LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON
PAROL EVIDENCE RULE

LRC 44

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TO THE HONOURABLE L. ALLAN WILLIAMS, Q.C.
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The Law Reform Commission of British Columbia has the honour to present the following;

REPORT ON THE PAROL EVIDENCE RULE

In this Report the Commission examines an aspect of the common law known as the parol evidence rule. The effect of the rule is to exclude (extrinsic (evidence that would add to, vary or contradict the terms of a written agreement. The rule has become riddled with exceptions. Its scope and application are uncertain. When it does apply it may yield unfair results. It is recommended that the rule be abrogated.

CHAPTER I INTRODUCTION

When the parties to a contract have apparently set down all terms and conditions in a written document extrinsic evidence is inadmissible to add to, vary or contradict those terms and conditions. This, in essence, is the parol evidence rule. Although this formulation of the rule expresses it in absolute terms, there are a number of complex and illdefined exceptions. Treitel is able to set forth the exclusionary part of the rule in a single paragraph but then devotes nine pages of text to describe the exceptions to the rule. In addition, to these exceptions the rule may be avoided by the highly technical doctrine of the collateral contract.

Paralleling the uncertainty in the scope of the rule is a similar uncertainty as to its legal nature. In the United States, the parol evidence rule is considered to be a rule of substantive law which, defines the limits of a contract; it fixes the subjectmatter for interpretation, though not itself a rule of interpretation. This assessment is consistent with the plain meaning rule of the interpretation of contracts, that is, an objective appraisal of the parties' intention is derived from the written words of the document itself. Enquiry into the parties' actual intention outside the document is ordinarily forbidden on the ground that the writing shows their intention that the document state fully the terms of the agreement. Another view of the parol evidence rule is to regard it as a rule of evidence based on the "best evidence" principle. The best evidence of the contents of a writing is the original. Other evidence such as oral testimony is suspect because of failing memory, selfserving accounts and endless disputation concerning the meaning and use of words. This view of the rule is firmly rooted in history:

> The parol evidence rule, like most other evidential topics, represents a gradual reversal of primitive doctrines. Its evolution has been traced through several stages. Originally, it was a byproduct of the symbolism surrounding the use of the seal. Later it was associated with the classification of evidence according to grade, matters of record being higher than writing, and both than matter of averment. Its modern recognition begins with the Statute of Frauds, which illustrates the contemporary attitude of mind in the provision requiring devises of land "to be in writing and signed ... or else they shall be utterly void and of none effect."

By the end of the 19th century adherence had waned to the principle of interpretation whereby the courts would only look at the words of the written document before them. Today the exclusionary part of the parol evidence rule has been so undermined by exceptions that some commentators view it as no more than a presumption:

> What the parol evidence rule has bequeathed to the modern law is; a presumption namely that a document which looks like a contract is to be treated as the whole contract. This presumption is "very strong" but "it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement."

However the differing views of the legal nature of the rule are seldom explicitly recognized by the courts. Usually, the view held by a court emerges only implicitly from its strict or liberal approach to admissibility of evidence extraneous to the written contract.

In the United States and Canada, and throughout the Commonwealth proposals for the reform of the parol evidence rule have been advanced. In 1977 the California Law Revision Commission made tentative recommendations to codify the exceptions to the parol evidence rule. In 1976 the English Law Commission circulated a Working Paper in which the parol evidence rule was thoroughly and critically examined. weighing the arguments advanced for its retention (attainment of certainty and finality) against the confusion, technical complexity and occasional injustice associated with the rule, the Law Commission recommended that it be abolished. The Ontario Law Reform Commission was impressed by the simplicity and flexibility of the English Law Commission's recommendation, and adopted it "as its own" in respect of contracts for the sale of goods.

New Zealand has taken a somewhat different approach. The *Contractual Remedies Act, 1979* identifies the socalled "merger" or "cutoff" clause as a principal factor in the unjust exclusion of oral evidence. A merger clause is a provision in a written agreement specifying that the writing constitutes the entire agreement between the parties. Section 4 of the Act provides that such a clause should not preclude the court from ascertaining the true position unless it is "fair and reasonable" that the clause should be conclusive between the parties. The Act sets out factors to be considered by the court in determining what is "fair and reasonable."

