CITATION: Evergreen Community (Burlington) Ltd. v. FirstCanada ULC 2024 ONSC 3170
COURT FILE NO.: CV-22-0861-0000
DATE: 2024 06 04

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Evergreen Community (Burlington) Ltd. (Plaintiff/ Moving Party)	Richard Macklin and Meaghan Coker, Counsel for the Plaintiff/ Moving Party, Evergreen Community (Burlington) Ltd.
– and –	
FirstCanada ULC (Defendant/ Respondent)	Rosalind H. Cooper, Counsel for the Defendant/ Respondent, FirstCanada ULC
	HEARD: May 14, 2024

REASONS FOR DECISION- MOTION FOR INJUNCTION

CONLAN J.

[1] Has the Plaintiff/Moving Party, Evergreen Community (Burlington) Ltd. ("Evergreen"), met its burden, on a balance of probabilities, to obtain an order for an injunction against the Defendant/Responding Party, FirstCanada ULC ("FirstCanada")?

[2] Should this Court make an order for inspection under Rule 32.01(1) of the *Rules of Civil Procedure*, allowing Evergreen access to FirstCanada's property to conduct groundwater and soil testing?

[3] I would answer both of those questions in the negative and, consequently, dismiss Evergreen's motion.

I. The Action

[4] Evergreen commenced the action against FirstCanada on May 2, 2022.

[5] In its Amended Statement of Claim dated October 4, 2023, Evergreen seeks, among other relief:

(i) $1,000,000.00 in damages;
(ii) an order "for an interim, interlocutory, and permanent injunction requiring (FirstCanada) to give reasonable access to their property to (Evergreen) for the purpose of investigation and remediation"; and
(iii) an order "for an interim, interlocutory, and permanent injunction requiring (FirstCanada) to remediate their property".

[6] Evergreen is an Ontario corporation primarily engaging in the business of real estate development in the Burlington area. Evergreen owns the property at 5463 Dundas Street and 3232 Tremaine Road in Burlington (the "Evergreen Property"). The Evergreen Property is a large parcel of agricultural land.

[7] A small piece of the Evergreen Property, in the southwest corner, contains a residential dwelling, and that piece of the Evergreen Property adjoins the property owned by FirstCanada (the "FirstCanada Property").

[8] FirstCanada is an Alberta corporation with operations in Ontario. FirstCanada is in the business of transportation and logistics, and it operates a fleet of school buses. The FirstCanada Property, at 5421 Dundas Street in Burlington, immediately adjacent to the small piece of the Evergreen Property identified above, houses a fleet of school buses and supporting structures, including a fuel outlet.

[9] Evergreen alleges that, in or around 2021, it discovered possible signs of environmental contamination near the residential dwelling located at the southwest corner of the Evergreen Property.

[10] Evergreen retained the services of a consulting company, and, according to Evergreen, that consultant later determined that it was likely that the source of the soil and groundwater contamination around the residential dwelling located at the southwest corner of the Evergreen Property was the FirstCanada Property.

[11] Evergreen's action against FirstCanada is framed in nuisance and negligence, and Evergreen relies on the provisions of the *Negligence Act*, R.S.O. 1990, c. N.1 and the *Environmental Protection Act*, R.S.O. 1990, c. E.19.

[12] FirstCanada has defended the action and has a motion for summary judgment pending. That motion, which alleges that Evergreen's claim is statute-barred as having been commenced long after the expiration of the limitation period, is scheduled to be heard on October 7, 2024.

II. The Motion

[13] On May 14, 2024, this Court heard Evergreen's Amended Amended Notice of Motion ("Motion").

[14] Evergreen's Motion, originally dated October 2, 2023, amended on January 26, 2024, and amended further on April 15, 2024, requests, among other things, the following relief:

(i) an "interim or interlocutory injunction restraining (FirstCanada) from polluting and/or releasing contaminants from (the FirstCanada Property) onto (the Evergreen Property)";
(ii) such "corollary, interim or interlocutory relief, including relief under Rule 32 allowing reasonable access to (the FirstCanada Property) to conduct groundwater and soil testing, as may be necessary to fairly enjoin (FirstCanada) from causing environmental damage to (Evergreen)"; and
(iii) an "interim or interlocutory injunction restraining (FirstCanada) from trespassing onto (the Evergreen Property)".

[15] It should be noted that Evergreen's Motion also sought an order granting it leave to amend its Statement of Claim, which has already been done and, thus, does not require a ruling by this Court, and an order granting it leave to file the Affidavit of John Krpan sworn on February 26, 2024.

[16] Mr. Krpan is the senior investment manager of the Krpan Group, and the Krpan Group is Evergreen's project manager. The Affidavit in question is very brief – six paragraphs, 1.5 pages in length, and it deals principally with when Evergreen first discovered the likely source of the ongoing migration of contaminants onto the southwest corner of the Evergreen Property.

