief sought by the plaintiff is an interlocutory injunction restraining the defendants from engaging in an unlawful strike contrary to sections 63, 64 and 65 of the *School Boards and Teachers' Collective Negotiations Act*, R.S.O. 1990, c.S.2, and for an interlocutory mandatory order requiring the defendants to restore their services and return to work.

The defendants are the Ontario Teachers' Federation, Ontario Secondary School Teachers' Federation, Ontario English Catholic Teachers' Association, Ontario Public Schools Teachers' Federation, Federation of Women Teachers' Associations of Ontario and L'Association des Enseignantes et Enseignants Franco-Ontariens which together are the statutory bargaining agents for approximately 126,000 elementary and secondary school teachers in the publicly funded schools of Ontario.

The defendants Eileen Lennon, Earl Manners, Marshall Jarvis, Phyllis Benedict, Maret Sadem-Thompson and Diane Chenier are the Presidents of these organizations. In these reasons I will refer to the various defendants collectively as "the teachers."

On September 22, 1997 the Government of Ontario introduced Bill 160, the *Education Quality Improvement Act, 1997*, into the Legislature. It received second reading on October 7, 1997. Bill 160 is a major law-making effort; if enacted there will be numerous and significant changes to elementary and secondary school education in Ontario. Some of the key areas dealt with in Bill 160 are school governance, the financing of publicly funded schools, and the collective bargaining regime for school boards and teachers.

The teachers are very unhappy with some of the provisions of Bill 160. Their general complaint is that Bill 160 will remove important matters from a collective bargaining regime that has been in place in Ontario for almost 25 years, and place them under the direct authority of the Government. Their more specific complaint is that if the Government can deal unilaterally with such matters as class sizes, preparation time, length of the school year and designating non-teaching positions, the quality of education in Ontario will suffer because, the teachers assert, the Government's decisions on these matters will be based largely on finance, not education, considerations.

All of the public school teachers are employed by school boards. The terms of their employment are governed by collective agreements which are freely negotiated within the framework provided by the *School Boards and Teachers*

*Collective Negotiations Act*. During the life of a collective agreement teachers are prohibited from taking part "in a strike against the board" (section 63). Most of the teachers in Ontario are covered by valid and operating collective agreements; in other words, very few teachers are in what would be called a legal strike position.

In spite of this situation, on Monday, October 27, most of the public school teachers did not attend at their schools to teach their students. It is now Monday, November 3, and they are still not there. In short, they have withdrawn their professional services. Their only reason for doing so is their opposition to Bill 160.

Against the background of this brief summary of some of the relevant facts, I turn to an examination of the legal issues raised by this motion.

#### Preliminary Issue

This motion is brought by the Attorney General pursuant to Rule 40.01 of the *Rules of Civil Procedure*, which provides:

40.01 an interlocutory injunction or mandatory under section 101 or 102 of the *Courts of Justice Act* may be obtained on motion to a judge by a party to a pending or intended proceeding.

Relying on this provision, the Attorney General has chosen to bring this motion for an interlocutory injunction under s. 101 of the *Courts of Justice Act*, which provides:

101.(1) In the Ontario Court (General Division), an interlocutory injunction or mandatory order may be granted... where it appears to a judge of the court to be just or convenient to do so.

The teachers submit that the Attorney General has proceeded under the wrong section. They say that s. 102 deals with interlocutory injunctions in a 'labour dispute' context. There are a number of procedural steps which a moving party must take under s. 102; it is common ground that the Attorney General has not taken some of those steps. Accordingly, the teachers submit, this motion should not be heard.

I do not agree with this submission. The teachers' position on this issue is seriously undercut by the way they have chosen to describe their conduct. In both the public arena and in these court proceedings, they have termed their conduct a political protest, not a labour dispute. It is true that they acknowledge that their conduct is a strike which is, of course, a well-known component of many labour disputes. However, the teachers assert that their conduct is much more than a strike; it is also a political protest directed not against their employers, the school

boards, but against the Government of Ontario with respect to the Government's policies and proposed law on various education matters.

In short, the teachers cannot have it both ways. If they want to label their conduct 'political protest' and make submissions in court based on that label, they cannot limit the Attorney General's motion to the procedure which governs a labour dispute.

