

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *MM Fund v. Excelsior Mining Corp.*,
2024 BCCA 163

Date: 20240430

Docket: CA48572

Between:

MM Fund

Appellant
(Plaintiff)

And

**Excelsior Mining Corp., Stephen Twyerould
and Mark Morabito**

Respondents
(Defendants)

Before: The Honourable Justice Dickson
The Honourable Mr. Justice Butler
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated
September 1, 2022 (*MM Fund v. Excelsior Mining Corp.*, 2022 BCSC 1541,
Vancouver Docket S219385).

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Place and Date of Hearing:

Vancouver, British Columbia
April 6, 2023

Place and Date of Judgment:

Vancouver, British Columbia
April 30, 2024

Written Reasons by:

The Honourable Justice Dickson

Concurred in by:

The Honourable Mr. Justice Butler

The Honourable Justice Skolrood

Summary:

The appellant, a mutual fund, appeals an order striking its application to certify the underlying action as a class proceeding and appoint it as the representative plaintiff. The judge struck the application on the basis that the appellant lacked standing to commence a class action as it is not a British Columbia resident under s. 2(1) of the Class Proceedings Act. Held: Appeal dismissed. The judge applied the correct legal test in determining the appellant's residency under the Class Proceedings Act and her conclusion that the appellant is not a British Columbia resident is supported by the evidence and owed deference on appeal.

Reasons for Judgment of the Honourable Justice Dickson:**Introduction**

[1] This appeal centers on the question of standing to commence a class action under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. As Justice Cromwell observed in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, “it would be intolerable if everyone had standing to sue for everything”: at para. 1. Questions of standing concern who is entitled to bring a case to court for decision, and ask whether the court should deal with a particular claim brought by a particular plaintiff. Among other things, limitations on standing help to ensure the effective operation of the court system as a whole: *Downtown Eastside Sex Workers* at para. 26.

[2] The plaintiff in this putative class action is MM Fund, a mutual fund based in Toronto, Ontario. MM filed a notice of civil claim alleging that Excelsior Mining Corp, Stephen Twyerould and Mark Morabito (collectively, “Excelsior”) made misrepresentations in a prospectus, in violation of the *Securities Act*, R.S.B.C. 1996, c. 418. It sought an order certifying the action as a class proceeding and appointing it as the representative plaintiff. Excelsior applied for an order striking the certification application on the basis that MM lacked standing to commence the class action because it is not a British Columbia resident, as required by s. 2(1) of the *Class Proceedings Act*. The judge agreed, struck the certification application, and ordered MM to amend its pleadings to reflect that it is bringing an individual action, not a class action.

[3] MM appeals the order striking the certification application. In its submission, in determining whether it is a British Columbia resident with standing to commence a putative class action, the judge failed to apply the correct legal test and give effect to several factors that connect it to this province. Given those factors, MM says that it has a genuine, real, and substantial connection to British Columbia, and is thus a proper person to pursue the class action. It asks us to make a declaration to that effect.

[4] In my view, the judge did not err in her analysis or conclusion. She applied the correct legal test for determining MM's residency under s. 2(1) of the *Class Proceedings Act*, and her finding that MM is not a British Columbia resident with standing to commence a class action in this province is supported by the evidence and entitled to appellate deference.

[5] For the reasons that follow, I would dismiss the appeal.

Statutory Framework

[6] The *Class Proceedings Act* regulates the certification and conduct of class proceedings in British Columbia. A class action is a procedural tool that allows an individual member of a class to prosecute a suit on behalf of other members of the class. As stated in *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361, the three principal goals of the procedure are behaviour modification, judicial economy, and access to justice:

[13] ... Behaviour modification is facilitated by encouraging actual and potential wrongdoers to take full account of the harm they cause or might cause to the public; judicial economy, by avoiding unnecessary duplication in fact-finding and legal analysis: *Hollick* at para. 15. Access to justice is facilitated by providing class members with a fair, economical process to resolve their claims and, if the claims are established, with a just, effective remedy: *AIC Limited v. Fisher*, 2013 SCC 69 at para. 24.

[7] A resident of British Columbia has standing to commence a putative class action under the *Class Proceedings Act*. However, the term "resident" is not defined. Section 2(1) provides:

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.

[8] Pursuant to s. 2(2)(a), the British Columbia resident who commences a putative class action under s. 2(1) must apply for an order certifying the proceeding as a class proceeding, and, subject to s. 2(4), appointing them as the representative plaintiff. Section 2(4) provides:

2(4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.

[9] Prior to 2018, the *Class Proceedings Act* adopted an opt out model for British Columbia residents and an opt in model for non-residents. Under an opt out model, persons within a class definition are automatically class members, subject to opting out. Under an opt in model, such persons do not become class members unless they exercise an option to do so. Section 6(2) of the *Class Proceedings Act* required the separation of residents and non-residents into separate subclasses. Section 8(1)(g) required a certification order to state the manner in which non-residents could opt in to the proceeding.

[10] The *Class Proceedings Amendment Act*, 2018 S.B.C. 2018, c. 16, repealed ss. 6(2) and 8(1)(g), thus removing the foregoing requirements and applying the opt out model to all class members, resident and non-resident alike. It also repealed s. 2(1) and replaced it with the current version, which changed the words slightly but retained the requirement that a British Columbia resident commence a class proceeding. In addition, the amendments defined a “multi-jurisdictional class proceeding” as “a proceeding that is brought on behalf of a class of persons that includes persons who do not reside in British Columbia”, and added several provisions, including ss. 2(2)(b), 3.1, and 4.1.

[11] Section 2(2)(b) of the *Class Proceedings Act*, as amended, requires the British Columbia resident who commences a class proceeding to give notice of a certification application to the representative plaintiff of any multi-jurisdictional class proceeding involving similar subject matter commenced elsewhere in Canada.

