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THE PAROL EVIDENCE RULE

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TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

A. OVERVIEW

The parol evidence[1] rule has to do with a written contract and extrinsic evidence related to the contract, which a party to the contract wishes to adduce in a trial concerning the contract. It was suggested to the Commission that it should consider recommending the total abolition of the rule.[2]

B. ACKNOWLEDGEMENTS

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[1] "Although commonly referred to as the 'parol evidence rule', this label is somewhat misleading. In the first place, the rule applies to all forms of prior communication, not just oral communication. The rule, if applicable, would also preclude reliance upon prior written undertakings of parties who enter a subsequent written agreement. Second, although the rule is often treated as an evidentiary rule in the sense that it provides a basis for excluding evidence at trial, the rule is more appropriately considered to be a substantive rule of contract law in that it is a rule that determines that undertakings given in certain circumstances are unenforceable", John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 194. "The word 'parol' refers to oral or spoken evidence as distinct from written: to call it the 'parole evidence rule' is wrong. (Many judgments misspell the word and an electronic search has to deal with both spellings.) The word 'parole' refers to a promise, as by a prisoner of war (or now a criminal), to refrain from doing certain things on being released from custody", Angela Swan, *Canadian Contract Law*, Second Edition (Toronto: Lexis Nexis Canada Inc., 2009) at 596, note 100.

[2] The rule was to some extent abolished for contracts governed by *The Consumer Protection Act* by S.M. 1971, c. 36, s. 8, amended by S.M. 1972, c. 51, s. 3(a).

CHAPTER 2

COMPLETE ABOLITION

A. GENERALLY

"Perhaps only one other rule in the law of contracts has caused as much difficulty… the other [being]… the doctrine of fundamental breach".[1] The difficulty stems "in large part on confusion as to the proper scope [or formulation] of the rule",[2] which results in confounding complexity, frustrating "the advantages of simplicity, certainty, and predictability that are presumably its *raison d'être*".[3]

John McCamus explains that "[t]here are essentially two different version of the rule":

> The first might be referred to as the "traditional" version of the rule. This version holds that where a written agreement appears on its face to be in complete agreement, parol evidence cannot be admitted that contradicts, varies, adds to or subtracts from the terms of the written agreement. Under this version of the rule, one must determine that the written agreement appears to be, in some sense, incomplete before one can turn to consider evidence of prior communications of the parties. The second or "modern" version of the rule places emphasis on the need to demonstrate that parties actually intended to reduce their agreement into writing as a precondition to the application of the rule. In determining whether the parties actually did intend to reduce their agreement into written form, all evidence of their prior communications relevant to this issue, oral, written or otherwise, is admissible. Under this version of the rule, then, a party could lead evidence demonstrating that a written agreement that appears complete on its face [even one including an integration or entire agreement term] is actually merely a component of an agreement that is intended by the parties to be partly oral and partly in writing.[4]

[1] Angela Swan, *Canadian Contract Law*, Second Edition (Toronto: Lexis Nexis Canada Inc., 2009), at 596. The Commission notes that in relation to contractual exclusion clauses, the Supreme Court of Canada laid to rest the doctrine of fundamental breach in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 , where the court adopted a three part test to determine the enforceability of exclusion clauses.

[2] S.M. Waddams, "Do We Need a Parol Evidence Rule?" (1991) 19 Can. Bus. L.J. 385 at 392.

[3] *Ibid.*

[4] John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005), at 195. Also, S.M. Waddams, "Two Contrasting Approaches to the Parol Evidence Rule", (1986) 12 Can. Bus. L. J. 207.

It is the traditional version that has fomented criticism of the rule,[5] been the subject of lists of exceptions,[6] and generated recommendations for the abolition of the rule,[7] because it "excludes, in a more arbitrary way, evidence concerning the prior communications between the parties and is thus more likely to produce unjust results".[8] It is noteworthy that The English Law Commission changed its mind on abolition, considering the rule in its Working Paper in terms of the traditional version and in its final report in terms of the modern version.[9] It is also noteworthy that in the three most recent Supreme Court of Canada decisions,[10] the Court applied the rule without defining it, apparently employing the traditional version;[11] however, more recent lower court decisions indicate movement towards the modern version.[12]

We do not deal in detail with the versions of the rule; extensive treatments can be found in the various texts, articles, and reports heretofore cited.

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[5] Famously, *Zell v. American Seating Co*., 138 F. 2d. 641 (2nd Cir. 1943), Law Reform Commission of British Columbia, Report on *Parol Evidence Rule*, LRC 44, 1979, at Ch. III, Ontario Law Reform Commission, Report on *Sale of Goods*, 1979, at 111 et seq.., Alberta Institute of Law Research and Reform, Report No. 38, *The Uniform Sale of Goods Act*, 1982, at 134-35, Ontario Law Reform Commission, Report on the *Amendment of the Law of Contract*, 1987, Waddams, *supra* note 2, Ch. 8 at 392.