Accordingly, I conclude that the Attorney General is entitled to bring this motion under s.101 of the *Courts of Justice Act*. I emphasize the word 'entitled'.

On this preliminary issue all that I have decided is that, as between sections 101 and 102 of the *Courts of Justice Act*, the Attorney General is properly before this court under s.101. Whether he should be here at all at this juncture, and whether he is entitled to the injunctive relief he seeks, are questions that still need to be addressed.

### Principal Issue - Interlocutory Injunction

#### 1. The Role of the Attorney General

The relief sought by the Attorney General is an interlocutory injunction restraining the teachers from continuing what the Attorney General believes is an unlawful strike. There is no question the Attorney General has an important role to

play in securing compliance with the laws of the land. In *Attorney General of Ontario v. Dieleman* (1994), 20 O.R. (3d) 229 (Gen. Div.), Adams J. expressed it this way, at pp. 267 - 68:

The status of the Attorney General to bring this action is based on the combined effect of her right, acting on behalf of the Crown as *parens patriae*, to sue in the civil courts in respect of a flouting of the law contrary to the public interest and an Attorney General's inclusive right to seek to enjoin conduct constituting a public nuisance. The *parens patriae* role of the Attorney General was described by Lord Justice Pearce in *Attorney General v. Harris*, (1961) Q.B. 74 at 92,

It is now firmly established that where an individual or a public body persistently breaks the law, and where there is no person or no sufficient sanction to prevent the breaches, these courts in an action by the Attorney General may lend their aid to secure obedience to the law. They may do so whether the breaches be an invasion of public rights of property or merely an invasion of the community's general right to have the laws of the land obeyed.

See also *Gouriet v. Union of Postal Workers*, [1978] A.C. 435 (H.L.)

## 2. The Test

The test for obtaining an interlocutory injunction in most types of cases is the traditional three-part test enunciated by the House of Lords in the famous *American Cyanamid* case. In order to obtain an interlocutory injunction the plaintiff must establish that:

- (1) There is a serious issue to be tried;
- (2) Irreparable harm would result if the injunction is granted; and
- (3) The balance of convenience favours the granting of the injunction.

See *American Cyanamid Co. v. Ethicon Ltd.* [1975] 1 All E.R. 504 (H.L.); specifically adopted in Ontario in *Yule Inc. v. Atlantic Pizza Delight* (1977), 17 O.R. (2d) 505 (Div. Ct.); *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110; and *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. 385 (S.C.C.)

I will apply each of the components of this test in turn.

### 3. Serious Issue to be Tried

The Attorney General asserts that the teachers' conduct constitutes an unlawful strike under sections 63-65 of the *School Boards and Teachers' Collective Negotiations Act*, and that the questions of whether this the case and the legal consequences that should flow therefrom constitute serious issues to be tried in the intended action.

The word "strike" is defined in section 1 of the Act in the following terms:

"strike" includes any action or activity by teachers in combination or in concert or in accordance with a common understanding that is designed to curtail, restrict, limit or interfere with the operation or functioning of a school programme or school programmes, or of a school or schools including, without limiting the foregoing:

(a) withdrawal of services.

The teachers concede that their conduct comes within this definition. It is a withdrawal of services done in concert with the intention of curtailing the functioning of school programmes.

Is the strike unlawful? Sections 63 - 65 of the Act provide in relevant parts:

63. No teacher shall take part in a strike against the board that employs the teacher unless,

(a) there is no agreement in operation that is deemed under this Act to form part of the contract of employment between the board and the teacher...

64(1) ...in the event of a strike by the members of a branch affiliate each principal and vice-principal who is a member of the branch affiliate shall remain on duty during the strike....

65(1) The Federation shall not and no affiliate or branch affiliate shall call or authorize ... an unlawful strike.

(2) No officer ... of the Federation ... shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

The Attorney General contends that the individual teachers who have withdrawn their services are in violation of s.63, the principals and vice-principals who have withdrawn their services are in violation of s.64(2), the Ontario Teachers' Federation and its affiliates are in violation of s.65(1) and the various Presidents of these organizations are in violation of s.65(2).

The teachers' response to this argument is that the strike in which they are engaged is not "against the board", i.e. their employer. Indeed, they assert, their strike has nothing to do with school boards. Their actions are directed entirely at the provincial Government.

