ORDERS AND AWARDS IN ARBITRATION PROCEEDINGS

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Introduction

The Ontario Superior Court decision of *Farah v Sauvageau Holdings Inc.*[1] resolves many issues regarding orders and awards in arbitration proceedings. The application was brought because there were novel issues raised in its underlying arbitration. In his decision, Justice Paul Perell addresses several important issues, some brought up at the Superior Court for the first time, which should be taken into account by both arbitrators and arbitral counsel when conducting an arbitration.

We will first set out the facts in the case and Justice Perell's decision. We will then discuss an arbitrator's jurisdiction to make orders affecting non-parties, *Mareva* injunctions, *Anton Piller* orders, *Norwhich* orders, orders for interim preservation of property or orders for Certificate of Pending Litigation ("CPL").

That discussion raises the issue of whether it is or when it may be appropriate for arbitral counsel to have *ex parte* communications with the arbitrator; which will be discussed next.

Lastly, we will briefly discuss whether an arbitral award can become an order of the Court without resorting to the procedure in section 50 of the *Arbitration Act, 1991*[2] ("Act") in any circumstance (even an *ex parte* award).

[1] 2011 ONSC 1819 [*Farah v Sauvageau*]. We were counsel for the applicants in this case and also counsel at the arbitration before the Hon. R. S. Montgomery, QC. There has been no appeal by either party from Justice Perell's decision.
[2] SO 1991, c 17.

Farah v Sauvageau facts

Nadeer Munir Farah ("Farah") owned a collection agency known as CSC, which he listed for sale. He wanted to move to Florida. François Sauvageau ("Sauvageau") is a Toronto lawyer who was interested in purchasing the collection agency. A share purchase agreement was made and the transaction closed in December 2009. Sauvageau incorporated a Holdco to own his shares in the collection agency. On closing, Holdco paid $600,000.

Farah used the proceeds of sale to discharge the mortgage on the home he owned with his wife, to pay debts and to pay his brother for his interest in CSC. A week after closing, Farah transferred his undivided interest in his family home to his wife. He had no debts at the time. He knew of no claim by Sauvageau. He wanted to facilitate his move to Florida, where he was going to look for a job, while his wife stayed in Ontario to deal with selling the house.

A few months after closing, Holdco, represented by Sauvageau himself, sued Farah for fraudulent misrepresentations seeking rescission or damages for more than the purchase price. He also commenced a *Fraudulent Conveyances Act*,[3] action against Farah's wife claiming the transfer of title was fraudulent and obtained a CPL without notice. Farah's first legal counsel and Sauvageau agreed that all legal issues in both actions (except for the motion to discharge the CPL) be referred for arbitration by the Honourable R. S. Montgomery, QC of ADR Chambers ("the arbitrator").

[3] RSO 1990, c F29.

Farah's wife was not involved in the transaction. However, Sauvageau, without formally amending his pleadings, fashioned a fraud claim against her based on her alleged lie or mistake as to whether she was pregnant and her alleged use of this alleged lie to mislead him as to Farah's reason for selling the house to her.

In November 2010, Sauvageau attended before the arbitrator without notice to Farah or Farah's wife to seek a *Mareva* injunction restraining them from disposing of or using any of their assets. The arbitrator granted a far-reaching *ex parte Mareva* injunction restraining, *inter alia*, "all persons with notice of this injunction". The order also required all banks to freeze Farah and his wife's accounts and to deliver all records of their financial activities.

Sauvageau then filed the arbitrator's "order" in the Superior Court office in Newmarket, Ontario in the existing action against Farah and his wife. The Superior Court Registrar's office entered and date-stamped the arbitrator's "order" even though there was no application for enforcement under section 50 of the Act. The arbitrator's "order", with its appearance of legitimacy, was then served on Farah and his wife, on Farah's employer, on Farah's wife's father and on the banks where Farah and his wife did business, all with devastating effect.

Farah's counsel moved before the arbitrator to set aside the *ex parte* order on the basis that it was made without jurisdiction and asked the arbitrator to recuse himself. The arbitrator upheld his decision and refused the recusal motion. He reasoned that the

arbitration clause and the Act entitled him to issue all the remedies a judge could issue, including authority to grant the *Mareva* injunction. He further stated that he had not pre-judged the case.

