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New Frontiers for Canadian Judges

Litigation and Dispute Resolution

In Canada, many businesses operate across multiple provinces and have to be sensitive to the differing legal requirements across provincial borders. By contrast, the superior courts are by their nature limited to one province, even as the facts they adjudicate often have interprovincial or transnational aspects.

A recent Court of Appeal for Ontario decision considers if the courts' traditional limitation on sitting outside their province of jurisdiction should yield to the practicalities of an increasingly interconnected world. The Court of Appeal grounded the limitation in the principle that court proceedings should be open to the public, and determined that modern technology could be used to hear a matter in another province while ensuring public access in Ontario to the proceedings.

Parsons v Her Majesty the Queen in right of Ontario

The *Parsons* case arose from the tainted blood scandal in the early 1990s. A pan-Canadian settlement of separate Ontario, Quebec and British Columbia proceedings had been reached, and an issue arose regarding late claims to the settlement fund. Class counsel brought a motion for directions on the question of whether judges from each province, who would each have to decide the same issue, could sit together in Alberta to hear argument. The motions judge determined that

judges' inherent power to control their own procedure allowed them to sit outside the province. The Crown appealed.

By the hearing of the appeal, the issue at bar had become moot, as separate hearings had been held and three judgments issued, but the parties asked the Court of Appeal to nonetheless render a decision for future guidance and the court obliged.

The majority held that, when dealing with a motion that could be decided on a paper record without witnesses testifying in person at the hearing, Ontario judges could sit outside the province as long as there was a video link to a public courtroom in Ontario. The Court of Appeal limited its decision to cases where the court's coercive powers, such as compelling witnesses, would not be needed.

The open court principle

The Court of Appeal focused its consideration of whether an Ontario judge could convene a hearing outside the province on the open court principle. Justice LaForme, with whom the other judges agreed on this issue, emphasized that open courts are more likely to be independent and impartial; they allow Canadians to observe that justice is administered according to the rule of law, in a nonarbitrary manner. The open court principle is also linked to the freedom of expression, as access for the press to attend and report on court proceedings is "core to the constitutional nature of the open court principle."

A majority of the Court of Appeal held that the open court principle was not satisfied solely by a public hearing in another province. Justice Juriansz, writing for the majority on this issue, noted that under Ontario's *Courts of Justice Act*, court hearings shall be open to the public, unless there is a possibility of serious harm or injustice to any person. Since the *Courts of Justice Act* is an Ontario statute, the majority reasoned its intent is to guarantee that the *Ontario* public has the right to attend all court hearings of *Ontario courts*. For this right to be meaningful, the Ontario public must be able to attend the hearing within the province. A video link that would show the proceedings in an Ontario courtroom would be sufficient to achieve this objective.

Adapting to modern commercial and societal realities

Parsons shows the court looking for a pragmatic solution to reconcile transparency and accessibility, the jurisdictional organization of Canada's legal system, and the realities of cross-country litigation. As Justice LaForme wrote, "There is a need to shape common law rules in a way that accommodates modern commercial and societal realities."

The vast majority of motions are like *Parsons* in that they do not involve witnesses testifying in person, but there is rarely a need to hear a motion outside the province. Class actions are one area where parallel proceedings in multiple jurisdictions are common. Another area is insolvency, which has seen innovation in procedures spanning national borders using cross-border insolvency protocols. *Parsons* can be compared to the recent *Nortel* proceedings, where videoconferencing technology was used to link proceedings in Canada and the United States, although each judge sat in a courtroom in his own jurisdiction.

Whether *Parsons* could be extended to permit a hearing outside Canada is not clear. The court in *Parsons* observed that the hearing arose in the context of a pan-Canadian class action settlement to which all of the provinces, including Alberta where the hearing would be held, were signatory, and

that an extra-provincial hearing did not engage the issue of sovereignty among states. However, the precedent of international judicial cooperation in the insolvency context suggests that, in the appropriate case, national borders may not preclude a practical solution.

Parsons is the latest example of a court thinking creatively about its processes in this interconnected world, and it will certainly not be the last innovation in this area. As commerce and communications become increasingly borderless, courts are having to adapt and reconsider the traditional limitations of the court process.

