Toronto Law Journal

Under the Influence: The Canadian Competition Bureau's Stand on Misleading Product Endorsements

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For a number of years the Canadian Competition Bureau has expressed concern regarding misleading representations by "Influencers",[2] providing endorsements of products, typically in blogs, YouTube videos, Instagram posts and other types of social media.

They key concerns which the Bureau has articulated are, firstly, that unless told, consumers may not know that there is some sort of connection between the company and the Influencer,[3] and consequently may give greater weight to the endorsement than they would if they knew the connection. The second concern is that Influencers may make claims about the product which are not accurate, or which have not been properly tested.

In the Bureau's view a material connection between an Influencer and the company, which should be disclosed, includes the Influencer receiving financial compensation such as discounts, free products or services, trips or tickets. It can also involve a business or family relationship between the Influencer and the company.

Concerns about misrepresentation related to product endorsements is not new. These concerns have been expressed by the Bureau since the 1970s in relation to endorsements in more traditional forms of advertising.[4] In 2015 the Competition Bureau updated these concerns with respect to the new media environment. It published the first volume of its revised Deceptive Marketing Practices Digest[5] which contained an section dealing with "astroturfing" — purported grassroots support for products which are in fact not organic, but rather paid for — hence "astroturf". The fourth volume of the Deceptive Marketing Practices Digest, in 2018, also contains an article on Influencer marketing.[6]

By way of cases, in 2015, the Bureau filed a Consent Agreement with the Competition Tribunal in respect of Bell Canada's promotion of the "My Bell" and "Virgin My Account" apps. In that case the concern was that the apps had received very positive online reviews but most of the reviews were being posted by Bell employees who were encouraged by their employer to do so. To

[1] This paper is republished with the permission of McMillan LLP.

[2] Typically individuals with a strong social media following in a particular area, such as fashion, gaming, automobiles or the like.

[3] Whether or not consumers are likely to be misled in a particular case, given the fairly widespread understanding that product endorsements are generally the result of some sort of compensation, is a question which neither the Canadian courts nor the Competition Tribunal has yet had a chance to rule on.

[4] Director of Investigation and Research, *Misleading Advertising Guidelines*, October 1987, p. 47.

[5] Competition Bureau, "The Deceptive Marketing Practices Digest – Volume 1", Bulletin (10 June 2015).

[6] Competition Bureau, "The Deceptive Marketing Practices Digest – Volume 4", Bulletin (June 2018).

alleviate the Bureau's concerns Bell agreed to enhance its compliance program with respect to that conduct and pay a monetary penalty of $1.25 million.[7]

Most recently on December 19, 2019, the Bureau sent letters to approximately 100 advertisers and advertising agencies known to be involved in Influencer marketing, urging them to review their practices and, where appropriate, revise them to ensure they comply with the law. In particular, the Bureau's letters reminded advertisers and agencies that any content created and published by Influencers must not be misleading and that the connection between the Influencer and the advertiser must be clearly disclosed.[8] Disclosure should be sufficiently prominent to be noticeable and should not require clicking through. A typical approach is to mark the material with a note such as "Sponsored Content" or #Sponsored.

Given this latest, fairly dramatic development, with letters sent to one hundred advertisers, there is no doubt that Influencer marketing is clearly a focus of current Bureau enforcement activity. It would be wise for any organization that is engaged in Influencer marketing to heed the warning. Practical steps to consider include:

1. Review any agreements with Influencers (or with agencies employing Influencers) to ensure that they require that the Influencer clearly discloses the connections between themselves and the advertiser in all of their relevant posts.

2. Make sure that the agreement provides that anything the Influencer posts should not make performance or comparative claims. It would be wise to ensure that those sorts of posts not be made without company review and sign off.

3. Ensure that Influencers make it clear that their comments about the product are based on their own experience — and are not general performance claims.

4. Review posts by Influencers to ensure that Influencers are in fact complying with these requirements.

Given this wake-up call from the Bureau, an important early New Year's resolution for advertisers should be a review of the advertisers' approaches to Influencer advertising.

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[7] James Musgrove, “Astroturfing: What’s Real Online” (October 2015).

[8] Competition Bureau, “Influencer marketing: businesses and influencers must be transparent when advertising on social media”, News Release (December 19, 2019).

A cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

For more information on this topic, please contact:

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Dial an Accidental Franchise

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In the case of *Fyfe v. Vardy (Dial A Bottle)*, 2018 ONSC 5066, the Defendant, Glen Edward Vardy, found himself liable for damages after he had unwittingly created a franchise relationship with the Plaintiffs, Jill Fyfe and Dan Arthur Stephens.