Against this backdrop, Farah and his wife applied to the Court to set aside the arbitrator's *Mareva* injunction and to request that the arbitrator be disqualified on the basis that by granting the *ex parte Mareva* injunction, the arbitrator had prejudged that Farah was a fraudster and the playing field was now unbalanced.

Justice Perell's decision

Justice Perell held, *inter alia*, that while the Arbitrator had the authority to make a binding injunctive award enjoining Farah (a preservation order), which award could be enforced pursuant to the enforcement provisions of the *Act*, he did not have the jurisdiction to make an arbitral-*Mareva* injunction involving third parties, who were outside the arbitrator's jurisdiction.[4]

Justice Perell refused to enforce the "bogus"[5] arbitral-*Mareva* injunction.[6] He dismissed the motion for a *Mareva* injunction against Farah's wife with costs. Justice Perell did grant Sauvageau Holdings' motion for a judicial *Mareva* injunction as against Farah.[7] The Court also held that the best way to deal with the property transfer was simply to

[4] *Farah v Sauvageau*, *supra* note 1 at para 6.
[5] *Ibid* at para 42.
[6] *Ibid* at para 6.
[7] *Ibid*.

direct that the title be transferred back to joint tenancy between Farah and his wife.[8] This made the CPL unnecessary.

Arbitrator's authority to make orders affecting non-parties

It is well-settled that judicial intervention in the arbitral process is strictly limited to situations contemplated by the Act. This is in keeping with the modern approach to arbitration that sees it as "an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts".[9] The court has jurisdiction to intervene only where the arbitrator has exceeded jurisdiction as to the subject matter of the dispute or where the arbitrator has treated the parties unfairly.[10]

Arbitration is a consensual process[11] that has its roots in an agreement between the parties. Litigation in the Superior Court of Justice is presided over by a judge appointed by the government of Canada under section 96 of the *Constitution Act*.[12]

Arbitrators have no inherent jurisdiction, unlike a Superior Court judge.[13] They depend upon the Act and the contract between the parties for their jurisdiction.[14] An arbitration

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[8] *Ibid* at paras 6 and 109.
[9] *Inforica Inc. v CGI Information Systems and Management Consultants Inc.,* 2009 ONCA 642 at para 14.
[10] *Ibid* at paras 14 and 27.
[11] *Farah v Sauvageau*, *supra* note 1 at para 64. *Pirner v Pirner*, (1997) 34 OR (3d) 386 (Ct J (GD)) at para 16 [*Pirner v Pirner*] referring to R Merkin, *Arbitration Law*, (London/Hong Kong: Lloyds of London Press, 1991).
[12] *The Constitution Act*, 1867 (UK), 30 & 31 Victoria, c 3.
[13] *Dominion of Canada General Insurance Co. v Certas Direct Insurance Co.*, 2009 CanLII 37348 (ON SC) at para 21 [*Dominion v Certas*]. *Farah v Sauvageau*, *supra* note 1 at para 53 citing *Canadian Musical Reproduction Rights Agency Ltd. v Canadian Recording Industry Association*, 68 CPR (4th) 241 (ON SC) at para 9 [*Dian Musical v Canadian Recording*].
[14] *Dominion v Certas, ibid* at para 21; *Cumandra v Cumandra*, 2004 CarswellOnt 8145 (SC) at para 2 referring to *British Columbia (Minister of Public Works) v Tipping* [1931] 2 WWR 835 (BC SC).

agreement or a contract between the parties cannot give an Arbitrator jurisdiction over a non-party to the agreement or contract.[15]

Third parties must have notice of any legal proceedings which affect their rights, including arbitration.[16] An Arbitrator cannot order relief that would bind third parties;[17] nor can they dispose of the rights of non-parties to the arbitration.[18] Strangers to the arbitration agreement will not be bound by such an award, unless there is some agreement to the contrary.[19]

An arbitral award has no effect whatsoever on those who were not parties to the arbitration, and neither confers rights nor imposes obligations upon third parties.[20] An arbitral award will be quashed where it purports to affect the interests of a third party and where they were not given notice of or served with the materials to the arbitration and where they were not represented at, nor participated in the arbitration hearing.[21] An arbitral award which purports to dispose of the rights of non-parties constitutes an excess of jurisdiction; which would render the award void.[22]

