

## ENTIRE AGREEMENT CLAUSES: NEITHER RIDDLE NOR ENIGMA

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*Entire agreement clauses in standard form contracts continue to trouble courts in Canada which seem reluctant to enforce them despite the fact that they are a type of exclusion clause and should be treated as such when adjudicated. These clauses typically give rise to concerns about other problematic areas of contract law, especially the parol evidence rule, collateral contracts, and the proper construction of exclusion clauses when negligent misrepresentation is at issue. This comment will examine the recent case law about entire agreement clauses and argue that there is no mystery to them as other commentators have suggested. Rather, once seen as exclusion clauses, they should be subject to the same rules of contract for the control of exclusion clauses.*

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*Dans le contexte de contrats d'adhésion, les clauses d'intégralité (qui précisent que le texte du contrat contient la totalité de l'accord stipulé entre les parties) dérangent encore les tribunaux canadiens qui semblent hésiter à les appliquer, en dépit du fait qu'elles constituent une forme de clause d'exclusion et qu'elles devraient donc être respectées à ce titre lorsqu'elles font l'objet des décisions des tribunaux. Ces clauses suscitent typiquement des préoccupations au sujet d'autres aspects équivoques du droit contractuel, dont notamment la règle d'exclusion de la preuve extrinsèque, la problématique des contrats accessoires, ainsi que la question de l'interprétation correcte de clauses d'exclusion là où le différend porte sur des déclarations inexactes et entachées de négligence. Le présent article étudie la jurisprudence récente qui a pour objet des clauses d'intégralité, et prétend que celles-ci n'ont rien de mystérieux, contrairement à ce qu'avancent d'autres commentateurs. Il faudrait plutôt que, une fois que ces clauses sont perçues comme des clauses d'exclusion, elles soient assujetties aux mêmes règles contractuelles qui gouvernent les clauses d'exclusion.*

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### 1. Introduction

Writing a decade ago, Paul M. Perell described the law relating to entire agreement clauses as a “riddle inside an enigma,”<sup>1</sup> so complicated and possibly confused did that law seem to be. Over the succeeding ten years, several provincial appellate courts have reconsidered the matrix of contractual issues within which entire agreement clauses operate, including misrepresentation, collateral contract and the parol evidence rule, and the most recent of these cases from the British Columbia (B.C.) Court of Appeal, *Intrawest Corp. v. No. 2002 Taurus Ventures Ltd.*,<sup>2</sup> offers a salutary opportunity to re-examine the law relating to entire agreement clauses with a view to offering an illumination of the enigma and a solution to the riddle.

There can be very few contracts of adhesion today which do not contain an entire agreement clause, that is, a clause which states that the written text executed by the parties contains the whole agreement between them and which excludes all other representations made in the course of negotiating that text or subsequently. Contract scholars typically treat these clauses as a species of exclusion clause<sup>3</sup> and courts occasionally equate them roughly with the parol evidence rule,<sup>4</sup> yet the implications of those equations often elude courts faced with the question of contract enforcement. In fact, entire agreement clauses pose the same policy issues as exclusion clauses, and notwithstanding the reluctance of the courts to acknowledge this when they treat these clauses as somehow *sui generis*, it will be argued that they are not at all mysterious. The mystery, if there is any, is why the courts seem as hesitant as they do in construing and enforcing them.

Whether the contract in question is induced by negligent or fraudulent misrepresentation, the outcome for entire agreement clauses should be the same as in the case of exclusion clauses generally or in

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<sup>1</sup> “A Riddle Inside an Enigma: The Entire Agreement Clause,” (1998) 20 Adv. Q. 287.

<sup>2</sup> (2007), 281 D.L.R. (4th) 420 (B.C.C.A.) [*Intrawest*].

<sup>3</sup> For Canada see Geoff R. Hall, *Canadian Contractual Interpretation Law* (Toronto: Lexis Nexis, 2007) at 232-38; John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 206-07, 354-59, 690-95; John Swan, *Canadian Contract Law* (Toronto: Lexis Nexis, 2006) at 509-27. For England see Hugh Beale, ed., *Chitty on Contracts*, 29th ed. (London: Sweet & Maxwell, 2004) at 752-59.

<sup>4</sup> Some examples include *Hayward v. Mellick* (1984), 45 O.R. (2d) 110 (Ont. C.A.) at 120 [*Hayward*]; *Zippy Print Enterprises Ltd. v. Pawliuk*, [1995] 3 W.W.R. 324 (B.C.C.A.) at 337-41 [*Zippy*]; *Turner v. Visscher Holdings Ltd.* (1996), 23 B.C.L.R. (3d) 304 (B.C.C.A.) at 308, 318 [*Turner*]; *Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.* (1998), 67 Alta. L.R. (3d) 104 (Alta. C.A.) at 116.

cases where the parol evidence rule is applied; that is, they should not be enforced where there is a fraudulent misrepresentation, but may be enforced where there is a negligent misrepresentation, especially where the parties are sophisticated commercial parties. The underlying policy should be the same: courts should not sustain fraudulent conduct but may forgive negligent conduct when contracts are so negotiated. This comment will explore these issues beginning with the most recent appellate case and then moving to the larger contractual context within which entire agreement clauses are found.

## 2. *The Case*

*Intrawest* was concerned with the purchase of a building lot in Whistler, British Columbia, alleged to have been induced by representations that ski access to the lot would be built by the vendors. The purchasers paid \$2.85 million for the lot in a residential development with a view to reselling it for \$3.4 million; at the time of the hearing it had not been resold and the purchase price was the highest ever paid for a residential lot in Whistler. It was anticipated that a 7,500-square-foot house would be built on it valued at between \$9 million and \$13 million. The vendor financed the purchase and the mortgage was modified twice, but none of the payments under the second modification had been made. The purchaser sued for rescission or damages for breach of contract and for fraudulent and negligent misrepresentation, and the vendor brought foreclosure proceedings.

The trial judge found that the promotional literature, maps and model for the development showed the ski runs and ski trails leading to the lot but did not indicate who was responsible for their construction. The trial judge further found that the vendor had orally represented that it would be “providing the best possible ski access... in a timely fashion,”<sup>5</sup> and left the purchaser with the reasonable impression that access would be built within a reasonable time; without these representations, the purchaser would not have purchased the lot.<sup>6</sup> The trial judge also found that the contract made no express provision as to who would build the ski runs and trails or when they would be built, and that the Disclosure Statement incorporated into the contract did not address these matters either, although it included site plans showing their proposed location. The contract contained an entire agreement clause which included “terms, conditions, representations, warranties or collateral agreements, express or implied.”<sup>7</sup>

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<sup>5</sup> *Intrawest*, *supra* note 2 at 426.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.* at 427.