In order to assess the desirability of modifying the parol evidence rule in British Columbia, it will first be necessary to examine the state of the rule. Chapter II will examine the scope of the rule and trends in other jurisdictions. Chapter III is concerned with arguments in favour of and against retention of the rule. Chapter IV sets forth our conclusions and recommendations.

CHAPTER II THE PAROL EVIDENCE RULE

A. ___The Rule

The Parol Evidence rule, as traditionally applied, contemplates the existence of a written, and usually executed, document complete and unambiguous on its face. It apparently embodies all the terms, stipulations, warranties and conditions arrived at by the parties by negotiation and consent. By implication or by express avowal in a merger or cutoff clause, idle document is intended to be the full, final and complete expression of the parties' agreement. If these conditions are satisfied then the parol evidence rule clearly and unequivocally states that evidence dehors the document is inadmissible to add to, vary or contradict the intent expressed in the words of the document.

The analysis in the preceding paragraph must be qualified somewhat. First, it presupposes the existence of a single contract with the extrinsic (oral or written) evidence purporting to vary or contradict the terms of the agreement. If the extrinsic evidence can be characterized as establishing an independent or subsidiary or collateral contract between the parties it may be admitted for that purpose. This avoidance of the rule is discussed in section C below. Second, if the extrinsic (evidence is not offered to add to, vary or contradict the terms but only to aid in the translation or interpretation of the phrasing in the document, then it may be admissible. Third, a precondition to the application cof the rule is that the parties must have intended that the document was to be the complete expression of their agreement.

> As Denning L.J. said recently, "There have been many cases where the courts have found an oral warranty collateral to a written contract." There have indeed; and in some of them it is surprising that the presumption of completeness was sufficiently rebutted to let in the further oral terms. Furthermore, it is clear he may be able to persuade the Court that the contract is to be found in more than two places, *e.g.*, in the document plus other writings (such as correspondence), plus oral statements, all taken together.

If the document was not intended to stand alone then the rule is inapplicable and any evidence, oral, written or conduct may be admitted if it is relevant and of probative force. A note of caution is required here to avoid unnecessary confusion between the "warranty collateral to a written contract" (collateral warranty) mentioned in the passage quoted above and the concept of a collateral contract. When there is a collateral warranty, there is only one contract whose terms (oral and written) are found in several places. When there is a collateral contract, there are two independent contracts, usually one evidenced by an executed document and the other contained in the negotiations and conduct of the parties prior to execution of the document.

B. ___Exceptions to the Rule

Since the exceptions to the parol evidence rule have been discussed elsewhere, the analysis of each exception presented in this Report will be cursory. The aim is to acquaint the reader with the wide and sometimes uncertain rifts torn in the otherwise uniform applicability of the rule.

These exceptions allow the introduction of evidence to vary or contradict a writing when it is relevant to one of the following issues. By raising one of these issues in the pleadings, an astute lawyer can easily skirt the rule.

1. Validity.

Evidence is admissible to prove that the contract was invalidated due to misrepresentation, mistake, incapacity, lack of consideration, fraud or the defence of *non est factum*.

2. Custom, Implied Terms and Prior Course of Dealing.

Frequently businessmen operating in the same field leave unsaid that which is customarily taken for granted as a normal term of contracts in that field. The parol evidence rule does not operate to exclude evidence of such implied terms.

3. Conditions Precedent.

Where parties agree that a written document shall become operative only on the occurrence of some event or condition, (excluding evidence of such an agreement would defeat the parties' intentions and possibly create an injustice. However, where the provision is merely a condition subsequent parol evidence is inadmissible. The British Columbia case of *Standard Bank* v. *McCrossan* by the Supreme Court of Canada in 1920, however, illustrates the difficulty and uncertainty of determining whether a condition is precedent or subsequent. A guarantee was given by the defendant to the plaintiff bank on the oral promise by the bank to pay off out of the funds advanced certain other notes on which the defendant was guarantor. This was not done. At trial, Murphy J. found as a fact deduced from the testimony of the witnesses that the oral promise was meant to operate as a condition precedent. Once this stipulation was characterized as a condition precedent, parol evidence was admitted by the trial judge to prove the extent and terms of the oral promise. In the Court of Appeal, the majority upheld the opinion of the trial judge saying that it was a matter of the credibility of the witnesses. McPhillips J.A., dissented on the grounds that this vias at standard guarantee form, the bank manager was without authority to give such a promise and the condition was merely subsequent. In the Supreme Court of Canada the six judges split evenly on the characterization of the promise. Half the Court supported the decision of the Court of Appeal, while the other half held that the promise, at its highest, was a condition subsequent and parol evidence was inadmissible to vary the terms of the written contract.

