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DATE: December 7, 2011

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FROM: Mélanie for the Honourable Mr. Justice Johnston

FILE NO.: CV-11-499-00

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CITATION: Sawyer v. Loblaws, 2011 ONSC 7251
COURT FILE NO.: CV-11-499-00
DATE: 2011/DEC/07

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
PEARL SAWYER AND PAUL DOCHERTY ON THEIR OWN BEHALF AND ON BEHALF OF THE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 1000A AND ITS MEMBER ELISA BULAK AND ALL OTHER AFFECTED MEMBERS	)	Stephen J. Moreau and Patrick M.R Groom, Counsel for the Plaintiffs
Plaintiffs	)	
– and –	)	
LOBLAW COMPANIES LIMITED, LOBLAWS SUPERMARKETS LIMITED, RELATING TO LOBLAWS THE REAL CANADIAN SUPERSTORE AND LOBLAWS THE GREAT CANADIAN FOOD STORE	)	Robert W. Weir, Counsel for the Defendants
Defendants	)	

HEARD: November 9, 2011

THE HONOURABLE MR. JUSTICE J. JOHNSTON

E N D O R S E M E N T

[1] This is a motion commenced by Pearl Sawyer and Paul Docherty on their behalf and on behalf of the United Food and Commercial Workers Canada, Local 1000A ("Union")

who seek an interim and interlocutory Injunction prohibiting Loblaws Companies Limited and Loblaws Supermarkets Limited ("Loblaws") from maintaining minimum scheduling requirements for part-time employees. The Plaintiffs seek this Injunction on behalf of the affected members of the Union. The Union is seeking an Injunction preventing Loblaws from rejecting, on conversion of Loblaws stores to Great Canadian Food Stores, existing scheduling restrictions for its part-time employees unless the restriction is related to a religious or school schedule reason.

Facts:

[2] The Union and Loblaws are parties to a Collective Agreement governing stores that operate under the banner Loblaws. The parties refer to these stores as conventional stores and refer to the applicable collective agreement as the Conventional Collective Agreement ("Conventional Collective Agreement").

[3] Loblaws takes the position that, in responding to market pressures and, in particular, encroachment of large U.S. based retailers such as Walmart into the Canadian market, it needed to make changes to scheduling of employees. As a result, corporate restructuring is occurring and the Union and Loblaws entered into collective agreements to govern employees employed at Real Canadian Superstores ("Superstores") and Great Canadian Food Stores ("GCFS"). The Superstores Collective Agreement was agreed upon in 2003 and the GCFS Collective Agreement was finalized in 2006. These Collective Agreements are set out as appendices to the Conventional Collective Agreement. They are lower cost collective agreements, meaning that lower wages are paid and provide Loblaws with more flexibility in store operations.

[4] Part-time employees employed under the Conventional Collective Agreement have control over the days, how many hours and which time periods (to a maximum of twenty-four hours per week) that they are available to work. From Loblaws' point of view, this led to a number of problems in the conventional stores. The Company takes the position that their most experienced and highly trained employees often were not available to provide optimum service at peak times. The Company also had to hire and carry more part-time employees and pay associated costs, including benefit and training costs, associated with the part-time employees.

[5] Loblaws, therefore, sought, and obtained from the Union, an agreement that required part-time employees to be available on Fridays, Saturdays, Sundays and one evening or one day during the week. From the Company's point of view, this was an integral part of the deal that they negotiated with the Union. From the Company's point of view, these concessions are necessary to permit it to operate its stores as fifty-one percent of its' business in those stores accrue on Friday, Saturday and Sunday.

[6] The Company and Union came to an agreement that all conventional stores could convert to GCFS. The employee conversion costs associated with converting a store on average are $2,500,000.00, according to the Company.

[7] When a conventional store converts to a GCFS, employees are granted a number of options. They may elect to take a "buy-down" and work under the terms of the GCFS Collective Agreement. They may take a "buy-out" and leave the business. They may elect to continue to work under the economic terms of the Conventional Collective Agreement but submit to the non-economic terms of the GCFS Collective Agreement, including the minimum availability provision.

