**Arbitrator lacks jurisdiction to make injunction orders affecting non-parties. Arbitrator cannot make order without notice to all arbitration parties.**

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Justice Paul Perell's recent decision in *Farah v. Sauvageau Holdings Inc., 2011 ONSC 1819 (CanLII)*[1] addresses so many important issues affecting arbitration that it should be on every arbitrator's and every arbitration counsel's mandatory reading list.

We preface our discussion by noting that we were counsel for the applicants in this case and continue as counsel in the arbitration before the Hon. R.S. Montgomery, QC. With this in mind, this article informs about what the Court decided without critique. There has been no appeal by either party from Justice Perell's decision.

In the space of 130 short paragraphs, the erudite jurist of the Ontario Superior Court of Justice addresses several important issues affecting arbitral jurisdiction, particularly:

- An arbitrator's jurisdiction to make an ex parte award;
- An arbitrator's jurisdiction to make an order affecting non-parties; and
- An arbitrator's jurisdiction to grant a Mareva injunction.

However, these points are not the only reasons why *Farah v. Sauvageau* is significant. Justice Perell also provides guidance on the following arbitration questions:

- Whether an arbitrator should be disqualified for exceeding his/her jurisdiction;
- What to do about an arbitral award, which has been filed in a Court and enforced without resorting to s.50 of the *Arbitration Act (*"the Act"); and
- Whether an arbitrator has all the powers of a judge.

Justice Perell also applies the rarely-used judicial jurisdiction which permits a judge to turn any motion into a motion for judgment. He does so in respect of the motion to set aside a certificate of pending litigation ("CPL"). Instead of dealing with the CPL directly, Perell J. directed that the conveyance in the case be set aside and the property be reconveyed to both applicants.

*Facts*

Farah owned a collection agency known as CSC, which he listed for sale. He wanted to move to Florida. 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.

[1] See www.canlii.org or this link: http://bit.ly/hdNQDn.

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* 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 Hon. R.S. Montgomery, QC of ADR Chambers ("the arbitrator").

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 lie or mistake as to whether she was pregnant.

In November 2010, Sauvageau attended before the arbitrator without notice to Farah or his 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 Superior Court office in Newmarket in the existing actions against Farah and his wife. The Registrar's office issued and entered the arbitrator's order even though there was no application for enforcement under s.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 her father and on 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 of a judge, including authority to grant the Mareva injunction and stated 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 concluded that Farah was a fraudster and that the playing field was unbalanced.

*Justice Perell's decision*

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 under which the parties agree to have their disputes resolved by an arbitrator, not by the

courts. The Court has jurisdiction to intervene only where the arbitrator has exceeded his/her jurisdiction as to the subject matter of the dispute and where the arbitrator has treated the parties unfairly. [2]

After thoroughly reviewing the facts of case, Justice Perell concluded that the arbitrator did not have the same jurisdiction as a judge of the Superior Court. While the arbitrator had the jurisdiction to make an injunctive order against Farah and his wife only, he did not have jurisdiction to grant a Mareva injunction affecting non-parties to the arbitration agreement. The *ADR Chambers Arbitration Rules* prohibited *ex parte* communications with the arbitrator. These Rules were not trumped by the arbitration agreement which made certain provisions of the *Rules of Civil Procedure* applicable

Justice Perell noted that arbitrators depend upon the Act and the arbitration agreement for their jurisdiction. 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.

Sections 6 and 8(1) of the *Act* give the Court the power to assist the arbitrator by providing an injunction and enforcement order where required. It followed that the arbitrator did not have jurisdiction to grant a Mareva injunction affecting third parties. Further, the filing of the arbitral Mareva Order in the Court office was contrary to s.50 of the Act. The arbitral Mareva order, which Perell J. referred to as “bogus”, was set aside. However, Perell J. held that the circumstances narrowly justified a judicial Mareva order against Farah only. The Mareva order against Farah’s wife was set aside with costs.

Notwithstanding the arbitrator’s jurisdictional error, Perell J. did not disqualify him. Perell J. held that the arbitrator’s error was not a denial of natural justice nor was Farah’s apprehension of bias reasonable. The Court also held that the best way to deal with the property transfer was simply to direct that the title be transferred back to joint tenancy between Farah and his wife. This made the CPL unnecessary.

This case contains important lessons which will inform procedure and substantive law in future cases. It also highlights that even where a court action precedes an arbitration, the arbitration order cannot be filed in court without resort to the enforcement procedure in s. 50 of the Act if filed in the Court office. An arbitral order filed in Court as Sauvageau did in this case is bogus.

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. 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.

Below is a copy of Justice Perell’s Reasons for Decisions as published by the Canadian Legal Information Institute, www.canlii.org,

[2] *Inforica Inc. v. CGI Information Systems and Management Consultants Inc,* 2009 ONCA 642 at para. 14, 27.

**CITATION:** Farah v. Sauvageau Holdings Inc., 2011 ONSC 1819
**COURT FILE NO.:** 11-CV-417709
**COURT FILE NO.:** 11-CV-421997
**DATE:** 20110323

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**NADER MUNIR FARAH and EVA SAMEER SALIM AL-MOSHARBASH**

Applicants

- and -

**SAUVAGEAU HOLDINGS INC.**

Respondent

**COUNSEL:**

**Orie H. Niedzviecki and Evelyn Perez Youssoufian**, for the Applicants
**Bois Wilson and Francois Sauvageau**, for the Respondent

**HEARING DATES:** March 16 and 17, 2011

**PERELL, J.**

**REASONS FOR DECISION**

## A. Introduction and Outline

[1] This is an application by Nadeer Munir Farah and Eva Sameer Salim Al-Mosharbash, who are husband and wife, to have the Hon. Robert S. Montgomery removed as the arbitrator to resolve the dispute with Sauvageau Holdings Inc.

[2] Mr. Farah and Ms. Mosharbash also seek an order setting aside the Arbitrator's award granting a *Mareva* injunction.

[3] Further, they seek an order vacating a certificate of pending litigation registered against Mr. Farah and Ms. Mosharbash's matrimonial home. The certificate was obtained in a

fraudulent conveyance action brought by Sauvageau Holdings against Ms. Mosharbash, who received a conveyance of Mr. Farah's joint interest in their matrimonial home.

[4] At the hearing of their motion, Mr. and Ms. Mosharbash did not pursue requests for the Court to set aside the arbitration agreement or for a declaration that a new claim against Ms. Mosharbash was outside the referral to arbitration.

[5] There is a cross-application pursuant to s. 50 of the *Arbitration Act, 1991*, S.O. 1991, c. A.17 by Sauvageau Holdings for enforcement of the arbitral-*Mareva* injunction granted by Mr. Montgomery, or, in the alternative, Sauvageau Holdings brings a motion and asks the Court to grant a freshly-minted judicial *Mareva* injunction.

