CITATION: CCI Bioenergy Inc. v. Veolia Water Canada, Inc., 2024 ONSC 4694
COURT FILE NO.: CV-24-00718782-0000
DATE: 20240826

ONTARIO SUPERIOR COURT OF JUSTICE

RE: CCI BIOENERGY INC., Applicant/Moving Party

-and-

VEOLIA WATER CANADA, INC., Respondent/ Responding Party

BEFORE: L. Brownstone J.

COUNSEL: *Brian N. Radnoff, and Zachary Cooper*, for the Applicant

Alexandre Fallon, Elie Farkas, and Hannah Davis, for the Respondent

HEARD: August 14, 2024

ENDORSEMENT

Introduction

[1] The parties are both in the business of processing organic waste. The applicant, CCI Bioenergy Inc. ("CCI"), agreed to provide certain services as a subcontractor to the respondent, Veolia Water Canada, Inc. ("Veolia"). Veolia provides its services as the prime contractor to the City of Toronto at the city's organic waste management facility called the Disco facility ("the facility"). CCI's services were to be provided by two of its employees.

[2] In January, 2024, there was an explosion at the facility. Shortly thereafter, Veolia advised CCI that it was terminating the services of one of its employees Keith Grafton, who was managing the facility.

[3] In May, 2024, Veolia advised CCI that it was terminating the agreement, with the result that the services of the second CCI employee, Warren Jackson, were no longer required.

[4] CCI moves for:

a. an interlocutory injunction requiring Veolia to continue to operate pursuant to the terms of the agreement and to honour its obligations under the agreement;

b. an interlocutory injunction setting aside and enjoining Veolia's exclusion of Mr. Grafton and Mr. Jackson from the facility;

c. an order requiring Veolia to follow the procedure set out in the agreement in relation to the CCI Employees and/or finding a replacement for them; and

d. an order requiring Veolia to pay all amounts owing under the agreement, including the costs of CCI employees if it chooses not to use them.

[5] For the reasons that follow, CCI's motion is dismissed.

Background

(a) The parties

[6] CCI holds the North American distribution license for an organic waste processing system designed and patented by a German company called BTA International GmbH ("BTA"). The BTA technology is in use at the facility. CCI was acquired by Evergreen Environmental Inc. ("Evergreen") in 2021. The president of CCI is also the president and CEO of Evergreen.

[7] Veolia is an environmental solutions company that offers products and services in the energy, water and waste management fields.

(b) The agreements

[8] The parties had worked together prior to entering into the agreement that is the subject matter of this dispute.

[9] On July 1, 2019, Veolia became the primary contractor with the city for processing organic waste at the facility. Veolia entered into a 10-year primary agreement with the city to operate and maintain the facility ("the Prime Agreement").

[10] The same day, Veolia entered into a concurrent 10-year agreement with CCI, under which CCI provided services to Veolia as a subcontractor ("the Agreement").

[11] The Agreement required CCI to provide two of its employees to Veolia who were familiar with the operation and maintenance of the facility and who would perform defined work in accordance with the requirements of the Prime Agreement.

[12] The Agreement specified Mr. Grafton and Mr. Jackson as the two anticipated CCI employees. If either was unable or unwilling to perform the defined work, the parties agreed to work in good faith to find appropriate substitute personnel. If they were unable to do so, Veolia was permitted to directly engage someone else, and reduce its payment to CCI accordingly.

[13] In addition to paying for the services of the two CCI employees, Veolia was to pay CCI a tonnage fee for materials received and processed at the facility.

[14] CCI was required to ensure that its services complied with the requirements of the Prime Agreement, as well as with specified professional codes and standards.

[15] The Agreement contains the following termination clause:

> 7. TERMINATION.
>
> FOR CAUSE. Either party may terminate this Agreement by seven days written notice if through no material fault of the terminating party, the party being terminated fails substantially to perform its obligations under this Agreement. Provided, however, that if the party being terminated has commenced a cure within seven days of the notice of termination, then it shall have a period of up to 30 days to cure the breach.
>
> If such breach has not been cured after such period,
>
> (i) CCI can terminate and pursue reasonable claims against Veolia for the amount of damages caused by such termination, as set forth in Section 23 herein.
>
> (ii) Veolia shall have the following rights: when Veolia determines, acting reasonably, CCI to be in default, it will provide written notice thereof, describing in sufficient detail the default and the expected cure. If after the expiry of seven (7) days from written notice of the default, the default is not fully cured (and CCI has not begun to cure such default) or CCI has failed to diligently pursue a cure of such default, then at Veolia's sole option, and without limitation of other remedies available at law or equity, Veolia may take one or more of the following actions:
>
> i. immediately hire, retain, contract with or take immediate assignment of any and all of CCI's onsite personnel, employees that Veolia deems reasonably necessary, in its sole discretion, to assure timely and orderly completion of CCI's obligations under this Agreement; or
>
> ii. supply such number of professionals, operators, or other services or resources as [Veolia] deems necessary for the correction, replacement, re-execution or completion of CCI's obligations under this Agreement, or any part thereof which CCI has failed to correct, complete or perform after the aforesaid notice, and make a claim for the reasonable cost thereof to CCI, as set forth in Section 23 herein; or
>
> iii. withhold further payments to CCI, up to the amount of withholdings, retained moneys, or set-offs exercised or reasonably expected to be exercised by Toronto pursuant to the Prime Agreement and claim against CCI for the amount of all damages caused by CCI's acts, omissions or negligence, and any substantiated claim may be offset against any amount due to CCI for services prior to termination.