[8] A qualification to the minimum availability requirement for part-time employees is found in Letter of Understanding #59. The parties agreed in 2003 to append to the Conventional Agreement the Letter of Understanding ("LOU#59) that ensures existing part-time employees scheduling restrictions would be respected when an employee transferred to a Real Canadian Superstore. The Agreement stipulated:

> *"A part-time employee from a conventional store who had been regularly unavailable to work at a particular time or on a particular day of the week in the conventional store, because of legitimate reasons beyond personal preference, who transfers to an RCSS store will not be required to make themselves available in the RCSS store at the time or day notwithstanding [general scheduling provisions.]"*

[9] From 2002 to 2008, Loblaws converted twenty (20) of its fifty-one (51) Loblaws stores to RCSS. There were few issues with part-time employee transfers. In these earlier store conversions, the Union filed no grievance on behalf of any employee as a result of a request for scheduling an exemption. In those twenty (20) earlier store conversions, there were a very limited number of requests for exemptions. Both sides agree there were few requests for exemptions. The Union and Company disagree on the underlying reason for the absence of requests for exemptions at that time. From the Union's point of view, few part-time employees required the protection of LOU#59 as part-time employees at the time could, under another Letter of Understanding, elect to "bump" into another Loblaws store. The Company disputes the Union's explanation for the lack of requests for exemptions and the corresponding lack of grievances. The Company takes the position there is no evidence to support "bumping" was the reason for the lack of grievances. The Union argues "bumping" is no longer an option, as all of the conventional Loblaws stores are closing and will all be converted.

[10] In 2011, Loblaws converted ten (10) stores in Kingston, Lindsay and Ottawa. In those ten (10) stores, one hundred fifty-five (155) part-time employees made requests for scheduling exception. The Company has started to convert another four (4) stores in the Greater Toronto area ("GTA") with the intention to convert a total of eight (8) in the GTA by December 11, 2011. In four (4) stores, one hundred seventy-seven (177) out of eight hundred one (801) part-time employees have so far made requests for scheduling exemption. In addition, another thirteen (13) stores in the GTA will convert in 2012, involving another one thousand seven hundred (1700) part-time employees. The two sides differ as to how many part-time employees could possibly be covered by the terms of the order sought. The Union states the order sought will be limited in scope, affecting at most 10% of the part-time employees of "Loblaws". From the Company's perspective, the number of requests for scheduling exemptions is sky rocketing and the total number

of affected employees is unknown by anyone. The Union takes the view that, of the one hundred fifty five (155) scheduling exemptions sought from the stores converting in Kingston, Ottawa, Lindsay stores, sixteen (16) are religious exemption requests, a policy grievance and forty-five (45) others with sixty-two (62) related to grievances for Loblaws' refusal to accept requests of the scheduling restrictions. At present, most part-time employees in the GTA have not been advised whether their scheduling requests have been denied and so the Union has not yet filed grievances with respect to the conversions of the eight (8) GTA stores.

[11] The parties disagree as to whether Loblaws has instituted the decision "not to respect second job restrictions". According to the Union, toward the end of the conversion of the Ottawa stores in late September, 2011, it learned that some scheduling restrictions were not being respected. After some inquiries, Loblaws stated on or around September 27, 2011, they would not recognize any scheduling restrictions related to an employee's second job, claiming that its position was consistent with historical practice. According to the Union, there is no evidence that the company had such practice. To the contrary, the Union takes the position that Loblaws has historically honoured the second job or business scheduling restrictions when converting stores. The company takes the position that there is no evidence, other than hearsay evidence, that the company has a blanket rule of not respecting second job restrictions. The Company's position is that it considers each request for scheduling exemption on its own merits and makes a case by case decision.

The GCFS Conversions:

[12] In 2010, Loblaws announced that it would convert its remaining thirty-one (31) Loblaws stores to GCFS pursuant to the new Collective Agreement provisions that mirrored those of RCSS (Superstores). Generally, GCFS employment terms are lesser than those for Loblaws employees: thus, employees have less flexibility on their availability for work under the GCFS minimum availability scheduling rules and their wage/benefits are lower. Some of the moving parties Affiants testify to wage reductions from over $17.00 per hour to $13.00 per hour.

[13] Loblaws stores that are in the process of conversion follow three steps:

(1) Loblaws notifies the Union and employees that a store is to be converted;

(2) Meetings are held with the individual part-time employee, where the employee may declare a scheduling restriction, if any; and,

(3) Some date prior to the conversion date, the individual part-time employee is informed as to whether their restriction will or will not be honoured. There is conflicting evidence as to how much in advance of the conversion date the employee is given notice of the decision.

