

2011 CarswellSask 296, 2011 SKQB 174

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Saskatchewan Government v. Merchant

Saskatchewan Government Insurance, Plaintiff (Co-Applicant) and Evatt Francis Anthony Merchant, carrying on practice of law as Merchant Law Group, Defendant (Co-Applicant)

Saskatchewan Court of Queen's Bench

T.C. Zarzeczny J.

Judgment: April 28, 2011

Docket: Regina Q.B.G. 1477/09

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Counsel: John A. Epp, for Plaintiff / Applicant

E.F. Anthony Merchant, Q.C., for Defendant / Respondent

Subject: Civil Practice and Procedure; Insurance; Contracts

Civil practice and procedure.

Insurance.

T.C. Zarzeczny J.:

Introduction

1 The parties to this action have approached the court for the determination of points of law pursuant to Rule 188 of the *Queen's Bench Rules*. In support of that application they have prepared an Agreed Statement of Facts filed with the court March 1st, 2011.

2 This action advances a claim by the plaintiff Saskatchewan Government Insurance ("SGI") against the defendant Evatt Merchant practicing as Merchant Law Group ("Merchant") alleging that Merchant is liable to pay SGI \$3,000.00 as a consequence of its failure to honour an Assignment of Proceeds issued by a client of the firm. The Assignment dated January 25, 2000 directed Merchant to pay that amount from proceeds received by Merchant as the client's solicitors upon the settlement of the client's "Residential School claim" made against the Government of Canada.

3 The client owed SGI \$3,000.00 and the Assignment was provided to allow the client to regain his driving

privileges which SGI permitted based upon the Assignment.

4 The parties have requested the court to determine:

(a) the enforceability of the Assignment;

(b) whether a letter issued by Merchant March 30th, 2006 impacts that enforceability; and

(c) whether or not, if the Assignment was enforceable Merchant's failure to recognize and pay the monies under the Assignment entitles the plaintiff to judgment against Merchant.

5 It is submitted on behalf of Merchant that although Merchant would have liked to pay the amount claimed by SGI nevertheless it is prohibited from doing so by virtue of the provisions of s. 67 of the *Financial Administration Act*, R.S.C. 1985, c.F-11. Merchant relies upon the British Columbia Court of Appeal decision in the case of *Fontaine v. Canada (Attorney General)*, 2008 BCCA 329, [2008] 12 W.W.R. 621. Merchant argues that although this decision is not binding upon this Court, it should nevertheless be followed by it.

6 Ironically Merchant advises the court that although it disagrees with the decision in *Fontaine* in principle, nevertheless, the decision is one from a court of high authority. Therefore reluctantly, but bound by the legalities of the situation, Merchant paid to its client the residual proceeds of the settlement of his Indian Residential School claim received by Merchant from the Government of Canada without deduction for the \$3,000.00 assigned by the client to SGI.

7 In fact Merchant received two payments on account of this client in settlement of his Residential School claim against the Government of Canada. The Agreed Statement of Facts does not provide particulars of the first settlement payment nor details of exactly when it was received. In a letter dated March 30th, 2006, Merchant apparently wrote to SGI stating:

Mr. Shepherd's file has settled. After paying all the legal fees and assignments, Mr. Shepherd received no money. No money will be forthcoming from Mr. Shepherd's residential file.

(Agreed Statement of Facts, para. 6)

8 Merchant received a second settlement payment for the client, apparently on January 30th, 2008, in the total sum of \$8,984.45 received from the Government of Canada. After deducting its legal fees Merchant paid the client \$6,126.94 writing to SGI in part as follows:

On January 30, 2008, we received a different payment, a so called grid payment for Mr. Shepherd and we sent Mr. Shepherd \$6,126.94. It is our position that the assignment served was spent and in all events, had no application to the grid payment. Additionally we take issue with these assignments.

(Agreed Statement of Facts, paras. 7 and 11)

9 At odds with this stated position and internally is para. 8 of the defendant's written submissions, stating in part that:

8. Merchant Law Group LLP, in terms of fairness, is supportive of enforcing those assignments, opposes enforcing those assignments on behalf of its First Nations clients, although that appears to be an unfairness be-

cause the clients received the goods and services and in practical terms will not be called upon for payment if assignments are not honoured. But the views of fairness by Merchant Law Group LLP are irrelevant....

10 In para. 10 of its written submission Merchant states:

10. Justice supports judgment being rendered against Merchant Law Group LLP. The Indian Residential School settlement agreements and the case law do not.

11 What Merchant refers to in respect of its view that the Assignments like the one at issue are invalid and unenforceable is the decision of both the trial and appellate courts of British Columbia in the *Fontaine* case. In the *Fontaine* case the courts similarly had to consider the enforceability, as against the Attorney General, of certain Directions to Pay and Assignments of money owing to claimants under the Indian Residential Schools Settlement Agreement. In that case the applicant Levesque, a lawyer, represented certain of the class member claimants under that Settlement Agreement. She argued in favour of the enforceability of the Assignments and Directions to Pay, (some of which she prepared) to secure the indebtedness of her clients to financial institutions who had lent money to them on the strength of the Assignments.