[16] Section 23 of the Agreement, referred to in the termination clause above, is entitled "Claims and Disputes". It provides for each party to appoint a representative to act on its behalf to facilitate the handling of disputes, and allow for their expeditious resolution.

[17] The Agreement incorporates by reference the terms and conditions of the Prime Agreement, which is attached as a schedule to the Agreement. Veolia is required to ensure its personnel and subcontractors comply with the terms of the Prime Agreement, including with respect to matters of safety. Veolia is liable to the City of Toronto for costs or damages arising from its subcontractors' conduct. The Prime Agreement requires that Veolia not enter into or continue any agreement with subcontractors that would prevent Veolia from performing its obligations under the Prime Agreement.

(c) The events leading to this motion

[18] In February 2018, Mr. Grafton was appointed plant manager of the facility. From April 2022 until January 2024, he reported to a Veolia Vice-President, Mr. Fontana Giusti. There is a significant dispute between the parties as to whether there were issues with Mr. Grafton's services before the January 2024 incident.

[19] In brief, CCI claims that Mr. Grafton provided excellent services in accordance with the Agreement. CCI points to positive feedback and bonuses Mr. Grafton received, to an absence of any performance issues being brought to Mr. Grafton's or to CCI's attention, and to consistently positive bi-weekly health and safety inspections conducted by a third party. CCI claims Veolia has attempted to create after-the-fact complaints about Mr. Grafton and CCI to justify its unjustifiable termination. Veolia claims there were issues with Mr. Grafton's operation of the facility going back to 2022.

[20] One of the few facts that is common ground between the parties is that on January 18, 2024, Mr. Grafton advised Veolia that an explosion had occurred at the facility. The cause of the explosion is in dispute. CCI claims there was a sensor malfunction due to a previous spill, and that a Veolia employee caused the explosion by actions the employee undertook in disregard of the work order and safety protocols. Veolia claims that Mr. Grafton's actions directly or indirectly caused the explosion.

[21] Veolia instigated an investigation to determine the root cause of the incident ("the root cause analysis"). The parties disagree on whether Mr. Grafton was asked to participate in the root cause analysis and whether he co-operated with the investigation.

[22] The initial findings of the root cause analysis raised sufficient concerns that Veolia commenced a broader environmental, health and safety audit.

[23] CCI asked for, but did not receive until it was served with Veolia's responding materials in this proceeding, a copy of the final report from the root cause analysis. It had received only an early incomplete draft.

[24] Veolia claims that the root cause analysis and the feedback from the environmental, health and safety audit "strongly suggest that Grafton intentionally ran the facility beyond design limits and actively circumvented safety mechanisms in order to do so".

[25] On January 30, 2024, Mr. Fontana Giusti, to whom Mr. Grafton had been reporting, wrote to Mr. Ward Janssens, the President and CEO of Evergreen. Because CCI contests the adequacy of the notice provided in the letter, I reproduce it in full:

> Re: Operations and Maintenance Services Subcontract Agreement ("Subcontract") for the SSO Processing Facility at the Disco Transfer Station ("Disco Road facility") between Evergreen Environmental Inc. (as successor in interest to CCI Bioenergy, Inc.) ("Evergreen") and Veolia Water Canada, Inc. ("Veolia")
>
> Dear Ward,
>
> Given the findings over the past months, the recent RCA and the ongoing safety audit, a number of shortcomings have been identified highlighting that Keith Grafton has not worked in accordance with Veolia's instructions, notwithstanding additional resources that have been allocated to the site, and contrary to obligations under the Subcontract.
>
> Mr. Grafton is therefore not able to remain as Project Manager for the Disco Road facility and I expect his last day present on site to be this Friday, February 2. That said, Veolia will in good faith pay Evergreen for Mr. Grafton's services through February 16, 2024.
>
> Veolia will, of course, consider alternative candidates proposed by Evergreen. That said, in the interest of time, Veolia will concurrently search and interview candidates to ensure the right candidate is found as soon as possible to implement the required approach for the Disco Road facility. In the meantime, as of February 17, 2024, Veolia will reduce, accordingly, the relevant monthly payment to Evergreen.
>
> On another aspect, Veolia expects Evergreen's support in addressing design issues that have been identified recently at the Disco Road facility, and that Evergreen will work with Veolia in defining the required maintenance plan for the BTA technology installed on site.
>
> Looking forward to our ongoing collaboration,
>
> Marco Fontana Giusti, VP, Municipal Water

[26] In its response dated February 6, 2024, CCI advised that Veolia's actions were without authorization and in breach of the Agreement. CCI referred to s. 23 of the Agreement, advised that it would commence dispute resolution proceedings up to and including court action, and indicated that Veolia was not permitted to take unilateral action to remedy a dispute. In addition, CCI advised that Veolia had no authority to fire a CCI employee.

