IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Herdson v. Fortin,*
2024 BCSC 1767

Date: 20240925
Docket: S242810
Registry: Vancouver

Between:

Callum Herdson

Plaintiff

And

Richard Fortin, Robert Enslen, XCar Inc., FTW Services, Inc., XCar Remarketing Inc., Cross Border Vehicle Services Inc., and Crossborder Vehicle Sales Ltd.

Defendants

Before: The Honourable Justice Blake

Reasons for Judgment

In Chambers

Counsel for the Plaintiff, Callum Herdson:	S. Robertson J.D. Bradshaw
Counsel for the Defendants Richard Fortin, Robert Enslen, Cross Border Vehicle Services Inc., and Crossborder Vehicle Sales Ltd. (the “Canadian Defendants”):	L.B. Herbst, K. C. E. Miller
No other appearances	
Place and Date of Hearing:	Vancouver, B.C. June 3, 4 and 18, 2024

Written supplemental submissions of the Plaintiff:	June 28, 2024
Written supplemental submissions of the Canadian Defendants:	July 5, 2024
Place and Date of Judgment:	Vancouver, B.C. September 25, 2024

Table of Contents

I. INTRODUCTION

[1] On May 1, 2024, I granted the plaintiff, Callum Herdson, an *ex parte Mareva* injunction, with a return date before me of June 3, 2024 (the "*Mareva* Order"), which was to remain in force up to and including June 3, 2024.

[2] This matter arises out of an employment and business arrangement turned sour, which has already been the subject of much litigation in Washington State. This is discussed in detail below, but it is clear that it has been, and continues to be, highly adversarial litigation.

[3] Mr. Herdson filed a notice of application on May 21, 2024, set down for the return date of June 3, 2024, seeking that the *Mareva* Order be extended until further order of the Court. He also seeks an order that the personal defendants, Richard Fortin and Robert Enslen, be cross-examined before a court reporter on their respective affidavits made May 14, 2024 (collectively, the "Asset List Affidavits") within 30 days of the date these reasons for judgment are pronounced.

[4] The defendants Mr. Fortin, Mr. Enslen, Cross Border Vehicles Services Inc. ("Cross Border Services"), and Crossborder Vehicles Sales Ltd. ("Crossborder Sales") (collectively, the "Canadian Defendants") oppose the relief sought by the plaintiff. The defendants XCar Inc. ("XCar"), FTW Services, Inc. ("FTW Services"), and XCar Remarketing Inc. ("XCar Remarketing") were not represented at this hearing and have filed no pleadings in this action.

[5] Although the Canadian Defendants did not bring an application to set aside the *Mareva* Order, they oppose the continuation of the *Mareva* Order, and they oppose the plaintiff's application for cross-examination of Mr. Fortin and Mr. Enslen. Fundamental to their position, they say there was material non-disclosure at the *ex parte* hearing, sufficient to cause this Court to refuse to grant Mr. Herdson any further relief. In the alternative, they say that if the *Mareva* Order is continued in any form, it should be narrowed and the plaintiff should post security for its continuation.

[6] Although the hearing was initially scheduled for one day, it ultimately took three days to complete. On June 3, 2024, Mr. Herdson and the Canadian Defendants agreed to an order that the *Mareva* Order be continued on an interim basis until further order of this Court.

II. BACKGROUND FACTS

[7] Although I addressed the background facts briefly in my May 1, 2024 oral reasons for judgment, I will repeat them again here, and expand on them as appropriate, to provide the necessary context to this application.

[8] Mr. Herdson has worked in the automobile business since approximately 1992. Mr. Enslen and Mr. Fortin are engaged in the wholesale and retail car industry.

[9] Mr. Enslen is the owner and beneficiary of a holding company named Robert Enslen Enterprises Inc. (“REE Inc.”). Mr. Fortin is the owner and beneficiary of a holding company named C-Rich Management Ltd. (“C-Rich”). Through their holding companies, Mr. Enslen and Mr. Fortin jointly owned Cross Border Services until May 2023, at which time certain transactions occurred, as described below.

[10] Cross Border Services directly holds the shares of the following companies:

a) Crossborder Sales; and

b) International Parcel Services Inc. (“International Parcel”).

[11] International Parcel holds the shares of FTW Services.

[12] I note in my oral reasons for judgment issued May 1, 2024, I erroneously abbreviated XCar Remarketing as XCar. In fact, XCar Remarketing was a Washington corporation, has never done business, and was administratively dissolved on June 3, 2022.

[13] The defendant, XCar, was a Washington corporation with offices in Kent, Washington. XCar's shares were owned as follows:

a) Mr. Enslen owned 5,000 shares with voting rights;

b) Mr. Fortin owned 5,000 shares with voting rights; and

c) Mr. Herdson owned 5,000 shares without voting rights.

[14] XCar was administratively dissolved in October 2023, following an asset sale by Mr. Enslen and Mr. Fortin that completed in February 2023.

[15] Collectively, Cross Border Services, Crossborder Sales, and International Parcel are engaged in the business of selling and reselling used vehicles, which are imported from Canada to the United States. Prior to its dissolution, XCar was also engaged in this business. These companies primarily conducted business with each other.

[16] Mr. Herdson worked for XCar from approximately March 2014 to February 2017 as an employee. He was also a shareholder of XCar, as Mr. Fortin and Mr. Enslen agreed to make him an equal owner of XCar and agreed to share one-third of the profits with him.

[17] Mr. Herdson was terminated by XCar in February 2017. When he was terminated, he retained his shares in XCar. After his termination, disagreements ensued with the defendants that were not able to be resolved. Ultimately, on December 2, 2019, Mr. Herdson commenced legal proceedings by filing a complaint in the Superior Court of Washington in and for King County in case number 19-2-31698-5 KNT (the “Washington Action”). The defendants to the Washington Action are the same as the defendants in this action: Mr. Fortin, Mr. Enslen, XCar, FTW Services, XCar Remarketing, Cross Border Services and Crossborder Sales. When referring to these defendants collectively I will refer to them as the “Washington Defendants”.

[18] The Washington Action proceeded to trial in late 2021, and on November 23, 2021, Justice Shah found in favour of Mr. Herdson. On January 13, 2022, Justice Shah issued Findings of Fact and Conclusions of Law in the Washington Action,

incorporating the oral decision made November 23, 2021, and making additional findings ("*Washington FFCL*").

[19] Among other things, in the *Washington FFCL*, Justice Shah concluded that Mr. Fortin and Mr. Enslen had:

a) engaged in minority shareholder oppression against Mr. Herdson;

b) breached their fiduciary duties to Mr. Herdson; and

c) failed to pay the agreed one-third net, after-tax profits of XCar to Mr. Herdson.

See: *Washington FFCL* at para. 113.

[20] Justice Shah also determined that the Washington Defendants had manipulated XCar's accounting records, and that an active and purposeful concealment of XCar's true profits had occurred: *Washington FFCL* at para. 114.

[21] Ultimately, the Washington Court ordered the appointment of a receiver over XCar's assets, finding the appointment to be necessary and appropriate to ensure that XCar's interests were protected, and to ensure the Washington Defendants' oppressive conduct towards Mr. Herdson ceased: *Washington FFCL* at para. 124.

[22] The Washington Defendants appealed the *Washington FFCL* decision to the Washington Court of Appeals and filed a motion in the Washington Superior Court to have a special fiscal agent appointed in lieu of a receiver. They were successful in seeking the appointment of a special fiscal agent.

[23] Following the trial and the order made for the appointment of a special fiscal agent, but before the appeal on liability was determined, all of XCar's assets were sold by Mr. Fortin and Mr. Enslen, and XCar's business was administratively dissolved. XCar is no longer considered a going concern.

[24] In February 2023, two former employees of XCar provided sworn evidence in the Washington Action that the purpose of the sale of XCar's assets was to defeat

Mr. Herdson's claim. I will return to this in greater detail under the Analysis section below.

[25] After the assets of XCar were sold, a special discovery master of the Washington Court (the "Special Discovery Master") granted a temporary preservation order on February 24, 2023, ordering that Mr. Fortin, Mr. Enslen, XCar, FTW Services, XCar Remarketing, Cross Border Services and Crossborder Sales preserve any documents relating to, among other things:

a) communications regarding the sale of XCar;

b) evidence of the business and operational status of each of FTW Services, Crossborder Sales and Cross Border Services;

c) evidence of Crossborder Sales and Cross Border Services' sales or consignments of any vehicles to vehicle dealers other than XCar;

d) all financial records of Mr. Enslen and Mr. Fortin (or entities owned by them or their family members), evidence of the receipt of monies from XCar or Crossborder Sales or Cross Border Services; and

e) all managerial, financial, operational and accounting records of XCar, Crossborder Sales and Cross Border Services

(the "Emergency Preservation Order").

[26] That order included the following comment:

> The Special Discovery Master understands that there is an argument that such a preservation order is unnecessary because any failure to preserve any document in the above-referenced 8 areas (even before today) would be the subject of significant sanctions given the pendency of a Court-ordered investigation by the Special Fiscal Agent into the circumstances surrounding its sale. Given the highly contentious history of this case, the defendants' sudden sale of XCar without informing the Court or the Special Fiscal Agent and the Court's previous Finding of near-criminal conduct by defendants, counsel are ordered to brief this motion.
>
> (Emphasis added.)