[6] *Gallen v. Allstate Grain Co. Ltd*. (1984), 53 B.C.L.R. 38 (C.A.), at 49, 9 D.L.R. (4th) 496, at 506 and *Ellis v. Abell* (1984), 10 O.A.R. 226 (C.A.), at 247. See further Swan, *supra* note 1, at 604 *et seq*.., McCamus, *supra* note 4, at 199 *et seq*.., G.H.L. Fridman, *The Law of Contract in Canada, 5th ed.* (Toronto: Thomson Carswell, 2006), at 444 *et seq*.., The Law Commission (England), Working Paper, No. 70, *Law of Contract, The Parol Evidence Rule*, 1976, Law Reform Commission of British Columbia, *supra* note 5, at 8 *et seq*...

[7] The Law Commission (England), Working Paper, *ibid.* (ie. The Law Commission (England), Final Report, No. 54, 1986), the Law Reform Commission of British Columbia, *ibid*., the two Ontario Law Reform Commission Reports, *supra* note 5, and for contracts of sale, the Alberta Institute of Law Research and Reform, *supra* note 5 and the Uniform Law Conference of Canada, Proceedings of the Sixty-Third Annual Conference, August 1981, at 189. The Manitoba Law Reform Commission in its Report on *Uniform Sale of Goods Act*, No. 57, 1983, adopted the Uniform Law Conference of Canada's *Uniform Sale of Goods Act* with its s. 17, *infra* note 21 and the text immediately following note 20. Manitoba never adopted the ULCC *Uniform Sale of Goods Act*, but it did add s. 58(8) to *The Consumer Protection Act*, *infra* note 19. However, no subsequent Canadian law journal commentary on or textbook treatment of the rule advocates its abolition.

[8] McCamus, *supra* note 4, at 196.

[9] *Supra* note 7; see further Waddams, *supra* note 2.

[10] *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515, *Bauer v. Bank of Montreal*, [1980] S.C.R. 102, and *Carman Construction Ltd. V. Canadian Pacific Railway*, [1982]1 S.C.R. 958.

[11] Waddams, *supra* note 4, at 209 and McCamus, *supra* note 4, at 197-98 and 207.

[12] McCamus, *supra* note 4, at 203 *et seq*... During the last ten years reference has been made to the parol evidence rule in no fewer than twenty-eight Manitoba cases, reported and available electronically. In none of the cases does the analysis indicate an appreciation that there are two versions of the rule. The reference in many of the cases is so brief that it is impossible to fathom to what version of the rule the court is referring. In those in which the discussion has some heft, most appear to be applying the traditional version (*Boguch v. Boguch* (2000), 143 Man. R. (2d) 254, at para. 11 (Q.B.*), RJB Investments Ltd. v. Ladco Co*. (2001), 154 Man. R. (2d) 183, at para. 11 (Q.B.), *Campeau v. Imperial Life Ass. Co. of Canada* (2005), 201 Man. R. (2d) 119, at para. 31 (C.A.), *Brockhill v. Asmundson*, [2006] 2 W.W.R. 442, at paras. 13-14 (Q.B.) (Master Sharp), *Matthews Investments Ltd. v. Assiniboine Medical Holdings Ltd.* (2007), 221 Man. R. (2d) 55, at paras. 16-19 (Q.B.), *Andison v. Andison* (2008), 227 Man. R. (2d) 55, at paras. 14-15 (Q.B.) (Master Sharp)) and only a couple perhaps apply the modern version (*Trippel v. Parker* (2002), 164 Man. R. (2d) 104, at para. 14 (Q.B.) and *Stephenson v. Stephenson* (2004), 183 Man. R. (2d) 40, at para. 5 (Q.B.)).

The Law Commission of England concluded in its final report:

> 2.7. We have now concluded that although a proposition of law can be stated which can be described as the "parol evidence rule" it is not a rule of law which, correctly applied, could lead to evidence being unjustly excluded. Rather, it is a proposition of law which is no more than a circular statement: *when it is proved or admitted that the parties to a contract intended that all the express terms of their agreement should be a recorded in a particular document or documents, evidence will be inadmissible (because irrelevant) if it is tended only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract.* We have considerable doubts whether such a proposition should properly be characterized as a "rule" at all, but several leading textbook writers and judges have referred to it as a "rule"…
>
> 2.10. The two principal reasons which have led us to our conclusion on the nature of the parol evidence rule are, in substance, two aspects of the same process of reasoning. The first relates to the circumstances in which the rule is to be applied. In our view, some statements of the rule may have given rise to misunderstandings because they have concentrated on the *effect* of the rule rather than *when it is to be applied*. The effect of the rule is to exclude evidence or to cause the judge to ignore the evidence if given. As to the application of the rule, Lord Morris' statement in *Bank of Australasia* v. *Palmer* refers to the inadmissibility of parol evidence to "contradict, vary, add to or substract from the terms of a *written contract*" (emphasis added). Thus, the rule can only be applied where the parties have entered into a "written contract". Parties can only be said to have entered into a written contract when "the writing is intended by the parties as a contractual document which is to contain all the terms of their agreement". When the parties have set down all the terms of their contract in writing, extrinsic evidence of other terms must be ignored. If the contract is not entirely in writing, it is not a written contract…
>
> If it is proved or admitted that all the terms of the contract have been set out in a particular document or documents, then evidence of other terms must be irrelevant and therefore inadmissible, because inconsistent with the finding that the parties have entered into a written contract.
>
> 2.11. The second reason for our conclusion as to the nature of the parol evidence rule is exemplified by the concept of the contract which is made partly orally and partly in writing. Save where statute or some special rule of the common law provides otherwise, parties are free to state their contractual terms in whatever form they please. This may be in a deed or deeds, in an unsealed document or documents, in an oral statement or statements of those terms, or by any combination of these or other methods. For present purposes we concentrate upon the proposition that parties may make a contract partly orally and partly in

> writing. If a contract is in this form, there is no room for the application of the parol evidence rule because that rule only applies when the contract is entirely in writing…
>
> 2.12. Because a contract can be made partly orally and partly in writing, the mere production of a contractual document, however complete it may look, cannot as a matter of law exclude evidence or oral terms if the other party asserts that such terms were agreed. If that assertion is proved, evidence of the oral terms cannot be excluded because the court will, by definition, have found that the contractual terms are partly to be found in what was agreed orally as well as in the document in question. No parol evidence rule could apply. On the other hand, if that assertion is not proved, there can be no place for a parol evidence rule because the court will have found that all the terms of the contract were set out in the document in question and, by implication, will thereby have excluded evidence of terms being found elsewhere. The pleadings in the action should normally reveal whether there is an issue as to where the contractual terms are to be found and what those terms are. If there is an issue, it will be an issue of fact for resolution on the balance of probabilities. If there is no issue, neither party will be permitted to adduce evidence of the contractual terms being found elsewhere than as admitted in the pleadings.[13]

We agree and are hopeful that indeed Canadian courts are or will be handling their cases in terms of the modern version of the rule. We also agree with the Law Commission of England on legislative action:

> 3.1 The conclusion of the Commission as to the nature of the parol evidence rule binds no-one to follow it and has no value as a precedent. There are only two ways by which the law relating to the admissibility of extrinsic evidence can be stated with binding effect. First, the House of Lords in its judicial capacity or the Court of Appeal [in the Canadian context the Supreme Court of Canada or a provincial court of appeal] could state the relevant principles of law. However, the possibility of a case coming before either tribunal which raises the right issues is so remote that for present purposes it may be ignored.[[14]] Secondly, Parliament could legislate on the matter with a view to preventing misunderstanding about the rule causing relevant evidence to be excluded in future.

[13] *Supra*, note 7, footnotes excluded.

[14] Even if a case were to occur in which there was an issue as to the admissibility of extrinsic evidence, it could be decided by reference to the so-called "exceptions" to the parol evidence rule. Courts do not usually decide points which do not affect the outcome of a case and full argument as to the true nature of the rule might well not be permitted.

3.2 At first sight it may seem, in the light of our conclusion as to the nature of the parol evidence rule, that to recommend the enactment of legislation in this field would be wholly inappropriate. The practical difference between our understanding of the rule and that of our predecessors [the Law Commission's Working Paper, *supra* note 7, the traditional version] seems virtually non-existent. On their understanding of the rule, evidence relevant for doing justice would not be excluded in any case likely to occur since it could always be admitted under one of the exceptions; on our understanding, the rule simply does not apply to such evidence. Essentially, therefore, the difference between the two approaches is one of analysis. The improvement of legal analysis is not normally one of the purposes of legislation. Moreover, an Act of Parliament is not a suitable vehicle to achieve such a purpose. In particular, exposition of analysis generally requires explanation, but the legislative techniques available are inapt for the purposes of explaining a preferred legal analysis of a problem.

3.3 It might, however, be suggested that although legislation may at first sight seem inappropriate, nevertheless a different understanding of the rule is so prevalent that clarification by statute should be recommended. As we have seen, there are authorities which can easily be read as containing rules of exclusion which are wider than can be justified. Based upon these, some legal advisers or courts may have what we believe would be an erroneous understanding of the parol evidence rule which could lead to the wrong advice being given to clients or a wrong decision being reached between litigants.

3.4 …should we recommend the enactment of a statute intended to clarify the law and thus to prevent the possibility of injustice? We have considered this matter at length and have decided that legislation in this field would be likely to be more confusing than clarifying. No-one could, we think, say that there is a pressing need for such a statute. Needless litigation might well result from even the clearest enactment. Furthermore it would be legislation of a very unusual character. In the light of these considerations we could only recommend legislation if there was some clear benefit to those who might be affected.