Erik Penz and Guy White are members of Norton Rose Fulbright's transnational litigation team. The authors wish to thank Annie Tayyab, articling student, for her help in preparing this legal update.

Further Reading

1 2015 ONCA 158 [Parsons].

2 Ibid at para 141 per LaForme JA.

3 RSO 1990, c C-43.

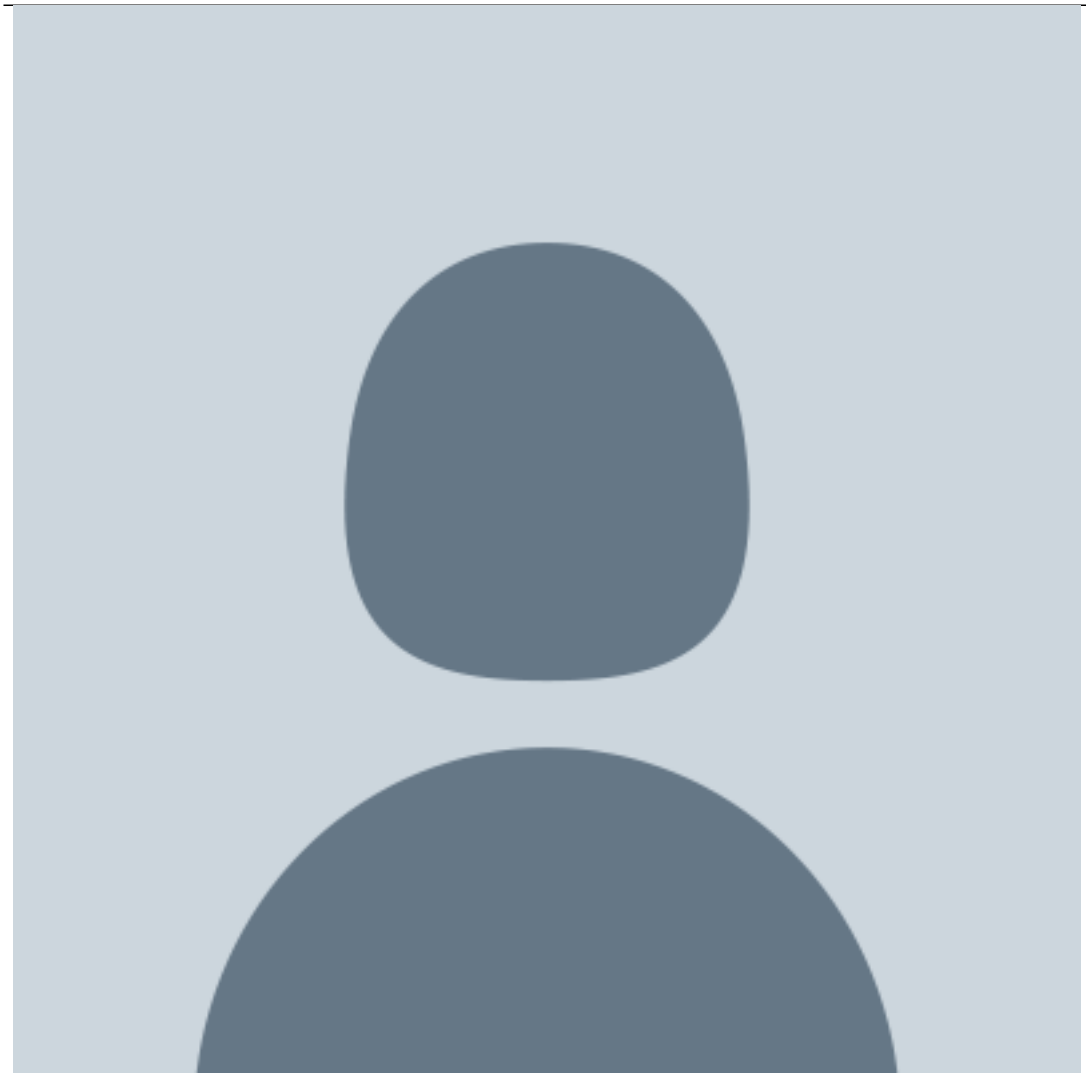
4 Ibid at para 214 per Juriansz JA.