[27] The Emergency Preservation Order was converted to a temporary order on February 28, 2023, and to a permanent order of preservation by the Washington Court on April 11, 2023.

[28] Ultimately, the Washington Defendants were unsuccessful on the appeal. Justice Shah's decision on the defendants' liability in the *Washington FFCL* was upheld by the Washington Court of Appeals on May 30, 2023. The Washington Court of Appeals reversed the determination that a special fiscal agent was appropriate, on the grounds that the appeal was already in existence when the motion was made to the lower court, and an application to the Washington Court of Appeals should have been made. The Washington Court of Appeals concluded:

> The court's findings after trial are supported by substantial evidence, or are credibility determinations that will not be disturbed on appeal, and its conclusions of law logically flow from the findings. The court did not err by pursuing an equitable remedy short of judicial dissolution after concluding Fortin engaged in minority shareholder oppression. However, because it lacked authority to enter the February 25 order, we reverse on that sole issue.

See *Herdson v. Fortin*, 26 Wn.App2d 628, 650 (2023) at 24–25 (the "*Washington Appeal*").

[29] The Washington Court of Appeals remanded the determination of the appropriate remedy to the Washington Superior Court.

[30] Also in May 2023, Mr. Enslen, the Enslen Family Trust, and REE Inc. sold the shares they each held in Cross Border Services to C-Rich (Mr. Fortin's holding company). Mr. Fortin explains in his affidavit #2 made May 28, 2024, that in May 2023 the Fortin Family Trust acquired the 50% share of Cross Border Services that was previously held as set out above. Although the Canadian Defendants say that Mr. Fortin also acquired the shares of Crossborder Sales through The Fortin Family Trust, there is no affidavit evidence to this effect.

[31] REE Inc. is a company owned by Mr. Enslen and his wife, and C-Rich is Mr. Fortin's holding company, in which he and his wife own shares. REF Holdings Inc.'s shareholders are REE Inc. and C-Rich.

[32] The Washington Superior Court concluded in reasons for judgment issued on March 21, 2024, that as XCar's business was no longer viable (due to the fact that all of its assets had been sold by Mr. Fortin and Mr. Enslen) and was administratively dissolved, the appropriate remedy was a monetary judgment in the amount of the value of the shares determined at the time of trial. Mr. Herdson advises that the Washington Superior Court determined that the fair market value of his shares in XCar was approximately USD $4.2 million, plus interest accruing at a rate of 12 percent per annum until paid in full: *Herdson v. Fortin et al.,* King County Superior Court Case No. 19-2-31698-5, Court's Additional Findings Re: Plaintiff's Motion for Entry of Judgment issued March 21, 2024 (the "Money Judgment").

[33] The Canadian Defendants advise that they have appealed the Money Judgment. They have not filed a bond with respect to the Money Judgment pending their appeal and have not brought a stay application pending the determination of their appeal.

[34] Central to this application, in addition to the appeal of the Money Judgment, is that two efforts have been made to have the claims against FTW Services, XCar Remarketing, Cross Border Services and Crossborder Sales dismissed, on the basis that Mr. Herdson has no claim against the companies. The parties differ on the importance of these two applications. Mr. Herdson argues that the Washington Court denied both attempts and has confirmed that the Money Judgment is joint and several against the Washington Defendants in the Washington Action. The Canadian Defendants argue that notwithstanding the denial of both applications, the fact they were made was a material fact that should have been brought to this Court's attention at the *ex parte* hearing, and Mr. Herdson's failure to do so was a material non-disclosure.

[35] Mr. Herdson began supplemental proceedings in Washington to enforce the Money Judgment pending the outcome of the Washington Defendants' appeal from the Money Judgment. He served the appropriate defendants in the Washington Action with these enforcement proceedings between April 12 and 15, 2024.

Mr. Herdson then brought a motion for them to attend an examination of judgment debtors in the Washington Action (the “Debtor Examination”).

[36] On May 1, 2024, Mr. Herdson filed a notice of civil claim in this court, seeking an order recognizing and enforcing the Money Judgment obtained in the Washington Action.

[37] At the *ex parte* hearing I found that the evidence tendered at that time established that after being served with respect to these enforcement proceedings, steps were taken for mortgages to be registered on some of the properties owned by the defendants in British Columbia. At that time, I was satisfied that Mr. Herdson had adduced evidence to show that:

a) there has been a determination of liability in Washington State, and the Washington Superior Court has issued the Monetary Judgment which remains unsatisfied in the amount of approximately USD $4.2 million;

b) there is sworn evidence from former employees of XCar that the assets of XCar were sold by the defendants for the purpose of defeating Mr. Herdson's claim against them;

c) the property owned beneficially by Mr. Enslen and Mr. Fortin located at 2587 154 Street and 2570 King George Boulevard in Surrey, BC is listed for sale and has had mortgages registered against title (apparently shortly after receiving service of the enforcement proceedings in Washington State); and

d) the property owned beneficially by Mr. Enslen and Mr. Fortin at 2143–20800 Westminster Hwy in Richmond, BC has had a mortgage placed on it by Mr. Enslen and Mr. Fortin in early 2023 in the amount of $750,000.

[38] Finally, at the time I issued the *Mareva* Order, Mr. Herdson advised that to the best of his knowledge, the defendants named in the Action had interests in the following real property located in British Columbia:

Civic Address	**PID**	**Legal Ownership**	***Land Owner Transparency Act* Interest Holders**
17280 Fedoruk Road, Richmond	004-898-745	Robert Enslen and Susan Enslen	
4760 Continental Way, Prince George (the "Prince George Commercial Property")	023-605-324	Each of REE Inc. and Wayne Barry Readman hold an undivided ½ interest	REE Inc. reports Interest Holders as: Robert Enslen and Susan Enslen
18135 19A Avenue, Surrey	004-440-285	Richard Fortin and Carolyn Fortin	
2587 154 Street and 2570 King George Boulevard, Surrey (together, the "Surrey Commercial Property")	013-140-558 013-140-566	2570 King George Highway Ltd.	2570 King George Highway Ltd. reports Interest Holders as: Robert Enslen, Richard Fortin and Brian Birchard
2143-20800 Westminster Hwy., Richmond (the "Richmond Commercial Property")	023-197-137	REF Holdings Inc.	REF Holdings Inc. reports Interest Holders as: Robert Enslen and Richard Fortin

[39] On May 10, 2024, after I issued the *Mareva* Order, the Washington Defendants advised the Court that none of the defendants would attend the Debtor Examination for a number of reasons, including the fact that the Money Judgment is currently under appeal. I am advised that, in Washington State, there are ongoing proceedings for contempt arising from the defendants' refusal to attend the Debtor Examination.

[40] On May 14, 2024, in accordance with the *Mareva* Order, the Canadian Defendants provided the Asset List Affidavits.

[41] On August 29, 2024, by consent, I ordered that the *Mareva* Order registered on title to the Richmond Commercial Property be discharged from title to allow the property to be sold, pursuant to an agreement reached between Mr. Herdson and the Canadian Defendants.

[42] The Surrey Commercial Property was listed for sale in January 2024 for $12,900,000, and I am advised that the listing price has been reduced to $11,588,888.

III. ISSUES

[43] This application raises a number of legal issues. The first is whether at the *ex parte* hearing there was material non-disclosure by the plaintiff sufficient to justify refusing to extend the *Mareva* Order. If not, the issue becomes whether it is appropriate to extend the existing *Mareva* Order, and, if so, over what properties and on what terms.

IV. APPLICABLE LEGAL PRINCIPLES

[44] A *Mareva* injunction is an extraordinary order that freezes a defendant's assets before an applicant has obtained judgment. It is an exception to the basic premise that a claim is not established until a matter is tried. Great caution must be shown in their use, and judges must be prudent and cautious in issuing them: *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.,* 2007 BCCA 481 at para. 46 [*Tracy*]. It is both an equitable and discretionary remedy: *Fernandes v. Legacy Financial Systems, Inc.,* 2020 BCSC 885 at para. 11 [*Fernandes*].

[45] As already noted, this is not an application brought by the Canadian Defendants to set aside the *Mareva* Order. While not strictly a set-aside application, nonetheless, the same principles are necessary to consider given the argument of the Canadian Defendants that Mr. Herdson failed to make appropriate disclosure of all material facts.

A. Material Non-Disclosure

[46] Accordingly, I will start by addressing the obligation to make full and frank disclosure of all material facts on such an *ex parte* application.

[47] A material fact is generally accepted as one that may affect the outcome of the application: *Northwestpharmacy.com Inc. v. Yates*, 2018 BCSC 41 at para. 16 [*Northwestpharmacy.com*]. The obligation to make full and frank disclosure of all material facts has been described in the following manner:

> [11] It is trite law that on an *ex parte* application, the applicant must make full and frank disclosure of all material facts. An *ex parte* applicant must be "fastidious" in disclosing all important aspects of the evidence and pointing out what defences may be available to the opposing party. An applicant is not to exaggerate or misrepresent the strength of the claim being advanced. The duty to disclose applies not only to known facts, but also to those facts that ought to have been known had proper inquiries been made: *Pierce v. Jivraj*, 2013 BCSC 1850.