[27] Veolia countered that Mr. Grafton had failed to follow Veolia's instructions on several occasions. It revoked its earlier offer to compensate Evergreen for Mr. Grafton's services until February 17, 2024, unless Mr. Grafton and Evergreen abided by its transitioning instructions.

[28] Meetings ensued. CCI sent a letter from counsel on April 2, 2024 reiterating its position that Veolia was in breach of the Agreement and requiring that Mr. Grafton be reinstated and that Veolia follow the dispute resolution provisions.

[29] Veolia responded through counsel on April 16, 2024, asserting that Mr. Grafton's performance was neither satisfactory nor compliant with CCI's obligations under the Agreement. It stated that Veolia would have been fully within its rights to terminate the Agreement rather than simply require the replacement of Mr. Grafton but as a measure of good faith, Veolia had given CCI the opportunity to propose a substitute, which CCI failed to do.

[30] On April 23, 2024 CCI served its court application, issued on April 19, 2024, seeking Mr. Grafton's reinstatement.

[31] In response, Veolia took the position that because neither Mr. Grafton nor CCI had done anything to cure the defaults referenced in its January 30, 2024 notice, and CCI was "manifestly uninterested in working in good faith with Veolia to address the CCI defaults that led Veolia to require Mr. Grafton's removal", Veolia was exercising its right to terminate the Agreement. It advised that Mr. Jackson's work at the facility would cease on May 20, 2024. Veolia set out the bases upon which it was terminating the Agreement for CCI's substantial non-performance.

[32] CCI amended its application to seek the relief summarized above and advised it would seek an urgent interlocutory injunction if the application itself could not be heard urgently.

Law and Analysis

(a) The test to be applied

[33] Injunctions are discretionary, equitable relief. The three-part test for an interlocutory injunction is well known. Generally, the moving party must show there is a serious issue to be tried, that it will suffer irreparable harm if the injunction is not granted, and that the balance of convenience favours granting the injunction: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at p. 334 ("*RJR*").

[34] However, the first branch of the test varies depending on whether the party is seeking a prohibitive or a mandatory injunction. If the injunction sought is a mandatory one, the applicant is required to demonstrate a strong *prima facie* case that it will succeed at trial. It must show a strong likelihood that it will ultimately be successful in proving the allegations in its originating notice: *R. v. Canadian Broadcasting Corp*., 2018 SCC 5, [2018] 1 S.C.R. 196, at para. 18 ("*CBC*").

[35] The compartments between the three branches of the test are not watertight. The overall concern is the interests of justice. The strength of one part of the test may compensate for weakness in the others: *Livent Inc. (Receiver of) v. Deloitte & Touche*, 2016 ONCA 395, 131 O.R. (3d) 784, at para. 5.

[36] However, an injunction will not issue when any one part of the test is not met: *Haudenosaunee Development Institute v. Metrolinx*, 2023 ONCA 122, 2023 CarsellOnt 2029, at para. 6.

(b) Is the injunction sought prohibitive or mandatory?

[37] The parties disagree on whether this injunction is prohibitive or mandatory and therefore on the appropriate standard to be applied on the first part of the test.

[38] A mandatory injunction directs the responding party to take a positive course of action, such as taking steps to restore the *status quo*. These steps can be costly and burdensome. The line between a prohibitive and a mandatory injunction is not always clear. Prohibitive injunctions can also require the taking of positive steps. The court is to look at the substance, not the form, of the order requested, and the order's practical consequences, in determining which type of injunction is being requested: *CBC*, at paras. 16,17.

[39] Where the injunction seeks to impose new obligations, and not simply maintain or re-institute a *status quo* of existing obligations, the injunction is a mandatory one.

[40] At least in contract cases, the court should take particular care to avoid a formulaic approach to determining whether an injunction is mandatory or prohibitive. As noted by Koehnen J. in *Ryerson Students' Union v. Ryerson University*, 2020 ONSC 1490, 149 O.R. (3d) 534 at para 32:

> Ryerson's submission that this is a mandatory injunction because Ryerson has already terminated the contract would lead to injustice in contract cases. By way of example, a party that ignored ordinary requirements of notice to terminate a contract would be in a better position than a party who complied with notice requirements. A party that ignored the law and terminated without notice would face a moving party who is forced to meet the more stringent strong *prima facie* case test while a party who complied with the law would have the disadvantage of facing a moving party who was required to meet the less stringent serious issue test.

