

Sauvageau Holdings v. Farah:

An Arbitrator lacks jurisdiction to make injunction orders affecting non-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.

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 matters:

- Whether an arbitrator has jurisdiction to make an award which binds non-parties to the arbitration agreement;
- Whether an arbitrator has the same powers as a Superior Court judge;
- Whether an arbitral award can become an Order of the Court without resort to the procedure in s.50 of the *Arbitration Act* ("the Act") in any circumstances

(even an ex parte award); and

- Whether an arbitrator should be disqualified for exceeding his/her jurisdiction;

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.

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 alleged 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 no-

tice 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, 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 en-

forcement 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 re-

fused 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

Justice Perell's decision is noteworthy because it rejects the notion that an arbitrator has the same powers as a judge of the Superior Court, particularly in respect of binding third parties who have not executed the arbitration agreement.

Arbitration is a consensual process which has its roots in an agreement between the parties. Where the agreement is silent on some issues, the *Act* fills the void. Litigation in the Superior Court of Justice is presided over by a judge appointed by the government of Canada under s.96 of the *Constitution Act*.³ Contrary to submissions urged by Sauvageau's counsel, Justice Perell held that the *Arbitration Act* does not confer the powers of a Superior Court judge on an arbitrator:

[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*.

[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.).

While the arbitrator had the jurisdiction to grant 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. Further, as noted by Justice Perell,⁴ s.18(1) of the Arbitration 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. Justice Perell concludes that:

[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.

The “bogus” arbitral Mareva order, to borrow the term used by Perell J., 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.

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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 on the scope of the jurisdiction of arbitrators. 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 as modified by the provision of the Arbitration 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. ♣

1 See *Farah v. Sauvageau Holdings Inc.*, 2011 ONSC 1819 (CanLII) <http://bit.ly/hdNQDn>. 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 *Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642 at paras. 14, 27.

3 The Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3

4 *Sauvageau Holdings v. Farah*, para. 60



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