The trial judge found there was no evidence of contractual intention to create a collateral contract and therefore did not consider the entire agreement clause. He did find negligent misrepresentation, however, rejecting the vendor's argument that the statements were of future intention, and that the entire agreement clause did not expressly exclude liability for negligent misrepresentation. He awarded damages to be set off against the amount owing under the mortgage.

On appeal, the Court gave effect to the entire agreement clause to preclude liability for negligent misrepresentation, after reviewing recent jurisprudence from the Supreme Court of Canada on concurrency of actions in contract and tort. Writing for the Court, Levine J.A. relied on *BG Checo International Ltd. v. B.C. Hydro and Power Authority*<sup>8</sup> for the proposition that concurrency of action is possible except where the contract precludes an action in tort because the common law permits such private ordering, or where the tort is independent of the contract.<sup>9</sup> She distinguished the minority position in *BG Checo* which maintained that an express term in the contract may preclude a tort action and limit the causes of action to contract.<sup>10</sup> This position was subsequently disapproved by the majority in *Queen v. Cognos Inc.*,<sup>11</sup> although the minority in *Cognos* continued to assert the restriction to contract if an express term in the contract addressed the matter in question.<sup>12</sup> In *Intrawest*, the Court of Appeal concluded that the trial judge had erred in relying on the minority position in the Supreme Court of Canada jurisprudence by finding no express provision in the contract of sale dealing with the ski access to the lot with the result that the purchaser could succeed in negligent misrepresentation.<sup>13</sup> The Court of Appeal also concluded that the trial judge had erred in relying on *Cognos*, a case about an independent tort, for the conclusion that the entire agreement clause was inoperative; no such clause was at issue in *Cognos*.<sup>14</sup> Thus, the appellate court restated the legal issue in *Intrawest* as whether the entire agreement clause excluded negligent misrepresentation.

Turning to this main issue, Levine J.A. canvassed much of the previous case law on entire agreement clauses, distinguishing those

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<sup>8</sup> (1993), 99 D.L.R. (4th) 577 (S.C.C.) [*BG Checo*].

<sup>9</sup> *Ibid.* per La Forest and McLachlin JJ. at 583-84.

<sup>10</sup> *Ibid.* per Iacobucci J. at 616.

<sup>11</sup> (1993), 99 D.L.R. (4th) 626 (S.C.C.) per La Forest J. at 628 [*Cognos*].

<sup>12</sup> *Ibid.* per Iacobucci J. at 645-46.

<sup>13</sup> *Intrawest*, *supra* note 2 at 433.

<sup>14</sup> *Ibid.*

cases dealing with negligent misrepresentation<sup>15</sup> from those dealing with collateral contracts.<sup>16</sup> Of the former, she considered only one previous decision from the B.C. Court of Appeal to be binding, *Zippy Print Enterprises Ltd. v. Pawliuk*,<sup>17</sup> in which the Court declined to enforce an entire agreement clause because it did not expressly exclude liability for *negligent* misrepresentations. The Court, however, considered *Zippy* to have been overtaken by a subsequent decision of the Supreme Court of Canada, *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*,<sup>18</sup> in which an exclusion clause which did not expressly refer to negligence was upheld to exclude liability for a negligent failure to warn.<sup>19</sup> *Zippy* was also distinguished in *Intrawest* on the ground that the purchaser in that case was a sophisticated property dealer who acknowledged that he had read and understood the contract.<sup>20</sup> Thus, the Court of Appeal concluded that the contract governed the relationship between the parties and the entire agreement clause should be enforced.

The Court of Appeal also expressed considerable doubt as to whether there was a negligent misrepresentation in the first place. It suggested that because the Disclosure Statement referred to ski access, the matter was a part of the contract and not outside it; the absence of an undertaking by the vendor to construct that access might well have been a deliberate part of the written agreement.<sup>21</sup> Again, the Court suggested that the oral representations about ski access could also be considered as statements of future intention rather than of existing fact.<sup>22</sup> Finally, it suggested that it was not a misrepresentation for Intrawest to fail to disclose that its plans could change nor that it might delay completion of the ski access for valid business reasons.<sup>23</sup> In short, the Court of Appeal doubted the finding of negligent misrepresentation by the trial judge at the outset.

Finally, the Court of Appeal remitted the question of a collateral contract for a retrial, regrettably without extensive consideration of the applicable law, especially in light of its finding about the application of

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<sup>15</sup> *Corfax Benefit Systems Ltd. v. Fiducie Desjardins Inc.* (1997), 37 O.R. (3d) 50 (Gen. Div.); *Zippy*, *supra* note 4.

<sup>16</sup> *MacMillan v. Kaiser Equipment* (2004), 33 B.C.L.R. (4th) 44 (B.C.C.A.) [*MacMillan*]; *Turner*, *supra* note 4.

<sup>17</sup> *Supra* note 4.

<sup>18</sup> (1997), 153 D.L.R. (4th) 385 (S.C.C.) [*Bow Valley*].

<sup>19</sup> See *Intrawest*, *supra* note 2 at 435.

<sup>20</sup> *Ibid.* at 435, 437.

<sup>21</sup> *Ibid.* at 437-38.

<sup>22</sup> *Ibid.* at 438.

<sup>23</sup> *Ibid.* at 438-34.

the entire agreement clause. The Court did emphasize the need to find an objective common intention to enter a collateral contract and ruled *Intrawest's* evidence that it never intended to build ski access to be inadmissible extrinsic evidence of a subjective state of mind.<sup>24</sup> The Court did not consider the relationship of a finding of a collateral contract to the entire agreement clause, but by leaving open this question it created the possibility of a finding in conflict with its enforcement of the clause in relation to the oral representation.

On several occasions, the Court of Appeal characterized *Intrawest* as “fundamentally a contract case,”<sup>25</sup> but offered no explicit reasons for that characterization beyond expressed doubts about whether the oral representations were representations of fact rather than of future intention as required for misrepresentation. How cases with this paradigm fact situation should be characterized is the first question raised by the decision – as contract *or* tort, or contract *and* tort. A second question is whether the majority-minority split in the Supreme Court decisions in *BG Checo* and *Cognos* as to concurrency is a distinction without a difference in light of *Bow Valley*, once express provision for negligence is no longer required in an exclusion clause provided the clause clearly encompasses negligence as a ground for escaping liability. If there is no distinction between cases where the contract addresses the matter under consideration and those where it does not, then concurrent actions should always be possible, depending on judicial construction of the exclusion clause or entire agreement clause under consideration. In other words, concurrent actions should always be possible subject to the rules of contractual construction.

