PROOF IN COMMERCIAL MATTERS IN QUEBEC

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I- Introduction

The general rule in civil cases in Quebec is that proof must be made by writing (Art. 1233 C.C.). Seven exceptions are provided for by Article 1233 of the Quebec Civil Code, and unless a particular matter can be brought within the ambit of one of the exceptions, an objection will lie to testimony. One of the seven exceptions is found in paragraph 1 of Article 1233, which states that proof may be made by testimony "of all facts concerning commercial matters". Thus, writings are the rule, and testimony is the exception. This is not a matter of public order, and testimony may always be admitted in the absence of an objection.

The rules embodied in Article 1233 are of French origin and go back to the "ancien droit" in force in Quebec prior to the cession of New France to the British Crown. After the cession, however, the English merchants successfully lobbied to have English law introduced in a number of areas, particularly in commercial matters. As a result, the English Statute of Frauds (1) and Lord Tenterden's Act (2) were substantially adopted into the law of Quebec, and already appear in the revised statutes of Lower Canada prior to 1867. Ultimately, this

became the basis for Article 1235 of the Civil Code which reads as follows:

> "Art. 1235 (Am. 1977, Bill 32, s. 46). In commercial matters in which the sum of money or value in question exceeds five hundred dollars, no action or exception can be maintained against any party or his representatives unless there is a writing signed by the former in the following cases:
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> 1. Upon any promise or acknowledgment whereby a debt is taken out of the operation of the law respecting the limitation of actions;
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> 2. Upon any promise or ratification made by a person of the age of majority, of any obligation contracted during his minority;
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> 3. Upon any representation, or assurance in favor of a person to enable him to obtain credit, money or goods thereupon;
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> 4. Upon any contract for the sale of goods, unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain;
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> The foregoing rule applies although the goods be intended to be delivered at some future time or be not at the time of the contract ready for delivery."

In common law jurisdictions, the rules contained in Article 1235 would not be part of the law of evidence, as they are in Quebec, relating to the exclusion of verbal proof, and the absence of a writing in the areas mentioned would not be the basis of an objection to testimony, but rather a ground for dismissing the action, i.e., the rule would form part of the substantive law of contract. However, in Quebec Article 1235 is treated as part of the law of evidence and as an exception to the exception that testimony is always admissible in

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in commercial matters.

Thus, there are 4 cases in commercial matters, if more than $500.00 is involved, where a writing is required, notwithstanding Article 1233 (1). This would apparently be true even in cases where, in non-commercial matters, a writing might not be necessary because the matter could be brought within the ambit of one of the other paragraphs or exceptions contained in Article 1233. This hybrid situation in Quebec is, of course, anomalous, because in some cases it can make the rules relating to commercial matters more restrictive than they are in civil matters (e.g., where a commencement of proof in writing exists)[3]; whereas the obvious intention of the legislator was to make proof by testimony easier in commercial matters than in civil matters, at least insofar as Article 1233 is concerned.

The distinction between commercial and non-commercial matters which is found in articles 1233 and 1235 does not exist in the same way in the common law, and in those common law jurisdictions in which the Statute of Frauds continues to be in force, it applies to all matters and not just those called "commercial" in Quebec.

As in the case of Article 1233, the rules contained in Article 1235 are not of public order, and may be waived by a failure

to object, etc. In addition, Article 1235, being a derogation from the general rule, must be interpreted restrictively. (4)

II- What is a commercial matter?

A presumption exists that an act is civil, and the burden of proof is on the person who wishes to prove it to be commercial. Transactions concerning immovables have traditionally been considered non-commercial. (5) According to the objective approach, there are matters which are commercial per se, for both parties, such as sales of movable effects when one or both parties are traders (Art. 2260 par.5 C.C.) (6), although some persons feel that this article only applies in the case of prescription. Some matters are clearly always commercial for one or both parties by statute; e.g., in virtue of Article 2492 C.C., marine insurance is always a commercial contract for both parties, and other insurance (with the exception of insurance with a mutual association) is always a commercial contract for the insurer.

According to the subjective approach, an act is commercial if entered into by a merchant or commerçant for the purpose of his commerce or business. Traditionally, a commercial act must involve an element of profit or speculation, the circulation of movable property, an onerous contract, and a private rather than a public interest.