[17] This Court grants leave to Evergreen to file that Affidavit, which evidence I have considered. Its filing was not contested by counsel for FirstCanada at the hearing of the matter. Besides, the Affidavit deals mainly with the limitation period issue, and as this Court indicated to counsel during the hearing of the matter, with FirstCanada's motion for summary judgment scheduled to be heard in October 2024, I have no intention of pre-empting that decision by commenting on the said issue herein any more than I strictly have to.

III. The Positions of the Parties

Evergreen

[18] Evergreen takes the position that its one-billion-dollar proposed development in Burlington, which development includes a plan to build some 13000 residential units, is being stalled as a result of the ongoing flow of contamination onto the Evergreen Property from the FirstCanada Property.

[19] Evergreen alleges that there is no question that the contamination is ongoing and is from the FirstCanada Property.

[20] One of two of Evergreen's experts is Patrick Fioravanti of DS Consultants Ltd. ("DS"). Evergreen points to the following evidence of DS, outlined at paragraph 15 of Evergreen's factum dated April 16, 2024, "[i]n the opinion of DS, it is apparent that contamination has migrated from the FirstCanada property…there has been an increasing trend in contaminant concentrations observed within the past two (2) years…[t]his in the opinion of DS is highly suggestive of ongoing contaminant migration from the FirstCanada property".

[21] In terms of its request for injunctive relief, the crucial submission on behalf of Evergreen is that its proposed development requires the issuance of a Record of Site Condition ("RSC") in order to proceed, and, according to DS, Evergreen cannot get the RSC with the ongoing contamination that exists.

[22] At page 35 of its report dated January 26, 2024, DS states the following, "[i]n the professional opinion of DS, the (City of Burlington's) conditions with respect to the land conveyance cannot be met without first addressing the concerns related to LNAPL on the conveyance lands, but also for measures to be implemented to prevent any current and future migration of contaminants from the FirstCanada Property".

[23] In other words, according to Evergreen and its experts, because of the ongoing contamination (the LNAPL – light non-aqueous phase liquids) on or very close to the conveyance lands (a pedestrian pathway and woodlot that Evergreen has committed to grant to the City of Burlington as a condition of approval of Evergreen's development project), Evergreen cannot secure the RSC that is required and, thus, Evergreen cannot proceed with its development.

[24] Evergreen submits that it has met the legal test for an injunction.

[25] On the Rule 32 order for inspection, Evergreen submits that it has met that legal test as well, which test, in its submission, is not an onerous one. There is no prejudice to FirstCanada, Evergreen submits, and the inspection might be relevant to the upcoming motion for summary judgment brought by FirstCanada in that Evergreen intends to respond to that motion by arguing that the limitation period issue is not a bar to its action because this is a continuing tort that is being committed by FirstCanada. The testing on the FirstCanada Property that Evergreen seeks as part of the order for inspection will support that argument about a continuing tort, Evergreen submits.

FirstCanada

[26] FirstCanada takes the position that Evergreen's request for a Rule 32 order for inspection should not be considered by this Court because that request was made as an afterthought and has prejudiced FirstCanada in that the request was made only after FirstCanada filed its Responding Motion Record. Why was the request not made in Evergreen's original Notice of Motion, asks counsel for FirstCanada, particularly when Evergreen states that it, commencing long ago, has repeatedly asked FirstCanada for access to the FirstCanada Property, which repeated requests have been denied by FirstCanada.

[27] FirstCanada submits that all of Evergreen's submissions on the Rule 32 order for inspection issue run contrary to Evergreen's argument that it has met the test for an injunction. For example, counsel for FirstCanada points out that counsel for Evergreen, in oral submissions at the hearing of the matter, stated that "the data sought is necessary" and "we are hamstrung without the data sought", which comments beg the question as to how Evergreen can succeed on its request for an injunction when it, by its own admission, requires more evidence.

[28] On the matter of the injunction, FirstCanada acknowledges that the source of the contamination in question was an underground storage container located on the FirstCanada Property.

[29] FirstCanada submits, however, the following:

(i) Evergreen does not come to this Court with clean hands in that it has known about the contamination since 2007 but did nothing for 15 years, until 2022, and now treats the matter as being terribly urgent, which it is not;
(ii) Evergreen and its experts do not properly understand the difference between a RSC and a Risk Assessment, and that lack of understanding has contributed to Evergreen's misplaced assertion that the development cannot proceed because of the contamination that exists;
(iii) FirstCanada's expert evidence, that from Thomas Guoth and Matthew Rousseau of GHD Limited ("GHD"), for many reasons, ought to be preferred over that of DS, and Mr. Guoth has clearly stated that a Risk Assessment could be obtained by Evergreen without difficulty, and a RSC filed, allowing Evergreen's development to proceed, subject to meeting any other conditions that it has to meet (see, in particular, paragraphs 27-29 of the factum filed on behalf of FirstCanada, and the evidence cited therein);
(iv) Evergreen has failed to properly identify what type of injunction it is seeking; what it is asking for must be characterized as a mandatory injunction, and Evergreen has not met the strict test for such an injunction; and

(v) In addition, Evergreen has failed to plead what specifically it wants FirstCanada to be ordered to do, and that is fatal to Evergreen's request for a mandatory injunction.