The Defendant owned and operated a business named *Dial A Bottle*, an on-call alcohol delivery service.

On May 18, 2015, the Plaintiffs entered into a simple one-page Exclusivity Agreement (the "Agreement") with the Defendant, wherein the Defendant granted the Plaintiffs the right to operate a *Dial A Bottle* (the "Business") in certain territories (the "Territory"). The Plaintiffs paid $40,000 to the Defendants as a one-time acquisition fee.

The Plaintiffs were also required to pay to the Defendant on-going fees of $3 per order to operate the Business. In return, the Defendant would operate a central call centre and refer orders to the Plaintiffs if placed within the Territory.

The only documents provided to the Plaintiffs prior to the parties entering the Agreement was a sales projection. Of note is that the Agreement and emails from the Defendant to the Plaintiffs explicitly stated that the Business was not a franchise.

The Business was unsuccessful. The Plaintiffs sued the Defendant, alleging that the Business was actually a franchise, and the disclosure required by the *Arthur Wishart Act (Franchise Disclosure), 2000* (the "*Wishart Act*") had not been provided. The Plaintiffs sought to rescind the Agreement within the two-year period afforded by the *Wishart Act*.

The Defendant conceded that disclosure had not been provided, but stated that the Agreement was not a franchise agreement and the parties' relationship was not that of a franchisor-franchisee. Therefore, disclosure was not required.

One of the key issues on this summary judgement motion was whether the Agreement was in fact a franchise agreement as defined within the *Wishart Act*. To determine this, the court examined the definition of a "franchise" contained in s. 1(1) of the *Wishart Act*. The court had to determine whether:

(i) the franchisee is required to make a payment or continuing payments to the franchisor in the course of operating the business (or as a condition of acquiring the business) (opening paragraph of the definition);

(ii) the franchisee is granted the right to sell or distribute goods or services that are substantially associated with the franchisor's marks, trade name or advertising (Subsection (a)(i) of the definition); and

(iii) the franchisor exercises significant control over, or offers significant assistance in, the franchisee's method of operation (subsection (a)(ii) of the definition).

In this case, the first requirement was easily satisfied. The one-time fee was held to be an initial acquisition cost and the $3.00 fees that were paid on a per-order basis were held to be continuing payments. Although the court did not delineate, it is the view of the authors that either of these payments would have satisfied the first part of the definition of "franchise".

The second requirement was also easily satisfied. The Defendant had granted the Plaintiffs a right to deliver alcohol under the *Dial A Bottle* trademark. The Defendant had further testified that if a third-party company attempted to provide an alcohol delivery service under the *Dial A Bottle* name, he would likely commence legal proceedings against them. That the Agreement was conditional on the Plaintiffs' successful receipt of a license from the Alcohol and Gaming Commission of Ontario did not prevent the court from finding that there was a grant of a right to distribute goods or services in association with the Defendant's trademark, as required by s. 1.1(a)(i) of the *Wishart Act*.

When determining whether the Defendant exhibited "significant control" or offered "significant assistance" to the Plaintiffs, the Court engaged in a fact-based analysis, before holding that this requirement was also met. The Defendant managed the Plaintiffs' day-to-day operations because it took customer orders and referred those orders to the Plaintiffs. The Defendant also managed the marketing — it controlled the logo, marketing materials and web design for the Plaintiffs and the Business.

Resultantly, because all elements of a "franchise" under the *Wishart Act* were met, despite the fact that the Agreement stated that this was not a franchise, the Defendant was held liable for rescission damages to the Plaintiffs.

This case follows a line of cases (see for example: *1706228 Ontario Ltd. v. Grill It Up Holdings Inc.*, 2011 ONSC 2735 and *Chavdarova v. Staffing Exchange Inc.*, 2016 ONSC 1822) in which courts have looked to the nature of the parties' relationship, and not just what the parties called the relationship, to determine whether it met the statutory definition of a "franchise". When entering into licensing and distributing agreements, parties should be warned that the courts will consider the true nature of their relationship when considering whether it was a franchisor-franchisee relationship, and ensure compliance with the *Wishart Act*, if necessary.

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Client Capacity - On the Rise in Family Law Cases

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With an aging population, perhaps it should not be surprising that capacity issues are appearing more frequently in family law cases. With clients becoming older and living longer, issues of decisional capacity are on the rise in a legal context due to many factors, including a litigant's ability to understand the terms of a contract and reasonably foresee the consequences of their decisions, as well as their ability to adequately instruct counsel who act for them.