Section 3.1 permits a person who receives such notice to make submissions at the certification hearing. Section 4(1) provides that the court must certify a proceeding as a class proceeding on an application brought under s. 2 when certain requirements are satisfied. Section 4.1 provides, in relevant part:

- 4.1(1) The court may make any order it considers appropriate in an application to certify a multi-jurisdictional class proceeding, including an order
 - (a) certifying the proceeding as a multi-jurisdictional class proceeding, if
 - (i) the requirements in section 4(1) are met, and
 - (ii) the court determines, having regard to section 4(2) and (3), that British Columbia is the appropriate venue for the multi-jurisdictional class proceeding,
 - ...
 - (2) If the court certifies a multi-jurisdictional class proceeding, it may
 - (a) divide the class into resident and non-resident subclasses,
 - (b) appoint a separate representative plaintiff for each subclass, and
 - (c) specify the manner in which and the time within which members of each subclass may opt out of the proceeding.

[12] Pursuant to s. 12 of the *Class Proceedings Act*, to ensure a fair and expeditious determination, “the court may at any time make any order it considers appropriate respecting the conduct of a class proceeding”. In *British Columbia v. The Jean Coutu Group (PJC) Inc.*, 2021 BCCA 219, Justice Butler affirmed that s. 12 does not apply to pre-certification applications, including sequencing applications: at paras. 38–40. He also affirmed the discretionary nature of a sequencing decision, the relevance of the factors summarized in *Shaver v. Mallinckrodt Canada ULC*, 2021 BCSC 455, to such a decision, and the highly deferential standard of review that applies: at paras. 30–32, 44–45.

Background

The Parties

MM

[13] MM is a trust established under the laws of Ontario. Its registered office is in Toronto. It does not maintain a registered address or office in British Columbia.

[14] MM is managed by Spartan Fund Management as trustee, investment fund manager, and portfolio manager. Spartan is an Ontario company with offices in Toronto. Its directors and executive officers are also located in Toronto or other Ontario locales.

[15] MM is regulated by the Ontario Securities Commission. It submits its compliance report to that body, and not to other provincial securities regulators. MM offers units of its fund for sale via registered dealers in Ontario, British Columbia, Alberta, Saskatchewan, Manitoba and the Northwest Territories. It is a registrant with the British Columbia Securities Commission and a reporting issuer under the *Securities Act*.

Excelsior

[16] Excelsior is a mining company incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57. Its registered office is in Vancouver.

[17] At all material times, Mr. Twyerould was president, chief executive officer, and a director of Excelsior. Mr. Morabito was its chairman and a director.

[18] Excelsior owns and operates the Gunnison Project, which is a copper mine located in Arizona.

The Action

[19] On November 1, 2021, MM commenced the putative class action under the *Class Proceedings Act*. The action arises out of a public offering of the securities of Excelsior undertaken pursuant to a prospectus and completed in February 2021. In the action, MM alleges that it purchased 500,000 units in Excelsior for \$0.95 per unit.

Each unit consists of one common share and one warrant which could be exercised to acquire an additional common share for \$1.25.

[20] According to MM, the prospectus failed to disclose that Excelsior was experiencing problems caused by the presence of carbon-dioxide at the Gunnison Project, and falsely represented that it anticipated achieving a nameplate production rate of 25 million pounds of copper per annum in 2021. It alleges that as a result of the misrepresentations the securities of Excelsior were sold to the public at an artificially inflated price, and asserts a statutory cause of action for damages under s. 131 of the *Securities Act*.

[21] In its amended notice of civil claim, MM pleads that the action is brought on behalf of all persons and entities who purchased the securities of Excelsior offered in the prospectus, wherever they may reside and except as expressly excluded. MM also pleads that: it “is a mutual fund based in Toronto, Ontario”; it “is ... governed by the *Securities Act*”; it “is ... a reporting issuer within the meaning and for the purposes of the *Securities Act*”; its “securities are ... available to investors in British Columbia through registered dealers in British Columbia”; it “has ... a real and substantial connection to British Columbia”; and it “is ... ‘a resident of British Columbia’ within the meaning and for the purposes of the *Class Proceedings Act*”. It seeks to recover damages on behalf of itself and the other proposed class members arising out of their purchase of Excelsior’s securities in the offering.

[22] MM applied for an order certifying the action as a class proceeding and appointing it as the representative plaintiff. In response, Excelsior sought an order striking the certification application and requiring MM to amend the amended notice of civil claim. In its strike application, Excelsior asserted that MM is not a British Columbia resident and thus lacks standing to commence a class proceeding under s. 2(1) of the *Class Proceedings Act*.

Reasons for Judgment: 2022 BCSC 1541

[23] The judge began by summarizing the parties’ positions and the background facts, including the pleadings and procedural history. She identified three issues for

determination: whether the issue of MM’s standing should be deferred to the certification application; if not, whether MM lacked standing as a British Columbia resident to commence the class proceeding; and, if MM is not a British Columbia resident, whether the *Class Proceedings Act* otherwise allowed a basis upon which the proceeding could proceed. She then dealt with each issue in turn.

Sequencing

[24] In dealing with the first issue, the judge noted the fact-specific nature of a sequencing decision (at para. 17). She also noted MM’s submission that the court has jurisdiction under ss. 2(4), 4.1, 5(6), and 12 of the *Class Proceedings Act* to appoint it as the representative plaintiff and make other orders it considers appropriate (at para. 19). After reviewing various authorities and considering the so-called *Shaver* factors, she rejected MM’s position that resolution of the residency issue should be left for the certification application (at paras. 21–32). In doing so, she acknowledged that class proceedings legislation is to be interpreted generously, but stated:

[30] ... the issue raised here by Excelsior is very straightforward – is MM a BC resident or not? Section 2(1) of the [*Class Proceedings Act*] requires that the person *commencing* the class proceeding be a BC resident.

[31] It is not up to MM, as plaintiff, to disregard clear procedural requirements of the [*Class Proceedings Act*]: *Araya* at para. 510; *British Columbia v. Apotex Inc.*, 2022 BCSC 1383 [*Apotex BCSC*] at paras. 55-59.

[25] Given the discrete nature of the residency issue, the interests of economy and judicial efficiency, and other salient considerations, the judge exercised her discretion to adjudicate Excelsior’s application to strike the certification application in advance of the certification hearing (paras. 33–34).