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[15] *Seidel v Telus Communications Inc.*, 2011 SCC 15 at para 39 [*Seidel v Telus*]. *Dian Musical v Canadian Recording, supra* note 13 at para 11 where Justice Echlin held at para 17 that an arbitrator does not have the right to order a non-party to answer interrogatories outside of a hearing.
[16] *Pirner v Pirner*, *supra* note 11 at para 16.
[17] *Seidel v Telus*, *supra* note 15 at para 39.
[18] *Pirner v Pirner*, *supra* note 11 at para 17 quoting A Walton & M Vitoria, *Russell on the Law of Arbitration* (London: Stevens & Sons, 1982) at 348.
[19] *Ibid.*
[20] *Ibid* at para 17 quoting M Mustill & S Boyd, *Commercial Arbitration* (Butterworths, London, 1982) at 364.
[21] *Pirner v Pirner*, *supra* note 11 at *para 19.*
[22] *Ibid* at para 18 referring to *Machinists, Fitters & Helpers, Local 3 v Victoria Machinery Depot Co.* (1960), 31 WWR 564 (BC CA) at paras 31-39.

The Legislature has not given arbitrators injunctive power over third parties and the private agreement of the parties to the agreement to arbitrate cannot invade the rights of non-parties.[23] Justice Binnie for the Supreme Court held in *Seidel v Telus Communications Inc.*[24] that arbitrators cannot order relief that would bind third parties and he further held that only superior courts have the authority to grant declarations and injunctions enforceable against the whole world.[25]

This does not preclude parties from bringing motions in the arbitration for interim protection of property as per the Act or the *International Commercial Arbitration Act* ("International Act")[26] or for parties to an arbitration conferring the arbitrator with the power to make interim measures of protection as against themselves.[27]

Mareva Injunctions, Anton Piller and Norwich Orders

In *Farah v Sauvageau* Justice Perell found that there is nothing in the Act that empowers arbitrators to grant *Mareva*[28] injunctions, to appoint receivers, grant *Anton Piller*[29] or *Norwich*[30] orders. He held that the Legislature did not confer the jurisdiction

[23] *Farah v Sauvageau*, *supra* at note 1 at para 57.
[24] *Supra* note 15.
[25] *Ibid* at para 39.
[26] RSO 1990, c I. Through the International Act the legislature of Ontario implemented the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law ("UNCITRAL Model Law") in 1985. The Model Law is included as a schedule to the International Act.
[27] *Quintette Coal Ltd. v Nippon Steel Corp.* (1988), 29 BCLR (2d) 233 (SC) at para 46.
[28] *Bruno Appliance and Furniture Inc. v Cassels Brock & Blackwell LLP*, 2011 ONSC 1305 at para 32: A *Mareva* injunction is an injunctive order that restrains the defendant from dissipating assets or from conveying away his or her own property pending the court's determination in the proceedings.
[29] *Dish Network LLC v Ramkissoon*, 2009 CanLII 71008 (ON SC) at para 19: An *Anton Piller* order is a pre-trial remedy by which a plaintiff is granted access, without notice, to a defendant's premises to inspect and secure evidence where there is a real concern that this evidence would be removed, destroyed or concealed by the defendant if the defendant were to be given advance notice of the action.
[30] *GEA Group AG v Ventra Group Co*., 2009 CarswellOnt 4854 at para 71: A *Norwich* order is an equitable bill of discovery that requires a third party to a potential action to disclose information that is otherwise confidential.

to grant *Mareva* injunctions on private arbitrators, nor was there anything in the Act that even suggested that the Legislature intended to confer this jurisdiction on arbitrators.[31]

Justice Perell doubted that the Legislature could confer on private arbitrators the same power as the court's jurisdiction without violating section 96 of the *Constitution Act*.[32] He further held that:

> granting an interlocutory injunction that requires financial institutions to prevent the removal of monies and assets and to disclose and deliver up records and report to a litigant, is not an order in which the arbitrator is ruling on the scope of the arbitration agreement or on the scope of his or her jurisdiction; it is an order in which the arbitrator purports to enjoin or direct the conduct of strangers to the agreement to arbitrate who are not bound by the jurisdiction of the arbitral tribunal.[33]

Sections 6 and 8(1) of the Act give the Court the power to assist the arbitrator by providing an injunction or an order enforcing an arbitral award or order where required. Justice Perell held that since this was the case, it followed that the arbitrator did not have jurisdiction to grant a *Mareva* injunction affecting third parties. Therefore, while the arbitrator had the jurisdiction to grant an injunctive order against Farah and his wife, he did not have jurisdiction to grant a *Mareva* injunction affecting non-parties to the arbitration agreement.

