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Entire Agreement Clauses – Understanding the Nuances of Surrounding Circumstances

Key Takeaway

Parties entering into a written contract should be aware that if a dispute arises about contractual interpretation, the inclusion of an entire agreement clause in the contract will not prevent the court from considering evidence relating to the circumstances of the contract formation.

A recent decision by the Ontario Court of Appeal in *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation*,[1] confirms that the inclusion of an entire agreement clause does not displace the well-established principles of contractual interpretation set out by the Supreme Court of Canada.[2] Specifically, an entire agreement clause alone will not prevent a court from considering admissible evidence of the surrounding circumstances at the time of contract formation.[3] The determination as to what constitutes properly surrounding circumstances is a question of fact.[4] Assuming the evidence is admissible, the surrounding circumstances may be used to illustrate the parties' objective mutual intention and the background facts leading to the contract.[5]

The Court of Appeal reiterates, however, that evidence of surrounding circumstances cannot be used to overwhelm the words of the written agreement or to deviate from the text to create a new agreement.[6]

The Background

In 2008, the Province of Ontario ("**Ontario**") and the Ontario Lottery and Gaming Corporation ("**OLG**") entered into a gaming revenue sharing and financial agreement (the "**Agreement**") with Ontario First Nations (2008) Limited Partnership ("**First Nations Partnership**"). The Agreement was to share revenue related to three sources: (1) gaming revenue (e.g., lotteries, slots), (2) non-gaming revenue (e.g., activities ancillary to the operations), and (3) complementary services (e.g., the retail value of accommodation, food, beverages, etc. which were provided on a complimentary basis to encourage patrons).

Prior to Ontario/OLG and the First Nations Partnership entering into the Agreement, there had been almost a decade of disputes regarding gaming revenues and the First Nations Partnership had sued Ontario and OLG for $2 billion in damages. The new revenue sharing agreement had been proposed to address the First Nations Partnership's concerns about unpredictable and reduced revenue from the prior agreements. During the negotiations, the parties agreed to a definition of "gross revenue" which included the three sources noted above. The government also assured the First Nations Partnership that

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[1] *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*, 2021 ONCA 592 [*First Nations (2008) Limited Partnership*].
[2] See *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, and *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32.
[3] *First Nations (2008) Limited Partnership*, at para 62.
[4] *First Nations (2008) Limited Partnership*, at para 64.
[5] *First Nations (2008) Limited Partnership*, at para 64.
[6] *First Nations (2008) Limited Partnership*, at para 64.

the primary objective of the Agreement was to replace uncertain sources of revenue with stable, predictable long term funds.

In 2010, OLG considered outsourcing its non-gaming activities to private operators. The private sector operators would assume all risk and responsibility for the non-gaming activities and in exchange keep 100% of the non-gaming revenue. OLG did not disclose its plans and did not seek to amend the Agreement to relieve the obligation to pay the First Nations Partnership all three types of revenue. In 2013, OLG implemented its plan. After outsourcing the non-gaming activities, OLG stopped paying the First Nations Partnership revenue from the non-gaming activities and the complementary service.

Upon discovering that OLG moved non-gaming activities to private operators, the First Nations Partnership commenced arbitration. The arbitration panel found that Ontario and OLG breached the Agreement. Specifically, a majority of the panel found that Ontario and OLG breached the express contractual terms when they ceased paying two of the three agreed upon types of revenue.

Ontario and OLG appealed the decision. That appeal was dismissed.

Ontario and OLG further appealed to the Ontario Court of Appeal.

The Court of Appeal's Decision

The focus of this article is the court's discussion of the entire agreement clause contained within the Agreement. This issue arose as Ontario and OLG submitted that "the appeal judge erred in failing to read the Agreement as a whole" and more specifically that the appeal judge erred by "failing to apply the entire agreement clause and allowing the extrinsic evidence to overwhelm the words of the Agreement."

The entire agreement clause provided as follows:

> *1.10 Entire Agreement*
>
> *This agreement and the Closing Agreement constitute the entire agreement between the parties pertaining to the subject matters herein. There are no warranties, conditions, or representations (including any that may be implied by statute) and there are no agreements in connection with such subject matters except as specifically set forth or referred to in this Agreement and the Closing Agreement. No reliance is placed on any warranty, representation, opinion, advice or assertion of fact made either prior to, contemporaneous with, or after entering into this Agreement, or any amendment or supplement thereto, by any party to this Agreement or its partners, directors, officers, employees or agents, to any other party to this Agreement or its partners, directors, officers, employees or agents, except to the extent that the same has been reduced to writing and included as a term of this Agreement, and none of the parties to this Agreement has been induced to enter into this Agreement or any amendment or supplement by reason of any such warranty, representation, opinion, advice or assertion of fact. Accordingly, there shall be no liability, either in tort or in contract, assessed in relation to any such warranty, representation, opinion, advice or assertion of fact, except to the extent contemplated above. …*

Ontario and OLG asserted that the appeal judge and majority erred in law by admitting the pre-contractual negotiations into evidence.[7] OLG also asserted that the entire agreement clause precluded reliance on any pre-contractual warranty, representation, opinion, advice or assertion of fact.[8]

The Court of Appeal rejected Ontario and OLG's submission.

