COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Merchant Law Group LLP v. Mayer,*
2024 BCCA 234

Date: 20240614
Docket: CA49456

2024 BCCA 234 (CanLII)

Between:

Merchant Law Group LLP

Appellant
(Defendant)

And

James Mayer

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Harris
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated October 13, 2023 (*Mayer v. Merchant Law Group LLP*, 2023 BCSC 1797, Vancouver Docket S229449).

Oral Reasons for Judgment

Counsel for the Appellant (via videoconference):	A. Tibbs
Counsel for the Respondent:	N.J. Kovak C.R. Mogerman
Place and Date of Hearing:	Vancouver, British Columbia June 14, 2024
Place and Date of Judgment:	Vancouver, British Columbia June 14, 2024

2024 BCCA 234 (CanLII)

Summary:

This case concerns an order in an underlying class proceeding initiated in British Columbia. In the application at issue, the judge refused to decline jurisdiction in favour of Saskatchewan on forum non conveniens grounds, and concluded that the respondent's service on the appellant in Regina was effective.

Held: Appeal dismissed. The appellant has not demonstrated any reversible error in the judge's conclusion that Saskatchewan is not a clearly more appropriate forum than BC for the proposed action. In the circumstances of this case, the judge did not err in relying on R. 4-5(6) of the Supreme Court Civil Rules to declare the service in Regina to be valid.

HARRIS J.A.:

Introduction

[1] The issues on appeal are whether the judge erred (1) in refusing to decline jurisdiction on *forum non conveniens* grounds and, (2) in concluding that the plaintiff's service of the notice of civil claim on November 25, 2022 was effective service.

[2] The background facts relevant on appeal may be briefly stated.

[3] The underlying action is a proposed class proceeding brought on behalf of individuals who allegedly were induced by misrepresentations from Merchant Law Group LLP ("MLG" or "Merchant Law") to pay a $500 retainer payment to participate in a different class proceeding involving a sham charitable donation tax shelter scheme.

[4] In 2016, after a Tax Court judgment finding that the tax shelter program was a sham, Merchant Law started a proposed class action against the promoter of the tax shelter and others in Saskatchewan: *Piett v. Global Learning Group Inc.*, 2018 SKQB 144; leave to appeal to Sask. C.A. refused, *Piett v. Canada Revenue Agency*, 2022 SKCA 141 (the "Piett Action"). Mr. Piett, the proposed representative plaintiff, had been a sales agent for the promoter.

[5] The plaintiff in this action alleges that Merchant Law, in concert with Mr. Piett and a former executive of the promoter, made misrepresentations that induced the

putative class members to pay a $500 "retainer fee" to Merchant Law to "join" the Piett class action, and that Merchant Law then misused the trust funds it collected from the putative class, including by using them to pay finders' fees to Mr. Piett and the former executive for "signing up" class members for the Piett Action, and to pay accounts owing to Merchant Law by Mr. Piett in respect of a separate proceeding. Merchant Law, it is alleged, received and disbursed approximately $1.7 million in "retainer fees". No accounts were rendered to the putative class members.

[6] The Piett Action was struck as an abuse of process because it subverted the class action process: the funding scheme, devised by Merchant Law and Mr. Piett and the former promoter executive, was contrary to the purpose and objectives of the Saskatchewan *Class Actions Act*, S.S. 2001, c. C-12.01. The court also found that Merchant Law acted improperly in using the trust funds without rendering accounts to the putative class members, and without otherwise obtaining court approval. Leave to appeal was denied. Merchant Law, in fact, used the trust funds to pay off Mr. Piett's other accounts owed to the firm, although this was not disclosed at the certification hearing, and was only disclosed by Merchant Law on Mr. Piett's appeal from the dismissal of his action.

[7] The plaintiff, Mr. Mayer, is a resident of British Columbia ("BC"), who paid from BC to Merchant Law the $500 retainer fee. He proposes a national class action, seeking repayment of the retainer fees taken by Merchant Law. This is the only proposed class action addressing these complaints. The distribution of the proposed class across Canada in percentage terms follows: it is estimated that 34% lived in Ontario, 17% in Saskatchewan, 17% in Manitoba, 10.5% in Alberta, approximately 6% in BC, and about 5% elsewhere in Canada.

