



SUPREME COURT OF CANADA

CITATION: *Endean v. British Columbia*, 2016
SCC 42

APPEALS HEARD: May 19, 2016
JUDGMENT RENDERED: October 20, 2016
DOCKETS: 35843, 36456

BETWEEN:

Anita Endean, as representative plaintiff
Appellant

and

**Her Majesty the Queen in Right of the Province of
British Columbia and Attorney General of Canada**
Respondents

AND BETWEEN:

Dianna Louise Parsons, deceased,
by her Estate Administrator, William John Forsyth,
Michael Herbert Cruickshanks, David Tull,
Martin Henry Griffen, Anna Kardish,
Elsie Kotyk, Executrix of the Estate of
Harry Kotyk, deceased, Elsie Kotyk, personally,
and Fund Counsel for Ontario
Appellants

and

Her Majesty the Queen in Right of Ontario,
Attorney General of Canada, Canadian Red Cross Society,
Her Majesty the Queen in Right of Alberta,
Her Majesty the Queen in Right of Saskatchewan,
Her Majesty the Queen in Right of Manitoba,
Her Majesty the Queen in Right of New Brunswick,
Her Majesty the Queen in Right of Prince Edward Island,
Her Majesty the Queen in Right of Nova Scotia,
Her Majesty the Queen in Right of Newfoundland and Labrador,
Government of the Northwest Territories, Government of Nunavut
and Government of the Yukon Territory
Respondents

- and -

Attorney General of Quebec
Intervener

AND:

Her Majesty the Queen in Right of Ontario
Appellant on cross-appeal

and

Dianna Louise Parsons, deceased,
by her Estate Administrator, William John Forsyth,
Michael Herbert Cruickshanks, David Tull,
Martin Henry Griffen, Anna Kardish, Elsie Kotyk,
Executrix of the Estate of Harry Kotyk,
deceased, Elsie Kotyk, personally,
Attorney General of Canada and
Canadian Red Cross Society
Respondents on cross-appeal

CORAM: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner,
Gascon, Côté and Brown JJ.

REASONS FOR JUDGMENT: Cromwell J. (McLachlin C.J. and Abella, Moldaver,
(paras. 1 to 81) Gascon, Côté and Brown JJ. concurring)

CONCURRING REASONS: Wagner J. (Karakatsanis J. concurring)
(paras. 82 to 101)

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ENDEAN v. BRITISH COLUMBIA

Anita Endean, as representative plaintiff

Appellant

v.

**Her Majesty the Queen in Right of the Province of
British Columbia and Attorney General of Canada**

Respondents

- and -

**Dianna Louise Parsons, deceased,
by her Estate Administrator, William John Forsyth,
Michael Herbert Cruickshanks, David Tull,
Martin Henry Griffen, Anna Kardish, Elsie Kotyk,
Executrix of the Estate of Harry Kotyk, deceased,
Elsie Kotyk, personally, and Fund Counsel for Ontario**

Appellants

v.

**Her Majesty the Queen in Right of Ontario,
Attorney General of Canada,
Canadian Red Cross Society,
Her Majesty the Queen in Right of Alberta,
Her Majesty the Queen in Right of Saskatchewan,
Her Majesty the Queen in Right of Manitoba,
Her Majesty the Queen in Right of New Brunswick,
Her Majesty the Queen in Right of Prince Edward Island,
Her Majesty the Queen in Right of Nova Scotia,
Her Majesty the Queen in Right of Newfoundland and Labrador,
Government of the Northwest Territories,
Government of Nunavut and
Government of the Yukon Territory**

Respondents

and

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**Her Majesty the Queen in Right
of Ontario**

Appellant on cross-appeal

v.

**Dianna Louise Parsons, deceased,
by her Estate Administrator, William John Forsyth,
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Martin Henry Griffen, Anna Kardish, Elsie Kotyk,
Executrix of the Estate of Harry Kotyk,
deceased, and Elsie Kotyk, personally,
Attorney General of Canada and
Canadian Red Cross Society**

Respondents on cross-appeal

Indexed as: *Endean v. British Columbia*

2016 SCC 42

File Nos.: 35843, 36456.

2016: May 19; 2016: October 20.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner,
Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURTS OF APPEAL FOR BRITISH COLUMBIA AND ONTARIO

Courts — Jurisdiction — Class actions — Hearings outside superior court's home province — Superior court judges in three provinces supervising implementation of pan-national class action settlement — Motions relating to settlement brought before supervisory judges — Class counsel proposing that supervisory judges sit together in fourth province to hear motions — Parties agreeing that judges have discretionary power to sit together outside their home provinces, but disagreeing on source of power and conditions under which it may be exercised — Whether source of authority is statutory or an aspect of inherent powers of superior court — Whether video link to open courtroom in judges' home jurisdiction is condition for exercise of authority — Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 12 — Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 12.

The superior courts of British Columbia, Quebec and Ontario certified concurrent class action proceedings on behalf of individuals infected with hepatitis C by the Canadian blood supply between 1986 and 1990. The British Columbia and Quebec class actions included residents of those provinces, while the Ontario class action included all other persons in Canada. The parties reached a pan-Canadian settlement agreement in 1999, which assigned a supervisory role to the British Columbia, Quebec and Ontario superior courts and provided that decisions of those courts only took effect if they were materially identical.

In 2012, class counsel filed motions before the supervisory judges relating to the settlement agreement and proposed that the motions be heard by the three judges sitting together in one location. British Columbia, Quebec and Ontario opposed the proposal on the basis that the judges did not have the jurisdiction to conduct hearings outside their home province. Motions for directions were brought in each jurisdiction to resolve the objection. All three motions judges concluded that it was permissible for the superior court judges to sit in a province other than their respective home province with their judicial counterparts to hear the settlement agreement motions. Only Ontario and British Columbia appealed. The Ontario Court of Appeal agreed with the motions judge that the basis for the power to conduct a hearing outside the province was the superior court's inherent jurisdiction, but concluded that a video link was required between the out-of-province courtroom and an Ontario courtroom. The British Columbia Court of Appeal found that the common law prohibited superior court judges from sitting outside the province, but that it was permissible for a judge who was not physically present in the province to conduct a hearing taking place in the province by telephone, video conference or other communication medium.

The representative plaintiffs appeal to this Court and Ontario cross-appeals. The parties now agree 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.

However, there is no agreement concerning the source of this power and the conditions under which it may be exercised.

Held: The appeals should be allowed and the cross-appeal should be dismissed.

Per McLachlin C.J. and Abella, **Cromwell**, Moldaver, Gascon, Côté and Brown JJ.: In pan-national class action proceedings over which the superior court has subject-matter and personal jurisdiction, a judge of that court 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.