In my view, this is a serious argument worthy of careful consideration. The word "strike" is used in different ways in various Ontario laws. In some laws it is unqualified by other language; in other laws, such as the *School Board and Teachers' Collective Negotiations Act*, it is limited by contextual language like "against the board."

However, my task on this motion is not to provide a final answer to the question of whether the strike is lawful or unlawful. Rather, my focus is directed only to whether the Attorney General's assertion that the strike is unlawful raises a serious issue to be tried.

In my view, framing the question that way does not present the Attorney General with much of a hurdle to clear. The teachers may not intend that their strike be directed against the school boards. However the reality is that the teachers have only one employer – their school boards. The effect of their strike is the withdrawal of their services from that employer. There are, of course, other effects – on students, parents, businesses engaged in education-related services and the Government. These other effects do not, however, detract from what I would call the common sense conclusion that the teachers' strike is, at least to the level of raising a serious issue to be tried, also against their boards.

At this juncture I note, parenthetically, that the teachers made the submission that the hurdle the Attorney General must clear on this first branch of *the American Cyanamid* test is higher than the serious issue to be tried hurdle. The teachers assert that the proper test on this motion is whether the Attorney General can demonstrate a *prima facie* case that the strike is unlawful. This would, of course, involve me in a much more detailed assessment of the merits of the Attorney General's legal arguments in support his position.

In making their submission about the proper test, the teachers rely on this passage from the judgment of Sopinka and Cory JJ. in *RJR-Macdonald*, at p 403:

- Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action.

The teachers state that my decision on this motion will be, in practical terms, a final determination of the action. I disagree. In the very next sentence of their judgment Sopinka and Cory JJ. explained what constitutes a final determination of the action:

This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial.

In my view, neither of these situations is present in this case. The teachers will be able to exercise their right to strike when their current collective agreements expire. And if the teachers return to work all of their rights of assembly and speech, the instruments for their current challenge to Bill 160, will be preserved. They just will not be able to exercise them during school hours.

For these reasons I conclude that the Attorney General has complied with the first branch of the *American Cyanamid* test; he has established that there is a serious issue to be tried.

4. Irreparable Harm

(a) Preliminary Issue

The Attorney General submits that once a judge determines that a person is in violation of a law it is unnecessary to consider whether the violation causes irreparable harm. The violation *per se* entitles the Attorney General to obtain an interlocutory injunction. In support of this submission, the Attorney General relies on *Attorney General for Ontario v. Bear Island Foundation* (1989), 70 O.R. (2d) 758 (H.C.), wherein O'Leary J. said, at pp. 760-61:

The defendants have no right to interfere with the construction of the road yet they are doing just that. Only at its peril will our society allow anyone to flout the law. The Attorney General as protector of public rights and the custodian of the public interest is entitled to seek an injunction against those flouting the law. In such case, the Attorney General does not have to show that irreparable harm will result if the injunction is not granted.

See also: *Attorney General for Ontario v. Grabarchuk* (1976), 11 O.R. (2d) 607 (Div. Ct.)

In my view these cases are easily distinguished from the present case. In *Bear Island Foundation*, the defendants sought to halt construction of a road by means of a blockade. They had lost three different court proceedings, and in all of the High Court, Divisional Court and Court of Appeal, with respect to their claims

concerning the road. Moreover, they had already disobeyed one injunction granted by a judge of the High Court. In *Grabarchuk*, the defendant had already been convicted on seven occasions of violating a public statute before the Attorney General decided to attempt to enjoin his conduct.

In *Bear Island O'Leary J.*, and in *Grabarchuk Reid J.*, both used the word 'flout' to describe the defendants' conduct, and linked the flouting of the law to their conclusion that the Attorney General need not demonstrate irreparable harm in order to obtain an injunction. The New Shorter Oxford English Dictionary defines 'flout' as follows, at p. 981:

flout: (verb) Treat or behave with disdain; mock; jeer; express contempt (for) by action or speech. Now usually denoting indirect expression: openly disregard (a law, an opinion, etc.)

The conduct of the teachers does not, in my view, come close to this definition of flout, or to the conduct of the defendants in *Bear Island Foundation* or *Grabarchuk*. The teachers' decision was not made with disdain. They had never engaged in a province-wide strike before last week. The record demonstrates that they made their decision in a careful, concerned and reluctant fashion. Moreover, there is not a hint of mocking or jeering in their conduct since the strike began. The

strike has been remarkably peaceful, especially in light of the fact that approximately 126,000 teachers are involved. Finally, the teachers do not believe that they are openly disregarding the law. As I described above, their legal position is that they are engaged in a lawful strike.