See: *Canadian Western Bank Corp. v. John Doe,* 2024 BCSC 555 [*Canadian Western Bank.*]

[48] In *Pierce v. Jivraj*, 2013 BCSC 1850 [*Pierce*] there is a useful and succinct summary of the general rules governing *ex parte* applications in the context of the obligation to make full and frank disclosure of all material facts:

> [37] On an *ex parte* application, the relevant principles include the following:
>
> 1) the applicant must make full and frank disclosure of all material facts;
>
> 2) a material fact is one that may affect the outcome of the application;
>
> 3) it is for the court to determine if the fact is material, not the applicant or his legal advisors;
>
> 4) the duty to disclose applies not only to known facts, but also to those facts that ought to have been known had proper inquiries been made;
>
> 5) the extent of the inquiries required depend on the circumstances of the particular case;
>
> 6) if material non-disclosure is established, the court may deprive the applicant of any advantage gained by reason of the breach of duty to disclose;

> 7) the failure to provide such full and frank disclosure will allow a court to set aside the order without regard to the merits of the application;
>
> 8) in deciding whether the Order should be set aside, the court must consider the importance of the non-disclosed fact to the issues which were to be decided by the judge at the *ex parte* hearing;
>
> 9) an innocent non-disclosure is an important consideration, but not decisive as to whether the breach is such that the Order is to be set aside; and
>
> 10) not every omission necessarily results in the order being set aside.
>
> [Citations omitted]

[49] However, this test must be applied in the context of what is typically an urgent order, and the standard of disclosure cannot be unrealistic. As noted in *China Citic Bank Corp. v. Yan*, 2016 BCSC 2332 at para. 14 [*China Citic Bank*] (citing *Mooney v. Orr*, [1994] B.C.J. No. 2652 (B.C. S.C.) at para. 20, 1994 CanLII 1779 (BC SC) [*Mooney*]), an *ex parte* chambers application is not a trial, and disclosure must be full "in the sense that it must be adequate to the demands of the particular application" and be fair to the absent defendant.

[50] If the court finds material non-disclosure, it may set aside the *Mareva* order. It may also take any such non-disclosure on the initial *"ex parte* hearing into account when it is deciding whether to maintain an existing *Mareva* order, or grant a new one": *Northwestpharmacy.com* at para. 18 (citing *Mooney* at para. 30). However, every incidence of material non-disclosure must be considered within the circumstances of each case. Even if there has been material non-disclosure on an *ex parte* application, "the court retains the discretion to consider whether the injunction should stand in light of additional evidence on the set-aside application": *Save-A-Lot Holdings Corp. v. Christensen*, 2019 BCSC 115 at para. 4.

B. Legal Framework for a *Mareva* Injunction

[51] This is a hearing *de novo* at which Mr. Herdson must establish that it is appropriate to extend the *Mareva* Order. It is an *inter partes* hearing, at which the Canadian Defendants have advanced a fulsome evidentiary record and made lengthy legal submissions, opposing the granting of such an order. It is at this stage

that the justification for the order and the balance of convenience in all of the circumstances is given flesh: *Mooney* at para. 51.

[52] The test for an order for granting a *Mareva* injunction requires two considerations:

a) the existence of a strong *prima facie* case or a good arguable case; and

b) having regard to all relevant factors in the case, whether granting an injunction would be just and convenient.

See *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420 at para. 10.

[53] In this province, courts have adopted a flexible approach to *Mareva* injunctions. This approach has been affirmed by our Court of Appeal in, among other cases, *Silver Standard Resources Inc. v. Joint Stock Co.* (1998), 168 DLR (4th) 309 at para. 19, 1998 CanLII 6468 (BC CA) [*Silver Standard*].

[54] Pursuant to this flexible approach, the Court is not a prisoner to a specific formula to be applied. There is no rule of law nor legal principle requiring evidence of fraud or evidence of a clear intention to dispose of or remove assets from the jurisdiction for the purposes of defeating a judgment. It is a flexible approach that allows the Court to take account of a variety of circumstances including the relative strengths and weaknesses of each party's position, evidence of irreparable harm one way or the other, potential effects on third parties, and factors affecting the public interest: *Silver Standard* at para. 19.

[55] There is no strict list or number of factors that the Court must consider in this two-part analysis. However, the following factors are relevant to the consideration of whether it is just and convenient to grant the injunction:

a) evidence showing the existence of assets within British Columbia or outside of the jurisdiction;

b) evidence showing a real risk of the disposal or dissipation of assets to render a judgment nugatory;

c) evidence of irreparable harm;

d) the strength of the plaintiff's case;

e) the nature of the transaction giving rise to the action;

f) the risks inherent in the transaction;

g) the amount of the claim;

h) the defendant's assets; and

i) the history of the defendant's conduct.

See: *567 Hornby Apartments Ltd. v. Le Soleil Hospitality Inc.*, 2009 BCSC 711 [*Hornby Apartments*] at para. 16.

[56] Relevant facts may also include where the defendant's residence is, and evidence that an injunction would have a material adverse effect on an innocent third party: *Fernandes* at para. 17.

[57] The overarching question on an application for a *Mareva* injunction is whether it is just and equitable in all of the circumstances to grant the order sought. While in most cases the plaintiff must show a real risk that the defendant will dissipate assets, a party may obtain a *Mareva* injunction as security for damages sought in the litigation without showing there is a real risk that the defendant will dissipate the assets. A *Mareva* injunction may be ordered not only to restrain the act of asset dissipation, but also as a form of security: *Hornby Apartments* at para. 14, citing *Mooney*.

[58] This Court retains the jurisdiction to grant a new *Mareva* order despite non-disclosure at the *ex parte* application. In considering whether to do so, the Court is governed by the principles set out in *MacLachlan v. Nadeau*, 2017 BCCA 326 at para. 37 [*MacLachlan*]:

i. on an application, *inter partes*, for a *Mareva* injunction following the grant of an *ex parte* injunction, the judge is to proceed with a *de novo* hearing;

ii. on the *de novo* hearing, the whole of the facts, including any incorrect or incomplete facts upon which the *ex parte* injunction was based, are to be taken into account;

iii. if the applicant failed to comply with the duty to make full and frank disclosure on the *ex parte* application, the nature of the failure and the degree and extent of the applicant's culpability are highly material factors for consideration;

iv. the degree and extent of the applicant's culpability may range from innocent non-disclosure to bad faith, which may include deliberate misstatements;

v. where material non-disclosure is established, the applicant should be deprived of any advantage derived by the breach of duty on the *ex parte* application;

vi. in every case, the judge has a discretion in determining, on the whole of the facts, whether, and, if so, on what terms to grant a new *Mareva* injunction; and

vii. the discretion is to be exercised judicially, in accordance with established principles, including those outlined in *Brink's-MAT Ltd.*

See *Canadian Western Bank* at paras. 33–35.

C. When Cross-Examination is Appropriate

[59] A disclosure order is intended to "breathe life" into an injunction for the preservation of assets and to permit the enforcement of the order: *Sekisui House Kabushiki Kaisha (Sekisui House Co. Ltd.) v. Nagashima* (1982), 42 BCLR 1 at para. 10, 1982 CanLII 800 (BC CA) [*Sekisui House*].

[60] There is no automatic right to cross-examine on an affidavit in our *Supreme Court Civil Rules*; rather, the Court holds the discretionary power to order such a cross-examination: Rule 22-1(4). In deciding whether to exercise this discretion, the judge is to consider whether there are material facts in issue, whether the cross-examination is relevant to an issue that may affect the outcome of the substantive application, and whether the cross examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue: *Stephens v. Altria Group, Inc.,* 2021 BCCA 396 at para. 5.

[61] In the context of a *Mareva* injunction specifically, a plaintiff may apply for cross-examination on an affidavit if the affidavit is unsatisfactory: *Sekisui House* at para. 10.

V. ANALYSIS

A. Alleged Material Non-Disclosure at the *Ex Parte* Hearing

[62] The Canadian Defendants say that significant material non-disclosure occurred at the *ex parte* hearing. They do not argue that Mr. Herdson's Canadian counsel intentionally withheld information; rather they say that Mr. Herdson "markedly departed" from his disclosure obligations, and that on certain points must have done so deliberately. They say he failed to provide the requisite full and frank disclosure of material facts, and so "did not meet the rigorous standard of disclosure required". They note that at the *ex parte* hearing I specifically asked what the defendants would say if they were at the hearing, and they say the response did not meet the rigorous standard of disclosure. Specifically, they point to the following exchange:

> THE COURT: What would the defendants be telling me if they were here today?
>
> [Counsel]: In the interest of full and frank disclosure, we have disclosed the fact that the quantum is currently under appeal, the liability has been proven, the remedy has been defeated once already. This second remedy, in my submission, is being–is in the process of potentially being defeated again.
>
> I know of no material fact that they would be able to bring forward that would raise any doubt on the validity of the liability judgment and the proceedings in Washington state.

[63] By way of summary, the Canadian Defendants argue Mr. Herdson failed to properly disclose:

a) that there is an argument that not all Canadian Defendants are liable under the Money Judgment;

b) that the Money Judgment could not be enforced in British Columbia against any defendant at this time;

c) material facts relating to Mr. Herdson and Mr. Fortin's residences in British Columbia;

d) material facts in respect of the sale of XCar's assets; and

e) material facts relating to mortgages registered on the Surrey Commercial Property and the Richmond Commercial Property.