[14] According to a supplementary Affidavit of Mr. Paul Docherty sworn October 21st, 2011, scheduling restriction requests have been made by part-time employees to Loblaws at the four (4) GTA Loblaws stores where conversions are taking place.

[15] At the Pickering store, sixty-five (65) scheduling restrictions have been requested and broken down as: fourteen (14) involving second job or business, fourteen (14) for family status reasons (relating to child care), sixteen (16) for religious reasons, fourteen (14) for school reasons.

[16] At the Young & Empress store: forty-five (45) requests have been made for scheduling restrictions broken down as: fifteen (15) for second job or business purposes, three (3) for child care purposes, six (6) for religious reasons, fifteen (15) for school reasons, three (3) for transit reasons, three (3) for other reasons.

[17] At the Bayview and Shepherd store: thirty (31) requests for scheduling restrictions have been made including seven (7) for second job or business purposes, eight (8) for family status reasons (they are broken down as five (5) for child care and three (3) for elderly parent care), seven (7) for religious reasons, five (5) for school reasons, one (1) for medical reasons and three (3) for transit reasons.

[18] At the McCowan store: a total of thirty-six (36) requests have been made for scheduling restrictions broken down as: sixteen (16) for second job or business purposes, five (5) for family status reasons, seven (7) for religious reasons, five (5) for school reasons and three (3) for medical reasons.

[19] Further in the supplementary material, the Union and the two Union representatives acting on behalf of members of UFCW 1000A, jointly and severally undertake to compensate the Defendants (Loblaws) for the reasonable, assessable damages caused by the Plaintiffs' actions in seeking and obtaining an interlocutory Order.

[20] A policy grievance and individual grievances over Loblaws' actions have been filed and the parties have moved to schedule arbitration dates for the resolution of these matters. I accept the company has attempted to expedite the grievances. The parties have agreed to dates before Arbitrator Marcotte, a variety of dates were set in November, January and early February, 2012.) The company believes not "nearly enough time" has been set to deal with the ever-growing lack of grievances. The Union is of the view that a decision will be attained by early March, 2012.

[21] The Company takes the position that the Christmas/holiday season is the busiest time of the year in the grocery business. The Company asserts, if the Court grants the Order sought, the Company will not be able to adequately staff their stores at the busiest time of the year. An unknown number of part-time employees will simply be able to refuse to work around weekends. The Company states, "Already, the Union is filing grievances on behalf of employees who can meet the scheduling restrictions but simply do not want to meet those restrictions." The Company points out that the Union has filed grievances on behalf a variety of part-time employees including, Gang Wang and Kristine Koreinko. Both of these employees, according to the Company, can meet the minimum scheduling requirements, but choose not to do so. According to Loblaws this is evidence that many grievance claims are not legitimate, or at the very least cast doubt on whether irreparable harm results.

[22] In the arbitration, the Union is seeking damages and reinstatement on behalf of employees who felt that they have no choice but to resign and take the buy-out. If Arbitrator Marcotte finds the Respondents have violated Letter of Understanding #59 (LOU#59), the individual employees are able to get full redress in the arbitration process, according to the Company.

[23] The Company states, by contrast, they do not know if they will be able to adequately staff their stores if part-time employees are able to maintain scheduling exemptions under the protection of an Injunction. The Company argues that such an Order completely undermines the bargain it negotiated with the Union in the GCFS Collective Agreement; as it will remove, for an indefinite period of time, the scheduling flexibility it needs to operate its stores.

The Issue and the Law:

[24] In the Motion for an interlocutory Injunction, the Plaintiffs bear the burden of establishing all three elements of the following tests as outlined in *RJ-MacDonald Inc. v. Canada (Attorney-General) [1994] 1 S.C.R.:*

(i) that the claim is not frivolous and that there is a serious question to be tried;

(ii) that the moving party will suffer irreparable harm which cannot adequately be compensated for by damages if the Order is not granted; and

(iii) that the balance of convenience favours the granting of the Order.

