IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *MM Fund v. Excelsior Mining Corp.,* 2024 BCSC 1176

Date: 20240702
Docket: S219385
Registry: Vancouver

2024 BCSC 1176 (CanLII)

Between:

MM Fund

Plaintiff

And

Excelsior Mining Corp., Stephen Twyerould and Mark Morabito

Defendants

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

Counsel for the Plaintiff:	S. Nematollahi
Counsel for the Defendants:	R.L. Reinertson P. Elahi
Place and Date of Hearing:	Vancouver, B.C. May 30, 2022
Place and Date of Judgment:	Vancouver, B.C. July 2, 2024

2024 BCSC 1176 (CanLII)

INTRODUCTION / BACKGROUND

[1] The plaintiff, MM Fund (“MM”), has failed in its attempt to advance these proceedings as a class action proceeding. MM now seeks an order to transfer the proceeding to Ontario. MM seeks this relief because it wishes to continue this action in Ontario in conjunction with recent class action filed there.

[2] The facts are unusual and require a review of the procedural history of this action.

[3] In 2021, the defendant, Excelsior Mining Corp. (“Excelsior”), operated a mine in Arizona. The individual defendants are directors or officers.

[4] In February 2021, Excelsior issued a prospectus to raise funds for its business; it raised approximately $31.7 million as a result. MM was a subscriber to 500,000 of the 33.35 million units issued in Excelsior (common shares and warrants).

[5] In November 2021, MM filed a notice of civil claim in this Court as a putative class proceeding pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]. MM alleged that Excelsior made misrepresentations in the prospectus that were in breach of s. 131 of the *Securities Act*, R.S.B.C. 1996, c. 418 [*Securities Act BC*] (and, if necessary, other province’s equivalent legislation). The proposed class included all persons who purchased Excelsior’s securities under the prospectus except for certain excluded persons. MM sought to be appointed as the representative plaintiff for the class.

[6] Shortly after the action was filed, MM applied for certification of the class proceeding. Excelsior opposed and took the position that MM had no standing to commence a class action in BC because it was not a BC resident, as the *CPA*, s. 2(1) required.

[7] Excelsior was correct in its interpretation of the *CPA*.

[8] In September 2022, I found that MM was not a BC resident as required by the *CPA* and that, as a result, it had no standing to advance a BC class proceeding, which decision was affirmed on appeal: *MM Fund v. Excelsior Mining Corp.,* 2022 BCSC 1541; aff'd 2024 BCCA 163. As a result, MM's certification application was struck and MM was ordered to amend its pleading to remove those allegations relating to the putative class proceeding.

[9] After April 30, 2024, when the appeal was dismissed, MM's counsel requested that Excelsior consent to a transfer of the BC action to Ontario. Excelsior refused.

[10] On May 2, 2024, MM filed a class action proceeding in the Ontario Superior Court of Justice. This action was identical to MM's BC pleading in the sense of advancing a claim for non-disclosure in the prospectus, save that the primary legal basis is s. 131 of the *Securities Act*, R.S.O. 1990, c. S.5 [*Securities Act Ont*] (and, if necessary, other province's equivalent legislation, including the *Securities Act BC*).

[11] MM's counsel says that the Ontario class action proceeding was filed in order to preserve the class members' claims against Excelsior for limitation purposes (which he calculated as running out two days later on May 4, 2024).

[12] MM now seeks an order requesting that the Ontario court accept a transfer of these proceedings pursuant to the *Court Jurisdiction and Proceedings Transfer Act,* S.B.C. 2003, c. 28 [*CJPTA*]. Excelsior and the individual defendants (collectively, "Excelsior") oppose any transfer of the matter.

[13] The sole issue on this application is whether there is any basis upon which the Court would exercise its discretion to transfer the matter. For the reasons set out below, I decline to do so and conclude that this application should be dismissed.

SHOULD THE PROCEEDING BE TRANSFERRED TO ONTARIO?