[8] Merchant Law is a national law firm, with offices in locations across Canada, including a head office in Saskatchewan. Merchant Law is a limited liability partnership formed in Saskatchewan under Part IV of *The Partnership Act*, R.S.S. 1978, c. P-3. Merchant Law is also a "firm" under *The Legal Profession Act, 1990*, S.S. 1990-91, c. L-10.1. It has a registered office in Regina, Saskatchewan.

2024 BCCA 234 (CanLII)

Merchant Law is registered as an extraprovincial partnership in BC under the *Partnership Act*, R.S.B.C. 1996, c. 348, and the *Extraprovincial Limited Liability Partnerships and Limited Partnerships from a Designated Province Regulation*, B.C. Reg. 90/2009. According to its extraprovincial registration, Merchant Law has five satellite offices in BC. Merchant Law's evidence is that it has two operating offices in BC.

2024 BCCA 234 (CanLII)

[9] Lawyers from Merchant Law, including Mr. Merchant, K.C., litigate in BC regularly. Mr. Merchant is a practising member of the Law Society of BC, called September 13, 1977. The evidence is that Mr. Merchant had primary responsibility for the conduct of the Piett Action. The retainer agreements involved in this action were executed by him.

[10] Given the centrality of the retainer agreement to the issue on appeal, it is worthwhile referring to it and some surrounding facts in more detail. As stated by the judge:

> [16] On November 25, 2015, the plaintiff paid $500 from his home in BC to Merchant Law. The plaintiff received a receipt for this payment in BC.
>
> [17] After making his payment, Merchant Law asked the plaintiff to complete and execute a written agreement (the "Agreement"). The Agreement was identified as being between the "Lawyer", Merchant Law, and the "Client", James Mayer. The Agreement acknowledges that the plaintiff lives in New Westminster, BC.
>
> [18] The Agreement includes the following terms:
>
>> <u>10. This Agreement shall be governed by the law of the jurisdiction of the Client's residence</u>.
>>
>> 11. The Client resides in the province or territory of British Columbia and acknowledges to have read and understood this Agreement and the paragraphs attached as Appendix A of this agreement, which are relevant to the jurisdiction of residence as regards the duty of the Lawyer to disclose the rules regarding contingency agreements because part of the payment that the Client will be expected to make to the Lawyer is conditional upon their success or partial success in the Legal Proceedings and which also, depending on the Client's province of residence, alerts the Client to the right of assessment or review of any legal account by court officials.
>>
>> [Emphasis added by chambers judge.]

> [19] Appendix A to the Agreement reads:
>
> > Appendix A (British Columbia)
> >
> > The person who has entered into this Agreement with Merchant Law Group may, within 3 months after the agreement was made or the retainer between the solicitor and client was terminated by either party, apply to a district registrar of the Supreme Court of British Columbia to have the agreement examined, even if the person has made payment to the lawyer under the agreement.
>
> [20] The plaintiff completed and executed the Agreement in BC and mailed the original from BC back to Merchant Law in Saskatchewan. The agreement was signed by Mr. Merchant in Saskatchewan.

[11] I will return to the facts about service in connection with that issue on appeal.

2024 BCCA 234 (CanLII)

The Reasons for Judgment

[12] Before the chambers judge, the appellant challenged the territorial competence of the court. That issue is not before us.

[13] The judge set out in some detail the background outlined above. The judge set out the law on the circumstances in which a court will decline jurisdiction in favour of a clearly more appropriate one. The judge acknowledged the mandatory legal factors found in s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*], and the continuing relevance of common law factors not expressly identified in that section. No issue is taken with the judge's statement of he governing principles.

[14] The judge asked whether it was established that Saskatchewan was a clearly more appropriate forum than BC for the prosecution of the proposed class proceeding. He concluded:

