

Ontario-Based Mutual Fund Denied Standing to Bring Class Action in BC: British Columbia Court of Appeal Clarifies Meaning of “Residency” Under Class Proceedings Act

Jordanna Cytrynbaum, Jeremy Martin, Danielle DiPardo, Luke Casburn

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On April 30, 2024, the British Columbia Court of Appeal released its decision denying an Ontario-based mutual fund standing to initiate a class action in British Columbia, affirming that the proposed representative plaintiff did not meet the residency requirements specified in the *Class Proceedings Act* R.S.B.C. 1996, c. 50 (the Act). The case of *MM Fund v. Excelsior Mining Corp.*, [2024 BCCA 163](#) centered on whether MM Fund (MM), a Toronto-based mutual fund constituted as a trust, could qualify as a resident of British Columbia such that it would be permitted to bring a putative class action in British Columbia on behalf of a geographically unlimited class.

Shortly after MM commenced the putative class action in November 2021, the defendants brought an application to strike MM's application to certify the underlying action as a class proceeding and appoint MM as the representative plaintiff. The application to strike was brought on the basis that MM lacked standing to commence a class action as it is not a British Columbia resident under s. 2(1) of the Act, which reads:

Plaintiff's class proceeding

2 (1) A resident of British Columbia who is a member of a class of persons may commence a proceeding in the court on behalf of the members of that class. [Emphasis added]

The BC Supreme Court (BCSC) granted the relief sought by the defendants, holding that MM was not a resident in British Columbia and lacked standing to commence a class proceeding under s. 2(1) of the Act. In particular, the BCSC held that the test for residency is “where the central management and control of the trust actually takes place.” The BCSC held that MM was a resident of Ontario, and although being a resident of Ontario does not automatically disentitle MM from being a resident of British Columbia, on the evidence before Justice Dickson, MM failed to show it was a resident of British Columbia.

MM appealed, arguing that the trial judge erred by applying an overly narrow interpretation of the term “resident” under the Act. In particular, MM argued that it had a real and substantial connection to British Columbia because it was a reporting issuer in British Columbia under the *Securities Act*,¹ sold its units through British Columbia dealers, was required to report to the BC Securities Commission, and also argued it had irrevocably attorned to the jurisdiction of British Columbia courts, and therefore ought to be

considered a “resident” under the Act.

On the other hand, MM had the burden of showing that it was a British Columbia resident, and it had no office or registered address in that province. It was regulated by the Ontario Securities Commission. It sold securities in British Columbia but conducted no operations there. Its trustee was also an Ontario resident.

The British Columbia Court of Appeal acknowledged that this was the first time it had been asked to interpret the meaning of the term “resident” under the Act. In doing so, the Court applied a modern approach to statutory interpretation by considering its text, context, and purpose. In noting that care must be taken not to “blur, distort, or ignore” the distinct meanings of “residence,” “jurisdiction,” “presence,” and “carrying on business,” the Court of Appeal held that the ordinary meaning specifically of the term “resident” in relation to a corporation or trust is where “its central management and control takes place.” In other words, confirming that it is the location where the “real business” of a corporation or trust “is carried on.” The Court of Appeal found no reason to deviate from the common law meaning of the term “resident” bearing in mind the text, context, and purpose of s. 2(1) of the Act.

The Court of Appeal emphasized that standing under the Act is intended to limit who can bring class actions to members of the public served by the British Columbia courts. The Court of Appeal ultimately agreed with the trial judge that MM did not have the requisite connection to British Columbia to qualify as a resident and dismissed its appeal.

Key Takeaways

This was the first time that the Court of Appeal was required to interpret the term “resident” under the Act. This decision serves as an important authority that individuals, corporations, and trusts who do not meet the residency requirement under the Act will not be permitted to bring a class action in British Columbia. Further, this decision clarifies that for the purpose of the Act, a corporation or trust is “resident” where its central management and control takes place.

Particularly given the abundance of national or multijurisdictional class proceedings commenced in, traversed to, or settled in British Columbia to take advantage of favorable jurisprudence and its no-costs certification regime, this decision stands as a forewarning. Plaintiffs – and especially corporate or trust plaintiffs – from outside British Columbia should think twice before forum-shopping on the west coast.

¹ RSBC 1991, ch. 418

Cassels

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