A third issue is the status of *Zippy* in light of *Bow Valley*. The Court of Appeal did not expressly overrule *Zippy* in *Intrawest*, although it implicitly did so by not expressly requiring “negligence” in an exclusion clause. A fourth issue is the policy issue of whether a party should be permitted to use an entire agreement clause to escape liability for either fraudulent or negligent misrepresentation. *Zippy* is based implicitly on the position that entire agreement clauses should rarely be enforced and it seems useful to reconsider an issue which has been ignored by the courts for a very long time. A fifth issue coming from *Intrawest* which has also not been addressed by the courts for some time is the distinction between a statement of future intention and a statement of fact – a distinction not clearly set out in contract law. Finally, *Intrawest* also revisits the relationship of entire agreement clauses and collateral contracts, and as a corollary to this, considers

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<sup>24</sup> *Ibid.* at 439-40.

<sup>25</sup> *Supra*, note 2 at 430, 440.

whether success in pleading collateral contract can be squared logically with a failure in pleading misrepresentation even where the court characterizes the case as fundamentally a contract case. The outcome in the Court of Appeal in *Intrawest* implicitly opens up this conflicting possibility without addressing its resolution. A brief review of earlier Anglo-Canadian law on entire agreement clauses seems appropriate in order to address these issues.

### 3. Entire Agreement Clauses and Misrepresentations

The relationship of entire agreement clauses and misrepresentation will be considered in three different factual situations: 1) where an entire agreement clause is never applicable; 2) where an entire agreement clause is always applicable; and 3) where an entire agreement clause may be applicable depending on other variables in the case.

#### 1) Never Applicable

The first category is constituted of cases where, on the facts, the courts found that the entire agreement clause did not come into play at all in determining liability between the parties. These cases represent the proverbial forest of single instances.

In *Turner v. Visscher*,<sup>26</sup> the plaintiff was the part owner of a company which sold its assets to the defendant. The plaintiff alleged that he had also entered into two oral contracts after the asset sale agreement with the purchaser, one in which the plaintiff was to be paid a bonus of \$180,000 for agreeing to the asset sale and the other in which the plaintiff would be employed as the manager of the defendant. After the asset sale, the defendant disputed the payment of a bonus and argued that there was no such agreement, and even if there was, both the parol evidence rule and the entire contract clause precluded liability to pay the bonus. The trial judge found that the oral agreement had been made but that neither the parol evidence rule nor the entire agreement clause operated because the bonus agreement was subsequent to the asset sale agreement and conditional on it. The majority of the B.C. Court of Appeal agreed, adding that the bonus agreement was a separate agreement with another party, the plaintiff, rather than the company with which the asset agreement was made. In dissent, Newbury J.A. considered the two oral agreements which were conditional on the asset sale agreement coming into effect to be true collateral agreements to which the entire agreement clause applied to defeat the plaintiff's bonus claim. Arguably, the majority decision

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<sup>26</sup> *Supra* note 4.

captured the true dynamic of the negotiations and should be preferred, while the minority constituted a strict application of a clause designed to defeat that dynamic. Nevertheless, the case stands for the position that entire agreement clauses only apply to their own contracts and not to other contracts completed subsequently between different parties.

*Shelanu Inc. v. Print Three Franchising Corp.*<sup>27</sup> more clearly demonstrated that contracts containing entire agreement clauses do not have prospective effect on subsequent oral agreements. Here, a company, BCD, purchased a print shop franchise from Print Three (P3). Two years later, the owner and his wife purchased the shares of Shelanu, which operated two other print shops on the same street. The P3 agreement provided for royalty rebates depending upon the volume of sales. After two more years, one of the Shelanu shops was closed, and two years after that, the original print shop was closed; all printing operations were consolidated in the remaining shop. No written formalities attested to any of these changes in operation. Yet another two years later, the BCD franchise was orally terminated and Shelanu reported sales as a single franchise, thereby entitling it to a greater royalty rebate under the franchise agreement. Two years later, Shelanu purported to terminate the franchise agreement and sued P3 for damages. The franchise agreement was contractually slated to terminate in a further two years. A number of issues were raised, of which one was the enforceability of the oral agreement to cancel the BCD franchise and the effect of that oral cancellation on the parties' subsequent relationship; the question in particular was whether exclusion clauses from the cancelled agreement, including an entire agreement clause, were still of any effect.

In a unanimous decision, the Ontario Court of Appeal found that the clauses did not, on construction, operate prospectively once the franchise had been orally cancelled. Weiler J.A. briefly reviewed recent Supreme Court decisions on the construction of exclusion clauses.<sup>28</sup> She concluded that the proper approach is to strictly construe them, in part by using the *contra proferentem* rule, and then to decide whether it is unfair to enforce them.<sup>29</sup> She treated the entire agreement clause at issue in the same way, thereby confirming that they are to be conceptualized as a species of exclusion clause. She concluded that the

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<sup>27</sup> (2003), 64 O.R. (3d) 533 (Ont. C.A.) [*Shelanu*].

<sup>28</sup> *Hunter Engineering Co. v. Syncrude Canada Ltd.* (1989), 57 D.L.R. (4th) 321 (S.C.C.); *Guarantee Co. of North America v. Gordon Capital Corp.* (1999), 178 D.L.R. (4th) 1 (S.C.C.).

<sup>29</sup> *Shelanu*, *supra* note 27 at 546-47.



clauses did not have prospective effect,<sup>30</sup> on construction, and that it would be unfair to enforce them after the agreement in which they are found has been terminated by the common intention of the parties.<sup>31</sup>

*Shelanu* clarifies two points about entire agreement clauses; first, that they are a species of exclusion clause; and secondly, that they do not apply prospectively unless expressly so drafted. Even if these clauses are drafted to have prospective effect, the decision in *Shelanu* suggests that future enforcement would be unfair once the contract has ended.

While it is fairly self-evident that an entire agreement clause should not apply to parties who are not parties to the agreement nor apply after the agreement has ended, it seems almost equally self-evident that such a clause should always apply in certain other situations.

