CITATION: Purolator Inc. v. John Doe et al. 2024 ONSC **6812**

COURT FILE NO.: CV-24-00732332
DATE: 20241206

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: PUROLATOR INC.

Plaintiff

AND:

JOHN DOE, JANE DOE, and OTHER PERSONS, NAMES UNKNOWN, who have been trespassing, picketing, or obstructing at or near the premises of the Plaintiff located at 90 Silver Star Boulevard in Toronto, Ontario

Defendants

BEFORE: Koehnen J.

COUNSEL: *Christopher J. Rae, Anastasia Reklitis, Adam Gilani* for the plaintiff

HEARD: December 1, 2024

ENDORSEMENT

[1] On November 29, 2024 I issued an *ex parte* injunction restraining the respondents and others from picketing on the plaintiff's property at 90 Silver Star Boulevard in Scarborough, Ontario in a manner that blocked the ability of the plaintiff's vehicles to leave the property

in a timely manner.[1] The injunction was issued at 7:30 PM on Friday November 29, 2024. As a term of the injunction, I ordered the plaintiff to provide immediate notice of the order to the President of the Canadian Union of Postal Workers ("CUPW") and to advise her that the court would be available for a with notice hearing in a timely manner, including on the weekend. On Saturday November 30, 2024 counsel for CUPW contacted me and asked for a hearing on Sunday December 1, 2024 which I granted. Shortly after the end of that hearing, I indicated that I would keep the order in place with reasons to follow. These are those reasons.

[2] Rather than referring back and forth between these reasons and my reasons of November 30, I will approach these reasons as a single cohesive set of reasons. That means there will be some duplication between these reasons and those issued on November 30.

A. Factual Background

[3] The plaintiff, Purolator Inc. is a Canadian integrated freight, package and logistics provider – delivering packages to, from and within Canada. Purolator's network includes hub facilities, located in key regional areas, as well as local pickup and delivery facilities, which vary in size and scope. Purolator's pickup and delivery facilities include the location at 90 Silver Star Boulevard in Scarborough, Ontario (the "Facility").

[4] The Facility has become caught up in a strike that CUPW members are mounting against Canada Post. Canada Post is the beneficial owner of 91% of the shares of Purolator.

[1] Reported at *Purolator Inc. v. John Doe et al*. 2024 ONSC 6696

Approximately 7% of the shares are beneficially held by an arms length individual through a holding company and the remaining shares are held by Purolator employees as part of an employee share purchase plan.

[5] Purolator employees are unionized as well but are represented by a separate bargaining unit and a different union. Purolator employees are not on strike.

[6] The Facility has a single entry/exit onto Silver Star Boulevard. On Thursday November 28, 2024 a group of CUPW members began picketing at the Facility. The picketers did not block the exit or otherwise prevent vehicles from leaving the premises. They did, however, picket at the exit of the Facility and, if a vehicle stopped, they communicated a brief message to the driver and gave the driver a pamphlet. Vehicles that stopped were held up for approximately 30 seconds to a minute.

[7] The following day, the picketing took on a different dimension. Shortly before 8 AM on Friday, November 29, 2024 a group of picketers began blockading access to and exit from the Facility. The number of picketers varied between 17 and 21 throughout the course of the day. The picketers were approximately 10 to 15 feet south of Silver Star Boulevard on the driveway of the Facility. Many of the picketers were wearing bright yellow jackets with Canada Post logos and were carrying flags which indicated that they may be associated with CUPW.

[8] Shortly after the blockade of the entrance began, Purolator employees approached the picketers and asked to speak with a picket captain. There did not appear to be one. The picketers advised the Purolator employees that they intended to stop each of the vehicles

leaving the Facility for 15 minutes. The evidence before me at the hearing on November 30 was that each Purolator vehicle was prevented from leaving for between 15 and 31 minutes.

[9] Purolator called Toronto Police Services for assistance. Police officers attended at approximately 8:25 AM and spoke with some of the picketers. The police advised Purolator that they had no grounds to remove the picketers and that they could not choose sides in a labour dispute. The Purolator employee engaged with the police and asked if that was the case even if the people blocking the exit were not Purolator employees. This did not change the view of the officers in attendance. The police then left.

[10] Blocking the exit and entry to the Facility has a critical impact on Purolator. The evidence before me was that 78 vehicles leave the Facility every day between 7:15 AM and 10 AM. There are additional deliveries to the Facility between noon and 2 PM. On Friday, November 29, only 27 of the planned 78 vehicles were able to leave the Facility.