[6] For the Reasons that follow:

- I dismiss the motion to disqualify Mr. Montgomery.
- I declare that while Mr. Montgomery has the authority to make a binding injunctive award enjoining Mr. Farah (a preservation order), which award can be enforced pursuant to the enforcement provisions of the *Arbitration Act, 1991*, he did not have the jurisdiction to make an arbitral-*Mareva* injunction involving third parties, who are outside the arbitrator's jurisdiction. I, therefore, quash or refuse to enforce the arbitral-*Mareva* injunction.
- I dismiss the cross-application for enforcement of the arbitral-*Mareva* injunction, which Mr. Montgomery did not have the jurisdiction to make.
- The motion for a *Mareva* injunction against Ms. Mosharbash should be dismissed.
- I grant Sauvageau Holdings' motion for a judicial *Mareva* injunction as against Mr. Farah and to the extent that the certificate of pending litigation that is registered against the matrimonial home may be replaced by a certificate registered against Mr. Farah's interest, subject to the right of Mr. Farah to apply for permission to secure a first mortgage for the purpose of financing normal living and business expenses and the legal expenses of the arbitration proceedings.
- In the fraudulent conveyance action, I convert the motion to vacate the certificate of pending litigation into a motion for judgment, and I grant judgment to Sauvageau Holdings setting aside the conveyance of Mr. Farah's interest in the matrimonial home to Ms. Mosharbash.

[7] To understand the rationale for these orders and to follow the discussion below, it will prove helpful to identify the major issues to be resolved and then to address them separately.

[8] The issues are interrelated, but finding their solutions is best achieved by a breakdown of the facts and the law for each issue. I will provide a fact synopsis, but some of the factual details will be found in the discussion of the major issues.

[9] This approach, for instance, will prove advantageous in discussing whether Mr. Montgomery should be disqualified for a reasonable apprehension for bias, which discussion is not aided by integrating it with the discussion of whether this Court should vacate a certificate of pending litigation or enforce an arbitration award or grant a *Mareva* injunction.

[10] By way of an outline of this approach, these Reasons for Decision will be divided into the following parts.

- Introduction and Outline
- Fact Synopsis
- Arbitrator's Jurisdiction to Grant a *Mareva* injunction
- Arbitrator's Jurisdiction to Hear Matters *ex parte*
- Whether Mr. Montgomery Should be Disqualified as Arbitrator
- Whether the Certificate of Pending Litigation Should be Vacated
- The Test for a *Mareva* injunction
- Whether a *Mareva* injunction Should be Granted against Ms. Mosharbash
- Whether a *Mareva* injunction Should be Granted against Mr. Farah
- The Terms of the *Mareva* injunction
- Costs
- Conclusion

## B. Fact Synopsis

[11] In the fall of 2010, François Sauvageau, a lawyer called to the bars of Ontario and Québec, negotiated with Mr. Farah to purchase the shares of Collection Systems Canada Corp., an Ontario corporation owned by Mr. Farah.

[12] Ms. Mosharbash, Mr. Farah's wife, who is not involved in the business, is not involved in the negotiations. She makes no representations about the business; however, she had some conversations with Mr. Sauvageau's employees and with Mr. Sauvageau about being pregnant, which was not true, although not long after these conversations, she did become pregnant and she has delivered the family's second child.

[13] Sauvageau Holdings will eventually fashion a fraud claim against Ms. Mosharbash based on her lie or mistake about being with child.

[14] Mr. Sauvageau incorporates Sauvageau Holdings to acquire Collection Systems.

[15] The form of the transaction is a Share Purchase Agreement. The Share Purchase Agreement includes a dispute resolution scheme that involves notice of claims, time to negotiate a settlement, and then arbitration or court proceedings. The Agreement sets a maximum on the vendor's liability save for fraud; that is, the Agreement provides that Mr. Farah's liability to indemnify Sauvageau Holdings is capped at $450,000.00, unless he has been fraudulent, in which case, there is no limit to his liability.

[16] The transaction closed on December 1, 2009, and Sauvageau Holdings paid $600,000 to Mr. Farah. He used this money to discharge the mortgage on the matrimonial home, to pay debts, and to pay his brother Tamar for his interest in Collection Systems.

[17] On December 8, 2009, Mr. Farah transferred his interest as a joint tenant in the matrimonial home, 246 Lakeland Crescent, Richmond Hill, to Ms. Mosharbash for no consideration. Mr. Farah continues to live in the matrimonial home.

[18] It was Mr. Farah's evidence that the plan at the time of the sale of Collection Systems was that he would look for work in Florida where the family would move and that the transfer of the matrimonial home to Ms. Mosharbash was to facilitate these plans. Sauvageau Holdings' position is that this is an untrue explanation for the transfer of the home and that the transfer was made with the intent to place assets out of the hands of Mr. Farah's creditors, most particularly Sauvageau Holdings, because no other creditors have been identified.

[19] It is Mr. Farah's evidence that in December 8, 2010, he had no outstanding liabilities and was unaware of any grievances by Sauvageau Holdings, which had just taken control of Collection Systems.

[20] In the months that followed, the business of Collection Systems did not prosper, but it continued to operate. Mr. Farah attributes the disappointing performance to Mr Sauvageau's alleged lack of business acumen. Mr. Sauvageau, however, attributes the problems to having been deceived by Mr. Farah and Ms. Mosharbash.

[21] Mr. Sauvageau is confident beyond arrogance that he will prove that Mr. Farah is a fraudster. Mr. Farah is similarly confident that he will prove that he has been falsely accused and that Mr. Sauvageau has only himself to blame.

[22] Sauvageau Holdings alleges that the Share Purchase Agreement contains false representations about: Collection Systems' clients, the value of its assets and liabilities; its profitability; and the absence of the threat of legal action.

[23] Notwithstanding these grievances, Sauvageau Holdings did not invoke the dispute resolution provisions of the Share Purchase Agreement, which would require Sauvageau Holdings giving notice of its claim for indemnification and allowing Mr. Farah 30 days to investigate and to attempt to resolve the claim. Rather, on March 2, 2010, Sauvageau Holdings commenced an action against Mr. Farah, and on March 8, 2010, it commenced a fraudulent conveyance action against Ms. Mosharbash with respect to the transfer of Mr. Farah's joint interest in the matrimonial home. These actions were commenced in Newmarket, Ontario in the Superior Court.

[24] In its fraudulent conveyance action against Ms. Mosharbash, on March 9, 2010, on a motion without notice, Sauvageau Holdings obtained a certificate of pending litigation, and it registered the certificate against the title of the matrimonial home.

[25] In the motions before the court, Mr. Farah attempts to make much of the fact that the claim resolution provision in the Share Purchase Agreement was not drawn to the court's attention on the without notice motion for the certificate of pending litigation.

[26] On April 24, 2010, Mr. Farah delivered his statement of defence and a counterclaim, and Ms. Mosharbash delivered her statement of defence in the fraudulent conveyance action.

[27] After the exchange of pleadings, Mr. Farah took the position that the Share Purchase Agreement required the parties to submit their dispute to arbitration and that Sauvageau Holdings had breached the agreement by commencing court proceedings. In these circumstances, Sauvageau Holdings agreed to submit the dispute to arbitration.

[28] It is my view that the Share Purchase Agreement made arbitration an alternative to court proceedings, but nothing now turns on this point, because on June 30, 2010, the parties signed an Arbitration Agreement and appointed the Hon. Robert S. Montgomery as arbitrator.