To determine the source of their discretionary power to sit outside their home jurisdiction, courts ought to look first to their statutory powers before considering their inherent jurisdiction. Given the broad and loosely defined nature of the inherent powers of superior courts, they should be exercised sparingly and with caution. In Ontario and British Columbia, superior court judges have the discretionary statutory power under s. 12 of the Ontario *Class Proceedings Act, 1992* and s. 12 of the British Columbia *Class Proceedings Act* (the "Acts") to sit outside their home provinces. A broad interpretation of these statutory powers, which confirms and reflects the inherent authority of judges to control procedure, helps to fulfil the purpose of class actions and to ensure that procedural innovations in aid of access to

justice will not be stymied by unduly technical or time-bound understandings of the scope of the class action judge's authority. There are no constitutional, statutory or common law limitations that restrict the scope of the broad and general language of these provisions and that prevent a judge from sitting outside his or her province for the purposes in issue in these cases.

Section 12 of the Acts should be understood as both confirming and reflecting the inherent jurisdiction of the superior courts to govern their own processes. Thus, in common law jurisdictions where comparable provisions do not exist, the analysis of the courts' inherent jurisdiction would lead to the same result, subject to any limitations on inherent jurisdiction there applicable, such as constraints imposed by the Constitution, by any statutory provisions or by common law rules. Absent some clear limitation, the inherent jurisdiction of the superior courts extends to permitting the court to hold the sort of hearing in issue here.

A video link between the out-of-province courtroom where the hearing takes place and a courtroom in the judge's home province is not a condition for a judge to be able to sit outside his or her home province. Neither the Acts nor the inherent jurisdiction of the court imposes such a requirement. The open court principle is not violated when a superior court judge exercises his or her discretion to sit outside his or her home province without a video link to the home jurisdiction.

The court's discretion to hold a hearing outside its territory must be exercised in the interests of the administration of justice. The court should also be

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.

Per Karakatsanis and Wagner JJ.: There is agreement that the superior court judges in these cases have discretionary statutory authority under s. 12 of the Acts to sit outside of their home provinces, and that a video link is not mandatory in an extraprovincial hearing.

The open court principle encompasses more than a singular requirement that justice not be carried out in secrecy. It fosters public confidence in the court system and furthers public understanding of the administration of justice. In addition, the open court principle protects the media's right to access courts and the circumstances necessary for the media to fulfil its role as a surrogate for the public. A judge sitting extraprovincially should be prepared to consider how to give effect to the educational and community centric aspects of the open court principle. In particular, courts should strive to make class actions procedure visible and understandable to class members and the community where the proceedings were initiated. While the court should not presumptively order that a video link back to the home provinces be set up where the court sits extraprovincially, members of the public, the media, or counsel can request that a video link or other means be used to

enhance the accessibility of the hearing. If such a request is made, or the judge considers it appropriate, a video link or other means to enhance accessibility should be ordered, subject to any countervailing considerations.

Cases Cited

By Cromwell J.

Referred to: *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572, 337 O.A.C. 315; *Fantl v. Transamerica Life Canada*, 2009 ONCA 377, 95 O.R. (3d) 767; *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130; *R. v. Rose*, [1998] 3 S.C.R. 262; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Re Southam Inc. and The Queen (No. 1)* (1983), 41 O.R. (2d) 113; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19; *Scott v. Scott*, [1913] A.C. 417; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326.

By Wagner J.

Referred to: *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442.

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Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 12.

Code of Civil Procedure, CQLR, c. C-25, art. 1045.

Code of Civil Procedure, CQLR, c. C-25.01, art. 11.

Constitution Act, 1867, s. 92(14).

Court of Queen's Bench Act, C.C.S.M., c. C280, s. 76(1).

Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 11(2), 15(1), 135.

Federal Courts Rules, SOR/98-106, r. 29.

Judicature Act, S.P.E.I. 2008, c. 20, s. 61.

Nova Scotia Civil Procedure Rules, r. 86.05(4).

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 1.08.

Rules of Court, N.B. Reg. 82-73, rr. 37.08, 38.08.

Supreme Court Act, R.S.B.C. 1996, c. 443, s. 3(1).

Supreme Court Civil Rules, B.C. Reg. 168/2009, rr. 22-1(5), 23-5(4).

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APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Tysoe and Goepel JJ.A.), 2014 BCCA 61, 59 B.C.L.R. (5th) 113, 352 B.C.A.C. 7, 601 W.A.C. 7, 49 C.P.C. (7th) 316, [2014] 5 W.W.R. 481, [2014] B.C.J. No. 254 (QL), 2014 CarswellBC 363 (WL Can.), setting aside a decision of Bauman C.J.B.C., 2013 BCSC 1074, [2013] B.C.J. No. 1304 (QL), 2013 CarswellBC 1828 (WL Can.). Appeal allowed.

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Juriansz, LaForme and Lauwers JJ.A.), 2015 ONCA 158, 125 O.R. (3d) 168, 331 O.A.C. 71, 381 D.L.R. (4th) 667, 64 C.P.C. (7th) 227, [2015] O.J. No. 1257 (QL), 2015 CarswellOnt 3336 (WL Can.), setting aside in part a decision of Winkler C.J.O., 2013 ONSC 3053, 363 D.L.R. (4th) 352, 43 C.P.C. (7th) 412, [2013] O.J. No. 2343 (QL), 2013 CarswellOnt 6659 (WL Can.). Appeal allowed and cross-appeal dismissed.

Sharon D. Matthews, Q.C., J. J. Camp, Q.C., and Michael Sobkin, for the appellant Anita Endean, as representative plaintiff.

Keith Evans and Katherine Webber, for the respondent Her Majesty The Queen in Right of the Province of British Columbia.

Robert J. Frater, Q.C., and Kathryn Hucal, for the respondent/respondent on cross-appeal the Attorney General of Canada.

Paul J. Pape and Shantona Chaudhury, for the appellants/respondents on cross-appeal Dianna Louise Parsons et al.

John E. Callaghan and Alex Zavaglia, for the appellant the Fund Counsel for Ontario.

Josh Hunter, Brent Kettles and Lynne McArdle, for the respondent/appellant on cross-appeal Her Majesty The Queen in Right of Ontario.

No one appeared for the respondent/respondent on cross-appeal the Canadian Red Cross Society.

Caroline Zayid, H. Michael Rosenberg and Adam Goldenberg, for the respondents Her Majesty The Queen in Right of Alberta et al.

Written submissions only by *Dana Pescarus, Carole Soucy and Manon Des Ormeaux*, for the intervener.

The judgment of McLachlin C.J. and Abella, Cromwell, Moldaver, Gascon, Côté and Brown JJ. was delivered by

CROMWELL J. —

I. Introduction and Issues

[1] Class actions are an important procedural tool designed to help improve access to justice. They are meant to provide a fair and expeditious resolution of the plaintiffs' claims and, to ensure that they do, class action judges have broad and flexible procedural powers. The limits of those powers are tested by these appeals.