[64] I will address each allegation briefly in turn.

[65] First, the Canadian Defendants contend that there is an argument that not all Canadian Defendants are liable under the Money Judgment. They took me, in great detail, through the *Washington FFCL*, the *Washington Appeal*, and the Money Judgment, and argue that there are passages in both the *Washington FFCL* and the *Washington Appeal* that "distinguished in potentially meaningful ways between the liability of Mr. Enslen and Mr. Fortin (the "Personal Defendants"), and Cross Border Services and Crossborder Sales" (together, the "CB Defendants"). They also argue that, in the Washington Action, Mr. Herdson made alter ego and accounting claims in respect of the CB Defendants that were dismissed. They criticize Mr. Herdson for failing to advise this Court that the Canadian Defendants and their US counsel had consistently taken the position in the Washington Action that, based on the *Washington FFCL*, earlier or embedding findings, and the *Washington Appeal*, their position is that the CB Defendants were not liable. However, I am not persuaded that this was material non-disclosure. After a careful reading of the Washington decisions, I am satisfied that in the *Washington FFCL* Judge Shah used carefully defined terms, and referred clearly, at times, to the Washington Defendants, and at other times to Mr. Fortin and Mr. Enslen. Likewise, in the *Washington Appeal*, the Washington Court of Appeals defined "Fortin, Enslen and their various other business entities" collectively as "Fortin". Both judgments show a careful use of defined terms.

[66] Further, the Washington Defendants have twice attempted to have the Washington Court dismiss the claims against FTW Services, XCar Remarketing, Cross Border Services and Crossborder Sales, filing their First Motion to Dismiss on March 17, 2022, and a Second Motion to Dismiss on November 2, 2022. Both motions were dismissed.

[67] I do not accept that it was material non-disclosure for Mr. Herdson to not bring to my attention arguments which the Canadian Defendants acknowledge were rejected by the Washington Court. Nor do I accept it was improper not to detail specific statements made by counsel for the Washington Defendants in the Washington litigation. These arguments were unsuccessful in Washington State to date, and so I do not find them to be material facts in issue on the *ex parte* application.

[68] The Canadian Defendants' argue that Mr. Herdson should have advised that he made claims in respect of the CB Defendants that were dismissed in the *Washington FFCL*. I do not accept this was material non-disclosure. Those claims were clearly identified in the *Washington FFCL*, and the focus on the *ex parte* application was, properly, on the determination reached by Judge Shah, the result on appeal, the Money Judgment, and the fact there is an *extant* appeal of that judgment. I am not satisfied that Mr. Herdson was required to provide full and frank disclosure of all arguments that were considered and rejected by the Washington courts.

[69] Second, the Canadian Defendants argue while Mr. Herdson did suggest there may be an enforcement issue under the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78 ("COEA"), he may have inadvertently implied that bringing a common law action resolved this barrier. They argue that this was material non-disclosure, and point to the following exchange:

> THE COURT: And there is an extant appeal on the damages quantification to the Washington State Curt of Appeal?
>
> [Counsel]: Correct.
>
> The Court: All right.
>
> [Counsel]: Yeah. Washington has a reciprocating state to – we had the ability to technically just bring it here if it was a final judgment. But, instead, we've commenced a proceeding by notice of civil claim to enforce the judgment, recognizing that the quantum is still subject to appeal.

[70] In this proceeding, there is no independent cause of action being advanced. Rather, the notice of civil claim refers rather generally to "[t]he law relating to the

recognition and enforcement of foreign judgments and in particular the *Court Order Enforcement Act*, RSBC 1996, c. 78". I do not accept that there was an implication left with the Court that a common law action resolved this barrier. Rather, it was clear at all times that Mr. Herdson was seeking a freezing order at this time, while waiting for the ultimate determination on appeal, due to his concerns that the defendants named in this action may dispose of their assets so as to render any judgment remaining after the appeal unenforceable.

[71] Third, the Canadian Defendants argue that Mr. Herdson failed to stress that Mr. Herdson and Mr. Fortin's residences are in British Columbia, and that they both have deep-rooted connections to British Columbia. They say his failure to advise the Court of these connections, in detail, was a failure to provide material disclosure of all the relevant facts. However, Mr. Herdson did seek that the *Mareva* Order apply to both of their personal residences. I find that is sufficient in the context of the *ex parte* application.

[72] Fourth, the Canadian Defendants argue that Mr. Herdson failed to make proper disclosure of all material facts in respect of the sale of XCar's assets. They say he relied "aggressively" on declarations in the Washington Action sworn on February 21, 2023 by two ex-employees, Greg Doublin and Mario Lyons (the "Ex-Employee Declarations").

[73] There is no doubt that I did place significance on these declarations in my reasons for judgment on the *ex-parte* application, and in my oral reasons for judgment. Specifically, I was satisfied that Mr. Herdson adduced sworn evidence in the Ex-Employee Declarations that the "assets of XCar were sold by the defendants for the purpose of defeating Mr. Herdson's claim against them" (para. 23(b)). This was one of the reasons I found Mr. Herdson had established a strong *prima facie* case for his claim (para. 30).

[74] By way of background, in his first affidavit made on April 29, 2024, Mr. Herdson deposed:

> 18. Following the Washington Trial Decision, but prior to the Washington Appeal Decision, Fortin and Enslen sold XCar's assets.
>
> 19. I have been informed by the sworn declarations of Mario Lyons and Greg Doublin, and do verily believe, that Enslen and Fortin's intent in selling XCar's assets was to defeat my claim to XCar's profits.

He, in turn, attached the Ex-Employee Declarations.

[75] Greg Doublin, the General Manager of XCar, deposed as to when he learned XCar was going to be sold, and as to the execution of the agreement to do the same. He swore:

> 11. After executing the agreement, Richard Fortin and Rob Enslen came into my office and closed the door. Mario Lyons (XCar's Assistant GM) was already in my office. While the four of us were in my office, Richard was sitting at the edge of my desk. He looked up from his phone and said, "[Expletive] Cal. We got him." He then danced around like an Irish jig. When I asked him what he meant by that, Richard said that Cal's lawyers "just got the letter." He and Rob were ecstatic and laughing.
>
> 12. Based on that experience, and other interactions I've had with Rob Enslen, Richard Fortin, and others, it was obvious to me that the purpose of the sale was to get out of this lawsuit with Cal Herdson, who I understand to be [the] other owner of XCar. Several people involved with the sale confirmed this to me, including Ron Stratton (an owner of Henning Auto), Jeremy Williams (who facilitated the sale), and Brendan Doyle (a warranty representative with Mr. Williams' company).
>
> 13. Scott Warren also confirmed that the sale of XCar was to get rid of Cal Herdson's suit.
>
> 14. While Rob and Richard claim that the sale of XCar is due to the issues with Next Gear, I have no doubt they could have salvaged XCar if they wanted to.

[76] He also deposed that Mr. Fortin asked him to delete an email Mr. Enslen had sent to him with the draft sale agreement, but he did not do so. He implied that while he went on holidays in February 2023, he was notified someone was attempting to access his Google accounts.

[77] In his sworn declaration, Mario Lyons, the Assistant General Manager of XCar, also deposed as to when he first heard about the sale of XCar, and witnessing Mr. Fortin and Mr. Enslen sign the sale documents on February 1, 2023. He went on to depose:

> 9. Just after Richard Fortin and Robert Enslen signed the agreement to sell XCar, they came into Greg Doublin's office at XCar. Greg Doublin, XCar's General Manager, Richard Fortin, Robert Enslen, and I were all in Greg Doublin's office.
>
> 10. When the conversation turned to the sale, Richard Fortin said "[expletive] Cal", referring to Cal Herdson. Mr. Fortin and Mr. Enslen both laughed and Mr. Fortin did a little dance. Then Mr. Fortin said the lawyers just sent the letter about the sale to Mr. Herdson's lawyers. They both seemed giddy. It was shocking to me because they seemed happy, while I expected to lose my job after years of service to the company. Based on my many conversations with Mr. Enslen, I understood that Mr. Fortin and Mr. Enslen believed the sale of XCar would leave Mr. Herdson with nothing.

[78] However, Mr. Herdson failed to advise the Court that the Washington Defendants had filed a motion on February 23, 2023, seeking, among other things, that the Ex-Employee Declarations be struck. He also failed to advise that Mr. Fortin had filed a response on March 7, 2023 to the Ex-Employee Declarations, characterizing them as "misleading" ("Mr. Fortin's Response"). While nowhere in Mr. Fortin's Response does he deny that the meeting described in the Ex-Employee Declarations occurred, he maintains that their characterizations are incorrect. He admits he hoped the sale "would end the albatross around our neck of being stuck in business with Mr. Herdson".

[79] Notwithstanding the fact that Mr. Fortin did not deny the meeting took place as described by Mr. Doublin and Mr. Lyons, the Canadian Defendants argue that not disclosing Mr. Fortin's Response, and the fact that the Washington Defendants sought to strike the Ex-Employee Declarations, amounts to material non-disclosure. They say it was problematic for Mr. Herdson to use them and rely upon them in the *ex parte* hearing, without making full disclosure of the defendants' opposition to their use in the Washington State proceedings.

