TRIAL PROCEEDINGS CONDUCTED OUTSIDE THE TERRITORIAL JURISDICTION OF THE COURT

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Introduction

The requirements for a 'full and fair trial' in the context of multijurisdictional litigation from time to time raises the need for the trial judge to accommodate witnesses testifying outside the territorial jurisdictions of the court. This issue was recently dealt with in *Borrelli v. Chan* ("*Chan*") where the trial judge granted a motion for commissioned evidence to be taken in Hong Kong and appointed himself commissioner.[1] The trial judge concluded that acting himself as commissioner would save costs and provide the best method of adjudicating the matters in the context of a complex and lengthy trial where witness credibility was a critical issue. (The examination of those witnesses located in Hong Kong and the People's Republic of China took 3 weeks alone). While commissioned evidence is not unusual, the practical approach taken by the trial judge appointing himself commissioner and travelling to Hong Kong to take the evidence, is a rarity in Canadian civil procedure.

This decision is part of a developing approach in the Canadian courts to find practical solutions to geographical limitations on the jurisdiction of the court in litigation involving multiple jurisdictions. Shortly after the decision in *Chan,* the Supreme Court of Canada ("SCC") determined in the joined cases of *Parsons v Ontario* and *Endean v British Columbia* (indexed as *Endean v. British Columbia*, "*Parsons/Endean*"), that provincial superior court judges can retain jurisdiction, in certain circumstances, while sitting out-of-province.[2]

Parsons/Endean were appeals of decisions handed down during directions hearings by the supervising Ontario and British Columbia superior court judges overseeing the execution of the national Canadian Blood Services Hepatitis C class action settlement agreement ("settlement agreement"). Class counsel in British Columbia, Ontario and Quebec sought orders extending time under the prescribed claims filing deadline. The terms of the settlement agreement contained a

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[1] 2016 ONSC 4953, [2016] CarswellOnt 13080 [*Chan*].

[2] 2016 SCC 42, [2016] 2 SCR 162 [58] [*Parsons/Endean*].

mutuality requirement that orders on related applications made by the British Columbia, Ontario and Quebec provincial superior court judges became effective only upon issue of the final province's determination and only if all were "without any material differences" to each other.[3] In these circumstances, the benefits of a joint hearing between the three judges to dispose of the motion for the extension deadline was clear.

While in *Chan* and *Parsons/Endean* the extraterritorial proceedings was a practical solution for the effective administration of justice, opposing counsel in both cases challenged the motions. Their common arguments were: first, judges would lack jurisdiction when disposing of matters if they were sitting outside their home province[4] and second, holding a hearing outside of the province seized of the matter prevented people physically located in that province from attending the court in violation of the open court principle.[5]

Challenges on the Basis of Lack of Jurisdiction

Geographic location is only one basis for determining or limiting jurisdiction. A court may seek pragmatic solutions to practically exercise jurisdiction across oceans and state borders to summons parties over which it possesses personal jurisdiction; it may rely on subject matter jurisdiction where conducting a portion of its proceedings in a foreign territory on the basis this is necessary for effective and functional adjudication.[6]

The starting point when establishing that a court possesses jurisdiction, is first to show specific authority for the contended exercise of jurisdiction; or in the absence of statutory authority, show that there is no prohibition to the contended exercise of jurisdiction.

Historically, this approach was set out in *The Steamship S.S. Lotus*[7] (cited in *R v. Finta*[8] and discussed at length in *R v. Pilarinos*[9]) by the Permanent Court of International Justice in its consideration as to whether Turkey had violated jurisdictional principles by bringing criminal