[11] The Facility is a hub for next day deliveries to hospitals, medical service providers, pharmaceutical providers, police departments, the passport office, car parts manufacturers, schools and individuals. Deliveries to hospitals, medical service providers, and pharmaceutical providers are especially critical because they operate on a just-in-time delivery system. By way of example, one of Purolator's main clients at the Facility is Johnson & Johnson Medical Technologies. Johnson & Johnson cleans and sterilizes surgical equipment and uses the Purolator Facility to deliver that equipment to hospitals throughout Canada for next day delivery. Medical instruments are delivered to hospitals

for use on the day of delivery or the day following delivery. Purolator provides the same service for suppliers of medical devices such as orthopedic implants. Those implants are similarly delivered to hospitals for use on the day of delivery or the following day. As a result, delays in the delivery of medical devices can have significant impacts on the ability of physicians to conduct surgery and the ability of patients to receive timely medical care.

[12] Pharmaceutical products are subject to similar timelines. The Facility receives and ships product for specialty pharmacies that prepare compounded prescriptions, usually for infusions. Infusions have stability limits governed by time and temperature. As a result, timely delivery is critical.

[13] This is of course not to say that other deliveries such as those to automobile manufacturers, other businesses and individuals are not also critical. Those businesses also depend on timely delivery to function properly.

[14] To be fair to the picketers, when Purolator approached them to explain that certain vehicles had to leave for medical drop-offs, the picketers negotiated and allowed those trucks through. In the pressure of the moment, Purolator was, however, able to identify only four vehicles that contained medical products. Medical products are not delivered on designated vehicles but are dispersed throughout the fleet. While there was no evidence led before me on the point, I assume that is because each vehicle is designated for a particular geographical area as opposed to being dedicated to a particular business use across a potentially wider geographical area. The four vehicles with medical deliveries that

Purolator was able to identify were allowed to leave at 9:59, 10:09, 10:33 and 11:38 AM. Those were still beyond the ordinary departure time of no later than 10 AM.

B. The Test for a Labour Injunction

[15] Section 102 of the *Courts of Justice Act*[2] sets out particular rules for injunctions in labour disputes. The principal differences between an injunction granted under s. 102 and a conventional injunction are that, there is a significantly greater reluctance to grant *ex parte* injunctions, a minimum of two days notice for an injunction is usually required, an interim injunction is applicable for only four days, and the court must be satisfied that the person seeking the injunction has made reasonable efforts to obtain police assistance to prevent any alleged danger of damage to property, injury to persons, obstruction of or interference with lawful entry or exit from premises.

[16] CUPW submits that the activity they are engaged in at the Facility brings this motion within the scope of s. 102. CUPW argues that s. 102 is jurisdictional in nature. That is to say, that if the activity falls within s. 102, the court simply has no jurisdiction to issue an injunction other than by following the requirements of s. 102. As a result, CUPW submits that the *ex parte* order of November 30, 2024 was issued without jurisdiction and must be

[2] *Courts of Justice Act*, R.S.O. 1990, c. C. 43

set aside without prejudice to Purolator beginning afresh to seek an injunction by complying with s. 102.

[17] In my view, s. 102 of the *Courts of Justice Act* does not apply here. Section 102 applies to injunctions issued in connection with a "labour dispute". Section 102 (1) defines labour dispute as follows:

> "labour dispute" means a dispute or difference concerning terms, tenure or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, **regardless of whether the disputants stand in the proximate relation of employer and employee.** [emphasis added]

[18] The focus of the argument on this issue turns on the bolded portion of the definition above. CUPW submits that the bolded portion of the definition means that s. 102 applies the moment an injunction is somehow related to a labour dispute, even though the parties to the injunction are not parties to the labour dispute because the section provides that the parties are not required to be in an employer - employee relationship.

[19] I do not read s. 102 in that way. The closing words must be read in light of what comes before. What comes before is the definition of a "labour dispute." A labour dispute is one that broadly concerns a disagreement about employment "regardless of whether the disputants are in an employer/employee relationship. The "disputants" can only refer to the parties to the "labour dispute." There are no other disputants referred to in the definition. Purolator is not a "disputant" for the purposes of s. 102 because it is not a party to any labour dispute. The broader reference to "regardless of whether the disputants stand in the proximate relation of employer and employee" is, on my reading, not intended to

capture strangers to the labour dispute but to include within the ambit of s. 102, parties to a labour dispute who might not technically be employer/employee but who may, for example, be characterized as independent contractors.