[29] Under the Arbitration Agreement, the parties agreed that the ADR Chambers Arbitration Rules apply to the arbitration except where the Arbitration Agreement provides otherwise. They agreed to use the pleadings in the existing actions in lieu of a notice of arbitration.

[30] On October 27, 2010, Ms. Mosharbash sold a property known as 46 Cottinghill Way, Aurora, which was owned by Mr. Farah but registered in her name. This sale led Sauvageau Holdings to believe that Mr. Farah and Ms. Mosharbash were dissipating their assets in order to avoid justice. This belief was heightened by the fact that following the sale of 46 Cottinghill, Ms. Mosharbash deposited and then withdrew $40,000 from a newly opened bank account at Scotia Bank and by the fact that following the sale, she gave more than $122,000 to her brother-in-law with no explanation other than this was her father-in-law's wish.

[31] On December 3, 2010, Sauvageau Holdings attended before Mr. Montgomery with three volumes of motion material, including a 74-paragraph affidavit sworn by Mr. Sauvageau and freshly amended statements of claim, which had not been seen by Mr. Farah and Ms. Mosharbash. Mr. Farah and Ms. Mosharbash were not given notice of this attendance.

[32] Although Ms. Mosharbash is not a party to the action against Mr. Farah, the amended pleading alleges that she conspired with Mr. Farah to induce Sauvageau Holdings to purchase Collection Systems. This allegation is also added to the fraudulent conspiracy action in which Ms. Mosharbash, but not Mr. Farah, is the defendant.

[33] As noted, the attendance before Mr. Montgomery was without notice to Mr. Farah or to Ms. Mosharbash. Sauvageau Holdings requested an interim *Mareva* injunction. It did not ask for leave to amend its pleadings, it simply included them in the voluminous material presented to Mr. Montgomery.

[34] Mr. Montgomery granted Sauvageau Holdings an interim *Mareva* injunction restraining Mr. Farah and Ms. Mosharbash. The terms of the Order include the following:

> 1. The Defendants, Nader Munir Farah, … and Eva Sameer Salim Al-Mosharbash … their servants, employees, agents, assigns and anyone else acting on their behalf or in conjunction with them and including any and all persons with notice of this injunction, are restrained from directly or indirectly, by any means whatsoever:
>
> > (a) selling, removing, dissipating, alienating, transferring, assigning, encumbering, or similarly dealing with any assets of the Defendant, wherever situate, including but not limited to assets and accounts listed in Schedule "A" hereto. ….
>
> 2. For the purpose of this Order, the Defendants' assets include any assets which they have the power, directly or indirectly, to dispose of or deal with as if it were their own. The Defendant is to be regarded as having such

> power if a third party holds or controls the assets in accordance with their direct or indirect instructions.
>
> *Ordinary Living Expenses*
>
> 4. The Defendants may apply for an order, on at least twenty-four (24) hours' notice to the Plaintiff, specifying the amount of funds which the Defendant is entitled to spend on ordinary living expenses and legal advice and representation.
>
> *Variation, Discharge or Extension of Order*
>
> 10. Anyone served with or notified of this order may apply to the Court [sic?] at any time to vary or discharge this Order, on two (2) days' notice to the Plaintiff.
>
> 11. The Plaintiff shall apply for an extension of this Order within ten (10) days hereof, failing which this Order will terminate.

[35] It may be noted that paragraphs 1 and 10 of the Order purports to make the *Mareva* injunction applicable to "all persons with notice of this injunction". Paragraphs 7 and 8 expressly dealt with the effect of the order on third parties. Those paragraphs state:

> *Third Parties*
>
> 7. This Order applies to any financial institutions with notice of this Order (the "Banks") to forthwith freeze and prevent any removal or transfer of monies or assets of the Defendants held in any account or on credit on behalf of the Defendant with the Banks, until further Order of this Court [sic?]
>
> 8. It is further ordered that the Banks forthwith disclose and deliver up to the plaintiff any and all records held by the Banks concerning the Defendants' assets and accounts, including the existence, nature, value and location of any monies or assets or credit, wherever situated, held on behalf of the Defendants by the Banks.

[36] Sauvageau Holdings filed the interim *Mareva* injunction in the Superior Court in Newmarket in the two court files for the actions against Mr. Farah and Ms. Mosharbash respectively, and Sauvageau Holdings had the court staff issue and enter the order.

[37] It is now admitted that that this was improper and that if court enforcement of an arbitral award is sought, it must be obtained by an application under s. 50 of the *Arbitrations Act, 1991*, which application would be on notice to Mr. Farah and Ms. Mosharbash.

[38] I note here that the application under s. 50 is now before the Court, and I foreshadow to say that I will conclude below that Mr. Montgomery did not have the authority to grant a *Mareva* injunction and thus resorting to s. 50 of the *Arbitration Act, 1991* is pointless.

[39] On December 5, 2010, Sauvageau Holdings served the new statements of claim and the arbitral-*Mareva* injunction order on Mr. Farah and Ms. Mosharbash.

[40] On December 15, 2010, Mr. Farah and Ms. Mosharbash brought a motion to have Mr. Montgomery recuse himself and for an order setting aside the *Mareva* injunction. At the hearing

on December 15, 2010, they presented very little evidence to rebut the material filed by Sauvageau Holdings and rather relied on a short affidavit from a clerk employed by their lawyer.

[41] Mr. Montgomery dismissed the motion and continued the *Mareva* injunction. He released reasons for his decision, which I will mention below.

[42] Sauvageau Holdings sent copies of the bogus Order of the Superior Court to all the major banks, to other financial institutions, Mr. Farah's employer, Mr. Farah's real estate agent, and Ms. Mosharbash's father.

[43] For present purposes, I need not go into the details, but the recipients responded to the bogus *Mareva* injunction order as if the order was a lawful order of the Superior Court. Mr. Farah and Ms. Mosharbash have been unable to deposit cheques, including Mr. Farah's paycheck and the family's child tax benefit cheques. Mr. Farah was temporarily dismissed from his employment as a restaurant cook because his employer was disturbed by having to deal with the bogus order.

[44] On January 17, 2011, Mr. Farah and Ms. Mosharbash attend in triage court and obtain a date for a motion for an order, among other things, to remove Mr. Montgomery as arbitrator. The motion is returnable on February 17, 2011.

[45] On February 17, 2011, I adjourned Mr. Farah's and Ms. Mosharbash's motion to March 16-17, 2011, and I raised the issue of whether Mr. Montgomery had the jurisdiction to grant a *Mareva* injunction affecting persons who were not parties to the agreement to arbitrate. Up until I raised the question, Mr. Farah's and Ms. Mosharbash's complaint was that Mr. Montgomery had made the order *ex parte*. They did not challenge his jurisdiction to grant an arbitral-*Mareva* injunction involving persons who had not signed the agreement to arbitrate.

[46] In the run up to the hearing of Mr. Farah's and Ms. Mosharbash's adjourned motion to disqualify Mr. Montgomery, they brought a motion to request that the certificate of pending litigation registered against the matrimonial home be vacated.