MM’s Residency

[26] Turning to the residency issue, the judge noted MM’s pleading that it is a “mutual fund based in Toronto, Ontario” (at para. 36). She also noted several aspects of the evidence, namely, that MM is a trust established under the laws of Ontario and managed by an Ontario company which offers units of its fund for sale via registered dealers in various Canadian locations, including British Columbia. She

noted further that MM does not maintain a registered office in this province, and stated “there is no evidence that MM maintains a place of business or has operations in BC” (at paras. 37–40).

[27] Next, the judge summarized MM’s argument in support of its position that it is a British Columbia resident:

[41] MM argues that it is a BC resident based on the following:

- a) MM is governed by the *Securities Act*;
- b) MM is an “investment fund”, “issuer”, “responsible issuer” and “reporting issuer” within the meaning and for the purposes of the *Securities Act*. In particular, being a “responsible issuer” under the *Securities Act*, according to MM, is said to give rise to a “real and substantial connection” to BC (as s. 140.1 of the *Securities Act* defines “responsible issuer” as a reporting issuer or any other issuer with a real and substantial connection to BC, any securities of which are publicly traded);
- c) MM’s securities are available to investors in BC through registered dealers in BC; and
- d) MM reports to the Commission.

[28] The judge rejected MM’s argument that these circumstances established it “has a ‘statutory seat’ in BC”. She described that concept as “anything but clear”, and not apparently equivalent “with the meaning of residency in BC” (at para. 42). Then she reviewed several authorities “that may guide the Court on the meaning of ‘resident’ under s. 2(1) of the [*Class Proceedings Act*]”.

[29] Specifically, the judge observed that in *Ewert v. Canada (Attorney General)*, 2018 BCSC 147, rev’d on other grounds 2022 BCCA 131, Justice Blok held that an inmate’s residence was their “ordinary, usual or habitual residence” prior to incarceration for purposes of s. 6(2) of the *Class Proceedings Act*. She also noted MM’s reference to *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, *Lee v. Direct Credit West Inc.*, 2014 BCSC 462, *Tucci v. People’s Trust Co.*, 2017 BCSC 1525, rev’d on other grounds 2020 BCCA 246, and *Ernewein v. General Motors of Canada*, 2004 BCSC 1462, rev’d on other grounds 2005 BCCA 540, leave to appeal ref’d [2005] S.C.C.A. No. 545. However, she did not find those authorities helpful in

addressing the residency requirement in s. 2(1) of the *Class Proceedings Act* (at paras. 44–45, 48).

[30] The judge quoted from the definition of “residence” in *Black’s Law Dictionary*: “the place where one actually lives, as distinguished from a domicile, and in particular the place where a corporation or other enterprise does business or is registered to do business” (at para. 46). After noting that a finding of residency is a finding of fact and a person can have more than one residence (at paras. 47–48), she considered *British Columbia (Attorney General) v. Brecknell*, 2018 BCCA 5 and *Sampson v. British Columbia*, 2018 BCSC 1503. However, she did not find those authorities helpful either:

[49] ... Leaving aside that [*Brecknell*] is highly distinguishable on its facts, I am not convinced that the court’s comments regarding physical versus virtual “presence” is at all relevant to the issue at hand, namely that of “residency”.

[50] Both parties have referred to various authorities that have considered residency in the context of taxation cases.

[51] MM refers to *Sampson v. British Columbia*, 2018 BCSC 1503, also involving an individual plaintiff...

[31] More relevant, the judge found, was *Fundy Settlement v. Canada*, 2012 SCC 14, a taxation case in which the Court held that, like the residence of a corporation, the residence of a trust should be determined by where its central management and control takes place (at para. 52). She also commented that the “ordinary residency” requirements in the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, are “[s]omewhat consistent” with the *Fundy Settlement* test (at paras. 53–54).

[32] Bearing in mind all of the foregoing, the judge concluded that MM is not a resident of British Columbia:

[55] Whether one takes the *Ewert* test, the *Fundy Settlement* test or the [*Court Jurisdiction and Proceedings Transfer Act*] approach, all roads lead to the conclusion that MM is resident in Ontario and not BC. That is the jurisdiction where MM is registered to do business; where its central management and control is located; and where its trustee, Spartan, and Spartan’s management and control are located.

[56] MM has no physical connection to BC or any other connection beyond the fact that it sells its securities to some BC residents through BC dealers who are registered in BC and who presumably are “resident” here.

[57] I accept Excelsior's arguments that MM's asserted limited "connection" to BC is insufficient to establish MM as a BC resident. As is evident, the only reason that MM is a "reporting issuer" in BC is to enable MM to sell units in its fund to BC residents (and others across Canada). These circumstances do not establish MM as resident in BC.

[58] The decisions in *Bhangu #1 and #2*, *Jiang* and *Araya*, as discussed above, all support that MM bears the onus of establishing its residency in BC at the time of the commencement of this proceeding. MM has failed to do so as the uncontradicted evidence shows that MM was and still is a resident of Ontario. To clarify, I am well aware that a person or corporation may have more than one residence, and the fact that MM is clearly a resident of Ontario does not automatically disentitle it from being a resident of BC. However, I find on the evidence before me that MM has failed to show that it is resident in BC.

Other basis to proceed

[33] The judge went on to ask whether the *Class Proceedings Act* provides some other basis upon which MM might proceed without being a British Columbia resident. She stated that MM advanced several arguments in this regard:

[60] MM says that this Court has jurisdiction over it and the proposed class members, as follows:

- a) The notion of residency in the [*Class Proceedings Act*] revolves around MM and the class members' claim to this Court's jurisdiction *simpliciter*. MM contends that it and each proposed class member have attorned to the jurisdiction of this Court, referring to provisions in a warrant indenture (not the Prospectus) that was part of the offering under the Prospectus. MM cites *Lee* at para. 63 and *Tucci* at para. 228 in support;
- b) The nexus between the claims and this Court's jurisdiction *simpliciter* can be established on the existence of the common issues amongst class members, citing *Harrington* at paras. 96-100 and *MacKinnon v. National Money Mart Co.*, 2004 BCCA 472 at paras. 49-50; and
- c) BC has significant ties to this proceeding and has a significant interest in determining this class proceeding. MM points to the fact that Excelsior is a BC company and is domiciled and resident in BC. MM further says that the alleged misrepresentations are found in the Prospectus which was an offering undertaken in BC, issued pursuant to the *Securities Act* and under the auspices of the Commission. MM argues that BC is the "natural jurisdiction" to adjudicate the claims and the Court should exercise its territorial competence over all class members, citing *Chalmers (Litigation guardian of) v. AMO Canada Co.*, 2009 BCSC 689 at para. 82, aff'd 2010 BCCA 560 at paras. 37-44.

