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mcmillan class action bulletin

judges without borders: multi-jurisdiction class action proceedings

In a recent ruling from the B.C. Supreme Court, *Endean v Canadian Red Cross*,[1] the Court considered the extent to which judges can cooperate across provincial borders in jointly hearing applications in parallel proceedings located in a single court location. The Endean case follows on a recent Ontario decision on the same subject in *Parsons v The Canadian Red Cross Society*.[2]

This case concerned six class proceedings brought in British Columbia, Ontario and Québec regarding persons who were infected with Hepatitis C from the Canadian blood supply between January 1986 and July 1990. A Settlement Agreement was approved in 1999 by orders of the B.C., Ontario and Québec courts and was signed by all of the Canadian provinces and territories. The Settlement Agreement provided ongoing jurisdiction to the Supreme Court of B.C., the Québec Superior Court and the Ontario Superior Court to issue orders necessary to implement, enforce, and supervise the performance of the Settlement Agreement.

The Settlement Agreement established a $1.118 billion fund from which claimants could receive compensation. A court-appointed Administrator was charged with reviewing and deciding claims.

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[1] 2013 BCSC 1074.

[2] 2013 ONSC 3053.

In 2012, Class Counsel filed motions before superior court justices in Ontario, B.C., and Québec for approval of a protocol extending the deadline for filing first claims for benefits from the settlement funds in the Settlement Agreement. Class Counsel proposed that the motions be heard by the three superior court justices in one location, Edmonton, Alberta, in order to increase the efficiency and cost effectiveness of the process.

Then concurrent applications were brought by Class Counsel from B.C., Ontario and Québec for directions from their respective courts on whether a superior court judge could sit in another province to hear an application under the Settlement Agreement. This issue was raised when the Chief Justices of B.C., Ontario and Québec wished to sit together in one court location in Edmonton, Alberta to hear applications brought in each of their respective courts.

The Attorney General of Ontario argued that a superior court justice lacked jurisdiction to hold a hearing regarding the Settlement Agreement outside of Ontario and that any order the court made would be a nullity and could be set aside.

In reaching its decision, the B.C. Supreme Court ultimately agreed with the parallel decision of Ontario's Chief Justice Winkler in *Parsons v The Canadian Red Cross Society*.[3] Chief Justice Winkler found that a court's inherent jurisdiction to control its own process permits a superior court judge to preside over a hearing conducted outside of its home province, provided it has personal and subject-matter jurisdiction and if, in the particular case, the interests of justice would be served.

The B.C. Supreme Court agreed with the submissions of B.C. Class Counsel that permitting one hearing before the three independent courts would lead to increased efficiency and avoid inconsistent decisions. This would also promote the *Supreme Court Civil Rules* Rule 1-3(2) which encourages the just, speedy and inexpensive determination of every proceeding on its merits and in a manner proportional to the amount involved, the importance of the issues in dispute, and their complexity.

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[3] 2013 ONSC 3053.

The B.C. Supreme Court further agreed with the Ontario court that there was no constitutional principle or rule of law prohibiting this conclusion. Many cases promote an expansive view of a superior court's inherent jurisdiction.[4] Moreover, the Supreme Court noted that technological advances have "fundamentally altered commercial and societal realities in our federation" (at para 13) such that "[a]ccommodating the flow of wealth, skills and people across state lines has now become imperative".[5]

In the related Ontario case, that Court found that there was no constitutional, statutory or common law provisions precluding superior court justices from conducting a hearing outside of Ontario (at para 56). Specifically, historical limitations on English courts' jurisdiction to sit outside of England did not apply to prohibit superior courts from sitting outside of their home provinces, especially where it would serve the interests of justice to do so. The Superior Court noted that *Morguard Investments v Savoie*, [1990] 3 S.C.R. 1077 is particularly instructive on the need to shape the common law and the rules of comity between provinces to accommodate the flow of people and resources between provinces as well as Canada's federal structure.

The *Parsons* case highlighted that the Supreme Court of Canada has found that a superior court's inherent jurisdiction includes the power to fully control its own process.[6] There are four specific functions of inherent jurisdiction: (i) ensuring convenience and fairness in legal proceedings; (ii) preventing steps being taken that would render judicial proceedings inefficacious; (iii) preventing abuse of process; and (iv) acting in aid of superior courts and in aid or control of inferior courts and tribunals.[7] Moreover, the Supreme Court of Canada has instructed that superior courts are obliged to use their

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[4] *MacMillan Bloedel Ltd. v Simpson*, [1995] 4 SCR 725; *Western Canadian Shopping Centres Inc. v Dutton*, [2001] 2 SCR. 534.

[5] per La Forest J. in *Morguard Investments Ltd. v De Savoye*, [1990] 3 SCR 1077.

[6] *MacMillan Bloedel Ltd. v Simpson*, [1995] 4 SCR 725.

[7] *MacMillan Bloedel* at para 33 citing Keith Mason, "The Inherent Jurisdiction of the Court" (1983), 57 ALJ 449.

inherent power to fill any voids in the rules of practice and procedure in order to fully address these four functions.[8]

The Ontario *Class Proceedings Act*, 1992 already reinforces the inherent jurisdiction of a superior court to create procedures to facilitate the efficient and effective resolution of nation-wide class proceedings.[9] Specifically, section 12 empowers a court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination". This supervisory jurisdiction continues to exist throughout "the implementation of the administration of a settlement".[10] In the present case, this includes the implementation of the Settlement Agreement.

The B.C. Court distinguished an earlier jurisdictional decision[11] which concluded that the Law Society of British Columbia did not have statutory authority to conduct part of a disciplinary hearing outside of B.C. The earlier decision did not directly address the ability of a superior court judge to hear an application outside of BC and thus, was not applicable to the present case.

The B.C. Court explained that section 9(2) of the *Supreme Court Act*, R.S.B.C. 1996, c. 443 permits a superior court judge to preside over a matter within its inherent jurisdiction "at any time and at any place". In *R v Pilarinos and Clark* ("*Pilarinos*"),[12] the Associate Chief Justice of BC, on an application before him in California, issued an authorization to intercept private communications in BC. *Pilarinos* highlighted that a superior court judge could exercise jurisdiction over persons, property or acts within his or her territory while outside of his or her home province, so long as he or she is not enforcing any order in the foreign jurisdiction.

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[8] *Western Canadian Shopping Centres Inc. v Dutton*, [2001] 2 SCR 534.

[9] *Fontaine v Canada (Attorney General)*, 2012 BCSC 839, at paras. 111-12.

[10] *Fantl v Transamerica Life Canada*, 2009 ONCA 377 (CanLII), 2009 ONCA 377.

[11] *Ewachniuk v Law Society of British Columbia* (1998), 46 BCLR (3d) 203 (CA).

[12] 2001 BCSC 1690.

The Supreme Court also rejected the suggestion to use videoconferencing in order to link the concurrent hearings in different provinces. The Supreme Court opined that "it appears nonsensical that this would be acceptable but the physical presence of the British Columbia and Québec judges in [another location] for the hearing would not be" (at para 15).

Ultimately, both the B.C. and Ontario courts considered what was the most efficient and efficacious manner in which to resolve the dispute, and concluded that allowing a joint hearing would meet those objectives.

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a cautionary note