4. Specific Performance and Rescission.

The remedies of specific performance and rescission are equitable. In deciding whether to grant an equitable remedy a court should not confine itself solely to the terms of the written document it other evidence is available. For instance, an unwritten part of a contract for the sale of land may be established by evidence of the conduct of the parties, applying the doctrine of part performance to override the requirement of writing established by the *Statute of Frauds*. Conversely, a court may deny specific performance of a written term of an agreement to a party that has refused to carry out part of that agreement established by parol evidence. The jurisdiction of the court to grant rescission of a contract on equitable grounds is much broader than that existing at common law. This jurisdiction even extends to innocent misrepresentation which induces the making of the contract and which leads to some fundamental mistake. Of course, parol evidence must be admitted to establish the existence of the misrepresentation.

5. Interpretation.

The subjectmatter, parties and consideration are essential terms of any contract. Oral evidence that will dispel latent ambiguities on these matters is admissible since a mistaken interpretation by the court would do violence to the canon of interpretation that requires giving effect to the parties' expressed intentions.

6. Rectification.

The written document may not embody all the terms of a previously concluded oral agreement where it was the intention that the document be a record of that agreement. If this is the case, then the written document may be rectified so that it corresponds with the previous oral agreement. This necessitates admission of parol evidence.

7. ___Oral Warranties and Misrepresentations.

In this respect the law in Canada is in a period of change and uncertainty. At issue is the effect of a written exclusion clause in a contract on the operation of a warranty for representation given outside the writing that induces a party to enter into a contract. Recent cases suggest that courts are admitting evidence of the alleged warranties or misrepresentations (innocent, negligent or fraudulent) before deciding on their contractual impact, if any. Frequently such warranties are given effect.

An example is the division of the English Court of Appeal in *Mendelssohn* v. *Normand*. This was a classic "ticket case" with a carpark ticket containing a repudiation of liability and a statement that its terms could only be varied in writing by garage company's manager. The garage attendant, however, made a statement to the plaintiff that had the effect of ousting the disclaimer if the representation could be relied upon. Lord Denning, PI.R., discussed the contention that the statement could not contradict the written contract:

> The printed condition is rejected because it is repugnant to the express oral promise or representation ... "It is illusory to say we promise to do a thing but we are not liable if we do not do it!" To avoid this illusion, the law gives the oral promise priority over the printed clause.

This case has had an impact on Canadian jurisprudence. *C..A. C.* v. *Midtown Motors*, a decision of the Saskatchewan District Court, cited *Mendelssohn* as representing the law applicable when a prior oral stipulation varies or contradicts the main written contract and induced the snaking of it.

In *C.A.C.* v. *Midtown Motors*, the contract for the lease of a mobile brake shop expressly negatived the existence ot any oral agreements when in fact there had been an oral promise to mount a significant advertising campaign at the expense of the lessor. This advertising campaign was not forthcoming and this fact was raised as a defence in an action by the lessor for unpaid rent. It was held that the oral promise overrode the provision of the written contract. *Mendelssohn* has been applied recently in British Columbia to a case having remarkably similar facts, *Minichiello* v. *Devonshire Hotel*.

21. [1976] 2 All E.R. 930 (C.A.). There was no discussion of the strictures against admission of parol evidence when that evidence conflicts with the terms of the written document.

One difficulty in analysing cases of this kind is that the distinction between admitting evidence of oral stipulations as an exception to the parol evidence rule, and the avoidance of the rule through the collateral contract doctrine, is blurred. The theoretical basis on which the parol evidence is admitted is not always clear from the decisions. In many instances the facts could be viewed as giving rise to a collateral contract.

In *Evans* v. *Merzario* for example, the court admitted evidence of an oral assurance that induced a party to enter a written agreement at variance with the assurance. The English Court of Appeal was unanimous in giving effect to the assurance but on different bases. Lord Denning M.R. held that the assurance amounted to a collateral contract; Reskill and Geoffrey Lane L.JJ., relying on *Mendelssohn*, held that the assurance was part of the main contract.