12 Brenner C.J. at the Chambers level held these Assignments to be invalid and unenforceable as against the Government of Canada on two grounds. Firstly, he found the Assignments to be prohibited by s. 67 of the *Financial Administration Act*. Secondly, the Assignments were contrary to the provisions of the Settlement Agreement which banned assignments of any amounts payable under the Agreement.

13 Section 67 of the *Financial Administration Act* provides as follows:

67 Except as provided in this Act or any other Act of Parliament,

(a) a Crown debt is not assignable; and

(b) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person any rights or remedies in respect of that debt.

14 At the Chambers level in *Fontaine* Brenner C.J. concluded at para. 31 of his judgment as follows with respect to the application of s. 67 of the *Financial Administration Act*:

31 Both the law (s. 67 of the *FAA*) and the Settlement Agreement (s. 18.01) are clear. The CEP payments must be paid by Canada to the CEP recipients. Once received, the CEP recipients are of course free to use or dispose of the funds in any manner they consider appropriate. But until 100% of the CEP monies are placed in their hands, the Crown debt will not have been discharged.

15 The Court of Appeal, in commenting upon this analysis and conclusion stated at para. 35 of its decision in part as follows:

35 ... It is clear that the transaction to which Canada was alerted was more than a Direction to Pay the claimant's counsel. It was an integral part of the transaction that was intended to fetter the class member's settlement proceeds the instant they became payable.

36 The effect of the transaction was to assign wholly the amounts payable under the Settlement Agreement to lenders, contrary to the intent of s.18.01 of the Settlement Agreement. ...

16 Merchant, in its written submissions, attached a copy of a November 20th, 2005 "Agreement in Principle" to which Merchant is a signatory party and an agreement entitled "Indian Residential Schools Settlement Agreement" dated May 8th, 2006 unsigned. The court observes that this was not incorporated into the Agreed Statement of Facts and therefore the court is not able to rely upon it in determining the issues put before the court. If it were entitled to rely upon it the court would observe that the Indian Residential Schools Settlement Agreement appears to be one and the same as the one referred to by the court in *Fontaine* and s.18.01 of the agreement contains the same prohibition against assignment considered in *Fontaine*.

17 For the present application, the court is confined to its consideration of the proper interpretation and application of s. 67 of the *Financial Administration Act* only without reliance upon this additional "evidence" gratuitously introduced by Merchant in its written argument.

18 In the interests of judicial comity respecting an issue having national impact but as well because I have concluded that the interpretation and application of the *Fontaine* court decisions respecting s. 67 of the *Financial Administration Act* is the correct interpretation and the circumstances of the current assignment is, in principle, on all fours with the circumstances addressed in *Fontaine*, I conclude, as did the courts in *Fontaine*, that the assignment in favour of SGI is void and unenforceable being contrary to the express provisions of s. 67 of the *Financial Administration Act*. As did the courts in *Fontaine*, I too conclude that until the settlement proceeds are in the hands of the residential school claimant, the Crown debt has not been paid. Payment to the recipient's solicitors do not constitute the settlement of the debt but merely one step towards that settlement. I adopt and apply the reasoning and conclusions of the British Columbia courts in *Fontaine* as fully despositive of the issues and questions raised upon this Rule 188 application.

19 In reaching these conclusions it should be pointed out that they are opposite the conclusions reached in similar circumstances addressed by this Court and the Saskatchewan Court of Appeal in the case of *Compushare Ltd. v. Evatt Francis Anthony Merchant, Q.C. and Evatt Francis Anthony Merchant*, 2007 SKQB 105, [2007] S.J. No. 235 (QL) affirmed by the Court of Appeal at 2008 SKCA 173, 320 Sask. R. 1.

20 While those decisions recognize that an assignment of a future debt at common law is enforceable nevertheless the provisions of s. 67 of the *Financial Administration Act* were neither argued nor, it appears, advanced for the court's consideration in the *Compushare* case. These common law principles of assignment may be subject to variation or limitation by an applicable statutory provision. That is the case with respect to the now recognized implications of the *Financial Administration Act* to the Residential School Settlement Agreement payments.

21 Section 67 in its current form was in effect at the time that both payments in favour of this client were received by the Merchant firm. It does not appear that Merchant was aware of it when it sent the March 30th, 2006 letter failing to deliver payment under the Assignment on the occasion of its receipt of the first Residential School settlement payment for this client. Nevertheless s. 67 of the *Financial Administration Act* applied then as it does now with the same result..

22 For the analysis undertaken and the reasons stated the court's answer to the questions remitted to it under this Rule 188 application are as follows:

1. The Assignment in question in this action is not enforceable;
2. The letter of March 30th, 2006 does not impact the enforceability of the Assignment;

3. The Assignment being void and unenforceable judgment against Merchant for the sum of \$3,000.00 is not entered.

23 Each party will assume their own costs in respect of this jointly submitted application for ruling.

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