[20] As a result, on my reading of s. 102, the starting point of the analysis is that s. 102 does not apply. That is not necessarily the end of the analysis though.

[21] The picketing at issue here is commonly known as secondary picketing. That is to say the target of the picketing is not a party to the labour dispute in question, and/or the picketing is conducted at a place other than the place of business of the employer of the picketers.[3] The picketers here were not Purolator employees.

[22] The parties disagree about the extent to which s.102 applies to secondary picketing. Purolator submits that it is settled law that secondary picketing is not picketing in relation to a labour dispute for purposes of s. 102 of the *Courts of Justice Act.*[4] CUPW submits that the cases Purolator relies on for that proposition must be treated with caution because they pre-date the Supreme Court's decision in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*,[5] which CUPW submits did away with the distinction between primary and secondary picketing. I do not think the situation is quite as stark as that. *Pepsi-Cola* overruled cases that stood for the proposition that secondary picketing was

[3] *Maple Leaf Sports & Entertainment Ltd. v. Pomeroy*, [1999] O.J. No. 685 (Gen. Div.)
[4] *Maple Leaf Sports & Entertainment Ltd. v. Pomeroy*, [1999] O.J. No. 685 (Gen. Div.); *C.T.V. Television Network Ltd. v. Kostenuk*, [1972] 2 O.R. 653 (H.C.); aff'd [1972] 3 O.R. 338 (C.A.); *Hersees of Woodstock Ltd. v. Goldstein*, [1963] 2 O.R. 81 (C.A.); *Canadian Pacific Railway Company v. Gill et al*, 2013 ONSC 256 at para. 19.
[5] *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd*., 2002 SCC 8 (CanLII), [2002] 1 SCR 156

illegal regardless of the circumstances. It did not, however, address or change the definition of labour dispute under s. 102. Moreover, in *Canadian Pacific Railway Company v. Gill et al.*,[6] which was decided well after *Pepsi-Cola,* Ellen MacDonald J stated:

> In the case of secondary picketing where the applicant is not the employer of the persons picketing its property, and there is no labour dispute between the parties, Section 102 has no application[.][7]

[23] Purolator concedes that the law is also not so stark as to say that s. 102 can never apply just because picketing occurs on premises that are technically not the place of business of the employer. The courts have long held that they will look to the underlying realities of the situation to determine whether s. 102 should apply. As Osler J. put it in *Nedco Ltd. v. Nichols et al.* [8]:

> … in a proper case when considering whether it is just or convenient that an injunction should be granted, the Court will not be slow to look beyond the corporate veil to ascertain the real parties to a dispute. As it was put by Fraser, J., in the Lescar case [at p. 849, O.R. p. 213 D.L.R.]: "When the Court is asked to exercise its discretion by granting an injunction it should have regard to the realities of the situation."

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[6] *Canadian Pacific Railway Company v. Gill et al*, 2013 ONSC 256
[7] *Canadian Pacific Railway Company v. Gill et al,* 2013 ONSC 256 at para. 19
[8] *Nedco Ltd. v. Nichols et al.* 1973 CanLII 470 at para.

[24] Principled guidance about when those realities may lead s. 102 to apply is found in *Trudel & Sons Roofing Ltd. v. Canadian Union of Shingler's & Allied Workers*[9] where Eberhard J. set out three tests to assist in the analysis: the alter ego test; the place of business test; and the remoteness test.[10] Thus, if the target of the picketing is the alter ego of the employer, it should be bound by s. 102. Similarly, if a party has the same place of business as the employer, it may be appropriate to have them be bound by s. 102. The remoteness test requires the court to determine more generally how remote the party seeking the injunction is from the labour dispute.

[25] Although decided long before *Trudel*, the case of *Nedco Ltd. v. Nichols et al*.[11] provides a good example of the application of these tests. In that case, employees of Northern Electric were on a lawful strike. The plaintiff, Nedco, sought an injunction to restrain Northern Electric employees from picketing outside of Nedco's premises. The court found that s. 102 applied to the dispute even though Nedco was not technically the employer. It is, however, the specific facts of the case that led to this conclusion. Nedco was a wholly owned subsidiary of the employer, Northern Electric. Nedco was created to take over certain operations of Northern Electric. Nedco carried on business in the same building as Northern Electric. A cafeteria in the building was used by employees of both companies. A single switchboard and switchboard operator served both companies. The entrances and exits of the building were used indiscriminately by employees of both companies (at least