[3] *Parsons/Endean*, *supra* note 1 at [8]; S. 10.01(2) of the 1986 – 1990 Hepatitis C Settlement Agreement.
[4] As argued at first instance in *Parsons v. Ontario*, 2013 ONSC 3053, [2013] CarswellOnt 3336, at [2]; inherent in the dicta of Bauman C.J.B.C. *Endean v British Columbia*, 2013 BSCS 1074, [2013] BCJ No. 1304 at [6] & [7]; and in *Chan*, *supra* note 1 at [12].
[5] *Parsons v Ontario*, 2013 ONSC 3053, [2013] CarswellOnt 3336 at [49]; and in *Chan supra* note 1 at [12].
[6] *Parsons v. Canadian Red Cross Society*, 2013 ONSC 3053, [2013] CarswellOnt 3336 at [19-20] [*Parsons*].
[7] Judgment No. 9, September 7, 1927 World Court Reports Vol. 11 1927 – 1932.
[8] [1994] 1 SCR 701, 88 CCC (3d) 417 (SCC) at [170].
[9] 2001 BCSC 1690, [2001] BCJ No. 2540 at [27 – 32; 60 – 61] [*Pilarinos*].

charges against an officer of the S.S. Lotus. The ship was responsible for a collision with a Turkish vessel that resulted in loss of life, but occurred outside of Turkey's territorial waters. The Court found that while a fundamental restriction of international law stipulated that a state could "not exercise its power in any form in the territory of another state" without a "permissive rule to the contrary" this did not mean that there was a "general prohibition to states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory."[10] Instead, states retain "a wide measure of discretion which is limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable."[11]

Similarly, in *Chan*, the trial judge ascertained that there was nothing under Rule 36 of the Ontario Rules of Civil Procedure prohibiting the trial judge from acting as commissioner.[12] He then moved on to determine that Rule 36 provided the power for a commissioner to preside extraterritorially and it had been used by trial judges in British Columbia to grant an order whereby those judges presided extraterritorially as commissioners.[13]

At the original hearing for directions in *Parsons v. Red Cross Society (*"*Parsons*"*)* in approving the request for an extraterritorial proceeding, Winkler C.J.O. relied on the powers under the inherent jurisdiction of the superior courts as authority for the contended exercise of jurisdiction.[14] However, he first conducted an analysis to determine that there were no statutory or constitutional bars prohibiting a superior court judge from holding a hearing outside of Ontario.[15]

Winkler C.J.O. noted that, though in opposition to the order sought, the Attorney General for Ontario ("AGO") as respondent was unable to point to any statutory or constitutional restriction prohibiting an extraterritorial sitting by the court.[16] The AGO's argument instead rested on historical, common law restrictions prohibiting the English courts from sitting outside their jurisdiction.[17] The AGO had pointed to s.11(2) of the Courts of Justice Act, providing the Superior

[10] Judgment No. 9, September 7, 1927 World Court Reports Vol. 11 1927 – 1932, pp. 34-35.
[11] *Ibid*.
[12] *Chan*, *supra* note 1 at [18].
[13] *Ibid*.
[14] *Parsons*, *supra* note 6 at [33-38].
[15] *Ibid* at [20-32].
[16] *Ibid* at [26].
[17] *Ibid* at [22].

Courts of Justice with the "jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario" arguing that Ontario courts therefore were prohibited from hearing matters outside Ontario.[18]

In response, Winkler C.J.O. noted that the various versions of the Judicature Act from 1881 until 1984 allowed judges to sit at any place to conduct the business of the courts.[19] He further relied on the pragmatic approach of the SCC in *Morguard Investments v. Savoie*[20] and determined:

> *The English common law rule precluding English courts from sitting outside England is not suited to modern realities of increasingly complex litigation involving parties and subject matters that transcend provincial borders*.[21]

Winkler C.J.O. distinguished the situation in issue, with provincial superior courts sitting within Canada, from that of a court sitting in a foreign state, where the former would not involve any issue of state sovereignty.[22]

Finally, in overcoming any constitutional concerns, Winkler C.J.O. stated:

> *there is no provision in the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3 that addresses or could be said to confine the superior courts' jurisdiction to adjudicate within territorial boundaries. Equally there is no provision of the Constitution that speaks to the physical location where the superior courts must sit.*[23]

