LITIGATION - CANADA

Supreme Court of Canada confirms judges' jurisdiction to sit extra-provincially without video link

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Introduction

The Supreme Court of Canada has confirmed the discretionary power of superior court judges to sit outside their home province without a video link to an open courtroom in their home province.

In two companion appeals – *Endean v British Columbia* and *Parsons v Ontario* – the court unanimously held that superior court judges from Ontario and British Columbia, presiding with a Quebec superior judge over concurrent pan-Canadian class action proceedings in the three provinces, could sit together outside their respective provinces to hear a motion based on a paper record brought in all three proceedings.(1) The court held that this discretionary power can be derived from provincial class action legislation, as well as the inherent jurisdiction of the superior courts, and is not dependent on a live video link back to courtrooms in the judges' home provinces – although if a video link is requested, it should be provided unless there is a good reason to refuse it. The decision was expressly limited to litigation that is pending wholly within Canada and to an adjudication that involves only a paper record.

Once the appeal reached the Supreme Court of Canada, it was not contested that superior court judges had the power to sit together outside their home provinces and hear a motion based on a written record in the context of a pan-Canadian class action settlement agreement. The disagreement before the court centred on two issues relating to the conditions under which superior court judges can exercise this power:

- What is the source of authority for a judge to sit outside his or her home jurisdiction?
- Is a video link to an open courtroom in the judge's home jurisdiction a condition for the exercise of that authority?

Facts

This decision was made in the context of concurrent pan-Canadian class actions in three provinces on behalf of individuals infected with hepatitis C by the Canadian blood supply. The British Columbia and Quebec class actions included residents of those provinces, while the Ontario class action included all other persons in Canada. The defendant governments and the Canadian Red Cross reached a pan-Canadian settlement agreement with the plaintiffs in 1999, which was approved by the courts in all three provinces. The settlement agreement assigned a supervisory role to the courts in each province, for implementation and enforcement of the settlement.

In 2012 motions were brought before the three supervisory judges for approval of a proposed protocol. Pursuant to the settlement agreement, materially identical orders were required from the superior courts in all three provinces for the protocol to take effect. In the interests of efficiency and effectiveness, so that all three supervising judges would hear the same submissions and be better

positioned to issue orders without material difference, class counsel proposed to argue the common protocol approval motions before the three supervisory superior court judges sitting in one location, when all three judges would be gathered in a fourth province – Alberta – to attend a Canadian judicial meeting. Each attorney general of British Columbia, Ontario and Quebec opposed this proposal, arguing that superior court judges do not have the jurisdiction to conduct hearings outside their home province.

Litigation history

Separate motions for directions concerning the disputed procedure for hearing the protocol approval motions were brought before each supervising judge to resolve the jurisdictional objection. The first-instance decisions were appealed in British Columbia and Ontario.(2)

Ontario

Sitting as the supervisory judge of the Superior Court of Justice, Chief Justice Winkler concluded that a superior court judge can preside over a hearing outside Ontario where the court has personal and subject-matter jurisdiction over the parties and issues.(3) He found that the source of this power lies in the court's inherent jurisdiction to control its own process.

The Court of Appeal for Ontario upheld this decision.(4) The majority of the court agreed that the basis for a judge's power to conduct a hearing outside of his or her home jurisdiction is in the superior court's inherent jurisdiction. However, a differently constituted majority concluded that a video link is required between an out-of-province courtroom and an Ontario courtroom, in order to comply with the open court principle.

British Columbia

Motion judge Chief Justice of the Superior Court Bauman largely adopted the reasons of Winkler.(5) Bauman confirmed his authority to sit outside British Columbia pursuant to the court's inherent jurisdiction and found no requirement for a video link to be provided to a courtroom in his home jurisdiction.

The British Columbia Court of Appeal disagreed with the motion judge on both points and held that the common law prohibits superior court judges from sitting outside British Columbia.(6) However the court concluded that it is permissible for a judge outside British Columbia to conduct a hearing, provided that the hearing notionally takes place in a British Columbia courtroom by a telephone or video conference link to an open British Columbia courtroom.

Quebec

The supervisory judge in Quebec reached the same result as the motions judges in Ontario and British Columbia.(7) The Quebec decision was not appealed.

Decision

Source of superior courts' authority

The Supreme Court of Canada held that superior courts must look first to their statutory powers before considering exercising their inherent jurisdiction. The court characterised the inherent jurisdiction of the superior courts as a "reserve or fund of powers" or a "residual source of powers", to be drawn on "wherever it is just or equitable to so do".(8) Given the broad and loosely defined nature of those powers, the court held that they should be exercised sparingly and only after the superior court has determined the precise scope of express grants of statutory power.