[2] At issue is the power of superior court judges who are implementing a pan-national class action settlement to sit outside their home provinces to hear and decide a motion relating to it.

[3] While all parties agree that judges may do this under certain conditions, there is disagreement about two related issues:

1. What is the source of authority for the judge to sit outside his or her home jurisdiction: Is it statutory or an aspect of the inherent powers of a superior court?
2. Is a video link to an open courtroom in the judge's home jurisdiction a condition for the exercise of this authority?

[4] In my opinion, superior court judges in Ontario and British Columbia have the discretionary statutory power under s. 12 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, and s. 12 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "Acts"), to sit outside their home provinces, and a video link to an open courtroom in the judge's home jurisdiction is not required. A broad interpretation of these statutory powers, which confirms and reflects the inherent authority of judges to control procedure, helps to fulfil the purpose of class actions and to ensure that procedural innovations in aid of access to justice will not be stymied by unduly technical or time-bound understandings of the scope of the class action judge's authority.

II. Facts

[5] Class counsel thought that it would be more efficient and effective for the superior court judges charged with managing and implementing a pan-national settlement of the proceedings in three provinces to sit together in a fourth province to hear motions relating to the settlement. Class counsel's attempt to pursue this course of action gave rise to the issues now before the Court.

[6] By way of a brief background, the superior courts of British Columbia, Quebec and Ontario certified concurrent class action proceedings on behalf of individuals infected with hepatitis C by the Canadian blood supply between January 1, 1986 and July 1, 1990. The British Columbia and Quebec class actions included residents of those provinces, while the Ontario class action included all other persons in Canada who received infected blood during the relevant period.

[7] The parties reached a pan-Canadian settlement agreement in 1999 ("1986-1990 Hepatitis C Settlement Agreement"). The Government of Canada, as well as all provinces and territories, agreed to be bound by the settlement agreement once it received court approval. The governments of provinces and territories other than Quebec and British Columbia attorned to the jurisdiction of the Ontario courts. The supervisory judges of the class actions in Ontario, British Columbia and Quebec heard settlement motions and approved the settlement agreement.

[8] The settlement agreement assigned a supervisory role to the British Columbia, Quebec and Ontario superior courts: s. 10.01(1). However, the decisions of the courts under the agreement only took effect if all three courts made orders “without any material differences”: s. 10.01(2).

[9] Class counsel subsequently wanted to extend the deadline in the settlement agreement for filing first claims for benefits from the settlement funds. Therefore, in 2012, they filed motions before the three superior court supervisory judges for approval of a proposed protocol. The motions were brought under s. 10.01 of the settlement agreement and, as noted earlier, required orders “without any material differences” in all three courts.

[10] Class counsel proposed that the most efficient and effective procedure for adjudicating the motions would be to have them heard by the three supervisory superior court judges sitting together in one location so that they would hear the same submissions and be better positioned to issue orders without “material differences”. The supervisory judges were to adjudicate on a paper record.

[11] Each province opposed class counsel’s proposal on the basis that the superior court judges did not have the jurisdiction to conduct hearings outside their home province. Separate motions for directions were brought in each jurisdiction to resolve the objection. The motions raised the issue of whether the superior court judges could sit in a province other than their respective home province with their judicial counterparts to hear a motion concerning the settlement agreement.

III. Judicial History

[12] All three motions judges concluded that this was permissible. The decision of the Quebec motions judge, which was not appealed, is not at issue here. Even though I appreciate that, at the time, the Quebec *Code of Civil Procedure*, CQLR, c. C-25, included a provision comparable to s. 12 of the Acts at art. 1045, I make no comment concerning the law of Quebec in relation to the issues raised on appeal.

A. *Ontario*

[13] Winkler C.J.O., sitting as a judge of the Superior Court of Justice, concluded that a superior court judge in Ontario could preside over a hearing outside Ontario where the court had personal and subject-matter jurisdiction over the parties and the issues: 2013 ONSC 3053, 363 D.L.R. (4th) 352. He was of the view that there were no constitutional or statutory prohibitions preventing this. He found that the court's inherent jurisdiction to control its own process empowered the court to exercise its discretion to hold a hearing outside Ontario having regard to whether sitting outside the province promoted the interests of justice. Winkler C.J.O. concluded that such a discretion should be exercised in this case.

[14] In the Ontario Court of Appeal, the majority of the court concluded that the basis for the power to conduct a hearing outside the province was the superior court's inherent jurisdiction: 2015 ONCA 158, 125 O.R. (3d) 168, per LaForme J.A.,

Lauwers J.A. concurring on this point. However, a differently constituted majority also concluded that a video link was required between the out-of-province courtroom and an Ontario courtroom: Juriansz J.A., Lauwers J.A. concurring on this point.

B. *British Columbia*

[15] Bauman C.J.S.C. (as he then was) adopted the reasons of Winkler C.J.O., with additional comments on the law in British Columbia, and confirmed his authority under the court's inherent jurisdiction to sit in this matter outside British Columbia without the requirement of a video link: 2013 BCSC 1074. The British Columbia Court of Appeal, however, disagreed on both points: 2014 BCCA 61, 59 B.C.L.R. (5th) 113.

[16] The Court of Appeal found that the common law prohibited superior court judges from sitting outside British Columbia and that any change to that ancient rule should be made by the legislature rather than by the courts. However, the court was of the view that it was permissible for a judge, who was not physically present in the province, to conduct a hearing taking place in a British Columbia courtroom by telephone, video conference or other communication medium. The court concluded that such a hearing — which would involve the judge exercising his or her jurisdiction or authority in a hearing in British Columbia — would not offend the common law prohibition against judges conducting hearings outside British Columbia.

IV. Analysis

[17] As I noted at the outset, it is common ground that the superior court judges have personal and subject-matter jurisdiction over the parties and issues in these proceedings and that they 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. However, there is no agreement concerning the interrelated questions of what is the source of this power and the conditions under which it may be exercised; those two issues are the focus of these appeals.

A. *First Issue: The Source of the Court's Power to Sit Outside its Home Jurisdiction*

(1) Introduction

[18] The first issue relates to the source of the court's discretionary power to sit outside its home jurisdiction and, more specifically, whether it is a statutory power or one that derives from the inherent jurisdiction of the superior courts. This issue gives rise to a number of questions which I address in turn.

[19] I will turn first to the question of whether courts ought to look first to their statutory powers before considering their inherent jurisdiction. I conclude that they should.

[20] Next, I will consider whether s. 12 of the Acts in Ontario and British Columbia confer on the superior courts in those provinces the power to hold the sorts of hearings in issue here outside the territorial limits of the province. Given the broad and general language of these provisions, the answer depends on whether there are any constitutional, statutory or common law limitations which would have to be understood as restricting the scope of that broad and general language. I conclude that there are none and that the provisions grant the authority to conduct the hearings in issue.