[80] Mr. Herdson argues it was not material non-disclosure, as nothing in Mr. Fortin's Response Declaration denied that the meeting occurred, or that the description of the meeting as characterized by Mr. Doublin and Mr. Lyons was inaccurate.

[81] In my view, this did amount to a material non-disclosure by Mr. Herdson. I do not find Mr. Herdson's argument persuasive that Mr. Fortin's characterization of the Ex-Employee Declarations as "misleading" was not relevant. Notwithstanding there was not a clear denial that the meeting as described occurred, or that the description was inaccurate, the fact that his response was filed may have been material to my determination on the *ex parte* application. In my view, the test set out in *Pierce* is satisfied.

[82] Finally, the Canadian Defendants argue that Mr. Herdson failed to make proper disclosure about the mortgages registered on the Surrey Commercial Property and the Richmond Commercial Property. First, they say that the mortgage on the Richmond Commercial Property was held by Mr. Birchard, who had a traditional funding relationship with the Canadian Defendants. They also argue that Mr. Herdson himself had approached Mr. Birchard to assist him with funding a company in the past. Second, they say that Mr. Herdson provided current information property searches, rather than current and cancelled information searches to his first affidavit. They argue if he had provided the latter, they would have made clear the mortgages in respect of the Surrey Commercial Property and the Richmond Commercial Property were in fact, not unique. They say Mr. Herdson's duty to disclose applies not only to known facts, but also to those facts that ought to have been known had proper inquiries been made: *China Citic Bank* at para. 12.

[83] I am not persuaded by either argument. The evidence tendered at the *ex parte* hearing was centered on the timing of the registration of the mortgages in respect of these two properties. Specifically, it was focused on the fact that the registration on title occurred after the Washington Defendants were served with notice of the enforcement proceedings in Washington State. It was the suspiciousness of the timing that was material, not to whom the mortgages were made, or whom historically had been a lender.

[84] After a careful and thorough consideration of the Canadian Defendants' argument, I only accept that Mr. Herdson failed to disclose Mr. Fortin's Response to the Ex-Employee Declarations. For the reasons set out above, I do not accept that Mr. Herdson failed to disclose any other material facts at the *ex parte* application.

B. Should a New *Mareva* Injunction be Granted

[85] As set out above, this Court has the jurisdiction to grant a new *Mareva* injunction, despite material non-disclosure at the *ex parte* stage. The proper approach was set out in *MacLachlan*, as described in para. [58] above.

[86] I will turn first to the only material non-disclosure I conclude occurred – that the plaintiff did not disclose Mr. Fortin's Response. As I noted already, the Ex-Employee Declarations were tendered as evidence of the potential risk of a dissipation of the assets if the *Mareva* Order was not granted. The Fortin Declaration described the evidence as "misleading". At this hearing, the Canadian Defendants also tendered an affidavit of Scott Warren made May 28, 2024. Mr. Warren is the former president of what he describes as the "Crossborder Group" which until February 2023, was comprised of XCar, Cross Border Services, Crossborder Sales, and FTW Services. He deposes as to conversations he had with Mr. Doublin after Mr. Doublin swore his declaration, characterizes Mr. Doublin as regretting having made the declaration, and details why he says it is inaccurate. He goes on at length to discuss why he says the sale of XCar occurred.

[87] In response to Mr. Warren's affidavit, Mr. Doublin swore an affidavit on May 30, 2024 in this action. He admits he "expressed some regret for having gotten involved in the Washington Action at all" to Mr. Warren. However, he maintains that the contents of his declaration are still true to the best of his knowledge and belief, and that "[p]rior to signing, I carefully reviewed the contents of the Doublin Declaration and understood the details of the declaration as at the time it was made".

[88] Considering the *MacLachlan* factors and the specific non-disclosure in this case, in my view, it is appropriate to consider extending the existing *Mareva*

injunction. Nothing in either Mr. Fortin's Response or Mr. Warren's affidavit said the meeting described in the Ex-Employee Declarations did not occur, nor denied that Mr. Fortin said the words attributed to him, nor denied the actions attributed to Mr. Fortin and Mr. Enslen. Their words, and their actions at this meeting, show an intention to sell the assets of XCar for the purpose of defeating Mr. Herdson's claim. Further, on the evidence before me, I do not find that non-disclosure was deliberate. As a result, I am unable to find that the nature of the failure, and the degree and extent of Mr. Herdson's culpability are so severe that extending the *Mareva* Order should be denied, without considering the merits of the application itself.

1. Has a Strong *Prima Facie* Case Been Established

[89] The *Mareva* Order was granted to freeze the Canadian assets of the Canadian Defendants, in aid of enforcing the Money Judgment, and, ultimately, the judgment that will be obtained after the appeal has been finally determined. In this proceeding, there is no independent cause of action being advanced. Rather, as already noted, the notice of civil claim refers rather generally to "[t]he law relating to the recognition and enforcement of foreign judgments and in particular the *Court Order Enforcement Act*, RSBC 1996, c. 78".

[90] There is no dispute that this court has the jurisdiction to issue a *Mareva* injunction in circumstances where: (a) a plaintiff's substantive claim is brought in a foreign jurisdiction; and (b) the injunction is sought to ensure that assets in BC are not dissipated so as to preclude the enforcement of a judgment which has been, or may later be, obtained in the foreign jurisdiction. This jurisdiction was recently described in *Broad Idea International Ltd. v. Convoy Collateral Ltd.,* [2021] UKPC 24 [*Broad Idea International Ltd.*] as follows:

> [92] In applying for a freezing injunction, the relevance of a cause of action, where there is one, is evidential: in showing that there is a sufficient basis for anticipating that a judgment will be obtained to justify the exercise of the court's power to freeze assets against which such a judgment, when obtained, can be enforced. That is the rationale for requiring the applicant to show a good arguable case; but there is no reason why the good arguable case need be that the applicant is entitled to substantive relief from the court which is asked to grant a freezing injunction. What in principle matters is that the applicant has a good arguable case for being granted substantive relief in

> the form of a judgment that will be enforceable by the court from which a freezing injunction is sought.
>
> [Emphasis added].

[91] This principle has been confirmed in this court. In *Mishkin v. Roddy Diprima Ltd.,* 28 B.C.L.R. (3d) 181, 1996 CanLII 1496 (BC SC) this Court granted a *Mareva* injunction when an appeal was pending in a foreign jurisdiction, and in *United States Securities and Exchange Commission v. Sharp*, 2023 BCSC 425 this court granted a *Mareva* injunction where no action had been brought by the plaintiff in British Columbia.

[92] I am satisfied that I do have the jurisdiction to grant a *Mareva* injunction in support of either an actual or prospective foreign judgment. The fact that there is currently an appeal from the Money Judgment does not detract from that authority. Rather, the issue is whether Mr. Herdson is able to demonstrate that he "has a good arguable case for being granted substantive relief in the form of a judgment that will be enforceable" by this Court: *Broad Idea International Ltd.* at para. 92.

[93] In *Tracy* the Court of Appeal (as a division of five justices) held:

> [54] The chambers judge used the test of "good arguable case". I do not consider that a strict formula should be applied. Whereas, the Supreme Court of Canada in *Aetna* appeared to favour "strong *prima facie* case", that Court also appeared to leave considerable room for courts to frame the test as fits the nature of the case before them. *Mooney No. 2* recognized both standards, "strong *prima facie* case" and "good arguable case," as formulations that have been used. I expect that the difference in words is a difference without practical consequence. In either case, it is more than an arguable case, and may be met by an assessment that does not reach the "bound to succeed" threshold.

[94] I accept that, in these circumstances, Mr. Herdson is not required to make out the Canadian Defendants' wrongdoing. That has already been determined by the Washington Court of Appeals, and there is no further appeal from that liability determination. Rather, he must show that he has a "strong *prima facie* case" or a "good arguable case" to enforce the Money Judgment in British Columbia: *The Resolution and Collection Corporation v. Nishiyama*, 2016 BCSC 574 at para. 28 [*The Resolution and Collection Corporation*].

[95] I cannot accept the Canadian Defendants' argument that there was some confusion as to whether the Canadian Defendants, and in particular, the CB Defendants, were held to be liable in either the *Washington FFCL* or the *Washington Appeal.* Notwithstanding their counsel's eloquent arguments identifying inconsistencies and alleged "sloppiness" in the *Washington FFCL*, I find that the Washington Court of Appeals made it clear that all of the defendants had been found liable. In the *Washington Appeal*, the Court of Appeals defined "Fortin" as collectively being "Fortin, Enslen, and their various other business entities". In their conclusion affirming the findings of the Washington Court, they held that:

> The court's findings after trial are supported by substantial evidence, or are credibility determinations that will not be disturbed on appeal, and its conclusions of law logically flow from the findings. The court did not err by pursuing an equitable remedy short of judicial dissolution after concluding Fortin engaged in minority shareholder oppression. …
>
> (page 24 –25, emphasis added).

[96] The arguments that the CB Defendants were not found to be liable were made to the Washington courts, to no avail.