We now turn to a more specific discussion of the collateral contract doctrine.

C. Collateral Contracts.

An exception to the rule exists when for reasons of policy, a specific contract situation is excluded from the operation of the rule. Avoidance of the rule arises when a party seeks to characterize the alleged contract terms outside the written document as a separate or "collateral" contract. This characterization is important because the parol evidence rule should not prevent proof of its terms. Assuming that it can be shown that the parties intended to set out their agreement in more than one contract, the issue that arises is whether a collateral contract may add to, vary or contradict the main written contract. The assumption that the parties intended one or more contracts to result often does not accord with their actual intention since they may not have set their minds to the issue. The courts, however, have perceived the two contract analysis as a necessary precondition to the development of the collateral contract doctrine and so have been forced to make a determination of intention where perhaps none may have existed.

In recognizing collateral contracts the English courts have vacilated between an expansive and a restrictive application of the doctrine, with the Supreme Court of Canada belatedly following suit. Three cases decided in England between 1864 and 1873 established that a collateral agreement may exist independently of the main agreement and that its existence (can be established by parol evidence. The Supreme Court of Canada accepted this collateral contract doctrine in *Byers* v. *McMillan* in 1887 Strong J. stated;

> By such a stipulation no term or Provision of the writing is varied or in the slightest degree infringed upon; both agreements can well stand together; the writing provides for the performance of the contract, and the consideration to be paid for it, and the parol agreement merely adds something respecting security for payment of the price to these terms. Surely it would be competent to the parties, either contemporaneously with the written memorandum or subsequently to it, to have stipulated by parol that the appellant should have had as security for payment a lien or pledge upon some chattel ...

In this passage Strong J. expressly contemplated that the collateral contract would add something to the main contract even if it was not allowed to vary, or contradict it. Part of the underlying reasoning was that if the oral promise had induced the party to enter the written agreement, it would be inequitable to enforce the written agreement without the promise. Extending this, in 1913 the Saskatchewan Supreme Court in *Eisler* v. *Canadian Fairbanks* held that the written agreement must be clearly and expressly worded in order to exclude reliance on such an oral representation.

In the same year as the Eisler decision, Lord Moulton in *Heilbut, Symons* v. *Buckleton* while affirming the existence of the collateral contract doctrine, assigned to it a very restrictive ambit and placed upon the claimant a heavy burden of proof to establish such a contract:

> It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds," is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by 100 pounds and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing

> a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts to making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same. subject-matter.

In *Hawrish* v. *Bank of Montreal,* in 1969, Judson J. expressly approved Lord Moulton's analysis on behalf of the Supreme Court of Canada. Mr. Hawrish, a solicitor, had given a continuing guarantee of $6,000 indebtedness of a company. The written contract was a standard form bank contract which stated that no representation had been made to him by the bank. The appellant alleged that the bank manager had assured him that his guarantee was only for the existing, not the later, indebtedness of the company and would be discharged when other guarantees were obtained. The Supreme Court rejected this submission with the express view that collateral contracts could not openly contradict the written contract to which they were supposed to be collateral.

Even before the Supreme Court narrowed the bounds of the collateral contract doctrine in hawrish, the English courts were beginning to adopt a less restrictive approach. In *City & Westminster Properties* v.. *Mudd* the defendant was a tenant leasing commercial property from the plaintiff and during the negotiations for the lease was assured orally by the plaintiff that a lease term forbidding use of the property as residential premises would not be enforced. Suit was brought for forfeiture of the lease on the grounds that the tenant was living on the premises contrary to his lease. The court admitted evidence as to the existence of this collateral contract and held that the tenant was entitled to rely on the oral agreement not to enforce notwithstanding that this contradicted the main in written contract.

No relaxation of collateral contract doctrine is yet evident in British Columbia and *Hawrish* continues to be applied with full vigor. In Grouse *Nest Resorts* v. *First National Mortgage* the plaintiff company was subdividing land for development with the aid of funds advanced by the defendant. To secure this loan, which was to be advanced in instalments upon proof of satisfactory progress on the subdivision, the plaintiff gave a mortgage of the land to the lender. The mortgage contained clauses stating in effect that the defendant was the sole arbiter of whether progress on the subdivision was satisfactory, and that it was under no obligation to advance any part of the moneys secured by the mortgage. An agent of the defendant, in conversation with the plaintiff prior to execution, had given assurances that these clauses would not be enforced so long as the subdivision progressed in good faith and a proper manner. At the time the second instalment of money was to be advanced, the defendant's agent made a determination that the subdivision progress was satisfactory and authorized the advance. The defendant, invoking its discretionary power, refused to advance the money.