Where a party to an arbitration, or a party to a contract that contains an arbitration clause, wishes to apply to the court for any of the above, it can do so. Both the Act and

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[31] *Farah v Sauvageau*, *supra* note 1 at paras 63 and 66.
[32] *Ibid* at para 51.
[33] *Ibid* at para 63.

International Act contemplate the dovetailing of the separate powers of both the arbitrator and the court.

Section 8(1) of the Act "acknowledges the court's jurisdiction to assist the conducting of arbitrations by making injunctive orders and orders for the detention, preservation and inspection of property and the appointment of receivers; "[34] it states:

> 8. (1) The court's powers with respect to the detention, preservation and inspection of property, interim injunctions and the appointment of receivers are the same in arbitrations as in court actions.

Similarly, article 9 of the UNCITRAL Model Law states that: "it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."

Counsel should note that a party does not waive its right to go to arbitration by requesting (or obtaining) interim measures of protection from a court and a national court is not prevented from granting such measures by the existence of an arbitration agreement. It is not limited to any particular kind of interim measures; including: measures to conserve the subject matter of the dispute; measures to preserve evidence; and pre-award attachments to secure an eventual award and similar seizures of assets.[35]

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[34] *Ibid* at para 59.
[35] H M Holtzmann and J E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, (Kluwer Law and Taxation Publishers, Deventer: Boston, 1989) at 332.

Arbitral orders for interim preservation of property

An arbitral tribunal can rely upon two sections of the Act in making interim awards for the preservation of property; sections 18(1) and 31.

Section 18(1) of the Act provides a tribunal with the jurisdiction to make orders for the detention, preservation and inspection of property. This power must be seen in light of the tribunal's jurisdiction, meaning, they can make such an order provided the order is "directed only at the parties to the arbitration and not toward third parties."[36]

Section 31 of the Act provides the tribunal the jurisdiction to "decide the dispute" in accordance with equity and to grant equitable remedies such as "specific performance, rescission, and injunctions." However, as Justice Perell stated there is nothing in section 31 that extends the arbitrator's equitable jurisdiction to persons who are not parties to the arbitration procedure."[37]

In *Healthy Body Services Inc. v Muscletech Research & Development Inc.*[38], Justice Somers of the Ontario Superior Court of Justice held that upon reading sections 6, 7 and 8 of the Act that it was clear that "an arbitration board has the power to grant both permanent and interim injunctive relief."[39]

[36] *Farah v Sauvageau*, *supra* note 1 at para 60.
[37] *Ibid* at para 62.
[38] 2001 CarswellOnt 2724 (SC).
[39] *Ibid* at para 5.

If the arbitration falls under the International Act, parties to the arbitration must look to section 9 of the International Act and article 17 of the UNCITRAL Model Law, which set out an arbitral tribunal's jurisdiction in making interim awards for the preservation of property where the International Act applies.

Art. 17 of the Model Law states:

> Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

Section 9 of the International Act sets out that "An order of the arbitral tribunal under article 17 of the Model Law for an interim measure of protection and the provision of security in connection with it is subject to the provisions of the Model Law as if it were an award."

In all cases, before making any order for the preservation of property, an Arbitrator should ask themselves whether the order will affect non-parties to the arbitration agreement. They must be mindful of the limits set out by Justice Perell in *Farah v Sauvageau* as to the orders for preservation of property that they can make.

As for counsel to the arbitration, they should be mindful that even where a party could seek permanent or interim injunctive relief from an arbitrator it may not always be

practical to do so. There are times where a party could not obtain that relief from the arbitral tribunal "with the same dispatch as it can by proceeding to the Court."[40]

Certificates of Pending Litigation and arbitration

There are no cases appealing the award of an arbitrator ordering that the registrar issue a CPL. Since there is no case law, there is no judicial authority for whether arbitrators even have the jurisdiction to order that a CPL be issued.

Judges derive their jurisdiction from section 103 of the *Courts of Justice Act* and Rule 42.01 of the *Rules of Civil Procedure*.[41] Rule 42.01(1) states that a CPL under section 103 may be issued by a registrar only under an order of the court.