[97] I am satisfied that all of the named defendants in the Washington Action, which include the Canadian Defendants (and the CB Defendants) were found to be liable by the Washington Court of Appeals. The position of the CB Defendants that they were not found liable, and should not be found liable, is based upon their arguments in carefully parsing through the *Washington FFCL.* After a careful reading of this judgment, and the *Washington* Appeal, I am satisfied that all of the named defendants were held liable for minority shareholder oppression. Arguments to the contrary were made in Washington, and were dismissed.

[98] Further, I am not persuaded by the argument that the "Canadian Defendants made substantial business decisions on the basis of believing the case against the CB Defendants was dismissed". They argue in their written submissions:

> …What they saw as the Superior Court's dismissal of the case against the CB Defendants provided the opportunity to Mr. Enslen to exit his involvement in the CB Defendants in May 2023, and was critical to the decision of The Fortin Family Trust (Mr. Fortin's family trust) to acquire the shares in the CB

> Defendants at that time from Mr. Enslen, Robert Enslen Enterprises Inc. ("REE Inc.") (a company owned by Mr. Enslen and his wife) and The Enslen Family Trust (Mr. Enslen's family trust).

[99] The evidence tendered on this point is set out at para. [30] above. That was a business decision made by Mr. Fortin and Mr. Enslen in May 2023. The published opinion of the Washington Court of Appeals was filed on May 30, 2023. The understanding or belief of either Mr. Fortin or Mr. Enslen, based upon their unsuccessful argument in Washington that the CB Defendants were not found liable, is not relevant to the issue I must determine on this application.

[100] I am also not persuaded by the Canadian Defendants' argument that the Money Judgment could not be enforced against them at this time. I accept that while the appeal in Washington State from the Money Judgment is outstanding, this Court is prohibited from enforcing the judgment under the COEA: s. 29(6). I also accept that if the plaintiff pursued the bringing of a common law action at this time to try to obtain recognition and enforcement of the Money Judgment without relying upon the COEA, the Canadian Defendants may have tried to obtain a stay of proceedings: *Litecubes v. Northern Light Products Inc.,* 2007 BCSC 1545 at paras. 12–22.

[101] However, the Canadian Defendants have not sought a stay in either the Washington Court or this Court. Any hypothetical stay that may be granted if they sought one is irrelevant. The plaintiff at this time is not attempting to execute upon the Money Judgment under the *COEA*, but, rather, is seeking a *Mareva* injunction for the express purpose of freezing assets to ensure any ultimate execution is not fruitless.

[102] Finally, the Canadian Defendants argue that the trial leading to the *Washington FFCL* may potentially have been contrary to the principles of natural justice, and the ultimate enforcement of the judgment in British Columbia may be contrary to public policy: *Beals v. Saldanha*, 2003 SCC 72 at paras. 39–42, 59–77. Insofar as those concerns reflect concerns over trial process and the buyout remedy, those concerns were addressed in the appeal, and were not accepted by the Washington Court of Appeals. Insofar as those concerns reflect the valuation date,

valuation process, and quantum, those arguments will clearly be addressed at the appeal of the Money Judgment.

[103] In my view, Mr. Herdson has established that he has a strong *prima facie* case or a good arguable case that the Canadian Defendants have been found liable by the Washington Court of Appeals. While the Money Judgment is under appeal, he does not seek to enforce that judgment at this time, but rather seeks to obtain a *Mareva* injunction to restrain the Canadian Defendants from dissipating assets that may ultimately be the subject of enforcement proceedings when the appeal has been finally determined. For a foreign judgment to be enforceable in Canada it must be for a debt or definite sum of money, must not be in the nature of a debt for taxes, fines or other penalty, and must be memorialized in a final judgment: *Pro Swing Inc. v. Elta Gold Inc.,* 2006 SCC 52 at para. 10; *The Resolution and Collection Corporation* at para. 29. The Money Judgement is for a definite sum of money; is not in the nature of a debt for taxes, fines or other penalty; but has yet to be memorialized in a final and conclusive judgment of the foreign court. The fact of the *extant* appeal does not preclude an extension of the *Mareva* Order, although it would preclude enforcement. It is only the appellate consideration of the quantum of damages that remains outstanding, not the determination of liability.

[104] I am satisfied Mr. Herdson has established a good arguable case, or a strong *prima facie* case, that the Canadian Defendants have been found liable by the courts in Washington State, and that he has obtained a Money Judgment that, after the appeal is finally determined, he will be able to enforce in British Columbia.

2. Is it Just and Convenient to Extend the *Mareva* Injunction

[105] It is trite law that the overarching consideration when determining whether a *Mareva* injunction should be granted is the balance of justice and convenience between the parties.

[106] In my oral reasons for judgment I found that Mr. Herdson had demonstrated:

> [23] I am satisfied in terms of the context in which this *Mareva* injunction is brought that Mr. Herdson has adduced evidence to show that:

> (a) there has been a determination of liability in Washington State, and the Washington Superior Court has issued the Monetary Judgment which remains unsatisfied in the amount of approximately USD $4.2 million;
>
> (b) there is sworn evidence from former employees of XCar that the assets of XCar were sold by the defendants for the purpose of defeating Mr. Herdson's claim against them;
>
> (c) the property owned beneficially by Mr. Enslen and Mr. Fortin located at 2587 154 Street and 2570 King George Boulevard in Surrey, BC is listed for sale and has had mortgages registered against title (apparently shortly after receiving service of the enforcement proceedings in Washington State); and
>
> (d) the property owned beneficially by Mr. Enslen and Mr. Fortin at 2143–20800 Westminster Hwy in Richmond, BC has had a mortgage placed on it by Mr. Enslen and Mr. Fortin in early 2023 in the amount of $750,000.

[107] I ultimately determined that Mr. Herdson had established it would be just and convenient to grant the *Mareva* Order. I noted that the determination of the Washington Defendants' liability was upheld on appeal. I found his claim to be a strong one, and the amount of his claim to be significant. I concluded:

> [32] I am also satisfied that, in these circumstances, where the defendants operate across multiple jurisdictions and the business of the companies is to move assets between those jurisdictions, the defendants have an ability to move and dissipate assets that might be able to be utilized to defeat the Washington enforcement proceedings. Their ability to do this, and their past behaviour, are both relevant factors that weigh towards granting the injunction.
>
> [33] I am also persuaded by the facts that the defendants have refused to date to pay the Money Judgment, have failed to bond the Money Judgment pending their appeal, and have decided to sell the assets of XCar following the determination of the liability in the Washington Superior Court. This is all evidence of the defendants' efforts to defeat Mr. Herdson's claim which supports the granting of an injunction. I am satisfied that there is a potential for non-recovery and a risk of dissipation of assets, and so there is the potential of irreparable harm for Mr. Herdson if the injunction is not granted.

[108] The Canadian Defendants argue that it is not just and convenient to extend the *Mareva* Order. In summary, they argue:

a) Mr. Fortin and Mr. Enslen have a strong connection with British Columbia;

b) the sale of XCar's assets does not, objectively, support a finding that there is a risk of dissipation of the assets; and

c) the mortgages placed on the Surrey Commercial Property and the Richmond Commercial Property are not evidence of a similar risk.

[109] I am not persuaded by their arguments, and am satisfied that Mr. Herdson has established a strong risk of dissipation of assets, which leads me to conclude that it is just and convenient to extend the *Mareva* Order, for the following reasons.

[110] First, the Canadian Defendants admit that the residence of Mr. Fortin and Mr. Enslen is not a determinative factor. In the circumstances of this case, I do not accept this as a compelling argument. Notwithstanding they are life-long residents of British Columbia who live here with their family, in light of their business in Washington State, and the extensive and adversarial litigation there, their connections with British Columbia are not determinative.

[111] Second, the Canadian Defendants set out, in great detail, their justification for the sale of XCar's assets, and their disagreement with the evidence set out in the Ex-Employee Declarations. In summary, they argue that the "context" in which the sale of the assets occurred was a "very particular one". They set out in detail the reasons they say the sale occurred, in what they say was a quiet fashion for understandable reasons.

[112] However, in the *Washington FFCL*, Judge Shah noted the oppressive conduct of Mr. Fortin and Mr. Enslen, the necessity to appoint a receiver, and, specifically, his concern that the Washington Defendants are "reasonably likely to try and move assets away from XCar for their own individual benefit and/or for the benefit of the Crossborder-owned companies, to the detriment of Herdson": at para. 124(ii). In fact, this concern was proven to be valid. It is the timing of the sale of XCar's assets that makes clear there is a significant risk of dissipation of assets. Whether the Canadian Defendants can now justify the business case behind this decision is irrelevant to the conclusion that it is evidence of a risk.

[113] Third, the Canadian Defendants argue that the placement of mortgages on the Surrey Commercial Property and the Richmond Commercial Property is not an indication of any risk of dissipation of assets. First, they argue that neither of the properties are legally or beneficially owned by any of the Canadian Defendants, which I will address below. Second, they argue that both mortgages were registered for valid reasons. They detail that on January 19, 2023, a mortgage was registered against the Richmond Commercial Property, securing repayment of $750,000 to Birchard Holdings Ltd. A mortgage was registered against the Surrey Commercial Property on April 19, 2024, stemming from a promissory note granted on May 19, 2023. However, as with the sale of the XCar assets, it is the timing of the placement of the mortgages that is the most concerning. Whether the Canadian Defendants now explain the reason for which the mortgages were placed on title, the timing itself is what is highly suspect. I am satisfied that the granting of these mortgages, in these circumstances, is evidence of a risk of dissipation of assets.