## 2) Always Applicable

The most vigorous judicial statement for the application of an entire agreement clause is found in a recent English Chancery Division case, *Inntrepeneur v. East Crown*,<sup>32</sup> in which a thirty-year lease for a tied pub was alleged to have been preceded by a statement that the vendor would release the tie after two years. The vendor denied this and relied on an entire agreement clause to exclude both the alleged representation and any collateral contract. The trial judge found there to be insufficient evidence that such a representation was made; the closest statement was some discussion some five years prior to the execution of the agreement. He also found that statements made in the course of negotiations have no contractual effect if not reduced to writing. The purpose of an entire agreement clause was to preclude precisely that possibility and to restrict the parties' contractual obligations to the writing.<sup>33</sup> The Court left open the possibility that a pre-contractual statement might amount to a collateral warranty but found that the evidence here showed no such intention.<sup>34</sup> The Court's further consideration of collateral contract will be addressed below,<sup>35</sup> but for present purposes, it should be noted that the Court did not address how conflicts between an entire agreement clause and a collateral contract should be resolved. Leaving open the possibility that a collateral

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<sup>30</sup> *Ibid.* at 551.

<sup>31</sup> *Ibid.* at 551-52.

<sup>32</sup> [2000] 2 Lloyd's Rep. 611 (Ch. D.) [*Inntrepeneur*].

<sup>33</sup> *Ibid.* at 614-15.

<sup>34</sup> *Ibid.* at 617.

<sup>35</sup> *Infra* at section 4.

contract could be found on appropriate facts weakens the strength of the statement about the purpose of an entire agreement clause.

The spirit of *Inntrepreneur*, that entire agreement clauses should normally be enforced because that is their *raison d'être*, is evident in several Canadian cases as well. In *Transamerica Life Canada Inc. v. ING Canada Inc.*,<sup>36</sup> the purchaser of a life insurance company alleged that it discovered after the closing significant problems with the company and sued for substantial damages for misrepresentation and breach of contract; the claim included an indemnity to remedy the problems. The vendor company alleged that the purchaser had breached implied duties of good faith and fair dealing which the trial judge struck out on the basis that they are not recognized in contract law and would have the effect of adding implied obligations to the contract in breach of the entire agreement clause. On appeal, the Ontario Court of Appeal overturned the trial decision on the grounds that a court should not, on a pleadings motion, dispose of matters unsettled in the jurisprudence and yet to be determined at a full trial, and that the plea of good faith was not tied solely to one clause in the contract. In a separate decision, Laskin J.A. agreed with the trial judge that the good faith argument could not succeed, but also added several observations about the entire agreement clause. In his view, an implied duty of good faith should not be permitted to trump an entire agreement clause for three reasons: 1) the contract was a sophisticated document between large, powerful insurance companies represented by legal counsel when negotiated;<sup>37</sup> 2) the contract contained specific provisions about good faith;<sup>38</sup> and 3) the rules for the implication of a contractual term were not satisfied.<sup>39</sup> Laskin J.A. pointed to the entire agreement clause, an amendment and a waiver clause as evidence that the only agreement between the parties was the written agreement.<sup>40</sup> *Transamerica* contained the classic ingredients for the enforcement of exclusion and entire agreement clauses: sophisticated parties and sophisticated agreements.

The Ontario Court of Appeal took a similar position of enforcing an entire agreement clause in another sophisticated commercial transaction in *Gutierrez v. Tropic International Inc.*<sup>41</sup> There the plaintiff owned 700 preference shares in the defendant redeemable at the plaintiff's option for \$7 million. The plaintiff exercised his option and

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<sup>36</sup> (2003), 68 O.R. (3d) 457 (C.A.) [*Transamerica*].

<sup>37</sup> *Ibid.* at 475.

<sup>38</sup> *Ibid.* at 476.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.* at 477.

<sup>41</sup> (2002), 63 O.R. (3d) 63 (C.A.) [*Gutierrez*].

part payment of the redemption price was paid. For the remainder, an agreement was executed containing a repayment schedule, an entire agreement clause and a time of the essence clause. The parties to this agreement were the plaintiff and the defendants including the company and a related company. The related company executed a guarantee promising repayment absolutely and unconditionally. The plaintiff sued both companies when payment was not forthcoming and they did not contest their respective liabilities under the two agreements. They alleged, however, that prior to their execution of the agreement, there was an oral agreement relating to various matters including the source of the funds to be repaid and the timing of any action by the plaintiff should the funds not be repaid on schedule. They did not contest the inconsistency between the oral and written agreements. The Court of Appeal upheld the decision of the trial judge awarding summary judgment for the plaintiff for several reasons: 1) even with an expansive approach to the parol evidence, the oral agreement was entirely contradicted by the redemption agreement;<sup>42</sup> 2) no misrepresentations were at issue;<sup>43</sup> and 3) there was no collateral contract.<sup>44</sup> Again, an appellate court simply enforced the entire agreement clause on its own as overtaking pre-contractual negotiations in the absence of any misrepresentation.

Confirmation for this no-nonsense approach to entire agreement clauses can be found from the B.C. Court of Appeal in *MacMillan v. Kaiser Equipment Ltd.*<sup>45</sup> In that case, the plaintiff's employer was purchased by the defendant, and the plaintiff, an inventor of tools for use in the drywall industry, was employed by the defendant as a consultant, under a separate contract. The contract for the sale of the company required that the plaintiff be employed by the defendant and that his inventions were to be the property of the defendant. Subsequently another contract was executed with the plaintiff to give him shares in the defendant, but within a year, the plaintiff was dismissed for cause. He sued for negligent misrepresentation and breach of contract, and alleged that he was originally induced to enter the various contracts by promises that he would receive ten per cent of the shares in the defendant. The Court of Appeal found that the plaintiff failed to prove an intention to enter a collateral contract, relying on the strict approach of the Supreme Court of Canada in *Hawrish v. Bank of*

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<sup>42</sup> *Ibid.* at 70-74.

<sup>43</sup> *Ibid.* at 72.

<sup>44</sup> *Ibid.* at 73-74.

<sup>45</sup> *Supra* note 16.