I would make one final observation about the Attorney General's argument on this point. In my view, it is important to recall the nature of the conclusion on the first branch of the *American Cyanamid* test. It is only that there is a serious issue to be tried. It strikes me as strange that, except in the context of extreme contempt for the law such as that demonstrated in *Bear Island* and *Grabarchuk*, an affirmative conclusion on such a low hurdle branch of the test would obviate the need to proceed to an analysis of the other two branches. In short, the leading cases in this area of the law - *American Cyanamid*, *Metropolitan Stores* and *RJR-Macdonald* - enunciate a three-branch test for a reason; they are all to be considered.

(b) The Merits

The motion for an interlocutory injunction was filed on Tuesday, October 28, the second day of the strike. The motion record contains material relating to the effects of the strike during those two days. On October 30, the Attorney General

filed a supplementary motion record which dealt with some effects of the strike on October 29. On October 31 and November 1, the hearing of this motion took place.

The Attorney General submits that I am not limited to the record on the issue of irreparable harm. Ms. McIntosh, counsel for the Attorney General, submits that in considering this issue I should combine an assessment of the events up to the hearing of the motion, using the material in the record, and a careful prediction as to the probable effects in the near future if those events continue. I agree. I must consider whether irreparable harm has already occurred, and whether it is likely to occur soon if the strike is allowed to continue.

Let me first consider the past, the events of the first week of the strike.

There is no doubt that the strike has already caused frustration and dislocation. Students want and need to be at school. Some parents are having difficulty providing for the care of their children. Some businesses which provide education-related services are starting to suffer.

However, on the basis of the record before me it would be impossible to conclude that the first week of the strike has caused irreparable harm. There is no direct evidence of any actual harm to any student. There is no direct evidence of any

actual harm to any parent. On the contrary, the only evidence from Ontario parents is the Affidavit of Robert Bettson, a parent and member of the East End Parent Network (note: the east end of Toronto). There are over 300 parents, grandparents and guardians in this organization. Mr. Bettson states, at paragraphs 14 and 15 of his Affidavit:

14. Members of the Network have observed no irreparable harm to their children's education and well-being as a result of their brief absence from school, an absence which can be relatively easily made up during the remainder of the school year. In the past, teachers' strikes have often lasted considerably longer than the current process, without resort by employer school boards to court applications for injunctions forcing a return to work. As parents, the members of the East End Parent Network are not aware of any evidence that these interruptions in the ordinary schooling schedule have resulted in serious and irreparable harm to children's educational development or well-being.

15. In addition, the East End Parent Network takes issue with the government's insinuation that the Respondent's protest has caused any threat to the safety of the children because of inadequate supervision. Numerous community centres and churches have established temporary child care centres to assist parents in making arrangements for supervision of their children. The Network's experience has been that parents have been able to make satisfactory arrangements for supervision of their children. In anticipation of the current situation, the Network established a registry of at least eight persons volunteering to provide child care for parents in need of such arrangements, and this was publicized on the last day of school preceding the Respondent's protest; not a single person has called the Network to avail themselves

- of these volunteers. The Respondent's protest presents no current threat to the safety of children.

There is no evidence of any harm to school boards, the employers of teachers. Indeed, in the record there are several letters from school boards to parents saying that the teachers' strike is not against them.

Finally, there is only one source of evidence about the effect of the strike on businesses. It is a letter from the Ontario School Bus Association to the Deputy Minister of Education, expressing concern about whether its transportation contracts with school boards will be honoured if there is a strike. This strikes me as a legitimate and important concern. However, it is also speculative in that I have no material about the nature of the contracts between school boards and transportation companies.

Turning to the future, I confess that I am uneasy about a teachers' strike continuing for a long period of time. I worry about O.A.C. students in semester programmes who are looking to attend universities next year. I wonder whether the adjustments that students and parents have made in their lives for one week become more problematic as the strike lengthens. I am concerned about the ill will and distrust between the government and the teachers that may well be the residue

of a protracted strike; some wounds never heal, no matter how happy a face you try to put on them.