[14] The statutory framework under the *CJPTA* in terms of the requirements for any transfer is well-established under s. 14(1) and represent a codification of *forum*

2024 BCSC 1176 (CanLII)

non conveniens: *Club Resorts Ltd. v. Van Breda,* 2012 SCC 17 [*Van Breda*] at para. 106; *Giustra v. Twitter, Inc.,* 2021 BCCA 466 at para. 81.

[15] The requirement under s. 14(1)(a) that the Ontario court has subject matter competence is not in dispute.

[16] The central dispute between the parties is the second requirement, namely, whether the Ontario court is “clearly” the more appropriate forum—or in a “better position”—to adjudicate this proceedings rather than this Court: *CJPTA*, s. 14(1)(b); *Van Breda* at paras. 108–109.

[17] MM bears the onus of establishing that a transfer should be made. The “clearly more appropriate” test is such that it is not sufficient for the applicant to merely show that another comparable forum exists: *Van Breda* at paras. 103 and 109; *Giustra* at para. 80.

[18] Pursuant to s. 11(1) of the *CJPTA*, the Court has discretion to decline jurisdiction on the basis that another court is the more appropriate forum to hear the proceeding after considering the interests of the parties and the ends of justice: *England v. Research Capital Corporation,* 2008 BCSC 580 at para. 72.

[19] In deciding the issue, the Court must consider the factors under s. 11(2) of the *CJPTA* although this is not an exhaustive list of factors and different weight may be attributed to the various factors, as is appropriate: *Van Breda* at para. 105; *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 at para. 59; *Giustra* at para. 112; *Wang v. Fu*, 2023 BCCA 247 at para. 52.

[20] With respect to *forum non conveniens,* assuming this Court has jurisdiction *simpliciter*, MM was (and still is) presumptively entitled to its choice of forum in commencing this action in BC: *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2015 BCCA 200 at para. 46, cited with approval in *Hydro Aluminum Rolled Products GmbH v. MFC Bancorp Ltd.*, 2020 BCCA 295 at para. 27.

2024 BCSC 1176 (CanLII)

2024 BCSC 1176 (CanLII)

[21] This application is very unusual in that it is usually a *defendant* who is the moving party. For example, the discussion in *Van Breda* is consistently about a *defendant* raising the issue of *forum non conveniens* and requesting that a court decline jurisdiction so as to deny a *plaintiff* its choice of forum: paras. 102–103 and 109.

[22] Counsel advise that they have been unable to find any decision where a *plaintiff*, such as MM, having chosen BC as the forum to conduct this litigation, later decides that it wishes that the matter proceed in another court.

[23] The unusual nature of MM's application is heightened because, as Excelsior's counsel points out, MM's pleading alleged that it and its claims had a "real and substantial connection" to BC. MM also emphasized Excelsior's presence in BC, referring to Excelsior being incorporated under BC law, being regulated in BC and carrying on business in the province. MM also alleged that the tort was committed in BC and the contractual obligations were to a substantial extent to be performed in BC.

[24] Further, MM's response to Excelsior's application to dismiss the class proceeding took great pains to emphasize MM and Excelsior's connections to BC. MM stated that "British Columbia is written all over this proposed, securities class proceeding". In those response materials, MM also addressed the jurisdiction of this Court to address its claim in this proceeding:

> … This Court is Excelsior's home jurisdiction and the <u>natural forum</u> with respect to the claims asserted in this class proceeding. There is no reason that this Court should decline to exercise its territorial competence over absent class members.
>
> [Emphasis added.]

[25] Finally, in its written submissions to resist the standing issue, MM repeated that this Court was the "natural forum" and asserted that the Court has a "strong interest" in its adjudication.

2024 BCSC 1176 (CanLII)

Section 11(2) Factors

[26] Just as MM emphasized earlier in these proceedings, the connections as between MM, Excelsior and the claim in this proceeding to BC are manifestly present.