*Montreal*.<sup>46</sup> Thus, the Court enforced the entire agreement clause and supported this result by noting that both parties were sophisticated businessmen who negotiated the agreement with legal advice.<sup>47</sup>

Finally, the recent Ontario Superior Court case, *Antorisa Developments Ltd. v. 172965 Canada Ltd.*<sup>48</sup> confirms that lower courts will follow the approach repeatedly demonstrated by the appellate courts and enforce entire agreement clauses. In this case, the plaintiff purchased a service station from a petroleum company on an “as is” basis. Prior to the sale, the vendor’s inspection of the property indicated no obvious signs of contamination and the purchaser had an opportunity to conduct a review, and did so, although the purchaser was told that the review conducted was too superficial to detect possible contamination. The purchaser completed the contract, despite legal advice that the environmental terms in the contract were too onerous, insofar as they required the purchaser to acknowledge that there were no guarantees as to the condition of the property and that the vendor undertook no liability whatsoever. The purchaser ran a gas station on the property for five years, and then, in anticipation of leasing the site for a non-petroleum use, secured an environmental report which disclosed significant contamination. The purchaser sued in fraudulent and negligent misrepresentation and on the basis of an alleged common law duty of care on a vendor of real property to disclose “environmental defect,” alleging an oral representation that the property was “clean.”

Lax J., in a comprehensively reasoned decision, enforced the agreement for a number of reasons: 1) although the contract did not expressly stipulate an exclusion of liability for negligence, negligence was clearly comprehended by the exclusion clauses;<sup>49</sup> 2) there was no fraudulent misrepresentation;<sup>50</sup> 3) there was no reliance or inducement in light of the purchaser’s own survey;<sup>51</sup> and 4) in commercial transactions, the parol evidence rule can be used to exclude oral representations and the entire agreement clause enforced.<sup>52</sup> The trial judge upheld the application of *caveat emptor* in finding for the vendor.<sup>53</sup>

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<sup>46</sup> (1969), 2 D.L.R. (3d) 600 (S.C.C.); the Court of Appeal also relied on *Gutierrez*, *supra* note 41 and distinguished *Turner*, *supra* note 4 and *Zippy*, *supra* note 4 on their facts.

<sup>47</sup> *MacMillan*, *supra* note 16 at 57.

<sup>48</sup> (2006), 20 B.L.R. (4th) 211 (Ont. Sup.Ct.J.).

<sup>49</sup> *Ibid.* at 227-31.

<sup>50</sup> *Ibid.* at 231-32.

<sup>51</sup> *Ibid.* at 233-34.

<sup>52</sup> *Ibid.* at 228-29.

<sup>53</sup> *Ibid.* at 235-37.

These cases leave no doubt that the courts treat entire agreement clauses like exclusion clauses where the parties are experienced and sophisticated commercial parties. Whether the oral representation is a mere representation or a negligent misrepresentation, the courts enforce the entire agreement clause against the representee. The courts construe the clause using the well-established rules for contractual construction, strict construction and *contra proferentem*. Moreover, as hinted in *obiter dicta* by Lax J., the only exception to this approach might be for fraudulent misrepresentation on the ground that the courts should not sustain fraudulent conduct in contractual negotiation.

The fact situations in which entire agreement clauses never apply and those in which they almost always apply accord with long-established principles of the law of contract, and the only mystery is why parties would ever bother to litigate them in the absence of a serious chasm between their understandings of the facts. Nevertheless, there is an intermediate group of cases in which the courts seriously entertain whether or not such clauses should be enforced, and these cases challenge the long established principles of contract.

### 3) *Sometimes Applicable, Sometimes Not Applicable*

The third set of cases typically involves a court deciding whether to enforce an entire agreement clause where there has been a representation which is either admissible notwithstanding the parol evidence rule or is a negligent misrepresentation. Some of these cases also involve collateral contract but that possibility will be considered separately below in the next section.

In the earliest of these cases, *Hayward v. Mellick*,<sup>54</sup> the vendor sold a ninety-four-acre farm to the purchaser but told him during negotiations that the farm had sixty-five workable acres under cultivation. The vendor honestly believed this to be true, having been so told by his father and grandfather. The purchaser discovered that the workable land was 51.7 acres and sued for damages for negligent misrepresentation and breach of collateral contract. The vendor relied on an entire agreement clause but the trial judge found that clause could not prevail over a fundamental breach of contract. The majority of the Ontario Court of Appeal overturned the trial decision. For the majority, Weatherston J.A. found the statement to be a negligent misrepresentation because made without measurement of the fields, knowing that the purchaser would rely on it because it was wintertime

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<sup>54</sup> *Supra* note 4.

and impossible to see which fields were under cultivation.<sup>55</sup> He further found, however, that the purchaser had read and understood the clause and that the clause covered negligence although it did not so expressly provide. Since the purpose of the clause, on construction, was to exclude liability for all statements outside the contract, the majority enforced the clause against the purchaser. In dissent, Houlden J.A. agreed that there was a negligent misrepresentation and that the issue was the construction of the contract; but because by analogy with the parol evidence rule, evidence about misrepresentation could be considered, he construed the entire agreement clause as not protecting the vendor from liability for negligence and found for the purchaser.

Although a straightforward case, the division of the Court in *Hayward* reflects the core problem when there is a conflict between a pre-contractual representation and an entire agreement clause, that is, that the construction of the contract will be the key to the resolution of the conflict. But that key is compounded by the further question of whether the clause must expressly stipulate negligence to preclude liability.

*Zippy*<sup>56</sup> addressed that issue. The defendants responded to an advertisement placed by a printing business whose representatives undertook to prepare feasibility studies for a franchise in the town in which the defendants wished to operate. The plaintiffs also promised substantial start-up support. The defendants purchased the franchise, but subsequently learned that many of the representations were untrue and fell behind in paying royalties because gross sales were lower than forecast. The plaintiffs asserted that the defendants were in default under the agreement but the defendants, after consulting a solicitor, decided to cease operating the franchise and to operate a similar business at the same retail site through a new company incorporated by the husband of one of the defendants. Zippy sued for the unpaid royalties, specific performance of the licensing agreement, an injunction and damages. The defendants maintained that the franchise automatically terminated when the royalties fell into arrears and that they were induced to enter the agreement by false representations which formed a breached collateral contract.

The trial judge decided that the franchise came to an end when the defendants ceased doing business as a franchise and that the royalties in arrears were payable, but that the defendants were entitled to an equivalent amount for misrepresentation which should be set off.

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<sup>55</sup> *Ibid.* at 115.

<sup>56</sup> *Supra* note 4.