[34] In addressing these arguments, the judge noted that the Court's jurisdiction over Excelsior and the claim advanced by MM was undisputed. The only issue raised by Excelsior, she stated, was whether MM met the s. 2(1) residency requirement (at para. 61). She also commented that there were "substantial issues" with MM's attornment arguments. However, she considered it unnecessary to decide that issue:

[62] I agree with Excelsior that there are substantial issues with MM's arguments concerning attornment, although I need not decide the issue. The clause in the warrant indenture, if that is the sole basis for attornment here, seems disconnected to the Prospectus, which is said by MM to be the source of the misrepresentations. MM has not referred to any similar attornment clause in the Prospectus itself.

[35] The judge agreed with Excelsior that MM was attempting to conflate issues of jurisdiction with the s. 2(1) residency requirement. In addition, she found, unlike the circumstances in *Lee*, nothing indicated that there were no class members who are British Columbia residents in this case (at para. 63). She also rejected MM's argument that s. 2(1) of the *Class Proceedings Act* is permissive, not restrictive, and distinguished *Lee* on the basis that the *Lee* defendants did not object to the proposed representative plaintiff based on s. 2(1):

[64] MM also argues that s. 2(1) of the [*Class Proceedings Act*] is permissive, not restrictive. With respect, I disagree given the clear language in that provision. The approach to statutory interpretation is well-known and settled. In *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2017 SCC 6, the Court stated at para. 21:

This follows from the application of our long-accepted approach to statutory interpretation, namely that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, quoting both E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

[65] While s. 2(1) is permissive in the sense that a BC resident *may* commence a proceeding, the clear import is that any class proceeding commenced under the [*Class Proceedings Act*] must be by a BC resident. This was consistently accepted as a requirement in *Bhangu#1 and #2, Jiang and Araya*.

[66] MM also cites *Lee* in support. In that case, the proposed representative plaintiff was not a BC resident (para. 44). However, the

defendants did not advance any objection under s. 2(1) of the [*Class Proceedings Act*] (para. 46), unlike Excelsior here.

[Emphasis in original.]

[36] Moreover, the judge saw no merit in MM's argument that she could exercise discretion pursuant to ss. 2(4), 4.1, 5(6) and 12 of the *Class Proceedings Act* to allow the action to proceed. She acknowledged that s. 2(4) provides the Court with discretion to certify a non-member of the class as a representative plaintiff. However, she noted that is only to avoid a substantial injustice to the class, and, in any event, MM had not brought a s. 2(4) application (at paras. 67–68). As to ss. 4.1 and 12, she said this:

[69] It is also unclear how ss. 4.1 and 12 of the [*Class Proceedings Act*] assist MM here. Neither of these sections can be said to alter the plain effect of s. 2(1) of the [*Class Proceedings Act*]. Further, as this proceeding has not been certified as a class proceeding, s. 12 does not provide a basis upon which to exercise the Court's discretion at this time: *Apotex CA* at para. 40.

[37] Finally, the judge characterized MM's argument that Excelsior was on the verge of bankruptcy such that any insolvency proceeding could be efficiently merged with the class proceeding as speculative and lacking in any merit (at para. 70).

Conclusion

[38] In the result, the judge concluded that MM is not a British Columbia resident for the purposes of s. 2(1) of the *Class Proceedings Act*, struck the certification application, and ordered MM to amend its pleadings to remove those related to advancing a class proceeding (at paras. 71–72).

Issues On Appeal

[39] The issues that emerge from the reasons, factums, and oral arguments are:

- a) What is the applicable standard of review?
- b) Did the judge err in interpreting the residency requirement in s. 2(1) of the *Class Proceedings Act*?

- c) Did the judge err in concluding that MM is not a British Columbia resident for purposes of s. 2(1) of the *Class Proceedings Act*?

Discussion

Standard of Review

[40] The standard of appellate review for questions of law is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

[41] The standard of review for findings of fact, including factual inferences, is palpable (obvious) and overriding (material) error: *Housen* at paras. 5, 10, 19.

[42] Questions of mixed fact and law involve applying a legal standard to a set of facts. The standard of review for questions of mixed fact and law is palpable and overriding error. However, a standard of correctness applies to an extricable error of law, such as the misapplication or mischaracterization of a legal standard: *Housen* at paras. 26–36.

[43] According to MM, the issue on appeal is how the residency requirement in s. 2(1) of the *Class Proceedings Act* should be interpreted. In its submission, this is a question of statutory interpretation with significant precedential value, and, as such, a question of law reviewable on a standard of correctness. In support of its submission, MM emphasizes this is the first time that this Court has been asked to interpret the meaning of the term “resident” in the *Class Proceedings Act*. It also emphasizes the statement in *Housen* at para. 9 that “the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application”. As discussed below, MM contends that the judge committed an extricable error of law by relying on taxation cases and the “central management and control” test in interpreting the residency requirement in s. 2(1).

[44] According to Excelsior, the issue on appeal is whether the judge erred in concluding that MM is not a British Columbia resident for purposes of s. 2(1) of the *Class Proceedings Act*. In its submission, this is a question of mixed fact and law subject to a standard of review of palpable and overriding error. As discussed below,

Excelsior contends the judge made no such error, and says MM has not identified an extricable question of law.

[45] Given the nature and breadth of MM's arguments, in my view both issues must be analysed and determined. The question of whether the judge erred in her interpretation of the residency requirement in s. 2(1) of the *Class Proceedings Act* is a question of law subject to a correctness review standard. The question of whether she erred in concluding that MM is not a British Columbia resident under s. 2(1) is a question of mixed fact and law subject to review for palpable and overriding error.

