Doctrine of collateral attack and issue estoppel

December 13 2016 | Contributed by Dentons

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Introduction

It is not uncommon for defendants to assert the defences of collateral attack and issue estoppel in pleadings where it is considered that the plaintiff is intending to re-litigate a matter previously considered and disposed of by a court. Too often, however, these defences are included in a defensive pleading as part of a 'scattergun', 'scorched-earth' or 'throw in the kitchen sink' approach. Often untested, whether these are tenable defences is left undetermined, as plaintiffs rarely move to strike out portions of statements of defences pleading collateral attack and/or issue estoppel; although Rule 21 of Ontario's Rules of Civil Procedure**(1)** is cast widely enough to entertain this type of motion.**(2)**

However, there are cases where the courts have critically examined these defences. This update deals with the leading cases in this area.

Issue estoppel

The Supreme Court of Canada has described issue estoppel as a doctrine which "precludes the relitigation of issues previously decided in court in another proceeding".**(3)**

For issue estoppel to be successfully invoked, the moving party must establish the following three preconditions, following which the court will ask whether it should exercise its discretion to not apply the doctrine:

- The issue is the same as that decided in the prior decision – the issues subject to estoppel are the conclusions of law decided in the prior proceeding, as well as the material facts and the conclusions of mixed fact and law that were "fundamental to the decision arrived at". This means that issue estoppel extends to preclude re-litigation of issues that were implicitly determined in the earlier proceeding, even if they were not made explicit in the reasons for decision.**(4)**
- The prior judicial decision is final – a decision is judicial when:
    - it is made by a body that is capable of receiving and exercising adjudicative authority;
    - it is required to be made in a judicial manner; and
    - it was in fact made in a judicial manner.

  A prior decision of an administrative tribunal or officer can give rise to issue estoppel if it has been reached in a judicial manner, which means that the decision was reached through making findings of fact and applying an objective legal standard to these facts.**(5)** That a decision may be appealed does not affect whether it is final.**(6)** In addition, the doctrine of issue estoppel may apply to interlocutory orders.**(7)**

- The parties to both proceedings must be the same, or their privies**(8)** – the boundaries of

privity in the context of issue estoppel are somewhat fluid.(9) For example, there may be sufficient privity where there was active participation by a person in the prior proceeding, even if that person was not a party.(10)

Judicial discretion

If the three preconditions to issue estoppel are met, the court must determine whether the doctrine ought to be applied or whether applying issue estoppel may give rise to an injustice because it would violate the principles of judicial economy, finality, consistency and the integrity of the administration of justice.(11)

Due to the broad variety of administrative procedures, courts have a broader discretion to decline to apply issue estoppel to administrative proceedings than that available for proceedings before the court.(12) In these situations, the courts will consider the circumstances of the prior administrative proceeding, including the following factors:

- the limits on awards that the administrative body could make;
- whether the act granting the administrative body authority shows legislative intent to preclude a civil action;
- the purpose of the administrative proceeding, including the effect that allowing a judicial body to rehear an administrative proceeding would have on the quick and inexpensive route that most administrative proceedings aim to offer;
- the convenience of hearing all of the party's claims in one proceeding;
- the procedural differences between the administrative body and the court (ie, discovery or cross-examination rights);(13)
- the availability of an appeal; and
- the circumstances giving rise to the prior administrative proceedings (eg, whether the party was vulnerable at the time of commencing the administrative proceeding).(14)

Doctrine of collateral attack

The Supreme Court has described the doctrine of collateral attack as "an attack made in proceedings other than those whose specific object is the reversal, variation or nullification of the order or judgment".(15)

The rule against collateral attack may be raised to prevent a party from attacking the validity of an order through a different forum, rather than the designated appeal or judicial review route. The rule against collateral attack "seeks to maintain the rule of law and preserve the repute of the administration of justice".(16)

Like issue estoppel, the court can refuse to apply the doctrine of collateral attack where doing so would result in an injustice.(17) In deciding this, the court will look at the same types of consideration as those outlined above.

Also like issue estoppel, the doctrine of collateral attack applies to administrative proceedings. To evaluate whether a collateral attack action will succeed against an administrative proceeding, it is necessary to look at the statutory scheme to determine whether:

- there is an appeal or review route outlined; and
- the language of the scheme is permissive or requires an appeal or review route to be taken.(18)

The above tests for issue estoppel and collateral attack, including the discretion of the court not to apply the doctrines, apply equally where the prior decision was made by a body outside the court's jurisdiction. There is no automatic application of the doctrines to extra-territorial judgments. The principles of comity and respect for orders of courts from other jurisdictions will be considered alongside the other factors that a judge will consider when exercising its discretion.(19)

Comment

There is no doubt that defendants will, in many cases, continue to include the defence of issue estoppel and the doctrine of collateral attack. However, they should take a critical look at the facts before including such defences in a defensive pleading – 'less is more' is often the objective when drafting pleadings.

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Endnotes

(1) RRO 1990, Reg 194.

(2) *Metropolitan Toronto Condominium Corp No 1352 v Newport Beach Development Inc*, 2012 ONCA 840 (CA) at para 4.

(3) *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 23.

(4) *Danyluk v Ainsworth Technologies*, 2001 SCC 24 at para 24.

(5) *MTCC, supra* note 2 at paras 45 and 48.

(6) *MTCC, supra* note 2 at para 56.

(7) *Xanthoudakis v Ontario (Securities Commission)*, 2009 CarswellOnt 2888 at para 13.

(8) *Toronto (City), supra* note 3 at para 23.

(9) *Danyluk, supra* note 4 at para 60.

(10) *MTCC, supra* note 2 at para 59.

(11) *MTCC, supra* note 2 at para 35; *Toronto (City), supra* note 3 at paras 37 and 51.

(12) *MTCC* No 1352, *supra* note 2 at para 63.

(13) *MTCC* No 1352, *supra* note 2 at paras 64-75.

(14) *Danyluk, supra* note 4 at paras 64-74

(15) *Toronto (City), supra* note 3 at para 33.

(16) *MTCC, supra* note 2 at para 87.

(17) *Antim Capital Inc v Appliance Recycling Centres of America*, 2014 ONCA 62 at para 16.

(18) *MTCC, supra* note 2 at para 91.

(19) *Antim, supra* note 17 at para 18.