While the SCC agreed with Winkler C.J.O.'s determination that three provincial court judges could sit together in a fourth province to adjudicate on matters, it held that when determining whether a court could sit extraterritorially, it must first look to see if there was a statutory power permitting this. Only in the absence of a statutory power should a provincial superior court dip into the "important but murky pool of residual authority that form their inherent jurisdiction."[24] In particular, it found that the statutory power existed in s. 12 of both the Ontario and British

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[18] *Parsons*, *supra* note 6 at [21].
[19] *Ibid* at [28].
[20] [1990] 3 S.C.R. 1077, [1990] CarswellBC 283.
[21] *Parsons*, *supra* note 6 at [25].
[22] *Ibid* at [25].
[23] *Parsons*, *supra* note 6 at [27]. Here, Winkler C.J.O. is adopting the findings of Professor Janet Walker in her article, "Are National Class Actions Constitutional? – A Reply to Hogg and McKee" (2010) 48 Osgoode Hall L.J. 95, at pp. 105-108.
[24] *Parsons/Endean*, *supra* note 2 at [24].

Columbia class proceedings acts. These provisions essentially allow the Court to make any order it deems necessary for the "fair and expeditious determination" in the conduct of a class proceeding.[25] In accordance with previous determinations, the powers under s. 12 are to be exercised broadly to achieve the founding principles of class action procedure: two of those being access to justice and judicial economy.[26]

Despite the Supreme Court's extensive analysis of the class proceeding statutes which permitted the extraterritorial sitting of the court, it ultimately found that in respect of provinces that have not enacted class proceedings statutes, a court could rely on its inherent jurisdiction to govern its own procedures to make the order.[27] Indeed, the class action statutes were a reflection of these powers.[28]

Powers available to Provincial Superior Court Judges while Presiding Extraterritorially

In *Chan* the trial judge considered the jurisdictional issue as a feature precluding the provincial superior court judge from attempting to exercise coercive powers while conducting proceedings in the foreign jurisdiction.[29] As commissioner he would have "no power to compel attendance or force an attending witness to answer questions."[30] The commissioner must rely, for these powers, either on the powers of the foreign jurisdiction (as in the case of letter of request issued on his or her behalf by an Ontario court to a foreign court) or on *in personam* jurisdiction of the Ontario court, if it exists.[31]

In *Endean v. Canadian Red Cross Society ("Endean")* the British Columbia Court of Appeal ("BCCA") considered the position taken by both the British Columbia Supreme Court and the Ontario Superior Court, that the exercise of a judge's discretion to sit outside the court's territory would be permissible as long as the judge has personal and subject matter jurisdiction over the case.[32] The BCCA found this position problematic as possession of jurisdiction also infers the ability to exercise that jurisdiction and issues could arise if a judge was called upon to use his or

[25] See, s. 12 Class Proceedings Act SO 1992, c 6; and s. 12 Class proceedings Act, RSBC 1996. C 50.
[26] See the foundational class action cases of *Western Canadian Shopping Centres Inc. v. Dutton* 2001 SCC 46, [2001] 2 SCR 534; and *Hollick v. Toronto (City)* 2001 SCC 68, [2001] 3 SCR 158.
[27] *Parsons/Endean*, *supra* note 2 at [62].
[28] *Ibid* at [62].
[29] *Chan*, *supra* note 1 at [15-16].
[30] *Ibid* at [16].
[31] *Ibid*.
[32] 2014 BCCA 61, [2014] CarswellBC 363 at [19] and [25-26, 27-28] ["*Endean*"].

her coercive powers while physically located in a foreign territory. If such an exercise occurred, the BCCA considered the judge would be infringing the host's territorial jurisdiction.[33]

