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# It is hard to write off an oral contract

By Paul Fruitman[[1]](#footnote-2)

Get it in writing. That is the approach anytime parties reach a verbal agreement. The prevailing view is that agreements in ink—or more recently, electronic signature—are inviolable guarantees.

Formalization in writing is a prudent step, but it is neither essential nor foolproof. An oral agreement is binding, subject to proof and rules of admissibility that are often honoured in the breach. At the same time, a contract, no matter how formal, is never bulletproof.

Recent case law shows that Canadian courts continue to focus on the intentions of contracting parties when asked to enforce oral and informal agreements. Courts will honour those intentions even at the expense of express exclusion clauses and the traditional “rules” of contract law. Though some might argue that this approach sacrifices predictability for “fairness”, it is in fact in line with the cardinal rule of contractual interpretation: to ascertain the objective intentions of contracting parties.[[2]](#footnote-3)

## Enforceability of oral contracts

With the exception of standard form agreements, formal written contracts are necessarily the product of oral (and email) bargaining. Sometimes those verbal exchanges are themselves sufficient to bind parties, even despite the parties’ own beliefs as to the state of their negotiations. Parties “do not, any more than the courts, find it easy to say precisely when they have reached agreement, and may sometimes continue to negotiate after they appear to have agreed to the same terms.”[[3]](#footnote-4)

Courts also regularly find an oral agreement sufficient to create a binding contract despite formal documentation never being signed, and despite an absence of agreement on all terms. If the essential terms are agreed, the agreement is enforceable.[[4]](#footnote-5)

The oral agreement on essential terms will also not be negated by:

1. Continued negotiations between the parties after the agreement is made;[[5]](#footnote-6)
2. Disagreement over the agreement’s interpretation, or unessential terms;[[6]](#footnote-7)
3. Attempts by the parties to obtain more than previously agreed during the process of drafting formal documentation;[[7]](#footnote-8) or
4. Disagreements between the parties while drafting the formal documents.[[8]](#footnote-9)

Moreover, the essential terms to create a binding contract can be minimal. In its recent decision in *1750738 Ontario c. 1750714 Ontario*, the Ontario Court of Appeal upheld an oral contract with just two terms. The plaintiff’s principal agreed to fund a subdivision development on an equal basis with its other investors. In exchange, a company affiliated with the plaintiff would get the right to build houses on a number of lots equal to its share in the project. All other terms—the total number of available lots, the price of the lots, the nature of the lots, the locations of the lots, the duration of the agreement, and the identity of the other investors—were unknown.[[9]](#footnote-10)

On the need for minimal essential terms, the Court of Appeal’s decision in *175 Ontario* is consistent with prior authority. In *Wilson v. Graydon Hall Pizza & Catering*, the Ontario Court (General Division) upheld an oral contract whose terms were limited to purchase price and forgiveness of prior debts. The formal written agreement—which the defendant refused to sign—included terms relating to product supply and non-competition. The trial judge held these additional terms were not essential to the parties’ bargain. The Ontario Court of Appeal affirmed the trial judgment.[[10]](#footnote-11)

At the root of these decisions is a recognition that a court’s role is to enforce a contract if it finds that the parties intended to bind themselves. This intention can manifest itself in oral agreements as well as rudimentary written ones. The Ontario Court of Appeal explained a court’s role in *Canada Square v. Versafood Services*, adopting the following edict from Lord Wright:

The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form.[[11]](#footnote-12)

## An oral agreement can even survive a targeted exclusion clause

The oral contract in *175 Ontario* included minimal terms and the defendant denied it outright. It also conflicted with an exclusion clause in the shareholders agreement that all investors later signed. The clause purported to terminate all prior agreements related to the corporation or shares in it.[[12]](#footnote-13)

The Court of Appeal’s decision to enforce the oral contract in the face of a *subsequent* entire agreement clause that purported to terminate prior oral contracts is significant. In its earlier decision in *Gutierrez v. Tropic International*, the same Ontario Court of Appeal rejected a claim on an alleged oral agreement that pre-dated a written contract with an entire agreement clause. The clause stated that the written contract superseded “any and all prior negotiations, understandings and agreements, written or oral.” The court concluded that that the oral agreement, even if proven, could not survive the entire agreement clause.[[13]](#footnote-14)

