Supreme Court of Canada Allows Courts to Sit Extraterritorially

In *Endean v British Columbia*, 2016 SCC 42 (available here) the Supreme Court of Canada has held that "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" (quotation from the court's summary/headnote).

The qualifications on the holding are important, since some of the earlier lower court decisions had been more expansive in asserting the inherent power of the superior court to sit outside the province (for example beyond the class proceedings context). I am concerned about any extraterritorial hearings that are not expressly authorized by specific statutory provisions, but I do appreciate the utility (from an efficiency perspective) of the court's conclusion in the particular context of this dispute. It remains to be seen if attempts will be made to broaden this holding to other contexts.

The court has also held that "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 [class proceeding statutes] 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" (quotation from the court's summary/headnote).

This aspect of the decision concerns me, since my view is that the open court principle requires that members of the Ontario public and the media can see the proceedings of an Ontario court in an Ontario courtroom. It is a hollow claim that they can fly to another province to watch them there. The separate concurring decision appreciates this aspect of the case more than the majority decision, though it too stops short of requiring a video link. In its view, "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" (quotation from the court's summary/headnote).