[27] MM and Excelsior disagree on the analysis under all of the s. 11(2) factors.

i. Comparative convenience / expense

[28] With respect to s. 11(2)(a) of the *CJTPA*, the relevant common law factors include where each party resides, where each party carries on business, the convenience or inconvenience of witnesses and the costs of conducting the litigation in this jurisdiction: *Rotor Maxx Support Limited v. Air Palace Co. Ltd.*, 2020 BCSC 1321 at para. 64.

[29] MM says that it is based in Ontario, now downplaying MM's connections to BC as it previously argued in this proceeding.

[30] Excelsior has its registered and records office in BC and its head office and business operations in Arizona. Stephen Twyerould, who remains a director of Excelsior, lives in Arizona. Mark Morabito has left Excelsior; he lives in the Lower Mainland. As MM previously argued, Excelsior has substantial connections to BC. It is significant that none of these connections point to Ontario.

[31] MM asserts that the action has not advanced at all and the costs of the litigation are said to be the same whether the action proceeds in BC or Ontario.

[32] As MM argues, the importance of the physical location of witnesses and documentation has waned over time given our digital world: *Leon v. Volkswagen AG*, 2018 ONSC 4265 [*Leon*] at para. 41; *Daytona Power Corp. v. Hydro Company, Inc.*, 2020 ABQB 723 at para. 58.

[33] In my view, this is a neutral factor at best.

ii. Law to be applied to issues

[34] Subsection 11(2)(b) of the *CJTPA* encompasses several traditional common law factors in the *forum non conveniens* analysis, i.e. where the cause of action arose, where the loss or damage occurred, the applicable substantive law, and considerations related to the difficulty and cost of proving foreign law, if necessary: *Lloyd's Underwriters v. Cominco Ltd. et al.,* 2006 BCSC 1276 [*Lloyd's Underwriters BCSC*] at para. 130; aff'd 2007 BCCA 249; aff'd *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11 [*Lloyd's Underwriters SCC*].

[35] MM opposed Excelsior's application to strike the certification application in part based on its allegations the prospectus was issued under the laws of BC and that MM's claims was brought pursuant to the *Securities Act BC.*

[36] MM now argues that the law to be applied under the primary market liability regime of the securities legislation is virtually identical under both the *Securities Act BC* and the *Securities Act Ont*, such that the Ontario court would have no difficulty applying the *Securities Act BC*. I agree that, if that is the case, expert evidence as to BC law may not be required in Ontario.

[37] However, the law to be applied to this action and this claim is that of BC. This militates in favour of this Court being the more appropriate forum for this dispute.

iii. Avoiding multiplicity of legal proceedings / conflicting decisions in different courts

[38] The two factors under ss. 11(2)(c) and (d) of the *CJTPA* involve a consideration of the existence of parallel proceedings, the legitimate juridical advantages or disadvantages to the parties in the competing jurisdictions. The discouragement of forum shopping may also be considered here: *Lloyd's Underwriters BCSC* at para. 157.

[39] The existence of parallel proceedings alone cannot detract from the objective of ensuring that the action is tried in the jurisdiction with the closest connection to the action and the parties: *Lloyd's Underwriters SCC* at para. 38.

2024 BCSC 1176 (CanLII)

[40] Where there are parallel proceedings in another jurisdiction concerning the same cause of action or set of facts, the court may exercise its discretion to decline jurisdiction in favour of the other jurisdiction to avoid potentially conflicting judgments: *Colonial Countertops Ltd. v. Maple Terrazzo Marble & Tile Incorporated*, 2014 BCSC 752 [*Colonial Countertops*] at para. 54.

[41] The test to assess the circumstance, where one party asserts the existence of a parallel proceeding, is found in *Westec Aerospace Inc. v. Raytheon Aircraft Co.*, 1999 BCCA 243 at para. 25, aff'd 2001 SCC 26 and as recently cited in *Colonial Countertops* at para. 57:

> (1) Are there parallel proceedings underway in another jurisdiction?
>
> (2) If so, is the other jurisdiction an appropriate forum for the resolution of the dispute?
>
> (3) Assuming there are parallel proceedings in another appropriate forum, has the plaintiff established objectively by cogent evidence that there is some personal or juridical advantage that would be available to him only in the British Columbia action that is of such importance that it would cause injustice to him to deprive him of it?

