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When the “Entire Agreement” is not the Entire Agreement



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As the Québec Court of Appeal recently held in *Invenergy Wind Canada LLC v. Électric Inc.*,¹ “entire agreement” clauses (also known as integration clauses) are valid under Québec law and must be applied when the parties have clearly expressed themselves. However, if there is ambiguity, courts can override such clauses and seek the true intentions of the parties, by any means of admissible evidence. “Entire agreement clauses” that are ambiguously drafted may be ineffective in restricting the arrangement between the parties to the written agreement.

Background

In this matter, Invenergy Wind Canada LLC (“IWC”) appealed a 2017 judgment of the Québec Superior Court, which condemned it to pay Électric Inc. (“ÉI”) over \$1 million in contractual royalties and payments in connection with the operation of wind turbines.

IWC produces sustainable energy solutions and participates in calls for tenders launched by Hydro-Québec and its divisions. When it submits a successful bid, IWC develops and operates a wind farm in order to supply Hydro-Québec with electricity. ÉI prospects sites that can potentially accommodate wind turbines.

Between April and December 2003, IWC and ÉI negotiated and entered into a contract under which the parties would share revenues from wind farming activities on a site in the Gaspésie region in Eastern Québec. The parties’ dispute concerned the scope of this contract: ÉI contended that it was owed royalty fees and other

payments from the operation of the wind farm, in connection with four subsequent power purchase agreements entered into between IWC and Hydro-Québec (in 2008, 2010, 2013 and 2014, respectively).

IWC and ÉI had exchanged four written communications in which they expressed their agreement: a Proposed Term Sheet (April 2003), a Memorandum of Understanding (May 2003), a Letter of Agreement (December 2003), and a Second Amendment modifying the Letter of Agreement (March 2007). The Letter of Agreement contained the following provision:

21. No Other Agreements. The Purchase Agreement and the Électric Transaction Documents represent the full and complete agreement of the parties regarding the Project and subject matter hereof, and except for the further documents and agreements expressly referenced herein or therein or contemplated hereby, there are no other agreements, oral or written, with respect to the Project and subject matter hereof. This Purchase Agreement further supercedes [sic] the Memorandum of Understanding, dated May 5, 2003 between Seller and Purchaser solely in connection with the Project and subject matter hereof.

At the time of the original Letter of Agreement, the parties had specifically contemplated a 2003 Hydro-Québec call for tenders. IWC’s submission to that call for tenders was unsuccessful.

Despite this initial setback, the parties continued to work together. ÉI monitored and collected data with respect to the wind farm site, which it transmitted to IWC. Using this data, IWC prepared a submission to a second Hydro-Québec call for tenders, involving the same wind farm site. In 2007, the parties agreed to the Second Amendment, which changed certain references in the Letter of Agreement to reflect the new submission. This second bid led to the 2008 power purchase agreement between IWC and Hydro-Québec. Through successful submissions to further Hydro-Québec calls for tenders, IWC obtained the 2010, 2013 and 2014 power purchase agreements to be fulfilled at the same site.

IWC did not dispute that ÉI was entitled to various payments and royalties flowing from the Hydro-Québec contract that it signed in 2008. However, IWC refused to pay any amounts to ÉI in relation to the subsequent power purchase agreements involving the same wind farm site, relying upon the entire agreement clause cited above to argue that ÉI's rights to remuneration were limited to the revenues generated from the 2008 Hydro-Québec contract.

Decision

In principle, “entire agreement” clauses are valid under Québec law.² When drafted effectively, integration clauses enable the predictability and stability of contractual relationships, by preventing the inclusion of additional or implicit provisions into contracts.³

In interpreting the contract between IWC and ÉI, the trial judge had held that ÉI was entitled to past and future royalties in addition to other payments, in respect of all power purchase agreements entered into between IWC and Hydro-Québec relating to the specified wind farm site.

On appeal, IWC argued that the trial judge erred in failing to give effect to the “entire agreement clause.” IWC contended that this clause limited its obligations to those flowing from the call for tenders specifically referred to and contemplated by the parties in their contract, as amended by the 2007 Second Amendment.

Ultimately, the Court of Appeal upheld the trial judge's decision. The Court referred approvingly to the trial judge's application of a 2013 decision⁴ in which the Supreme Court of Canada distinguished between the “common intention” and the “declared will” of contracting parties. The agreement between the parties is ultimately reflected in the common intention, despite the importance of the declaration (oral or written) of that intention.⁵ Where the declared will of the parties creates ambiguity, courts can override an “entire agreement” clause and seek the actual common intention of the parties, subject to the rules of civil evidence.⁶ This is consistent with

article 1425 of the Civil Code of Québec, which states: “The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract” (*emphasis added*).

In this case, ambiguity arose from the fact that the Letter of Agreement (as amended in 2007) did not expressly state whether the payment obligations and royalty fees owing to ÉI were ongoing or limited to a single contract resulting from a Hydro-Québec call for tenders. The Court upheld the trial judge's findings through his use of documentary and testimonial evidence to dispel this ambiguity, thereby effectively setting aside the integration clause contained in the contract.

The Court of Appeal concurred with the trial judge's determination that the fees payable to ÉI throughout the operation of the wind turbines were not linked to any specific tender process, but to the entire site. The Court held that it was logical that, having done everything necessary to assess the energy potential of the site, ÉI should receive ongoing royalties from the operation of the wind turbines on that site (including from Hydro-Québec power purchase agreements that did not exist at the time of the 2003 Letter of Agreement or the 2007 Second Amendment). The Court of Appeal found that IWC's interpretation of the contract, which sought to restrict the remuneration owing to ÉI by virtue of the entire agreement clause, was neither commercially reasonable for ÉI nor consistent with other positions taken by IWC.

Takeaways

This case is an important reminder that a contract is distinct from its physical medium.⁷ While entire agreement clauses are common in Québec contracts, they must reflect all of the agreements to which the parties consented in order to be enforceable, as courts may override a clause that deviates from the true common intention of the parties, provided the evidence supports their conclusion. This effectively means that parties may introduce evidence by any permissible means in order to contradict an entire agreement clause, if it serves their interest, such that contractual stability may be more difficult to achieve with certainty in practice.

When drafting an entire agreement clause, it is essential to ensure that it is clear and unambiguous. If there is any ambiguity in its language, the clause may not be effective in protecting the parties' intentions to restrict their arrangement to the confines of the written agreement.

Although the purpose of drafting an entire agreement clause is often to exclude understandings or representations made in the negotiation process, it is important to consider any post-contractual issues that may arise, and to the extent possible, specifically address these points.

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1. 2019 QCCA 1073.
 2. Christine LEBRUN, *Les clauses d'intégralité au Québec*, 2007-2008 R.d.B., Tome 67, p. 43.
 3. *Ibid.*
 4. *Québec (Agence du revenu) v. Services Environnementaux AES inc.*, 2013 SCC 65 (CanLII).
 5. *Ibid.*
 6. *Aéroports de Montréal v. Meilleur*, 1997 CanLII 10820 (QC CA).
 7. *Ibid.*

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