This paper deals with just a few of the ways in which the issue of capacity is most commonly found in family law situations, including:

1. Capacity to marry (and reconcile)
2. Capacity to make legal decisions and give instruction to counsel
3. How capacity can be abused in a legal context

Family law lawyers must be familiar with how capacity issues may affect either their clients or opposing parties, and with what their obligations are to ensure they are able to aid their client to the best of their ability.

Capacity Issues in Family Law

While there are several ways to define capacity, it is important to note that there is no all-purpose legal or medical definition. In cases being litigated, it may be necessary for a client's expert evidence to include a well-supported definition of what it means to have or to lack legal capacity, and counsel must be prepared and ensure the expert is prepared for questions that the capacity expert may face from the judge.

For our purposes, the test for capacity requires that parties have the ability to enter into contracts with others and/or instruct their counsel with the requisite knowledge and understanding of their resulting rights and obligations,[1] and capacity requires that a party be able to foresee reasonable consequences flowing from their decision-making.[2] This is an objective two-part test that, simplified, comes down to whether or not a person is able to understand and retain information, and whether that person is able to apply that information to their own situation.

[1] *Rules of Professional* Conduct, s. 3.2-9.
[2] *Starson v. Swayze*, 2003 SCC 32.

The test deals with cognitive ability and *not* whether the person made the correct choice for herself in her litigation. If, for example, a litigant has remorse over a previous settlement and approaches the Court to state that no one in her right mind would have accepted such a settlement and therefore she must have lacked capacity, this approach should be challenged by the other side and ultimately fail. A capable litigant retains the right to make decisions that are unwise, foolish or against self-interest.

A person claiming incapacity as grounds to set aside an agreement must undergo a capacity assessment, the focus of which is to assess the person's cognitive functioning at the time of the settlement. In *Koch,*[3] the wife had suffered from multiple sclerosis for 15 years. While in the process of negotiating a separation agreement, the husband challenged the wife's capacity. After reviewing the assessments and the circumstances surrounding them, Justice Quinn set aside the finding of incapacity, finding that there is a distinction between *failing* to understand and appreciate the risks and consequences and being *unable* to understand and appreciate the risks and consequences. (Emphasis mine).

Rule 2 of the *Family Law Rules*[4] defines as a "special party" a party who is (or appears to be) mentally incapable for the purposes of the *Substitute Decisions Act, 1992* ("SDA") in respect of an issue in the case and who, as a result, requires legal representation. However, it is a somewhat limited rule from which to proceed. Rule 7 of the *Rules of Civil Procedure* provides much greater specificities as to process, and under this rule a person lacking capacity is defined as a "party under disability". Given the specificity in the *Rules of Civil Procedure,* and the fact that no equivalent is found in the *Family Law Rules,* family counsel must be prepared to work under Rule 7 if capacity is an issue on a file.

Factors the Court May Consider

If a party has a mental disorder, their capacity could be affected, as they would not likely meet the first or second part of the test. Similarly, if a party is under the age of majority, that person's capacity to make legal decisions may be deemed lacking. In *Children's Aid Society of Hamilton v. M.N.*,[5] Justice Quinn once again presided over a capacity case and gave a list of relevant factors for consideration:

- There is a distinction to be drawn between failing to understand and appreciate risks and consequences and being unable to understand and appreciate risks and consequences. It is only the latter that can lead to a finding of incapacity.
- It is immaterial whether one's words, deed and choices appear reasonable to others. Reasonableness in the eyes of others is not the test.
- What is in one's best interests must not be confused with one's cognitive capacity. The form is not relevant to a determination of capacity.

[3] *Re: Koch* (1997), 35 O.R. (3d).
[4] *Courts of Justice Act*, R.S.O. 1990, c. C.43, O. Reg. 114/99.
[5] 2007 CanLII 13503 (ON SC).

- The test for incapacity is an objective one.
- It is mental capacity and not wisdom that is the subject of the SDA.
- Compelling evidence is required to override the presumption of capacity found in subsection 2(2) of the SDA. Notwithstanding the presence of some degree of impairment, the question to be asked is whether one has retained sufficient capacity to satisfy the SDA.

