

(CLASS) ACTIONS HAVE CONSEQUENCES

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Background

Early strategic litigation choices can have long reaching impacts, as the plaintiff found out in the recent decision of *MM Fund v. Excelsior Mining Corp.*, 2024 BCSC 117. MM Fund (“**MM**”), an Ontario-based mutual fund, lost its application to have an action it initially commenced in British Columbia against Excelsior Mining Corporation (“**Excelsior**”), a publicly traded company, transferred to Ontario after both the British Columbia Supreme Court and Court of Appeal refused to certify the action as a class action. This was on account of MM not being a resident of British Columbia, as required by the British Columbia *Class Proceedings Act*.^[1] When MM tried to then move the case to Ontario, the court quickly shut it down.

Procedural History

In late 2021, MM sought to bring a shareholder class action lawsuit against Excelsior Mining Corp. and its executives (collectively, the “**Excelsior Defendants**”) before the British Columbia Supreme Court. The lawsuit alleged that Excelsior, a mining company with operations in Arizona and offices in British Columbia, made misrepresentations in a prospectus it issued back in 2021 to raise funds for its mining operations, in violation of the British Columbia *Securities Act*.^[2]

On April 30, 2022, the British Columbia Supreme Court denied MM’s application to certify the class action, stating that MM did not meet the British Columbia residency requirements under the *Class Proceedings Act* following a determination that MM’s operations, central management, and control were based entirely in Ontario. Consequently, the Court ordered MM to amend its pleadings to proceed with an individual action only against Excelsior instead of the putative class proceedings.^[3]

MM appealed the decision, arguing that it had substantial ties to British Columbia, specifically referencing its status as a reporting issuer under the British Columbia *Securities Act* and its registration to do business in British Columbia. On April 30, 2024, the British Columbia Court of Appeal dismissed MM’s appeal and confirmed that mere business connections or compliance with British Columbia regulations do not establish residency.^[4]

On May 2, 2024, MM regrouped and filed a class action proceeding in the Ontario Superior Court of Justice

mirroring in substance the class action it failed to get certified in British Columbia.

Application to Transfer Claim to Ontario

MM then filed an application seeking an order from the British Columbia Supreme Court that its individual action against the Excelsior Defendants be transferred to Ontario to consolidate it with the new class action filed there, pursuant to the *Court Jurisdiction and Proceedings Transfer Act* (“**CJPTA**”). [5]

The application was opposed by the Excelsior Defendants.

Legal Framework

Section 14 of the *CJPTA* gives the Court discretion to order a matter be transferred to another court outside British Columbia if the Court is satisfied that:

1. *the receiving court has subject matter competence in the proceeding; and*
2. *under section 11, the receiving court is a more appropriate forum for the proceeding than the Supreme Court.* [6]

The fact that the Ontario court had subject matter competence was not in dispute. The crux of the dispute was whether the Ontario court was “clearly” the more appropriate forum, or in a “better position” to adjudicate the proceedings rather than the British Columbia court.

Section 11 of the *CJPTA* provides the following non-exhaustive list of factors the Court must consider in determining whether another court is a more appropriate forum:

- a. *the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;*
- b. *the law to be applied to issues in the proceeding;*
- c. *the desirability of avoiding multiplicity of legal proceedings;*
- d. *the desirability of avoiding conflicting decisions in different courts;*
- e. *the enforcement of an eventual judgment; and*
- f. *the fair and efficient working of the Canadian legal system as a whole.* [7]

The Court commented that the application before it was very unusual as it is typically a defendant applying to have a matter transferred to another jurisdiction, noting that counsel had been unable to find any decision where a plaintiff, such as MM, having chosen British Columbia as the forum to conduct its litigation, later decides that it wishes that the matter proceed in another court.

As the applicant, MM bore the onus of establishing that a transfer should be made.

Court's Analysis

1. **Forum Non Conveniens:** The court applied the “clearly more appropriate” test, emphasizing that merely showing another comparable forum exists is insufficient. MM initially argued that British Columbia was the appropriate forum in its earlier class action certification application, citing Excelsior’s substantial connections to British Columbia and asserting that the prospectus was issued under British Columbia law. Further, the court found MM’s failure to demonstrate significant juridical advantages in Ontario or substantial inconvenience in British Columbia to be pivotal.
2. **Applicable Law:** The court noted the law to be applied to this action is the law of British Columbia law, supporting British Columbia as the more appropriate forum.
3. **Multiplicity of Proceedings/ Conflicting Decisions:** the court determined that the existence of parallel proceedings in Ontario (to the extent the claim involves the same parties and cause of action) did not detract from the objective of ensuring the action is tried in the jurisdiction with the closest connection, which the court determined to be British Columbia.
4. **Enforcement of any eventual judgment:** the court noted that the enforcement of any potential judgment would be the same whether the action was tried in British Columbia or Ontario, as Excelsior’s assets are based in Arizona.
5. **Fair and Efficient Working of the Legal System:** The court expressed concern over MM’s shifting positions, which appeared to be driven by strategic considerations related to potential limitation issues in Ontario and the desire to use the British Columbia action (once transferred to Ontario) to assist in the prosecution of the Ontario class action. The court stated:

The substance of MM's present position is predicated on moving the matter to Ontario and potentially gaining a strategic advantage so as to benefit other parties and in another proceeding filed in that province. This is a tactic not directed toward the parties in this action; nor do I consider that it is necessarily directed toward a resolution of the dispute between MM and Excelsior here, as it is framed (i.e., not a class action but a direct claim by MM only).^[8]

The Court dismissed MM’s application to transfer the proceeding to Ontario with costs to the Excelsior Defendants.

Key Takeaways

This case highlights the consequence of a claimant advancing inconsistent legal strategies. MM’s contradictory stances regarding the appropriate forum ultimately undermined its position. In emphasizing the principles of fairness and efficiency, the court held that “while MM’s U-turn in the litigation is not forum shopping in the true

sense of choosing a jurisdiction for a juridical advantage, it does smack of unfairness and abuse of process given the history of this matter”.[\[9\]](#)

This case also highlights the importance of early litigation decisions, especially those involving the procedural complexities inherent in securities litigation involving multiple jurisdictions. It reinforces the necessity for plaintiffs to carefully consider and establish appropriate jurisdictional grounds before initiating class proceedings, specifically in British Columbia where the intended representative plaintiff must be a resident of British Columbia to have standing in a commence a class action in the province.

Finally, the decision provides a detailed application of the *CJPTA*, particularly in cases involving potential class actions and cross-jurisdictional litigation and may guide future cases where plaintiffs seek to transfer proceedings for strategic reasons.

[1] *Class Proceedings Act*, RSBC 1996, c 50, s 2(1).

[2] *Securities Act*, RSBC 1996, c 418, s 131.

[3] *MM Fund v Excelsior Mining Corp.*, 2022 BCSC 1541.

[4] *MM Fund v Excelsior Mining Corp.*, 2024 BCCA 163.

[5] *Court Jurisdiction Proceedings Transfer Act*, SBC 2003, c 28.

[6] *Court Jurisdiction Proceedings Transfer Act*, SBC 2003, c 28, s 14.

[7] *Ibid*, s 11.

[8] *MM Fund v Excelsior Mining Corp.*, 2024 BCSC 1176 at para. 56.

[9] *Ibid*. at para. 64.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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