[47] Sauvageau Holdings brought a cross-motion for enforcement of the arbitral-*Mareva* injunction pursuant to s. 50 of the *Arbitration Act, 1991* or in the alternative, it requested a court ordered *Mareva* injunction.

[48] Mr. Farah and Ms. Mosharbash deposed that they have no money and that their only asset is the unencumbered matrimonial home, which is estimated to have a value of $1 million. Ms. Mosharbash cares for two infant children. Mr. Farah is employed as a cook at a restaurant earning a salary of $14 per hour.

[49] Mr. Montgomery has scheduled March 28, 2011 for the commencement of the arbitration hearing.

## C. Arbitrator's Jurisdiction to Grant a Mareva injunction

[50] The first major issue to address is whether Mr. Montgomery had jurisdiction to grant an arbitral-*Mareva* injunction.

[51] I disagree with Sauvageau Holding's arguments that the Legislature has conferred a jurisdiction on arbitrators under the *Arbitrations Act,* 1991 to grant *Mareva* injunctions. In its factum, it submitted that "arbitrators acting under the Act have the same power as the Courts with respect to granting interim relief." I conclude, rather, that the Legislature did not confer this jurisdiction. I add

that I doubt that the Legislature could confer on private arbitrators the same power as the court's jurisdiction without violating s. 96 of the *Constitution Act*.

[52] I agree with the following observation of J. B. Casey, *International and Domestic Commercial Arbitration* (Carswell: Scarborough, 1993) at para. 6.5:

> The extent to which preservation orders made by the arbitral tribunal are useful are questionable. Usually preservation orders and orders in the nature of an interim injunction involve third parties who are not bound by the jurisdiction of the arbitral tribunal. In these cases, it is necessary to apply to the court for assistance, and rather than use the tribunal's powers, it may well be more expeditious to simply proceed to court and use the provisions of the legislation giving the court power with respect to the detention, preservation, and inspection of property, interim injunctions, and appointment of receivers. Under the Ontario domestic Act, it may be more advantageous to bring a motion before a judge in Motions Court for the interim relief a party is seeking, in the same way a party would move for interim relief in an action rather than use the arbitral tribunal.

[53] In *Canadian Musical Reproduction Rights Agency Ltd. v. Canadian Recording Industry Association*, [2005] O.J. No. 6387 (S.C.J.), the applicant, a music licensing agency, and the respondent, an industry association, negotiated a licensing agreement that included an arbitration clause. BMG Music withdrew from the negotiations and was not a party to the contract. A dispute arose and the applicant and the respondent submitted the dispute to arbitration, and the arbitrator made an interlocutory order requiring BMG Music to answer extensive written interrogatories. Justice Echlin held that the arbitrator did not have the jurisdiction to make this order. In comments, with which I agree, in paragraphs 9 and 11, Justice Echlin stated:

> 9. BMG was not a party to the arbitration. The arbitrator had no inherent jurisdiction, unlike a Superior Court judge. The jurisdiction did not arise from the arbitration agreement nor from the *Arbitration Act*, 1991 S.O. 1991, c. C-17.
>
> 11. While the arbitration agreement purports to give the arbitrator the jurisdiction, an arbitration agreement cannot give an arbitrator jurisdiction over a non-party.

[54] An arbitral tribunal gets its jurisdiction only from the contractual or statutory instrument appointing it: *Dominion of Canada General Insurance Co. v. Certas Direct Insurance Co.*, [2009] O.J. No. 2971 (S.C.J.) at para. 21; *Cumandra v. Cumandra*, [2004] O.J. No. 5540 (Sup. Ct.).

[55] In *Pirner v. Pirner* reflex, (1997), 34 O.R. (3d) 386 (Gen. Div.), Justice Jarvis quashed an arbitral award that purported to dispose of the rights of non-parties to the arbitration and held that strangers to the arbitration agreement will not be bound by the award, in the absence of some agreement to the contrary. See also *Rampton v. Eyre*, [2006] O.J. No. 5222 (S.C.J.).

[56] In *Jardine Lloyd Thompson Canada Inc. v. SJO Catlin*, 2006 ABCA, leave to appeal to S.C.C. ref'd [2006] S.C.C.A. No. 87, the Alberta Court of Appeal held that under the *International Commercial Arbitration Act*, an arbitration tribunal could not compel a non-party to submit to examinations for discovery, but the tribunal was entitled to seek assistance from the court in obtaining discovery evidence from third parties.

[57] Domestic arbitrators, like Mr. Montgomery in the case at bar, depend upon the *Arbitration Act, 1991* and the arbitration agreement for their jurisdiction. Contrary to Sauvageau Holdings' argument, 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.

[58] It is precisely because the *Arbitration Act, 1991*recognizes that arbitrators do not have jurisdiction over third parties who are strangers to the arbitration agreement that the Act acknowledges the court's jurisdiction to come to the aid of the arbitrator. This approach of the court's jurisdiction being an adjunct power to support arbitration is exemplified by s. 6 of the Act, which permits the court to intervene to assist the conducting of arbitration. Section 6 states:

> 6. No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:
>
> 1. To assist the conducting of arbitrations.
>
> 2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
>
> 3. To prevent unequal or unfair treatment of parties to arbitration agreements.
>
> 4. To enforce awards.

[59] Section 6 is complemented by s. 8 (1) of the Act, which 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. Section 8 (1) 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.

[60] Section 18 (1) of the Act does provide a jurisdiction on arbitrators to make detention, preservation and inspection of property orders, but this jurisdiction is expressly directed only at the parties to the arbitration and not toward third parties. Section 18 (1) states:

> *Detention, preservation and inspection of property and documents*
>
> 18. (1) 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.

[61] Section 18 (2) the Act recognizes, once again, that the court's jurisdiction may need to be called in aid of assisting the conduct of the arbitration. Section 18 states:

> *Enforcement by court*
>
> (2) The court may enforce the direction of an arbitral tribunal as if it were a similar direction made by the court in an action.

[62] Section 31 of the Act does provide the arbitrator to "decide the dispute" in accordance with equity and to grant equitable remedies such as specific performance, rescission, and injunctions, but there is nothing in s. 31 that extends the arbitrator's equitable jurisdiction to persons who are not parties to the arbitration procedure. Section 31 states:

*Application of law and equity*

31. An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies.

[63] In my opinion, there is nothing in the *Arbitration Act, 1991* that empowers arbitrators to grant *Mareva* injunctions or for that matter to appoint receivers, grant *Anton Pillar* orders, or grant *Norwich* orders. 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.

[64] Relying on the observation of Justice Blair in *Ontario Hydro v. Denison Mines Ltd*., [1992] O.J. No. 2948 (Gen. Div.) at para. 14 that the *Arbitration Act, 1991* signals a shift in policy and attitude towards the resolution of disputes in civil matters through consensual resolution mechanisms, Sauvageau Holdings argues that the Legislature intended: (a) to give primacy to arbitration over adjudication; and (b) to give arbitrators the full panoply of powers and remedies available to a court.