The court in *175 Ontario* did not reference *Gutierrez*. It also cited no precedent for enforcing an oral contract that *preceded* a written contract with a clause purporting to terminate all prior agreements.The court in *175 Ontario* instead relied on the parties’ conduct being consistent with the oral contract,[[14]](#footnote-15) and caselaw concerning exclusion clauses and pre-contractual representations. The court deemed the exclusion clause unenforceable because the defendant did not bring it to the plaintiff’s attention.[[15]](#footnote-16)

The importance of specifically adverting to onerous clauses is well known. Courts have also recognized that an entire agreement clause does not preclude the *defence* of misrepresentation.[[16]](#footnote-17) However, it is a further step to *enforce* an oral contract despite a *subsequent* exclusion clause that explicitly sought to terminate all prior contracts.

Though the outcomes in *Gutierrez* and *175 Ontario* appear inconsistent at first blush, they can be reconciled by reference to how the presiding courts received the evidence. Put simply, the *175 Ontario* Court accepted that the oral agreement expressed the parties’ intentions and that the subsequent shareholders agreement did not. The Court of Appeal specifically noted the plaintiff’s lack of sophistication and limited knowledge of English, the language in which the shareholders agreement was written.[[17]](#footnote-18)

In contrast, the judges hearing *Gutierrez* were skeptical of the oral agreement the appellant advanced. They did not accept that the alleged oral agreement reflected the parties’ intentions.[[18]](#footnote-19) Although the Court of Appeal in *Gutierrez* held that the written agreement would prevail in any event, courts commonly reference traditional “rules” to buttress their factual findings, as shown below.

## An exclusion clause will not bar a later oral agreement

*175 Ontario* is unique in that it enforced an oral agreement post-dating an exclusion clause that purported to nullify it. However, the concept of disregarding exclusion clauses is not novel. The established jurisprudence has focused on oral agreements *post-dating* written contracts with entire agreement clauses.

In *Soboczynski v. Beauchamp*, the Ontario Court of Appeal found that a vendor could be liable for negligent misrepresentations made after the execution of an agreement of purchase and sale containing an entire agreement clause. Though the Court stated that the purpose of any entire agreement clause is to “to lift and distill the parties' bargain from the muck of the negotiations…and provide certainty and clarity”, it nevertheless held that the subject clause only operated retrospectively, and was “spent” at the time of the misrepresentations.[[19]](#footnote-20)

The Court of Appeal in *Soboczynski* followed its earlier decision in *Shelanu v. Print Three Franchising*, in which the court enforced an oral agreement for royalty rebates despite an entire agreement clause in a prior written franchise contract. The clause stated that the written contract “constitutes the entire agreement with respect to all matters herein” and that any other representations were of no force or effect in the "construction of the rights and obligations of the parties created by this Agreement”.[[20]](#footnote-21)

The Court of Appeal in *Shelanu* accepted that an entire agreement clause does not bar subsequent agreement that modifies the contractual relationship.[[21]](#footnote-22) The Court of Appeal further held that the subsequent oral agreement for rebates did not qualify as “matters herein” nor was it “created by” the written franchise agreement.[[22]](#footnote-23)

More recently, the Ontario Superior Court of Justice refused to strike a pleading of an oral contract to renew the term of a franchise agreement even though the franchise agreement had an express non-renewal provision. Unlike the oral agreement in *Shelanu*, the alleged oral agreement in *6646107 Canada v. The TDL* covered the very same matters as the written contract.[[23]](#footnote-24)

## Oral contracts and the parol evidence rule

With the exception of *Gutierrez*, the decisions discussed above all seem to run contrary to the parol evidence rule, which is supposed to exclude extrinsic evidence that might vary the meaning of an unambiguous written contact.[[24]](#footnote-25) The case law around the parol evidence rule has developed numerous exceptions to it, in furtherance of efforts to ascertain and enforce the true intentions of contracting parties. These include claims of fraud or misrepresentation, evidence supporting a rectification claim, and evidence supporting a collateral oral agreement.