First, the Ontario Court of Appeal reiterated the principles of contractual interpretation as set out by the Supreme Court of Canada:[9]

1. Courts should take a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine the intent of the parties and scope of their understanding.
2. Courts must read the contract as a whole, giving the words used their ordinary meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.
3. The surrounding circumstances should be considered in contractual interpretation […] interpretating a commercial contract requires knowledge of the commercial purpose of the contract, based on the genesis of the transaction, the background, the context, the market in which the parties are operating.
4. The evidence of the surrounding circumstances should include only objective evidence of background facts at the time of the execution of the contract, that is knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.
5. The surrounding circumstances should never overwhelm the words of the agreement. The surrounding circumstances are to understand the mutual and objective intention of the parties as expressed in the words of the contract. The surrounding circumstances cannot be used to deviate from the text of the contract to the point that the court effectively creates a new agreement.

Second, in line with the principles set out by the Supreme Court of Canada, the Court of Appeal found that an "*entire agreement clause alone does not prevent a court from considering admissible evidence of the surrounding circumstances at the time of contract formation*."[10] The surrounding circumstances are relevant in interpreting a contract because "*words alone do not have an immutable or absolute meaning.*"[11] Relevant background and context are often essential to understand contractual language.[12]

The Court cited the following quote from the Alberta's Court of Appeal in *IFP Technologies (Canada) v. EnCana Midstream and Marketing*:

> *The mere existence of an "entire agreement provision" does not mean that the words chosen beyond that entire agreement provision admit of one interpretation only. The purpose of considering the surrounding circumstances is not to add to, contradict or vary the terms of the agreement but rather use them as an*

[7] *First Nations (2008) Limited Partnership*, 2021 ONCA 592, at para 61.
[8] *First Nations (2008) Limited Partnership*, 2021 ONCA 592, at para 62.
[9] *First Nations (2008) Limited Partnership*, 2021 ONCA 592, at para 46.
[10] *First Nations (2008) Limited Partnership*, 2021 ONCA 592, at para 62.
[11] *First Nations (2008) Limited Partnership*, 2021 ONCA 592, at para 62.
[12] *First Nations (2008) Limited Partnership*, 2021 ONCA 592, at para 62.

> *interpretative aid to determine the meaning of the words in dispute. Where the parties have concluded an agreement and a court is left to sort out the parties' objective intentions, it cannot be prevented from considering the surrounding circumstances by a provision that is itself based on the assumption that the agreement is clear – when it is not.*[13]

Determining what constitutes properly surrounding circumstances is a question of fact.[14] In *First Nations (2008) Limited Partnership*, the Agreement provided that any appeals were limited to questions of mixed fact and law. Therefore, such a question of fact was outside of the Court's jurisdiction.

However, the Court of Appeal noted that in that case, the surrounding circumstances helped to place the Agreement in its proper setting and understand the genesis of the transaction, the background and context. It included:

- The parties history of litigation over revenue sharing and the settlement by the First Nations Partnership of a $2 billion claim in exchange for the Agreement to obtain stable funding for their communities;
- The shared objective of locking in three identified revenue streams to ensure stable, predictable, long term funds for First Nations communities; and
- Ontario's commitment not to convert revenues received to the final account of the Province into revenues that were not.

The Court of Appeal held that such evidence was admissible to show the parties' objective mutual intention and the background facts leading to the Agreement.[15] Moreover, the surrounding circumstances were not used to overwhelm the words of the agreement or deviate from the text to create a new agreement.[16]

The Court of Appeal notes that while the majority of the arbitration panel considered the surrounding circumstances, its interpretation of the Agreement was firmly grounded in the actual wording of the agreement. The Court of Appeal further noted that the surrounding circumstances or matrix of facts were not determinative in interpreting the Agreement one way or the other.[17]

In result, the Court of Appeal rejected what was framed as Ontario and OLG's "matrix-free case" which ignored the circumstances leading up to the Agreement and the parties' common objectives.

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[13] *IFP Technologies (Canada) v EnCana Midstream and Marketing*, 2017 ABCA 157.
[14] *First Nations (2008) Limited Partnership*, 2021 ONCA 592, at para 63.
[15] *First Nations (2008) Limited Partnership*, 2021 ONCA 592, at para 64.
[16] *First Nations (2008) Limited Partnership*, 2021 ONCA 592, at para 65.
[17] *First Nations (2008) Limited Partnership*, 2021 ONCA 592, at para 65.

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