[25] Granting an Injunction is a wholly, exceptional remedy. When deciding this matter, I consider and accept the following authority as outlined in *Intercity New Company v. Penthouse International [1983 O.J. No. 422] (ONSC):*

> *"Every motion for interlocutory Injunction must be approached with the realization that the remedy sought is an extraordinary one, to be granted only in a clear case, for the purpose of preserving the status quo until the legal right asserted by the Plaintiff can be dealt with by the trial Court and be in existence for suitable distribution by that Court when the trial takes place."*

[26] I now turn to consideration of the evidence and three-prong test as outlined in *RJ-MacDonald Inc.*

(i) **Is the claim frivolous and is there a serious issue to be tried?**

[27] The law requires the Plaintiff to demonstrate a serious issue to be tried. The Respondents concede this is a low threshold and do concede that there is a serious issue to be tried with respect to the five Affiants (the five individuals who initially filed Affidavits in support of the Union's position)

[28] Loblaws, however, takes the position that there is no evidence respecting the other affected members of the Union and, therefore, no evidence upon which the Court can

conclude that there is a serious issue to be tried. The Company argues, before the Court can grant an Injunction, it must have clear evidence. The Company argues that evidence cannot be speculated, nor assumed. The Union argues, based upon the Affidavits they have filed in support of their Motion for interim Injunction, there is sufficient evidence for the Court to consider that the issue is serious and not frivolous. The Union argues that, on the best information available, all part-time employees share the same characteristics as the five Affiants, namely, (1) they are part-time employees; (2) they have converted from a Loblaws store; and (3) their restrictions almost exclusively relate to types of restrictions requested by the Affiants (for child care or second job or business) or related analogous ones like elder care. The Union acknowledges that insofar as information about other employees (other than the five affiants) it is less clear. It argues this due mainly to the fact that Loblaws has failed to provide the Union with information, or in the alternative, the Company simply does not have information as to how many employees have valid employment restrictions that have previously been honoured by the company. The Union further argues that, as stated in *RJ-MacDonald Supra,* an Injunction is not the place to conduct a full evidentiary review: a preliminary assessment on a limited record is all that is needed.

[29] In short, the Union submits that there are sufficient serious issues to be tried by the Arbitrator that apply to many of the employees covered by the proposed Order, that the Order ought to issue. The Supreme Court of British Columbia in the matter of *Brotherhood of Maintenance Way Employees Canadian Pacific Systems Federation and Canadian Pacific Limited [1993] (Tab 8 of the Plaintiffs' Book of Authorities)* states at page 241 of the Plaintiffs' Book of Authorities:

> *"The company says that it is fully justified in imposing scheduling which requires the gangs to work every Sunday. Pressures of competition and heaviness of traffic are cited as the reasons. I do not think that I should comment upon the evidence that has been provided by the company and the Union regarding the requirements in paragraph 5.1, other than to say that, in my view, there is a fair case to be heard. The decision on the evidence will, of course, be for the arbitrator."*

[30] I agree that it is inappropriate for this Court to pass judgment on the respective positions of Loblaws and the Union. Both parties make persuasive arguments in support of their respective positions. In short, Loblaws argues that it entered into a new bargain with the Union when converting to GCFS stores and that the Union agreed to a requirement for part-time employees to be more flexible on scheduling. On the other hand, the Union argument is that, notwithstanding the amendments to the Collective Bargaining Agreement, LOU#59 allows part-time employees with previous scheduling exemptions to maintain those exemptions. It will be for the Arbitrator to decide these issues and to decide what, if any, remedies ought to be imposed. I find the Affidavit evidence filed by the Union to date supports the conclusion that the issue is not trivial and is, in fact, a serious issue requiring determination.

(ii) **Has the Union established that it will suffer irreparable harm which cannot adequately be compensated for by damages if the Order is not granted?**

[31] Loblaws correctly states the Plaintiffs have the onus of establishing this element of the test based on evidence that it, or Union members, will suffer actual harm which is not compensable in damages. Counsel for the Respondents reminds the Court that irreparable harm cannot be founded upon mere speculation. I agree with the Respondents that "irreparable harm" cannot be inferred and that the evidence of such harm must be clear and not speculative. I further agree with the legal proposition that the "fact that irreparable harm may arguably arise does not establish irreparable harm" *(Centre Ice Ltd. v. National Hockey League [1994] FCJ..No. 68 (Fedca).* Loblaws argues there is no evidence based on the record filed in this case regarding the alleged harm being suffered by the affected members of the Union. Loblaws argues "the Plaintiffs are asking that the irreparable harm alleged by the Five Affiants be inferred to every other member of the Union with a pending scheduling exemption request. The irreparable harm to the affected member is purely hypothetical". (Respondents' Factum paragraph 28)

