Zoom hearings: Just one consideration when assessing jurisdiction

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Virtual hearings have become the new norm. Individuals from four corners of the world can be in the same courtroom with the click of a button. This raises the question of the extent to which the physical location of a courtroom, and witnesses, may carry weight in *forum non conveniens* assessments going forward.

On Feb. 9, 2023, the Ontario Court of Appeal (OCA) released its decision in *Black & McDonald Limited v. Eiffage Innovative Canada Inc*., 2023 ONCA 91, in which it indicates that the physical location of a court and witnesses may remain a relevant consideration, even in light of virtual courts that witnesses may attend with the click of a button.

Background

The facts in *Black & McDonald Limited* arise out of a construction project in British Columbia.

A subcontractor, Black & McDonald Limited (B&M), commenced an action against a general contractor, Eiffage Innovative Canada Inc. (Eiffage), in Ontario in respect of work allegedly performed in British Columbia.

Eiffage raised the *forum non conveniens* doctrine (a discretionary power) with the motion judge and, on appeal, with the OCA. The motion judge stayed the action against Eiffage in Ontario, on the basis that British Columbia was the more convenient forum. However, the OCA granted B&M's appeal of that decision and found that the action may proceed in Ontario.

Motion judge's decision

Following a *forum non conveniens* assessment, the motion judge found that British Columbia was the more convenient forum for the action against Eiffage and stayed the action against it in Ontario.

As part of its assessment, the motion judge found that the physical location of witnesses was neutral because of "the post COVID reality that converted court proceedings from in person to virtual." Of note, the Superior Court similarly concluded in *Kore Meals LLC v. Freshii Development LLC*, 2021 ONSC 2896 that "Chicago and Toronto are all on the same cyber street. They are accessed in the identical way with a voice command or the click of a finger. No one venue is more or less unfair or impractical than another."

Court of Appeal decision

On appeal, following a *forum non conveniens* assessment, the OCA found that one jurisdiction was not favoured over the other and, as a result, found that the action may proceed in Ontario.

With respect to the physical location of witnesses, the OCA suggested that the availability of virtual court proceedings "does not render this factor neutral". The OCA highlighted that, "[v]irtual appearances by witnesses cannot be safely equated to appearances in person in terms of their impact on the fact-finding process."

Key takeaway

Traditional jurisdiction considerations, such as the physical location of the courtroom and witnesses, may remain relevant, notwithstanding the ease with which parties can now attend virtual court proceedings.

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