[41] CCI takes the position that it is only seeking to prohibit Veolia from wrongfully terminating the Agreement. Therefore, the injunction is prohibitive in nature and CCI need demonstrate only a serious issue to be tried, which is a low threshold: *RJR* at p. 337. If the injunction is mandatory, which CCI denies, it argues that it meets the higher threshold of a strong *prima facie* case in any event.

[42] CCI argues that Veolia wrongfully terminated Mr. Grafton, Mr. Jackson and the Agreement, in breach of the Agreement's provisions. It says an injunction to force Veolia to comply is not truly a mandatory injunction. Veolia should not be able to reap an advantage on this branch of the test as a result of its wrongful termination. The termination of Mr. Jackson and of the Agreement only occurred after CCI's initial application was issued; at a minimum, the injunction sought with respect to Veolia's actions taken in May, 2024 terminating Mr. Jackson and the Agreement is a prohibitive one.

[43] Veolia takes the position that the order sought is clearly mandatory. Mr. Grafton has not worked at the facility since January 2024 and Mr. Jackson since May 2024. Both men have been replaced. To seek to reinstate the contract, and re-engage these two employees, requires positive mandatory action on its part.

[44] Veolia argues that reinstating the Agreement and the CCI employees would entail significant disruption and cost. Veolia argues that it has reason to be concerned about safety at the facility in the event of reinstatement. This is particularly so with respect to Mr. Grafton, but also with respect to any CCI employee, including Mr. Jackson, given the complete breakdown of trust engendered by CCI's failure to take responsibility for any issues at the facility. Therefore, an order to reinstate means CCI would have to expend significant resources retraining and supervising any CCI employees, which is an added burden not contemplated in the Agreement.

[45] Veolia's affiant deposes that while Mr. Grafton stated there had always been spills at the facility, there have been none since his departure. Steps have been taken to train staff, restore safety mechanisms, and address other issues that have come to light. The disruption entailed in re-engaging Mr. Grafton and Mr. Jackson would be significant. Veolia deposes that the return of Mr. Grafton and Mr. Jackson would be detrimental to safety, operations and staff morale.

[46] I agree that the reinstatement of Mr. Grafton would be a mandatory injunction, such that the higher threshold applies on part one of the injunction test. Such an order would require positive steps to be taken by Veolia, including the reshuffling of employees and additional training and supervision of Mr. Grafton (regardless of whether CCI and Mr. Grafton believe his supervision to be necessary, Veolia clearly does). It would put Veolia in a position it has not been in since January 2024 and in respect of actively supervising Mr. Grafton, a position it was never in.

[47] The line between a prohibitive order and a mandatory order is less clear in respect of the termination of Mr. Jackson and the Agreement that occurred in May 2024. Veolia's termination of the Agreement contains an element of "steal[ing the] march on the court" as referred to in R.J. Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters, 2023), at 2:18. However, focusing on the practical effect of the injunction, that is, the restoring of Mr. Jackson and all of the terms of the Agreement between the parties, I find that the injunction sought requires significant positive action on the part of Veolia, again in the form of staff re-deployment, training, and supervision. I therefore find that the injunction is a mandatory one in this respect as well.

[48] I therefore conclude that the higher threshold applies to all of the relief sought by CCI. In the event I am incorrect, I will also consider the lower threshold in respect of the May termination.

(c) Has CCI demonstrated that there is a strong *prima facie* case or in the alternative, a serious issue to be tried?

[49] CCI argues it has a "crystal-clear" case that Veolia breached the Agreement and acted in bad faith. It argues that:

- No notice of any defect was given to Mr. Grafton as required under the Agreement. Mr. Grafton therefore had no opportunity to cure any defects. This is in direct violation of s. 7 of the Agreement.

- In any event, Veolia's own evidence is that the only way to cure the defect was by removal of Mr. Grafton. When Mr. Grafton was removed on January 31, 2024, any defects were therefore cured. Thus, there can have been no defects existing after January 31, 2024, and no basis on which Veolia could have terminated Mr. Jackson or the Agreement.

- Under the Agreement, the only basis upon which Mr. Grafton or Mr. Jackson could have been terminated is if they had been unwilling or unavailable to work. Neither of those conditions existed.

- If a dispute arose in respect of CCI's employees or the services provided, Veolia was required to follow the dispute resolution mechanism set out in the Agreement. It failed to do so.

- Veolia was not entitled to replace Mr. Grafton with another person of its choosing.

- Veolia has acted in bad faith. Among other things, it failed to provide information to CCI or Mr. Grafton, including the information necessary to cure any defects. Its actions in terminating the Agreement were retaliatory. Veolia refused to provide CCI with the root cause analysis report, claiming it was confidential, yet included the report in its publicly filed responding materials in this motion.

[50] Veolia is of the view that it is the party with the strong case, and that CCI's case is weak. It argues that:

- Mr. Grafton failed to enforce basic safety standards; he directed or permitted staff to prioritise short-term production over safety and asset preservation.

