Catalyst Capital Group Inc. v. *VimpelCom Ltd.*: A Consideration of "Obiter" and Obiter Commentary on Appellate Review

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The Ontario Court of Appeal recently dismissed an appeal brought by the plaintiff, Catalyst Capital Group Inc., which stemmed from a series of lawsuits arising from the plaintiff's attempted purchase of Wind Mobile Group from VimpelCom Ltd. in 2014.[i]

This is an interesting case as the Court considered a number of legal concepts such as issue estoppel, cause of action estoppel and abuse of process. The Court also commented on two other propositions – what is considered "*obiter*" and what is the *scope of appellate review* - which were somewhat surprising in nature.

What follows is a brief summary of the decision and commentary on the two legal principles of what is "*obiter*" and the *scope of appellate review.*

Background

This case arises out of the failed attempt by the plaintiff, Catalyst Capital Group Inc., ("Catalyst") to purchase Wind Mobile Group from VimpelCom Ltd. ("VimpelCom"), which was later sold to a group of purchasers (the "Consortium").

As such, the plaintiff commenced a number of lawsuits, the first of which was (the "Moyse Action") against Brandon Moyse ("Moyse"), a junior analyst at Catalyst. He left the company during their negotiations with VimpelCom Ltd. to work at one of the members of the Consortium, West Face Capital Inc. ("West Face").

In short, an employee (Moyse) of the plaintiff went to work for the company that ultimately bought Wind Mobile Group during the time the plaintiff was still trying to purchase Wind Mobile Group.

This matter went to trial in June 2016 before Justice Newbould. The trial judge dismissed the Moyse action in its entirety as Catalyst failed to make out the three elements of the breach of confidence claim.[ii] In February 2018, the Ontario Court of Appeal also dismissed Catalyst's appeal of Justice Newbould's decision on its merits.[iii]

The second and current action ("current action") was commenced five days before the trial of the Moyse Action. Catalyst in the current action, having failed in their suit against

their former employee, tried to sue the successful purchaser on causes of action arising from essentially the same factual matrix.

In the current action, Catalyst alleged breach of contract, breach of confidence, conspiracy and inducing breach of contract against West Face (the successor employer of Moyse) and a number of other defendants. The defendants were successful in dismissing the action on the basis of issue estoppel, cause of action estoppel and abuse of process.[iv]

The Court of Appeal dismissed the appeal and found that the trial judge did not err in striking the claims on the basis of issue estoppel and abuse of process, as these issues had essentially already been determined in the Moyse Action.

What is "Obiter"?

In the Court of Appeal's analysis as to whether the trial judge erred in dismissing the current action, the Court of Appeal analyzed the issue of which findings are considered as "obiter".

On appeal, the plaintiff argued that the findings in the Moyse action that affect the current action were in obiter and collateral (and hence not binding) because they were not necessary to the judge's decision.

The plaintiff argued that the central issue with respect to the Moyse Action was whether Moyse passed confidential information to West Face and that any other analysis and findings by the trial judge should be treated as obiter (and hence not caught by the doctrine of estoppel).

The plaintiff's arguments appeared consistent with the traditional understanding of "obiter". For example, when a case deals with a situation where there are two separate points and the first point is dispositive, the analysis with respect to the second point may well be treated as obiter as it was strictly speaking, not necessary for the disposition of the case.[v]

The Court of Appeal rejected this submission stating **that if both points are before the Court and are dispositive,** then neither is to be considered "obiter".

The Court notes that the plaintiff's interpretation (the traditional understanding) of "obiter" would lead to absurd consequences as it would make the applicability of the doctrine of

issue estoppel dependent upon the order in which the Court chooses to address issues in its reasons.[vi]

The Court's clarification with respect to the concept of "obiter" is of significance as it not only alters the traditional understanding of what is considered "obiter", but also broadens the scope of what is considered as a binding judicial precedent.

Scope of Appellate Review

The Court of Appeal in this decision also makes an interesting observation while noting that there is a limited scope of appeal by the Court of Appeal when it comes to reviewing a lower court's exercise in discretion. **The Court somewhat surprisingly suggests that the scope of review is greater when the lower Court is an administrative tribunal.**[vii]

This comment by the Court seems rather counterintuitive as it relates to the level of deference afforded by a reviewing Court to an administrative tribunal. Courts traditionally have afforded greater deference to administrative tribunals, particularly when they are interpreting their home statue.[viii]

Here the Court of Appeal suggests that at least with respect to the interpretation of issue estoppel, the level of deference would be less for an administrative body rather than greater.

This suggestion by the Court, although stated boldly as a stand alone proposition, may well have been advanced by the Court in that instance, as it was the Court's view that the interpretation of issue estoppel did not fall within the particular expertise of many, if not most, administrative bodies. As such, Courts are to be given a greater scope of review.

However, even that interpretation of the Court's comments does not seem to be well supported in the case law.

In our review of the case law, we were unable to find a case which clearly supports the proposition and instead found that, in many instances, administrative tribunals were awarded judicial deference even when analyzing technical legal or equitable issues.

For example, in *Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professionals,* [2011] 3 SCR 616, the Supreme Court of Canada, found that labour

arbitrators are awarded judicial deference to adopt and apply common law and equitable principles within their distinctive sphere.[ix]

Nevertheless, perhaps there is some force to the position advanced in certain circumstances. For example, it may be that certain administrative tribunals (such as those presided over by non-lawyers) may well not have sufficient expertise in equitable remedies to be afforded deference in that context.

In the decision of *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd*., [1993] 2 SCR 316, Sopinka J. notes specifically that in matters that do not fall within the expertise of the arbitrator, those findings would be reviewable on a standard of correctness.[x] Therefore, the scope of review to be greater in those circumstances.

It should be noted that this remark by the Court is "obiter"as the case did not deal with an administrative tribunal. Nevertheless, the suggestion by the Court regarding deference could dramatically alter what the scope of appellate review of administrative tribunals.

The resolution of this apparent conflict may need to await a case which turns on the discretion between the level of deference owed on an appeal to a Court versus an administrative tribunal.

Conclusion

In conclusion, this decision brings up a number of interesting legal points and concepts, such as the two discussed in this article, both of which seemed counterintuitive.

We hope this article proves helpful with respect to what the Court considered as "obiter" and the scope of appellate review of an administrative body.

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[i] *Catalyst Capital Group Inc. VimpelCom Ltd.,* 2019 ONCA 354 [VimpelCom ONCA].
[ii] *Catalyst Capital Group Inc. v. Moyse,* 2016 ONSC 5271.
[iii] *The Catalyst Capital Group v. Moyse,* 2018 ONCA 283.
[iv] *The Catalyst Capital Group Inc. v. VimpelCom Ltd.,* 2018 ONSC 2471.
[v] See *Canada Inc. V. Apotex Inc* 2011 FCA 300, as an example of the traditional understanding of "obiter" in

these circumstances.

[vi] *Membery v. The Great Western Railway co.* (1889), 14 App. Cas. 176 (H.L.) at p. 187.

[vii] *VimpelCom ONCA* at para 47.

[viii] See *Belairdirect Insurance v. Dominion of Canada General Insurance Co. (Travelers)* 2012 ONCA 101 at para 58, where the Court of Appeal specifically states that there is "no reason to displace the deference owed to the arbitrator, who was applying his home status and his specialized expertise".

[ix] At para 53.

[x] At p. 336.