What happens when one party is a commerçant and the other is

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not? If the matter is commercial *per se*, Article 1233 would permit either party to make proof by testimony (e.g., if the *objective* theory is accepted, with respect to the sale of movable effects between a trader and a non-trader; and where both parties are traders whether the objective or subjective approach is followed). If one of the parties is a merchant or commerçant and the other is not, and if the matter is not commercial *per se*, then the rules relating to commercial matters will apply to the *obligation* of the commerçant, and the rules relating to civil matters will apply to the *obligation* of the civil party. Thus, under Article 1233, the *civil* party will be able to use testimony *against* the commerçant, even if the matter cannot be brought within one of the other exceptions of Article 1233, as it will come within paragraph 1 (assuming of course that Article 1235 does not apply, and that one of the exceptions to the exception for commercial matters thus does not come into play). However, the commercial party will only be able to introduce testimony against the civil party if he can bring the matter within one of the other paragraphs of Article 1233, since the civil party's obligation is a non-commercial one, and paragraph 1 of Article 1233 cannot apply to it.

It may be noted that regardless of whether testimony is admissible under paragraph 1 of Article 1233 or not, in no

case may testimony in a commercial matter, as in a civil matter, be admitted to contradict or vary the terms of a valid written instrument, in virtue of the parol evidence rule embodied in Article 1234 C.C., which applies equally to commercial as well as non-commercial matters.

Bills of exchange, cheques, promissory notes, etc., have often been held to be commercial per se, although there are good arguments against this, to the effect that one must go behind the document itself to see if it represents a civil or commercial transaction. According to this second view, a loan from a husband to his wife, for example, evidenced by a promissory note, would not be a commercial matter.

An additional problem relating to bills of exchange is that posed by Articles 2340 and 2341 C.C., which provide that in all matters relating to bills of exchange, recourse must be had to the laws of England in force on May 30th, 1849, particularly in matters relating to evidence. Article 2341 says in addition that in actions founded on bills of exchange, whether drawn or endorsed by traders or other persons, "no additional or different evidence is required or can be adduced by reason of any party to the bill not being a trader". However, under section 37 of the Canada Evidence Act, it is provided that in all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the

province in which such proceedings are taken apply. The better view seems to be that this is a reference, not to articles 2340 and 2341, but to the rules of evidence contained in articles 1204 and following, including articles 1233 and 1235. If this is the case, then the laws of England in 1849 no longer apply to evidence in matters relating to bills of exchange. However, Article 1206 C.C. does provide that when no provision is found in the Civil Code for the proof of facts concerning commercial matters, recourse must be had to the rules of evidence laid down by the laws of England (presumably in 1866).

III- Article 1235 C.C.

The writing involved for the purpose of article 1235 must contain the essential elements of the contract, and a mere commencement of proof in writing is insufficient. It would seem that only a complete admission as to each element of the contract is adequate to replace the writing required by Article 1235 (7), and that a partial admission, which does not cover all the essential elements of the contract, would not be sufficient to permit testimony to be introduced, although it would be adequate to serve as a commencement of proof in writing in non-commercial matters) However, it seems obvious that a so-called complete admission could not mean one containing every condition of the contract, or no completion by testimony would ever be required.

Article 1235 (1).

This paragraph requires that a renunciation of prescription in commercial matters be in writing. Obviously, we are only concerned with the short prescriptions in commercial matters, e.g., article 2260 C.C. What kind of proof of an interruption of prescription by a payment on account must be made? Some decisions have held that such a payment is simply a _fait matériel_, not a _fait juridique_, and may therefore be proved by a testimony,[8] while others have held that the rule of article 1235 par. 1 must be followed strictly.[9] It would appear that the better view is that a writing _is_ necessary to prove a payment on account having the effect of interrupting prescription, as in the common law statute a specific provision allowing testimony as to payment exists, and this was omitted, presumably deliberately, in Article 1235.[10]

Article 1235 (2)

This paragraph requires that a ratification, by a person who has attained the age of majority, of an obligation contracted during his minority, must be in writing in commercial matters; its application is limited.

Article 1235 (3)

This paragraph requires guarantees in commercial matters to be in writing. What is involved here is the contract of suretyship; a simple undertaking to pay another person's debt

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would not be covered by this paragraph and testimony would be permitted. It would seem that false representations made in favour of a third party to induce a loan of money or a sale on credit would also fall within the purview of this paragraph and such representations would have to be proved by a writing.(11) Assurances or representations made by a person acting as a mandatary of a debtor would not come under this rule and can be proved orally.(12)

Article 1235 (4)

This paragraph requires that in a commercial sale, the contract must be in writing unless the buyer has accepted or received part of the goods, or has given something in earnest to bind the bargain. Note that, in the common law statute, the words are "accepted and received" rather than "accepted or received".