- Mr. Grafton failed to follow Veolia's instructions.

- Mr. Grafton was disengaged, evasive, or misleading during the root cause analysis.

- CCI proposed no alternate employee when Veolia provided it the opportunity to do so. It did not, as required under the Agreement, "work in good faith to find appropriate substitute personnel". Rather, CCI insisted that Veolia reinstate Mr. Grafton, an entirely unreasonable position given Veolia's identified concerns.

- The Prime Agreement, which forms part of the Agreement, includes Veolia's undertaking not to continue any agreement with subcontractors that would prevent it from performing its obligations, including with respect to matters of safety and professional standards.

- Mr. Grafton's failures led to the explosion in January, 2024, yet he blamed his subordinate for the incident and failed to take any responsibility for his part in causing the explosion. CCI also persisted in failing to be accountable for these serious actions.

- Having determined that CCI and Mr. Grafton had not performed the services in compliance with the Agreement, Veolia was within its rights to terminate Mr. Grafton and ultimately the Agreement.

[51] The evidence on all issues is hotly contested. The parties agree on virtually nothing of substance. CCI strenuously denies any wrongdoing. A summary trial has been scheduled for November of 2025. That trial will be necessary, given the state of the written record.

[52] It is CCI's burden, however, to meet the *RJR* test on this injunction. I do not accept that it has established a strong *prima facie* case on the merits on the record before me. I do not find CCI has satisfied the first part of the test. (I express no view on which side's arguments on the merits are stronger because that is not the issue today and will be decided at the trial).

[53] If I am wrong on the issue of the nature of the relief sought, and this motion is to be considered a request for a prohibitive rather than mandatory injunction, I would find that CCI meets the threshold of raising a serious issue to be tried.

[54] This would not change the outcome, however, because I find that CCI fails on the remaining two branches of the *RJR* test as set out below.

(d) Has CCI demonstrated that it will, or is likely to, suffer irreparable harm if the injunction is not granted?

[55] In assessing irreparable harm, the court is concerned with the nature, not the magnitude, of the harm. Irreparable harm is harm that cannot be quantified in monetary terms or cannot be cured: *RJR* at para. 64

[56] An end to an enterprise's business can constitute irreparable harm: *RJR* at p. 341.

[57] Evidence of irreparable harm must be clear, not speculative, and supported by the evidence. Inferences may be drawn from the evidence: *Molson Canada 2005 v. Miller Brewing Company*, 2013 ONSC 2758, 116 O.R. (3d) 108, at para. 132.

[58] CCI claims it is sufficient to show that it is likely to suffer irreparable harm, or that there is a "meaningful risk" of irreparable harm. Veolia claims CCI must show that it will suffer irreparable harm. There are cases that support each party's position.

[59] CCI argues that it should be given the benefit of the doubt when the court is determining the width of the "zone of irreparable harm." It relies on *Quality Pallets and Recycling Inc. v. Canadian Pacific Railway Company*, 2007 CanLII 13712 (ON SC) for this proposition. There, the moving party was being evicted from its industrial premises on six-days' notice. Its argument was that the landlord's failure to provide adequate notice of the eviction, not the eviction, would cause it irreparable harm. The court sought to arrive at the appropriate notice period that "protects Quality from the likelihood of complete business collapse, but … does not extend the injunction period beyond the point where the harm being sustained, although serious, is no longer irreparable and the injunction is no longer justified": *Quality Pallets* at para. 30.

[60] In so doing, the court recognised that a notice period that was too short would be "catastrophic" for the moving party's survival and "would most likely result in an irreparable collapse of the business": *Quality Pallets* at paras 28, 31.

[61] It was in this context that the court stated that "the party in jeopardy of being put out of business should probably be given the benefit of the doubt when a judge attempts to determine the width of this "zone of irreparable harm": *Quality Pallets* at para. 32.

[62] I do not take these comments to mean that the moving party need not show the likelihood of irreparable harm. Having demonstrated that irreparable harm was likely, the court determined that it should err on the side of having the injunction last for an amount of time that would protect the moving party from "irreparable collapse".

[63] Having said that, the trend in the case law is that there is some leeway on the degree of certainty required to establish irreparable harm, and some flexibility on the level of certainty or high likelihood of irreparable harm: Sharpe, at 2:10; *International Steel Services Inc. v. Dynatec Madagascar S.A.*, 2016 ONSC 2810, 8 B.L.R. (5th) 150 at paras. 51-52; *EVS (Edge Value Solutions) Canada Ltd. v. Nestle Canada Inc.*, 2022 ONSC 7003, 2022 CarswellOnt 18712, at para. 50.

[64] I turn now to the parties' positions on the application of these principles to the facts.