In *R v. Pilarinos* the judge refused to set aside the Associate Chief Justice of British Columbia's authorization for a wiretap, issued while he was located in the State of California, on the basis that the order did not affect persons, property or subject matter and required no exercise of a power of enforcement, within the United States.[34]

The issue is less clear post-*Parsons/Endean*. The SCC pointed out that as the matter to be adjudicated was based on a paper record and required no coercive powers, respect was maintained for the "deep seated sense" that there were physical limits to jurisdiction.[35] However, it declined to address the AGO's query as to whether the ability of a superior court judge to sit outside provincial limits would be restricted to matters where he or she would not have to exercise the court's coercive powers. Instead, it held this issue was not relevant to the case before it and accordingly the Court refrained from making a determination.[36]

Presumably the judge sitting extraterritorially could not make any order that infringed the authority of the court in the territorial jurisdiction where he or she was located, but could give directions governing the process of the proceeding being conducted. The court could not exercise compulsion over a witness testifying at the extraterritorial proceeding (assuming the court did not have *in personam* jurisdiction over the witness) but the court may be able to assert jurisdiction over counsel, over whom it would have jurisdiction by reason of them being officers of the court. Similarly witnesses over whom the court had *in personam* jurisdiction could be subject to the jurisdiction of the court related to asserting control over its process so long as in asserting such jurisdiction, the court was not offending or infringing the law or jurisdiction of the courts in the host's jurisdiction.

[33] *Endean*, *supra* note 32 at [65].
[34] *Pilarinos*, *supra* note 9 at [74].
[35] *Parsons/Endean*, *supra* note 2 at [46]. Here, the SCC is responding to the argument put forward in V. Black and S.G.A. Pital's article "Out of Bounds: Can a Court Sit Outside Its Home Jurisdiction?" (2013), 41 Adv. Q. 503.
[36] *Ibid* at [78].

The Open Court principle

The open court principle is embedded in statute,[37] the Constitution[38] and its importance articulated by the court in a number of cases.[39] For example, in *Edmonton Journal v. Alberta (Attorney General)* the SCC stated the principle is necessary…

> (1) to maintain an effective and 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.[40]

In both *Chan* and *Parsons/Endean* counsel opposing the extraterritorial proceedings argued that it would violate the open court principle based on the oft quoted maxim, justice must not only be done, but must be seen to be done. The argument asserted that the breadth of the principle required the proceeding to be physically located in the province in order to be compliant with the principle of 'open to the public.' The SCC noted however that an open court is not necessarily one accessible to the public physically located in the particular province.

The issue in *Parsons/Endean* was whether a live video link transmitting the extraterritorial proceedings to a courtroom or other facility in the province with subject matter jurisdiction was required under the open court principle. This requirement was the finding of the Ontario Court of Appeal ("ONCA") in *Parsons*.[41] Further, as the ONCA decision was available at the time of the commissioned evidence application in *Chan*, respondent's counsel relied on it in their arguments for opposing the grant of the order sought by the defendant.[42] Here, the respondent argued that by

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[37] Section 135(1) of the *Courts of Justice Act* mandates that "all court hearings shall be open to the public." The only exception to this rule is prescribed under s. 135(2) where "serious harm or injustice to any person" in the court's opinion, justifies the public's exclusion. Further, s. 486 of the *Criminal Code* is a similar provision. It states: "[a]ny proceedings against an accused shall be held in open court, but the presiding judge or justice may…order the exclusion of all or any members of the public from the court room for all or part of the proceedings…if the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security."

[38] Section 2 of the *Constitution Act*, 1982.

[39] See, for example, *Vancouver Sun (Re)* [2004] 2 SCR 332 [22-27] and *Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (Re R v. Carson)* [1996] 3 SCR 480 [20-22].

[40] [1989] 2 SCR 1326 [61].

[41] [2015] ONCA 158 [227-236] [*Parsons' Appeal*].

