COURT OF APPEAL FOR ONTARIO

CITATION: Purolator Inc. v. Canadian Union of Postal Workers, 2025 ONCA 565
DATE: 20250730
DOCKET: M55799 (COA-24-CV-1392)

Gillese, Gomery and Pomerance JJ.A.

BETWEEN

Purolator Inc.

Plaintiff (Moving Party/
Respondent)

and

Canadian Union of Postal Workers*, 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 (Responding Party/
Appellant*)

Christopher J. Rae and Adam Gilani, for the moving party/respondent

Stephen J. Moreau and Ryan White, for the responding party/appellant

Heard: April 8, 2025

On a motion to quash the appeal from the orders of Justice Markus Koehnen of the Superior Court of Justice, dated November 29, 2024, December 1[1], 9 and 16, 2024, with reasons reported at 2024 ONSC 6696, 2024 ONSC 6812, and 2024 ONSC 7037.

Gillese J.A.:

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[1] No order issued on this date. Relief granted by email from Koehnen J. dated December 1, 2024, with endorsement released on December 6, 2024.

[1] Secondary picketing is typically defined as picketing in support of a union that occurs at a location other than the premises of the union's employer.[2] The motion now before this court depends on whether an injunction restraining secondary picketing is governed by s. 101 or s. 102 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43 (the "*CJA*").

I. Overview

[2] In November 2024, the Canadian Union of Postal Workers ("CUPW") commenced a legal nationwide strike against Canada Post Corporation. Canada Post Corporation is the majority shareholder of Purolator Inc. ("Purolator"). Purolator employees were not on strike because they are represented by a separate bargaining unit and a different union.

[3] On the morning of November 29, 2024, a group of CUPW picketers began blocking access to, and exit from, a Purolator facility. Purolator obtained an *ex parte* interim injunction that same day, which enjoined CUPW members from picketing at the Facility or any other of Purolator's premises in the province of Ontario for a period of ten days. A series of orders between then and December 16, 2024, extended the duration of the injunction (the "Orders"). CUPW appeals the Orders to this court.

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[2] *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.,* 2002 SCC 8, [2002] 1 S.C.R. 156 ("*Pepsi-Cola*"*)*, at para. 1.

[4] Purolator maintains that because the Orders are interlocutory, CUPW's appeal lies to the Divisional Court, with leave, as prescribed by s. 19(1) of the *CJA*. Thus, Purolator brings this motion for an order quashing CUPW's appeal on the basis this court lacks jurisdiction (the "Motion").

[5] CUPW contends that the act restrained by the injunction – secondary picketing by a union during a lawful strike – constitutes an activity in connection with a labour dispute under s.102 of the *CJA* and, therefore, its appeal lies to this court pursuant to s. 102(10).

[6] For the reasons that follow, I would dismiss the Motion. In my view, this court has jurisdiction to hear CUPW's appeal by virtue of s. 102(10) of the *CJA*.

II. Background

[7] Purolator is a Canadian integrated freight, package, and logistics provider. One of Purolator's pickup and delivery facilities is located on Silver Star Boulevard in Scarborough, Ontario (the "Facility"). The Facility has a single entry/exit onto Silver Star Boulevard.

[8] On November 28, 2024, a group of CUPW members began picketing outside the Facility. The following day, the picketers began blockading access to, and exit from, the Facility. The blockade caused significant delay to the Purolator vehicles and impacted Purolator's operations, with only 27 of the planned 78 vehicles being able to leave the Facility. That same day, Purolator successfully

brought an urgent motion for an *ex parte* interim injunction to restrain the picketing. It brought the motion and claimed relief under both ss. 101 and 102 of the *CJA.*

[9] In reasons dated November 30, 2024, the motion judge concluded that s. 102 of the *CJA* did not apply because "there is no labour dispute between Purolator and the picketers" (at para. 13). Relying on *Maple Leaf Sports & Entertainment Ltd. v. Pomeroy* (1999), 49 C.L.R.B.R. (2d) 285 (Ont. Gen. Div.), the motion judge reasoned as follows at paragraphs 14 and 15 of those reasons.