At trial for breach of contract, the plaintiff was awarded damages of $586,266 and costs. The trial judge held that the defendant could not rely on the discretionary clause because of the representations of its agent, since it was in reliance upon such representations that the plaintiff executed the mortgage. On appeal, however, the Chief Justice pointed out that the trial judge had not referred to the parol evidence rule at all. Farris, C.J.B.C., said;

> In my view the application of that rule precludes the use of the evidence that the trial judge relied on. *See Hawrish* v. *The Bank of Montreal*.

The Court unanimously held that the parol evidence rule required that the terms of the parties' agreement hid to be obtained from the writing in the mortgage document itself. Most recently, *Hawrish* was applied by ifutcheon J. of the Supreme Court of British Columbia in *Bogardus, Wilson Ltd*., v. *Richview Glass Ltd*.

D. Modification by Statute

The British Columbia Legislature has recognized that the intent of consumer protection legislation might be suuverted by the operation of the parol evidence rule. To avoid this possibility, the *Trade Practices Act* in section 27 provides that;

> In a proceeding in respect of a consumer transaction, no rule of law respecting parol or extrinsic evidence, nor any term or provision in a consumer transaction, shall operate to exclude or limit the admissibility of evidence relating to the understanding of the parties as to the consumer transaction or a particular term or provision of the consumer transaction.

This section has only once been the subject of judicial comment since it was enacted in 1974. In that case Ruttan, J. in the Supreme Court simply applied the clear wording of section 27 to find that precontractual representations which constituted a deceptive practice could be proved by parol evidence:

CHAPTER III SHOULD THE RULE BE RETAINED?

The arguments for the retention of the parol evidence rule in its present form may be described under the following headings;

1. ___Certainty

If a contract, upon its face, appears to be complete in its terms and appears to be the final expression of the parties' agreement, then it is presumed that the solicitor can advise with authority and the businessman can act in confidence, certain that no extracontractual stipulation will send their planning into disarray. This rationale assumes that tile words have a plain and unambiguous meaning and there are no latent ambiguities.

2. ___Finality

There must be some end to the contractual negotiations in order to promote certainty, avoid protracted rethinking of positions and enhance enforceability of contracts. The written document formalizing negotiations, when executed, provides a means of recognizing the finality and completeness of the parties' agreement.

3. ___Narrowing of Issues

In any lawsuit based on a contract, the use of the court's time and consequent costs can be kept down by restricting the parties to the terms of the written agreement which purportedly embodies the whole of their agreement. If any injustice arises or violence is done to the real intentions of the parties, then an exception to the rule can usually be invoked (or invented if necessary).

While the benefits of the rule are not to be ignored, they are far from conclusive of the issue.

To say that the rule promotes certainty is an overstatement. Words may have different meanings for different people or the words may be modified by the context of the agreement. As McLauchlan said:

> One suspects that instead of ambiguity admitting the evidence, the evidence often establishes the ambiguity.

Even assuming that words can be plain in meaning and unambiguous in context for all parties to the contract, certainty is not necessarily enhanced under the present use of the parol evidence rule in British Columbia with its technical qualifications, many exceptions and partial statutory repeal. A solicitor advising on a contract today never has the clear certainty that any written document, even when it contains a merger clause, contains the whole agreement between die parties. All the rule does is to promote a sense of security that may not always be warranted regarding the potency of the written document, visavis the parol agreement.

There is no clear empirical evidence that the rule does assist in attaining the objectives of promoting finality and narrowing the issues in litigation. On the other hand, since the existence of a latent ambiguity can raise an exception to the rule and parol evidence is admissible to establish that ambiguity, the court must listen to the evidence before ruling on its admissibility. It seems probable that if the parol evidence has any relevance at all, the court will bear the evidence and then rule on admissibility under the rule. This seems a backward procedure because, in effect, the evidence is already before the court and what it really needs to do is rule on its weight or probative force.