3.5 As we considered the nature of any such legislation, it became apparent to us that the task involved fundamental difficulties. If we approached it by abolishing the rule, or declaring it not to exist, it would be necessary either to refer to the rule by name or to describe it. Naming the rule would not be possible because, as we have noted above, the same name is used for more than one rule of law. Describing the rule might seem to leave more scope for the production of a plausible provision. But we could not avoid the conclusion that any description consistent with our analysis of the rule would be circular, so that any

purported abolition would plainly appear to be beating the air. We considered the possibility of legislation which would enact the opposite of the rule, instead of abolishing it. But this approach involved the same problem - if on a true analysis the rule cannot be said to have legal effect, nor can its opposite.

3.6 In addition to, or perhaps because of, the fundamental problems just described, we found that our attempts to formulate a legislative provision constantly created dangers of interfering with quite distinct rules of law which we intended to leave untouched. Examples of such rules are those requiring transactions to be in a particular form or to be evidenced in writing and those relating to merger and to rectification. These dangers would, we believe, be real ones, because the courts would be reluctant to accept that a legislative provision was not intended to have any legal effect.

3.7 The above are but some examples of the impossibility, as we see it, of drafting unambiguous and helpful legislation in this field. If we had a comprehensive code of civil evidence, the simple absence of a parol evidence rule would solve the problem. But a single statement divorced from its context, as it needs must be in the absence of a statutory code, is likely, at best, to be as confusing as clarifying. We hope that this report will itself go some way towards clarifying the law and that a process of re-educating, if necessary, is a more satisfactory means of achieving justice than any attempt to legislate.

3.8 For the above reasons we recommend that no legislative action should be taken to try to reform or clarify the so-called "parol evidence rule".[15]

RECOMMENDATION 1

In regard to contracts not governed by* The Consumer Protection Act*, we recommend no legislative action to abolish or to try to clarify the parol evidence rule.

[15] *Supra* note 7, footnotes 2 and 4 excluded. Also Waddams, *supra* note 4, at 211, last para. and McCamus, *supra* note 4, at 207.

B. CONSUMER TRANSACTIONS

Various Canadian law reform agencies have recommended legislation abolishing the parol evidence rule in regard to consumer transactions;[16] four provinces have enacted such legislation, Saskatchewan, New Brunswick, Manitoba, and British Columbia.

> Saskatchewan: *The Consumer Protection Act:*[17]
>
> 39 In this Part…
>
> (d) **"consumer"** means a person who buys a consumer product from a retail seller and includes a non-profit organization, whether incorporated or not, that has objects of a benevolent, charitable, educational, cultural or recreational nature and that acquires a consumer product from a retail seller, but no person who:
>
> (i) acquires a consumer product for the purpose of resale shall be a consumer respecting that product;
>
> (ii) intends to use a consumer product in a business or who intends to use the product predominantly for business purposes but also for personal, family or household purposes is a consumer respecting that product, except that where goods are consumer products within the meaning of subclause (e)(ii) the individual or the corporation is a consumer for the purposes of this Part;
>
> (e) **"consumer product"**:
>
> (i) means any goods ordinarily used for personal, family or household purposes and, without restricting the generality of the foregoing, includes any goods ordinarily used for personal, family or household purposes that are designed to be attached to or installed in any real or personal property, whether or not they are so attached or installed; and
>
> (ii) includes any goods bought for agricultural or fishing purposes by an individual or by a family farming corporation but does not include any implement the sale of which is governed by the provisions of *The Agricultural Implements Act*;
>
> (l) **"retail seller"** means a person who sells consumer products to consumers in the ordinary course of his or her business but, subject to subsection 50(1), does not include a trustee in bankruptcy, receiver, liquidator, sheriff, auctioneer or person acting under an order of a court.
>
> 45(1) Any promise, representation, affirmation of fact or expression of opinion or any action that reasonably can be interpreted by a consumer

[16] *Supra* note 7.

[17] S.S. 1996, c. C-30.1.

as a promise or affirmation relating to the sale or to the quality, quantity, condition, performance or efficacy of a consumer product or relating to its use or maintenance is deemed to be an express warranty if it would usually induce a reasonable consumer to buy the product, whether or not the consumer actually relies on the warranty.

(2) Subsection (1) applies to a promise, representation, affirmation of fact or expression of opinion made verbally or in writing directly to a consumer or through advertising by a retail seller or manufacturer, or his or her agent or employee who has actual, ostensible or usual authority to act on his or her behalf.

…

46 Parol or extrinsic evidence establishing the existence of an express warranty is admissible in any action between a consumer and a retail seller or manufacturer even though it adds to, varies or contradicts a written contract.