> The picketing at issue here is commonly known as secondary picketing. That is to say it is picketing by people who have no business or contractual relationship with the target of the picketing, where the target of the picketing is not a party to a labour dispute, and the premises of the target are not the place of business of the employer of the picketers. The picketers here were not Purolator employees.
>
> It is settled law that secondary picketing is not picketing in relation to a labour dispute for purposes of section 102 of the [*CJA*].

[10] On December 1, 2024, CUPW moved to set aside the *ex parte* injunction. It argued that the secondary picketing was "in connection with a labour dispute" and, therefore, s. 102 of the *CJA*, with its added protections, applied. CUPW pointed out that if s. 102 did apply, Purolator had failed to comply with its dictates in bringing the *ex parte* motion.

[11] The added protections in s. 102 to which CUPW referred include: specifying the steps that must be taken before an injunction proceeding (s. 102(3); limiting an

interim injunction to a period of not longer than four days (s.102(5)); and specifying the notice requirements to be given by a person seeking an interim injunction (ss. 102(2), (6) - (8)). Further, s. 102(10) dictates that an appeal from a s. 102 order "lies to the Court of Appeal without leave".

[12] The motion judge rejected CUPW's submission and reiterated his earlier ruling that s. 102 was inapplicable to secondary picketing. In further orders, he extended the province-wide interim injunction for another 30 days.

[13] CUPW filed for leave to appeal the Orders to the Divisional Court. It also launched an appeal in this court. CUPW then obtained the consent of the Divisional Court to hold its leave to appeal motion in abeyance for four months or until this court's decision is released.

[14] Thereafter, Purolator brought this Motion, asking that this court quash CUPW's appeal for lack of jurisdiction.

III. The Issue

[15] The Motion raises a single issue: does this court have jurisdiction to hear CUPW's appeal of the Orders?

IV. The relevant statutory provisions

[16] The parties rely on various provisions in ss. 19(1), 101, and 102 of the *CJA* for their positions. CUPW also relies on s. 2 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada*

Act 1982 (UK), 1982, c. 11 (the "*Charter*"). The most relevant of the provisions relied on by the parties are set out below.

[17] Section 19(1)(b) of the *CJA*, which reads as follows:

> **Divisional Court jurisdiction**
>
> **19** (1) An appeal lies to the Divisional Court from,
>
> > (b) an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court

[18] Section 101(1) of the *CJA*, which reads as follows:

> **101** (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

[19] Sections 102 (1), (2) and (10) of the *CJA*, which read as follows:

> **Injunction in labour dispute**
>
> **102** (1) In this section, "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.
>
> (2) Subject to subsection (8), no injunction to restrain a person from an act in connection with a labour dispute shall be granted without notice.
>
> (10) An appeal from an order under this section lies to the Court of Appeal without leave.

[20] Sections 2(b) and (d) of the *Charter*, which read as follows:

> 2. Everyone has the following fundamental freedoms:

> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; ...
>
> d) freedom of association.

V. The Parties' Positions

[21] Purolator submits that because the injunctions are interlocutory orders, the prescribed appeal route is that in s. 19(1)(b) of the *CJA* so CUPW's appeal lies to the Divisional Court, with leave. It points out that the motion judge held that s. 102 did not apply and granted injunctive relief under s. 101 of the *CJA*. Because the Orders were made under s. 101, Purolator argues that any alleged error in adjudicating the injunction motion – including whether the motion was governed by s. 101 or s. 102 – can be reviewed only by the Divisional Court and only after the test for leave to appeal to that court has been met.

[22] CUPW submits that it is for this court to determine whether the Orders were s. 101 or s. 102 orders and the motion judge's reasons on that matter are not dispositive. It argues that, properly interpreted, s. 102 encompasses secondary picketing and is not restricted to labour disputes between employer and employees, as the motion judge held. It relies on the ordinary meaning of the words in s. 102(1) and argues that a contextual consideration of that provision reinforces that it applies to both primary and secondary picketing. Accordingly, CUPW argues, the appeal route specified in s. 102(10) of the *CJA* applies and its appeal lies to this court.

[23] CUPW further submits that if there is a genuine ambiguity in the wording of s. 102, interpreting it as applying to secondary picketing should be preferred because s. 102 provides greater substantive and procedural protections to picketing activities connected with a labour dispute than does s. 101, thereby promoting the *Charter* rights and values underlying ss. 2(b) and (d).