[65] In cross-examination, CCI explained that "its business will no longer be viable and it may have to go out of business; not that it will." In its factum it asserted that it "may no longer be a viable business, if the injunction is not granted". In oral argument its counsel took the position that CCI likely will no longer be a viable business if the injunction is not granted.

[66] CCI pitches the case as one of a large multinational firm bullying a small operation. It puts forth several bases for irreparable harm.

[67] First, it states that in 2022, 78% of its revenues came from the facility, and in 2023 100% of its revenues came from the facility. The Agreement represents all of its business.

[68] Second, CCI argues that Toronto City Council has approved CCI to provide its BTA solutions as part of the expansion to the facility. The facility is expected to be expanded by late 2027 or spring 2028. Toronto City Council has approved a five-year extension of the Prime

Agreement with Veolia from the date of the facility's expansion. CCI claims it has been deprived of significant revenue increase from the expansion.

[69] Third, CCI points to the work it is doing with the City of Toronto to develop business at another waste processing facility, the Dufferin facility. It argues that Veolia's conduct could negatively impact CCI's ability to obtain the contract at the Dufferin facility.

[70] Fourth, CCI raises Veolia's interference with its relationship with BTA. Veolia advised BTA that it had terminated the Agreement and wanted nothing further to do with CCI. CCI argues that Veolia will "likely continue" to interfere with its relationship with BTA.

[71] Veolia points out that CCI has obtained a further contract with a separate party since the termination of the Agreement. However, that contract is minor and short-term.

[72] Veolia also argues that CCI speculates that the loss of this contract will adversely affect its relationship with the City of Toronto, but speculation is not the kind of evidence required to show irreparable harm.

[73] Veolia further argues that CCI and Evergreen should be viewed as functionally a single entity when considering whether there is irreparable harm. Veolia argues that the two corporations are very closely intertwined. Evergreen can avoid or ameliorate harm to CCI if it chooses to do so. Amelioration is effectively within its own control: *Morguard Residential v. Mandel*, 2017 ONCA 177, 2017 CarswellOnt 2732, at para. 25

[74] In my view, CCI's second, third, and fourth arguments are easily dismissed.

[75] The expansion of the facility is not expected to occur until late 2027 at the earliest. The trial of this matter is scheduled for November 2025. There can be no gains that would accrue to CCI between now and trial from a facility expansion that post-dates the trial. Whether CCI will lose out on the expansion and its revenues is a matter for a damages assessment at trial. It is future looking. The expansion of the contract at the facility would provide no benefit to CCI between now and trial and therefore cannot be used to support its argument of irreparable harm between now and trial.

[76] CCI's argument that Veolia's conduct might harm its relationship with the City of Toronto and the pursuit of the Dufferin facility contract is speculative, and without foundation in the record. CCI continues to pursue that contract and conceded that there is no evidence that its negotiations or relationship with the City of Toronto has been adversely affected.

[77] Likewise, there is no evidence of any adverse effect on CCI arising from Veolia's conversation with BTA about the termination of the Agreement. It is speculative to suggest that BTA and CCI's longstanding relationship will be adversely affected by a failure to reinstate the Agreement.

[78] These arguments do not amount to evidence of irrevocable damage to CCI's business reputation, as was the case in a number of the cases on which CCI relied.

[79] CCI's real argument about irreparable harm is that because the Agreement represented all of its revenues for 2023 and most of its revenues for 2022, it is likely to suffer irreparable harm from the Agreement's termination because it will have no revenue (unless it is able to secure other contracts).

[80] A significant disagreement between the parties is the role of Evergreen in the irreparable harm analysis. CCI argues that Evergreen is completely irrelevant. CCI therefore refused to answer questions about Evergreen's financial position. It confirmed that the viability of or irreparable harm to Evergreen is not in issue in this proceeding.

[81] CCI argues that although CCI and Evergreen are related, they are separate legal entities. It says that to accept Veolia's argument would mean that a subsidiary can never suffer irreparable harm if the parent company is not in jeopardy.

[82] Veolia, on the other hand, argues that the companies are so intertwined that it is artificial to draw the line CCI asks the court to draw.

[83] I agree with CCI that there can be no general proposition that the health or viability of a parent corporation is automatically relevant to the question of irreparable harm to a subsidiary corporation: *Sprott Private Wealth LP v. BMO Nesbitt Burns Inc.*, 2014 ONSC 5842, 2014 CarswellOnt 13863, at para. 7. Such a conclusion undermines the legal proposition that corporations are distinct entities with separate legal personalities.

[84] However, I am of the view that as a factual matter, resources available to a corporation should be considered in the irreparable harm analysis, even if the potential source of those resources is its parent company. On the facts of this case, I find that Evergreen's resources are not irrelevant to CCI's position. The two corporations are significantly intertwined. For example:

- CCI's affidavit evidence states: "CCI is a small company. At its largest, CCI had 15 employees. As of January, 2024, CCI has 2 employees, but it effectively has 8 people working for it through its parent company, Evergreen." On cross-examination, Mr. Janssen tempered this characterization. But those words were chosen for and sworn to in his affidavit.