[65] Further, Sauvageau Holdings argues that giving arbitrators the same power as courts is necessary to "fill a gaping hole in the scope of the *Arbitrations Act, 1991* and in the assistance and encouragement it is able to offer to those who wish to use the mechanism of arbitration with relative ease and with confidence in the enforcement procedure."

[66] I disagree with these arguments. There is nothing in the Act that suggests that the Legislature intended to confer on arbitrators a jurisdiction commensurate with the court's jurisdiction over persons who are not parties to the agreement to arbitrate. Necessity is not the mother of jurisdiction, and moreover, the Legislature recognizes in sections 6, 8 (1), and 18(2) that the courts are available to fill any "gaping holes" in the efficacy of arbitration proceedings. The approach of the Legislature is to limit the court's ability to stay arbitration proceedings and to direct courts to assist the arbitration process by making available the Superior Court's jurisdiction in aid of the arbitrator's jurisdiction, which is enhanced over the parties to the agreement to arbitrate but not over strangers to that agreement.

[67] In advancing its argument that arbitrators have the jurisdiction to grant *Mareva* injunctions, Sauvageau Holdings relies on another comment of Justice Blair, this time in *Deluce Holdings Inc. v. Air Canada et al.* reflex, (1992), 12 O.R. (3d) 131 (Gen. Div.) at para. 62, where he stated that the "Act entrenches the primacy of arbitration proceedings over judicial proceedings once the parties have entered into an arbitration agreement by directing the court generally not to intervene."

[68] I do not disagree with Justice Blair's comment, but he is discussing the role of the court with respect to parties who "have entered into an arbitration agreement" and he does not remotely suggest that arbitrators have the same jurisdiction as courts over persons who are strangers to the arbitration agreement.

[69] Sauvageau Holdings relies on various provisions of the Arbitration Agreement, which includes the Arbitration Rules utilized by Mr. Montgomery; namely "the ADR Chambers Arbitration Rules" to give the arbitrator the jurisdiction to grant a *Mareva* injunction. For example, it relies on Rule 11, which states:

> *Interim Measures of Protection*
>
> 11.1 At the request of any Party and on notice to all the other Parties the Arbitral Tribunal may order whatever interim measures it deems necessary, including injunctive relief, measures for the protection or conservation of property and security for costs.
>
> 11.2 Such interim measures may take the form of an interim award.

[70] I do not doubt that these rules enabled Mr. Montgomery to make orders binding on the parties to the arbitration agreement, but these private contractual provisions do not and cannot confer on the arbitrator the court's jurisdiction over third parties who are strangers to the arbitration agreement.

[71] In another argument, Sauvageau Holdings submitted that while the arbitrator had the jurisdiction to grant *Mareva* injunctions, the enforcement of these injunctions required the imprimatur of the court's power to enforce awards under s. 50 of the *Arbitration Act, 1991* and "this enforcement mechanism counterbalances the broad powers given to arbitrators by section 31 of the *Arbitration Act, 1991* in allowing the Court to refuse to enforce an unusual award it would not have made in similar circumstances (see subsection 50(7))."

[72] Apart from the fact that the court's jurisdiction under s. 50 of the Act to refuse to enforce an arbitration award is very narrowly circumscribed and would provide very little counterbalance, this argument assumes, but does not prove, that the Legislature conferred arbitrators with the jurisdiction of judges appointed under s. 96 of the *Constitution Act*.

[73] None of Sauvageau Holdings' arguments are adequate to prove that arbitrators have the same jurisdiction as judges of the Superior Court. I conclude that while Mr. Montgomery had the jurisdiction to make an injunctive order or arbitral award against Mr. Farah and Ms. Mosharbash as parties to the agreement to arbitrate, he did not have the jurisdiction to grant a *Mareva* injunction effecting persons who did not sign the agreement to arbitrate.

## D. Arbitrator's Jurisdiction to Hear Matters ex parte

[74] A great deal of the argument in the factums of the parties and on the hearing of the motion and the cross-motion was dedicated to the issue of whether arbitrators have the jurisdiction to grant interlocutory relief on a motion without notice (*ex parte*), as occurred in this case. This issue was intertwined with the debates about an arbitrator's jurisdiction under the *Arbitration Act, 1991* to grant an arbitral-*Mareva* injunction and about whether Mr. Montgomery should be disqualified because of a reasonable apprehension of bias because he proceeded to hear the *Mareva* injunction motion *ex parte*.

[75] I have already concluded that arbitrators do not have the jurisdiction to grant *Mareva* injunctions, and, thus, the issue about an arbitrator's jurisdiction to proceed *ex parte* remains pertinent only to the discussion below about whether Mr. Montgomery should be disqualified.

[76] On this issue, it is my opinion that whether an arbitrator may proceed *ex parte* depends 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. It depends upon the agreement of the parties.

[77] In the case at bar, Clause 2 of the parties' Arbitration Agreement incorporates Rules 8 and 11 of the ADR Chambers Arbitration Rules, except where the Arbitration Agreement provides otherwise. Rules 8 and 11 of the ADR rules state:

> *Communications with the Arbitral Tribunals*
>
> 8. No Party of person acting on behalf of a Party may communicate *ex parte* with the Arbitral Tribunal.
>
> *Interim Measures of Protection*
>
> 11.1 At the request of any Party and on notice to all the other Parties the Arbitral Tribunal may order whatever interim measures it deems necessary, including injunctive relief, measures for the protection or conservation of property and security for costs.

[78] These provisions from the ADR Rules support the argument that *ex parte* motions were not authorized by the parties in the case at bar. However, Sauvageau Holdings relies on clauses 13 and 20 of the Arbitration Agreement to argue that Mr. Montgomery was authorized to make *ex parte* orders. Those clauses state:

> *Motions and Interim Matters*
>
> 13. The parties agree that Rules 37 and 39 apply except that all motions shall be heard at a location selected by the Arbitrator.
>
> *Remedial Powers of the Arbitrator*
>
> 20. The Arbitrator shall have all the remedial powers of a trial judge of the Ontario Superior Court of Justice

[79] In my opinion, however, these provisions offer only weak support for Sauvageau Holdings' argument. It is a stretch to use these clauses to overcome the clear language of the ADR Rules. Clause 20 is particularly weak support, because the remedial powers of a trial judge are by definition trial powers, not interlocutory powers.

[80] Thus, it is my view that Mr. Montgomery erred in allowing the arbitration to proceed *ex parte.* However, as I will next explain, this mistake is not a reason to disqualify him as arbitrator.

[81] Generally speaking, as a matter of proper civil procedure, judicial or 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. However, it is also recognized in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 that if parties decide to forgo their right to attend, or if they forfeit the right to attend by breaching the *Rules of Civil Procedure*, that the arbitrator or judge can decide the matter without the party being present. These general principles are acknowledged by s. 27(3) of the *Arbitration Act, 1991*, which states:

> *Failure to appear or produce evidence*
>
> 27(3) If a party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may, unless the party offers a satisfactory explanation, continue the arbitration and make an award on the evidence before it.