[30] On the issue of whether the contamination from the FirstCanada Property is "continuing", FirstCanada highlights Mr. Guoth's expert opinion that "it is very unlikely that LNAPL/free product could be currently migrating from (the FirstCanada Property) to (the Evergreen Property) – paragraph 20 of the factum filed on behalf of FirstCanada, referencing paragraphs 35-36 of Mr. Guoth's Affidavit sworn on December 20, 2023.

IV. The Law

A. Order for Inspection

[31] The statutory authority for making an order for inspection is found in Rule 32 of the *Rules of Civil Procedure*. Subrules 32.01(1) through (4) are set out below.

> 32.01 (1) The court may make an order for the inspection of real or personal property where it appears to be necessary for the proper determination of an issue in a proceeding. R.R.O. 1990, Reg. 194, r. 32.01 (1).
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> (2) For the purpose of the inspection, the court may,
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> (a) authorize entry on or into and the taking of temporary possession of any property in the possession of a party or of a person not a party;
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> (b) permit the measuring, surveying or photographing of the property in question, or of any particular object or operation on the property; and
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> (c) permit the taking of samples, the making of observations or the conducting of tests or experiments. R.R.O. 1990, Reg. 194, r. 32.01 (2).
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> (3) The order shall specify the time, place and manner of the inspection and may impose such other terms, including the payment of compensation, as are just. R.R.O. 1990, Reg. 194, r. 32.01 (3).
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> (4) No order for inspection shall be made without notice to the person in possession of the property unless,
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> (a) service of notice, or the delay necessary to serve notice, might entail serious consequences to the moving party; or

(b) the court dispenses with service of notice for any other sufficient reason. R.R.O. 1990, Reg. 194, r. 32.01 (4).

[32] I agree with Evergreen that the decision of Goldstein J. in *Metrus Properties 2004 Limited Partnership v. Wrigley Canada Inc.*, 2016 ONSC 2881 (S.C.J.) is instructive.

[33] The background of that case was described by Justice Goldstein, at paragraphs 1-4 of the decision, as follows.

> [1] Metrus and Wrigley are next-door neighbours in Toronto. Metrus's address is 1121 Leslie Street. Wrigley's address is 1123 Leslie Street. Wrigley has made chewing gum there since 1959. Metrus purchased the Metrus Property (as I will refer to it) in 2005 from Sony Music Canada and leased it back to Sony. Sony carried out extensive environmental testing and remediation of the Metrus Property after it surrendered it back in 2011 as part of the terms of its lease.
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> [2] In 2011 Metrus discovered the extent of the contamination of the Metrus Property as a result of the testing and remediation. In 2013 Metrus sued Sony over its failure to properly remediate. In 2014 Metrus also sued Wrigley, alleging that hazardous waste had seeped onto the Metrus Property from what I will refer to as the Wrigley Property. In early 2016 Wrigley asked for permission to enter the Metrus Property to conduct its own testing. Metrus refused.
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> [3] In March of this year Metrus began to excavate and demolish the property in anticipation of preparing it for sale, rent, or development. Wrigley, fearing that it would lose an opportunity to do its own testing, asked Metrus to stop. Metrus refused. Wrigley now asks for an interim injunction, a preservation order, and an inspection order so it can carry out its own testing. Metrus argues that Wrigley can use the samples taken as part of Sony's remediation project. Wrigley, not surprisingly, wants to employ its own consultant and take its own samples.
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> [4] In my view, Wrigley should have the opportunity to test. For the reasons that follow, I grant the interim injunction and order that testing be permitted pursuant to Rule 32.

[34] In terms of the legal test for obtaining an order for inspection, I agree with the following comments of Justice Goldstein found at paragraphs 28-33 of the decision.

> [28] The court may order an inspection of real or personal property pursuant to Rule 32.01 of the Rules of Civil Procedure "where it appears necessary for the proper determination of an issue."

[29] Mr. Winton, for Metrus, argues forcefully that nowhere in the Golder proposal is there to be found an opinion that the inspection is necessary. He says that this is a glaring omission. He says that I should draw an adverse inference against Wrigley on the issue of necessity and therefore dismiss the motion on that basis alone: *Boehringer Ingelheim Canada Ltd. v. Pharmacia Canada Inc*, 2004 CanLII 28573 (ON SCDC), 2004 CanLII28573 (Ont.Div.Ct) at para. 22, citing with approval from Sopinka and Lederman, *The Law of Evidence in Canada*.

[30] I must respectfully disagree. I see nothing in the authorities requiring an expert opinion on the issue of necessity. Necessity simply means "useful" or "probative of an issue": *Brick Warehouse Inc. v. B. Gottardo Construction Ltd.*, 2011 ONSC 5933 at paras. 17-18.

