

Supreme Court Confirms that Judges Can Conduct Hearings Outside Home Province

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National class actions raise a host of complicated jurisdictional issues. This is especially true when there are parallel class actions in multiple provinces. In such cases, it is typical for courts in more than one province to have supervisory jurisdiction over a class action settlement. How these different supervisory judges achieve consistent, fair and efficient outcomes can be extremely challenging absent some level of coordination and cooperation.

In the recent decision of *Endean v. British Columbia*, 2016 SCC 42, the Supreme Court of Canada provided some much needed clarity on what level of coordination is permissible in the context of administering a national class action settlement. Specifically, the Court considered whether a superior court judge could sit outside the physical borders of his or her home province to participate in a joint hearing.

Background

The appeal arose out of a national tragedy involving individuals who were infected with Hepatitis C by the Canadian blood supply in the late 1980s. A number of class actions were commenced in the wake of this tragedy and the various actions settled in 1999 for over \$1.18 billion. The superior courts of British Columbia, Quebec and Ontario assumed supervisory jurisdiction over the management of this settlement, the administration of which is expected to extend for over 80 years.

Over the last 17 years, challenges to administering this massive settlement emerged. In particular, the settlement agreement deemed no order effective unless all three supervisory judges arrived at substantively the same decision. In other words, the parties could go to Ontario and then British Columbia and obtain certain relief. But if Quebec then denied it, the parties would have to start over and go back to Ontario to start the process over again. This occurred on at least two occasions. Motions took years to resolve in some instances. Since class members in this case were dealing with life-threatening issues, delays of this kind were of more than merely procedural inconveniences. These delays had real world consequences.

As a result, class counsel proposed a joint hearing where all three supervisory judges could sit together and hear the same submissions from counsel, and confer with their fellow justices, before returning to their respective provinces to issue orders. This proposal was rejected by the provinces and led to the motions that gave rise to the Supreme Court appeal.

The Decisions Below

All three supervisory judges held that the court's inherent jurisdiction authorized them to sit outside their home province to participate in joint hearings.

The Quebec decision was not appealed. The provinces of BC and Ontario both appealed.

The BC Court of Appeal reversed the motion judge's decision and held a judge could not sit outside the province. However, the Court went on to say that if there was a video link to a courtroom in BC, the hearing outside the province would be deemed to take place inside the province, thus avoiding the jurisdictional issue altogether.

The Ontario Court of Appeal held that superior court judges did have inherent jurisdiction to sit outside the home province. However, the Court also held that a video link to an Ontario courtroom was necessary to comply with the "open court" principle.

Both decisions were appealed to the Supreme Court.

The Supreme Court Weighs In

The Court agreed unanimously on the central issue on appeal. Namely, a superior court judge with subject-matter and personal jurisdiction has discretion to hold a hearing outside his or her home province. Furthermore, supervisory judges from different jurisdictions are permitted to sit together to conduct such a hearing.

The authority for an extra-provincial sitting was held to flow from both statute and from a superior court's inherent jurisdiction. The Court considered s.12 of both the BC and Ontario *Class Proceedings Acts* and held that each affords their respective courts broad remedial discretion. The legislative history of these respective provisions revealed a legislative intent to create a statutory mechanism similar to the courts' inherent jurisdiction powers. Indeed, the Court held that s.12 "confirms and reflects the inherent authority of judges to control procedure". Accordingly, the Court unanimously held that courts have discretionary statutory power to conduct a hearing outside their home province.

In provinces without an equivalent statutory power, courts can rely on their inherent jurisdiction to hold a hearing outside the judge's home province. These inherent powers could be limited by statute, but no such statutory limits existed in this appeal.

The Attorney General of Ontario cross-appealed, asking the Court to confirm that superior court judges could not exercise "coercive" powers at an extra-provincial hearing and were compelled to comply with legislative limits on their ability to participate in such joint hearings. The Court dismissed the cross-appeal on the basis that the facts of this case did not give rise to the issues raised. The proposed motion did not require the use of "coercive" powers, and there were no "statutory limits" on the ability to participate in joint hearings.

While the Court was unanimous on the issues above, the Court split on the issue of whether a video link from the hearing to the home province was necessary. In a 7-2 majority decision, Justice Cromwell found that no such link was necessary and it should be left to the discretion of the judges. In a concurring decision Justice Wagner agreed that a video link was not a prerequisite for jurisdiction, but added that the open court principle dictates that a request for a video link should be complied with subject to any countervailing considerations.

This decision should pave the way toward greater cooperation and coordination between courts across the country in managing national or multi-provincial class action settlements. In cases like *Parsons*, which give rise to settlement funds that will take years even decades to distribute and manage, this is a welcome development.