Did the judge err in interpreting the residency requirement in s. 2(1) of the *Class Proceedings Act*?

Positions of the Parties

MM

[46] MM begins its submissions on this aspect of the appeal by referring to *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, which concerned the constitutional applicability of a provincial regulatory scheme to an out-of-province defendant. It emphasizes the Court's statement that "[w]hat constitutes a 'sufficient' connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it", considered in the context of the dispute (at paras. 56, 65). After quoting thus from *Unifund*, MM describes the issue for determination in this case as whether it "has a sufficient connection to British Columbia to establish it as 'a resident of British Columbia' for purposes of s. 2(1) of the [*Class Proceedings Act*]."

[47] According to MM, the judge erred in interpreting the term "resident" in the s. 2(1) context by failing to consider or give effect to three important factors that connect it to British Columbia, namely: it is a reporting issuer under the *Securities Act*; it is registered under the *Securities Act* to carry on business in British Columbia, and does so; and, it has irrevocably attorned to the jurisdiction of British Columbia courts in relation to the offering. It says that s. 2(1) should be interpreted liberally, generously, and flexibly, bearing in mind the context and structure of the legislation,

and the goals of access to justice, behaviour modification, and judicial economy. However, it says, the judge interpreted the residency requirement in s. 2(1) narrowly, and, without actually stating a legal test, applied the “central management and control” test for residency. In MM’s submission, this was an error because the central management and control test applies in taxation cases, not class proceedings, and, as *Unifund* teaches, different levels of connection to a jurisdiction are required for different legislative purposes.

[48] MM describes the residency requirement in s. 2(1) as “a remnant from the previous iteration” of the *Class Proceedings Act*. It says the previous iteration created “a dual regime for class member participation based on residency” which the legislature abandoned in 2018 in favour of “modern and flexible provisions for certification of multi-jurisdictional class proceedings”. Citing ss. 2(2)(b) and 3.1, MM contends that the current iteration of the *Class Proceedings Act* envisages active and direct participation of out-of-province representative plaintiffs and class members, and the residency requirement in s. 2(1) should be interpreted generously and flexibly to facilitate such participation. It also emphasizes the broad discretionary powers conferred on the court under s. 4.1, namely, the power to make any order it considers appropriate where, as here, British Columbia is the appropriate venue for a multi-jurisdictional class action.

[49] MM goes on to argue that, contrary to the reach and flexibility of the provisions concerning multi-jurisdictional class actions, the judge limited her assessment of residency to the question of physical presence. It says that, in doing so, she failed to consider and give effect to its real and substantial connections to British Columbia, which was an extricable error of law.

[50] MM urges us to adopt a more expansive interpretation of s. 2(1) of the *Class Proceedings Act*. In particular, it says, we should interpret the term “resident” in s. 2(1) as encompassing business organizations that carry on business in British Columbia or are registered to do business here. In MM’s submission, giving effect to its real and substantial connections to British Columbia when determining its residency under the *Class Proceedings Act* would align with the context, structure,

and goals of the legislation. In addition, it says, such an interpretation is harmonious with the *Securities Act*, consistent with its regulatory footprint in British Columbia, and supported by several authorities, which, while not directly on point, provide helpful guidance for the interpretive exercise.

[51] Specifically, MM says, authorities such as *Harrington v. Dow Corning Corp.* (1997), 29 B.C.L.R. (3d) 88, 1997 CanLII 4153 (S.C.) (“*Harrington SC*”), *Harrington v. Dow Corning Corp.*, 2000 BCCA 605 (“*Harrington CA*”) and *Chalmers v. AMO Canada Company*, 2009 BCSC 689, aff’d 2010 BCCA 560, suggest that, while not identical, there is a strong correlation between concepts of residency, territorial competence, and jurisdiction for *Class Proceedings Act* purposes. For example, it notes, in *Harrington SC*, Justice Mackenzie, as he then was, observed that the opt in procedure for non-residents in force at the time avoided “potential difficulties in exercising jurisdiction over class members outside the province who have not taken any initiative to attorn to the jurisdiction of the B.C. court” (at para. 9). MM also asserts that in *Harrington CA* this Court held “that the residency requirement is established with respect to out-of-province class members based on the existing connections to the jurisdiction such that they would participate in the class proceeding on an opt-out basis”.

[52] In addition, MM says, in *Ernewein* Justice Taylor stated that a proposed representative plaintiff met the residency requirement by “physical presence for a period of time with an intention to remain” for purposes of “being a person entitled to bring [a class action]” (at paras. 99–100), and in *Brecknell* this Court held that for purposes of determining whether a corporation conducts business in British Columbia there is no distinction between “physical presence” and “virtual presence” (at paras. 36, 40). Moreover, it says, in *Lee*, Justice Griffin (then of the trial court) noted the strong policy reasons for facilitating non-resident participation in class actions, and rejected a narrow reading of s. 2(1) of the *Class Proceedings Act* in order to achieve a just result (at paras. 62, 64).

[53] Bearing this guidance in mind, MM submits that, properly interpreted, the residency requirement in s. 2(1) engages full consideration of all connecting factors

between a proposed representative plaintiff and British Columbia, not just physical presence. It also submits that an expansive interpretation of s. 2(1) accords with the modern approach to statutory interpretation, which focuses on the text, context, and purpose of a statutory provision.

[54] Dealing first with the text of s. 2(1), MM notes that the *Class Proceedings Act* does not define the term “resident”. However, it says, the ordinary meaning of that term encompasses the location where an entity does or is registered to do business, as set out in *Black’s Law Dictionary* and quoted by the judge. In addition, MM says, the term “resident” is associated contextually in the *Class Proceedings Act* with the representation of a class of persons (in this case, all purchasers under the impugned prospectus without territorial limitation), and the broad powers of the court in multi-jurisdictional class actions in s. 4.1. Moreover, it says, the purposes of class actions are advanced by a liberal, generous, and flexible interpretation of the residency requirement in s. 2(1).