It is difficult to try to look ahead to the next week or few weeks in such a large and diverse province as Ontario. What events are likely to unfold, and how should they be assessed under the legal rubric 'irreparable harm'?

In the record before me there is perhaps one solid signpost which can assist in providing an answer to this question. It begins with this proposition: strikes by teachers are not *per se* unlawful. Teachers are permitted to strike if they are not subject to a collective agreement. Since 1975 there have been several strikes by teachers against individual school boards.

I can make two observations about those legal strikes. First, it appears that no one has ever tried to enjoin them after two days, as the Attorney General has done here. Second, there is a mechanism in the *School Boards and Teachers' Collective Negotiations Act* for the identification of strikes that are causing harm. The *Act* creates an Education Relations Commission. Historically, it has been chaired by an eminent Ontarioan. The duties of the Commission include:

- 60(1) It is the duty of the Commission,

...

(h) to advise the Lieutenant Governor in Council when, in the opinion of the Commission, the continuance of a strike, lock-out or closing of a school or schools will place in jeopardy the successful completion of courses of study by the students affected by the strike, lock-out or closing of the school or schools.

Since 1975 the Commission has issued a student jeopardy advisement on 13 occasions. Most of these have been issued in the context of a full withdrawal of services by teachers. The earliest at which such an advisement has been issued is after 27 school days; the latest after 73 school days. In the present case the Attorney General has sought an injunction after two days.

I recognize that there is a difference between the word 'jeopardy' and the phrase 'irreparable harm.' However, in my view the difference tells against the Attorney General. Irreparable harm seems more serious and more permanent than jeopardy. I also recognize that the student jeopardy advisements deal only with students. However, I think everyone would agree that the principal concern in a teachers' strike is the students. It seems to me that the 27-73 day period for student jeopardy advisements, over a 22-year period, indicates that there are ways to make up for lost time caused by a strike, provided the strike does not last too long.

For these reasons I conclude that the Attorney General has not established that the teacher strike has caused irreparable harm in its first week. Nor, as near as I can tell, and acknowledging that I say this with more hope than certainty, is it likely to cause irreparable harm in the near future.

5. Balance of Convenience

This criterion requires that I weigh the effect on the teachers of granting the interlocutory injunction against the effect on the Attorney General, arguably representing the public interest, of refusing to grant it. Under this heading a judge can look at all of the factors that may assist him or her in determining whether it is "just or convenient" (section 101 of the *Courts of Justice Act* ) to grant an interlocutory injunction. As expressed by Lord Diplock in *American Cyanamid*, at p. 511:

It would be unwise to attempt to list all the various factors which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Let me begin with an assessment of the consequences of not granting an interlocutory injunction.

The first and most serious consequence, in my view, is the possibility that a refusal would be perceived by the ordinary Ontario resident as a judicial sanction for lawbreaking. The response to this potentially serious problem of public perception is the reality that I have not decided on this motion that the strike is lawful or unlawful. I have decided that there is a serious issue about the legality of the strike; I have not, and should not on this interlocutory motion, go further and make a final determination on a question which lies at the heart of a nation committed to the constitutional principle of the rule of law.

A second negative consequence of refusing to grant the injunction might be a public perception that individuals or groups with perfectly acceptable means of expressing their views are entitled to move beyond those means and enter the terrain of more problematic, perhaps even unlawful, means. There is no question in this case that the teachers do have accessible and entirely legal means for conveying their views about Bill 160. They can assemble and speak freely wherever they want, as long as they do so outside school hours. And they can strike legally as soon as their collective agreements expire.

A third potentially negative consequence of refusing to grant the injunction might be a signal that the Attorney General alone does not represent the public

interest in the domain of law enforcement. In perhaps its broadest terms, this role of the Attorney General is expressed by Lord Wilberforce in *Gouriet, supra*, at p. 481:

That it is the exclusive right of the Attorney General to represent the public interest - even where individuals might be interested in a larger view of the matter - is not technical, not procedural, not fictional. It is constitutional.