[21] Finally, I will explain why, in my view, these provisions should be understood as both confirming and reflecting the inherent jurisdiction of the superior courts to govern their own processes. Thus, in common law jurisdictions where comparable provisions do not exist, the analysis of the courts' inherent jurisdiction would lead to the same result, subject to any limitations on inherent jurisdiction there applicable.

(2) Should the Courts Look First to Their Statutory Powers Before Turning to Consider Inherent Jurisdiction?

[22] The answer to this question is yes.

[23] The inherent powers of superior courts are central to the role of those courts, which form the backbone of our judicial system. Inherent jurisdiction derives from the very nature of the court as a superior court of law and may be defined as a

“reserve or fund of powers” or a “residual source of powers”, which a superior court “may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them”: I. H. Jacob, “The Inherent Jurisdiction of the Court” (1970), 23 *Curr. Legal Probs.* 23, at p. 51, cited with approval in, e.g., *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 20; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 24; and *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 29-31.

[24] The courts have recognized that, given the broad and loosely defined nature of these powers, they should be “exercised sparingly and with caution”: *Caron*, at para. 30. It follows that courts should first determine the scope of express grants of statutory powers before dipping into this important but murky pool of residual authority that forms their inherent jurisdiction: see, e.g., *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at paras. 63-68. As The Honourable Georgina Jackson and Janis Sarra write, “[i]t is only where broad statutory authority is unavailable that inherent jurisdiction needs to be considered as a possible judicial tool to utilize in the circumstances”: “Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and the Inherent Jurisdiction in Insolvency Matters”, in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 73.

(3) Are There Statutory Authorities in Ontario and British Columbia That Allow the Superior Court Judges to Sit Outside Their Provinces?

[25] The parties canvassed various potential sources of statutory power. In Ontario, we were referred to s. 12 of the *Class Proceedings Act, 1992* and rule 1.08 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. In British Columbia, we were referred to s. 12 of the *Class Proceedings Act* and rule 23-5(4) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. As in my view s. 12 of the respective Acts provides a statutory basis for holding these hearings, it is not necessary to consider the rules of court.

[26] It will be convenient to consider the very similar provisions of s. 12 of the two Acts together.

[27] Section 12 of the *Class Proceedings Act, 1992* in Ontario 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.

[28] Section 12 of the *Class Proceedings Act* in British Columbia reads:

12. The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

[29] The grammatical and ordinary sense of these provisions leaves little doubt that the legislatures intended judges in class proceedings to have, and to exercise, broad, discretionary powers to manage the proceedings to ensure their “fair and expeditious determination”.

[30] The object and scheme of the Acts also support this broad interpretation of s. 12 of the Acts. As this Court observed in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, class proceedings are intended to improve access to justice through the efficient and judicially economical disposition of litigation: paras. 27-28. A broad interpretation of s. 12 of the Acts furthers this object of class action legislation: *ibid*. A broad interpretation of these provisions is also faithful to this Court’s interpretation of the Ontario legislation in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, where it found that the Ontario *Class Proceedings Act, 1992* “should be construed generously”: para. 14. As this Court noted in that same case, “it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters”: para. 15.

[31] The legislative histories of the provisions also support the view that the provincial legislatures intended a broad role for both versions of s. 12 of the Acts.

[32] First, legislative debates of both the Ontario and British Columbia legislatures demonstrate the access to justice purpose of the Acts.¹ A broad interpretation of s. 12 furthers the access to justice objective of the Acts. Broad powers to manage class actions give judges the ability to take measures to ensure the fair and expeditious determination of issues arising in class proceedings, which furthers access to justice.

[33] Second, the legislative histories of these provisions also show that the legislatures in Ontario and British Columbia intended s. 12 of the Acts to be interpreted broadly.

[34] In Ontario, the Ontario Law Reform Commission's *Report on Class Actions* (1982) was instrumental in the subsequent adoption of class action legislation in the province.² In its report, the Commission was of the view that "court[s] should have a broad general power in order to enable [them] to respond to the many management problems that are likely to arise at the various stages of a class action": pp. 449-50. The Commission further observed that "[o]nly if judges are empowered expressly to assume an active role can this type of complex litigation be handled efficiently": p. 450. The Commission recommended language substantially similar to

¹ See, e.g., in Ontario, *Official Report of Debates (Hansard)*, 1st Sess., 35th Parl., November 18, 1991 (online), at 16:40, Mr. Winninger (the bill is an important contribution to access to justice), and at 16:50, Mr. Hanick (the bill provides access to justice); in British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, No. 20, 4th Sess., 35th Parl., June 6, 1995, at p. 15072, L. Stephens (the bill allows individuals to join together to seek justice and compensation), at p. 15075, Hon. P. Priddy (the bill increases access to justice for all British Columbians), and at p. 15076, B. Jones (the bill is about access to justice).

² Ontario, *Official Reports of Debates (Hansard)*, 2nd Sess., 34th Parl., June 12, 1990 (online), at 13:50, Hon. Mr. Scott observed that class action legislation builds on the work of the Ontario Law Reform Commission.

that which was eventually adopted in s. 12 of the Ontario *Class Proceedings Act, 1992: ibid.* Similarly, the Attorney General’s Advisory Committee on Class Action Reform also commented that s. 12 “describes the general power of the Court to control its own process and to develop procedures as needed from case to case”: *Report of the Attorney General’s Advisory Committee on Class Action Reform* (1990), at p. 37.

[35] In British Columbia, the Ministry of the Attorney General drafted a consultation document referred to in legislative debates.³ In that document, in relation to a provision similar to s. 12, the Ministry observed that “[c]ourts take a much more active role in managing the conduct of class actions than they do in ordinary actions” and observed that the Ontario statute also includes a “broad general management provision”: *Consultation Document: Class Action Legislation for British Columbia* (1994), at p. 5.

[36] Section 12 was also briefly discussed in legislative debates in British Columbia before the passing of the bill, when a concern was raised about the provision’s open-ended language.⁴ In response to this concern, it was explained that giving “this authority to the court [in s. 12] is the best way to ensure that the

³ British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, June 6, 1995, at p. 15070, J. Dalton.

⁴ British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, No. 23, 4th Sess., 35th Parl., June 8, 1995, at p. 15231, J. Dalton.

protection is afforded to people who aren't there or represented directly in the action".⁵

[37] The Uniform Law Conference of Canada ("ULCC") *Uniform Class Proceedings Act* (1996 proceedings) (online), which provides model legislation recommended for adoption across Canadian jurisdictions, is also instructive. The ULCC legislation contained language very similar to that in s. 12 of the Ontario *Class Proceedings Act, 1992* and identical to that in s. 12 of the British Columbia *Class Proceedings Act*. The commentary on this provision observed that "[s]ection 12 grants the court broad discretion in making orders": p. 8-7. Further, it states that "[t]his broad discretion is thought necessary as the court must protect not only the interests of the representative plaintiff and the defendant but also the interests of absent class members": *ibid.*

[38] A broad interpretation of s. 12 is also consistent with the approach taken by other courts to the interpretation and application of class action legislation. For example, in *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572, 337 O.A.C. 315, Strathy C.J.O. observed that while s. 12 is procedural and does not allow a judge to override other provisions of the *Class Proceedings Act, 1992*, the provision nonetheless entitles case management judges in class actions "to seek and impose creative solutions to the efficient determination of the issues": para. 70. In *Fantl v. Transamerica Life Canada*, 2009 ONCA 377, 95

⁵ British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, June 8, 1995, at p. 15232, Hon. C. Gabelmann.