[55] According to MM, a narrow interpretation of s. 2(1) that leads to a multi-jurisdictional class action such as this being struck at an early stage based on a “technicality” where the proposed representative plaintiff is clearly connected to British Columbia is contrary to the goals of access to justice and behaviour modification. In its submission, such an interpretation should be avoided by the court. In particular, MM says, courts should strive to protect the interests of absent class members and decline to refuse certification on the basis that a proposed representative plaintiff is not a British Columbia resident when a more flexible approach would facilitate a putative class action. It cites *Jiang v. Peoples Trust Company*, 2018 BCSC 299, aff’d 2019 BCCA 149, as an example of such a flexible approach.

[56] In advancing this submission, MM acknowledges that it did not appeal the sequencing decision. However, it says, once the certification application was filed, s. 4.1 was engaged, and the judge was obliged to consider the broad powers that it confers, but did not. MM contends that the context, structure, and objectives of the *Class Proceedings Act*, together with those broad powers, support a declaration that

it has a sufficient connection to British Columbia to pursue this putative class action as the representative plaintiff. It asks this Court to set aside the order below and make a declaration to that effect.

Excelsior

[57] Excelsior responds that the judge interpreted the term “resident” in the *Class Proceedings Act* in an error-free manner. In its submission, she correctly adopted the legal test for the residency of a trust articulated in *Fundy Settlement*, namely, “where the central management and control of the trust actually takes place”. In addition, it says, in applying the central management and control test she considered all salient factors in question. In other words, Excelsior submits, the judge’s interpretation and application of the test for residency under s. 2(1) was correct and error-free.

[58] In support of its submission, Excelsior emphasizes the absence of authority to support MM’s assertion that its status as a reporting issuer under the *Securities Act* equates to “carrying on business” in British Columbia, much less to residence. It also says that MM conflates the concepts of jurisdiction and residence, as it did in the court below. For example, Excelsior says, courts regularly take jurisdiction over litigants who are not residents, and attorning to the jurisdiction of a court does not make a foreigner a resident. Further, it says, presence within a jurisdiction, virtual or otherwise, does not constitute “carrying on business” there.

[59] Excelsior goes on to submit that, contrary to MM’s submission, the residency requirement in s. 2(1) is not “a remnant from the previous iteration” of the *Class Proceedings Act*. Nor is it a mere “technicality”. Rather, the residency requirement is a statutory prerequisite to standing to commence a class action in British Columbia intentionally chosen and maintained by the legislature. Accordingly, Excelsior says, it cannot simply be ignored to facilitate the pursuit of a putative multi-jurisdictional class action, particularly given the generous nature of the *Class Proceedings Act* on matters such as costs, which make British Columbia an attractive forum for non-resident plaintiffs and class counsel. In its submission, the judge correctly declined to accept MM’s invitation to do so.

Analysis

[60] As MM states, this aspect of its appeal involves a question of statutory interpretation. In *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, the Supreme Court described the modern approach:

[91] The modern approach to statutory interpretation requires us to read the words of [the statutory provision] in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of [the statute] and the intention of the legislature.

[61] In other words, as stated in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, in applying the modern approach to statutory interpretation, the Court must interpret a statutory provision:

[10] ... according to a textual, contextual and purposive analysis to find meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[62] As noted, this is the first time this Court has been asked to interpret the meaning of the term “resident” for purposes of the *Class Proceedings Act*. With the foregoing principles in mind, I turn to that exercise now, applying the modern approach to statutory interpretation.

Text

[63] The term “resident” appears repeatedly in the *Class Proceedings Act*. However, it is not included in the definition section, nor is it defined elsewhere. To repeat, s. 2(1) provides:

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.

[64] The meaning of an undefined term in a statute may be illuminated by reference to case authorities. For example, in *H.M.B. Holdings Ltd. v. Antigua and Barbuda*, 2021 SCC 44, the Court interpreted the undefined term “carrying on

business” in s. 3(b) of the *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5. [REJA] by referring to the common law. It noted that the concept of “carrying on business” has a long history at common law, and found that its meaning in the case law informed the proper interpretation of “carrying on business” in s. 3(b) of REJA: at para. 41. In adopting this interpretive approach, the Court explained:

[30] ...[a]s a matter of statutory interpretation, common law terms and concepts are presumed to retain their common law meaning when used in legislation (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §17.14).

[65] Similarly, in *Petrowest*, the Court looked to the common law when interpreting the undefined term “party” in the *Arbitration Act*, R.S.B.C. 1996, c. 55. It stated:

[112] ... where legislation does not fully address a matter relating to its subject, courts may look to the common law to interpret the statutory language (R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at §17.02). In such a scenario, the common law is presumed to apply, absent persuasive evidence that the legislature intended to change or displace it by enacting the statute at issue (Sullivan, at §17.02).

[66] Like the concepts of “carrying on business” and a “party”, the concept of “residence” is well-established in the case law. Its ordinary meaning has been discussed in many cases and contexts, often involving questions of taxation or jurisdiction and individuals who inhabit more than one home on a regular basis. For example, in *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209, the appellant was found to be ordinarily resident in Canada for tax purposes based on the time he spent in his New Brunswick home and his “settled life” there, although he also had a home in the United States. In *Broad v. Pavlis*, 2015 BCCA 20, the appellant in family law proceedings was found to be ordinarily resident in British Columbia for jurisdiction purposes based on the “significant amount of time” in the “settled routine of his life” that he spent at his West Kelowna vacation home, although his primary residence was in Alberta: see also, *English v. McCurdy*, 2021 BCCA 376.

[67] Further, in the context of class proceedings, the court in *Ernewein* appointed a representative plaintiff over the defendants’ objection that he was not a British Columbia resident. The plaintiff was a lawyer and geologist who divided his time

between British Columbia and Yukon, and maintained homes in both locations. In interpreting the residency requirement under the *Class Proceedings Act*, Justice Taylor considered the test for residency discussed in *Snair v. Halifax Insurance* (1995), 145 N.S.R. (2d) 132, 1995 CanLII 4400 (S.C.), an insurance case, and the definition of residence in *Black's Law Dictionary*:

[99] ... the law recognises that a person may have more than one residence. The requirement of residency is met by the physical presence for a period of time with an intention to remain. It is not the same as domicile but rather engages a concept of permanence or of an intention to stay for an indefinite period of time (*Snair v. Halifax Insurance* (1995), 145 N.S.R. (2d) 132, 31 C.C.L.I. (2d) 279 (N.S.S.C.) [*Snair* cited to N.S.R.], at para 12).