[32] Loblaws argues that no irreparable harm has been shown to have been suffered by the five Affiants, who filed Affidavits in support of the Union position. Three of the Affiants elected to take the buy-out position offered by Loblaws and are, therefore, no longer employed by the Company: Jamie Christopher Roberts, Anita McIntyre and Elisa Bulak. Clearly these three individuals would not be covered by this Injunction, even if granted. Loblaws argues that these three employees can only benefit from arbitration and that they will not suffer irreparable harm if the Court does not grant the Order sought.

[33] The Affiant, James McIntyre, is currently meeting the minimum scheduling requirements and could be compensated for loss of income from his other job, according to the Company. The only alleged harm being suffered by him according to Loblaws is a loss of revenue from his videography business. He can be compensated in damages if he is successful at the arbitration. In fact, the Union takes the position that damages is one of the remedies they might advance at arbitration. Further, Loblaws argues that the evidence of Pui-Yin So is that she has managed to schedule around her other job. Loblaws argues, therefore, there is no evidence that she has or will suffer irreparable harm. There is no evidence, beyond speculation, that she has quit her second job. Moreover, the Company argues that Ms. So, like Mr. McIntyre, if they have suffered harm, have only suffered economic harm that can be compensated by an Order in the arbitration process.

[34] The law is clear that, if the Union or its members may be compensated in damages, injunctive relief should be denied. The Company further argues that, if the Union is successful at arbitration, damages are easily quantifiable and a full remedy can be granted for the indemnified claimants.

[35] I turn to consider of the evidence presented on behalf of the Union. Ms. Elisa Bulak files an Affidavit indicating that she was an employee of Loblaws Supermarket Ltd. and is a member of the Union. She states she was employed by Loblaws for eight years and has required a second job in order to make ends meet. Further Ms. Bulak states that, for the

last three years, "I have restricted my availability on Fridays and weekends because I am a part-time worker at Community Living Kingston. I work at Community Living for about 20 – 30 hours per week mostly during weekend shifts from 9 a.m. to 9 p.m." (Affidavit sworn October 11, 2011, paragraph 2). Ms. Bulak further states that there were no problems at Loblaws with these restrictions for three years. She made herself available as much as she could, generally her Friday shifts at Loblaws and Community Living were scheduled back to back and she had the weekends off from Loblaws to perform 12-hour shifts at Community Living.

[36] She applied for a scheduling restriction, based upon her Community Living job. She applied for the restriction on the basis "I do not earn enough money to support myself from this job alone." The scheduling restriction was not accepted and the Union filed a grievance on or about September 9, 2011. She was told that she would not be able to have an arbitrator hearing the grievance until sometime in November. Ms. Bulak testifies that "I could not balance the demands of the GCFS scheduling requirements with my job at Community Living long enough to get a decision from an arbitrator." As a result, Ms. Bulak states that she ultimately felt "forced" to take a buy-out and sever her employment with Loblaws.

[37] In his Affidavit sworn October 11, 2011, Jamie Roberts states that he was an employee of the Loblaws store in Kingston as a part-time produce clerk. His seniority date commenced October 5, 2000, and he worked as a produce clerk since September, 2002, and is a member of the Union. Mr. Roberts states he, too, had a second job, working at the Casino in Gananoque. Mr. Roberts confirms that he, too, applied for a scheduling exemption as a result of his second job and it was not respected. Mr. Roberts states: "I could not take the effects of the new scheduling rules on myself and my family. It was simply too difficult to work all these hours and spend time with my family. So in early September, I took the buy-out option. I felt I had to choose between either keeping my job at the Casino and spending time with my family or leaving Loblaws." (Affidavit paragraph 11)

[38] Mr. Roberts further stated "I need to work two part-time jobs to make ends meet for my family. I have two children, a one-year old and a four-year old. I am the main financial provider in our family. Our costs in caring for our children are significant. In the past, I received approximately $12,000.00 a year from working at Loblaws. This source of income is now gone from our family." Mr. Roberts states "if Loblaws had respected my restrictions, I would not have taken the buy-out." (Affidavit paragraphs 12 & 13).