The only sections under which an arbitrator could possibly make an order for a CPL are section 18(1)[42] of the Act and article 17[43] of the UNCITRAL Model Law.

Although the practical effect of a CPL is that the property that is subject to a CPL will be preserved, a CPL is actually "a cloud on title, such that its presence would dissuade a purchaser, acting reasonably and properly advised, from completing the transaction."[44] It is not actually an order for the interim preservation of property, and therefore

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[40] *Ibid*.
[41] *Courts of Justice Act*, RRO 1990, Reg 194.
[42] Section 18(1) of the Act states: "On a party's request, an arbitral tribunal may make an order for the detention, preservation or inspection of property and documents that are the subject of the arbitration or as to which a question may arise in the arbitration, and may order a party to provide security in that connection."
[43] Article 17 of the UNCITRAL Model Law states: "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure."
[44] *Fitzpatrick v Orwin*, 2012 ONSC 3492 at para 141 referring to *Katana v Wilson*, [1996] OJ No 2109 (Ct J (GD)) at para 13.

arguably, does not fall under either section 18(1) of the Act or article 17 of the UNCITRAL Model Law.

The scant case law available is not clear. In *Alton Developments Inc. v Millcroft Inn Ltd.*[45], the plaintiff obtained a CPL on a motion made without notice and registered it against the property. The defendant moved to discharge the CPL on the basis that it was overreaching and also sought an order staying the action because the partnership agreement provided for the arbitration of disputes arising from it. Justice Hayes ordered that the action be stayed and that the CPL be vacated "without prejudice to [the Plaintiff] making such application as it may be advised under the provisions of the [Act].[46]

In *Seganfreddo v Seganfreddo*[47] the wife brought a motion for a stay of the husband's action, for orders for preservation, CPLs and damages, on the basis that those issues were to be dealt with pursuant to the mediation/arbitration agreement. Justice Corrick found that the claims fell within the mediation/arbitration agreement.[48]

Counsel for the husband argued that the husband's claims "should not be submitted to arbitration because it includes a claim for certificates of pending litigation, which can only be issued by the registrar under an order of the court."[49] Justice Corrick did not respond directly to that argument, instead she stated that the argument was irrelevant

[45] (1992), 17 CPC (3d) 334 (ON Ct J (GD)).
[46] *Ibid* at paras 26 and 29.
[47] 2010 ONSC 6609, Corrick J.
[48] *Ibid* at para 28.
[49] *Ibid* at para 27.

as the husband had already obtained CPLs from the court earlier that year.[50] Justice Corrick ordered that the action be stayed.[51]

The only case with some guidance regarding this issue is *2033363 Ontario Ltd. v Georgetown Estates Corp*.[52] In this decision the vendor brought a motion requesting the discharge of the CPL along with the stay of the action. The sole issue before the Master was whether the arbitration clause precluded the buyer from obtaining a CPL from the court.[53]

The Master notes that counsel could find no cases where an arbitrator had ordered that a CPL be issued.[54] In discussing the practical aspects of having an Arbitrator order that a CPL be issued, Master Albert states:

> As a practical matter obtaining a CPL from an arbitrator would be a lengthy and cumbersome process. First the parties would have to agree upon and appoint an arbitrator. In this case the parties have not yet done so. Then the attendance to move for interim relief would have to be scheduled and argued. The issue of whether such a motion could proceed without notice (as contemplated in Rule 42) would have to be considered. Then, if obtained, the arbitrator's order for a CPL would have to be enforced by the court pursuant to section 50 of the Act, and a court file would have to be opened for that purpose (see: rule 42.01).[55]

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[50] In fact, six days before the motion before Justice Corrick, in *Seganfreddo v Seganfreddo*, 2010 ONSC 6588, the wife had brought a motion before Justice Whitaker to set aside an order for an ex parte *Mareva* injunction and CPLs obtained by the husband on June 23, 2010. No arguments as to a stay pending arbitration were brought up by the wife before Justice Whitaker. He ordered the continuation of the *Mareva* injunction and the CPLs.
[51] *Ibid* at para 27.
[52] (2006), 45 RPR (4th) 307 (ON SC Master) [*2033363 v Georgetown*].
[53] *Ibid* at para 5.
[54] *Ibid* para 6.
[55] *Ibid* at para 6.