The leading case in Canada that generally dealt with the issue of mental capacity is *Starson v. Swayze*.[6] In that case, an otherwise brilliant scientist suffered from schizophrenia. The Court found that the presence of a mental health issue or disorder did not necessarily render a litigant a special party. In fact, Mr. Swayze's cognitive abilities were sound; he could retain and understand the process and apply it to his situation with insight as to consequences, and he was deemed a capable party.

Our highest court emphasized that a capable party must ***have the ability*** to understand consequences of their decision-making, but they do not have to demonstrate that they used that ability. The Court notes: "The Board's … conclusions appear to be based on its perception that Professor Starson *failed* to understand the information or appreciate the consequences as evidenced by his refusal to agree that he should have the recommended treatment, rather than any evidence that his mental disorder prevented him from being *able* to understand and appreciate." In other words, the Court recognized that a party can make unwise, even bad, decisions while maintaining their status as a capable party.

In *Bilek,*[7] the judge ultimately found that the plaintiff had capacity, under a balance of probabilities standard. Justice Coo determined that the burden of proving incapacity "quite properly" rested with the party alleging incapacity. He further commented that "[o]ne must be very cautious in coming to a conclusion which would bar the plaintiff from having the final say in how his litigation is to be conducted or resolved," underscoring the importance of the presumption of capacity to a litigant.

Capacity to Marry/Reconcile

It is often stated, and perhaps more frequently believed but left unspoken, that the capacity required to consent to matrimony is the lowest bar. On the one hand, marriage can be viewed as a simple contract, therefore the capacity to consent may be seen as a proportionately low threshold. On the other hand, it is also arguable that the decision to marry is a complex decision requiring a detailed knowledge and understanding of issues such as property management, money management, etc. And then there is the issue of "predatory" marriages, wherein an elderly or otherwise compromised individual is targeted for marriage potentially for profit.

[6] 2003 SCC 32.
[7] *Bilek v. Constitution Insurance*(1990), 49 C.P.C. (2d) 304 (Ont. Dist. Ct.).

The well-publicized case of *Chuvalo v. Chuvalo*[8] was decided by Justice Kiteley and is instructive as to the role the Court may play when there is a question of incapacity to reconcile. The "non-durability" of the elderly Mr. Chuvalo's statement of wanting to resume living with his wife informed the judge that Mr. Chuvalo lacked the ability to appreciate the consequences of this legal decision. To add to this complicated case, there were multiple capacity assessments done over a period of time; some found capacity and others did not. The capacity assessment ultimately favoured by her Honour was the report closest to the trial. Proximity to the trial satisfied the judge that the capacity assessment captured Mr. Chuvalo's continuing mental deterioration from dementia. Therefore, earlier reports were deemed unreliable.

Interestingly, there is a case now before the courts in Ottawa involving a 91-year-old man[9] whose adult children are contesting his ability to marry a woman 36 years his junior. Included in this case is the fact that the elder gentleman, Mr. Overtveld, has considerable wealth. Approximately three years ago, his adult children had concerns about their father's decision-making ability and invoked an existing but never activated power of attorney (the POA was put in place some years before, due to Mr. Overtveld's plans to travel for an extended period where he would not be able to make decisions for the business in his absence). The adult children, doubting his ability to consent to the marriage, have filed an annulment application with the Court: they see his new wife as a "gold digger" whom they must stop from preying on their father. The matter will very likely be resolved by trial; Mr. Overtveld firmly believes he is able to manage his affairs including consenting to marry, while his children are firm in their belief that their father lacks capacity such that he needs their protection.

Capacity to Make Decisions and Give Instructions

In real life, counsel must take instructions from their clients, relying on the presumption that their client has capacity to make decisions on their own matters. Another way to view the issue of capacity is as a balancing act between the individual litigant's autonomy and an incapacitated party's need for protection. Counsel must have confidence that their clients are mentally stable to the point of being able to anticipate and assess the reasonable consequences of the settlement's terms. But lawyers are not mental health specialists, and we are not trained specifically to determine if our clients do or do not have capacity.

While there is an existing presumption of capacity, the *Rules of Professional Conduct* are in place to further guide counsel. The *Rules* alert us to our obligation to ensure our clients exhibit a requisite degree of understanding what we explain to them, and that our clients have the ability to understand the consequences of their decisions.

Once a party with counsel moves to be found to have lacked capacity, that party should expect a finding that they have waived solicitor/client privilege to the point where some or all of their file may be producible to the other side, and their counsel may be exposed to questioning.[10]

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[8] 2018 CarswellOnt 334.