The B.C. Court of Appeal upheld this decision. On appeal, the argument was focused on whether the plaintiff could rely on an entire agreement clause to avoid liability. Writing for the Court, Lambert J.A. noted that the trial judge had not categorized the misrepresentations but observed that many of them were “incorrect (or what is sometimes called ‘false’),”<sup>57</sup> and that they were “at worst intentional and at best negligent.”<sup>58</sup> Opting to characterize them as negligent, the Court declined to enforce the entire agreement clause on the ground that it did not expressly exclude liability for negligence, relying on a line of authority preceding *Bow Valley* which takes a strict construction approach when negligence is at issue.<sup>59</sup> The Court further considered the factual matrix in contract law and came to the same conclusion about the unenforceability of the entire agreement clause.

Following a well-known line of English authorities,<sup>60</sup> Lambert J.A. decided that the parol evidence rule could not be invoked to exclude the oral misrepresentations which induced the contract when made by a commercial enterprise.<sup>61</sup> The representations should be regarded either as part of the entire agreement between the parties or as a collateral agreement.<sup>62</sup> He conceded, however, that liability could be excluded either way, provided the exclusion clause is expressly so drafted, has been considered by both parties and intended by both parties to so operate.<sup>63</sup> Otherwise the more explicit representation should prevail.<sup>64</sup> He summarized his position thus:

A general exclusion clause will not override a specific representation on a point of substance which was intended to induce the making of the agreement unless the intended effect of the exclusion clause can be shown to have been brought home to the party to whom the representation was made by being specifically drawn to the

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<sup>57</sup> *Ibid.* at 336.

<sup>58</sup> *Ibid.* at 337.

<sup>59</sup> These cases were *Alderslade v. Hendon Laundry Ltd.*, [1945] 1 All E.R. 244 (C.A.) and *Cavell Developments Ltd. v. Royal Bank* (1991), 78 D.L.R. (4th) 512 (B.C.C.A.); for a discussion of the *Cavell* approach to account verification clauses in banking law see Keith W. Perrett, “Account Verification Clauses: Should Bank Customers Be Forced to Mind Their Own Business?” (1999) 14 B.F.L.R. 245.

<sup>60</sup> *Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd.*, [1965] 2 All E.R. 65 (C.A.); *Mendelssohn v. Normand Ltd.*, [1970] 1 Q.B. 177 (C.A.); *J. Evans & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd.*, [1976] 2 All E.R. 930 (C.A.).

<sup>61</sup> *Zippy*, *supra* note 4 at 338-39.

<sup>62</sup> *Ibid.* at 338.

<sup>63</sup> *Ibid.* at 338-39.

<sup>64</sup> *Ibid.* at 339.

attention of that party, or by being specifically acknowledged by that party, or in some other way.<sup>65</sup>

The result in *Zippy* was that the entire agreement clause could not be relied upon by the plaintiff because it did not meet this test. The analysis of Lambert J.A. remains one of the most coherent on this matter notwithstanding many subsequent appellate court decisions. The strict approach to entire agreement clauses by a differently-constituted bench of the B.C. Court of Appeal subsequently in *Turner*<sup>66</sup> also appears to mirror that approach.

In *Beer v. Townsgate I Ltd.*,<sup>67</sup> the Ontario Court of Appeal took a similar approach. In that case, the plaintiffs purchased condominiums from the defendant developer in an atmosphere of frenzy and extreme hype. They were told that their investments were risk-free and guaranteed, and that the vendor would buy back their units at any time. When the real estate market went into a steep decline, the plaintiffs refused to complete the purchase, and sued for rescission and the return of their deposits. The standard agreement of purchase and sale contained an entire agreement clause but not the various oral representations which preceded the sale. Both the trial judge and the Court of Appeal found for the purchasers.

Writing for the Court, Brooke J.A. found that there was no assent to the clause given the frenzied context of the sale, the absence of notice to the purchasers of the clause and the absence of opportunity to read the contract.<sup>68</sup> In short, this was a straightforward application of *Zippy*, and also of *Tilden Rent-a-Car Co. v. Clendenning*, in which the Ontario Court of Appeal found that signature did not indicate acceptance of the onerous terms of a car rental agreement made in a hurried and informal way.<sup>69</sup> The second reason for the decision in *Tilden* focused on the misrepresentation and the entire agreement clause. The Court in *Beer* found that the parol evidence rule could not be used to exclude evidence of a misrepresentation that induced the contract,<sup>70</sup> so as to permit the defendants to rely on the clause. In short, the entire agreement clause was not enforced.

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<sup>65</sup> *Ibid.* at 341.

<sup>66</sup> *Supra* note 4.

<sup>67</sup> (1997), 36 O.R. (3d) 136 (C.A.) [*Beer*]; see also Perell, *supra* note 1.

<sup>68</sup> *Ibid.* at 147.

<sup>69</sup> (1978), 18 O.R. (2d) 601 (C.A.) [*Tilden*].

<sup>70</sup> *Beer*, *supra* note 67 at 147.



Notwithstanding *Zippy* and *Beer*, subsequent courts have not been reluctant to enforce entire agreement clauses. In *Corfax Benefit System Ltd. v. Fiducie Desjardins Inc.*,<sup>71</sup> the plaintiff sued to collect a balance owing pursuant to a software license agreement and the return of proprietary material. The defendant argued that it was entitled to rescind the agreement due to numerous breaches by the plaintiff, and counterclaimed for damages for breach of the agreement. The defendant sued five individual employees of the plaintiff for fraudulent and negligent misrepresentations and these individuals moved to strike out that counterclaim.

Wilson J. found that the individuals were entitled to rely on the entire agreement clause to escape liability for any misrepresentations.<sup>72</sup> However, the trial judge declined to find the existence of a special relationship between them and the plaintiff to trigger a duty of care in the first place. Without a finding of negligent misrepresentation, the finding on the entire agreement clause is nugatory although it is also clear from the decision that had a negligent misrepresentation been found, the court would still enforce the entire agreement clause in favour of both employees and employers.<sup>73</sup> The Court conceded, however, that a finding of fraudulent misrepresentation would override the clause with the potential to expose the employees to liability.<sup>74</sup> Again the Court found, however, that the legal requisites for fraudulent misrepresentation were not pleaded.<sup>75</sup>

Finally, a similar approach to the application of an entire agreement clause in relation to negligent misrepresentation is found in *Air Nova v. Messier-Dowty Ltd.*<sup>76</sup> by the Ontario Court of Appeal. Here, the plaintiff purchased planes built by British Aerospace which contained landing gear designed and manufactured by the defendant. Subsequently, there was an accident resulting from defective landing gear and the plaintiff sued the manufacturer of the gear in negligence. The manufacturer moved for summary judgment on the strength of exclusion clauses in the contract of warranty from the manufacturer which was incorporated into the sale agreement for the planes, and which were framed as part of the entire agreement between the parties. Writing for the Court, MacPherson J.A. found that the clauses effectively precluded liability, on construction, for design and

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<sup>71</sup> *Supra* note 15.