In *Shelanu*, the Ontario Court of Appeal held that an exception to the parol evidence rule is an oral agreement to rescind or modify a written contract, provided that the oral agreement is not invalid under the *Statute of Frauds*.[[25]](#footnote-26) The Saskatchewan Court of Appeal reached the same conclusion in *Barber v. Glen*.[[26]](#footnote-27) Another, related exception is a so-called “umbrella agreement”—an overarching contractual relationship that can override specific terms in subsidiary contractual documents like promissory notes.

The concept of an “umbrella agreement” traces back to the B.C. Court of Appeal decision in *Bank of Montreal v. Wilder*, which held that the interpretation of “on demand” in a promissory note would need to be interpreted in a manner consistent with the broader oral loan agreement between the lender and borrower. The Court of Appeal added that if an alleged umbrella agreement is a true collateral agreement, as opposed to a unilateral oral representation, it is an exception to the parol evidence rule.[[27]](#footnote-28)

The B.C. Court of Appeal further extended the umbrella agreement doctrine in *0930032 B.C. v. Oaks Dairy Farms*. In that case, the umbrella agreement was a partnership document executed years earlier that had a prohibition on either party taking steps detrimental to their dairy farm business. The Court of Appeal refused to enforce a promissory note that would make it impossible for the dairy farm to continue. The Court of Appeal explained that an umbrella agreement can be oral or written, but that in either case, a court must be “satisfied that the evidence, objectively considered, shows that the parties intended to bind themselves to the contractual obligations, that there was consideration for their promises, and that the terms of the agreement are not vague, but capable of both performance and enforcement”.[[28]](#footnote-29)

The admissibility of umbrella and other collateral agreements as an exception to the parol evidence rule is even more apposite after the Supreme Court’s decision in *Sattva,* and in particular the following passage:

The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.[[29]](#footnote-30)

In *Stankovic v. 1536679 Alberta,* the Alberta Court of appeal cited the above passage in reversing a chambers decision to exclude evidence of a collateral umbrella agreement that would be contrary to the terms of a written mortgage. The defendant had alleged that the mortgage was part of a broader oral joint venture in which the parties agreed that there would be no indebtedness under the mortgage independent of subdivision and sale of the property.[[30]](#footnote-31)

Though the parol evidence rule remains good law,[[31]](#footnote-32) courts are loathe to enforce it if there is strong evidence of a contrary oral agreement. Whether an oral agreement is “contrary” to the written contract can be case dependent. A year after the Alberta Court of Appeal decided *Stankovic*, it refused to allow parol evidence where it found insufficient indicia of an umbrella agreement.[[32]](#footnote-33) Despite the parol evidence rule, credible, contrary oral evidence will regularly be admitted in support of a collateral oral agreement, including a prior umbrella agreement, or a subsequent agreement that modifies the contractual relationship, as in *Shelanu*.

## The paradox of prohibitions on oral amendments

In *Shelanu*, the Ontario Court of Appealhad to consider two distinct but related types of exclusion clauses. The first were entire agreement clauses, discussed above. The second were clauses prohibiting contractual amendments except in writing and where signed by the parties. The latter are called “no oral amendment”, or “NOM” clauses.

The NOM clause in *Shelanu* is typical. Itread, “No waiver, amendment or change of any of the terms or covenants of this Agreement or non-compliance therewith, shall be binding or effective unless effected by a notice signed by any and all parties hereto.”[[33]](#footnote-34)

A NOM clause creates a conflict between two contract law principles: the freedom of parties to bind themselves and the freedom of parties to change contractual relationships. A NOM clause also creates a contractual paradox in which the freedom to contract extends to the right to voluntarily limit that freedom.