In her analysis, Master Albert referred to *Sunshine Films Limited v Cleaver*[56], where Justice Nordheimer stated that a motion for a CPL is a special type of motion, usually brought without notice, where there is expectation that there is some urgency and usually must be heard quickly. Rule 42 recognizes that notice will usually not be given on a motion for a CPL, and requiring notice is the exception rather than the rule.[57]

In *2033363 v Georgetown* Master Albert held that: "in light of the above as well as rule 42.01(1) and a significant reason for including an arbitration clause in the Agreement, namely to expedite the resolution of disputes that arise under the Agreement, [Buyer] acted appropriately by applying to the court for a CPL rather than initiating the arbitration process for that purpose."[58]

Master Albert refused to discharge the CPLs and ordered that they remain on title pending final determination of the dispute through arbitration. She then ordered that the action be stayed pending final determination of the dispute pursuant to arbitration and that if there was a resulting order that required enforcement through the courts, then the parties could apply at that time to lift the stay to enforce the arbitrator's award.[59]

There are two options open to counsel that do not involve starting an action. The first option is to bring a motion before the Arbitrator and have the Arbitrator decide an amount that is to be held in trust as security in lieu of a CPL.[60] The second option is

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[56] 2003 CanLII 18914 (ON SC) [*Sunshine Films v Cleaver*].
[57] *2033363 v Georgetown*, *supra* note 52 at para 7 referring to *Sunshine Films v Cleaver*, *ibid*.
[58] *Ibid* at para 9.
[59] *Ibid* at paras 33 and 35.
[60] *Angelo Breda Ltd. v Guizzetti*, 1995 CarswellOnt 4734 at para 40 (Ct J (GD)).

negotiation; where a party may negotiate with the opposing party for a CPL either before or after the commencement of an Arbitration.[61]

However, in cases where the agreement or contract has a choice of forum clause calling for Arbitration and where a party requires the additional security of a CPL and wants to have it issued *ex parte*, then the most expeditious procedure is:

a. Start an action and bring a motion for a CPL *ex parte*. Make sure to advise the Court that there is an Arbitration clause in the contract between the parties, but make a case as to the urgency and need for a CPL. Advise the Court that once the CPL is on title, there will be no objection to staying the action in favour of Arbitration;

b. Issue and enter the order for a CPL;

c. Have the CPL issued; and

d. Serve all parties with the Statement of Claim and the CPL materials, as per Rule 42.01(4) of the *Rules of Civil Procedure*. Also, include a letter seeking opposing counsel's consent to stay the action pending the disposition of the Arbitration.

[61] See: *Demers v Desrochers*, 2009 CarswellOnt 4600 (SC) at para 3, where the Plaintiff requested a CPL and the Defendant consented on the understanding that the dispute between the parties would be resolved by arbitration rather than the court.

Upon receiving the CPL materials and the letter asking for consent to stay the action, opposing counsel may bring a motion to vacate the CPL. This motion should be made to the court pursuant to Rule 42.02 of the *Rules of Civil Procedure*[62] because the action is not yet stayed. No cases exist where a party sought to enforce an interim award of an Arbitrator ordering that a CPL be vacated.

Ex parte communications

It is understood that the procedure involved in selecting arbitrators will clearly involve some contact between the parties and the arbitrator whom they wish to appoint. Before accepting, the arbitrator will want to understand "what he is getting into".[63] Therefore, there must be some appreciation of flexibility with respect to the position of the arbitrator.[64] However, such contact should be limited prior to the appointment of the arbitrator and effectively non-existent after their appointment.[65] Once the arbitrator is appointed, they must be, and appear to be, completely impartial.[66]

Even minor *ex parte* communications can raise problems for arbitrators and counsel. In *Kitt v Voco Developments Inc.*,[67] an Application was brought to dismiss the Arbitrator for *ex parte* communications with counsel for one of the parties. The Court held that the Arbitrator should not be dismissed because the *ex parte* communications involved minor

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[62] Rule 42.02 (1) states: "An order discharging a certificate of pending litigation under subsection 103 (6) of the *Courts of Justice Act* may be obtained on motion to the court."
[63] *Waterloo (Regional Municipality) v Elgin Construction*, (2001) 13 CLR (3d) 24 (ON SC) at paras 15 and 20 [*Waterloo v Elgin*].
[64] *Ibid* at para 15.
[65] *Ibid* at para 20.
[66] *Ibid* at para 15.
[67] 2005 ABQB 743.