[9] *Trudel & Sons Roofing Ltd. v. Canadian Union of Shingler's & Allied Workers* [1994] O.J. No. 1528
[10] *Trudel & Sons Roofing Ltd. v. Canadian Union of Shingler's & Allied Workers* [1994] O.J. No. 1528 . at paras. 7-9.
[11] *Nedco Ltd. v. Nichols et al*. 1973 CanLII 470

until the strike broke out). Many of the officers and employees of Nedco were formerly employees of Northern Electric. In those circumstances the court had no difficulty finding that s. 102 should apply when Nedco sought to enjoin employees of Northern Electric from picketing "its" premises. Although the court did not expressly refer to the alter ego, place of business or remoteness tests, one can readily see how at least the place of business and remoteness tests would justify applying s. 102.

[26] In my view, the Purolator Facility does not give rise to the concerns that s. 102 or these three tests are designed to address.

[27] Although Canada Post is a 91% shareholder of Purolator and although Canada Post's CEO and Chair are on Purolator's board, the other directors of Purolator are arms length from Canada Post. There was no evidence before me to suggest that Purolator is in any way the alter ego of Canada Post. There is no evidence of joint premises. Apart from the two directors, there is no evidence of employees of one company providing services to the other. As noted, Purolator employees are represented by a different union than Canada Post employees. The union representing Purolator employees has written to Purolator indicating that it would refuse to handle any parcels that were diverted from Canada Post to Purolator. There is no particular connection between the business operations of Canada Post and Purolator. Indeed, it appears that Canada Post allows Federal Express, a competitor of Purolator, to set up kiosks in some Canada Post facilities. The Facility at

issue is used exclusively by Purolator. There was no evidence before me to suggest that any other Purolator facilities in Canada are shared with Canada Post.

[28] These various factors apply equally to the remoteness test. In addition, Purolator does not appear to have any connection to the labour dispute between Canada Post and CUPW. The closest CUPW came to demonstrating a connection between Purolator and Canada Post for purposes of the strike was to say that during previous CUPW strikes Purolator benefited from an increase in parcel volumes. That is not surprising. I would expect that courier companies generally would have increased volumes in the event of a strike at Canada Post. In a similar vein, CUPW notes that on November 20, 2024, in reference to the ongoing Canada Post strike, Purolator issued a statement saying, among other things:

> "Purolator is open for business. … As the courier company with the largest reach in Canada, our network is well prepared and ready to deliver continued success for our customers and all Canadians, including those who have been impacted by the recent Canada Post labour disruption. …
>
> To make things easier for anyone looking to spread some cheer during this holiday season, Purolator is offering a range of promotions for shippers, including a new flat rate box which starts as low as $15, plus taxes and fees, for province-wide shipping and $20 for the rest of Canada ground shipping, as well as providing a coupon for up to 50 per cent off…."

[29] I do not find statements like that surprising either. I would expect that all courier companies would try to benefit from the strike by persuading Canada Post customers to switch over to them with the hope of retaining those customers after the strike ends. In my view, that does not connect Purolator any more closely to the labour dispute between Canada Post and its employees than similar efforts by Purolator's competitors would.

[30] Finally, CUPW submits that Purolator is connected to the labour dispute because Canada Post uses revenues from its 91% shareholding in Purolator to offset losses from its own operations. That simple fact does not make Purolator the alter ego of Canada Post nor does it connect Purolator so closely to the Canada Post labour dispute that one should override principles of separate corporate personality.

[31] It is also worth noting in this regard that CUPW has the ability to ask the Canada Labour Relations Board to declare that Canada Post and Purolator are related employers. It has never done so.

[32] As a result of the foregoing, I am satisfied that s. 102 does not apply to the present circumstances either by its language or by its purposive application to the facts.

[33] I continue to remain troubled, however, by the lack of notice to CUPW. Even outside of the labour context, courts are reluctant to grant injunctions *ex parte* without so much as short, informal notice. They do so only when there are circumstances of such urgency that informal notice cannot be given, or where giving notice would put the moving party at risk, such as in situations of fraud. There is no suggestion before me that Purolator would somehow have been put at risk had it given informal notice to CUPW. Here, notice could have been given. Purolator first contacted the court office to notify it of an impending urgent injunction at approximately 11:00 AM on November 29. Purolator ought to have given CUPW notice at the same time.

[34] The case for informal notice becomes even clearer because, as has now become apparent, Purolator's counsel have been involved in other disputes with CUPW, including ongoing

disputes, where CUPW's counsel of record is the same counsel as is acting for CUPW in this matter.