The Court of Appeal in *Shelanu* did not have to reconcile these two conflicting concepts because it found that the oral agreement was separate and apart from the written contract. In *6646107 Canada v. The TDL*, the Ontario Superior Court held that the oral agreement *could* be a separate contract rather than an attempt to renew, but did not decide the issue.[[34]](#footnote-35)

Other courts have grappled head on with apparent oral variations to the very contracts that expressly prohibited such informal amendments, and the jurisprudence on NOM at first blush appears mixed. Alberta courts seem to favour strict enforcement of NOM clauses while Ontario, British Columbia and Nova Scotia courts take a more nuanced approach. However, these distinctions can again be reconciled by looking at the facts of each case. Courts that enforce NOM clauses invariably find the evidence of the alleged oral variation to be weak and not reflective of the parties’ intentions.

This divergence is most evident in Ontario. Trial level courts in *Toronto Dominion Bank v. 1745361*, *Toronto Dominion Bank v. Turk*, and *Honey Bee v. VitaSound Audio* rejected alleged oral amendments to contracts with NOM clauses. In all three cases, the evidence supporting the alleged oral agreements was unconvincing.[[35]](#footnote-36) In the *Turk* case, the Ontario Court Appeal later described the alleged oral agreement as lacking “an air of reality”.[[36]](#footnote-37)

On the other side of the ledger are cases following the Ontario Court of Appeal’s decision in *Colautti Construction v. Ottawa*. *Colautti* involved a construction contract that required all additional charges to be in writing. However, the Court of Appeal held that the parties had varied that contractual term by their conduct. The Court of Appeal relied on the city’s payment of earlier charges lacking written authorization as proof of the parties’ intention to modify their written agreement.[[37]](#footnote-38)

*Colautti* has been followed in and outside Ontario. In *Craigdarloch Holdings v. Syscon Justice Systems*, the B.C. Supreme Court cited *Colautti* in refusing to enforce a NOM clause that was inconsistent with the parties’ conduct. As the plaintiff had previously declared the agreement containing the NOM clause to be non-binding, the court rejected its attempt to rely on the NOM clause at trial. The court instead compensated the plaintiff for his work on a *quantum meruit* basis.[[38]](#footnote-39) Notably, the court also held that the parol evidence rule did not preclude it from recognizing the parties’ subsequent agreement to treat the written contract as non-operative.[[39]](#footnote-40)

In *Canadian Premier Life Insurance v. Sears Canada*, decided within days of *Craigdarloch*, the Ontario Superior Court of Justice queried whether the *Colautti* approach might survive post *Tercon Contractors v. British Columbia*, and the Supreme Court’s repudiation of “judicial discretion to depart from the terms of a valid contract upon vague notions of ‘equity or ‘reasonableness’”.[[40]](#footnote-41) However, Ontario courts continue to use the *Colautti* approach*.* In *466369 Ontario v. 2379078 Ontario*, the Ontario Superior Court of Justice cited *Colautti* in enforcing an oral agreement to reduce rents despite a NOM clause.[[41]](#footnote-42)

Nova Scotia jurisprudence supports a similarly permissive approach. In *Archibald v. Action Management Inc*, the Nova Scotia Court of Appeal enforced an oral agreement to “terminate” a lease on payment of a fixed sum despite a clause requiring any waiver of obligations under the lease to be in writing. The court held that the waiver clause did not bar a subsequent oral agreement to “terminate” the lease as “[i]t cannot be said [the waiver clause] was clearly intended to cover any and all future contractual relations between the parties.”[[42]](#footnote-43)

In contrast, Alberta jurisprudence is more deferential to NOM clauses. In *Gainers v. Pocklington Holdings*, the Alberta Court of Appeal overturned a trial decision that accepted amendments to management services contracts “by implication, conduct, oral discussions, or oral agreements”. The trial judge held that the defendant had by these means unilaterally and retroactively increased the contracts’ prescribed fees. The Alberta Court of Appeal disagreed. It found that the contracts’ entire agreement and NOM clauses “alone would suffice to prevent” the trial judge’s findings. The Alberta Court of Appeal expressly affirmed the right of parties to restrict their future ability to amend contracts through a writing requirement.[[43]](#footnote-44)