[42] *Chan, supra* note 1 at [44].

sitting as commissioner and hearing evidence, the trial judge would effectively be conducting a portion of the trial in Hong Kong. As the Hong Kong time zone was 12 hours ahead of Ontario, a live video link could not be instituted in a way that would provide effective public access to the proceedings and the motion therefore should not be granted as such an order would violate the open court principle.[43]

In *Parsons,* the ONCA largely concurred with the findings of Winkler C.J.O. that the exterritorial sitting of the national settlement's supervising judges did not contravene the open court principle. It agreed the right of public access was maintained in the proposed hearing on the basis of three circumstances. First, the proceedings would occur in a courtroom accessible to the public which would preserve the "cleansing effect public scrutiny has on the legitimacy of legal proceedings."[44] Second, the media had access to and could report what transpired at the hearing.[45] Finally, the right of public access was not absolute and, in any event did not "guarantee the right to be physically present in the courtroom."[46]

Still, the ONCA amended Winkler C.J.O.'s order to require the proceedings be transmitted via video link to an Ontario courtroom.[47] While Justice LaForme took the view that the public access requirement was satisfied as long as the proceedings could be attended by the Ontario public in an out-of-province courtroom, Justices Juriansz and Lauwers disagreed. Justice Juriansz opined that Rule 1.08 of the Courts of Justice Act which allows a motion to be conducted by way of video conference combined with the court's discretion to hold concurrent hearings was a sufficient basis to find an extraterritorial sitting permissible as long as there was a video link.[48] Justice Lauwers expanded the basis of Justice Juriansz's decision by finding it necessary to also rely on the inherent jurisdiction of the court.[49]

The open court principle is of less force in the case of evidence taken on commission where there is a well-established precedent for the procedure. In *Chan,* it was noted that even where the trial

[43] *Parsons' Appeal*, *supra* at note 41 at [45].
[44] *Ibid* at [146].
[45] *Ibid* at [147].
[46] *Ibid* at [142].
[47] *Ibid* at [236].
[48] *Ibid* at [225].
[49] *Ibid* at [235].

judge is appointed commissioner before whom the evidence is to be taken, there is nevertheless a material distinction from trial proceedings.

Addressing the policy interest related to the open court principle, the Court observed that the evidence would be recorded and added to the exhibits marked at trial, which the public could view upon request.[50] In fact, the proceedings in that case were physically open to the public and, interested persons attended. The accessibility of the hearing was exhibited by way of a public notice placed at the venue in Hong Kong where the commission proceedings were conducted.

In *Parsons/Endean* the SCC determined that the open court principle does not place a blanket ban on extraterritorial sittings or require, in every case, the use of a video link transmission to a courtroom of the home province.[51] However, it did not provide a general test as to when a video-link would be required to avoid violation of the open court principle. Nonetheless, its position on the matter can be summarized by the following. First, while a judge may prefer to order the use of video-link during an extraterritorial sitting, there is no provision that specifically requires this.[52] Second, the courts can look to the conduct of the proceedings to determine whether the extraterritorial proceeding will violate the open court principle.[53] Where there is no issue of accessibility of the media or general public from "entering the courtroom and observing or reporting on the proceedings" the integrity of the open court principle, even during an extraterritorial proceeding without a video-link, can remain intact.[54] Finally, the jurisdiction of court to sit outside its province is separate and apart from the "technological means it decides to use."[55]

Wagner J in a minority opinion, in part, found that where a video-link is requested by members of the public, the media or counsel, that request, subject to any countervailing considerations, should generally be granted.[56]

[50] *Chan*, *supra* note 1 at [46].
[51] *Parsons/Endean*, supra at note 2 at [63].
[52] *Ibid* at [64].
[53] *Ibid* at [67].
[54] *Ibid* at [67-68].
[55] *Ibid* at [64].
[56] *Ibid* at [101].