[9] https://www.cbc.ca/news/canada/ottawa/multi-millionaire-annulment-lawsuit-1.5456835, February 19, 2020

[10] *Guelph (City) v. Super Blue Box Recycling Corporation* (2004), O.J. 4468 (SC); *Ranger v. Pentermen*, 2011 ONCA 412; *Dick v. McKinnon*, 2014 ONSC 342; *Family Law Rules*, Rule 20(5) & (9).

The party is bringing their state of mind squarely before the judge at the time of the settlement, and therefore the issue of legal advice received at the time of settling is central and relevant. This is an explicit, not merely implicit, waiver of privilege, as the litigant is herself communicating to third parties otherwise privileged solicitor-client discussions including the legal advice she received (or claims she did not receive) as the case may be.

Capacity: a sword or a shield?

While there is a presumption of capacity in law, the principles can be abused. If a party genuinely lacks capacity, it is clearly unjust to allow that person to enter into a legally binding contract that they are unable to understand. Similarly, it may be unconscionable to hold a mentally incompetent[11] person to terms they were unable to comprehend when they entered into a binding contract. In this manner, the legislation and case law endeavour to protect the vulnerable party by allowing such an agreement to be set aside. Once there is a finding of incapacity, the party lacking capacity no longer makes their own legal decisions. The Public Guardian and Trustee may become involved, or a Litigation Guardian may be appointed to make future legal decisions for the party, and any settlement must be reviewed by a judge under the *Rules of Civil Procedure*.[12] These layers of protection are in place to protect the vulnerable party.

As well, if one party to a contract has pre-existing knowledge that the other party lacks capacity, yet a contract is entered into, the interests of the vulnerable party attract protection under the law by allowing the contract to be set aside.

But the issue of capacity can also be used by less ethical litigants to "get another kick at the can" as the case law has described it when the Court has ruled on a matter but one party involved seeks to re-open or re-litigate it.[13] A litigant seeking to abuse the protection afforded to special parties under the law may be willing to mislead the Court regarding their own capacity, with the goal of negating a deal about which the litigant now has second thoughts. In order to re-open a settled matter that was negotiated to conclusion, the onus rests upon the party alleging they are a special party to demonstrate that they lacked capacity at the time of the settlement.

In *Lougheed v. Ponomareva*,[14] minutes of settlement agreed upon by the parties and their counsel formed the final arbitration award. After the award was made, the wife claimed that she was "emotionally and mentally incapable" of understanding what was going on and therefore she sought to have the award and the minutes of the award set aside. The husband brought a motion to enforce the award, and Justice Gray granted his motion. The judge noted that most agreements "…represent a package of trade-offs," so the fairness of the contract is not a relevant consideration except to the extent that it might be one of the factors that could

[11] *Starson v. Swayze*, 2003 SCC 32.
[12] *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, s. 7.
[13] *Gupta v. 2075750 Ontario Inc.*, 2016 CarswellOnt 18380; *665750 Ontario Inc. v. Atlantic Towing Inc.*, 2017 CarswellOnt 10876.
[14] 2013 CarswellOnt 8615.

put a party on notice of an issue regarding the mental competence of the other party. The judge found that the husband had entered into the settlement without any knowledge of the wife's alleged disability. The wife had legal counsel throughout the mediation/arbitration process. There was no intent found to take advantage, and therefore no need for protection from the common or civil law.

Similarly, in *Cameron v. Dorcic*, Justice Tidman ruled for specific performance on a contested contract on the basis that the plaintiffs and the third parties did not know of the defendant's mental disability at the material times. The defendant did not mention any incapacity during the negotiation of settlement until he moved to set aside the settlement. This decision supports the high regard the Court holds for the parties' ability to contract and run their litigation as they see fit. In *Hardman v. Falk*, Justice Robertson states "Courts of equity will not interfere if a contract with a lunatic is made in good faith without any knowledge of the incapacity of the lunatic and no advantage is taken".

The substance of an agreement, whether the deal is good or bad for the party claiming incapacity, is generally deemed not relevant to the issue of whether or not a party had capacity to enter into a settlement. Competent adults are allowed to enter into "bad" deals; therefore such a low threshold for setting aside an agreement has been rejected repeatedly by the courts.

What Should Counsel Do …?

a) **When Counsel suspects or knows that their client lacks capacity:**

Section 3.2-9 of the *Rules of Professional Conduct* states that a lawyer's duty to their impaired client is to maintain a normal solicitor/client relationship as far as is possible.