<sup>72</sup> *Ibid.* at 53.

<sup>73</sup> *Ibid.* at 54-58.

<sup>74</sup> *Ibid.* at 58.

<sup>75</sup> *Ibid.* at 60-61.

<sup>76</sup> (2000), 128 O.A.C. 11.

workmanship.<sup>77</sup> An argument that the clauses did not cover a negligent duty to warn of defects attracted more detailed consideration, however, before being found to exclude liability for a negligent failure to warn. The Court found that since a negligent failure to warn was now a recognized part of the tort of negligence, it was as much covered by the word “negligence” in the clause as negligence in relation to design and manufacture.<sup>78</sup> Indeed, the Court concluded that the case for enforcing the clause was even stronger than in *Bow Valley* where the word “negligence” did not appear in the clause.<sup>79</sup>

In summary, where the issue is the enforcement of an entire agreement clause or an oral representation, which may or may not be a misrepresentation, the courts will not enforce the clause when it is patently not applicable – where it is found in another contract entirely, for example, where the parties are not parties to the contract in which it is found, or where the representation postdates the contract. The outcome of a contest between the enforcement of the clause or of a conflicting representation, especially a negligent misrepresentation, however, will be determined by well-defined variations on the facts: sophisticated commercial parties or unsophisticated consumer; notice or knowledge of the clause; construction of the clause; and the weight on any court of a presumption in favour of enforcement. Where the parties are sophisticated parties, the clause will be enforced provided it is construed as applicable to the facts; otherwise, for a contract involving a non-commercial party, the requirements of reasonable notice must be satisfied for enforcement. The construction issue of whether “negligence” must be expressly so stated in the clause appears to have been resolved by *Bow Valley*;<sup>80</sup> negligence need not be expressly stated provided the clause, on construction, can be interpreted to include negligence within its compass. Whether or not this rule will apply to consumer contracts remains to be clarified, since *Bow Valley* has not yet been considered in a consumer context; but for this last point neither riddle nor enigma seem as mysterious once the cases are sorted and unpacked.

#### *4. Entire Agreement Clauses and Collateral Contracts*

The first conflict – between a pre-contractual representation and a contract containing an entire agreement clause – is mirrored in the second conflict between a pre-contractual representation alleged to

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<sup>77</sup> *Ibid.* at 17-18.

<sup>78</sup> *Ibid.* at 18-19.

<sup>79</sup> *Ibid.* at 19.

<sup>80</sup> *Supra* note 17.

constitute a collateral contract and a main contract containing an entire agreement clause. The first conflict involves the single process already described of adjudicating between the representation and the clause: Which is to apply? The second conflict involves a two-part process: Does the representation constitute a collateral contract, and should that contract be enforced in preference to the main contract? Several of the cases already discussed considered the second conflict as well and, with the exception of *Zippy*,<sup>81</sup> dismissed collateral contract as an alternative grounds for success.

The most detailed statement of the relevant legal principles in relation to collateral contract is found in *Inntrepreneur*,<sup>82</sup> in which the English Chancery Division enforced the entire agreement clause over the alleged representations. Lightman J. stated five principles: 1) the parties must intend that the statement has contractual effect and such intention is a statement of fact on the whole evidence; 2) the test of intention is the ordinary objective test for the formation of a contract; 3) where the statement is followed by a written contract not containing any term corresponding to the statement, it will be harder to infer that the statement was intended to have contractual effect because the *prima facie* assumption is that the written contract contains all the terms agreed by the parties; 4) the longer the lapse of time between the statement and the contract, the greater will be the presumption that the parties did not intend the statement to have contractual intent; and 5) a statement of fact is more likely to have contractual effect than a statement about the future.<sup>83</sup> By application of these principles to the facts, the Court concluded that oral representations made some five years before the written agreement did not constitute a collateral agreement.

A similar presumption in favour of the enforcement of an entire agreement clause over a collateral contract is found in the dissenting judgment of Newbury J.A. in *Turner*. The majority found the three contracts to be separate contracts and separately enforceable according to their terms, so that no issue of collateral contract arose.<sup>84</sup> Newbury J.A., however, considered the two oral representations to be true collateral contracts to the main asset sale agreement but also found that they were unenforceable because of the entire agreement clause in the main contract with the result that she did not think the bonus should be paid. She regarded the classical decisions on collateral contract,

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<sup>81</sup> *Supra* note 4.

<sup>82</sup> *Supra* note 32.

<sup>83</sup> *Ibid.* at 615.

<sup>84</sup> *Supra* note 4 at para. 10.

*Heilbut, Symons & Co. v. Buckleton*<sup>85</sup> and *Bank of Montreal v. Hawrish*,<sup>86</sup> as stating the evidentiary test for collateral contracts, which was satisfied on the facts here.<sup>87</sup> She also, however, thought them to be subject to the entire agreement clause in the main contract and unenforceable by application of *Carmen Construction Ltd. v. Canadian Pacific Railway Co.*<sup>88</sup> In short, the longstanding presumption in favour of the enforcement of entire agreement clauses as between commercial parties<sup>89</sup> was sustained.

Again, in *Gutierrez*, the Ontario Court of Appeal privileged the entire agreement clause over the collateral contract since the oral representations could not be reconciled with a number of provisions in the main contract, relying *inter alia* on *Hawrish*.<sup>90</sup> Similarly, in *MacMillan*, the B.C. Court of Appeal took the same approach to the promise of shares, relying on *Hawrish*<sup>91</sup> and *Gutierrez*,<sup>92</sup> to enforce the entire agreement clause.

The appellate courts in both *Gutierrez*<sup>93</sup> and *MacMillan*<sup>94</sup> expressly distinguished *Zippy*<sup>95</sup> as inapplicable to their respective facts, notwithstanding that there was no collateral contract issue argued in *Zippy*. Their shared concern was the position taken in *Zippy* in respect to the requirement that an entire agreement clause be brought home to the other party or specifically acknowledged before it could be enforced in relation to negligent misrepresentation might leak over into considerations of collateral contracts. This might result in the defeat of an entire agreement clause. Both appellate courts distinguished *Zippy* as a case involving an unsophisticated party negotiating with a sophisticated franchisor, thereby neutralizing any further consideration where contracts are negotiated between experienced commercial parties with legal advice.