O.R. (3d) 767, Winkler C.J.O. specifically observed that s. 12 of the *Class Proceedings Act, 1992* provides the court with a “broad, discretionary jurisdiction”: para. 42. Similarly, in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (S.C.J.), Winkler J. (as he then was) noted that, in including s. 12 in the *Class Proceedings Act, 1992*, “the legislature has given the court a flexible tool for adapting procedures on a case specific basis”: para. 41.

[39] In conclusion, the legislatures intended courts in Ontario and British Columbia to have wide powers to make orders respecting the conduct of class proceedings. Thus, the appropriate starting point for the analysis in this appeal is s. 12 of the Acts, rather than the superior court’s inherent power over procedure. The broad powers appear on their face to authorize the sort of extraterritorial hearing which class counsel sought in these cases.

[40] While the legislation must be interpreted purposively and remedially, its broad and general language invites consideration of whether there are any clear common law, statutory or constitutional barriers to the court sitting outside its territorial boundaries. If there were, then the broad language of the provisions would have to be read as subject to those limitations.

- (4) Are There Common Law, Constitutional or Statutory Rules That Prevent Judges From Sitting Outside Their Province in These Circumstances?

[41] A key question, therefore, is whether there are any rules or principles of common, constitutional or statutory law that prevent a judge from sitting outside his or her province for the purposes in issue here. In my view, there are none.

[42] I underline that the power claimed for the superior courts in this case is limited. We are concerned here with cases in which the courts have personal and subject-matter jurisdiction. There is no claim that the judges sitting outside their home jurisdiction have any authority to use their coercive powers outside their province. There is no suggestion that holding an out-of-province hearing would be contrary to the law of the jurisdiction in which the hearing would be held. Further, this case involves litigation wholly within Canada.

(a) *Common Law and Constitutional Barriers*

[43] The British Columbia Court of Appeal found that English common law, which, in its view, prohibited judges in England from sitting outside England, was received into British Columbia as of November 1858 and prevented British Columbia judges from sitting outside their province. The court also found that using inherent jurisdiction to support out-of-province hearings would be inconsistent with and contrary to the common law and ancient usage. Further, while the common law was subject to modification, the Court of Appeal concluded that any major revisions of the common law rule prohibiting judges from sitting outside their territorial jurisdiction was better left to the legislature.

[44] The British Columbia appellant, Anita Endean, as representative plaintiff, submits that the Court of Appeal was wrong to find a common law limit on the court's inherent power. Ms. Endean submits that this old English rule was not received into British Columbia law and, in any event, should not be followed.

[45] When one looks at the common law relating to courts sitting outside their jurisdiction, one finds that the jurisprudence is sparse and the precise ambit of any limitation is unclear. However, I accept that there is, as V. Black and S. G. A. Pitel have put it, a "deep-seated sense" in the common law that courts conduct their business within their geographical boundaries: "Out of Bounds: Can a Court Sit Outside Its Home Jurisdiction?" (2013), 41 *Adv. Q.* 503, at p. 503; see also pp. 509-510.

[46] A number of considerations support this "deep-seated sense", including concerns about the sovereignty of the jurisdiction in which the hearing is held and concerns about the territorial limits of the coercive powers of the judge conducting the hearing. But the type of court hearing in issue in these cases does not give rise to the concerns which support any broader principle against out-of-province sittings. In particular, judges in cases like these will not be called on to exercise any coercive powers, as they would be adjudicating on a paper record. And there is no suggestion that the proposed hearing would be inconsistent with the law of the place in which it would be held. There is thus no threat either to the authority or dignity of the superior court or to the sovereignty of the jurisdiction in which the hearing would be held.

[47] Moreover, it is open to the Court to modify the common law if necessary to make it clear that it does not preclude such hearings.

[48] Permitting these hearings does not give rise to the concerns about sovereignty, dignity of the courts or extraterritorial exercise of coercive powers. It is also a practical alternative that serves the underlying purposes of class proceedings. To take too dogmatic a stand on this point, as Winkler C.J.O. noted, risks leaving the common law unsuited “to modern realities of increasingly complex litigation involving parties and subject matters that transcend provincial borders”: para. 25.

[49] Further, the narrow circumstances of these appeals do not raise a concern that the judiciary is trenching on powers reserved to the legislature. What is proposed here is not the sort of major procedural innovation that arguably ought to be left to the legislature. On the contrary, the legislatures have, through s. 12 of the Acts, encouraged courts to make full use of their power to regulate the process in the interests of making it fair and expeditious. Allowing courts to hold the type of hearing in issue here furthers the legislative intention evident in this scheme; far from usurping legislative authority, this approach uses the authority broadly conferred by the legislature to further its objectives.

[50] The Attorney General of Ontario suggests that any interpretation of s. 12 of the *Class Proceedings Act, 1992* must respect the “presumption against extraterritoriality” (R.F., at para. 53), an interpretative presumption that “[t]he legislature is presumed to intend the territorial limits of its jurisdiction to coincide

with that of the statute's operation" and "[u]nless implicitly or explicitly provided otherwise, the legislature is presumed to enact for persons, property, juridical acts and events within the territorial boundaries of its jurisdiction": P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 212. The Attorney General notes that such a concern would arise if s. 12 were interpreted to allow an order to have a true extraterritorial effect, such as a coercive order taking effect outside Ontario or British Columbia.

[51] I do not rely on s. 12 of the Acts as providing for the exercise of coercive powers outside the court's home province. Interpreting s. 12 as allowing the type of hearing at issue in these cases therefore does not engage the presumption against extraterritoriality since this application of the provisions does not give rise to any impermissible extraterritorial effect.

[52] Finally, in my opinion, no constitutional impediment has been identified to the limited authority of a superior court to sit outside its jurisdiction that we are addressing in this case.

(b) *Statutory Barriers*

[53] There are also no statutory barriers in these circumstances to the broad interpretation of s. 12 of the Acts described in these reasons.

[54] Section 11(2) of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, reads:

(2) The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario.

[55] Section 3(1) of the British Columbia *Supreme Court Act*, R.S.B.C. 1996, c. 443, provides:

3(1) The Chief Justice, Associate Chief Justice and judges have all the powers, rights, incidents, privileges and immunities of a judge of a superior court of record, and all other powers, rights, incidents, privileges and immunities that on March 29, 1870, were vested in the Chief Justice and the other justices of the court.