[82] The *Rules of Civil Procedure* also recognize that sometimes it is necessary and not a violation of the *Rules of Civil Procedure* or of natural justice to decide a matter without notice to the party effected. Thus, *Mareva* injunctions, *Anton Pillar* orders, *Norwich* orders, and certificates of pending litigation 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 or the affected party will have an opportunity to vacate or set aside the order, as is the case with certificates of pending litigation. In the case at bar, Mr. Montgomery made only a temporary order which was to be brought to the attention of Mr. Farah and his lawyer.

[83] There was no denial of natural justice in the case at bar. Notice of the arbitral-*Mareva* injunction was given and Mr. Farah and Ms. Mosharbash had an opportunity to be heard as to why the order should not be extended.

[84] In *Inuit Tapirisat of Canada v. Canada (Attorney General)*, 1980 CanLII 21 (S.C.C.), [1980] 2 S.C.R. 735, the Supreme Court of Canada approved the following comment from the House of Lords in *Pearlberg v. Varty (Inspector of Taxes)*, [1972] 1 W.L.R. 534 (H.L.) at p. 546

> Where the person affected can be heard at a later stage and can then put forward all the objections he could have preferred if he had been heard on the making of the application, it by no means follows that he suffers an injustice in not being heard on that application. *Ex parte* applications are frequently made in the courts. I have never heard it suggested that that is contrary to natural justice on the ground that at that stage the other party is not heard.

[85] Thus, although Mr. Montgomery erred by proceeding without notice, there was no denial of natural justice, and I see no reason to disqualify Mr. Montgomery on this account.

## E. Whether Mr. Montgomery Should be Disqualified as Arbitrator

[86] The next issue is whether Mr. Montgomery should be disqualified as arbitrator because of a reasonable apprehension of bias.

[87] The test for a reasonable apprehension of bias was described by Justice de Grandpré in his dissenting judgment in *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (S.C.C.), [1978] 1 S.C.R. 369 (S.C.C.), and it has been approved in numerous cases. The test is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would think that it is more likely than not that the decision-maker consciously or unconsciously would not decide the matter fairly. The information of this hypothetical observer would include knowledge of the traditions of integrity and impartiality of the judiciary: *R. v. S. (R.D.)*, 1997 CanLII 324 (S.C.C.), [1997] 3 S.C.R. 484 (S.C.C.).

[88] The test for a reasonable apprehension of bias has two elements of objectivity: (1) the measure is that of the reasonable and informed person; and (2) his or her apprehension of bias must be reasonable.

[89] The grounds for an apprehension of bias must be substantial: *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII), [2003] 2 S.C.R. 259 at para. 76; *Committee for Justice and Liberty v. Canada (National Energy Board)*, *supra*, a p. 395, but each case must be evaluated in its own particular circumstances and in light of the whole proceeding: *Wewaykum Indian Band v. Canada*, *supra*, at para. 77; *R. v. S. (R.D.)*, *supra*, at paras. 136-41.

[90] The party alleging bias has the onus of proving it, and the threshold of proof is a high one: *Ontario (Commissioner, Provincial Police) v. MacDonald*, [2009] O.J. No. 4834 (C.A.) at para. 44; *R. v. Jackpine* 2004 CanLII 28435 (ON C.A.), (2004), 70 O.R. (3d) 97 (C.A.) at para. 58.

[91] Sections 11 (1), 12, 13 (1), (5) and (6), 14 (1)(d), 15 (1), 19 (1), 20 (1) and 46 (1) of the *Arbitration Act, 1991* are relevant to the determination of the issue of whether there was a reasonable apprehension of bias in the case at bar. These sections state:

> *Duty of arbitrator*
>
> 11.(1) An arbitrator shall be independent of the parties and shall act impartially.
>
> ….
>
> *No revocation*
>
> 12. A party may not revoke the appointment of an arbitrator.
>
> *Challenge*
>
> 13.(1) A party may challenge an arbitrator only on one of the following grounds:
>
> > 1. Circumstances exist that may give rise to a reasonable apprehension of bias.
>
> ….
>
> *Decision of arbitral tribunal*
>
> (5) If the challenged arbitrator is not removed by the parties and does not resign, the arbitral tribunal, including the challenged arbitrator, shall decide the issue and shall notify the parties of its decision.
>
> *Application to court*
>
> (6) Within ten days of being notified of the arbitral tribunal's decision, a party may make an application to the court to decide the issue and, in the case of the challenging party, to remove the arbitrator.
>
> ….
>
> *Termination of arbitrator's mandate*
>
> 14. (1) An arbitrator's mandate terminates when, …
>
> > (d) the court removes the arbitrator under subsection 15(1).
>
> *Removal of arbitrator by court*
>
> 15. (1) The court may remove an arbitrator on a party's application under subsection 13 (6) (challenge), or may do so on a party's application if the arbitrator becomes unable to perform his or her functions, commits a corrupt or fraudulent act, delays unduly in conducting the arbitration or does not conduct it in accordance with section 19 (equality and fairness).
>
> *Equality and fairness*
>
> 19. (1) In an arbitration, the parties shall be treated equally and fairly.

*Idem*

(2) Each party shall be given an opportunity to present a case and to respond to the other parties' cases.

*Procedure*

20. (1) The arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with this Act.

*Setting aside award*

46. (1) On a party's application, the court may set aside an award on any of the following grounds: …

6. The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator.

….

8. An arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias.

[92] In the circumstances of the case at bar, it is my conclusion that an informed person, viewing the matter realistically and practically and having thought the matter through, would not think that Mr. Montgomery would not decide the matter fairly and they would not fear that he had prejudged the matter. Indeed, I would go farther, and I conclude that Mr. Farah and Ms. Mosharbash's apprehension of bias was unreasonable in the circumstances.

[93] Probably because of his supreme confidence in his own case, Mr. Farah had agreed to submit to arbitration a case based on serious allegations of fraud, but had the case been before the courts, he and his lawyer would not have been surprised or they should not have been surprised or agitated by an *ex parte* motion for a *Mareva* injunction, which is how they reacted when they learned that Mr. Montgomery had granted a *Mareva* injunction in the arbitration.

[94] I have decided above that Mr. Montgomery did not have the jurisdiction to grant this injunction, but he did have jurisdiction to grant preservation orders and injunctions against the parties to the arbitration agreement and that jurisdiction should have come as no surprise to Mr. Farah when he had agreed to submit a fraud case to arbitration. It is notable that he did not object to Mr. Montgomery granting an injunction only that he had proceeded *ex parte*.

[95] Mr. Farah's reaction to the *ex parte Mareva* injunction was to immediately ask Mr. Montgomery to recuse himself. In dealing with the issue of bias or apprehension of bias, in his reasons dated December 21, 2010, Mr. Montgomery stated:

I had never met either of the parties or counsel until a conference call was held to fix the dates for hearing the arbitration. I do not know either of the parties. I have not made a determination of the issues between the parties and, in particular, the allegations of fraud. What I have done on the basis of the affidavit evidence that was before me on the Mareva is to conclude that there was a strong *prima facia* case of fraud in the defendants' sale of Collection Systems Canada Corp. ("CSC") to the plaintiff. It is on the basis

> of my deciding an interlocutory motion against the defendants that they perceive bias. I repeat that the issues of fraud are not resolved and cannot be resolved until the arbitration is concluded. This aspect of the motion is dismissed.