[35] One answer to the issue of notice could be to say that it was up to the court to determine whether it would proceed with the *ex parte* injunction or grant it. While there is some merit to that suggestion, it is no answer to put the entire responsibility on the court. Injunctions evolve in real time in circumstances of urgency. The injunction first came to my attention at approximately 4:50 PM on November 29 as an extremely urgent matter. The hearing began at approximately 5:30 and lasted until approximately 7:30. At the outset of the hearing the strong message delivered to the court was that Purolator did not know who the picketers were. As the hearing proceeded information emerged to suggest that the picketers were CUPW members and in particular were Canada Post employees. When information trickles out during the course of an urgent hearing, its full implications are not necessarily immediately understood. Especially not when the court is being told that an injunction is required immediately. Given what I perceived (and still continue to perceive) to be the strength of Purolator's case I nevertheless granted the injunction on November 29 with the proviso that CUPW be given immediate notice. With the benefit of hindsight, the technically perfect answer may have been to decline to hear the motion until CUPW had been given at least the courtesy of a phone call. The strength of Purolator's position is such that I do not think the failure to give notice should lead to a refusal of the injunction. It may, however, be that some consequence for failing to provide even short notice by telephone is appropriate. I will entertain submissions about that issue should CUPW wish to pursue it.

C. The Test for a Conventional Interim Injunction

[36] The test for a conventional injunction requires the moving party to demonstrate:

a. That there is a serious issue or a strong *prima facie* case to be tried.

b. That the moving party would suffer irreparable harm if the injunction were not granted.

c. That the balance of convenience favours granting the injunction.

d. That the moving party has provided an undertaking in damages.

[37] The analysis of this four-part test requires a balancing of the factors. Each factor is not a standalone watertight compartment. Factors can be balanced against each other. Strength with respect to one factor can offset weakness with respect to another.

a. Strong Prima Facie Case

[38] Purolator submits that it must establish a serious issue to be tried to warrant an injunction. CUPW submits that Purolator must establish a strong *prima facie case.* There is law to support the proposition that a strong *prima facie* case is required when there are no material facts in dispute or when the picketing injunction amounts to a final order.[12] There are no

[12] *RJR MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) at para. 51.

such facts in dispute here and it is likely that the interlocutory proceeding here will, for all practical purposes, amount to a final order. I therefore apply the strong *prima facie* case test.

[39] The bulk of the parties energies were devoted to the presence or absence of a strong *prima facie* case. The issue focuses on the extent to which there remains any distinction between primary and secondary picketing and to what extent obstruction of egress from a property is to be tolerated.

[40] CUPW submits that the Supreme Court of Canada did away with the distinction between primary and secondary picketing in *Pepsi-Cola*.

[41] Although the Supreme Court did say later in *Pepsi-Cola* that "all picketing is allowed, whether "primary" or "secondary,"[13] and that "we should not lament the loss of the primary – secondary picketing distinction,"[14] the court nevertheless continued to draw a distinction between employers and third parties.

[42] CUPW Relies on statements in *Pepsi-Cola* and elsewhere that recognize and accept the coercive nature of labour disputes. For example, in paragraph 38 of *Pepsi-Cola*, the Court said:

[13] *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd*., 2002 SCC 8 (CanLII), [2002] 1 SCR 156 at para 78.
[14] *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd*., 2002 SCC 8 (CanLII), [2002] 1 SCR 156 at para. 79.

> As previously discussed, one important objective of labour picketing is the infliction of economic harm on the employer with an eye to compelling a favourable resolution of the dispute. Thus, expressive action in the labour context, as in other situations, may cause economic harm.

[43] In a similar vein, CUPW notes the words of Justice Gray in *Sobey's v. UFCW, Local 175*,[15] to the effect that:

> Each side hopes to eventually force concessions that will result in a more favourable agreement.[16]
>
> and
>
> A picket line that is merely expressive, without more, will do little to cause disruption to the employer's business. It is not surprising, therefore, that picketers were attempting to delay people who wished to cross the picket line.[17]

[44] At the same time, however, both of those courts recognized the potentially different position in which third parties find themselves. In *Pepsi-Cola* the Supreme Court noted that "third parties are to be protected from undue suffering, not insulated entirely from the repercussions of labour conflict"[18] (emphasis in original).