Statutory jurisdiction

The court concluded that Section 12 of both Ontario's Class Proceedings Act 1992(9) and British Columbia's Class Proceedings Act(10) provides a statutory basis for holding hearings outside the judge's home jurisdiction. Both sections are substantially similar.(11) The Ontario statute provides:

> *"12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate."*

The court concluded that this provision – and its counterpart in British Columbia – must be interpreted broadly, purposively and remedially in order to confirm the inherent authority of judges to control procedure, fulfil the purpose of class action legislation and "ensure that procedural innovations in aid of access to justice are not stymied by unduly technical or time-bound understandings of the scope of a class action judge's authority".(12)

Justice Cromwell, writing the majority reasons for seven justices, noted that the provincial legislatures intended judges in class proceedings to exercise broad discretionary powers to manage proceedings, to ensure their "fair and expeditious determination".(13) He emphasised that class proceedings are intended to facilitate access to justice through the efficient and judicially economic disposition of litigation. Cromwell concluded that a broad interpretation of Section 12 was necessary to give effect to this and other purposes of class action legislation, including allowing judges to assume an active role in managing class action proceedings that are often complex.

Accordingly, Cromwell held that the broad powers contained in Section 12 of the acts authorise the extraterritorial hearing sought in the motions for directions.

The Supreme Court of Canada concluded that no constitutional, statutory or common law limitations in Ontario or British Columbia prevent judges in pan-Canadian class action proceedings from exercising discretion in the interests of the administration of justice to hold a joint hearing outside of their territory. Cromwell clarified that this reasoning applies to similar situations where:

- courts have personal and subject-matter jurisdiction over the action;
- judges are not attempting to use coercive powers in order to convene or conduct the hearing outside their province, such as the power to direct witnesses to appear or answer questions and to make contempt orders;
- holding the hearing would be consistent with the law of the jurisdiction in which the hearing is held; and
- the litigation is wholly within Canada.(14)

As the proposed hearing would involve only a written record, Cromwell concluded that all of these conditions were satisfied.

The British Columbia Court of Appeal noted that the English common law prohibited English judges from sitting outside the territorial limits of England. Since English common law was incorporated into the law of British Columbia at the turn of the 19th century, the appeal court found that it similarly prevents British Columbia superior court judges from sitting outside their province. The Supreme Court of Canada acknowledged the concerns animating this historical rule, including sovereignty and the territorial limits of powers, but found that they should not act as an impediment in the narrow circumstances before the court. Further, Cromwell observed that the appeal court's concern that an expansive interpretation of the superior court's jurisdiction would trench on powers reserved for the legislature was misplaced, since the legislatures – through Section 12 of the acts – have encouraged courts to make full use of their power to regulate the process in the interests of fairness and expeditiousness.(15)

The Supreme Court of Canada similarly concluded that no statutory barriers prevent a broad interpretation of Section 12.

Inherent jurisdiction

Cromwell held that the same result would also follow in common law jurisdictions without provisions comparable to Section 12 of the acts. In those provinces, superior court judges can rely on their inherent jurisdiction to authorise sitting outside of their home province, absent any clear statutory limitation.

The court noted that one aspect of the superior court's inherent jurisdiction is the power to regulate the court's process and proceedings. Inherent jurisdiction empowers superior courts to regulate proceedings in a way that secures convenience, expeditiousness and efficiency in the administration of justice. Accordingly, the court held that – absent a clear statutory limitation in those other provinces – the inherent jurisdiction of the superior courts permits judges to sit outside the boundaries of their home province.(16)

Video link

The Supreme Court of Canada concluded that a video link between the out-of-province courtroom and an open courtroom in the judge's home province is not required under the acts or the inherent jurisdiction for a judge to sit extra-provincially, and is similarly not required by the open court principle. In this respect, the Supreme Court of Canada disagreed with both appellate courts below.

Cromwell rejected the argument that the absence of a video link would violate the open court principle. He discussed the role of this principle, which embodies "[t]he importance of ensuring that justice be done openly".(17) He also reviewed the rationale for this principle, which includes:

- preserving an effective evidentiary process;
- displaying sensitivity to local communities;
- promoting the administration of justice; and
- educating local communities and society in general.(18)

Cromwell concluded that no identified purpose of the open court principle would be automatically frustrated by a judge sitting extra-provincially without a video link.(19) He noted that accessibility under the open court principle "is not typically concerned with whether a hearing is held within the bounds of the province in which the matter originated"(20) and that accordingly, the principle is not violated when a hearing is held in a location outside the home province that is accessible to the public and the media.(21) Similarly, Cromwell held that 'open to the public' in Section 135(1) of Ontario's Courts of Justice Act(22) – which codifies the open court principle – does not mean "open to the public physically present in Ontario".(23)

Concurring reasons on open court principle

Justices Karakatsanis and Wagner concurred with the result, but delivered their own reasons on the open court principle and how it is affected when a court exercises discretion to sit extra-provincially.

Writing for both justices, Wagner reviewed the principles underlying the open court principle. He noted that a central tenet of Canada's constitutional framework is that justice is administered provincially. Wagner disagreed with the majority's interpretation of Section 135(1) of Ontario's Courts of Justice Act, holding instead that the term 'public' refers specifically to the Ontario public and provides a *prima facie* right to Ontarians to attend all hearings of Ontario courts. Wagner referred to similar statutory provisions in Quebec and Nova Scotia, and reasoned that the open court principle "has always been tied to local communities".(24) The class action context heightens the concerns about a potential lack of openness. Wagner stated: "Courts should strive to make class actions procedure visible and understandable to class members and the community where the proceedings were initiated."