[96] Had Mr. Farah been before the courts in comparable circumstances - and the comparison is quite close given that Mr. Montgomery was a judge before he was an arbitrator - it would have been unreasonable to apprehend bias because the judge had granted the interim injunction and the matter had come back to him or her on the motion to extend the interlocutory injunction. Mr. Montgomery's reaction to the request to recuse himself was correct.

[97] Mr. Farah builds his case for a reasonable apprehension for bias in part on the basis that Mr. Montgomery had granted the interim *Mareva* injunction *ex parte*. As discussed above, it is arguable that having done so was a procedural mistake by Mr. Montgomery, but a person informed of these circumstances would not have an apprehension of bias.

[98] In submitting that there was a reasonable apprehension of bias, Mr. Farah relies on the fact that in the three volumes of material submitted to Mr. Montgomery, Sauvageau Holdings had included irrelevant and prejudicial material for the sole purpose of discrediting Mr. Farah. This submission of prejudicial evidence, however, is not a matter for which Mr. Montgomery can be blamed, and as an experienced adjudicator, he was more than capable of ruling on the evidentiary value of the evidence and excluding it as a factor in his decision-making. There is no reasonable apprehension of bias.

[99] Mr. Farah next submits that Mr. Montgomery's findings on the motion to extend the interim *Mareva* injunction and his decision not to rescind the injunction indicate that he has now prejudged Mr. Farah's and Ms. Mosharbash's defence to the allegations of fraud and found against them in the arbitration. In my opinion, a person informed of the circumstances would not come to a similar conclusion.

[100] It should be noted that from an evidentiary perspective, Mr. Farah and Ms. Mosharbash decided to present very, very little by way of rebuttal to the voluminous materials filed by Sauvageau Holdings in support of its motion for a *Mareva* injunction. If they needed more time to file material or if they wished to cross-examine, they could have asked for that time, but they did not. Rather, they decided to ask Mr. Montgomery to recuse itself, and when that request failed, they went very thin and argued that the injunction should be set aside on the basis that there had not been fair disclosure for a motion without notice. They did not file rebutting material.

[101] Based on the uncontroverted evidence presented to Mr. Montgomery, it was understandable that he would extend the *Mareva* injunction. An informed observer would not anticipate that Mr. Montgomery had closed his mind about Mr. Farah's and Ms. Mosharbash's defence. An informed person would not think that Mr. Montgomery had prejudged a case that had not yet been submitted to him.

[102] In my opinion, Mr. Farah and Ms. Mosharbash had not met the onus of demonstrating a reasonable apprehension of bias in Mr. Montgomery arbitrating their dispute with Sauvageau Holdings.

## F. Whether the Certificate of Pending Litigation Should be Vacated

[103] Sauvageau Holdings obtained a certificate of pending litigation in the fraudulent conveyance action against Ms. Mosharbash. It relied on s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, which states:

> 2. Every conveyance or real property… heretofore or hereinafter made with intent to defeat, hinder or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures [is] void as against such persons and their assigns.

[104] The purpose of Sauvageau Holdings' fraudulent conveyance action was to set aside the conveyance by Mr. Farah of his joint interest in the matrimonial home to Ms. Mosharbash. Ms. Mosharbash brings a motion to have the certificate of pending litigation vacated. During the course of the motion, she advanced a very elaborate argument that the certificate should be vacated because Sauvageau Holdings did not make proper disclosure on the motion without notice when obtaining the certificate. As noted in the fact synopsis above, the argument made much of the fact that the claim resolution provision in the Share Purchase Agreement was not drawn to the Court's attention on the without notice motion for the certificate of pending litigation.

[105] Ms. Mosharbash advanced other arguments for vacating the certificate, but during the course of these arguments, it emerged that she acknowledged that she was holding Mr. Farah's interest in the matrimonial home in trust for him and that she did not object to the joint title of the matrimonial home being restored.

[106] This revelation led me, during the argument of the motion, to ask the parties whether the Court should exercise its jurisdiction to convert the motion to vacate the certificate into a motion for judgment and simply grant Sauvageau Holdings a judgment setting aside the alleged fraudulent conveyance. Ms. Mosharbash replied that without admitting there had been a fraudulent conveyance, she did not oppose this approach and was more concerned about being able to raise money for living and legal expenses.

[107] Sauvageau Holdings objected to being granted judgment because they did not want to lose the certificate of pending litigation that was registered against the property, which suggested to me that Sauvageau Holdings' fraudulent conveyance action was a façade for obtaining pre-judgment execution against Mr. Farah and Ms. Mosharbash.

[108] In J. W. Morden and P. M. Perell, *The Law of Civil Procedure in Ontario*, (Markham: LexisNexis, 2010) at pp. 460-61, I describe the court's jurisdiction to order that a motion be converted into a motion for judgment. I state:

> Under rule 37.13(2)(a), a judge who hears a motion may, in a proper case, order that the motion be converted into a motion for judgment: *Wilson v. Ingersoll* (1916), 38 O.L.R. 260 (H.C.J.); *Janisse v. Livesey*, [1944] O.J. No. 185 (H.C.J.); *CMLQ Investors Co. v. CIBC Trust Corp*., [1996] O.J. No. 3171 (C.A.). This jurisdiction provides another way to dispose of an action without a trial. The jurisdiction under this rule is narrow, and a judge may resort to it only where the motion for judgment would result in the resolution of the case, either by granting judgment in favour of the plaintiff or dismissing the plaintiff's action: *Centre Town Developments Ltd. v. Hull*, [1997] O.J. No. 4458 (Gen. Div.) at para. 12; *McNab v. Lechner*, [2002] O.J. No. 1530 (C.A.); *Buffa v. Gauvin* 1994 CanLII 7276 (ON S.C.), (1994), 18 O.R. (3d) 725 (Gen. Div.) and where all the necessary evidence is before the court and the parties have had full opportunity to argue their positions; *CMLQ Investors Co. v. CIBC Trust Corp*. *supra*; *Chrysalis Restaurant Enterprises Inc. v. 212 King Street West Ltd.*, [1994] O.J. No. 1983 (Gen. Div.).
>
> Where the parties do not consent, a motion should not be treated as a motion for judgment unless the court is satisfied that no other question

> remains to be tried: *Wilson v. Ingersoll*, *supra*; *Famous Players Canadian Corp. v. Hamilton United Theatres Ltd.*, [1944] O.R. 321 (H.C.J.); *Janisse v. Livesey*, *supra*.

[109] In my opinion, this is an appropriate case for the court to take the initiative and convert the motion into a motion for judgment. The purpose of the fraudulent conveyance action was to have the conveyance made by Mr. Farah set aside. That purpose will be achieved and the question of whether Sauvageau Holdings is entitled to pre-judgment execution can be determined in the context of its motion for a *Mareva* injunction, to which issue, I now turn.

