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Away Game: Canadian Supreme Court Allows Superior Court Judges to Determine Settlement Motions Outside of their Home Provinces

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Recently, the Supreme Court of Canada had the opportunity to decide a specific issue with potentially large ramifications. In ***Endean v. British Columbia (Endean)***, the Court considered whether judges of the Canadian Superior Courts have jurisdiction to hear motions in a different province. While the decision was limited to a fairly specific circumstance, the Court's answer in the affirmative confirms the Canadian court system's dedication to ensuring efficiency and easy access to justice in class action proceedings.

Endean began when the Superior Courts of British Columbia, Quebec, and Ontario certified concurrent class action proceedings on behalf of those infected with Hepatitis C by the Canadian blood supply between 1986 and 1990. The parties reached a pan-Canadian settlement agreement in 1999, whereby the courts of the three provinces would have a supervisory role. The agreement provided that the decisions of the courts of the provinces only took effect if all three courts reached materially identical decisions. This had the effect of requiring class counsel to file identical motions before all three courts, argue the motions in three provinces, and hope that each court reached the same decision.

In 2012, class counsel filed motions before the three supervisory judges relating to the settlement agreement, but took the step of proposing that the motions be heard by the three judges sitting together in one location. The three provinces opposed the proposal, arguing that the judges did not have the jurisdiction to conduct hearings outside their home provinces. All three motion judges concluded that they had the discretion to sit in other provinces to hear settlement agreement motions. Ontario and British Columbia appealed, and the appellate courts of each province reached a slightly different decision. The Ontario Court of Appeal agreed that the judge had the inherent jurisdiction to conduct a hearing outside of Ontario, but concluded that a video link was required between the out-of-province courtroom and an Ontario courtroom, in order to satisfy the open courtroom requirements. The British Columbia Court of Appeal found that the common law prohibited Superior Court judges from sitting outside the province, but held that it was permissible for a judge who was physically present in an Ontario courtroom to conduct a hearing taking place in another province by telephone or video link.

On appeal to the Supreme Court, the parties agreed that the Superior Court judges "have a discretionary power to sit together outside their home provinces to hear a motion without oral evidence in the context of a pan-Canadian settlement agreement." They did not, however, agree on the source of that power, or the conditions under which it could be exercised.

In allowing the appeals, the Court agreed that a Superior Court judge "has the discretion to hold a hearing outside his or her territory in conjunction with other judges managing related class actions, provided that the judge will not have to resort to the court's coercive powers in order to convene or conduct the hearing and the hearing is not contrary to the law of the place in which it will be held." It went on to define the source of that power. First, it noted that Section 12 of both the *Ontario Class Proceedings Act, 1992* and the *British Columbia Class Proceedings Act* both give Superior Court judges the inherent authority to control procedure in order to ensure access to justice and avoid "unduly technical or time-bound understandings of the scope of the class action judge's authority." It held that these clauses (and all class action authority) were to be interpreted broadly. Thus, in the absence of any constitutional, statutory, or common law limitations restricting the scope of the statutes, a Superior Court judge has authority to sit outside of his or her province in these circumstances

The Court went further, noting that the language in Section 12 of both *Acts* merely confirms and reflects the inherent power of the Superior Courts to govern their own processes. Thus, in jurisdictions without comparable statutory provisions, judges may still sit outside of their home province in these circumstances, provided there is no clear statutory or common law limitation on their ability to do so. The Court also added that a video link is not necessary to comply with the open court requirements (but noted that it should generally be provided when requested).

Finally, the Court laid out clear rules to be followed by Superior Court judges in deciding whether to exercise their discretion to hold a hearing outside of their territory. First and foremost, the decision to do so must be exercised in the interests of the administration of justice. Beyond that requirement, Superior Court judges are guided by the following broad considerations:

- Whether sitting in another province will impinge or could be seen as impinging on the sovereignty of that province;
- Whether there are benefits or costs to the proposed out-of-province proceeding; and
- Whether any terms should be imposed, such as conditions as to the payment of extraordinary costs or use of a video link to the court's home jurisdiction.

While the Court's decision in *Endean* is interesting, it is important to note that the circumstances here are very limited. It remains to be seen whether the newly-found ability for judges to sit outside of their home province has much applicability beyond the context of motions in the context of pan-Canadian settlements. However, the Court's decision does reinforce Canada's preference for efficient and accessible class action proceedings. The class in *Endean* was faced with the expensive, time-consuming, and essentially untenable requirement of filing identical motions in three separate provinces, before three separate judges, and hoping for three identical results. In allowing the judges to sit together for one hearing, the Supreme Court found a workable solution, and demonstrated its commitment to efficiency.

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