[31] Necessity is something that can be inferred from the materials, or even the pleadings. In my view, Metrus's allegation alone that the VOCs seeped from the Wrigley Property to the Metrus property is enough to establish necessity. Rule 32 should be applied liberally, without reference to the balance of convenience: *Farhi v. Wright*, 1987 CarswellOnt 569, [1987] O.J. 1241, 26 C.P.C. (2d) 88 at para. 22 (Ont.H.C.). As long as there is a reasonable possibility that the inspection will reveal something useful to a trier of fact the inspection should be ordered: *I.C.R. General Contractors Ltd. v. Broadview Developments Ltd.*, 2011 NBQB 20.

[32] In any event, it is abundantly clear that the Golder proposal assumes that the proposed groundwater flow testing must be done on both sides of the property line between the Metrus Property and the Wrigley Property – which is, to my mind, an obvious assertion of necessity.

[33] The purpose of Rule 32 is to give an opposing party an opportunity for conducting an inspection in order to relieve him or her from the necessity of being entirely dependent on the other side's evidence: *Donnelly v. Fraleigh*, 2001 CarswellOnt 2381, [2001] O.J. No. 2731, 9 C.P.C. (5th) 271 (Sup.Ct).

B. Order for Injunction

Statutory Authority

[35] The statutory authority for making an order for an injunction is set out in section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Subsections 101(1) and (2) are set out below.

Injunctions and receivers

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. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

Key Principles Related to Injunctions

[36] The decision of the Court of Appeal for Ontario in *1711811 Ontario Ltd. (AdLine) v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125, should be the starting point in terms of gaining a proper appreciation of the key legal principles related to injunctions.

[37] Paragraphs 49-52 and 56-59 of the decision authored by Gillese J.A. are, in my opinion, required reading for anyone confronted with a request for injunctive relief. Note, specifically, Justice Gillese's comments about the unique nature of a mandatory injunction, which is "rarely ordered" (paragraph 57).

> [49] Various types of injunctive relief have been sought or ordered in this proceeding: interim, interlocutory, mandatory and permanent. What do each of those terms mean and how do they differ from one another?
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> [50] Let us first consider interim and interlocutory injunctions. While motions for pre-trial injunctive relief often term the relief that is sought as both interim and interlocutory, some distinctions can be drawn between the two.
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> [51] A motion for an interim injunction can be made *ex parte* or on notice. Argument on the motion is generally quite limited and, if an order is made for interim injunctive relief, the order is typically for a brief, specified period of time: see Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Toronto: Canada Law Book, 2013), at para. 2.15. If an interim injunction is granted on an *ex parte* basis, the moving party must normally bring a further motion to have the interim injunction continued.
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> [52] An interlocutory injunction, like an interim injunction, is a pre-trial form of relief. It is an order restraining the defendant for a limited period, such as until trial or other disposition of the action: see Sharpe, at para. 2.15. Interlocutory injunctive relief typically follows much more thorough argument than that for an interim injunction, by both parties, and is generally for a longer duration than an interim injunction.
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> …
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> [56] The next useful distinction to be drawn is between interlocutory and permanent injunctions. Interlocutory injunctions are imposed in ongoing cases whereas permanent injunctions are granted after a final adjudication of rights: see Sharpe, at para. 1.40, citing *Liu v. Matrikon Inc.*, 2007 ABCA 310, 422 A.R. 165, at

para. 26. As will be seen, this conceptual distinction features prominently in the present case, where a key issue is whether the court must apply a different test for permanent injunctions than for interlocutory injunctions.

[57] It is also important to distinguish between mandatory and permanent injunctions. A mandatory injunction is one that requires the defendant to act positively. It may require the defendant to take certain steps to repair the situation consistent with the plaintiff's rights, or it may require the defendant to carry out an unperformed duty to act in the future: see Sharpe, at para. 1.10. Mandatory injunctions are rarely ordered and must be contrasted with the usual type of injunctive relief, which prohibits certain specified acts.

[58] Because of their very nature, mandatory injunctions are often permanent. However, permanent injunctions are not necessarily mandatory. An example illustrates this point. If, after trial, a court orders that a defendant can never build on a right of way, it will have made a permanent order enjoining the defendant from building on the right of way. But, the injunction would not be mandatory because it does not require the defendant to perform a positive act.

[59] In short, the words "mandatory" and "permanent" are not synonymous, especially in the context of injunctive relief.

The Three-Part Test for Injunctive Relief

[38] A serious issue to be tried, or a strong *prima facie* case, irreparable harm, and balance of convenience – that three-part test for an injunction, which test must be satisfied by the moving party on the civil standard of a balance of probabilities, is well-established.

A Different, Stricter Test for a Mandatory Injunction

[39] Where the moving party is requesting what is properly characterized as being a mandatory injunction, the test is a particularly strict one.