New Brunswick: *Consumer Product Warranty and Liability Act*:[18]

1(1) In this Act
…"consumer product" means any tangible personal property, new or used, of a kind that is commonly used for person, family or household purposes.

4(1) In every contract for the sale or supply of a consumer product the following statements are express warranties given by the seller to the buyer:

> (a) any oral statement in relation to the product that the seller makes to the buyer, unless the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's statement;
> (b) any written statement in relation to the product that the seller makes to the buyer, whether or not the buyer relies on the statement, unless the circumstances show that it would be unreasonable for him to rely on the statement; and
> (c) any statement in relation to the product, however made, that the seller makes to the public or a portion thereof, whether or not the buyer relies on the statement, unless the circumstances show that it would be unreasonable for the buyer to rely on the statement.

4(2) The seller shall be deemed to have made any statement

[18] S.N.B. 1978, c. C-18.1.

(a) made by his agent or employee, unless he proves that the agent or employee was not acting within the scope of his actual, usual or apparent authority; or

(b) made in writing on the product or its container or in a label, tag, sign or document attached to, in close proximity to, or accompanying the product, unless he proves that the statement was made by another person who was not a distributor of the product and that he neither knew nor ought to have known that the statement was made.

4(3) Where a statement was made in a manner or circumstances that it appears that the statement was made by the seller, it shall be presumed that the statement was made by the seller unless he proves that it was not his statement.

4(4) In this section

(a) "makes" includes causes to be made;

(b) "statement" means a promise or representation of fact or intention that is made before or at the time of the contract.

5 Where there is a written contract, oral and other extrinsic evidence is admissible in any court to establish an express warranty notwithstanding that it adds to, varies or contradicts the written contract.

Manitoba: *The Consumer Protection Act*:[19]

58(1) Notwithstanding any agreement to the contrary, the following conditions or warranties on the part of the seller are implied in every retail sale of goods and in every retail hire-purchase of goods: [respecting seller's right to sell, merchantable quality, fitness for the purpose, etc.]…

58(6) Unless otherwise expressly agreed in writing signed by the buyer, there shall be implied in every retail sale of services a condition, on the part of the seller, that the services sold shall be performed in a satisfactory manner.

58(8) Every oral or written statement made by a seller, or by a person on behalf of a seller regarding the quality, condition, quantity, performance or efficacy of goods or services that is

(a) contained in an advertisement; or

(b) made to a buyer;

[19] R.S.M. 1987, c. C200.

> shall be deemed to be an express warranty respecting those goods or services.

Incidentally, the Ontario Law Reform Commission in its Report on *Sale of Goods*[20] recommended in vain, the enactment of:

> 4.6 The parol evidence rule does not apply to contracts for the sale of goods and a provision in a writing purporting to state that the writing represents the exclusive expression of the parties' agreement has no conclusive effect.

The Uniform Law Conference of Canada followed up stating:

> 2. *Parol Evidence Rule*. We agree with the conclusion in the OLRC Report, pp. 110-17, that the parol evidence rule, as traditionally interpreted, should cease to apply in contracts of sale and that a court should be free to hear all relevant evidence to determine the terms of the bargain struck between the parties. A similar conclusion, in a wider setting, was reached in a subsequent report by the British Columbia Law Reform Commission.
>
> We feel, however, that Ontario bill, s. 4.6, which gives effect to the OLRC recommendation, is too compressed and that the effect of abolishing the parol evidence rule should be spelt out more fully. Accordingly, s. 4.8 of the draft Act provides:
>
> > 4.8 No rule of law or equity respecting parol or extrinsic evidence and no provision in a writing shall prevent or limit the admissibility of evidence to prove the true terms of the agreement, including evidence of any collateral agreement or representation, or evidence as to the true identity of the parties.
>
> Section 4.8 does not mean of course that a court must always - or even most of the time - accept the parol evidence when it varies or conflicts with the written terms. It means simply that the court may admit it and may take it into consideration in determining whether the writing was intended by *both* parties to be the exclusive expression of their agreement.[21]

Most Canadian jurisdictions have enacted business practices legislation, which provides relief, including rescission, damages, and specific performance, to contractors victimized by statutorily defined representations constituting unfair or unconscionable business practices.

[20] *Supra* note 5.

[21] *Supra* note 7, at 189-190. The Alberta Institute of Law Research and Reform, *supra* note 5, agreed. At the 1982 annual meeting of the ULCC s. 4.8 became s. 17 of its final *Uniform Sale of Goods Act*.