The common law statute refers to "goods, wares and merchandise" and it would seem that the word "goods" should be restricted to corporeal movables. (13) However, some authorities, on the basis of the French word "effets", have extended the application of this paragraph to incorporeal movables.(14)

The word "sale" would not appear to cover a mixed contrat, e.g., of sale and lease and hire, since the article, being an exception, should be restrictively interpreted.(15) However, it would appear that if the principal object of the parties in entering into the contract is the transfer of ownership,

rather than the lease of services, and the contract as a whole can be properly characterized as a sale, then the paragraph would apply.

Notwithstanding the fact that article 2260 (5) is found in the section of the Code dealing with prescription, decisions have held that sales of movable effects between traders and non-traders are reputed to be commercial matters for the purpose of this paragraph, even insofar as the civil, non-commercial party is concerned.[16] Thus, the private purchaser of an automobile from a dealer, under this theory, would have to have a writing. With great respect, the undersigned does not believe that Article 2260 (5) should be applied other than to prescription.

The word "accepted" implies the approval of the goods as being satisfactory as to both quality and quantity, and is an act emanating from the purchaser[17]; while "received" seems to imply the physical transfer of the goods to the buyer by delivery,[18] and not simply constructive possession. However, in some cases constructive receipt has been accepted by our courts, e.g., the transfer of keys to a store, or the handing over of an endorsed bill of lading or shipping document.[19] Note that in the original English statute, both acceptance and receipt were required, whereas our article has been changed substantially and is written in the alternative, so that either one of them suffices.[20] Acceptance and receipt have

also been held by the courts to be faits matériels, and thus these can be proved orally.(21)

The "earnest" referred to in this paragraph is not the same as the earnest in Article 1477 C.C., but merely something paid at the time of the contract in order to bind the bargain, and it does not therefore have to involve an agreement whereby the buyer can liberate himself from the contract by abandoning the deposit, or the seller can liberate himself by refunding twice the deposit. It would appear that the payment or receipt of earnest as a deposit on account of the price may be proved orally for the purpose of this paragraph.(22)

CONCLUSION

This brief exposé has simply outlined in summary form some of the highlights of the law in Quebec relating to proof in commercial matters. From what has been said above, it is obvious that certain problems and differences of opinion persist, which can hopefully form the basis of a discussion among the participants in the Seminar.

(1) (1676) 29 Ch II, c. 3
(2) (1828) 9 Geo IV, c. 14
(3) Nadeau, Traité de droit civil, 1965, vol. 9, p. 417
Mignault, 1902, vol. 6, pp. 88, 89.
(4) Boulet & Métayer (1903) 23 S.C. 289 at 293

(5) But see *Colonia Development Corp. v. Beiliveau*, 1965 B.R. 161
(6) See *Cyrille Larochelle Inc. v. Chabot* (1979) C. P. 392
(7) Mignault, *supra*
(8) *Boulet & Métayer*, *supra*; *Leblanc v. Ethier* (1924) 62 S.C. 217; *Bouthillier v. Sabourin* (1927) 42 K.B. 18
(9) *Henderson v. Armstrong* (1911) 13 P.R. 140; *Laflamme v. St-Pierre* (1943) B.R. 533 at 538; Mignault, *supra*, at p. 91; *Charest v. Murphy* (1894) 3 K.B. 376 at 385; *Cie Légaré v. Fafard* (1967) R. P. 315; *Abrams v. Pinsky* (1978) C. S. 250
(10) But an entry in plaintiff's books has been held sufficient: *Cloutier v. Pelletier* (1979) C. P. 203; *contra*: *Arnold Farms v. Deziel* (1962) R.L. 427 (C.S.); *B.C.N. v. Tanguay* (1962) C. S. 379
(11) Mignault, *supra*, p. 91
(12) *Industrial Fuel & Refrig. v. Pennboro Coal* (1957) S.C.R. 161; *Carruthers v. Schmidt* (1915) 24 K. B. 151
(13) Mignault, *supra*, p. 92; Nadeau, *supra*, p. 425; *Carruthers v. Schmidt*, *supra*
(14) Perrault, *Droit Commercial* (1936) vol. 1, p. 530; *Marchand v. Dalfen* (1955) C. S. 462 at 466
(15) Mignault, *supra*, p. 92; *Donegani v. Molinelli* (1870)L.C.J.106
(16) *Baril v. Read Motors* (1929) 46 K. B. 174
(17) Perrault, *supra*, p. 544; Mignault, *supra*, p. 93
(18) Nadeau, *supra*, p. 427
(19) *Marchand v. Dalfen*, *supra*; *Weill v. Miller* (1929) 67 S.C. 65
(20) *Munn v. Berger* (1884) 10 S.C.R. 512 at 521
(21) Mignault, *supra*; *Marchand v. Dalfen*, *supra*; *Munn v. Berger*, *supra*, p. 522
(22) Mignault, *supra*, p. 95