VI. Analysis

A. Introduction

[24] As I explain below, in my view, correctly interpreted, the definition of "labour dispute" in s. 102 encompasses secondary picketing. Consequently, I accept CUPW's submission that its secondary picketing at the Facility were acts in connection with a "labour dispute" and, therefore, an interim injunction to restrain the picketers could be granted only under s. 102 of the *CJA*.

[25] Because I see no genuine ambiguity in interpreting s. 102, I find it unnecessary to address CUPW's submission that interpreting it as applying to secondary picketing promotes the *Charter* rights and values underlying ss. 2(b) and (d).[3]

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[3] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paras. 28 and 62, directs the courts to use *Charter* values as an interpretative principle only where there is genuine ambiguity to the meaning of a provision.

[26] I conclude my analysis by explaining why I reject Purolator's submission that even if s. 102 governed the motion at first instance, CUPW must pursue its appeal under s. 19(1) of the *CJA* because the Orders were made under s. 101.

B. Section 102 of the *CJA* encompasses secondary picketing

[27] The modern principle of statutory interpretation is well-known. The words of a statutory provision must "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at para. 21.

[28] Accordingly, I will begin with a plain reading of s. 102(1), considered within the context of s. 102(2) and the balance of that section. Thereafter, I will consider the legislative intention behind the current wording of s. 102(1). In the final section of this analysis, I will briefly review the limited body of relevant jurisprudence.

[29] For ease of reference, ss. 102(1) and (2) are set out again now.

> (1) In this section, "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.]
>
> (2) Subject to subsection (8), no injunction to restrain a person from an act in connection with a labour dispute shall be granted without notice. [Emphasis added.]

1. A plain reading of s. 102(1)

[30] “Labour dispute” is defined in s. 102(1) as a dispute concerning, among other things, terms of employment “regardless of whether the disputants stand in the proximate relationship of employer and employee” (the “Phrase”). On a plain reading of s. 102(1), therefore, a labour dispute encompasses secondary picketing because the Phrase expressly mandates that it applies “regardless of whether the disputants stand in the proximate relationship of employer and employee”. In short, on a plain reading of s. 102(1), the parties do not need to be in an employer-employee relationship to be involved in a “labour dispute”.

[31] The broad language of s. 102(2) supports this interpretation. The word “person” is used, rather than “employee”. The description of the behaviour which is sought to be enjoined is also broad, “an act in connection with a labour dispute”, and the reference back to “labour dispute”, as I have just explained, encompasses secondary picketing.

[32] The balance of s. 102 sets out very specific procedures for obtaining injunctions in the labour context. These procedures are to be contrasted with the general procedure governed by s. 101, a matter of significance when considered within the legislative history of the Phrase in s. 102(1).

2. The legislative intent behind the Phrase in s. 102(1)

[33] As the following history demonstrates, the Phrase was introduced with the legislative intention of ensuring that a uniform standard applies to all labour-related picketing, whether primary or secondary.

[34] Section 17(1) of the *Judicature Act*, R.S.O. 1960, c. 197, was the predecessor to s. 102(1) of the *CJA*. Section 17(1) defined "labour dispute" as:

> a dispute or difference between an employer and one or more employees as to matters or things affecting or relating to work done or to be done by the employee or employees or as to the terms and conditions of employment or the rights, privileges or duties of the employer or the employee or employees.

[35] It will be readily apparent that the Phrase does not appear in that version of s. 17(1) of the *Judicature Act.* Its addition to s. 17(1) arose as a result of the Rand Report.

[36] In 1966, the Ontario government appointed Justice Ivan C. Rand as Commissioner of the Royal Commission Inquiry into Labour Disputes. The Commission was directed to, among other things, inquire into "the means of enforcement of the rights … of employees and employers … and of trade unions and their members … and the use of … picketing … whether lawful or unlawful, in labour disputes, and to examine the use of procedures for obtaining injunctions in relation thereto": *Report of the Royal Commission Inquiry into Labour Disputes,* (Toronto: Frank Fogg Queen's Printer, 1968), at p. 15.