In *West Edmonton Mall v. Clock Gallery*, the Alberta Court of Queen’s Bench rejected claims of an oral agreement to reduce rents in the face of a NOM clause. The court noted that NOM clauses allow “parties to protect themselves from uncertainty (and the litigation that too often goes with uncertainty) by agreeing to provisions that only that which is in writing is to have legal efficacy. I see nothing wrong with that. Certainty in contracts is to be desired.”[[44]](#footnote-45) The court also distinguished entire agreement clauses—which cover pre-contractual representations—with NOM clauses that cover subsequent oral agreements. The court accepted that unlike entire agreement provisions, NOM clauses can—and do—bar post-contractual arrangements not committed to writing.[[45]](#footnote-46)

The Alberta Queen’s Bench reached the same conclusion in *Becker v. Jane Doe No 1*, in which a tenant again relied on an alleged oral agreement to reduce rents prescribed in a contact with a NOM clause. The court found “nothing unconscionable about the clause. It is a fair clause benefiting both parties”.[[46]](#footnote-47) The *Becker* court also cited *Tercon* and found no overriding public policy to militate against enforcing the NOM clause.[[47]](#footnote-48)

Despite the apparent strict approach to NOM clauses, the courts hearing each of the above Alberta decisions mentioned a lack of evidence supporting the alleged oral amendments or the otherwise unfair outcomes that would result if they did not enforce the NOM clause in issue.[[48]](#footnote-49) Those decisions may well have been different if evidence of the oral agreement had been strong.

The recent decision of the Ontario Superior Court of Justice appears to reconcile the competing caselaw. The court hearing *Ruetz* *v. Metro Canada* refused to recognize an alleged oral amendment, but only because of insufficient evidence. Citing *Colautti*, the Superior Court confirmed that an oral agreement can be enforced despite a NOM clause—if the evidence shows a mutual intention to modify the contractual relationship.[[49]](#footnote-50) As with entire agreement clauses and the parol evidence rule, if the evidence proves a common intention to modify the contractual arrangement, courts will respect that intention despite lack of adherence to a prescribed writing requirement.

## Oral agreements and the *Statute of Frauds*

Even where legislation seeks to impose a writing requirement, courts will find ways to ensure the parties’ intentions are respected. The best example of this is the *Statute of Frauds*, whichwas first enacted in England in the late 17th century[[50]](#footnote-51) as a way to ensure the legitimacy of contracts conveying an interest in land. It remains in force in numerous jurisdictions to “prevent fraudulent dealings based on perjured evidence”.[[51]](#footnote-52)

The statute, in its various iterations, stipulates that contracts for the sale of land, wills, and “to answer for a debt” must be in writing and signed by the parties.[[52]](#footnote-53) However, to ensure that the statute does not itself become “an engine of fraud”,[[53]](#footnote-54) courts have established numerous exceptions to its application.

First, courts will invoke the doctrine of part performance as exception to the writing requirement. The doctrine provides that a party acting on the oral contract to its detriment is evidence of the contract’s existence.[[54]](#footnote-55) Recent decisions confirm that evidence of partial performance is also an exception to the parol evidence rule and can be used to establish an umbrella agreement.[[55]](#footnote-56)

In addition, courts will interpret the *Statute of Frauds* generously or narrowly, as circumstances require. The Alberta Court of Appeal recently held that an email signature meets the signing requirement,[[56]](#footnote-57) consistent with earlier Ontario authority that faxing a draft agreement with the sender’s name is sufficient.[[57]](#footnote-58)

There is also a long[[58]](#footnote-59) and growing list of specific transactions that courts have found do not create an interest in land as contemplated by the statute, meaning that they are not subject to the writing requirement. Recently in *Danesh v. Vahed*, the Ontario Superior Court of Justice held that the *Statute of Frauds* was unlikely to apply to an oral agreement to extend a closing date. This exception would go beyond the acceptance of collateral oral agreements in *Shelanu*, which nevertheless required them to comply with the *Statute of Frauds*. The Superior Court in *Danesh* also rejected the application of the statute because the seller’s actions evidenced an agreement to extend the closing date, and a failure to recognize that extension would be “unconscionable”.[[59]](#footnote-60)