[45] In *Sobey's,* Justice Gray went on to say, 11 years after *Pepsi-Cola* was decided:

> While the matter is not before me, I think there would be less toleration of delay in the case of pure secondary picketing, that is, in a case where the picketed employer has no relationship with the striking trade union, and little relationship with the struck

[15] *Sobey's v. UFCW, Local 175*, 2013 ONSC 1207, at paras. 21 and 24.
[16] *Sobey's v. UFCW, Local 175*, 2013 ONSC 1207 at para. 21.
[17] *Sobey's v. UFCW, Local 175*, 2013 ONSC 1207 at para. 24.
[18] *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd*., 2002 SCC 8 (CanLII), [2002] 1 SCR 156 at para.44.

> employer. In such a case, I think a strong argument could be made that picketing should remain informational only, without its coercive elements. The rationale for maintaining an appropriate balance, as in the case of a lawful strike, would usually be lacking.[19]

[46] In *Pepsi-Cola*, the Supreme Court resolved the question of how much harm was acceptable to third parties by holding that picketing of third parties is acceptable unless it involves a tort or a crime.[20] The court further amplified on this as follows:

> … Courts may intervene and preserve the interests of third parties or the struck employer where picketing activity crosses the line and becomes tortious or criminal in nature. It is in this sense that third parties will be protected from "undue" harm in a labour dispute. Torts such as trespass, intimidation, nuisance and inducing breach of contract will protect property interests and ensure free access to private premises. Rights arising out of contracts or business relationships will also receive basic protection. Torts, themselves the creatures of common law, may grow and be adapted to current needs.[21]

[47] This becomes a particularly live issue here because the picketing that CUPW members carried out on Friday, November 29 involved blocking trucks from leaving the Purolator property for between 15 and 30 minutes. Given that approximately 78 vehicles leave the Facility every day, a 15 minute delay for each vehicle results in a total delay of 19 ½ hours. Should a third party to the dispute have to endure that sort of harm?

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[19] *Sobey's v. UFCW, Local 175*, 2013 ONSC 1207 at para. 49.
[20] *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 (CanLII), [2002] 1 SCR 156 at para.62.
[21] *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 (CanLII), [2002] 1 SCR 156 at paras. 73.

[48] Blocking access to property can constitute wilful obstruction, interruption or interference with an owner's lawful use, enjoyment or operation of its property contrary to section 430 of the Criminal code.[22]

[49] Blocking entry or exit to the property of another can also constitute nuisance.[23] In *Brookfield Properties v. Hoath et al.*,[24] D.M. Brown J., as he then was, summarized the law as follows in a case involving the picketing of an employer:

> The courts of this province have consistently held that picketing which prevents the lawful entry and exit of the owners, tenants or users of a property constitutes a nuisance which can be controlled through the issuance of an injunction. In *Canada v. Gilleham* the court stated that peaceful picketing did not allow any vehicle to be "stopped for a moment. It does not allow the interference with any person being stopped or held up."[25]
>
> Thus, the case law distinguishes two very different situations. Picketing which constitutes obstruction of the lawful entry to and exit from premises is unlawful, constituting a nuisance. That the blockading or obstruction occurs during a labour dispute does not transform an unlawful nuisance into a lawful expression of a message. However, picketing which attempts to communicate information to those attempting to enter into or leave premises may result in temporary delays where the targets of the communicated message stop and engage the picketers in discussion. Delays incidental to such communication which last only for the amount of time reasonably required to convey the message may fall into

[22] *Criminal Code*, RSC 1985, c C-46, ss 423(1), 430(1); *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd*., 2002 SCC 8 at paras. 77 and 103; *Aramark Canada Ltd. v. Keating,* [2002] O.J. No. 3505 (Ont. S.C.J.) at paras. 30 and 35-37.
[23] *Brookfield Properties v. Hoath et al.*, 2010 ONSC 6187 at para. 32; A*ramark Canada Ltd. v. Keating,* [2002] O.J. No. 3505 (Ont. S.C.J.) at paras. 30 and 33-34; *Ogden Entertainment Services v. Retail, Wholesale/ Canada, Local 440*, [1998] O.J. No. 1769 (Ont. Gen. Div.) at paras. 22-24, varied [1998] O.J. no. 1824 (C.A).
[24] *Brookfield Properties v. Hoath et al.*, 2010 ONSC 6187
[25] *Brookfield Properties v. Hoath et al.*, 2010 ONSC 6187 at para. 32

> the category of permissible impedence, rather than unlawful obstruction or blockage.[26]

[50] Numerous cases have made clear that picketers are not permitted to obstruct entry or exit from the property of their own employers let alone that of third parties.[27]