Most of these jurisdictions have discrete consumer protection and business practices statutes. In 1998 Alberta enacted its *Fair Trading Act*[22] treating both consumer protection and unfair business practices in one statute. This model was followed by Ontario,[23] Saskatchewan,[24] British Columbia[25] and Newfoundland and Labrador.[26] None of the discrete business practices statutes abolish the parol evidence rule, which, presumably, is implicitly displaced by clear effect and intent of the legislation.[27] Among the five provinces which have consolidated their consumer protection and unfair business practices legislation, British Columbia is unique for its abolition of the parol evidence rule:

> 1(1) In this Act: …
> "consumer transaction" means
>
> > (a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or
> > (b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to a paragraph (a),
>
> and, except in Parts 4 and 5, includes a solicitation of a consumer by a supplier for a contribution of money or other property by the consumer.
>
> 187 In a proceeding in respect of a consumer transaction, a provision in a contract or a rule of law respecting parole [sic] or extrinsic evidence does not operate to exclude or limit the admissibility of evidence relating to the understanding of the parties as to the consumer transaction or as to a particular provision of the contract.[28]

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[22] S.A. 1998, c. F-1.05.

[23] *Consumer Protection Statute Law Amendment Act*, S.O. 2002, c. 30.

[24] *The Consumer Protection Act*, *supra* note 17.

[25] *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2.

[26] *Consumer Protection and Business Practices Act*, S.N.L. 2009, c. C-31.1.

[27] The Commission notes that the business practices legislation in Prince Edward Island partially abolishes the parol evidence rule in connection with oral evidence respecting an unfair practice; section 4(7) of the *Business Practices Act*, R.S.P.E.I. 1988, c.B-7 provides that "…oral evidence respecting an unfair practice is admissible notwithstanding that the evidence pertains to a representation of a term, condition or undertaking that is or is not provided for in the agreement." Similarly, some of the jurisdictions that have consolidated their consumer protection legislation distinctly deal with oral evidence respecting an unfair practice and provide that such evidence is admissible despite the existence of a written agreement and despite the fact that the oral evidence pertains to a representation in respect of a term condition or undertaking that is not provided for in the agreement (see the legislation in Alberta, *supra* note 22, s.7.2(1) and Ontario, *supra* note 23, s.18(10)). The consolidated scheme in Saskatchewan, *supra* note 24, also deals with unfair practices distinctly but is more explicit in its abolition of the parol evidence rule and section 37 dealing with unfair practices provides that "[p]arol or extrinsic evidence establishing the existence of an express warranty is admissible in any action between a consumer and a supplier even though it adds to, varies or contradicts a written contract."

[28] *Supra* note 25.

Obviously, there is a difference in the treatment of the parol evidence rule between the consumer protection legislation of Saskatchewan and New Brunswick on the one hand and Manitoba and British Columbia on the other hand. The Saskatchewan and New Brunswick sections appear to have "spelt out more fully"[29] the abolition of the parol evidence rule. However, upon close examination, Manitoba's s. 58(8) essentially equals the Saskatchewan and New Brunswick legislation. It is also to borne in mind that s. 58(8) has been mentioned in only two reported cases. In *Yarechewski v. Stadium Ford Sales (1980) Ltd.*[30] the section, while pleaded, was really not relevant on the facts. In *Fontaine v. Roofmart Western Ltd.*,[31] the court for good measure simply added s. 58(8) to s. 58(1)(e) and (h), which imply warranties respecting merchantable quality and reasonable fitness for the purpose, to decide the case for the plaintiff. This brings to mind the, perhaps crude, aphorism "If it ain't broke, don't fix it". Nonetheless, borrowing from the Saskatchewan and New Brunswick legislation, s. 58(8) can be improved with a few tweaks. Also, the Commission recently pointed out that while s.58(1) proscribes contracting out of its provisions, subject to limited exceptions,[32] and s. 58(6) allows contracting out of its provisions, s. 58(8) is silent in this regard.[33] The Commission thinks that s. 58(8), as well at 58(6), should be made expressly inviolate, subject to contrary circumstances.

[29] From the ULCC comment on the OLRC proposal, *supra* note 21.

[30] (1990), 68 Man. R. (2d) 217 (Q.B.).

[31] (2005), 198 Man. R. (2d) 199 (Q.B.).

[32] Although section 58(1) provides that specified conditions or warranties are implied in every retail sale of goods and in every retail hire-purchase of goods, "notwithstanding any agreement to the contrary", some subsections permit exclusion by agreement of certain implied warranties. For example, 58(1)(e) provides that "goods are of merchantable quality, *except for such defects as are described*." (emphasis added). This provision has most frequently arisen in case law concerning used goods, largely in used car cases, where it has been held that where the circumstances of the sale "bring to the attention of the buyer, the general condition or quality of the goods, a seller may properly exclude the warranty implied under sec.58(1)(e). An example common in the market place is the sale by a retailer of damaged or defective goods which are advertised and sold in an "as is" condition at a clearly reduced price." (as per reasons of Philp J.A. (Huband J.A. concurring) in *Radul v. Daudrich* (c.o.b. Jeremy Holdings), [1983] 6 W.W.R. 278 (Man. C.A.)). This principle was more recently cited in *Frechette v. The Charles Lage Piano Co. Ltd*., [2006] 8 W.W.R. 131 (Man.Q.B) which also involved used goods (an antique piano). Other subsections within s.58(1) also permit limited exclusion of conditions or warranties, such as s. 58(1)(c) which provides that "A warranty that the goods are free from any charge or encumbrance in favour of any third party *except only for any that the buyer has specifically agreed in writing to accept*." (emphasis added) and 58(1)(d) which provides that "A condition that the goods are new and unused *unless otherwise described*." (emphasis added).