The Use of the Court's Discretion in Requests for Extraterritorial Proceedings

The final consideration in requesting an extraterritorial proceeding is showing that the court should exercise its discretion in favour of granting the order. In *Parsons/Endean* the SCC set out factors for a court to consider when making this determination. These include, first, whether presiding extraterritorially will infringe upon the sovereignty of another jurisdiction and if conducting the proceeding extraterritorially will prevent the court from "competently presiding over the hearing".[57] Second, courts will consider the benefits and disadvantages of the proposed proceeding. In an outline of the possible factors to be weighed, the SCC refers to the availability of the media in the foreign jurisdiction to enable practical public access to the proceedings. Other factors may be what is fair to each of the parties in relation to the logistics of travel and the cost of holding the proceedings in the proposed location; and whether fundamental principles of justice require the proceedings to be held at home or out-of-province.[58] Finally, superior court judges should consider what terms may be required under the granting order and whether the terms would be too onerous on the parties.[59]

In addition to the considerations outlined by the SCC above, there has been a necessity element present in the cases where the courts have granted an order for an extraterritorial proceeding, that is, necessary for the effective administration of justice. Whether this consideration actually rises to the levels of necessity, remains to be seen. It may well be simply a matter of balance of convenience.

In *Parsons/Endean* the mutuality requirement for orders under the national settlement agreement demonstrated the necessities for a joint hearing. Evidence of this was seen in the fact that when the extraterritorial sitting proposed was refused by the BCCA, the supervising judges returned with orders materially different from each other rendering them ineffective under the terms of the settlement agreement.[60]

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[57] *Parsons/Endean*, *supra* note 2 at [73].
[58] *Ibid* at [74].
[59] *Ibid* at [75].
[60] 2014 BCSC 621 [27] refusing the application to approve the late filing protocol; *Parsons v. Canadian Red Cross Society* 2013 ONSC 7788 [102] approving the late filing protocol on the condition that the protocol is approved by the British Columbia and Quebec courts; *Honhon c. Canada (Procureur général)* 2014 QCCS 2032 [30] – [31] refusing the application to approve the late filing protocol.

In the few cases where a trial judge has travelled extraterritorially to take commissioned evidence, different circumstances have existed that necessitated granting the request. In *Chan*, the trial judge spoke to the necessity of sitting as commissioner in Hong Kong since witnesses were not prepared to travel to Ontario to testify and with credibility a central issue, it was more practical, effective and less costly for the trial judge to conduct proceedings as a commissioner in Hong Kong to hear their testimony than to appoint a third party commissioner or pursue the cumbersome process of witnesses testifying extraterritorially via live video-link. However, he refused to accommodate the defendant's request to testify in Hong Kong. While non-party witnesses in the proceedings could refuse to travel to an Ontario courtroom and the court had no ability to compel them, the defendant (who had attorned to the jurisdiction) and had not filed evidence establishing that he was unable to travel, was not accommodated notwithstanding the court had decided to conduct proceedings in Hong Kong as commissioner for non-compellable witnesses. In the circumstances the accommodation of a party was a matter of judicial discretion as opposed to necessity.[61] In refusing the defendant's request despite the fact that other witnesses would be testifying in Hong Kong, the court signaled a strong view that resort to extraterritorial proceedings should not be merely a matter of convenience.

It is reported that Madam Justice McLachlin, as she was then, while presiding as trial judge in *Norlympia Seafoods Ltd v Dale and Company Ltd,* travelled to Seattle to act as commissioner where the witness was unable to travel to Canada as leaving the United States would affect his immigration status to the point that he would be refused reentry.[62] This appears to be the earliest Canadian instance of the trial judge appointing herself as commissioner for the taking of a witness' evidence extraterritorially.