[42] In *Colonial Countertops* at para. 59, citing *Westec*, Justice Punnett described "parallel proceedings" as "litigation between the same parties about the same subject matter" which "raise the possibility of inconsistent or conflicting judgments being given".

[43] I accept that parallel proceedings exist here, on the basis that it involves the same parties with respect to the same cause of action, with the distinction that this BC action involves a direct claim by MM against Excelsior, whereas the Ontario proceeding is a putative class proceeding against Excelsior which potentially includes other persons.

[44] As counsel note, this factor is often addressed within the ambit of the last factor under s. 11(2)(f) in relation to the fair and efficient working of the legal system. I will do likewise, as broader considerations need to be addressed in that respect.

2024 BCSC 1176 (CanLII)

2024 BCSC 1176 (CanLII)

iv. Enforcement of any eventual judgment

[45] The prospects of enforcement of any eventual judgment would be the same whether the action is advanced in BC or Ontario. As noted above, Excelsior's assets are based in Arizona.

[46] The parties agree that this is a neutral factor under s. 11(2)(e) of the *CJTPA*.

v. Fair and efficient working of Canadian legal system as a whole

[47] MM argues that the interests of the parties to a proceeding, including absent class members, as well as the ends of justice, militate in favour of an order to transfer the proceeding to Ontario.

[48] After hearing MM's counsel's submissions, it became apparent that the true basis for MM's "about face" and contradictory positions on this unusual application related to a limitation issue and MM's view that this BC action can assist in some way in the prosecution of the Ontario class action proceeding.

[49] In its notice of application, MM asserts:

> The Superior Court of Justice of Ontario is "a more appropriate forum" for the proceeding because <u>it is only in Ontario that the class action may proceed</u>, serving the goals and remedial purposes of the *CPA* (access to justice, judicial economy and behaviour modification) as well as securities legislation (investor protection and deterrence of corporate misconduct), therefore ensure the fair and efficient working of the Canadian legal system as a whole. Furthermore, <u>a transfer of this proceeding would be appropriate because it is at this juncture only the Ontario Action that has protected the claims of putative class members against the running of limitation period, and also a transfer order avoid a multiplicity of proceedings.</u>
>
> [Emphasis added.]

[50] MM's counsel explained that MM wanted this proceeding transferred to Ontario so that it could, if it succeeds, then apply to the court to consolidate this action with the Ontario class action. He also said that he considered that this would "save" the Ontario class action by avoiding any argument by Excelsior that the claim

had become statute barred (no such argument has been raised at this time in Ontario as far as I'm aware).

[51] At the hearing, MM's counsel also stressed that it requires a transfer because it is the "only way" that the interests of the putative class members can be protected from any limitation defence that may be raised by Excelsior in the Ontario proceeding. MM also argues that Ontario is more appropriate because:

> … the claims of putative class members are protected against the running of applicable statutory limitation period through the Ontario Action, therefore proceeding in Ontario would ensure protecting the interests of absent class members…

[52] MM points to s. 17 of the *CJPTA* which provides:

> 17. A transfer of a proceeding to or from the Supreme Court takes effect for all purposes of the law of British Columbia when an order made by the receiving court accepting the transfer is filed in the transferring court.

[53] Excelsior disagrees that a transfer of this proceeding to Ontario is necessary to preserve some rights that may be affected by reason of limitation issues with respect to any putative class members. Excelsior also argues that there is no evidence before this Court that any potential class members exist, although I agree that the securities reporting by Excelsior indicates that other persons beside MM purchased shares under the public offering.