[56] Section 11(2) of the *Courts of Justice Act* should be read as inclusive, not exclusive. It does not explicitly provide that the powers of the court are limited to those of the courts of common law and equity in England and Ontario. In *R. v. Rose*, [1998] 3 S.C.R. 262, this Court held that the inherent jurisdiction of superior courts can only be removed by “clear and precise statutory language”: para. 133. The language of s. 11(2) does not meet this threshold and, I would add, does not take away from the breadth of the language in s. 12 of the *Class Proceedings Act, 1992*. Further, the broader language of s. 3(1) of the *Supreme Court Act* clearly provides that the powers of the superior court judges in British Columbia are not limited to those that existed in 1870.

[57] In addition, the language of s. 15(1) of the *Courts of Justice Act* does not prevent judges in Ontario from sitting outside the province. Section 15(1) provides that the Chief Justice of the Superior Court of Justice “shall assign every judge of the Superior Court of Justice to a region and may re-assign a judge from one region to another”. This provision, of course, does not confine the authority of the judge to his or her assigned region. Like s. 11(2) of the *Courts of Justice Act*, this provision is not sufficiently express to preclude judges from sitting outside the province under s. 12 of the *Class Proceedings Act, 1992*. As the Ontario Court of Appeal concluded, this provision “does not speak to where a superior court judge may conduct a hearing”: para. 135. Furthermore, a judge sitting outside a province to hear a motion in relation to a pan-national settlement agreement would still be assigned to a specific region under s. 15(1).

(5) Conclusion

[58] In pan-national class action proceedings over which the superior court has subject-matter and personal jurisdiction, a judge of that court has the discretion to hold a hearing outside his or her territory in conjunction with other judges managing related class actions. This is 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. This discretion must, of course, be exercised in the interests of the administration of justice. In Ontario and

British Columbia, this discretion flows from s. 12 of those provinces' respective Acts in relation to motions properly falling within that section.

(6) A Word About Inherent Jurisdiction

[59] Not all Canadian common law jurisdictions have provisions comparable to s. 12 of the Acts. The question of whether these hearings could be held pursuant to the superior courts' inherent jurisdiction was fully argued and I therefore think it useful to comment briefly on the question.

[60] I mentioned earlier that the superior courts' inherent jurisdiction is a residual source of power which a superior court may draw on in order to ensure due process, prevent vexation and to do justice according to law between the parties. One aspect of these inherent powers is the power to regulate the court's process and proceedings: Jacob, at pp. 25 and 32-40. As Master Jacob put it, "it is difficult to set the limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process, for these limits are coincident with the needs of the court to fulfil its judicial functions in the administration of justice": p. 33. In short, inherent jurisdiction, among other things, empowers a superior court to regulate its proceedings in a way that secures convenience, expeditiousness and efficiency in the administration of justice.

[61] The breadth and generality of s. 12 of the Acts has been understood as being largely reflective of the courts' inherent powers to control its processes in the

interests of justice. The Ontario Law Reform Commission in its report observed that “the general management power” provisions it recommended, similar to what is now s. 12, might be seen as “unnecessary” in light of the inherent jurisdiction of the court but that the “inclusion in the proposed *Class Actions Act* of an express general management power would encourage Ontario courts to resort to this power to ensure the proper functioning of class actions”: p. 451. In a similar vein, the Alberta Law Reform Institute commented on s. 12 of the ULCC’s *Uniform Class Proceedings Act*, similarly worded to the provisions in issue here, noting that “[t]he court probably already enjoys the general power” described in that provision: Final Report No. 85, *Class Actions* (2000), at p. 111.

[62] Of course, these inherent powers may be limited. The exercise of inherent jurisdiction is subject to the constraints of the Constitution, as well as to any statutory provisions and common law rules that might limit the court’s ability to exercise that power: see, e.g., *Criminal Lawyers’ Association*, at paras. 22-24; *Caron*, at para. 32; *Halsbury’s Laws of England* (5th ed. 2010), vol. 24, at p. 328-29. But absent some clear limitation, my view is that the inherent jurisdiction of the superior courts extends to permitting the court to hold the sort of hearing in issue here. As I have explained in my analysis of s. 12 of the Acts, there is no constitutional or common law limitation and no statutory limitation in either Ontario or British Columbia. It follows that unless there is a statutory limitation in the jurisdictions which do not have provisions comparable to s. 12 (a point on which I do not comment), the superior courts there can hold hearings of this nature.

B. *Second Issue: Is a Video Link Required?*

[63] In my opinion, and with great respect to the contrary view of the appellate courts, a video link between the out-of-province courtroom where the hearing takes place and a courtroom in the judge's home province is not a condition for a judge to be able to sit outside his or her home province. Neither is it necessarily required by the open court principle.

[64] First, neither the Acts nor the inherent jurisdiction of the court imposes this requirement in order for judges to sit outside their home province. While a superior court judge will likely find it preferable to use a video link in most situations, the court has the jurisdiction to sit outside its province separate and apart from the technological means it decides to use.

[65] Next, it is submitted that the open court principle is violated when a superior court judge exercises his or her discretion to sit outside his or her province without a video link to the home jurisdiction. I reject this submission. If holding the hearing in the home jurisdiction without a video broadcast does not violate the open court principle, the fact that the hearing is being held in a publicly accessible location outside the province does not necessarily do so either. In other words, the fact that the hearing is being held outside the court's territory does not, on its own, give rise to a requirement that there be a video link between the territory and the hearing.

[66] The open court principle embodies “[t]he importance of ensuring that justice be done openly”, which is “one of the hallmarks of a democratic society”: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (“*C.B.C. v. New Brunswick*”), at para. 22, quoting *Re Southam Inc. and The Queen (No. 1)* (1983), 41 O. R. (2d) 113 (C.A.), at p. 119; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at para. 23; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, at para. 31; and *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19, at para. 1. As this Court has previously remarked, “[p]ublicity is the very soul of justice”: *C.B.C. v. New Brunswick*, at para. 21, quoting *Scott v. Scott*, [1913] A.C. 417 (H.L.), at p. 477; *Vancouver Sun (Re)*, at para. 24; *Named Person*, at para. 31. And, as Wilson J. summarized in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1361, the open court principle is rooted in the need:

(1) to maintain an effective evidentiary process; (2) to ensure a judiciary and juries that behave fairly and that are sensitive to the values espoused by the society; (3) to promote a shared sense that our courts operate with integrity and dispense justice; and (4) to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts affects them.

[67] There is nothing about the conduct of the proceedings or the decision by the supervisory judges to sit together outside their respective home provinces that undermines accessibility to the courtroom or impedes any of the identified purposes of the open court principle.