The lawyer should seek to determine if the impairment is minor or if it is severe enough to prevent the client from giving counsel instructions and entering into contracts.[15] Counsel can suggest to their client that they undergo a formal assessment, while informing them of their right to refuse or challenge the assessment.

It is important to note that capacity is not static, and a client who may present well one day may be unable to understand consequences of their legal decisions another day. This can be problematic for counsel, who must be clear at all times that their client has capacity when making legal decisions. To complicate matters further, a party under a disability may lack capacity in one area but not others. For example, a party may be found to have had capacity to enter a marriage, but she may also be found to lack capacity to manage her property or settle a court matter.

Ultimately, if the lawyer concludes that his client is not able to give instructions or simply cannot understand issues and consequences of making binding decisions on those issues, he may take steps to have a litigation guardian appointed. A litigation guardian

[15] *Ibid*. Commentary.

may be a competent friend or family member who agrees to make decisions in the place of the party under disability. This role is a serious undertaking, and some risks to the litigation guardian are discussed in Rule 7 of the *Rules of Civil Procedure*.[16]

b) When the other party may lack capacity:

If the other side is unable to understand enough to make their own decisions, that may pose a problem for your client who is seeking to find a binding resolution to her legal issues. As her counsel, you can suggest that the other side undergo a formal capacity assessment by an assessor. This is recommended if the parties are in litigation and the ability to understand and instruct on legal matters may be required.

If the party suspected of lacking capacity has counsel, this sensitive issue should be broached with counsel. That counsel will then have an obligation to investigate the concern further, while advising their client that they have the right to refuse or challenge the result of an assessment.[17]

c) When a lack of capacity is claimed without merit:

Counsel and courts alike must be sensitive to litigants' potential mental health concerns while remaining aware that an otherwise fairly and properly negotiated final agreement may be vulnerable if capacity is misused. It can often be a difficult task given that if no concern for capacity was raised at the time of the settlement, a judge may be asked to decide retroactively if there was or was not capacity at the relevant events. The process requires the party or their representatives claiming special party status to prove their incapacity at the time of the event. Parties can hire experts to provide opinions to the Court, but it is not possible to positively assert the lack of, or existence of, capacity retroactively. To add to this dilemma, capacity can "wax and wain," meaning that a party can have capacity on one day and be found to lack capacity on another day. Though it may seem like an obvious requirement, any expert capacity assessment or examination must state the date and time it was conducted.

In addition, it can be difficult for a court to determine retroactively if a party was under "normal" stressors caused by family law disputes and time spent in court, or if the party's mental state rendered them incapable of understanding terms and consequences of settlement.

Given the above, the cases show us that the circumstances surrounding the settlement are important factors. For instance, in an expert report, did the alleged special party undergo a proper assessment by a qualified assessor? Were collaterals interviewed who know the party well and could opine on their observations in and around the event? Was the party represented by counsel? If so, does the counsel file record observations that

[16] *Rules of Civil Procedure*, Rule 7(2)(a)-(h).
[17] *Substitute Decisions Act, 1992*, SO 1992 c 30.

support or undermine that the client was able to understand? Was the party prepared by the counsel? Was a judge presiding when the deal was made, and did a judge learn about the final terms reached? Was there a transcription available of the proceedings, etc.?

In another example, *Dick v. Mackinnon*, Justice Morgan needed to decide if an August 2005 settlement agreement never implemented should be enforced in 2013, when the plaintiff's litigation guardian objected to the enforcement. In this case, the litigation guardian for the plaintiff believed that the plaintiff had been a special party back in August 2005, and therefore the settlement should be non-binding.

Some difficulties that the litigation guardian faced in *Dick* were:

- The deal was made in 2005 and the plaintiff's capacity was not assessed until 2012.
- the plaintiff had counsel when the deal was made in August 2005 who did not seek to have a litigation guardian appointed for his client.
- The plaintiff was available but not questioned or interviewed.
- The assessor failed to speak to the plaintiff and failed to interview collaterals such as family members.
- The litigation guardian failed to present an affidavit or testimony from the plaintiff's solicitor in 2005, to hear from that counsel regarding his observations of the plaintiff in August 2005, and to discuss instructions he received from the plaintiff toward settlement.
- Neither the plaintiff nor the litigation guardian had brought a claim against the plaintiff's counsel in 2005.
- There was no evidence before Justice Morgan denying that the plaintiff had instructed his counsel, who had the authority to deal with counsel for the defendants.
- While it was suggested in the materials that the defendants must have known of the plaintiff's pre-existing head injury, it is nowhere suggested that they had reason to view the plaintiff's lawyer's offer to settle as anything other than an authorized offer.