matters that did not go to the heart of the arbitration, and because any potential damage was remedied when arbitrator allowed the other party to respond.[68]

However, not all *ex parte* communications are conducted on such minor matters and Arbitrators should be mindful of their reputations. In *Waterloo v Elgin*, the Court ordered that the Arbitrator be removed from the arbitration tribunal[69] because prior to retaining the arbitrator as an appointee to the tribunal, the principal witness for one of the parties met with the arbitrator at the arbitrator's home, they spent some sociable time together, and at that meeting the witness provided the arbitrator with documents related to the dispute, some of which were privileged, and discussed the facts in issue.[70]

In *Wright v Toronto Railway*[71] the Court granted a motion to set aside an Arbitral Award where: a) two of the three Arbitrators separately received *ex parte* communications referencing an offer to settle from the plaintiff's solicitor (the Court found that this alone it could be argued that the arbitrator *ipso facto* became disqualified); and b) the two arbitrators also discussed the case in the absence of the third arbitrator.[72]

According to the Act and the International Act, any statement, correspondence, documents or information provided to the tribunal by one party must also be provided to both parties.[73] Neither section mandates as to when the statement, correspondence, document or information provided to the tribunal shall be provided to opposing counsel.

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[68] *Ibid* at paras 47 and 54.
[69] *Waterloo v Elgin*, *supra* note 62 at para 29.
[70] *Ibid* at paras 7 and 21.
[71] 1914 CarswellOnt 155 (S Ct (HCJ)).
[72] *Ibid* at paras 3 and 5.
[73] *Arbitration Act, 1991*, section 26(3); Model Law, article 24(3).

This means that subject to the agreement between the parties, there are times when a party can have *ex parte* communications with the tribunal.

Whether or not counsel can have *ex parte* communications with the tribunal will depend upon the terms of the arbitration agreement and the terms of the submission to arbitration. "In other words, arbitrators may or may not be authorized to proceed without notice."[74] Counsel should carefully read the arbitration agreement, and the rules under which the arbitration is to be conducted, before embarking on *ex parte* communications with the tribunal.

In *Farah v Sauvageau*, the arbitration agreement mandated that the arbitration was to be conducted pursuant to the *ADR Chambers Arbitration Rules*[75] ("*ADR Rules*"). It also incorporated certain provisions of the *Rules of Civil Procedure*. Justice Perell held that the *ADR Rules*, which prohibited *ex parte* communications, were not trumped by the particular provisions of the *Rules* set out in the agreement.[76] Consequently, Justice Perell held that the arbitrator erred in allowing the arbitration to proceed *ex parte*.[77]

Justice Perell notes that as a matter of proper civil procedure, arbitral proceedings should be conducted on notice so that the affected parties may be present and have an opportunity to be heard, which is an important principal of natural justice.[78]

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[74] *Farah v Sauvageau*, *supra* note 1 at para 76.
[75] http://goo.gl/lXN6M.
[76] *Farah v Sauvageau, supra* note 1 at para 79.
[77] *Ibid* at para 80.
[78] *Ibid* at para 81.

Counsel can protect their clients from *ex parte* communications with the arbitral tribunal or arbitrator, and all the problems that may entail, by turning their minds to whether the rules they are adopting contain a rule prohibiting *ex parte* communications[79]. If the rules do not, or if the Arbitration is to proceed according to the *Rules of Civil Procedure*, counsel may wish to insist that the arbitration agreement contain a specific clause prohibiting *ex parte* communications.

When faced with an *ex parte* communication, arbitral tribunals should conduct their own review of the arbitration agreement, and any rules it adopts, before accepting said *ex parte* communications, documents or information. However, even where *ex parte* communications are allowed either pursuant to the arbitration agreement or the rules in adopts, an arbitrator should never speak with or correspond with one party without copying the other to avoid any question of failing to treat the parties equally.[80]

Proper forum for seeking orders

In matters of emergency, either before or after the tribunal being constituted, where counsel has decided that an interim measure of protection is necessary, because there is a serious threat of the opposing party absconding with assets or destroying evidence, and where the arbitration agreement prohibits *ex parte* communications, counsel will have no choice but to bring an Application to the Superior Court of Justice for the interim order it seeks.