[114] The Canadian Defendants make further arguments as to why it is not just and convenient to extend the *Mareva* Order. First, they argue that there is no requirement for an appellant to post a bond before, or as a condition, to pursuing an appeal. Further, they say a stay in a foreign jurisdiction is not a prerequisite for a Court in British Columbia to defer recognition and enforcement in British Columbia, pending resolution of the foreign appeal. While I accept this proposition, the sale of XCar's assets following the determination of liability in the *Washington FFCL*, is evidence of a risk that they are willing and able to take steps to defeat Mr. Herdson's claim.

[115] In a similar fashion, the parties are in agreement that the underlying businesses engaged in cross border activity. The Canadian Defendants stress that the business of the CB Defendants is coming to a close, and that as Washington State is the jurisdiction in which the Money Judgment was made, "[s]ending assets to Washington State would scarcely assist in defeating Washington enforcement proceedings". However, that ignores the reality that assets may be dissipated without removing them from the jurisdiction. Notwithstanding the business may be

drawing to a close, the historic behaviour and the risk of dissipation of assets is an ongoing concern.

[116] Finally, the Canadian Defendants argue that Mr. Herdson has not established a risk of dissipation of assets, but even if he has, a *Mareva* injunction must be rooted in a party's other connection to this Court, from which it seeks to take advantage, and a desire of this Court to guard against abuse: *567 Hornby Apartments* at para. 14. They stress Justice Huddart's (as she then was) warning in paragraph 66 of *Mooney* that "[a] litigant cannot be permitted to use the court to his advantage while effectively disavowing in advance any judgment against him". However, the case law makes clear that a *Mareva* injunction may be ordered, not only to restrain the act of asset dissipation, but also as a form of security. I do not find this argument to be compelling in determining whether it is just and convenient to extend the *Mareva* Order, although I accept it is relevant to determining whether security should be given by Mr. Herdson if it is extended.

[117] Notwithstanding counsel's eloquent arguments, I continue to be satisfied that it is just and convenient in all of the circumstances of this case to extend the *Mareva* Order. The claim of Mr. Herdson is a strong one, and the amount of his claim is significant. The determination of the Canadian Defendants' liability was upheld in the Washington Court of Appeals, and that determination is final and conclusive. The *extant* appeal is not for liability, but, rather, only for the quantum of damages. Further, the decision to sell the assets of XCar after determination of liability by the Washington Court, and the registrations of a mortgage on the Richmond Commercial Property on January 19, 2023, and on the Surrey Commercial Property on April 19, 2024, are all evidence of a potential risk of dissipation of assets sufficient to satisfy me that there is a serious risk.

[118] In these circumstances, the Canadian Defendants' conduct, prior to and leading up to the pronouncement of the Money Judgment in March 2024, demonstrates a pattern of highly organized behaviour, intended to dissipate assets. Their ability to do this, and their past behaviour, are both relevant factors that weigh

towards granting the injunction. There is the potential of irreparable harm for Mr. Herdson if the injunction is not granted.

C. Should the *Mareva* Injunction be Narrowed

[119] In the alternative, the Canadian Defendants argue that the *Mareva* Order should be narrowed, and that its status with respect to s. 284 of the *Land Title Act*, R.S.B.C. 1996, c. 250 ["*LTA*"] should be clarified.

[120] Turning first to the issue of s. 284 of the *LTA*, they argue that that this section does not apply in these circumstances, and it was improper for the *Mareva* Order to be registered against title to the properties pursuant to that section. Section 284 of the *LTA* provides:

> Power of court to issue injunction
>
> **284** (1) In this section, "**order**" includes injunction.
>
> (2) The Supreme Court may,
>
> (a) on the application of a person interested in land, or
>
> (b) on application made on behalf of the owner of a future or contingent interest,
>
> make an order prohibiting dealing with that land.
>
> (3) The court may annex to the order terms and conditions it may consider proper, including an expiry date.
>
> (4) The order may be lodged with the registrar, and, if lodged with the registrar, the registrar must deal with it in the same manner as a caveat.
>
> (5) This section applies only to land registered under this Act.

[121] After I granted the *Mareva* Order, Mr. Herdson registered it on title to the six properties that were listed within it. The Canadian Defendants argue that neither the original notice of application, nor the *Mareva* Order, nor this notice of application, refers to s. 284 of the *LTA* as the basis for the order sought. They rely on *Osooli-Talesh v. Emami*, 2003 BCSC 1924 [*Osooli-Talesh*] for the applicable legal test for obtaining an injunction pursuant to s. 284 of the *LTA*, which is different from the legal test applicable when obtaining a *Mareva* injunction. They argue that there was no specific reference in the initial *ex parte* to obtaining relief pursuant to this section,

and say it is inappropriate to have had it registered against title to the six parcels of land it has been registered on.

[122] Counsel were unable to provide me with a case directly on point. They agree that the test to obtain a *Mareva* injunction is a more onerous test than the test for an injunction under s. 284 of the *LTA*, or under Rule 10-1 of the *Supreme Court Civil Rules: Osooli-Talesh* at para. 52. However, I do not accept that s. 284 is a complete code within itself, which requires that an application be brought for an injunction pursuant to s. 284 to be registered against title. I am satisfied that in the case of a *Mareva* injunction, an applicant is not directly claiming an interest in the land, as they would be pursuant to s. 284(2). Rather, they are seeking a freezing order, whose purpose is to protect the enforceability of a judgment. That is the basis for the more onerous test an applicant is required to meet on a *Mareva* injunction: *Osooli-Talesh* at para. 54.

[123] Section 284(1) defines “Order” as including an injunction, and s. 284(4) allows the order – or injunction – to be lodged with the registrar. It does not define “Order” as only being an injunction granted pursuant to s. 284(2). The order may be lodged with the registrar, and, if lodged with the registrar, the registrar must deal with it in the same manner as a caveat.

[124] While perhaps it may have been better to have the relief sought in the notice of application clearly refer to the intent to register the *Mareva* injunction on title to the properties pursuant to s. 284(4), I am satisfied it was validly registered on title to the properties under the provisions of the *LTA.*

[125] Turning next to the issue of narrowing the scope of the *Mareva* Order if it is continued, the Canadian Defendants argue that none of the Prince George, Surrey and Richmond commercial properties should be included. They highlight the fact that, in the original notice of application, Mr. Herdson identified these properties as being “owned beneficially” by Mr. Enslen and Mr. Fortin, and that this allegation was maintained at the *ex parte* hearing on May 1, 2024. They say the current notice of application is more conservative when it alleges that “[t]o the knowledge of the

Plaintiff at the time of the Freezing Order, the Defendants had interests in the following real property located in British Columbia": at para. 51.

[126] At the *ex parte* hearing, Mr. Herdson relied upon disclosure made to the Land Owner Transparency Registry (the "Registry") as proof that the Canadian Defendants had a beneficial interest in these properties, as is set out in greater detail at para. [38] above. The Canadian Defendants argue that this was not appropriate, and despite the disclosure in the Registry, neither Mr. Fortin nor Mr. Enslen have any beneficial interest in any of those properties.

[127] By way of very brief background only, the *Land Owner Transparency Act*, S.B.C. 2019, c. 23 [*LOTA*] was enacted to create the Registry, whose purpose was to increase transparency of land ownership in British Columbia. Pursuant to the *Land Owner Transparency Act* White Paper: Draft Legislation with Annotations (June 2018), it is clear that *LOTA* was enacted to provide transparency and information. This information is intended to enable auditors, law enforcement agencies and regulators to conduct investigations. While it is intended to provide information on interests held in land, *LOTA* itself does not state what may be done with this information, nor does it create any new substantive rights or claims.

[128] The parties spent significant time arguing whether it was proper to use the Registry to attempt to locate assets in which a party may have a beneficial interest. With respect, many of the arguments conflated the concept of what is meant by beneficial interest, which may vary depending upon the circumstances, with the required reporting of a beneficial ownership for the purposes of *LOTA*. The arguments focused on whether "beneficial ownership" as declared in the Registry was, in fact, beneficial ownership for all purposes.

[129] While it may be that "beneficial ownership" for the purpose of *LOTA* and the Registry differs from beneficial ownership in other contexts (for example, vis-à-vis a trust, or a corporate relationship), I am satisfied that the Registry offers another tool for parties to obtain information about assets in which a party may have a beneficial interest. However, that is all it is in the circumstances – a tool. It is not conclusive

evidence, without further investigation, that someone does have a beneficial interest in an asset.

[130] Mr. Herdson argues, following the production of the Asset List Affidavits, it is clear that Mr. Fortin and Mr. Enslen do have indirect interests in the Surrey Commercial Property, the Richmond Commercial Property, and the Prince George Commercial Property. He relies upon their disclosure of their corporate interests. In brief, each disclosed shareholdings as of May 1, 2024, as follows. Mr. Fortin disclosed the following corporate and other interests:

a) 100 common shares in C-Rich.;

b) 1/3 of the shares of XCar,

c) 500 Class A Preferred Shares in Cross Border Services;

d) 89 common shares and 500 Class A Preferred Shares in Cross Border Services, held in his capacity as Trustee for The Fortin Family Trust;

e) 100 Class A Voting Common Shares in C-Rich Auto Centre Ltd., held in his capacity as Trustee for The Fortin Family Trust; and

f) discretionary beneficiary of The Fortin Family Trust.