Under each of the three scenarios above, a lawyer continues to have an ethical obligation to ensure that their client's interests are pursued, including ensuring that a client under a disability does not give instructions without the ability to understand. It can be tempting to substitute the lawyer's own belief as to settlement terms for the client's wishes.

Conclusion

The issue of clients' capacity is causing family law to increasingly intersect with estates law and elder law, and as such, the family law bar has to keep in step. And it has become increasingly important for lawyers to recognize and understand what it may mean to have a client who lacks capacity.

To ensure that capacity issues are identified and dealt with early in a legal matter, counsel and the Court alike should be aware of the rights and obligations arising in cases where capacity is an issue. The legislation is in place to protect the vulnerable, but case law demonstrates that parties dissatisfied with an otherwise soundly reached settlement may choose to exploit the protections under the law for their own benefit. Fortunately, the case law also demonstrates that judges understand the difference between a party claiming they did not understand terms and a party unable to understand terms, such that this is an area of law that may one day be utilized by the truly vulnerable only, with those seeking to take advantage learning quickly that courts are skilled at interpreting evidence versus allegations in such cases. The principle of a presumption of capacity remains firmly in place to guard litigants' rights to negotiate their own outcome, knowing that a final deal properly negotiated will remain final.

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When to Speak Up: Applying the Parol Evidence Rule in Contractual Disputes

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In a terse, seven-paragraph decision, the Court of Appeal for Ontario applied the parol evidence rule, a doctrine fundamental to contract law and how we litigate contractual disputes, to dismiss an appeal. *Fung v. Decca Homes Ltd.*[1] is an interesting case study in the parol evidence rule and its role in contractual disputes.

The Story

Fung overpaid Decca Homes by $150,000 for a construction project. The parties eventually entered into a demand promissory note for the full amount. After a few miscommunications, Fung made a written demand on the promissory note. Fung sent the demand to Decca Homes' lawyers, who had been given an irrevocable direction to pay the funds to Fung but only if Decca Homes' properties, into which the overpayment had been directed, had sold.

The law firm did not pay, and Fung brought an application for payment. The application was granted. Decca Homes appealed.

Parol Evidence Rule: Oral Agreement Cannot Contradict the Written Agreement

On appeal, Decca Homes argued that the application judge failed to consider an alleged oral agreement, made at the same time as the promissory note, that purportedly modified the promissory note. The Court of Appeal upheld the application judge's refusal to do so. The Court of Appeal explained that the parol evidence rule operates such that, "[e]ven if there was a collateral oral agreement, something that is disputed by the respondent, that oral agreement could not contradict the written agreement. Accordingly, we agree with the application judge that the written agreement prevails and that the respondent could enforce the note."[2] No further analysis was needed.

In part, the Court of Appeal could be brief because the parol evidence rule has a long history in the common law. In *Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co.*,[3] the Ontario High Court summarized the rule as follows:

> A transaction having been reduced to writing, extrinsic evidence is generally inadmissible to contradict, vary, add to or subtract from its terms. This is fundamental in the interpretation of

[1] 2019 ONCA 848 [*Fung*].

[2] *Fung*, 2019 ONCA 848 at para. 5.

[3] [1969] 1 O.R. 469 (Ont. H. Ct.) at para. 238.

> written instruments. Parol evidence may, however, be admitted in aid of interpretation.

Parol evidence is evidence relating to the written agreement that is not included in the written agreement itself. A common example of parol evidence is oral evidence given by a party to explain the circumstances surrounding the written contract. Although the law requires us to consider the surrounding circumstances when entering an agreement, the parol evidence rule makes it impermissible to use such extrinsic evidence to interpret the agreement in a way that contradicts or varies the written text of the agreement.[4]

In *Fung*, based on the finding that the oral agreement purported to contradict the written agreement, the rule applied. In cases where the oral agreement does not so clearly contradict the written agreement, counsel can point to an exception to the parol evidence rule. For example, if part of the agreement is oral, or where there is clear evidence that the parties did not include every term of the agreement in the written contract, parol evidence becomes admissible to prove the remaining terms of the agreement. In this way, whether a written contract contains the full agreement of the parties is a presumption which can be rebutted.[5] In *Fung*, the Court of Appeal likely did not consider this use of parol evidence because the oral agreement appeared to contradict the written document. Also, Fung disputed the existence of the oral agreement.