- In June 2023, Mr. Janssen wrote to Mr. Fontana Giusti at Veolia as follows: "At this time, both Keith [Grafton] and Warren [Jackson], as well as potential future replacements, are important players within the Evergreen Team. It is appreciated Veolia and others are recognizing value, the quality and experience CCI BioEnergy team members have brought and are bringing to the table." Mr. Janssen stated in cross-examination that he calls all of the Evergreen/ CCI employees "the Evergreen Team."

- The CCI/Evergreen president testified on cross-examination that there are no written agreements between the two companies, but funds flow from CCI to Evergreen from time to time and Evergreen helps CCI wherever possible. The following is part of the exchange about the flow of funds between the two entities:

Q. Okay, so what makes the payment to Evergreen by CCI larger or smaller?

A. The need for cash.

Q. Evergreen's need for cash?

A. Or CCI's need for cash, if applicable.

Q. Okay, understood.

- When Veolia wrote to the president and CEO about Mr. Grafton's termination, the re-line was: "Re: Operations and Maintenance Services Subcontract Agreement ("Subcontract") for the SSO Processing Facility at the Disco Transfer Station ("Disco Road facility") between Evergreen Environmental Inc. (as successor in interest to CCI Bioenergy, Inc.) ("Evergreen") and Veolia Water Canada, Inc. ("Veolia")". The letter spoke repeatedly about payments being made to Evergreen for Mr. Grafton.

- I am mindful that this is a letter from Veolia, not CCI. But there was no return correspondence correcting Veolia. Both parties refer to the two entities somewhat interchangeably at times.

- The June 2023 letter from Mr. Janssen to Mr. Giusti referred to in the second bullet-point above also states: "At this point, we need not address this too much as we think we have established our foundation for the continuation of Disco and the pursuit of either Dufferin or a 3rd AD plant. From the operational perspective, we have discussed a relationship where we are contracted partners in the ratio of 51% Veolia - 49% Evergreen. (Emphasis added)

- Evergreen signs agreements in its capacity "as successor in interest to CCI".

- Evergreen's engineer performs work for CCI and describes his CCI experience on his cv.

- The two corporations have the same president, the same address, and money flows frequently and freely between the two corporations. Emails from CCI are signed by its president followed by "Evergreen Environmental Inc." in the signature line.

[85] As noted above, CCI says it is concerned about its relationship with the City of Toronto in pursuing the Dufferin facility contract. But the CCI/Evergreen CEO wrote to Veolia and referenced Evergreen, not CCI, pursuing this contract. That does not show that it is Evergreen, not CCI, that is pursuing the Dufferin contract. But it does show the overlapping of the two entities in correspondence not just from Veolia but also from Evergreen/CCI.

[86] Significantly, CCI's financial statements show an account receivable from Evergreen of just under $1,800,000.

[87] On the evidence before me, I find that Evergreen's resources are available to CCI, and that this is a valid consideration in the irreparable harm analysis.

[88] The Agreement accounts for most of CCI's revenues. However, it continues to source other revenues, and it has an asset of just under $1,800,000 in the form of an account receivable from Evergreen. It has passed initial stages in the process to provide services at the Dufferin facility.

[89] It has not demonstrated it will, or is likely to, suffer permanent market loss or irrevocable damage to its business.

[90] Nor are damages difficult to quantify in this case. Should CCI be successful at trial, the damages it has lost under the contract are quantifiable. This includes the payment of tonnage fees under the Agreement, which could be assessed as a matter of damages at trial.

[91] I find that CCI has not demonstrated it will, or is likely to, suffer irreparable harm if the injunction is not granted.

(e) Does the balance of convenience favour granting the injunction?

[92] In determining the balance of convenience, the court considers the relative impact on the parties of granting or withholding the injunction.

[93] The balance of convenience, in my view, clearly favours Veolia. There is no doubt that there is a high level of acrimony between the parties. Each accuses the other of engaging in misleading or dishonest conduct. Each is of the view that the other has not behaved honourably. The remedy sought by CCI requires the reintegration of two parties between whom trust is absent.

[94] In this respect, the facts before me are very different than those in *Molson*, on which CCI relies. There, the court enjoined the defendant's notice of termination of a license agreement pending trial. The irreparable harm alleged there was an unquantifiable effect on the moving party's market share and brand equity. The license agreement had been in effect between the parties for three decades. The court considered at para. 154 that the relationship between the parties had not deteriorated to the point where the injunction should not be granted. The same can not be said here, where the effect of the injunction would require the parties to work closely together, in the same facility, where there are potential safety issues.

[95] Veolia's evidence is that the facility is now operating well, morale is good, and there have been no spills since Grafton left. It states that public safety is protected in the current set-up. To ensure public safety would be protected if the Agreement were reinstated, it would have to expend additional training and supervision resources.