[51] Picketing of employers in a way that obstructs entry to or exit from property has been subject to time limits.[28] Time limits for blocking access to an employer's property have tended to be longer than those applicable to third parties. In the latter situation, courts have tended to prevent blockages altogether, have reserved picketing to purely informational purposes and voluntary stops, or have imposed time limits on any delays to which the third party is subject. By way of example, in *Metro Ontario Inc. v Teamsters Local 928*,[29] Justice Cavanaugh limited delays at the premises of a third party to a cumulative total of 12 minutes.[30]

[52] CUPW submits that courts have allowed delays of 15 minutes per vehicle and longer as a result of which it argues that Purolator has not made out a strong *prima facie* case. The

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[26] *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 (CanLII), [2002] 1 SCR 156. at para 36.
[27] *Fleming Door Products Ltd. v. Hazell,* [2008] O.J. No. 3039 (S.C.J.) at para. 15; *Ogden Entertainment Services v. Retail, Wholesale/ Canada, Local 440*, [1998] O.J. No. 1769 (Ont. Gen. Div.) at paras. 17 and 26; varied [1998] O.J. no. 1824 (C.A); *Ontario Power Generation Inc. v. Society of Energy Professionals,* [2005] O.J. No. 5817 (S.C.J.) at paras. 36-44 and 47; *CNR v. Chief Chris Plain*, 2012 ONSC 7348 at para. 19.
[28] *Brookfield Properties v. Hoath et al.*, 2010 ONSC 6187; *Industrial Hardwood Products v. International Wood and Allied Workers of Canada, Local 2693*, 2001 CanLII 24071 (ON CA), [2001] O.J. No. 28, (2001), 52 O.R. (3d) 694 (C.A.);
[29] *Metro Ontario Inc. v Teamsters Local 928,* [2019] O.J. No. 2060
[30] *Metro Ontario Inc. v Teamsters Local 928,* [2019] O.J. No. 2060 at para. 27

case that CUPW relies on for that submission[31] is, however, one involving the employer of the striking workers, not a third party.

[53] I recognize that the right to strike and the right to picket are constitutionally protected rights under the *Charter*. Picketing is an essential component of freedom of expression. As noted in *Pepsi-Cola*, the extent of the right should be informed by its nature as a protected form of expression. In that context, picketing of a third party that provides information to those who want to stop and listen is permissible and protected. That was the general nature of the picketing at the Facility on Thursday November 28. The picketing on Friday did not, however, have that objective. As CUPW put it in its factum, on Friday, November 29:

> Purolator drivers exiting the Purolator Facility **were stopped and held for approximately five to fifteen minutes** during which drivers were told about CUPW's strike action and given information about CUPW's attempts to secure a fair collective agreement.

[54] Thus, on Thursday drivers who stopped of their own volition received about 30 seconds to one minute of information. On Friday drivers "were stopped and held." That is a significantly different.

[31] *Cancoil Thermal Corp. v. Abbott*, [2004] O.J. No. 3016 (S.C.J.)

[55] The distinction between the picketing on Thursday and Friday is reflected in the description of acceptable third party picketing in *U.F.C.W., Local 1518, v. KMart Canada Ltd.*,[32] where the Supreme Court of Canada noted:

> In deciding whether the consumer leafleting activity in question is acceptable, it will be important to determine whether consumers are able to determine for themselves what course of action to take without being unduly disrupted by the message of the leaflets or the manner in which it was distributed. Consumers must retain the ability to choose either to stop and read the material or to ignore the leafleter and enter the neutral site unimpeded.[33]

[56] In response to a question from the court, Purolator expressed a willingness to designate an area in or adjacent to the employee parking lot at the Facility where CUPW members could engage in lawful informational picketing with anyone who wanted to speak with them without obstructing access in or out of the property. Purolator would also be open to making similar arrangements with respect to its other Ontario premises as well where it is feasible to do so. In the event of a disagreement with respect to the designated area provided, the parties can approach me for a case conference to resolve the disagreement.

[57] In my view Purolator has demonstrated a strong *prima facie case* of nuisance by having its trucks blocked from leaving the property for up to 19.5 hours.

[32] *U.F.C.W., Local 1518, v. KMart Canada Ltd.*, **1**999 CanLII 650 (SCC), [1999] 2 SCR 1083
[33] *U.F.C.W., Local 1518, v. KMart Canada Ltd.*, 1999 CanLII 650 (SCC), [1999] 2 SCR 1083 at para. 56.

b. Irreparable Harm

[58] CUPW submits that Purolator has not met this branch of the test because irreparable harm is limited to harm that cannot be quantified or cured in monetary terms. CUPW says such harm must be supported by hard evidence rather than "speculative assertions" and that Purolator relies on only unparticularized allegations of economic loss.