There are several other circumstances in which parol evidence is admissible, although none of them appear to apply on the facts of *Fung*. For example, parol evidence has been admitted where one party challenges the validity of an agreement. Courts will also consider parol evidence where there has been fraud, illegality, mistake in fact or law, lack of capacity in or any other matter which, if proved, would speak to the validity of the document.[6]

Rectification is another scenario in which parol evidence is admissible. Courts have held that where an agreement contains a mistake such that the written terms do not reflect the actual agreement between the parties, parol evidence may be admitted to support rectification.[7] Rectification allows the parties to revise the document and reconcile the form and language of the agreement with the intention of the parties.[8]

Further, an exception to the parol evidence rule exists where the contract contains a particularly onerous clause that is not brought to the attention of the party seeking to avoid

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[4] See, for example, *C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; and *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (Ont. C.A.).

[5] Cudmore, *Civil Evidence Handbook*, (2019) at s. 15.6. See also *Corey Developments Inc. v. Eastbridge Developments (Waterloo) Ltd.* (1997), 34 O.R. (3d) 73(Ont. Gen. Div.); affirmed (1999), 34 O.R. (3d) 73 (Ont. C.A.).

[6] Cudmore, Civil Evidence Handbook, (2019) at s. 15.7. See also *Haig v. Malfara Holdings Inc.* (1992), 11 C.P.C. (3d) 116 (Ont. Ct. J. [Gen. Div.]) and *Chant v. Infinitum Growth Fund Inc.* (1986), 55 O.R. (2d) 366 (Ont. C.A.) [*Chant*].

[7] Waddams, *Law of Contracts*, 2nd ed. (1984) at p. 243.

[8] *Lovell & Christmas Ltd. v. Wall* (1911), 104 L.T. 85 (Eng. C.A.); and *Chant* (1986), 55 O.R. (2d) 366 (Ont. C.A.).

the application of that clause. Parol evidence may be admitted to show that the parties never agreed to the clause, disentitling the first party from relying upon it.[9]

However, parol evidence will not be admitted to establish the subjective intentions of the parties. Rather, where a term is ambiguous, the court must consider what a reasonable person would have taken the words of the document to mean.[10] Relying on the Supreme Court's finding in *Non Marine Underwriters, Lloyd's of London v. Scalera*,[11] the Ontario Superior Court held in *Recchia Developments Inc. v. 1059233 Ontario Ltd.* that "[a]mbiguity exists if the contract phraseology is capable of more than one meaning. In that event, the most reasonable interpretation which promotes the intentions of the parties prevails."[12]

Conclusion

Long-established in the history of contract law, the parol evidence rule is often applied strictly and, as seen in *Fung*, with little room for dispute. However, counsel should not be deterred from its strict application in cases that trigger an exception to the rule. The rule's many exceptions are evidence that the interests of fairness and justice guide a court's application of the rule. However, counsel must not forget that the rule's purpose of promoting certainty and finality in agreements guides the court in its consideration of extrinsic evidence. When you intend to introduce parol evidence before the court, carefully assess whether an exception applies or risk swift defeat in the face of the parol evidence rule.

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[9] See *Hoffman v. Sportsman Yachts Inc.* (1990), 47 B.L.R. 101 (Ont. Dist. Ct.), additional reasons (August 17, 1990), Doc. York 335051/88 (Ont. Dist. Ct.), affirmed on other grounds (1992), 89 D.L.R. (4th) 600 (Ont. C.A.); and *Beer v. Townsgate I Ltd.* (1997), 36 O.R. (3d) 136 (Ont. C.A.). See also See *MacQuarie Equipment Finance Ltd. v. 2326695 Ontario Ltd. (Durham Drug Store)*, 2020 ONCA 139, where the Ontario Court of Appeal relied on parol evidence and held that a failure in communication between the parties resulted in a lack of real assent on an onerous provision in the agreement at issue.

[10] See, for example, *Kentucky Fried Chicken Canada v. Scott's Food Service Inc.* (1998), 41 B.L.R. (2d) 42 (Ont. C.A.); *Misfud v. Owens Corning Canada Inc.* (2003), 38 C.C.P.B. 109 (Ont. Sup. Ct. J.); and *Commercial Alcohols Inc. v. Suncor Energy Products Inc.*, 2008 ONCA 261.

[11] 2000 SCC 24.

[12] (2015), 252 A.C.W.S. (3d) 832 (Ont. S.C.J.) at para. 42.