[96] Veolia is concerned that reinstatement of the Agreement would put it at risk of violating its obligations under the Prime Agreement and damaging its relationship with the City of Toronto.

[97] I do not accept CCI's submission that reinstating the Agreement would maintain the *status quo.* There has not been a fully functioning Agreement since the end of January, 2024, and no effective Agreement at all since May, 2024.

[98] I agree with Veolia's submission that the relief requested is akin to specific performance for a personal services contract, a remedy the courts are generally disinclined to order: *ProPurchaser.com Inc. v. Wifidelity* Inc., 2017 ONSC 7307, 2017 CarswellOnt 1942 at para. 45. This is particularly so when a degree of trust and co-operation between the parties is required, and that trust and co-operation have ceased to exist: *Healthy Body Services Inc. v. Muscletech Research and Development Inc.*, [2001] O.J. No. 3257 at paras 20-22.

[99] That is, CCI is unlikely to obtain a permanent injunction reinstating the Agreement. If successful at trial, it will more likely than not have a damages claim. Interim injunctive relief would put it in a position it is unlikely to be in even if ultimately successful at trial. That would not be an equitable result.

[100] As stated, I find that the balance of convenience strongly favours Veolia.

CCI's request for a sealing order

[101] CCI asks that the court seal its 2022 and 2023 financial statements that were produced for this motion. It also asks that Mr. Grafton and Mr. Jackson's social insurance numbers and addresses be sealed or redacted in the court file.

[102] CCI states that the financial information would reveal sensitive financial information to the public and its competitors, thereby causing CCI serious commercial harm, negatively affecting its competitive position, its relationship with prospective clients, and damaging its key business relationships, including its partnership with BTA, about whom some of the information relates.

[103] CCI is a private company that maintains confidentiality over the information set out in its financial statements. The information was provided further to an undertaking provided in cross-examination. CCI relies on a similar order made in *Cle Leasing Enterprises Ltd. (Re)*, 2012 ONSC 1301, 90 C.B.R. (5th) 101,at paras. 23-25 and on the analyses of this issue in *Bluemoon v Ceridian*, 2022 ONSC 301, 2022 CarswellOnt 471, at paras 64-66 and *Subway Franchise Systems v. CBC*, 2019 ONSC 2584, 2019 CarswellOnt 6349.

[104] Veolia argues that a sealing order covering the entirety of the financial statements is not necessary to prevent a serious risk to an important interest, as required by *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2022] 2 S.C.R. 522 at paras. 53, 55. At most, a partial order would suffice to protect the interests at issue.

[105] The order requested constitutes a limit on the open courts principle, a matter not to be lightly interfered with. The court must consider whether the applicant has provided a sufficient evidentiary record to demonstrate that openness would present a serious risk to an important public interest, that the order is necessary to prevent the serious risk, and that the benefit of granting the order outweighs its negative effects. Preserving confidential commercial information can represent an important public interest: *Bluemoon* at paras. 64-65.

[106] I find that the evidentiary record, although somewhat thin, is sufficient to establish that requiring the private information contained in the financial statements to be publicly available at this stage would present a serious risk of the nature contemplated in the case law. There is no

alternative method suggested to obviate the risk. Given the limited nature of the request in the context of the record, I find that the incursion on the open court principle is relatively small and that the benefit of the order outweighs its negative effects.

[107] The social insurance numbers and addresses contained in the T4 slips of Mr. Jackson and Mr. Grafton may be redacted.

[108] The requested order is therefore granted. In granting the order at this stage I pause to note that these financial statements, and more, may form part of the trial evidence. I do not in any way intend to signal that in that context, the same analysis would necessarily occur.

Costs

[109] Fixing costs is a discretionary exercise under s. 131 of the *Courts of Justice Act*, RSO 1990, c. C. 43. Rule 57.01 sets out factors I may consider in exercising that discretion. In addition to the results of the proceeding and any offers to settle, I may consider, among other things, the principle of indemnity, the amount of costs an unsuccessful party could reasonably expect to pay, the complexity of the proceeding, the importance of the issues, and the conduct of the parties. Ultimately, I must fix costs in an amount that is fair and reasonable for the unsuccessful party to pay: *Boucher v Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.) at para. 26.

[110] In this case, the costs outlines provided by the two parties are very similar. The hours spent, legal fees and disbursements are almost equal. The main difference appears to be that one party has included HST in its calculations and the other has not.

[111] This is a good indication that the time spent and fees charged are reasonable and proportionate to the issues, which were of great importance to both parties. Further, the fees would be in the contemplation of the losing party. I therefore fix costs payable by CCI to Veolia in the amount of $160,000.

Disposition

[112] The motion is dismissed. The sealing order is granted. CCI shall pay Veolia its costs in the amount of $160,000 inclusive of disbursements and HST within 30 days.

[113] The parties may forward a draft order to my judicial assistant at Linda.Bunoza@ontario.ca.

L. Brownstone J.

Date: August 26, 2024