[59] In support of its position CUPW cites Justice Gray's statement in *Sobey's v. UFCW* to the effect that:

> [I]n the context of a lawful strike, it is not enough to say that the employer has the right to access its property and thus must be granted an injunction to prohibit any delay in accessing the property. To take that approach, as some courts have done, would inadequately take account of the dynamics of a strike.[34]

[60] That is an entirely fair observation. However it was made in the context of restrictions on an employer's rights to access property during a strike, not in the context of a third party being denied use of its property.

[61] It is well-established in law that where protesters engage in tortious or criminal actions, damages are not an adequate remedy. The remedy for intentional, unlawful conduct ought to be an order to cease and desist, not a lengthy action for damages.[35] Courts have also

[34] *Sobeys v. UFCW, Local 175*, 2013 ONSC 1207, at para. 39.
[35] *Aramark Canada Ltd. v. Keating*, [2002] O.J. No. 3505 (Ont. S.C.J.) at para. 44; *Ideal Railings Ltd. v. Laborers' International Union of North America*, 2013 ONSC 701 at paras. 57-58; *Sobeys v. UFCW, Local 175*, 2013 ONSC 1207 at paras. 33 and 35-38; *Fleming Door Products Ltd. v. Hazell*, [2008] O.J. No. 3039 (S.C.J.) at para. 18.

regularly found that blocking entry or exit to an owner's property constitutes irreparable harm to the owner.[36]

[62] Given that Purolator has demonstrated that continued activity of the sort that occurred on Friday November 29 would lead to delays of 19.5 hours each day which, as a practical matter, would prevent the majority of its trucks from leaving the Facility each day, I am satisfied that Purolator has demonstrated that it will suffer irreparable harm if the injunction is not granted.

c. Balance of Convenience

[63] The balance of convenience requires the court to determine which of the two parties will suffer greater harm if the injunction is granted or denied.

[64] If the injunction is granted, picketers will be enjoined from blocking egress from the Facility. The law prohibits them from doing that in the first place. In similar situations, other courts have noted that there is nothing inconvenient in being asked to stop conduct that one has no right to engage in to begin with. In those circumstances, there is simply nothing to balance.[37]

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[36] *Vale v. USWA Local 6500 et al*, 2010 ONSC 1774 at paras. 31-32; *Hamilton (City) v. Loucks*, 2003 CanLII 64221 at paras. 25-27; *Sobeys v. UFCW, Local 175*, 2013 ONSC 1207 at paras. 35-38.

[37] *Fleming Door Products Ltd. v. Hazell*, [2008] O.J. No. 3039 (S.C.J.) at para. 21; *Ontario Power Generation Inc. v. Society of Energy Professionals*, [2005] O.J. No. 5817 (S.C.J.) at para. 47; *Ideal Railings Ltd. v. Laborers' International Union of North America*, 2013 ONSC 701 at para. 62; *Glasrock Products Inc. v. United Steelworkers, Local 1005*, 2011 ONSC 5021 at paras. 13-15; Lower *Lakes Towing Ltd v. United*

[65] If the injunction is not granted, Purolator will continue to be deprived of the free use of its property and its many customers will be deprived of timely delivery of products including products needed for immediate surgery or pharmaceutical infusions.

[66] Given that the primary purpose of picketing on or around third party property is to provide information, that objective would appear to be satisfied by Purolator's agreement to make space available on the Facility parking lot for CUPW members to picket and engage Purolator employees for as long as each Purolator employee wishes to speak. Nothing of course prevents other picketing off of the Purolator property which does not block entry or egress from the property.

[67] In those circumstances, the balance of convenience strongly favors Purolator.

d. Undertaking in Damages

[68] Since the hearing on November 29, Purolator has provided a formal undertaking in damages. That requirement has therefore been fulfilled.

Steelworkers Local 1005, 2011 ONSC 3668 at para. 9; *Ogden Entertainment Services v. Retail, Wholesale/ Canada, Local 440*, [1998] O.J. No. 1769 (Ont. Gen. Div.) at para. 30, varied [1998] O.J. no. 1824 (C.A)

Conclusion

[69] For the reasons set out above, I grant the injunction that Purolator requests on condition that Purolator grant access to CUPW members to a designated space on its parking lots as set out in paragraph 56 above.

Date: December 6, 2024

Koehnen J.