[40] While the first criterion developed in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 (S.C.C.) normally asks whether there is a serious issue to be tried, for a mandatory injunction the question becomes whether the moving party has shown a strong *prima facie* case. What that means, and why that is, and what makes something a mandatory injunction was described by Justice Brown of the Supreme Court of Canada in *R. v. Canadian Broadcasting*

Corporation, [2018] 1 S.C.R. 196, 2018 SCC 5, at paragraphs 15-18, reproduced below.

> [15] In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR — MacDonald* test is *not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel.[25] Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial".[26] The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR — MacDonald* as "extensive review of the merits" at the interlocutory stage.[27]
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> [16] A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory injunctions.[28] While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR — MacDonald* test, I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take . . . positive actions".[29] For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the . . . injunction are likely to be".[30] In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from doing* something.
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> [17] This brings me to just what is entailed by showing a "strong *prima facie* case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success";[31] a "strong and clear" or "unusually strong and clear" case;[32] that he or she is "clearly right" or "clearly in the right";[33] that he or she enjoys a "high probability" or "great likelihood of success";[34] a "high degree

> of assurance" of success;[35] a "significant prospect" of success;[36] or "almost certain" success.[37] Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.
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> [18] In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR — MacDonald* test, which proceeds as follows:
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> (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
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> (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
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> (3) The applicant must show that the balance of convenience favours granting the injunction.

Even a Prohibitive Injunction is an "Extraordinary Remedy"

[41] In *Metrus Properties, supra*, Justice Goldstein's analysis of the first criterion of the test for an injunction, at paragraphs 38 and following of the decision, specifically His Honour's remark that "[i]t is enough that the claim is not frivolous and vexatious" (paragraph 38), was made in the context of a prohibitive (not a mandatory) injunction.

[42] Still, Justice Goldstein, at paragraph 55 in *Metrus Properties, supra*, labelled the (non-mandatory) injunction sought in that case as being "a drastic and extraordinary remedy".

In Assessing the Type of Injunction, Contractual Relations Matter

[43] Where, in granting the injunction, the court is merely enforcing a right created by the parties themselves, the order made may not properly be considered to be

a mandatory injunction. In *TDL Group Ltd. v. 1060284 Ontario Ltd.*, [2001] O.J. No. 3614, the Divisional Court put it this way, at paragraph 9 of its decision.

> 9. In prohibiting the franchiser from taking steps to evict the defendants or interfering with the ordinary course of the business, the court is enforcing is enforcing a right created by the parties. An order preventing the denial of a right previously agreed to is very different from an order establishing a new right never agreed to and requiring a party to act accordingly. In our view, this order was not a mandatory injunction. Its essence is the prohibition of what is alleged to be a breach of contract. The one effect of this is to require both parties to act in accordance with their contract while the dispute is being tried, does not change the essence of the matter. It follows, therefore, that Mesbur J. committed no error in applying the R.J.R.- MacDonald test.

[44] Also in the context of contractual relations, in *Ryerson Students' Union v. Ryerson University*, 149 O.R. (3d) 534 (S.C.J.), Justice Koehnen stated the following at paragraphs 29 and 39 of the decision.

> [29] RSU relies on a line of cases which holds that an injunction that prevents a breach of contract or prevents the denial of a previously agreed to right is prohibitory, while an injunction that establishes a new right not previously agreed to is mandatory: *TDL Group Ltd. v. 1060284 Ontario Ltd*., [2001] O.J. No. 3614, [page540] 150 O.A.C. 354 (Div. Ct.), at para. 9; *MacRae v. Woermke*, [2019] B.C.J. No. 1975, 2019 BCCA 355, at para. 16.
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> …
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> [39] In my view, the policy concerns underlying the different tests for mandatory and prohibitive injunctions militate towards a finding that this is a prohibitive injunction. By definition, many prohibitive injunctions will have some mandatory consequences. An injunction to restrain termination of a contract that has not yet been terminated by definition obliges the contracting party to engage in mandatory actions of contractual performance. Con-tinued contractual performance does not impose any new rights or obligations. It merely continues a *status quo* to which the party has already agreed.

Third-Party Interests

[45] On the second factor of the test for an injunction, irreparable harm, the interests of the broader audience are not to be considered. Rather, those third-party interests are considered at the balance of convenience stage of the analysis.

Cardinal v. Cleveland Indians Baseball Company Limited Partnership, 2016 ONSC 6929 (S.C.J.), a decision of Justice McEwen, at paragraph 71.

[46] In the same vein, in *Cargill Limited v. Igor Makarenko, et al*, 2009 SKQB 235, at paragraph 29, Mills J. of what is now the Court of King's Bench for Saskatchewan stated as follows.