There are a number of arguments that support a modification of the parol evidence rule. Some of these have already been raised in response to the arguments favouring its retention. The rule has evolved into a highly technical body of law that has become encrusted with numerous exceptions. It tends to operate on an arbitary basis and its application cannot be said to reflect any consistent policy. Such a situation brings the law into disrepute and it may fairly be argued that the rule has outlived its usefulness.

Moreover, considerations of fairness and justice are at stake. In this context, fairness and justice means meeting the legitimate expectations of the parties by giving effect to the whole of their agreement. In some cases the application of the rule may yield a result that is fair in this sense but there is no guarantee this will always be the case.

This highlights what is probably the most objectionable feature of the rule that it is arbitrarily and mechanically applied the situations within its scope irrespective of the facts in issue. This is illustrated if one considers the way in which the courts would deal with a conflict between two provisions of a wholly written contract. Assuming that conflict is not so serious as to destroy the entire contract, the court would hear evidence concerning the formation of the contract, assign appropriate weight to that evidence and arrive at a conclusion that reflects what the court believes to be the true agreement between the parties. This is undoubtedly the correct approach.

If, however, the courts were told that such a conflict was to be resolved through the mechanical application of a rule say that the first (or last) provision must invariably prevail that would rightly be condemned as nonsense. An appropriate response would be to say that, to the extent that the sequence is probative of the parties' intent, this is a matter of weight only to be balanced against other evidence.

But the parol evidence rule operates in the same fashion as the arbitrary rule in the example. At bottom, it says that where an agreement is alleged to be partly in, writing and partly oral, the writing must be regarded as conclusive if it is at variance with the oral part alleged. Logically, this ought to be a matter of weight only.

A person may, with considerable justification, feel illused by the legal system when a technical rule of law is raised as a bar to oral stipulations on which he may have relief. It is not always an adequate answer to tell that person the stipulations should have been reduced to writing in the agreement. The realities of negotiation in the commercial world do not always permit this.

It might be argued, however, that an abrogation or modification of the rule would create injustice of a different kind, in that it would facilitate the breach or termination of agreements by parties who undergo a change of heart. This, it is said, is unfair to the contracting parties that have, in good faith, attempted to reduce all contractual terms to writing and fortified their position with a merger clause. In effect, the argument concludes, the risk of injustice would not be reduced but merely transferred from one kind of case to another.

This argument does not admit of a totally satisfactory answer. Whenever a court is faced with conflicting evidence as to the intent of the parties to an agreement, there is always a danger that it will arrive at an incorrect result. This danger is one that is inherent in the process of litigation. On balance, however, the court is likely to arrive at a just result more often if it is permitted to examine all the evidence and give it whatever weight is appropriate than if a technical rule of law compels the court to disregard otherwise relevant evidence.

CHAPTER IV CONCLUSIONS AND RECOMMENDATIONS

A. Our General Conclusion

1. Options for Reform

On balance, we are persuaded that some modification of the parol evidence rule is called for. No legislature or law reform body that has addressed itself to the parol evidence rule has concluded that the rule in its present state is satisfactory.

We do not overlook the possibility that the courts, if left to their own devices, would arrive at a more satisfactory position than the present one. The approach the courts have taken to late, however, does not encourage expectations of coherent reform in the foreseeable future.

The objections to continued judicial refinement of the common law emerge from the analysis in Chapter II. The exceptions to and evasions of the rule have reridered its scope sufficiently uncertain that it is not easy to predict when the rule might apply. The uncertainty is compounded by the rigidity of the Supreme Court of Canada (in Hawrish) in applying the collateral contract doctrine as contrasted with the flexibility sometimes displayed in trial court decisions. *Standard Bank* v. *McCrossan* is an example in the Supreme Court of a less rigid approach to parol evidence than that of Hawrish. The court in flawrish distinguished *Standard Bank* on the basis that it involved a condition precedent; whereas in *Hawrish* the characterization of the oral stipulation was as a collateral contract. If the facts of the two cases are read together, there is little to distinguish them other than this characterization. Both involve a solicitor giving a guarantee to a bank on behalf of a company of which he is a director, pursuant to an oral commitment or stipulation given by the bank manager. If the oral commitment is a condition precedent, parol evidence is allowed in under an exception; if it is a collateral contract, the rule bars it. Technical distinctions such as these do not serve to clarify legal relationships or to enhance certainty in contract interpretation and enforcement. On the whole, we believe legislative reform is preferable.