[39] Ms. Anita McIntyre states in her Affidavit sworn October 11, 2011, she was employed at Loblaws Supermarkets in Kingston as a cake decorator in the bakery department. She was hired by Loblaws on October 21, 1997, and worked in the same store for nearly fourteen years and is a member of the Union. She is the spouse of James McIntyre. Ms. McIntyre confirms that, at a conversion meeting with representatives from Loblaws, she was given her various options and accepted the "buy-down" option. Ms. McIntyre indicated that she needed weekends off because she had two kids and she and her husband did not have a day care or school on weekends and there was no one else to take care of the children. Ms. McIntyre states that she explained she had these restrictions for

years and believed that she worked only one Saturday in the past ten years at Loblaws. Ms. McIntyre states "as a result of Loblaw's refusal to accept my restrictions, I had no choice but to take the buy-out and sever my employment in August, 2011, after nearly fourteen years at the store. Otherwise, I would not be able to look after my children." (Affidavit paragraph 13 of Anita McIntyre October 11, 2011).

[40] James McIntyre provided an Affidavit also sworn October 11, 2011. Mr. McIntyre confirmed that he, too, was an employee of Loblaws Supermarket hired in 1985 and worked in his current store since 1991. He was 15 and still in high school when he started working. Since that time, he finished high school and college. He states he is 41 years of age and relies upon his Loblaws job to supplement his income to support his family and is a member of the Union. He is the spouse of Anita McIntyre.

[41] Mr. McIntyre testifies in his Affidavit that, for over eight years, he had restricted his availability and has not worked for Loblaws on weekends, particularly Saturdays, because he has a second, full-time job. He operates his own business as a wedding videographer. He also has child care responsibilities during the week and on Sundays when his wife is scheduled to work and, as a result, generally works twelve hours per week at Loblaws. Mr. McIntyre has asked for restriction on Fridays. Mr. McIntyre states, "Since Loblaws has not allowed me to restrict my schedule, I have been forced to turn down at least four weddings, from which I would have earned between $6,000.00 and $8,000.00, because I have been unable to confirm Saturday bookings because I may be scheduled to work at Loblaws."

[42] I also consider the Affidavit of Joan Valente sworn October 31, 2011, filed on behalf of Loblaws. Ms. Valente is a Senior Manager of Labour Relations for Loblaws Companies. Ms. Valente indicates that she has dealt with several part-time employees of Loblaws, each of whom has filed grievances arising from denial of scheduling requests. Specifically:

Alain Benoit:

[43] Mr. Benoit requested a scheduling exemption as occasionally his wife is out of town and he needs to take care of his child. The scheduling exemption was not approved by the Company because he was able to make child care arrangements when his wife is not out of town and he can request time off, two weeks in advance when he knows that she will be out of town. Mr. Benoit currently is meeting the minimum scheduling requirement of the Collective Agreement, pending his grievance.

Gang Wang:

[44] Mr. Wang requested a scheduling exemption because he only wanted to work overnight on Saturday nights. Mr. Wang asked to be exempt from all shifts except Saturday night. Mr. Wang has taken the buy-out option and resigned, subject to his grievance.

Kristine Korienko:

[45] Ms. Korienko requested a scheduling exemption because she worked a second job at a day care facility. She informed Loblaws that her day care job ended at 3:30 p.m. on two days of the week. Prior to the conversion, Ms. Korienko had only made herself available to work on Saturdays. She wants to continue to only work on Saturdays. The Company took the position that it would have been possible for her to meet minimum scheduling requirements of the Collective Agreement by electing to be available to work during one evening shift Monday to Thursday and an evening shift Friday, all day Saturday and all day Sunday. Accordingly, her request was denied. Ms. Korienko is continuing to meet the minimum scheduling requirements of the Collective Agreement.

Karen Heney:

[46] Ms. Heney requested a scheduling exemption for all day Saturday and all day Sunday because the weekends cause her transportation problems. She is currently meeting the minimum scheduling requirements of the Collective Agreement, pending her grievance.

Maurice Seguin:

[47] Mr. Seguin requested a scheduling exemption for Thursday, Friday, all day Saturday and all day Sunday because he has another job operating his own business. He is currently meeting the minimum scheduling requirements of the Collective Agreement, pending his grievance.