> [29] The balance of convenience is not restricted to the parties themselves. Although *RJR-MacDonald* speaks of balance of convenience between the parties, that is a constitutional case involving the public interest. There is little case law on the issue of whether third party interests are to be considered in private matters such as the litigation between these two corporations. In Saskatchewan, *Moss v. Transcanada Pipelines Ltd.*, 1999 SKQB 118, 185 Sask. R. 319, a decision of Dielschneider J., assessed the issue of balance of convenience and determined that an injunction restraining Transcanada from work on its natural gas transmission line would shut down the transmission of natural gas from Western Canada to Eastern Canada and the United States. The potential harm to that large population was the deciding factor in assessing balance of convenience. In this case, third party interests are significant. The construction workers, the material suppliers and the farmers all will suffer damage in the event that the plant is not completed or is delayed in its construction. When taking into account these third party interests, the balance of convenience again favors an order that will allow continued completion of the Louis Dreyfus plant. The contrasting view is that third party interests in this situation are not to be considered (see *Columbia National Investments Ltd. v. Abbotsford (City),* 2007 BCSC 386, [2007] B.C.J. No. 590 (QL); *Northwest Territories v. Sirius Diamonds Ltd.*, 2001 FCT 702, 3 C.P.R. (4th) 486), although that approach has not been followed in Saskatchewan.

[47] In our case, Evergreen places emphasis on the interests of the public in the Burlington area and what this development going forward will mean for them.

The Balance of Convenience – Again, Contractual Relations Matter

[48] At the third stage of the test for an injunction, balance of convenience, an order that merely preserves the contractual status quo may be seen as tipping the scale in favour of granting the injunction. Justice Molloy stated the following at paragraph 25 of Her Honour's decision in *Arrowsmith Program Inc. v. Wasdell Centre for Innovative Learning, et al*, 2005 CanLII 21113 (ON SC).

> [25] In my opinion, the balance of convenience favours granting the injunction sought. If the injunction is not granted, there will be irreparable harm both to the defendants and to third parties. Further, those third parties who would be harmed are children with disabilities, one of the most vulnerable and disadvantaged groups in our society. If the injunction is granted, the status quo will merely be preserved, and the parties will continue under the agreement as they contemplated in February 2005 when the contract was renewed for the coming school year. All of the rights of the parties under the agreement will continue, except that the plaintiff is not entitled to terminate the agreement for 2005/2006 on the basis asserted in its notice of termination in April, 2005. Arrowsmith will receive the usual revenue for students enrolled in its program. If the other programs offered by Wasdell are an infringement of any rights held by Arrowsmith, damages will be an adequate remedy.

Overall, Specificity is a part of the General Guidelines for Equitable Orders, including Injunctions

[49] Equitable orders, including injunctions, are crafted in accordance with the specific circumstances of each case. Because of the claimant's ability to follow-up non-performance with something as serious as a contempt of court proceeding, specificity in the order itself is imperative. The terms of the order must be clear. They must be specific. They must delineate exactly what has to be done to comply with the order. *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52 (CanLII), [2006] 2 S.C.R. 612 (S.C.C.), at paragraphs 23-24 of the majority opinion per Deschamps J.

V. The Legal Principles Applied

A. Order for Inspection

[50] On the evidence filed, I would have granted the order for inspection as I would have held that Evergreen had satisfied the test as set out by Justice Goldstein in *Metrus Properties, supra*, which articulated test I agree with.

[51] This Court cannot reasonably grant the order, however, because of the following.

[52] First, it would be procedurally unfair to FirstCanada to make a substantive order in the absence of any opportunity for FirstCanada to file evidence pertaining to the matter. Evergreen's Motion was amended to seek the Rule 32 order in mid-April 2024, just one month before the hearing and well after FirstCanada had filed its evidence as contained in its Responding Motion Record dated December 21, 2023.

[53] Second, there is no explanation offered on behalf of Evergreen as to why it did not include that relief in its original Notice of Motion, or even in the first amendment thereto, especially given Evergreen's complaint that FirstCanada has obstructed its requests for reasonable access to the FirstCanada Property for testing purposes for a long time now (since well before October 2, 2023, the date of the original Notice of Motion).

[54] Third, one could safely presume that FirstCanada could, and would, have offered evidence against the order for inspection sought. This is a relatively intrusive order being requested by Evergreen, relief that FirstCanada has steadfastly opposed ever since it was served with the Statement of Claim more than two years ago.

[55] Fourth, I respectfully disagree with counsel for Evergreen that the Rule 32 request is simply further particularization of what was already contained in the original Notice of Motion, in terms of relief that is corollary to the request for an injunction, and thus there is no prejudice to FirstCanada. With respect, I fail to see how an order granting Evergreen and its experts access to FirstCanada's Property for independent testing purposes is a necessary corollary to an order that enjoins FirstCanada from spilling contaminants onto the Evergreen Property.

[56] Fifth and finally, respectfully, I do not understand Evergreen's implied submission that for the Court to deny the order for inspection may deprive the

parties and the judge hearing the upcoming summary judgment motion brought by FirstCanada of potentially important evidence. There is nothing before this Court to suggest that the order for inspection would result in any test results being obtained by October 7th. Besides, Evergreen's materials before this Court make it clear that it thinks that it already has the evidence to support its argument that the tort allegedly committed by FirstCanada was continuing as of May 2022, when Evergreen commenced the action against FirstCanada. That is the key argument on the limitation period issue that is the subject of the motion for summary judgment – not whether the contamination is continuing today.