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[79] See Rule 8 of the *ADR Rules*, *supra* note 75; Rule 7(b) of the *ADR Institute of Canada National Arbitration Rules*; http://goo.gl/Qd5Am; and Article 7 2 of the *American Arbitration Association International Centre for Dispute Resolution Rules* http://goo.gl/Na0MW; all prohibiting *ex parte* communications.

[80] J. B. Casey, *Arbitration Law of Canada: Practice and Procedure*, 2d (Huntington: New York: JurisNet, LLC, 2011) at 195.

The *Rules of Civil Procedure* recognize that sometimes it is necessary and not a violation of the Rules or of natural justice to decide a matter without notice to the party effected. Thus, *Mareva* injunctions, *Anton Piller* orders, *Norwich* orders, and CPLs are typically obtained without notice to the affected party.

Invariably, however, these orders are made on an interim or temporary basis with a requirement that the moving party give notice of what happened to the affected party. Typically, the temporary order will have a deadline and automatically expire unless renewed. The affected party may also have an opportunity to vacate or set aside the order; as is the case with CPLs. In *Farah v Sauvageau*, the arbitrator made only a temporary order which was to be brought to the attention of Farah and his lawyer.

Where there are no matters of emergency, no fear that a party will abscond with assets or destroy evidence, a tribunal has not yet been formed, and an interim measure of protection is needed, the claimant should first commence the arbitration by preparing the Notice of Arbitration, and then go to court while the Notice of Arbitration is being served.[81]

In *ATM Compute GmBH v DY 4 Systems, Inc.*[82] Justice Sedgwick refused to make an order pursuant to article 9 of the Model Law for interim protection of property as: article 17 of the Model Law confers on an arbitral tribunal the jurisdiction to make the same

[81] *Ibid* at 175.
[82] 1995 CarswellOnt 4446 (Ct J (GD)).

order the applicant was seeking. However, the decision is silent on whether there was any urgency to the matter.[83]

Even where, *ex parte* communications are permitted by the Arbitration Agreement, nothing prohibits counsel from bringing an *ex parte* Application to the court subject to the usual restrictions.

Enforcement of arbitral orders

Justice Perell set out that "if court enforcement of an arbitral award is sought, it must be obtained by an application under section 50 of the *Arbitrations Act, 1991*".[84] The Application has to be on notice to the other parties to the arbitration agreement.[85] Section 50 of the Act states: "A person who is entitled to enforce an arbitral award made in Ontario or elsewhere in Canada may make an application to the court to that effect."

Section 11(1) of the International Act states: "An arbitral award recognized by the court is enforceable in the same manner as a judgment or order of the court." Article 35 of the UNCITRAL Model Law sets out that an arbitral award, irrespective of the country in which it was made, shall be recognized as binding. A party must bring an application to a court and the court is mandated to enforce it subject to the narrow provisions set out in article 36.

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[83] *Ibid* at paras 7 and 9.
[84] *Farah v Sauvageau*, *supra* note 1 at para 37.
[85] *Ibid*.

Where a party wishes to enforce an arbitral award, that party must bring an Application on notice to the court under: 1) section 50 of the Act, if it is an Ontario domestic arbitration, or 2) section 11(1) of the International Act, if it is an international arbitration and enforcement is sought in Ontario.

Farah v Sauvageau highlights that even where a court action precedes an arbitration, an arbitral order cannot be filed with the court office without resorting to the enforcement procedure in section 50 of the Act. The filing of the arbitral *Mareva* Order in the Court office was contrary to section 50 of the Act. An arbitral order, filed in Court as Sauvageau did in this case, is rendered bogus if accepted by the court registrar.[86]

Final thoughts on the Farah v Sauvageau

Farah v Sauvageau contains important lessons which will inform procedure and substantive law on the scope of the jurisdiction of arbitrators. Justice Perell's decision reminds us that arbitrators are not Superior Court judges. Arbitrators are clothed only with the authority the parties to the arbitration agreement have given them as modified by the provision of the Act. They cannot affect the rights of non-parties. Where the arbitration agreement is silent or incorporates by reference, the Act and the agreed upon arbitration rules may provide assistance. Within these parameters, the arbitrator is unable to proceed *ex parte* because an informed arbitration party would not permit it.

[86] *Ibid* at paras 42-43.