Marilyn Donnelly:

[48] Ms. Donnelly requested a scheduling exemption for all day Saturday and all day Sunday to babysit her granddaughter. She is currently meeting her minimum scheduling requirements of the Collective Agreement, pending her grievance.

Paula Stone:

[49] Ms. Stone requested a scheduling exemption because she had another job and also needs to take care of her grandmother on every second Friday. Ms. Stone's request for an exemption based on a second job was not approved. Loblaws, at the moment, declined her request for an exemption due to care of her grandmother, however, has requested further documentation to support the request. To date, Loblaws has not received any documentation to support the request. Ms. Stone has taken the buy-out option and resigned, subject to her grievance.

[50] I agree with the Respondents that evidence of irreparable harm cannot be hypothetical or speculated upon.

[51] I accept the argument advanced on behalf of the Union that a grievor's potential job loss, even though it may be compensated for later in damages, can constitute irreparable harm, particularly where the grievor is employed at a lower wage in the retail food sector. Losing such a job for one in that socio-economic class can be irreparable economic

hardship. In *Reference Re Public Service Employment Relations Act AB [1987] 1 S.C.R. 313 Dickson C.J.* states at paragraph 91:

> *"A person's employment is an essential component of his or her sense of identity, self-worth and emotional well being."*

It is clear from at least three of the Affidavits filed on behalf of the Plaintiffs, that some part-time employees of Loblaws chose to accept the buy-out option and leave their employment with the Company, because the Company would not recognize a previous long standing commitment to a second job. I accept the foregoing evidence as real evidence of harm. While the Affiants will not gain any benefit from an Injunction, other part-time employees of the Company in similar circumstances undoubtedly would. The loss of one's job is significant. While I agree with the Company that not all part-time employees who have filed grievances will suffer irreparable harm, I am satisfied that people in the position of Ms. Bulak, Mr. Roberts and Ms. McIntyre will suffer irreparable harm. These employees have the stark choice: comply with the new scheduling requirements, give up their second job or leave their employment with Loblaws and accept a buy-out. I accept the affidavit evidence that those who have accepted a "buy-out" did so because they felt they had no choice. I also accept as evidence the assertion of the Affiants that they are part-time employees and require second jobs in order to "make ends meet". While loss of employment is significant for anyone, the consequences are even graver for individuals and families who are struggling week to week to meet expenses. I am not satisfied that economic damages can adequately compensate part-time employees who are forced to either quit their second job or quit their employment with Loblaws.

[52] It is not speculation that a number of part-time employees face the same agonizing decision and dilemma as faced by Bulak, Roberts and McIntyre. In support of my conclusion on this issue, I rely upon the following decisions:

> *Retail Store Employers Union, Local 832 v. Canada Safeway Ltd., [1980] M.J. No. 88 (MAN C.A.);*
>
> *Assn. Des Bieliothecaires, Professeures et Professeures de l' Universite de Moncton v. Universite de Moncton [2007] NBJ No. 521;*
>
> *International Brotherhood of Electrical Workers, Local 1574 v. Northwestel Inc. [1986] Y.J. No. 43 (C.A.).*

[53] I also find that, where employers have altered schedules, evidence that employees will lose time with family or will have to make other care arrangements is also evidence of irreparable harm. Losing control over one's schedule to ensure care is likewise irreparable. (*Brotherhood of Maintenance of Way Employees Canadian Pacific Systems Federation v. Canadian Pacific Limited (unreported – June 10, 1993 B.C.S.C.)*

[54] I find that an Injunction is necessary to prevent future significant and predictable irreparable harm to affected members of the Union, namely, part-time employees, based on the harm that has already occurred to other employees to date.

I concur with Loblaws that not all employees will suffer irreparable harm. However, the fact that some employees who have grieved the process will not suffer irreparable harm, does not take away from employees have and undoubtly will. Scheduling changes in somewhat analogous cases have been found by other Courts to constitute irreparable harm, including *C.P. Supra and Aranas v. Toronto East General and Orthopaedic Hospital Inc. [2005 O.J. No. 169] ONSJ.*

(iii) **Balance of Convenience:**

[55] Where there is a doubt as to the adequacy of the remedy and damages to either party, regard should be had to where the balance of convenience lies. The Plaintiffs must establish that the balance of convenience as between it and the Respondent favours granting the Injunction. For the Court to grant an Injunction, the Plaintiffs must prove that they will suffer greater hardship if the Injunction is not granted than the Respondents will suffer if the Injunction is granted. The Supreme Court of Canada has stated that the balance of convenience requires:

> *"a determination of which of the two parties will suffer the greater harm from granting or refusal of an interlocutory Injunction, pending the decision on the merits." R.J. – McDonald Inc. Supra* at paragraph 62.