[57] In summary, an order for inspection is a significant legal remedy. The test for obtaining such an order is not particularly onerous, but its significance is made clear by (a) the wording of subrule 32.01(1) itself, "necessary for the proper determination of an issue", and (b) the fact that subrule 32.01(3) makes it a requirement for the court to specify the time, place, and manner of the inspection, and (c) the fact that the court may also order compensation in favour of the owner of the subject property, and (d) the fact that proper service of a motion for inspection is mandatory except in very limited circumstances. In the circumstances of this case, any probative value of such an order, which I think is minimal in terms of the upcoming motion for summary judgment, is outweighed by the prejudice and unfairness to FirstCanada in making the order on a late-breaking amendment to the relief sought and on a one-sided evidentiary record.

B. Order for Injunction

Evergreen's Theory of the Motion is not Persuasive

[58] In my opinion, in summary, (i) what Evergreen seeks, at this interlocutory stage of the proceeding, is a mandatory injunction, and (ii) Evergreen has not met the test for such an injunction.

[59] I do not accept the penultimate theory of Evergreen that its proposed development has been precluded from proceeding because of the contamination. That is the opening salvo in the factum filed on behalf of Evergreen, and it was the crux of the oral submissions at the hearing made by counsel for Evergreen.

[60] On this point, I prefer the evidence of GHD over that of DS. A review of the credentials and experience of the competing experts suggests that Mr. Guoth, in particular, one of FirstCanada's two experts, is in an unparalleled position to opine on whether the Ontario Ministry of the Environment, Conservation and Parks ("Ministry"), which is the entity that will make the key decision on whether to accept the RSC or Risk Assessment submitted on behalf of Evergreen and thereby give the green light for the proposed development to proceed, is likely to give that green light.

[61] Why is Mr. Guoth uniquely positioned to give that opinion? Because that is what he does. Unlike DS, Mr. Guoth actually conducts peer reviews for risk assessments submitted to the Ministry. He, personally, for about 5.5 years now, has been a peer reviewer for such risk assessments. I cannot think of anyone better positioned to say whether Evergreen can get what it needs or not.

[62] A Risk Assessment is not the same thing as a RSC. The latter depends on the site being clean, while the former does not. The former can be pursued with contamination existing on the subject property. None of that is in dispute.

[63] It is my respectful view that the most authoritative and compelling expert opinion in all of the evidence filed, on the specific question of whether a Risk Assessment can proceed and a RSC obtained for Evergreen's Property, even assuming the existence currently of LNAPL/free product contamination on a small piece of the Evergreen Property, is that of Mr. Guoth in his Affidavit sworn on December 20, 2023, at paragraphs 40-50 therein.

[64] Based on that evidence, this Court cannot make a finding of fact that the proposed development could proceed but for the contamination, as suggested by Evergreen. Consequently, I reject the argument on behalf of Evergreen that the injunctive relief sought should be granted because, otherwise, the proposed development will remain stalled.

This Case is all about a **Mandatory** Injunction

[65] I find that Evergreen has failed to recognize that it is seeking a mandatory injunction.

[66] Although Evergreen has not been at all specific, in any of its materials filed, as to what it wants this Court to order FirstCanada to do, which itself is directly contrary to *Pro Swing, supra* and works against the granting of an injunction in this case, clearly the only way in which FirstCanada could comply with an order to stop any contaminants from going from the FirstCanada Property to the Evergreen Property is to do something positive. Something substantial, in fact. Something concrete.

[67] One would reasonably think that positive action might include digging up the ground and searching for and removing any remnants of that underground storage tank and apparatus and/or creating some underground artificial barrier between the two properties, as examples.

[68] Hence, it is the stricter test as set out in *Canadian Broadcasting Corporation, supra* that Evergreen must meet in our case. On the first criterion, Evergreen must demonstrate on a balance of probabilities that it has a strong *prima facie* case.

This is Not a Strong *Prima Facie* Case for Evergreen

[69] As stated previously in these reasons, I find that Evergreen has not met the test for a mandatory injunction.

[70] On the first branch of the test, is there a strong likelihood, on the law and the evidence presented, that, at trial, Evergreen will succeed? With respect, I would answer that question in the negative.

[71] There is an arguable limitation period issue that could result in the action being dismissed. Further, there is a debate among the experts as to whether contamination from the FirstCanada Property has continued to migrate onto the Evergreen Property (the opinion per DS) or, rather, ceased any such migration many years ago, likely not long after the underground storage tank was decommissioned and removed sometime prior to 1991-1992 (the opinion per GHD), which was well before FirstCanada even acquired the lands.

[72] On the record before this Court, I am unable to resolve the debate among the experts in favour of Evergreen.

[73] Remember, this case has nothing to do with any contractual relations between the parties. This case is very different, factually, than what was before the learned justices in the *TDL Group*, *supra*, *Ryerson Students, supra*, and *Arrowsmith Program, supra* cases referred to above in these reasons.