[37] The Rand Report raised concern about *ex parte* injunctions in the labour context. It made recommendations about the procedures that should be followed for obtaining injunctions in labour disputes. Without distinguishing between primary and secondary picketing, the Rand Report concluded that picketing as a means of obtaining or communicating information is lawful and, therefore, injunctions restraining picketing should be permitted only on notice, except in cases of emergency.

[38] Bill 177 led to the *Judicature Act* being amended in 1970 to incorporate the Rand Report recommendations. It was at that time that the definition of "labour dispute" was amended to include the Phrase. Following the amendment, s. 17(1) read as follows:

> 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.]

[39] The explanatory notes to Bill 177 set out the legislative intent to treat all labour disputes uniformly with respect to injunctive relief:

> This definition of labour dispute has been expanded to include disputes and differences in a labour context whether or not there is an actual employer-employee relationship existing between the contestants … The enlarged definition provides a uniformity of procedure for obtaining injunctive relief in all labour disputes (RG 4-2, *Explanatory Notes – The Judicature Amendment Act, 1970*, p. 1).

[40] In 1984, the *CJA* replaced the *Judicature Act*, including its amended definition of “labour dispute”.

[41] This legislative history of s. 102 of the *CJA* reveals that the legislature intentionally broadened the definition of “labour dispute” to ensure a uniformity of procedure for obtaining injunctive relief and limit *ex parte* injunctions in the labour context. The wording of s. 102 itself, the explanatory notes, and the Rand Report do not distinguish between primary and secondary picketing nor does s. 102 impose restrictions based on location of the picketing.

[42] On a plain reading of s. 102(1), with due regard for its purpose and context, it is clear that it governed Purolator’s injunction motion and the motion judge erred in finding otherwise.

3. Relevant caselaw

[43] This court has not before ruled on the applicability of s. 102 to secondary picketing. However, a consideration of the Supreme Court’s reasoning in *Pepsi-Cola* offers support for the interpretation advanced above, namely, that s. 102 encompasses secondary picketing. Caselaw from the Superior Court of Justice following *Pepsi-Cola* also lends support to that interpretation.

[44] In *Pepsi-Cola*, the Court addressed the legality of secondary picketing at common law. It concluded that secondary picketing is generally lawful unless it involves tortious or criminal behaviour. The Court acknowledged that picketing in

a democratic society engages distinct and frequently conflicting interests among the parties affected by a labour dispute, noting the clash between the right of unions to freely express their views on the conditions of their employment and the resulting potential for economic damage to third parties: at para. 46.

[45] After canvassing the interests at stake and the conflicting approaches the law had adopted to reconcile them in the context of secondary picketing, the Court concluded that the “wrongful action model” was the best approach for balancing the various interests in a way that conformed to the fundamental rights reflected in the *Charter*: at para. 74. Under the wrongful action model, as noted, secondary picketing is permitted except where it involves tortious or criminal action.

[46] In arriving at this conclusion, the Court rejected earlier decisions that started from the proposition that secondary picketing is *per se* unlawful, regardless of its character or impact. Such an approach, the Court stated, runs counter to the *Charter* values which hold that intrusions on free expression are permitted only to the extent that they are justified: at para. 68. Further, that outdated approach cast the economic protection of third parties from the effects of labour disputes as the pre-eminent concern of the law, regardless of the resulting incursion on free expression: at para. 71. Protection from economic harm is an important value capable of justifying limitations on freedom of expression but cannot be accorded pre-eminent importance over all other values, including free expression: at para. 72. The wrongful action approach focuses on the character and effects of the

activity, as opposed to its location, and gets at the heart of why the courts may limit picketing: at para. 76.

[47] The Court's statement at para. 79 of *Pepsi-Cola* is of particular importance on this Motion. There, the Court flatly rejects the distinction between primary and secondary picketing, noting that it is "a difficult and arbitrary distinction that deserves to be abandoned".

