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Ruling raises concerns about efficient management of cases

Judges can't sit in hearings outside their jurisdiction, appeal court rules

KIM ARNOTT

A British Columbia Court of Appeal ruling that judges there may only preside over hearings that take place within the province offers a new challenge in the quest for efficient management of national class action cases, according to experts in the field.

The ruling (*Endean v. Canadian Red Cross Society* [2014] B.C.J. No. 254) is the latest to come out of the 1999 class action settlement agreement being supervised by superior judges in Ontario, B.C. and Quebec in relation to claims from individuals who contracted hepatitis C infections from the Canadian blood supply.

In a unanimous decision, the B.C. Court of Appeal overturned a lower court judgment allowing a B.C. Supreme Court judge to sit in a joint hearing in an Alberta courtroom to concurrently rule on motions related to the settlement agreement.

Justice Richard Goepel found that common law prohibits domestic courts from sitting outside their territorial boundaries, and added that there is no authority to turn to the justification of inherent jurisdiction to allow the practice.

That justification provided the basis of rulings in both British Columbia (*Endean v. Canadian Red Cross Society* [2013] B.C.J. No. 1304) and Ontario (*Parsons v. Canadian Red Cross Society* [2013] O.J. No. 2343) allowing hearings outside of the province provided the court had "personal and subject-matter jurisdiction over the parties and the issues in the proceeding." Approval was also given in a Quebec decision.

The rulings were appealed in both B.C. and Ontario by the provincial attorneys general. The Ontario appeal is scheduled to be argued in September.

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>
> **Chris Naudie**
> Osler, Hoskin and Harcourt

"The question was whether traditional principles should bend in light of modern needs," said Chris Naudie, who co-chairs the national class action specialty group at Osler, Hoskin and Harcourt. While the lower courts ruled that they should, the B.C. Court of Appeal decision found that longstanding common law principles should be respected, barring legislative change.

Although the decision concluded that B.C. judges cannot conduct hearings that take place outside the province, Justice Goepel's ruling added that judges who aren't personally present in the province may still preside over hearings through telephone, video conference or other communication medium.

He also permitted judicial participation in out-of-province concurrent hearings with regard to the settlement agreement under consideration, provided the hearing of the application in the B.C. proceeding is conducted in a B.C. courtroom.

However, that qualification has some observers wondering precisely what is required to determine that a hearing has taken place in British Columbia.

"It seems to me that if the judge and the witnesses and everybody else is in Alberta say, all you really need in B.C. is the court clerk and a microphone so people in the audience can hear it in the open court principle and you're good," said Thompson Rivers University law professor Craig Jones.

While the decision may not have much practical impact on the current administration of cases, which typically already involve a link to a live courtroom, it is still noteworthy, said Naudie.

"There is an important point of legal principle out there and it's likely to create a significant obstacle to ongoing efforts to improve the co-ordination of national class actions in Canada," he said.

Despite the Court of Appeal's invitation to the legislature to consider the issue, there is little expectation that legislators will see this as an important concern for legal reform.

"I think it would be helpful to have a comprehensive review of the issues but I just don't see this being a big priority for government or legislators," said Randy Sutton, a partner at Norton Rose Fulbright.

He believes significant change will have to start with the country's law reform agencies. "That would allow for one set of general principles to be developed and then the legislatures could deal with them."

The issue is on the radar of the Ontario Law Commission, which is undertaking a class action project that will consider "the unique challenges of national class actions," according to LCO counsel in residence Judy Mungovan.

"This B.C. Court of Appeal decision and Ontario's 2013 Superior Court decision on the same issue will be looked at as part of this review," Mungovan said in a written statement e-mailed to *The Lawyers Weekly*. "The LCO is pleased that technology, such as video conferencing, is being considered and more frequently used to mitigate access to justice challenges."

Jones says the need for plaintiffs to litigate in a multitude of jurisdictions as a result of the inability to create an effective national class action regime clearly has access to justice ramifications.

"If class actions work because they give an economy of scale to plaintiffs that can match or at least rival that of defendants, and I believe that's why class actions exist, then every time you force the class to subdivide, either on issues or jurisdictionally, you lose part of that economy of scale," he said. "You are discouraging suits by disallowing optimal aggregation of the class and that is an access to justice issue.

"We have to think of mass litigation as a new kind of justice, and I'm always disappointed when courts consider themselves hidebound by rules that were developed in the mists of time."

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