[74] In our case, there is no policy reason for discouraging the employment of the stricter test for a mandatory injunction as set out by Justice Brown in the *Canadian Broadcasting Corporation, supra* decision. Further, in our case, there is no tipping of the scale in favour of granting the injunction, on the balance of convenience criterion, on the basis that to do so is simply preserving the contractual status quo.

[75] In conclusion, the first branch of the test for an injunction runs against Evergreen.

Irreparable Harm has Not been Demonstrated by Evergreen

[76] In addition to not satisfying the first branch of the test for the mandatory injunction that it seeks, I find that Evergreen has failed to meet the second criterion – that it will suffer irreparable harm if the order sought is not granted.

[77] DS has opined that the available data is “highly suggestive” that there is ongoing (current) migration of contaminants from the FirstCanada Property to the Evergreen Property, while GHD has opined that it is “very unlikely” that there is any such current migration (see the summary of these respective opinions of the competing experts outlined at page 7 of the factum filed on behalf of FirstCanada).

[78] Evergreen’s argument about irreparable harm is premised on the current migration of the contaminants, in other words, ongoing contamination that will irreparably harm Evergreen and its proposed development if it is not stopped now by the issuance of an injunction.

[79] On a review of the reports and the credentials and experience of the four experts in this case, I am not prepared to say that Evergreen has an advantage over FirstCanada. If anything, it would appear that Mr. Rousseau, an expert retained by FirstCanada, is the leading authority on LNAPL, the major contaminant at issue in this case.

[80] At the very least, I cannot find as a fact that there is current and ongoing contamination.

[81] Like the first branch of the test, the second branch of the test for an injunction runs against Evergreen.

The Balance of Convenience does Not Favour Evergreen

[82] I find that the third branch of the test for an injunction has also not been met; it also runs against Evergreen.

[83] Paragraphs 57 and 58 of FirstCanada's factum state as follows.

> 57. The Plaintiff argues that it will suffer greater harm if the injunction is not granted and that no harm will come to the Defendant by granting the injunction. This is plainly wrong. The Defendant will be required to take positive steps, at significant cost, to prevent alleged ongoing migration of contamination when such migration has not been proven; when the Claim will likely be struck on an upcoming summary judgment motion; and when the Plaintiff has clearly failed to demonstrate any actual or expected harm, much less irreparable harm.
>
> 58. In this regard, the Plaintiff's unfounded and unsubstantiated arguments regarding harm to the community, which will be alleged deprived of economic benefit, must be wholly disregarded, particularly since the Plaintiff has failed to even commence the submission process to the Ministry.

[84] I agree with what is expressed at paragraph 57 of the factum filed on behalf of FirstCanada, except that I would not say that it is likely that the motion for summary judgment will succeed. Rather, I would say that the limitation period issue is not a frivolous one; it is reasonably arguable.

[85] I agree as well with what is expressed at paragraph 58 of the factum filed on behalf of FirstCanada, although I think that it is wrong in law to suggest by implication that the interests of third parties are not relevant. They are relevant at the balance of convenience stage. But this Court is simply not satisfied that the public in the Burlington area will be deprived of this undoubtedly valuable development if the injunction is not granted. In fact, as indicated above, I prefer the expert opinion evidence of Mr. Guoth that the contamination, even if existing currently, is not a barrier to the RSC and/or Risk Assessment being obtained and the Ministry effectively green-lighting the proposed development.

None of the Branches of the Test for an Injunction has been Met

[86] In summary, I am of the opinion that each one of the three criteria of the test for the mandatory injunction sought by Evergreen has not been met.

VI. Conclusion

[87] For all of the reasons outlined above, Evergreen's Motion is dismissed. There is no order for inspection made. There is no injunction granted.

[88] FirstCanada would ordinarily be entitled to costs.

[89] If the issue of costs cannot be resolved between the parties, then the Court will receive written submissions. Each submission shall not exceed three pages in length, excluding any necessary attachments. There shall be no reply permitted. FirstCanada shall file first, within thirty (30) calendar days after the date of these reasons. Evergreen shall then file within fifteen (15) calendar days after its counsel's receipt of FirstCanada's submissions.

[90] The materials filed, and the oral submissions advanced, by counsel in this matter were excellent. They were very helpful to me. I am grateful to all counsel, Mr. Macklin and Ms. Coker for Evergreen and Ms. Cooper for FirstCanada.

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Conlan J.

Released: June 4, 2024

CITATION: Evergreen Community (Burlington) Ltd. v. FirstCanada ULC 2024 ONSC 3170
COURT FILE NO.: CV-22-0861-0000
DATE: 2024 06 04

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Evergreen Community (Burlington) Ltd.
(Plaintiff)

– and –

FirstCanada ULC
(Defendant)

REASONS FOR DECISION- MOTION FOR INJUNCTION

Conlan J.

Released: June 4, 2024