[48] Following *Pepsi-Cola*, in several first instance decisions, the Ontario courts found that secondary picketing is a "labour dispute" and, therefore, s. 102 of the *CJA* applies to motions for interim injunctions brought to restrain such picketing. See, for example, *Ontario Power Generation Inc. v. Society of Energy Professionals,* [2005] O.J. No. 3822 (Ont. S.C.), at para. 1; *Georgian Downs Limited v. Ontario Harness Horse Racing Association,* 2007 CanLII 1341 (Ont. S.C.), at para. 8; and *AirTime Express Inc. v. Teamsters Local Union No. 419*, 2017 ONSC 5401, at paras. 26-27. However, in *Canadian Pacific Railway Company v. Gill et al.,* 2013 ONSC 256, at para. 19, the court held that s. 102 did not apply to a case of secondary picketing because "there was no labour dispute between the parties". For the reasons already given, in light of the expanded definition of "labour dispute" in s. 102, I reject that reasoning.

[49] For the sake of completeness, I note that in *Southern Sanitation Inc (Wasteco) v. Fiore,* 2009 CanLII 35724 (Ont. S.C.), at para. 34, the court found it

unnecessary to decide whether secondary picketing was “in connection with a labour dispute”. Further, while the court in *Metro Ontario Inc. v. Teamsters Local 938,* [2019] O.J. No. 2060, considered the reasoning in *Pepsi-Cola* at length, it did not squarely address whether s. 101 or s. 102 governed the motion for an interim injunction to restrain secondary picketing.

[50] Purolator relies on a single judge motion decision of this court by Grange J.A. in *Stamos v. Belanger*, [1994] O.J. No. 2780 (Ont. C.A.), as support for its position that it was open to the motion judge to make the Orders pursuant to s. 101 of the *CJA.* In my view, that reliance is misplaced for three reasons.

[51] First, *Stamos* is factually not on point: (1) the parties were not in a labour dispute because the dispute was between an international union and a local chapter of that union; (2) the dispute did not involve workers’ terms of employment; and (3) there was no picketing. In the present case, there was a labour dispute, it did involve the terms of employment of the CUPW members, and there was picketing.

[52] Second, *Stamos* predates *Pepsi-Cola,* in which, as has been noted, the Supreme Court rejected the distinction between primary and secondary picketing.

[53] Third, in his reasons, Grange J.A. makes comments directly contrary to Purolator’s position on this Motion. At p. 4, Grange J.A. discusses s. 102 and states: (1) “to be a labour dispute, there need not be a direct relationship of

employer and employee between the parties" (emphasis added); and (2) s. 102 is "mainly concerned with picketing and in that regard mainly secondary picketing, which of course did not involve a direct relationship of employer and employee".

[54] I do not find the other cases on which Purolator relies of assistance because they pre-date *Pepsi-Cola* and its abolition of the distinction between primary and secondary picketing.

[55] The motion judge relied on *Maple Leaf Sports* for his assertion that it was settled law that secondary picketing was not picketing in relation to a labour dispute and, therefore, the motion for the injunction before him was governed by s. 101 of the *CJA*. *Maple Leaf Sports* is a first instance decision rendered before *Pepsi-Cola* was decided. In my view, *Maple Leaf Sports* is unpersuasive because it is inconsistent both with the wording of s. 102(1) and the dictates of *Pepsi-Cola* which, as noted, abolishes the distinction between primary and secondary picketing.

C. CUPW's appeal lies to this court

[56] Purolator submits that even if s. 102 governed the motion at first instance, CUPW must pursue its appeal under s. 19(1) of the *CJA* because the motion judge made the Orders pursuant to s. 101 of the *CJA*. I reject that submission. Treating the motion judge's reasons as dispositive of the court's jurisdiction offends the

principle that jurisdiction exists independently of any assumption of jurisdiction below.

[57] Jurisdiction is fundamental to a court's authority to deal with a matter. It is not optional, cannot be conferred by consent, cured by attornment, or assumed voluntarily just because there is an interesting and significant issue to be considered: *J. N. v. Durham Regional Police Service,* 2012 ONCA 428, 284 C.C.C. (3d) 500, at para. 25. This court has held repeatedly, when deciding motions to quash based on an alleged lack of jurisdiction, that it cannot engage in a superficial review of the orders under appeal. Rather, it must focus on the nature and substance of those orders: *Paulpillai Estate v. Yusef*, 2020 ONCA 655, at para. 16, citing *Prescott & Russell (United Counties) v. David S. Laflamme Constructions Inc.,* 2018 ONCA 495, 142 O.R. (3d) 317, at para. 7. In short, the jurisdiction of this court is "governed by the substance of the order made": *Arcamm Electrical Services Ltd. v. Avison Young Real Estate Management Services LP,* 2024 ONCA 251, at para. 14, relying on *Dal Bianco v. Deem Management Services Limited*, 2020 ONCA 585, 82 C.B.R. (6th) 161, at para. 11, citing *RREF II BHB IV Portofino, LLC v. Portofino Corporation,* 2015 ONCA 906, 33 C.B.R. (6th) 9, at para. 12.