5 Ibid at para 215 per Juriansz JA.

6 Ibid at paras 218-219, 234 per Juriansz and Lauwers JJA.

7 Ibid at para 108 per LaForme JA.

Erik Penz



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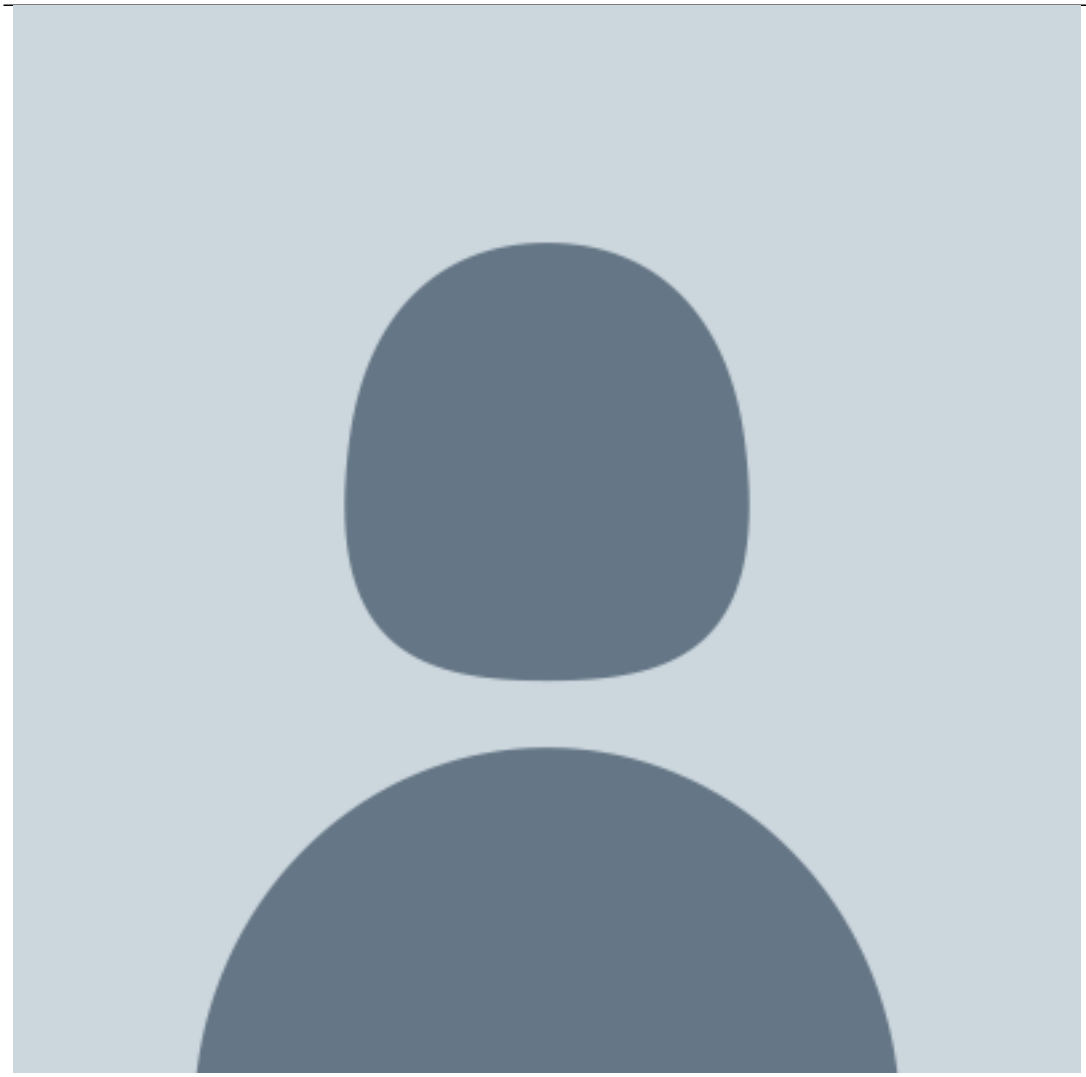

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