Blacks Law Dictionary, 8th ed. (St. Paul: West Pub. Co., 2004) defines residence at p. 1335 as:

1. The act or fact of living in a given place for some time. 2. The place where one actually lives, as distinguished from a domicile. Residence usually just means bodily presence as an inhabitant in a given place; domicile usually requires bodily presence plus an intention to make the place one's home. A person thus may have more than one residence at a time but only one domicile. Sometimes, though, the two terms are used synonymously.

[100] I am satisfied on the evidence that in terms of being a person entitled to bring this litigation, the plaintiff, is a resident of British Columbia.

[68] On the other hand, in *Bhangu v. Honda Canada Inc.*, 2021 BCSC 2381, Justice Iyer declined to appoint a proposed representative plaintiff who was a class member, but not a British Columbia resident. In applying the residency requirement, she did not discuss the ordinary meaning of the term “resident”, presumably because its meaning was not controversial. Nor was the ordinary meaning of the term “resident” discussed in *Jiang, Lee, or Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856, although issues of residency also arose in those cases.

[69] The foregoing cases all concerned the residency of an individual. However, the concept of the residency of a corporation or trust is also well-established in the case law, and, to the extent possible, approximates that of an individual.

[70] As the judge noted, *Fundy Settlement*, a taxation case, is particularly helpful in illuminating the meaning of the residency of a trust at common law. The trustee of the trusts in question was a corporate resident of Barbados, but the central

management and control of the trusts was carried out by the main beneficiaries, who resided in Canada. The trusts contended that their residence was the residence of the trustee. The Minister of National Revenue contended it was in Canada.

[71] Based on common law principles that apply to the residence of a corporation, the Court adopted the central management and control test for determining the residency of a trust. Quoting from *De Beers Consolidated Mines, Ltd. v. Howe*, [1906] A.C. 455 (H.L.), it explained that those principles seek to analogize the residence of a company to that of an individual, and ask “where it really keeps house”, “where its real business is carried on” and “where its central management and control actually abides”. In conducting its analysis, the Court observed that the principal basis for imposing income tax in Canada is residency. It also observed that there are many similarities between a trust and a corporation, including the basic function of both, namely, the management of property:

[7] As Sharlow J.A. in the Federal Court of Appeal explained, the principal basis for imposing income tax in Canada is residency (para. 52). Professor V. Krishna in *The Fundamentals of Income Tax Law* (2009), noted, at p. 85, that the policy reason for this is to ensure that a person who enjoys the legal, political and economic benefits of associating with Canada will pay their appropriate share for the costs of this association. For an individual, factors such as nationality, physical presence, location of family home and social connections, among others, will be considered in determining residence. While the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the “Act”), contains certain deeming rules with respect to residency, generally residence is question of fact.

[8] While there is a dearth of judicial authority on the question of the residency of a trust, the residency of a corporation has been determined to be where its central management and control actually abides. In *De Beers Consolidated Mines, Ltd. v. Howe*, [1906] A.C. 455 (H.L.), Lord Loreburn stated, at p. 458:

In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. ... [A] company resides for purposes of income tax where its real business is carried on. ... I regard that as the true rule, and the real business is carried on where the central management and control actually abides.

The central management and control test for residency of a corporation has been adopted in Canada in a number of cases and is well established (see

The King v. British Columbia Electric Railway Co. [1945] C.T.C. 162 (Ex.Ct.); *Crossley Carpets (Canada) Ltd. v. M.N.R.* (1967), 67 D.T.C. 522 (T.A.B.).

[9] In general, the central management and control of a corporation will be exercised where its board of directors exercises its responsibilities. However, as Sharlow J.A. pointed out (at para. 56), where the facts are that the central management and control is exercised by a shareholder who is resident and making decisions in another country, the corporation will be found to resident where the shareholder resides. (See *Unit Construction Co. v. Bullock*, [1960] A.C. 351 (H.L.).)

...

[14] ... there are many similarities between a trust and corporation that would, in our view, justify application of the central management and control test in determining the residence of a trust, just as it is used in determining the residence of a corporation. Some of these similarities include:

- 1) Both hold assets that are required to be managed;
- 2) Both involve the acquisition and disposition of assets;
- 3) Both may require the management of a business;
- 4) Both require banking and financial arrangements;
- 5) Both may require the instruction or advice of lawyers, accountants and other advisors; and
- 6) Both may distribute income, corporations by way of dividends and trusts by distributions.

As Woods J. noted: “The function of each is, at a basic level, the management of property” (para. 159).

[15] As with corporations, residence of a trust should be determined by the principle that a trust resides for the purposes of the Act where “its real business is carried on” (*De Beers*, at p. 458), which is where the central management and control of the trust actually takes place...

[16] We agree with Woods J. that adopting a similar test for trusts and corporations promotes “the important principles of consistency, predictability and fairness in the application of tax law” (para. 160). As she noted, if there were to be a totally different test for trusts than for corporations, there should be good reasons for it. No such reasons were offered here.

[72] As is apparent from the cases, the common law distinguishes between the concept of “residence”, on one hand, and concepts of “jurisdiction”, “presence”, and “carrying on business”, on the other. While I accept that these concepts often relate and intersect, their ordinary meanings nonetheless differ, and care must be taken not to blur, distort, or ignore their distinct meanings when engaging in the interpretive exercise, however flexibly and generously. Notably in this regard, in *Brecknell* this Court held that a non-resident Internet-based advertising company headquartered in

California with a virtual, but no physical, presence in British Columbia carried on business in this province such that the court had *in personam* jurisdiction to issue a production order under s. 487.014(1) of the *Criminal Code* requiring it to produce records. In addition, in *H.M.B. Holdings*, the Court held that the appellant could not register a default judgment obtained in British Columbia against Antigua, a non-resident foreign country, under *REJA* because Antigua did not carry on business in British Columbia for purposes of traditional presence-based jurisdiction, which requires actual, not only virtual, presence, such as maintaining an office in the jurisdiction. Moreover, courts regularly assume jurisdiction over non-resident litigants for a variety of reasons, as discussed in many cases, including *H.M.B. Holdings*, *Harrington CA*, and *Chalmers*.