[58] The fact the motion judge decided the injunction motions under s. 101 does not alter the substance of the Orders. The substance of the Orders is to enjoin secondary picketing in a labour dispute. CUPW and its members were engaged in a lawful strike relating to working conditions at Canada Post. As part of the lawful

strike, CUPW engaged in secondary picketing at the Purolator Facility. Purolator is a related entity that was providing competing services. Because Purolator sought to enjoin the secondary picketing, s. 102 governed its motion for an interim injunction and CUPW's appeal of the Orders lies to this court, pursuant to s. 102(10) of the *CJA*.

[59] In conclusion, while the motion judge erroneously decided the motion under s. 101 of the *CJA*, that jurisdictional error should not, and does not, define the route by which the appeal should be decided.

VII. Disposition

[60] For these reasons, I would dismiss the Motion with costs to CUPW fixed at $18,000, all inclusive.

"E.E. Gillese J.A."
"I agree. R. Pomerance J.A."

Gomery J.A. (dissenting):

[61] I have had the benefit of reading my colleague's reasons. With great respect, I do not agree that this court has jurisdiction to hear CUPW's appeal.

[62] It is common ground between us that the appeal route depends on the nature and substance of the order, as held in *Arcamm Electrical Services Ltd. v. Avison Young Real Estate Management Services LP,* 2024 ONCA 251, at para. 14; *Dal Bianco v. Deem Management Services Limited*, 2020 ONCA 585, 82 C.B.R. (6th) 161, at para. 11; and *RREF II BHB IV Portofino, LLC v. Portofino Corporation*, 2015 ONCA 906, 33 C.B.R. (6th) 9, at para. 12. If the motion judge's order is in nature and substance an order made pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, an appeal lies, with leave, exclusively to the Divisional Court, as provided in s. 19(1)(b) of the Act. If it is in nature and substance a s. 102 order, the appellant CUPW can appeal to this court without leave pursuant to s. 102(10).

[63] We disagree, however, on the nature and substance of the order made by the motion judge. In my view, it is clearly an interlocutory injunction order made pursuant to s. 101.

[64] In *Paulpillai Estate v. Yusef*, 2020 ONCA 655, the court affirmed a contextual approach in determining the nature and substance of an order. Citing this court's earlier decision in *Prescott & Russell (United Counties) v. David S. Laflamme*

Construction Inc., 2018 ONCA 495, 142 O.R. (3d) 317, at para. 7, the court held that it should examine not only the terms of the order, but "the motion judge's reasons for the order, the nature of the proceedings giving rise to the order, and other contextual factors that may inform the nature of the order". In *Arcamm Electrical Services*, at para. 15, the court relied on the reasons given for granting an order to inform its determination of the nature and substance of the order. It rejected the moving party's challenge to this court's jurisdiction on the ground that an order was made under the *Construction Act*, R.S.O. 1990, c. C.30, noting that the motion judge had explicitly refused to grant relief under that statute.

[65] Adopting the approach used in *Paulpillai Estate* and *Arcamm Electrical Services*, I conclude that the motion judge's order is, in nature and substance, a s. 101 order. I reach this conclusion primarily based on the motion judge's reasons in response to CUPW's motion to set aside the order after learning that it had been issued *ex parte.* In lengthy endorsements issued on November 30 and December 6, 2024, the motion judge explained why he found that s. 102 did not apply "either by its language or by its purposive application to the facts."[4] He found that Purolator met the test for obtaining an injunction under s. 101 and, after a hearing where CUPW was present, maintained the original *ex parte* order.