Three models of legislative reform have emerged recently; the total abrogation of the rule, podification of the rule, and provisions that would deny merger clauses a conclusive effect.

2. Abrogation

The English Law Commission's provisional recommendation is for outright abolition of the rule. Their estimation is that many if not most of the cases that arise would be decided in the same fashion. This is especially true in England since the judicial erosion of the rule has been greater there than in Canada and the contractual effects of misrepresentation are regulated by statute. They also assume that in those cases decided differently under the new regime the results would be more just in that the court would be giving effect to the actual intentions of the parties.

This assumption appears implicitly in the discussion by the Ontario Law Reform Commission directed towards adoption of the English Law Commission's proposal for abolition of the rule. They seem to put slightly more emphasis ozi the evidentiary aspect of the legal nature of the rule, however, saying that:

> The courts will continue to attach very great weight, and rightly so, to written terms freely consented to by the parties; they will continue to express scepticism with respect to the consensual nature of unbargained terms contained in printed forms of agreement. The main difference is likely to be that there will be less frequent recourse to circumstances that now constitute exceptions to the rule, especially the exception based on collateral agreements. This result would follow because, in the light of the evidence, the court would find it easier than under existing law to hold that the writing could not have been intended as the final and exclusive expression of the parties' agreement.

3. ___Codification

The approach of the California Law Revision Commission consists essentially of codifying the present rule, as developed in California. It would give the exceptions to the rule statutory force both to conform to present usage and to the provisions of the Uniform Commercial Code while making some slight allowance for continuing the previous law (regardless of whether the writing was meant as the final expression of agreement) when the extrinsic evidence is offered to explain or interpret the terms of a written agreement. This approach merely embeds the present shortcomings and uncertainties of the rule into statute and does not address the necessity for reform of the rule. This approach of codification rather than abrogation reflects a desire to conform to the Commercial Code and maintain uniformity of law among the various state jurisdictions.

These considerations of conformity and uniformity are inapplicable to Canada since the parol evidence rule is not encapsulated in any code having persuasive force on the provincial legislatures. Hence, each province is free to modify or abrogate the rule by statute.

4. ___*Merger Clauses*

In Chapter I we pointed out that recent New Zealand legislation had modified, but not abrogated, the parol evidence rule through provisions concerned with merger clauses. Section 4(1) of the *Contractual Remedies Act, 1979* provides;

> (1) If a contract, or any other document, contains a provision purporting to preclude a Court from inquiring into or determining the question

Whether a statement, promise, or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or

(b) Whether, if it was so made or given, it constituted a representation or a term of the contract; or

(c) Whether, if it was a representation, it was relied on -

the Court shall riot, in any proceedings in relation to the contract, be precluded by that provision from inquiring into and determining any such question unless the Court considers that it is fair and reasonable that the provision should be conclusive between the parties, having regard to all the circumstances of the case, including the subjectmatter and value of the transaction, the respective bargaining strengths of the parties, and the question whether any party was represented or advised by a solicitor at the time of the negotiations or at any other relevant time.

We have reservations about this approach.

Although a criterion of "fairness" in determining whether or not a merger clause should be effective seems laudable as an abstraction, it does not stand up under close examination. Surely the relevant question for the Court is whether the merger clause truly reflects the agreement between the parties in the totality of the circumstances. The answer to that question does not necessarily hinge on "fairness" in the sense that the legislation employs that concept.

5. ___Our Conclusion

In principle, we are attracted by the English approach total abrogation of the rule. Assuming that the parol evidence rule can often act as an impediment to interpretation of the contractors' mutual intentions, what results might flow from its abolition? The Law Commission tentatively concluded:

> The abolition of the rule would produce the same result in many cases but in some cases it might lead to a different and more just result.

As an indicator of what might result from abolition, it is instructive to assess how the British Columbia case referred to earlier, *Grouse Nest Resorts* v. *First National Mortgage*, might be decided if there were no parol evidence rule.