Where the court is of the opinion that granting an extraterritorial sitting would bring the administration of justice into disrepute, it may for that reason refuse the request, even where it prejudices the substantive legal rights of the requesting party. In *Cansulex Limited v Perry*[63] the trial judge refused to appoint himself commissioner to travel to San Francisco and examine a witness whose evidence he recognized as vital to the action,[64] on the basis that the witness's reason

[61] *Chan*, *supra* note 1 at [26] – [41].
[62] *O.E.X. Electromagnetic Inc. v. Coopers & Lyebrand* 1991 CarswellBC 1909, [1992] B.C.W.D. 01 at [21] [*O.E.X. Electromagnetic*].
[63] 1982 CarswellBC 163 (BCSC) [*Cansulex Limited*].
[64] *Ibid* at [3].

for refusing to travel to testify at trial was that he feared being charged with a criminal offence if he attended in Canada.[65] In another case where counsel opposing the extraterritorial proceedings had intimidated witnesses located in the U.S. by threatening criminal proceedings against them if they testified, the court not surprisingly granted the request for the witnesses' evidence to be taken extraterritorially, over the objections of opposing counsel again raising allegations of criminal wrongdoing.[66] In the first case the court considered acceding to the request would bring the administration of justice into disrepute; in the second case the consideration was the opposite.

Conclusion

At first glance, the decisions in *Chan* and *Parsons/Endean* involve two distinct and self-contained procedural matters. In *Chan*, the trial judge held he was permitted to conduct extraterritorial proceedings on the basis that the taking of commissioned evidence was a well-defined procedure distinct from the court hearing. *Parsons/Endean* related to class proceedings where the power to sit extraterritorially was found to be contained in the Ontario and British Columbia class proceedings statutes.

Nevertheless, the reasoning of the SCC did not restrict the principles governing out-of-province sittings to class proceedings.[67] In *Chan* the trial judge directed that the evidence heard in Hong Kong would become trial exhibits, but it was unlikely to be - and in fact was not - adduced a second time at the trial proceedings in Ontario. Arguably, this brought the taking of evidence in Hong Kong as close to an exterritorial session of the actual trial as is possible, albeit under a procedure where the trial judge lacks power to compel witnesses or testimony during the extraterritorial proceedings. These decisions are indicative of a willingness by the Canadian courts to fashion practical solutions for the procedural complexities arising in modern, cross-border litigation.[68]

For counsel seeking such orders, these decisions provide that first, it must be established there is no provision restricting the jurisdiction of the court to either order or hold the extraterritorial

[65] *Cansulex Limited*, *supra* note 63 at [5].
[66] *O.E.X. Electromagnetic*, *supra* note 62 at [21].
[67] *Parsons/Endean*, *supra* note 2 at [71-76]. In exercising its discretion, the SCC maintained general language in reference to a 'proceeding' held extraterritorially.
[68] As discussed by V.Black and S.G.A. Pitel in their article "Out of Bounds: Can a Court Sit Outside Its Home Jurisdiction?" (2013), 41 Adv. Q. 503 at p. 503. Here, the authors describe the 'deep seated sense' as being one where courts conduct hearings only within their geographical boundaries. Also considered by Justice Cromwell in *Parsons/Endean*, *supra* note 2 at [45].

proceedings. Second, where possible, any specific statutory provisions authorizing or permitting the procedure should be identified. However, resort may be had to the inherent jurisdiction of the courts in absence of statutory authority. Third, as coercive powers generally will not be available, counsel should show how the use of such powers will not be necessary, or, if those powers are necessary, how they can be exercised effectively without infringing upon the jurisdiction of the foreign court or the sovereignty of the state in which the proceedings are to take place.

In relation to any objections raised pertaining to the open court principle, counsel should be able to put before the courts a response as to how public and media accessibility will be facilitated.

Of fundamental importance will be showing the court why the extraterritorial sitting is necessary for the effective administration of justice and that the circumstances weigh in favour of granting the requested order. Where the motion is for taking evidence extraterritorial by commission, cogent reasons for the unavailability of witnesses within the territorial jurisdiction of the Court, should be provided. Where the witness is a party to the proceedings, stronger reasons submitted by way of affidavit sworn by that party may be required.