[4] *Purolator Inc. v. John Doe et al.*, 2024 ONSC 6812, at para. 32; see also *Purolator Inc. v. John Doe et al.*, 2024 ONSC 6696, at para. 13 ("In my view, section 102 of the *Courts of Justice Act* does not apply because, as noted earlier, there is no labour dispute between Purolator and the picketers").

[66] The very premise of this appeal is that the motion judge erred in this analysis and that he should not have issued orders pursuant to s. 101. This is why CUPW initially filed a notice for leave to appeal to the Divisional Court before filing a notice of appeal to this court. Had the motion judge issued an order pursuant to s. 102, the grounds of appeal advanced by CUPW would be different.

[67] Other contextual factors also support the conclusion that the motion judge's order is, in substance, a s. 101 order. In its notice of motion, Purolator moved for an interlocutory injunction pursuant to s. 101. The notice cited s. 102 in the alternative, but Purolator sought a hearing without notice to CUPW, even though s. 102(6) requires notice absent exceptional circumstances. The motion judge's original order does not refer to s. 101, but it was granted on an *ex parte* basis.[5] This is consistent with a s. 101 order but not a s. 102 order.

[68] My colleague agrees with CUPW that the motion judge erred in granting an order under s. 101 and that Purolator was required to seek an injunction under s. 102. Because she finds that it was open to the motion judge only to make a s. 102 order in the circumstances of this case, she concludes that this court should assume jurisdiction over the appeal on the basis that the order is substantively a s. 102 order.

[5] The motion judge stated he was granting Purolator a "conventional injunction", which he contrasted with "an injunction granted under s. 102".

[69] I disagree. This court's jurisdiction is statutory. Section 102(10) provides that an appeal "from an order under this section lies to the Court of Appeal without leave". This appeal route is only available in respect of an order made under s. 102: *Hordo v. Zweig*, 2021 ONCA 893, at para. 20, leave to appeal refused, [2022] S.C.C.A. No. 218. The motion judge explicitly declined to make such an order.

[70] Moreover, in my view, to the extent that the orders may be enjoining lawful strike activities as opposed to ones not falling within the definition of "labour disputes" in s. 102(1), that is not "the substance" of these orders. It is their practical effect. As this court has repeatedly stated, "the characterization of the order depends upon its legal nature, not its practical effect": *Paulpillai Estate*, at para. 16, citing *Ontario Medical Assn. v. Miller* (1976), 14 O.R. (2d) 468 (C.A.), at p. 470 and *Deltro Group Ltd. v. Potentia Renewables Inc*., 2017 ONCA 784, 139 O.R. (3d) 239, at para. 3; see also *Laurentian Plaza Corp. v. Martin* (1992), 7 O.R. (3d) 111 (C.A.), at p. 116 and *Amphenol Canada Corp. v. Sundaram*, 2019 ONCA 932, at para. 19.

[71] CUPW argues that the motion judge committed a jurisdictional error by granting an order under s. 101 rather than s. 102, and that this jurisdictional error allows this court to hear the appeal because jurisdiction is fundamental to a court or tribunal's authority to deal with a matter. But this court is limited by its own jurisdiction. It cannot cure a potential jurisdictional defect in a lower court's order

in advance of a hearing on the merits by itself assuming jurisdiction it does not have.

[72] In the context of this motion, our task does not extend to determining whether or not the motion judge did commit the alleged jurisdictional error. Such an error of law will be properly before the court presiding over the appeal on its merits. Rather, our task is to determine whether this court lacks jurisdiction over the subject matter of the appeal, as Purolator contends.

[73] The determination of what appeal route applies "does not depend upon whether the decision being appealed from is correct or not. The answer is driven by the nature of the order being appealed from": *Wang v. Canada (Public Safety and Emergency Preparedness)*, 2018 ONCA 605, at para. 12. Whether the decision below "is right or wrong will be the subject of review on appeal": *Wang*, at para. 13.

[74] In sum, the nature and substance of the order under appeal is plainly an injunction granted under s. 101. This court does not have jurisdiction to hear an appeal from such an order, even if the motion judge arguably erred in granting the order under that provision.

[75] I would accordingly grant the motion to quash the appeal, with costs of $18,000 to Purolator.

"S. Gomery J.A."

Released: July 30, 2025 "E.E.G."