The net effect of cases where collateral contracts are said to be enforceable notwithstanding an entire agreement clause to the contrary is to show that courts operate on the presumption that such clauses

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<sup>85</sup> [1913] A.C. 30 (H.L.).

<sup>86</sup> (1964), 2 D.L.R. (3d) 600 (S.C.C.) [*Hawrish*].

<sup>87</sup> *Turner*, *supra* note 4 at 311.

<sup>88</sup> (1982), 136 D.L.R. (3d) 193 (S.C.C.).

<sup>89</sup> *Turner*, *supra* note 4 at 317-19.

<sup>90</sup> *Gutierrez*, *supra* note 41 at 71.

<sup>91</sup> *MacMillan*, *supra* note 16 at 53.

<sup>92</sup> *Ibid.* at 56.

<sup>93</sup> *Supra* note 41.

<sup>94</sup> *Supra* note 16.

<sup>95</sup> *Supra* note 4.

should be privileged over collateral agreements as much as over representations and negligent representations inducing a contract which fall within the compass of a clause on construction. In short, the collateral contract device is not really an alternative route to defeating an entire agreement clause since the courts employ the same reasoning and principles of contract law in their consideration. There is really no mystery to this whole area after all.

### 5. Conclusion

Although most courts have not expressly equated entire agreement clauses with exclusion clauses, preferring instead the parol evidence rule analogy, the foregoing analysis of the case law demonstrates beyond doubt that they actually treat entire agreement clauses exactly as they treat exclusion clauses. This is unsurprising since the function of these clauses is to exclude liability for everything outside the four corners of the agreement and to restrict liability only to every actual promise within that instrument. They are simply a means for controlling liability and as such the courts have shown sensitivity to their potential for abuse in the contractual bargaining process.

Taking all the cases together, it seems possible to summarize the law coherently. Concurrence of actions in contract and tort where there are pre-contractual representations inducing a contract is now widely accepted. To be considered as a possible source of liability, the representations must precede the execution of the agreement, relate to the agreement, and induce the other party to enter the agreement in reliance on the statements. They must be statements of fact and not statements of future intention. Pre-contractual representations which do not conflict with the entire agreement may be considered as part of the entire contractual package provided there is evidence of an objective intention that they be so considered. When there is conflict with the written agreement – as will inevitably be the case when litigation ensues – the statements may be classified as misrepresentations and it is with these pre-contractual representations that the courts are most concerned.

Where the representation is fraudulent, the case will always be dealt with as one of fraudulent misrepresentation, as Lax J. noted in *Antorisa*.<sup>96</sup> The courts do not and could not enforce contracts which result from dishonesty or fraud. A fraudulent misrepresentation is a dishonest statement and it would be a truly sad day for the law and for society should any court sustain such dishonesty. Morality should

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<sup>96</sup> *Supra* note 48.

always trump any contract which purports to condone dishonesty by exclusion or entire agreement clauses, whether the case is characterized as being about the tort of deceit or fraudulent misrepresentation in contract.

Where the representation is negligent, the approach of the courts to entire agreement clauses follows that for exclusion clauses; they distinguish commercial parties from non-commercial parties. Where the parties are experienced commercial parties, often negotiating with legal advisers, the presumption in the case law is that the written agreement reflects the entire agreement of the parties and the entire agreement clause serves as confirmation of that presumption. This means that parol evidence will not be considered and any conflicting collateral agreement will not be enforced in preference to the main agreement. The clause will be strictly construed to determine if it covers the negligent words which induced the contract; no longer need there be express exclusion of “negligence” provided the clause is comprehensive of negligence in its meaning.

Where the complainant is a non-commercial party, on the other hand, the courts will follow the same analytical process as they do for exclusion clauses in consumer contracts and look for evidence that the less sophisticated party had notice, and apparently, knowledge of the entire agreement clause in the contract. The requirement of actual knowledge, apparently meaning comprehension, is a higher standard for entire agreement clauses than the reasonable notice requirement for exclusion clauses. Since the only relevant case to date is *Zippy*, there may well be a reconsideration of the amount of knowledge and comprehension required in future cases. It should be noted that parol evidence may be heard and collateral contracts enforced in the context of a non-commercial party. Moreover, it still remains unclear whether “negligence” must be expressly contained in the entire agreement clause, since *Bow Valley* was a case involving commercial parties. Finally, there are no cases to date on whether a court may decline to enforce an entire agreement clause on the ground that it is unconscionable or unreasonable, when the other variables suggest that it ought to be enforced, but there is every reason to think that it is in the non-commercial context that this question will arise. In short, the law relating to entire agreement clauses mirrors that in relation to exclusion clauses, including the unresolved issues.

Returning to *Intrawest*,<sup>97</sup> a contract negotiated between two sophisticated commercial parties, it is arguable that the entire

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<sup>97</sup> *Supra* note 2.

agreement clause should have been enforced and any collateral contract discounted, provided the representations are construed as statements of fact and not of future intention. Yet, whether a trial judge finds the statements to be of fact or of future intention may not be important at the end of the day. In the latter, the statements would be discounted by a court and the contract enforced, and in the former, the statements would be taken more seriously but also discounted and the contract still enforced because of the entire agreement clause. The Court in *Intrawest* was correct to characterize these types of cases as essentially about contract since courts have consistently done so since *Donoghue v. Stevenson*<sup>98</sup> and its companion case *Hedley Byrne & Co. v. Heller*<sup>99</sup> incorporated negligence into private law and permitted parties to exclude liability for negligent words by contract. Where the parties have agreed to forgive negligence, the courts have ratified that by upholding suitably drafted contracts. There is no sign in the law relating to negligence generally that the courts will rethink that commitment and assimilate negligence with fraudulent conduct for private law purposes.

Notwithstanding learned commentators in this area who have characterized the law relating to entire agreement clauses as disconcerting and confused<sup>100</sup> or as a riddle inside an enigma,<sup>101</sup> the law is consistent with the law of contracts generally, and not even remotely enigmatic, just a little difficult at times to apply.

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<sup>98</sup> [1932] A.C. 562 (H.L.).

<sup>99</sup> [1964] A.C. 465 (H.L.).

<sup>100</sup> Hall, *supra* note 3 at 238.

<sup>101</sup> Perell, *supra* note 1 at 287.