> [38] I find that the collective weight of the following factors prevents the court from reaching a conclusion that Saskatchewan is a clearly more appropriate forum:
>
> a) The plaintiff is resident in BC (s. 11(2)(a));
>
> b) The plaintiff's chosen law firms are resident in BC and Ontario, not Saskatchewan (s. 11(2)(a));
>
> c) There are a material number of proposed class members in BC (s. 11(2)(a));

d) The defendant has operations and offices in BC (s. 11(2)(a) and (e));

e) The plaintiff received the alleged misrepresentations in BC (s. 11(2)(b));

f) The plaintiff executed the Agreement in BC (s. 11(2)(b));

g) The Agreement contains a clause making BC law govern (s. 11(2)(b));

h) The Agreement was executed in BC (s. 11(2)(b));

i) The retainer amount was delivered from BC (s. 11(2)(b));

j) The plaintiff suffered his loss in BC (s. 11(2)(b));

k) There is no overlapping proceeding in Saskatchewan (s. 11(2)(c) and (d));

l) The plaintiff is not able to commence a class proceeding in Saskatchewan given the local residency requirement in s. 4(1) of Saskatchewan's *Class Actions Act*, SS 2001, c C-12.01, thereby negating the ability to access the efficiency gains that may be possible through class certification, should all BC's requirements be satisfied (s. 11(2)(f)); and

m) Even if the plaintiff were able to commence a proceeding in Saskatchewan, he would be at risk for an adverse costs award, a risk that is largely mitigated in BC (see common law factors (5) and (6) from *Stern*). Saskatchewan has now adopted a 'loser pay' approach to costs, while BC generally remains a largely 'no costs' jurisdiction. Other courts have determined that such class action costs rules can be a juridical advantage relevant to the jurisdictional analysis: *Lieberman and Morris v. Business Development Bank of Canada*, 2006 BCSC 242 at para. 73-79, leave to BCCA ref'd, 2006 BCCA 300; *Ward v. Attorney General of Canada, Ministry of National Defence*, 2006 MBQB 212 at para. 35; and *Ring v. Canada*, 2007 NLTD 213 at para. 31.

[39] On the other hand, I accept that the following factors favour Saskatchewan, but conclude they are not of sufficient weight to oust the plaintiff's chosen jurisdiction:

a) The *Piett* litigation took place in Saskatchewan (s. 11(2)(a));

b) The defendant's primary operations are in Saskatchewan (s. 11(2)(a) and (e));

c) The defendant's primary witnesses are likely to be residents of Saskatchewan (s. 11(2)(a));

d) It is possible that certain legal claims, such as the professional negligence claim, may be governed by Saskatchewan law (s. 11(2)(b));

e) It is likely that only 6.1% of the class damage occurred in BC, while a greater percentage occurred in Saskatchewan (common law factor (4) from *Stern*);

f) The plaintiff has alleged that the defendant breached Saskatchewan's *Class Actions Act* (common law factor (3) from *Stern*); and

2024 BCCA 234 (CanLII)

> g) Enforcement efforts would likely be more efficient and effective in Saskatchewan (s. 11(2)).

[15] Finally, the judge distinguished *Churchill Cellars Ltd. v. Haider*, 2018 ONSC 2013 (Master), an authority relied on by Merchant Law, and found that Merchant Law had failed to establish that Saskatchewan is a clearly more appropriate forum. Accordingly, he dismissed the application.

2024 BCCA 234 (CanLII)

<u>On Appeal</u>

[16] It is useful to remember that this is an appeal from a discretionary decision, which is entitled to deference absent an error of law or a palpable and overriding error in the determination of relevant facts. Merchant Law says it meets this test, alleging three errors, namely:

> a. Committing an error of law by failing to consider the Respondent's pleading that the Agreement is alleged to be null and void, and therefore could not form the basis of a jurisdictional determination;
>
> b. Committing a palpable and overriding error of fact (rising to the level of an error of law) by giving inordinate and unreasonable weight to the alleged juridical advantage of British Columbia being a "no costs" jurisdiction;
>
> c. Committed an error of law by considering the prospects of a Saskatchewan action only from the perspective of the named plaintiff, without giving any consideration to the class nature of the claim; ...

[17] I find these submissions unpersuasive. First, with respect to the pleading that the retainer is a nullity: this argument overlooks the fact that whether the agreement is a nullity is an issue in the litigation. Even if it is a nullity, or is otherwise unenforceable, the facts relating to the agreement form an important factual foundation of the action. Facts about the agreement also support multiple causes of action in misrepresentation, negligence, unjust enrichment, as well as allegations of professional misconduct. BC is the place where the proposed representative plaintiff received alleged misrepresentations and suffered harm as a result. I fail to see that a pleading that the agreement is null and void has any impact on the jurisdictional connection to BC. That connection would remain in place, even if a pleading of nullity or unenforceability was the only issue in play. I discern no error in the judge's

approach to the pleadings and factual and legal issues connecting the action to BC. As Mr. Mayer points out in his factum:

> The fact remains that Merchant Law entered into an arrangement with the plaintiff whereby it took legal fees and deposited them into its trust account. The language in the Agreement is evidence that Merchant Law intended to be bound by the laws of the Province of British Columbia when it took those legal fees and executed the Agreement …

[18] Second, I see no error, and certainly not a palpable and overriding error, in the judge's treatment of the cost implications of proceeding in BC as opposed to Saskatchewan. The judge treated the costs implications of proceeding in different provinces as only one consideration among many. I fail to see that he put inordinate weight on those factors. The fact that Saskatchewan is a loser pays jurisdiction and BC is not (post certification at least) is one among many considerations. These facts are relevant and were appropriately weighed by the judge.

[19] Third, I do not accept that the judge failed to have regard to the class nature of the claim. The judge was evidently aware that this is a proposed class proceeding. Mr. Mayer as a non-resident could not bring the action in Saskatchewan, hence his ability to do so in BC is a legitimate procedural advantage both to him as a proposed representative plaintiff and the class he proposes to represent. There are no competing proceedings in other provinces. I would not give effect to this alleged error.

[20] In short, I do not think Merchant Law has demonstrated any reversible error in the judge's exercise of discretion in finding that it had not been demonstrated that Saskatchewan was a clearly more appropriate forum than BC for the conduct of the action. I would not accede to the appeal of this aspect of his order.

[21] I turn now to address the issue of service. As the judge noted, the court only has jurisdiction if the defendant is properly served. Despite Merchant Law having a registered office in BC (which could have been served with this notice of civil claim), the plaintiff served Merchant Law in Saskatchewan without leave, and without the necessary endorsement. Although Mr. Tibbs acknowledged in argument that this

2024 BCCA 234 (CanLII)

aspect of the appeal may be moot since the action was subsequently served in BC, the point raised can be readily dealt with on the merits.

[22] The judge concluded that the plaintiff could have served the pleading on the defendant's registered office in BC. Therefore, he could rely on R. 4-5(6) which provides:

> (6) This rule does not invalidate service of a document outside British Columbia without leave of the court if the document could have been validly served apart from this rule.

[23] The judge noted that it was unclear whether the provision operates automatically or simply grants a discretion to validate the service. To the extent it was necessary, the judge concluded it was in the interests of justice to validate the service where, but for the absence of an endorsement, no issue of validity would arise, and where it appeared the absence of an endorsement was a counsel error.

[24] On appeal, Merchant Law says the judge abused his discretion rendering nugatory the rules respecting jurisdiction. It says that serving without leave was a concession that BC did not have "jurisdiction of manifest significance". The failure to endorse the pleading is said to necessitate an application for leave, and there is no possibility of remediating the situation (although that apparently is not the position that was submitted to us on appeal). It says guidance is needed on the "curious wording" of R. 4-5(6).

[25] I would not give effect to any of these submissions. It is clear, on the facts, that the plaintiff could have validly served Merchant Law in BC (indeed, as conceded, later they did exactly that). Merchant Law is registered as an extraprovincial limited liability partnership under the *Partnership Act*. Accordingly, under s. 121(4), the notice of civil claim could be served on it by delivering the record to the delivery address. The judge was entitled to rely on R. 4-5(6) in the circumstances, and gave cogent reasons for doing so. I also accept Mr. Mayer's submission, in his factum, that the error here is properly characterized as an irregularity and would not render the proceeding a nullity.

2024 BCCA 234 (CanLII)

[26] There is no basis to conclude that Merchant Law was misled or prejudiced. The basis of territorial competence is clear from the pleading, and it is not disputed on appeal that BC has territorial competence. It appears that counsel for Merchant Law and the plaintiff engaged in discussions for some months, and the issue of invalid service was not raised by Merchant Law until the jurisdictional challenge was filed. Subsequently, Merchant Law was served personally at its Surrey office.

[27] In all the circumstances, I discern no error in the judge's decision to rely on R. 4-5(6) to declare the service to be valid.

Disposition

[28] I would dismiss the appeal.

[29] **GROBERMAN J.A.**: I agree.

[30] **SKOLROOD J.A.**: I agree.

[31] **GROBERMAN J.A.**: The appeal is dismissed.

"The Honourable Mr. Justice Harris"

2024 BCCA 234 (CanLII)