[33] Manitoba Law Reform Commission, *Waivers of Liability for Sporting and Recreational Injuries* (Report #120, 2009) at 21, where the Commission observed that the dichotomy between services and goods is difficult to justify on policy grounds. A review of the Legislative Assembly of Manitoba, Debates and Proceedings, *Hansard*, does not address this differential treatment. This is particularly questionable when one considers that the limited ability to contract out of s.58(1) often involves used goods and the courts have accepted situations where used goods may be sold in less than merchantable condition; whereas a distinction between new and used cannot reasonably be made for services and yet s.58(6) provides an unrestricted ability to contract out of services being sold in a satisfactory manner.

RECOMMENDATION 2

Manitoba should amend s. 58(8), where underlined, to read:

58(8) Notwithstanding any agreement to the contrary, every oral or written statement made by a seller or manufacturer or by a person on behalf of a seller or manufacturer regarding the quality, performance, efficacy, or relating to the use or maintenance of goods or services that is:

(a) contained in an advertisement or on a product or its container or in a label, tag, sign or document attached to, in close proximity to, or accompanying the product; or

(b) made to a buyer;

shall be deemed to be an express warranty respecting those goods or services, unless the circumstances show that the buyer does not rely, or that it is unreasonable for the buyer to rely, on the seller's or manufacturer's statement.

(8.1) Notwithstanding any agreement to the contrary, parol or extrinsic evidence with respect to the existence of an express warranty is admissible in any action between a buyer and a seller or manufacturer of goods or services even though it adds to, varies, or contradicts a written contract.

RECOMMENDATION 3

Manitoba should amend s. 58(6), where underlined, to read:

58(6) Notwithstanding any agreement to the contrary, there shall be implied in every retail sale of services a condition, on the part of the seller, that the services sold shall be performed in a satisfactory manner.

Although it is beyond the scope of this Report, the Department of Family Services and Consumer Affairs should consider consolidating *The Sale of Goods Act*, *The Consumer Protection Act*, and *The Business Practices Act* to provide a single source for this related legislation.

CHAPTER 3

LIST OF RECOMMENDATIONS

1. In regard to contracts not governed by *The Consumer Protection Act*, we recommend no legislative action to abolish or try to clarify the parol evidence rule. (p. 7)

2. Manitoba should amend s. 58(8) to read:

58(8) Notwithstanding any agreement to the contrary, every oral or written statement made by a seller or manufacturer or by a person on behalf of a seller or manufacturer regarding the quality, performance, efficacy, or relating to the use or maintenance of goods or services that is:

(a) contained in an advertisement or on a product or its container or in a label, tag, sign or document attached to, in close proximity to, or accompanying the product; or
(b) made to a buyer;

shall be deemed to be an express warranty respecting those goods or services, unless the circumstances show that the buyer does not rely, or that it is unreasonable for the buyer to rely, on the seller's or manufacturer's statement.

(8.1) Notwithstanding any agreement to the contrary, parol or extrinsic evidence with respect to the existence of an express warranty is admissible in any action between a buyer and a seller or manufacturer of goods or services even though it adds to, varies, or contradicts a written contract. (p. 14)

3. Manitoba should amend s. 58(6) to read:

58(6) Notwithstanding any agreement to the contrary, there shall be implied in every retail sale of services a condition, on the part of the seller, that the services sold shall be performed in a satisfactory manner. (p.14)

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 31st day of May, 2010.

"Original Signed by"
Cameron Harvey, President

"Original Signed by"
John C. Irvine, Commissioner

"Original Signed by"
Gerald O. Jewers, Commissioner

"Original Signed by"
Perry W. Schulman, Commissioner

THE PAROL EVIDENCE RULE

EXECUTIVE SUMMARY

A. INTRODUCTION

The parol evidence rule has to do with a written contract and the extrinsic evidence related to the contract, which a party to the contract wishes to adduce in a trial concerning the contract. This report considers the parol evidence rule in connection with written contracts that are not governed by *The Consumer Protection Act* and in connection with consumer transactions that fall within the scope of *The Consumer Protection Act*.