In *Grouse Nest Resorts*, oral evidence admitted by the trial judge to prove the existence of EL collateral agreement vias held on appeal to be excluded by the rule. The existence of the rule obscures the true issue in this case. The true issue is not whether the evidence is excluded; it is whether the evidence establishes a mutual intent that the oral representations are to be a binding addendum to the written mortgage document. Although the oral representations were advanced by an agent of the defendant mortgage company to the plaintiff and were directly contradictory of the terms of tile document as approved by the defendant, at a later stage of the negotiation the terms of the written mortgage were confirmed by the solicitors for the plaintiff. It is arguable that the required mutual intent to be bound by the oral representation did not exist and that the writing represented the true agreement between the parties. On an objective appraisal of the facts a court could reach the same decision as in *Grouse Nest Resorts* without invoking the rule.

As noted in the previous chapter, the parol evidence rule has been abolished in respect of consumer transactions in British Columbia. Over a four year period, there has been only a single case mentioning this abolition and then not in a contentious fashion. While British Columbia experience with a limited abrogation of the rule is of limited assistance in measuring the impact of total abrogation it cannot be said that the experience should discourage such a step.

It is our conclusion that the parol evidence rule should be abrogated.

B. ___Our Recommendations

At an earlier stage of this project a tentative draft of this Report was given limited circulation among judges, local practitioners, and law teachers. We were seeking responses directed at two issues. The first was the general conclusion that the parol evidence rule should be abrogated. The reaction we received, while not totally unanimous, strongly supported that conclusion.

The second issue concerned the particular form a recommendation to this effect might take. This matter is not as straightforward as it might seem. A simple legislative statement that the rule is abrogated would leave a number of questions unanswered. In the draft, we suggested a provision similar to section 27 of the *Trade Practices Act* be enacted. The critical response to that formulation proved to be most helpful in sharpening our views.

The principal difficulty identified relates to the uncertainty of the legal nature of the rule which we discussed in the first chapter. The thrust of such comment was that to address the rule as one of evidence only poses a risk that the courts might continue to apply the rule as one of substance. It was suggested that the courts might admit evidence of an oral stipulation but then continue to invoke the rule to avoid giving effect to the stipulation.

The concern expressed led the Commission to consider a number of differently formulated proposals, each of which purported to abrogate the parol evidence rule as a matter of substantive law. The possible application of each formulation was tested against hypothetical and real cases. Duriny this process, it became increasingly clear that no single formulation consistently yielded results that we perceived as being correct. Much would depend on the express wording of the contract and the extent to which the application of other substantive rules of law might turn on giving effect to oral stipulations.

While there is much to be gained from allowing evidence of oral stipulations to come before a court, any attempt to specify the effect of such evidence once it is admitted might do more harm than good. The impact of an abrogation of the parol evidence rule would be felt in such a wide variety of contractual situations that it is impractical to attempt to prescribe a result for each case. Morever, contract law is not static. New concepts and ideas are constantly being brought to bear on contractual problems. The law concerning restitution, for example, opens up new possibilities for the readjustment of contractual relations. In the face of such developments it seems undesirable to attempt to specify the effect of parol evidence which is admitted. Rather, the admission of all the evidence will permit a judge to apply whatever law might be invoked to the actual facts of the case. The sanctity of the written contract would no longer automatically prevail over every other substantive law that might apply to the real agreement between the parties.

Our principal concern is the injustice which might arise where a party to an action is prevented by the artificial application of a technical rule from bringing the substance of his agreement before the court. A recommendation directed at this concern only does not bind a court invariably to prefer one form of evidence over another, although in some cases it may be appropriate for it to do so. A "cutoff" or merger clause may itself represent the true intention of the parties. Where a court, on all the evidence available, reaches that conclusion, it may properly refuse to hear further evidence designed to establish an agreement at variance with the written contract. The important point is that the parol evidence rule should not bar evidence of the parties' intention with respect to the merger clause.

In summary, we believe that most of the difficulty and injustice created by the parol evidence rule can be met by a straightforward provision that addresses the rule primarily as one of evidence as opposed to substance. One minor concession might be to include in the provision a reference to weight. This should alert the court to the inten-

tion that the written evidence of an agreement is not invariably to be preferred to oral evidence of its contents that may be at variance with it.

The Commission recommends;

The *Evidence Act* be amended by adding a provision comparable to the following

> If an agreement or provision thereof is disputed, neither the parol evidence rule, nor any agreement or provision I:hereof, shall result in the exclusion of evidence which would otherwise be admissible, and if such evidence is admitted, it shall be accorded such weight, if any, as is appropriate in the circumstances.

We would like to express our thanks to Mr. George Copley, formerly of the Commission's research staff for his assistance in this study.

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