Wagner further noted that access to justice includes procedural access to justice, which includes transparency of decision making in the process of resolving a claim. He also noted that the open court principle protects the media's right to access courts as a surrogate for the public. When a hearing is held extra-provincially, it is more difficult for the media to relay information back to the communities that they serve because of the expense of travelling to report on the proceedings.

However, Wagner agreed that the open court principle does not always mandate that a video link be provided to a home province when a court is sitting extra-provincially – it will depend on the circumstances at hand. Here, a video link – which was not requested by class counsel, the public or the media – was not required. He observed however, that if counsel, the public or the media request a video link, then it should generally be granted – subject to any countervailing considerations. Even absent a request, a video link should be ordered if the judge considers it appropriate to protect the public's interest in knowing what transpires in the courtroom.

Extra-provincial hearings

The majority's reasons briefly outline a general framework to guide the exercise of a superior court judge's discretion to convene an extra-provincial hearing in circumstances where the judge would have subject-matter and personal jurisdiction over the matter if the hearing were held within his or her home jurisdiction.(25) Cromwell noted that in exercising this discretion, a superior court judge

must:

- keep in mind whether sitting in a different territory will impinge (or could be seen as impinging) on the sovereignty of the province in which the hearing is held;
- weigh the benefits and costs of the proposed out-of-province proceeding; and
- consider whether it is appropriate to impose terms such as payment of extraordinary costs occasioned by having the hearing in the proposed location or requiring a video link back to the judge's home jurisdiction, in the interests of open justice.

He noted that the judge should have a good reason to refuse to order a video link, if it is requested. Factors to be considered under the cost/benefit criteria include:

- the length and cost of the out-of-province hearing compared to a hearing in the home province;
- whether the parties have agreed to travel out of province and whether the proposed location imposes undue burdens on the parties or the court; and
- whether there is a public interest in the hearing taking place in the home province or whether access to justice favours an out-of-province hearing.

Comment

This decision clarifies an important point of procedure in pan-Canadian class actions – encouraging judges to employ pan-national solutions to ensure that the process works efficiently, expeditiously and cost effectively. The court also clarified the nature and role of superior courts' inherent jurisdiction. However, as the ruling was expressly confined to litigation wholly within Canada, the decision does not apply to transnational class actions.

Broadly, the Supreme Court reaffirmed its commitment to access to justice and its interest in modernising and expediting procedure – putting pragmatism over formalism. Recognising that a primary purpose of class action legislation is to facilitate access to justice, the court was unwilling to let "unduly technical or time-bound understandings" narrow the broadly worded statutory authority of class action judges to manage proceedings to ensure their fair and expeditious determination. The discussion of the open court principle and territorial jurisdiction demonstrates an effort by the court to make common law traditions compatible with "the modern realities of increasingly complex litigation involving parties and subject matters that transcend provincial borders".(26) In so doing, the British Columbia Court of Appeal's appeal to antiquity was resoundingly rejected in favour of a modern approach to the realities and imperatives of civil litigation in the 21st century.(27)

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Endnotes

(1) 2016 SCC 42 (*Endean SCC*).

(2) For further details please see "British Columbia appeal court sets territorial jurisdiction limits for superior courts" and "Appeal court confirms judge's inherent jurisdiction to sit outside home territory".

(3) 2013 ONSC 3053, at para 4 (*Parsons* first instance).

(4) *Parsons v The Canadian Red Cross Society*, 2015 ONCA 158 (*Parsons* ONCA).

(5) *Endean v Canadian Red Cross*, 2013 BCSC 1074 (*Endean* first instance).

(6) *Endean v British Columbia*, 2014 BCCA 61 (*Endean* BCCA).

(7) *Honhon v Canada (Procureur General)*, 2013 QCCS 2782.

(8) *Endean* SCC, *supra* note 1 at para 23.

(9) SO 1992, c 6.

(10) RSBC 1996, c 50.

(11) *Endean* SCC, *supra* note 1 at para 26.

(12) *Ibid*, at para 4.

(13) *Ibid*, at para 29.

(14) *Ibid*, at paras 42 and 58.

(15) *Ibid*, at para 49.

(16) *Ibid*, at para 62.

(17) *Ibid*, at para 66, citing *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, (1996) 3 SCR 480, at para 22.

(18) *Ibid*, at para 66, citing *Edmonton Journal v Alberta (Attorney General)*, (1989) 2 SCR 1326, at page 1361.

(19) *Ibid*, at para 67.

(20) *Ibid*, at para 69.

(21) *Ibid*, at paras 65 and 68.

(22) RSO 1990, cC 43.

(23) *Endean* SCC, *supra* note 1 at para 70.

(24) *Ibid*, at para 91.

(25) *Ibid*, at paras 71 to 76.

(26) *Ibid*, at para 48, quoting Winkler in *Parsons* first instance, at para 55.

(27) For another example, see *Hryniak v Mauldin*, 2014 SCC 7.