[68] For example, there is no issue here about the media and the general public being prevented from entering the courtroom and observing or reporting on the proceedings. Nor are these appeals concerned with balancing the open court principle against other interests such as the privacy of litigants or whether the court can conduct an *in camera* hearing. Further, these appeals do not raise broader questions of the acceptable limits on the use of electronic communication mediums in the courtroom.

[69] In short, the notion of accessibility protected by the open court principle is not typically concerned with whether a hearing is held within the boundaries of the province in which the matter originated. The location of the hearing in a publicly accessible place outside the court's territorial jurisdiction does not, on its own, create a requirement for a video link to protect the open court principle.

[70] For the reasons given by LaForme J.A. in the Ontario Court of Appeal at paras. 179-82, I do not accept that s. 135 of the *Courts of Justice Act*, which requires (subject to exceptions) that "all court hearings shall be open to the public", means that Ontario hearings held outside the province must be conducted so that there is a video link to an open courtroom in Ontario. In my respectful view, "open to the public" does not mean "open to the public physically present in Ontario".

C. *Exercising the Discretion*

[71] On the assumption that the judges had the authority to hold the proposed sitting, there was little controversy on appeal that their discretion to do so was reasonably exercised in the circumstances. However, a few comments may be helpful for future cases.

[72] The British Columbia appellant proposes a framework to guide the exercise of the discretion to convene a hearing outside the court's home jurisdiction. Several parties agree that this framework is helpful. With some modifications, so do I. When faced with the issue of whether to decide to sit outside his or her home province, a superior court judge should keep in mind the broad considerations set out below. The underlying assumption is that the judge would have subject-matter and personal jurisdiction over the matter if the hearing were held within his or her home jurisdiction.

[73] First, the judge should consider whether sitting in a province other than his or her own will impinge or could be seen as impinging on the sovereignty of that province, creating impermissible extraterritorial effects in that province or preventing the court from competently presiding over the hearing.

[74] Second, the judge should weigh the benefits and costs of the proposed out-of-province proceeding. This could include consideration of the nature of the proceeding, issues of fairness to the parties, the ability and willingness of the home province media to fulfil its role of surrogate for the public in that province, and the broader interests of the administration of justice. Thus, factors to weigh could

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 the latter 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, among others.

[75] Third, the judge should consider what terms, if any, should be imposed. Only by way of example, this may include considering conditions as to the payment of extraordinary costs occasioned by having the hearing in the proposed location and whether the interests of justice would be best served by requiring a video link back to the judge's home jurisdiction. While such a link is not required, a judge should take into account the effect that the presence or absence of such a link has on open justice and may order a link where appropriate. The judge should have good reason to refuse to order a link when requested.

[76] Other factors and concerns may arise in the exercise of this discretion in the circumstances of another case; however, this framework should provide superior court judges with some general guidance as to how to proceed.

D. *Other Issues*

[77] The Attorney General of Ontario raises two additional points by way of cross-appeal that I address very briefly.

[78] The first is whether the authority of an Ontario superior court judge to sit outside Ontario is limited to cases in which the judge will not exercise any of the court's "coercive" powers. Those powers include the power to direct a witness to appear, to answer questions and to make orders controlling behaviour during a court hearing. The appeals before the Court relate to cases in which no such coercive powers will be exercised and so I prefer to confine my analysis to the type of situation that we have before us.

[79] The second point is that Ontario superior court judges sitting outside Ontario must comply with legislation imposing limits on their ability to participate in the hearing from a location outside Ontario. It is of course a given that all judges must comply with validly enacted and constitutional laws. Nothing more need be said about this second point, in my view.

[80] I would dismiss the cross-appeal by the Attorney General of Ontario because it is not necessary to address either of the points raised.

V. Conclusion

[81] In the Endean appeal, I would allow the appeal, set aside the order of the Court of Appeal and restore the order of Bauman C.J.S.C., dated June 19, 2013. In the Parsons appeal, I would allow the appeal, set aside para. 1 of the order of the Court of Appeal and restore para. 1 of the order of Winkler C.J.O., dated June 28,

2013. The appellants in both appeals and in the cross-appeal requested that no costs be awarded and I would award none.

The reasons of Karakatsanis and Wagner JJ. were delivered by

WAGNER J. —

[82] I have read the reasons of my colleague Justice Cromwell, and I agree that the superior court judges in these cases have discretionary statutory authority under s. 12 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, in Ontario, and s. 12 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, in British Columbia, to sit outside of their home provinces. I also agree that a video link is not mandatory in an extraprovincial hearing. However, I would like to add the following observations about the open court principle and how it is affected when a court exercises discretion to sit extraprovincially.

I. The Open Court Principle

[83] The open court principle encompasses more than a singular requirement that justice not be carried out in secrecy. The open court principle is multifaceted: *Canadian Broadcasting Corp. v. Canada (Attorney General)*, **2011 SCC 2**, [2011] 1 S.C.R. 19 (“*C.B.C. v. Canada*”), **at para. 30**. It must be understood as an “ensemble of practices” and principles that are called upon in various contexts to serve our

society's democratic ideals, one of which being the public's "right to know the law and to understand its application": E. Cunliffe, "Open Justice: Concepts and Judicial Approaches" (2012), 40 *Fed. L. Rev.* 385, at pp. 388-89.

[84] The open court principle fosters public confidence in the court system and furthers public understanding of the administration of justice: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 ("*C.B.C. v. New Brunswick*"), at para. 22; *C.B.C. v. Canada*, **at para. 28**. That is why in "any truly democratic society, the courts are expected to be open, and information is expected to be available to the public": *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, at para. 1. It is only through openness that the public can learn about court processes and be "convinced of the probity of the actions of judges": Hon. M. Warren, "Open Justice in the Technological Age" (2014), 40 *Monash U.L. Rev.* 45, at p. 47.

[85] Thus, the open court principle not only prevents unnecessary secrecy; it includes an educational aspect and emboldens public confidence in the integrity of court processes: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1360-61. While historically, the open court principle has often been met by the ability of members of the public to enter the hearing room, as Justice LaForme noted, sometimes litigants or the public may "have to travel considerable distances to attend a court hearing" even within their home province: 2015 ONCA 158, 125 O.R. (3d) 168, at para. 179.

[86] I agree with Justice Cromwell that these appeals do not raise broader questions about the use of electronic communication mediums in the courtroom. I note, however, that modern realities of communication and information dissemination may permit a more flexible understanding of what is required to ensure courtrooms are adequately accessible to the public. Information about what happens inside a courtroom may sometimes be shared through a variety of platforms.

[87] Thus, where a court is sitting outside its home province, the open court principle does not always mandate a video link to that province. It may be, however, that a video link will be an effective means to provide the public of that province an opportunity to access the proceedings. Whether one is required will depend on the circumstances at hand.