[73] Based on the foregoing, I conclude that the ordinary meaning of the term “resident” in relation to a corporation or trust is where its central management and control takes place. As Lord Loreburn observed in *De Beers*, that is the location where the “real business” of a corporation or trust “is carried on”.

Context

[74] Section 2(1) of the *Class Proceedings Act* is a standing provision. By its clear language, it limits standing to commence a putative class action on behalf of class members to residents of British Columbia who are members of the proposed class.

[75] Contrary to MM’s submission, in my view, there is nothing in the structure of the *Class Proceedings Act* that suggests the residency requirement in s. 2(1) is “a remnant” from a previous iteration which created a “dual regime for class member participation based on residency”. Nor does anything suggest that the residency requirement in s. 2(1) is a mere “technicality”.

[76] As I have explained, when the *Class Proceedings Act* was amended in 2018, the legislature repealed the existing version of s. 2(1) and replaced it with a revised version. The revised (and current) version changed the words of its predecessor slightly, but maintained the residency requirement. In my view, this strongly suggests that the legislature intended to continue limiting standing to commence a putative

class action in the courts of British Columbia to British Columbia residents, as the term “resident” is ordinarily understood.

[77] Moreover, while the 2018 amendments replaced the opt in model for non-residents with an opt out model, s. 4.1(2) provides that, if a multi-jurisdictional class proceeding is certified, residents and non-residents may be divided into subclasses with differing opt out features. In other words, although the *Class Proceedings Act* no longer requires the separation of residents and non-residents into subclasses, it continues to contemplate separate treatment of class members based on their residency.

[78] In interpreting s. 2(1), I see no reason to deviate from the common law meaning of the term “resident” based on the context and structure of the *Class Proceedings Act*.

Purpose

[79] To repeat, the three principal goals of class actions are behaviour modification, judicial economy, and access to justice. Behaviour modification is facilitated by encouraging actual and potential wrongdoers to account for “the harm they cause or might cause to the public”; judicial economy, by avoiding unnecessary duplication in judicial work; access to justice, by providing a fair, economical process to resolve the claims of class members and, where established, a just, effective remedy: *Finkel* at para. 13 (emphasis added).

[80] The purpose of a standing provision is to delineate who is entitled to bring an action to court for decision. As I noted at the outset, limitations on standing may be necessary for many reasons. These include helping to ensure the effective operation of the court system as a whole and prevent it from becoming overburdened: *Downtown Eastside Sex Workers* at paras. 1, 26.

[81] In my view, the purpose of s. 2(1) of the *Class Proceedings Act* is to limit standing to bring a putative class action to the British Columbia courts for decision to members of the public of British Columbia, namely, British Columbia residents.

Although, as discussed in *Harrington CA* and reflected in the *Class Proceedings Act*, non-residents may be entitled to “piggyback” onto such claims and thus gain access to this attractive forum, s. 2(1) is intended to limit entitlement to initiate them to members of the public served by the courts of British Columbia.

[82] In interpreting s. 2(1), I see no reason to deviate from the common law meaning of the term “resident” based on its purpose and that of the *Class Proceedings Act*.

Summary

[83] Bearing in mind the text, context, and purpose of s. 2(1) of the *Class Proceedings Act*, read as a whole, I conclude that, for class action purposes, a corporation or trust is a “resident” of the location where its central management and control takes place.

[84] As MM acknowledges, the judge identified and applied the central management and control test in determining its residency. It follows that she did not commit an extricable error of law in her interpretation or application of the residency requirement in s. 2(1) of the *Class Proceedings Act*.

Did the judge err in concluding that MM is not a British Columbia resident for purposes of s. 2(1) of the *Class Proceedings Act*?

Positions of the Parties

MM

[85] MM also contends the judge committed palpable and overriding error in concluding that it is not a British Columbia resident.

[86] It is challenging to isolate MM’s submissions on this aspect of the appeal from those made on the correct legal test for residency under s. 2(1) of the *Class Proceedings Act*. However, as I understand it, MM argues that because it is a reporting issuer registered under the *Securities Act*, by statutory definition it carries on business in British Columbia. Therefore, it says, despite its lack of a physical presence in this province, it is a British Columbia resident, and the judge made a

palpable and overriding error in finding otherwise. In addition, it says, she erred in finding that the attornment clause in the warrant indenture was “disconnected” from the prospectus. According to MM, the evidence does not support her conclusion in that regard and is manifestly to contrary effect.

Excelsior

[87] Excelsior responds that the judge did not err in concluding that MM is not a British Columbia resident. In its submission, MM is simply repeating the unsuccessful arguments that it made to the judge and hoping for a different result on appeal. However, Excelsior says, the judge’s finding that MM is not a British Columbia resident was available, well supported by the evidence, and is entitled to appellate deference. In particular, it says, as the judge found, MM’s status as an issuer under the *Securities Act* and its attornment to the British Columbia courts do not make it a resident of British Columbia.

Analysis

[88] The judge’s finding that MM is not a British Columbia resident for purposes of s. 2(1) of the *Class Proceedings Act* is a question of mixed fact and law. Accordingly, as noted, it is subject to review for palpable and overriding error. I see no such error in the judge’s finding that MM is not a resident of British Columbia.

[89] As Excelsior points out, the judge considered the fact that MM is a reporting issuer in this province. However, she found this status simply enabled MM to sell units in its fund to residents of British Columbia, which did not establish it as a British Columbia resident. In my view, that finding was plainly available on an application of the central management and control test.

[90] As to the attornment clause, the judge expressly declined to decide the issue because in her (correct) view it was unnecessary to do so for purposes of determining MM’s residency. Accordingly, if she erred in her *obiter* comment on the attornment clause (about which I express no opinion), any such error was immaterial.

Conclusion

[91] For the foregoing reasons, I would dismiss the appeal.

“The Honourable Justice Dickson”

I AGREE:

“The Honourable Mr. Justice Butler”

I AGREE:

“The Honourable Justice Skolrood”