In Canada, the sweep of this generalization has been modified, at least in cases involving the *Canadian Charter of Rights and Freedoms*. As Sopinka and Cory JJ expressed it in *RJR - Macdonald*, at pp. 407-08:

However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in Charter litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in Charter disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest." Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the

to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

On behalf of the teachers, Mr. Cavalluzzo argues that this is a *Charter* case, raising the serious issue of an attempt by the Government to restrain the constitutionally protected rights of speech and assembly of Ontario teachers. Because of the time constraints of rendering a quick decision, I have decided not to consider this argument on the merits. However, I do say that the number and sweep of fundamental education issues addressed in Bill 160 place it on a plane very close to the *Charter*. It is difficult to conceive of any subject matter more important to society than education, and it is difficult to imagine a law proposing more changes to education structure and policy than Bill 160. Accordingly, it is open to the teachers to articulate their view of the public interest in their response to the motion brought by the Attorney General.

I turn now to the potential negative consequences of granting an interlocutory injunction.

First, and foremost, if an injunction is granted, the practical effect will be that the enforcement regime in the very statute the Attorney General asserts has been violated will be ignored. The Attorney General asserts that the teachers are violating only one law - the *School Boards and Teachers' Collective Negotiations Act*. There is a clear enforcement mechanism for violations of that Act. It is section 67 of the Act, which provides:

67(1) Where the Federation, affiliate or branch affiliate calls or authorizes a strike or teachers take part in a strike against the board that the board, a member association, the Council or any person normally resident within the jurisdiction of the board alleges is unlawful, the board, member association, Council or person may apply to the Ontario Labour Relations Board for a declaration that the strike is unlawful, and the Board may make the declaration. ...

(3) Where the Ontario Labour Relations Board makes a declaration under (1) ..., the Board in its discretion may, in addition, direct what action, if any, a person, teacher, branch affiliate, affiliate, the Federation a board, member association or the Council and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike...

(4) The Ontario Labour Relations Board shall file with the Ontario Court (General Division) a copy of a direction made under subsection (3), exclusive of the reasons therefor, whereupon the direction shall be entered in same way as an order of the court and is enforceable as such.

Moreover, section 77 of the *Act* provides for penalties for violations of the *Act*, namely fines of up to \$1,000 per day for teachers, and \$25,000 per day for the Ontario Teachers' Federation and its affiliates.

In my view, these are robust enforcement provisions. They cover alleged unlawful conduct by everyone involved in the current teachers' strike. They provide every resident of Ontario, every school board and the Ontario School Trustees Council with access to challenge the strike. They provide for enforcement of any order against the striking teachers in a fashion identical to that which would apply to an order the Attorney General might obtain under section 101 of the *Courts of Justice Act*, and they set out severe penalties.

The courts have consistently held that a public rights injunction, brought by the Attorney General to restrain an alleged statutory breach, will only be granted in exceptional cases, and in particular where:

- (a) there is repeated flouting of the law following determinations of illegality by the body entrusted with making those findings, or there is a serious and established risk to public health and safety;
- (b) the court is satisfied that the alleged breach of law is clear; and
- (c) the enforcement provisions of the statute in question have proven ineffective.

See Robert Sharpe, Injunctions and Specific Performance, second edition, paragraphs 3.190 - 3.240; and *Gouriet, supra*, at pages 491 and 500.

In my view, none of these factors is present in this case.

There has been no repeated flouting of the *School Board and Teachers' Collective Negotiations Act* by the teachers. The Ontario Labour Relations Board has not determined that the teachers have violated the *Act*. There is no serious risk to public safety, especially in light of the way the teachers are conducting the strike. The alleged breach of the *Act* by the teachers is not clear (rather their conduct raises a serious question of legality.) And the enforcement provisions of the *Act* have not been tried, let alone proven ineffective.

Accordingly, the Attorney General's motion for an interlocutory junction in this court is, at a minimum, premature. Having asserted that ss. 63 - 65 of the *School Board and Teachers' Collective Negotiations Act* have been violated, the Attorney General cannot ignore the remedy and penalty provisions of that *Act* which commence at section 67. In my view, this is the single most important factor on the whole balance of convenience calculus.