[88] It cannot be ignored that Canadian communities are organized provincially through our constitutional structure. The geographical reality is that Canadian provinces are vast in territory and therefore, that hearings held inside a province may not be geographically accessible to all of the province's residents. However, the fact that such a situation does not violate the open court principle does not permit my colleague's conclusion that extraprovincial hearings do not limit the openness of a court proceeding. To accept this conclusion would ignore a central tenet of Canada's constitutional framework, namely, that justice is administered provincially (*Constitution Act, 1867*, s. 92(14)). The division of powers reinforces the

relationship between local communities and their access to court proceedings through the provincial superior courts that serve them.

[89] Several provincial legislatures have codified their desire to protect public access to court proceedings within their own province. In Ontario, s. 135(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides that “all court hearings shall be open to the public”.⁶ I agree with Justice Juriansz that the term “public” refers to the Ontario public and provides a *prima facie* right to Ontarians to attend all hearings of Ontario courts: Ontario Court of Appeal, at para. 215.

[90] Similarly, in Quebec, art. 11 of the *Code of Civil Procedure*, CQLR, c. C-25.01, requires that “[a]nyone may attend court hearings wherever they are held”. This guarantee is hollow if a Quebec citizen must travel across provincial borders to exercise this right. Nova Scotia’s rules expressly provide that extraprovincial hearings conducted with a judge of the Supreme Court of Nova Scotia must be “transmitted to a courtroom in Nova Scotia” to ensure that the hearing is “accessible by the public in Nova Scotia”: *Nova Scotia Civil Procedure Rules*, r. 86.05(4).

[91] The open court principle has always been tied to local communities and the provincial courts that serve them. As Justice Wilson explained, the educational

⁶ See also *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 22-1(5) (“[e]xcept in cases of urgency, a chambers proceeding must be heard in a place open to the public”); New Brunswick *Rules of Court*, N.B. Reg. 82-73, rr. 37.08 and 38.08 (motions and applications “shall be open to the public”); *Judicature Act*, S.P.E.I. 2008, c. 20, s. 61 (“all court hearings shall be open to the public”); *Federal Courts Rules*, SOR/98-106, s. 29 (hearings “shall be open and accessible to the public”); *The Court of Queen’s Bench Act*, C.C.S.M., c. C280, s. 76(1) (“a hearing held by the court or a judge is open to the public”).

aspect of the open court process provides “an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts affects them”: *Edmonton Journal*, at p. 1361 (emphasis added); *Vancouver Sun*, at paras. 86-87. In fact, through courts and discussions about their processes, “private persons come together to form a public”: J. Resnik, “The Democracy in Courts: Jeremy Bentham, ‘Publicity’, and the Privatization of Process in the Twenty-First Century” (2013), 10 *NoFo* 77, at p. 101.

[92] My concerns about a potential lack of openness are heightened in the realm of class actions. Access to justice includes procedural access to justice, which is primarily concerned with ensuring that claimants have recourse to a fair process for the resolution of their claims: *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at paras. 24 and 55. While the fairness of the process is not at issue in these cases, procedural access to justice must also include careful attention to every decision-making step in the process of resolving a claim: R. A. Macdonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions”, in J. Bass, W.A. Bogart and F. H. Zemans, eds., *Access to Justice for a New Century — The Way Forward* (2005), 19, at p. 105. A process that is efficient and expeditious, but is “a mystery to those who participate in it . . . is not a process that enhances access to justice”: *ibid.*

[93] Courts should strive to make class actions procedure visible and understandable to class members and the community where the proceedings were initiated.

II. The Role of the Media

[94] As “surrogates for the public”, the media plays a central role in ensuring that the public can access information about the courts: *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), at p. 573; *Edmonton Journal*, at p. 1360. Open access to information about our courts is the public’s right, but “[p]ractically speaking, this information can only be obtained from the newspapers or other media”: *Edmonton Journal*, at p. 1340. While the decision to sit outside of the judges’ home provinces does not *preclude* the media from attending and reporting on these cases, this does not mean that the decision does not *affect* the media’s ability to report on these cases.

[95] The open court principle protects not only the media’s right to access courts, but the circumstances necessary for the media to fulfil its role as a surrogate for the public. Where a hearing is held extraprovincially, it is more difficult for the media to relay information about the hearing back to the communities they serve. If journalists must travel outside of their province at their own expense to report on matters relevant to their local community, the means by which the media can act on its “right to gather this information” are more limited: *C.B.C. v. New Brunswick*, at para. 24.

[96] Our Court has recognized that “the presence of journalists in courthouses is essential” to ensure that the public’s right to information about court proceedings is not illusory: *C.B.C. v. Canada*, at **para. 45**. Yet, as the British Columbia Court of Appeal noted, the ease and ability of the local media to monitor such proceedings

could be affected if judges are allowed to conduct hearings outside their home province without a video link to a courtroom in that province: 2014 BCCA 61, 59 B.C.L.R. (5th) 113, at para. 69.

[97] The Ontario appellants argue that “‘out of province’ does not equal *in camera*”. This is not disputed. But the decision to sit out of province may be equivalent to an *in camera* hearing if there is no one from the province to report on the hearing and no reasonable way for residents of the province to observe the hearing without substantial cost.

III. Application

[98] A video link was not necessary in the particular circumstances of these cases. One was not requested by class counsel, the public, or the media.

[99] While a video link is not mandatory in an extraprovincial hearing, a judge sitting extraprovincially should be prepared to consider how to give effect to the educational and community-centric aspects of the open court principle. The absence of a request for a video link does not mean that one should not be provided where the judge considers it appropriate. The open court principle operates to protect the public’s interest in knowing what transpires in the courtroom.

[100] I readily acknowledge that the open court principle is not unassailable. The open court principle may be limited where countervailing values are engaged:

Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442. For example, the open court principle “must yield to circumstances that would render the proper administration of justice unworkable”: *C.B.C. v. New Brunswick*, at para. 29.

[101] While the court should not presumptively order that a video link back to the home provinces be set up where the court sits extraprovincially, members of the public, the media, or counsel can request that a video link or other means be used to enhance the accessibility of the hearing. If such a request is made and subject to any countervailing considerations, such a request should generally be granted.

Appeals allowed and cross-appeal dismissed.

Solicitors for the appellant Anita Endean, as representative plaintiff: Camp Fiorante Matthews Mogerma, Vancouver; Michael Sobkin, Ottawa.

Solicitor for the respondent Her Majesty the Queen in Right of the Province of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitor for the respondent/respondent on cross-appeal the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitors for the appellants/respondents on cross-appeal Dianna Louise Parsons et al.: Pape Barristers, Toronto.

Solicitors for the appellant the Fund Counsel for Ontario: Gowling WLG (Canada) Inc., Toronto.

Solicitor for the respondent/appellant on cross-appeal Her Majesty the Queen in Right of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the respondents Her Majesty the Queen in Right of Alberta et al.: McCarthy Tétrault, Toronto.

Solicitor for the intervener: Attorney General of Quebec, Québec.