B. COMPLETE ABOLITION

This report observes that the parol evidence rule has caused much difficulty within the law of contracts and notes that essentially two different versions of the rule exist: (1) the 'traditional' version holds that where a written contract appears to be a complete agreement, parol evidence may not be introduced and only if it is determined that the written agreement appears to be incomplete will evidence of prior communication be considered; (2) the 'modern' version of the rule holds that for the rule to apply it must first be determined that the parties intended to reduce their agreement into writing and all relevant evidence of prior communication is admissible to that determination. The traditional version of the rule has fomented criticism, been the subject of lists of exceptions and generated recommendations for its abolition, largely because this version of the rule can preclude relevant evidence concerning prior communication between the parties, and is more likely to result in a possible injustice.

While both versions of the rule can be found in Canadian case law, recent lower court decisions indicate movement towards the modern version, and the Commission is hopeful that this approach will continue. This report considers possible legislative reform to prevent misunderstanding about the rule; however, the Commission concludes that any legislative action could be more confusing than clarifying. In regard to contracts not governed by *The Consumer Protection Act*, the Commission recommends no legislative action to abolish or to try to clarify the parol evidence rule.

C. CONSUMER TRANSACTIONS

Various Canadian law reform agencies have recommended legislation abolishing the parol evidence rule in regard to consumer transactions. Saskatchewan, New Brunswick, Manitoba and British Columbia have enacted some such provisions in their consumer protection legislation, although Saskatchewan and New Brunswick have provided more fully for the abolition of the parol evidence rule. The Commission recommends that section 58(8) of *The*

Consumer Protection Act dealing with express warranties could be improved upon by expanding upon the abolition of the parol evidence rule and by making this section inviolate.

LA RÈGLE D'EXCLUSION DE LA PREUVE EXTRINSÈQUE

RÉSUMÉ

A. INTRODUCTION

La règle d'exclusion de la preuve extrinsèque entre en jeu lorsqu'une partie à un contrat écrit désire invoquer une preuve extrinsèque relative au contrat dans le cadre d'un procès portant sur ce contrat. Le présent rapport examine la règle de l'exclusion de la preuve extrinsèque à l'égard des contrats écrits qui ne sont pas régis par la *Loi sur la protection du consommateur* et à l'égard des transactions de consommateur qui sont du ressort de la *Loi sur la protection du consommateur*.

B. ABOLITION COMPLÈTE

Les auteurs du présent rapport constatent que la règle d'exclusion de la preuve extrinsèque a causé beaucoup de difficultés dans le domaine du droit contractuel et ils observent qu'il existe essentiellement deux versions différentes de la règle : (1) selon la version « traditionnelle », lorsque le contrat écrit semble constituer un accord complet, la preuve extrinsèque peut ne pas être présentée; et la preuve d'une communication antérieure ne sera prise en compte que s'il est déterminé que l'accord écrit semble incomplet; selon la version « moderne » de la règle, pour que celle-ci s'applique, on doit d'abord conclure que les parties avaient l'intention de consigner leur accord par écrit, et toutes les preuves pertinentes de communication antérieure sont admissibles pour en arriver à cette conclusion. La version traditionnelle de la règle a suscité des critiques, a fait l'objet de listes d'exceptions et a donné lieu à des recommandations en vue de son abolition, en grande partie parce qu'elle peut empêcher la présentation d'une preuve pertinente de communication antérieure entre les parties, et qu'elle est plus susceptible de déboucher sur une injustice.

Bien que l'on trouve les deux versions de la règle dans la jurisprudence canadienne, les récentes décisions des tribunaux inférieurs traduisent un mouvement vers la version moderne, et la Commission espère que cette approche se poursuivra. Le présent rapport examine de possibles réformes législatives visant à éviter les malentendus à propos de la règle; la Commission juge cependant que toute mesure législative risquerait d'entraîner davantage de confusion au lieu de clarifier les choses. En ce qui concerne les contrats non régis par la *Loi sur la protection du consommateur*, la Commission recommande que l'on n'adopte aucune mesure législative visant à abolir ou à tenter de clarifier la règle d'exclusion de la preuve extrinsèque.

C. TRANSACTIONS DE CONSOMMATEUR

Plusieurs organismes de réforme du droit du Canada ont recommandé des mesures législatives visant à abolir la règle d'exclusion de la preuve extrinsèque en ce qui concerne les transactions de consommateur. La Saskatchewan, le Nouveau-Brunswick, le Manitoba et la Colombie-Britannique ont mis en vigueur de semblables dispositions dans le cadre de leur législation sur la protection du consommateur, la Saskatchewan et le Nouveau-Brunswick allant le plus loin dans le sens de l'abolition de la règle d'exclusion de la preuve extrinsèque. Selon la Commission, on pourrait améliorer l'article 58(8) de la *Loi sur la protection du consommateur*, qui porte sur la garantie expresse, en étendant l'abolition de la règle d'exclusion de la preuve extrinsèque à cet article et en rendant celui-ci inviolable.