[56] Loblaws argues that, even if I am satisfied there is a serious issue and that there is evidence of irreparable harm the claim for Injunction fails on a consideration of balance of convenience. Loblaws argues that the employees' losses, should they ultimately be successful in their grievances, are easily quantifiable and can be dealt with by way of economic reparations. On the other hand, the Company argues that the Respondents' losses are not quantifiable.

[57] Loblaws argues, if the Court grants the Order sought, the Company will not be able to adequately staff their stores. An unknown number of part-time employees will simply be able to refuse to work on week-ends by asserting a second job or child care responsibilities. The Respondents will lose a key part of the bargain that was agreed to in the GCFS Collective Agreement and will lose the scheduling flexibility that was bargained in good faith. All consequential disruptions will occur at the busiest time of the Respondents' business, namely, over the Christmas holiday.

[58] The Company also argues there has been a long-standing agreement between the Company and the Union to "work now, grieve later". The request for this Injunction is an exception to this otherwise harmonious relationship. The Company, therefore, argues that the balance of convenience favours them and favours rejection of the requested Injunction.

[59] I find the status quo appears to have been that Loblaws has permitted part-time employees the option of not working on specified days as a result of valid reasons, such as a second job or child care responsibilities. Loblaws feels this type of scheduling has led to problems with its own competitiveness. As a result of the Company's concerns, the Collective Agreement has been amended. However, both sides agree that LOU#59

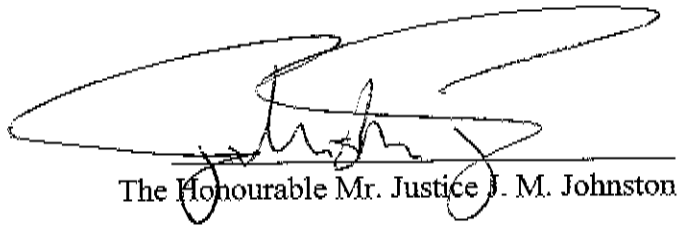
continues. It will be for an arbitrator to decide if there is a conflict in these provisions and what the outcome should be of the various grievances. In my view, the status quo supports granting the Injunction. I accept that it would be beneficial from the Company's point of view not to impose the Injunction, particularly as Christmas and their busiest time of the year approaches. However, in my view, an assessment of the potential harm leads to a conclusion that persons working second jobs and/or requiring a time off to provide child care are likely to suffer a greater harm than the Company. The Company's concerns may be real, however, when one considers the competing interests, balance of convenience favours the Union position.

Conclusion:

[60] For the foregoing reasons, I grant the interlocutory Injunction in accordance with the draft Order presented in argument of this matter. The interlocutory Injunction is granted on the premise that the Union will cooperate with expediting the grievance process and in anticipation of a decision from the Arbitrator in early March, 2012.

Costs:

[61] If the parties cannot agree upon costs, the moving party shall prepare and serve a two-page written submission, attaching Bill of Costs. The Respondent shall have two weeks to reply. The moving party shall serve and file its material by December 31, 2011.



The Honourable Mr. Justice J. M. Johnston

Released: December 7, 2011

CITATION: Sawyer v. Loblaws, 2011 ONSC 7251
COURT FILE NO.: CV-11-499-00
DATE: 2011/DEC/07

BETWEEN:

PEARL SAWYER AND PAUL DOCHERTY ON THEIR OWN BEHALF AND ON BEHALF OF THE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 1000A AND ITS MEMBER ELISA BULAK AND ALL OTHER AFFECTED MEMBERS

Plaintiffs

– and –

LOBLAW COMPANIES LIMITED, LOBLAWS SUPERMARKETS LIMITED, RELATING TO LOBLAWS THE REAL CANADIAN SUPERSTORE AND LOBLAWS THE GREAT CANADIAN FOOD STORE

Defendants

ENDORSEMENT

The Honourable Mr. Justice J. M. Johnston

Released: December 7, 2011