[54] I have serious concerns about MM's shifting and contradictory positions which appear to be borne from strategic reasons only. The authorities are to the effect that *forum non conveniens* is toward ensuring fairness to the parties and that there is an efficient resolution of the dispute: *Van Breda* at para. 105.

[55] Here, MM chose BC and was adamant for years that BC was the appropriate forum to resolve its claim. It conducted this litigation for years on that basis, continually asserting the connection between BC and the parties and the claim. For all intents and purposes, MM still has its claim against Excelsior and is able to prosecute it in this jurisdiction. I cannot see that the failure of MM to establish the

2024 BCSC 1176 (CanLII)

right to prosecute the claim as a class action has changed the fundamentals of this litigation.

[56] 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).

[57] MM refers to *Underhill v. Medtronic Canada*, 2023 ONSC 5919. In that case, the court adjourned an application to discontinue the Ontario class proceeding until such time as the overlapping BC class proceeding was disposed of because of a potential risk of a limitation period expiring for the class members: paras. 5, 25–28. The court referred to s. 39 of the *CPA* which the parties agreed continued the suspension of any limitation period while the BC class proceedings were underway: para. 26.

[58] Unlike *Underhill*, I am not being asked to discontinue a class proceeding in the context of an overlapping class proceeding in another province. This is not a class proceeding. This decision is of little assistance on this application.

[59] It remains the case that MM never had standing to bring a class proceeding in BC and this proceeding never was a class proceeding. That aspect of the claim has been dismissed. The course of these BC proceeding is complete, in so far as it was purported to be prosecuted as a class action. In that respect, the objectives of the *CPA* are now irrelevant in this proceeding.

[60] It is not my role on this application to consider the merits of any limitation issue. MM's counsel did not undertake any analysis of the interplay between the *CPA* provisions in terms of limitation issues and the Ontario class proceeding.

[61] Again, MM asserts that the claims of the putative class members are protected against the running of applicable limitation periods "through the Ontario

2024 BCSC 1176 (CanLII)

Action". If MM's counsel is correct in his suggestion that this BC putative class proceeding resulted in a suspension of the limitation period to the time of appeal (as may be the case under the *CPA*, s. 38.1 for the period from November 2021–April 2024, but upon which I make no comment), I fail to see how a transfer of this proceeding changes that. That conclusion applies even if MM considers the limitation issue "unclear".

2024 BCSC 1176 (CanLII)

[62] I am not aware that a transfer of this single claim by MM against Excelsior will have any legal effect on the ability of MM to prosecute the Ontario class proceeding. I am not being asked to grant any relief in respect of the Ontario class proceeding and, as far as this Court is concerned, that is for the Ontario court to address. As MM's counsel conceded, if this action is not transferred, MM will proceed in the Ontario class action and the matter will be dealt with on its merits there.

[63] In my view, MM's current position invites this Court to consider an irrelevant factor that does not engage a true consideration as to whether Ontario is clearly a more appropriate forum to decide *this claim*.

[64] In addition, 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: *Leon* at paras. 42–46; *Wang* at paras. 59–60. In that sense, MM's application does raise issues of prejudice to Excelsior. To the contrary, as I have discussed above, MM has also not established any prejudice to it if the matter is not transferred. Arguably, if any prejudice to MM did arise, it was due to its own error in advancing a class proceeding in BC without standing in the first place.

[65] I conclude that the factor under s. 11(2)(f) of the *CJTPA* supports BC as the more appropriate forum.

CONCLUSION

[66] MM's application is dismissed.

[67] In my view, MM has failed to meet its burden to show that Ontario is clearly the more appropriate forum to decide the issues in this proceeding. To the contrary, the overall circumstances support allowing this action to continue. I will not decline to exercise this Court's jurisdiction under s. 11(1) of the *CJPTA*, as MM requests I do.

[68] Costs are awarded in favour of the defendants against MM on the usual Scale and in any event of the cause.

"Fitzpatrick J."

2024 BCSC 1176 (CanLII)