## G. The Test for a *Mareva* Injunction

[110] For a *Mareva* injunction, the moving party must establish: (1) a strong *prima facie* case; (2) that the defendant has assets in the jurisdiction; and (3) that there is a serious risk that the defendant will remove property or dissipate assets before judgment: *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (C.A.); *United States of America v. Yemec* 2005 CanLII 8709 (ON S.C.D.C.), (2005), 75 O.R. (3d) 52 (C.A.).

[111] In J. W. Morden and P. M. Perell, *The Law of Civil Procedure in Ontario*, (Markham: LexisNexis, 2010) at pp. 169-170, I describe the nature of a *Mareva* injunction as follows:

> A *Mareva* injunction is not meant to give the plaintiff any priority over other creditors, nor to prevent the defendant from carrying on business in the usual course and paying other creditors. The problem addressed by a *Mareva* injunction is not so much that the defendant is depleting his or her own property, which, in the absence of the plaintiff having a security or ownership interest and subject to fraudulent conveyance and preference legislation, is something that the defendant is entitled to do, but that the defendant is doing this out of the normal course with the aim of making himself or herself judgment-proof or beyond the reach of the court's authority. In these circumstances of an attempt to evade the court's civil law authority, a *Mareva* injunction may be appropriate.

[112] In the next two parts of my Reasons for Decision, I will apply the test for a *Mareva* injunction to the circumstances of Ms. Mosharbash and then to the circumstances of Mr. Farah.

## H. Whether a *Mareva* Injunction Should be Granted against Ms. Mosharbash

[113] The case against Ms. Mosharbash is described in paragraphs 21 to 23 of Sauvageau's factum as follows:

> 21. On or around November 16, 2009, Eva told François that she was pregnant and that her and Nader were no longer planning to move to Florida because of this.
>
> 22. On November 30, 2009, Valerie Gingras, a lawyer working at Sauvageau & Associates, congratulated Eva for her pregnancy. Eva replied by saying "Thank you".
>
> 23. In June 2010, it was admitted by Eva, under oath, that she had never been pregnant, or thought to be pregnant, at any time in 2009. Nader has been untruthful as to the reason for his sale of CSC and Eva was his accomplice. They both have been untruthful in their representations to

> Sauvageau and these misrepresentations induced Sauvageau to purchase CSC.

[114] The case against Ms. Mosharbash amounts to Mr. Farah explaining to Mr. Sauvageau during the negotiations that the reason the price of Collection Systems was low was that the family was moving to Florida, which allegedly was a lie, and then after the agreement was signed, Mr. Farah needing an explanation for why the family was not moving to Florida, which was the lie that his wife was pregnant. Mr. Sauvageau sets out this case in para. 46 of the affidavit he filed for the *Mareva* injunction motion before Mr. Montgomery. Mr. Sauvageau states as follows:

> 46. It is clear to me that Eva and Nader conspired to defraud me and fabricated a story about an alleged pregnancy to justify the fact that they were no longer moving to Florida. They both acted in concert to ensure that I was not suspicious of anything. They used their alleged move to Florida to convince me that there was a legitimate reason for the sale of Collection Systems and then they created a false story about Eva's pregnancy to explain the fact that they were no longing moving.

[115] At this juncture, the evidence in support of a claim against Ms. Mosharbash is pathetically weak. Mr. Sauvageau has been cross-examined, and he admitted that: (a) his only complaint against her is that she once told him that she was pregnant and it turned out she was not and that she knew her husband was lying and supported him; (b) she made no representations to about Collection Systems; (c) she was not involved in the negotiations; (d) that her comment about being pregnant came after he had signed the Share Purchase Agreement; and (e) he could not show any reliance on anything Ms. Mosharbash had told him.

[116] At this juncture, the evidence in support of granting a *Mareva* injunction against Ms. Mosharbash is abysmally weak. There is no *prima facie* case. The evidence does not establish that she is moving property beyond the reach of her creditors or that she is fleeing the jurisdiction. She wishes to use her assets in order to sustain her family and to defend the litigation. The matrimonial home was her joint property before she had her minuscule involvement with Mr. Sauvageau, and the balance of convenience is not for the purpose of providing Sauvageau Holdings pre-judgment execution or a tactical advantage to discomfort an opposing party.

[117] I conclude that no *Mareva* injunction should be granted against Ms. Mosharbash.

## I. Whether a *Mareva* Injunction Should be Granted against Mr. Farah

[118] The last major issue is whether a *Mareva* injunction should be granted against Mr. Farah.

[119] The evidentiary record has changed since Sauvageau Holdings moved for an interim *Mareva* injunction before Mr. Montgomery. This round, Mr. Farah has presented his own affidavit material and been subjected to cross-examination. Mr. Sauvageau has also been cross-examined.

[120] It is now a much tougher call than it was for Mr. Montgomery to decide whether to grant a *Mareva* injunction or an order for the preservation of property, and with the arbitration imminent, it would be inappropriate for me to say much about the merits of the claim or the defence.

[121] Given that Sauvageau Holdings continues to operate Collections Systems, I have some doubt that it will suffer irreparable harm or that the balance of convenience favours granting it a *Mareva* injunction. On the other hand, Mr. Montgomery may decide that there have been fraudulent misrepresentations and that Sauvageau Holdings' money may be traced into Mr. Farah's assets.

[122] There is also the factor that with the arbitration about to begin, the fate of the interlocutory injunction will soon be resolved one way or the other.

[123] I, therefore, will simply say that in all these circumstances, it is my opinion that Sauvageau Holdings has just barely satisfied the criterion for the granting of a *Mareva* injunction against Mr. Farah and I will make the order.

## J. The Terms of the *Mareva* Injunction

[124] The terms of the *Mareva* injunction against Mr. Farah are to be those as found in paragraphs 1(a), 2, and 4 of the order made by Mr. Montgomery.

[125] As an additional term, the certificate of pending litigation registered against the matrimonial home can remain in place until it is replaced by a certificate registered only against Mr. Farah's interest in that property.

## K. Costs

[126] Neither Mr. Farah and Sauvageau Holdings should have any costs for the motion or the countermotion. Success and failure has been divided, and in all the circumstances, neither of these parties deserves, or should have a reasonable expectation of costs.

[127] I have decided that nothing would be served by commenting about the uncivil manner in which the litigation has been conducted save to note that there may be other reasons to deny the parties costs.

[128] If the parties cannot agree, the parties may make submissions in writing about Ms. Mosharbash's costs, beginning with her submissions, within 20 days of the release of these Reasons for Decision followed by Sauvageau Holdings' submissions within a further 20 days.

## L. Conclusion

[129] For the above reasons: (a) I dismiss the motion to disqualify Mr. Montgomery without costs; (b) I dismiss the motion to enforce the *Mareva* injunction pursuant to s. 50 of the *Arbitrations Act, 1991* without costs; (c) I grant judgment to Sauvageau Holdings in the fraudulent conveyance action without costs; (d) I grant a *Mareva* injunction against Mr. Farah without costs; and (e) I dismiss the motion for a *Mareva* injunction against Ms. Mosharbash with the matter of costs to be determined.

[130] Orders accordingly.

**Perell, J.**

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