Second, as I suggested above, it is fair and necessary to examine the teachers' arguments grounded in the public interest. The teachers have never engaged in a province-wide strike. They are typically law-abiding people. They are deeply committed to the education of their students, and they have behaved in an entirely peaceful fashion throughout the first week of the strike. Moreover, they believe that their strike is lawful, and, as I concluded earlier, there is a serious issue to be tried on that point. In that context, they say that when they point to the serious problems of Bill 160 they do so in the public interest. That assertion should not be dismissed out of hand, especially in light of the observations quoted above by Sopinka and Cory JJ. in *RJR-Macdonald* with respect to the availability of public interest arguments to both the Attorney General and opposed to him in major litigation raising clear issues of public interest. The future of public education in Ontario strikes me as such an issue.

In conclusion, when I weigh all the factors I have listed, I cannot conclude that the balance of convenience favours the Attorney General in this case. In my view, his motion is significantly premature. Moreover, the appropriate forum for considering whether the teachers have violated the *School Boards and Teachers' Collective Negotiations Act* is the forum provided for in that Act - the Ontario Labour Relations Board. If the process of enforcement set out in that Act should prove to

be ineffective, resort to this court under s. 101 of the *Courts of Justice Act* might then be appropriate.

**Disposition**

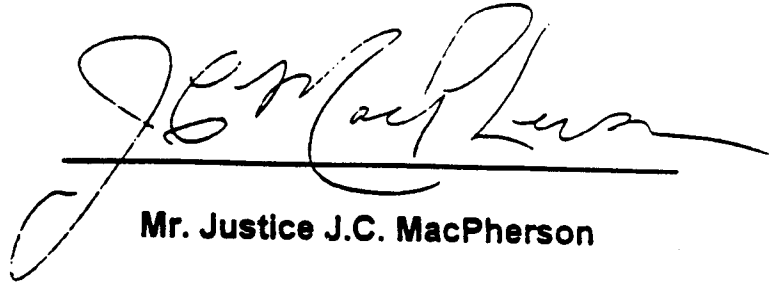
The Attorney General has sought what is known as a public interest interlocutory injunction. He has established that there is a serious issue to be tried. However, he has not demonstrated that the refusal of the injunction would cause irreparable harm. Nor has he established that the balance of convenience favours the granting of the injunction.

In the end, I am not persuaded that the Attorney General has demonstrated that he is entitled to the powerful and equitable remedy of an interlocutory injunction.

In saying that, I do not intend to be understood as saying that I agree with the teachers that it is in the public interest that they stay out of their classrooms in protest against Bill 160. I say no such thing.

The motion is dismissed.

Costs may be spoken to later at a mutually convenient time, if necessary.



Mr. Justice J.C. MacPherson

Released: November 3, 1997

ONTARIO COURT OF JUSTICE  
(GENERAL DIVISION)

B E T W E E N:

THE ONTARIO GENERAL FOR ONTARIO

Plaintiff

-and-

ONTARIO TEACHERS' FEDERATION  
("OTF"), EILEEN LENNON,  
PRESIDENT AND ITS OFFICER,  
DIRECTORS AND AFFILIATES,  
ONTARIO SECONDARY SCHOOL  
TEACHERS' FEDERATION ("OSSTF")  
EARL MANNERS, PRESIDENT AND ITS  
OFFICERS, DIRECTORS, BRANCH  
AFFILIATES AND MEMBERS, ONTARIO  
ENGLISH CATHOLIC TEACHERS'  
ASSOCIATION ("OECTA"), MARSHALL  
JARVIS, PRESIDENT AND ITS OFFICERS,  
DIRECTORS, BRANCH AFFILIATES AND  
MEMBERS, ONTARIO PUBLIC SCHOOL  
TEACHERS' FEDERATION ("OPSTF"),  
PHYLLIS BENEDICT, PRESIDENT AND ITS  
OFFICERS, DIRECTORS, BRANCH  
AFFILIATES AND MEMBERS, FEDERATION  
OF WOMEN TEACHERS' ASSOCIATIONS  
OF ONTARIO ("FWTAO"), MARET SADEM-  
THOMPSON, PRESIDENT AND ITS  
OFFICERS, DIRECTORS, BRANCH  
AFFILIATES AND MEMBERS,  
L'ASSOCIATION DES ENSEIGNANTES ET  
ENSEIGNANTS FRANCO-ONTARIENS  
( 'AEFO' ), DIANE CHENIER, PRESIDENT  
AND ITS OFFICERS, DIRECTORS, BRANCH  
AFFILIATES AND MEMBERS

Defendants

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ORAL REASONS FOR JUDGMENT

  
MACPHERSON J.