[131] Mr. Enslen disclosed the following corporate interests:

a) 54 Class F Preference Shares, 644 Class F Non-Voting Preference Shares, 100 Class B Common Voting Shares in REE Inc.; and

b) 1/3 of the shares of XCar.

[132] As set out above, according to the Canadian Defendants, REE Inc. is a company owned by Mr. Enslen and his wife. C-Rich is Mr. Fortin's holding company, in which he and his wife own shares. REF Holdings Inc.'s shareholders are REE Inc. and C-Rich.

[133] The Canadian Defendants say that none of them are a beneficial owner of the properties in question.

[134] With respect to the Prince George Commercial Property, they say the legal and beneficial owners are REE Inc., in which Mr. Enslen and his wife are shareholders of an undivided ½ interest.

[135] With respect to the Surrey Commercial Property, they say the legal owner is 2750 King George Highway Ltd., who holds these properties as bare trustee for its beneficial owner, RBR Investments Ltd. The shares of both of these companies are owned by three other companies, two of which are C-Rich and REE Inc.

[136] Finally, with respect to the Richmond Commercial Property, the legal owner is REF Holdings Inc., whose shareholders are REE Inc. and C-Rich. The Canadian Defendants take the position that the legal and beneficial owner of the Richmond Commercial Property is REF Holdings Inc.

[137] The Canadian Defendants take the position that notwithstanding Mr. Enslen and Mr. Fortin are shareholders in some of the above entities, a shareholder of a corporation is not, as such, the beneficial owner of any of that corporation's property. As a shareholder has no legal or equitable claim to the corporate property, they say neither are beneficially interested in the Prince George, Surrey or Richmond commercial properties. They say it is trite law that a corporation is a distinct and separate entity from its shareholders: *Sommerer v. Canada*, 2012 FCA 207 at paras. 41–42; and *Salomon v. A. Salomon & Co. Ltd.,* [1897] AC 22 (HL) at 51.

[138] However, in these circumstances, that is not the end of the matter. There are circumstances in which it is appropriate for the Court to make an order directly against companies owned directly or indirectly by individual defendants so as to preserve the *status quo* of the corporate assets. In other circumstances the Court will pierce the corporate veil to fully investigate the true nature of a defendant's relationship with a company, and their ability to control (and dissipate) a company's assets. See, for example, *TSB Private Bank International v. Chabra*, [1992] 1 WLR 231 (Ch). This issue was not argued fully by the parties at this *intra partes* hearing, as the submissions focussed on the issue of *LOTA*, the Registry, and beneficial ownership of the three commercial properties.

[139] In these circumstances, the Canadian Defendants have not disclosed sufficient information to allow me to conclude they are not the beneficial owners of these properties. The corporate relationship between the Canadian Defendants, notably Mr. Fortin and Mr. Enslen, and the legal entities who own the three commercial properties, is complicated and intertwined. To what extent is impossible to say on the evidence disclosed to date. The disclosure of the corporate structure for each company to date was insufficient, as was the information as to who is the directing mind of each of the companies. To reward the Canadian Defendants for this lack of disclosure at this time by narrowing the scope of the *Mareva* Order would not, in my opinion, be appropriate.

[140] Further, counsel have not had the opportunity to advance fulsome arguments as to who is the beneficial owner of the three commercial properties, separate and apart from the issue of the Registry. They have also not advanced arguments as to whether, given the nature of the Canadian Defendants' relationship with the legal owners of the properties, it would be proper to freeze the properties, rather than merely the shares that Mr. Fortin and Mr. Enslen hold. This is one of Mr. Herdson's most compelling arguments in seeking cross-examination on the Asset List Affidavits, as an efficient way to determine the corporate structure, the value of the assets, and who controls each of the companies.

[141] In light of the disclosure to the Registry that Mr. Fortin and Mr. Enslen are the beneficial owners of the properties in question, and in light of the lack of material disclosure to determine the true nature of the complex corporate relationships, I decline to narrow the *Mareva* Order at this time. However, after the cross-examination on the Asset List Affidavits is concluded, either party may then apply to vary the terms of the *Mareva* injunction.

D. Should Cross-Examination on the Asset Lists Be Ordered

[142] For the reasons set out above, I would order that cross-examination on the asset lists be conducted within 60 days of these reasons for judgment. Although Mr.

Herdson sought this to occur within 30 days, I am allowing 60 days to ensure all counsel, and parties, are able to determine a convenient date.

[143] I am satisfied that the asset lists filed are unsatisfactory, and that Mr. Herdson has established cross-examination is appropriate to ensure that the assets of the Canadian Defendants are clearly and accurately disclosed, to clearly identify all assets over which Mr. Fortin and Mr. Enslen have control (whether in their name or that of another) and to establish whether it is appropriate to continue to freeze the Prince George, Surrey and Richmond commercial properties, or whether merely freezing the shares owned by Mr. Fortin and Mr. Enslen is sufficient. For clarity, the proper scope of cross-examination would include disclosure of assets held by third parties, including the above-named companies, over which the Canadian Defendants have the power, directly or indirectly, to control, dispose of, or deal with as if they were their own, and all assets in which they arguably have a beneficial interest.

[144] Further, neither counsel made any argument as to the value of assets that should be frozen. An applicant must establish that the extent of the potential claim bears some relation to the value of assets sought to be impounded: *Tracy* at para. 56. However, I accept that one of the significant reasons Mr. Herdson seeks cross-examination is that he says it is the most efficient path forward to “breathe life” into the *Mareva* Order, to determine the ownership structure, how the complex corporate assets are owned and intertwined, and to determine the value of the assets owned both personally and beneficially by the Canadian Defendants.

[145] I am satisfied for all these reasons that cross-examination is appropriate. Again, however, after cross-examination occurs, either party has leave to apply to vary the scope of the *Mareva* order, including to narrow it to ensure that its extent is relative to the value of the assets necessary to be frozen.

E. Should the Canadian Defendants be Granted Security

[146] Mr. Herdson provided the requisite undertaking, including the undertaking as to damages, as is set out in the proposed *Model Order for Preservation of Assets*

(PD-47). The Canadian Defendants now seek that he be ordered to post security for this undertaking.

[147] Mr. Herdson argues that the existing *Mareva* Order provides at clause 6 that anyone affected by the order may apply to request the plaintiff be required to post security for the undertaking and says as the Canadian Defendants did not bring any such application, such an order should not be granted at this time. I am not persuaded by that argument. Mr. Herdson now applies to extend the *Mareva* Order, and it is to that application that the Canadian Defendants are responding. I am satisfied that it is appropriate to grant an order for Mr. Herdson to grant security for his undertaking, given the value of the properties frozen, the lack of a clear timeline to the hearing of the appeal in Washington, and the ultimate timeline of the eventual enforcement of the judgment in British Columbia. Enjoy brekk

[148] However, where security is ordered, the court must determine an amount that is just and equitable to both parties: *Luu v. Wang*, 2008 BCSC 1810 at paras. 25–26. Neither party tendered any evidence nor made any substantive submissions on the appropriate amount to be posted as security for Mr. Herdson's undertaking. I am satisfied it is now appropriate that security, in an amount acceptable to counsel for the parties, be posted, on the terms set out in the *Model Order For Preservation of Assets*. If they are unable to reach such an agreement, either has liberty to apply for a further court order addressing the proper amount and form.

F. Costs

[149] Mr. Herdson made no submissions with respect to costs. The Canadian Defendants sought special costs on the basis that Mr. Herdson made material non-disclosure on the *ex parte* application: *Canadian Western Bank* at para. 53. In the alternative they sought the costs of this application.

[150] Given the divided success of the parties on this application, I find it appropriate that the costs should be in the cause.

VI. CONCLUSION

[151] I am indebted to counsel for their comprehensive written arguments and able oral submissions.

[152] I am satisfied on the basis of the evidence before me that Mr. Herdson has demonstrated he has a strong *prima facie* or good arguable case, and that the balance of convenience favours him. I am prepared to extend the *Mareva* Order on the same terms as I granted the *Mareva* Order, and I make the following further orders:

a) Mr. Herdson is entitled to conduct a cross-examination on the Asset List Affidavits within 60 days of these reasons for judgment;

b) after the cross-examination is conducted, either party is entitled to apply to narrow the scope of the *Mareva* injunction;

c) Mr. Herdson is to post appropriate security, in an amount acceptable to counsel for the parties, on the terms set out in the *Model Order For Preservation of Assets*. If counsel are unable to reach such an agreement, either has liberty to apply for a further court order addressing the proper amount and form; and

d) the costs of this application are to be costs in the cause.

[153] I note there is no application brought by the Canadian Defendants for either a stay in the British Columbia proceeding, nor do they seek one at this time. Nor do they propose any further potential sales at this time. Accordingly, I decline to make any specific order at this time; however, should any of the Canadian Defendants wish to sell any of their assets, they may apply to do so on appropriate terms, if those terms cannot be worked out by consent.

"Blake, J."