In another recent decision, the Alberta Court of Queen’s Bench relied on the doctrine of part performance to enforce an agreement for the sale of shares in a company whose main asset was resource wells.[[60]](#footnote-61) The Alberta Court of Appeal doubted whether part performance was even necessary as the transaction was for shares of the land-holding company, rather than the land itself.[[61]](#footnote-62)

## Conclusion

At bottom, the goal of contract law is to enforce agreements. Where the agreement is entirely in writing, it is about interpreting the words used. Where the agreement is oral, it can be more challenging because the contents can themselves be a matter of dispute. In any case, the purpose of the exercise is to ascertain the intentions of the parties.

The Ontario Court of Appeal’s decision in *175 Ontario* is in line with prior jurisprudence, but also takes it to a new level. There is prior authority for enforcing a collateral oral agreement that post-dates a written contract with an entire agreement clause. Oral umbrella agreements preceding a narrower written contracts are also enforceable. Both types of oral agreements are also recognized exceptions to the parol evidence rule.

However, the oral agreement in *175 Ontario* would not likely qualify as an umbrella agreement. Moreover, it was not just contrary to the terms of the subsequent written contract. The written contract had a clause that expressly sought to terminate all prior agreements; it was directed at the exact kind of oral arrangement on which the plaintiff relied. Still, the trial court and the Ontario Court of Appeal accepted that the oral agreement represented the parties’ true intentions. Viewed through that lens, the decision follows the direction from the Supreme Court in *Sattva*.

Canadian courts approach NOM clauses with the same ultimate objective. They enforce NOM clauses where the evidence of an alleged oral variation is weak and find daylight outside clauses where the evidence of an oral agreement to vary is strong.

This jurisprudence further shows that oral agreements cannot be negated simply with exclusion clauses, no matter how tightly they are written. Just as courts will not allow the *Statute of Frauds* to be “an engine of fraud”, they will not allow an exclusion clause to override the parties’ true agreement. Exclusion clauses will not stop a reviewing court from enforcing a prior or subsequent oral agreement—even one that conflicts with the written contract—if the oral agreement captures what the parties actually intended.

1. Partner at Lax O’Sullivan Lisus Gottlieb LLP. [↑](#footnote-ref-2)
2. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [“***Sattva***”] at para. 55. [↑](#footnote-ref-3)
3. *Klemke Mining Corp. v. Shell Canada Ltd.*, 2007 ABQB 176 at paras. 192-193, aff’d 2008 ABCA 257 (quoting Chitty on Contracts 29th ed.). [↑](#footnote-ref-4)
4. *1750738 Ontario Inc. c. 1750714 Ontario Inc.*, 2020 ONCA 836 [“***175 Ontario***”]at paras. 37-38; *Ruparell v. J.H. Cochrane Investments Inc. et al.*, 2020 ONSC 7466 at paras. 20-21; *Canadian Northern Shield v. 2421593 Canadian Inc.*2018 ONSC 3627 at paras. 72-73; *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*(1991), 79 D.L.R. (4th) 97 (Ont. C.A.) at 103-104; *UBS Securities Canada, Inc. v. Sands Brothers Canada, Ltd.*, 2009 ONCA 328 at para. [47](https://www.canlii.org/en/on/onca/doc/2009/2009onca328/2009onca328.html#par47); *Betser-Zilevitch v. Nexen Inc.,* 2019 FCA 230 at para. [4](https://www.canlii.org/en/ca/fca/doc/2019/2019fca230/2019fca230.html#par4); *Calvan Consolidated Oil and Gas Company Limited v. Manning*, [1959] S.C.R. 253 at 260-261; *Klemke Mining Corp. v. Shell Canada Ltd.*, [2008 ABCA 257](https://www.canlii.org/en/ab/abca/doc/2008/2008abca257/2008abca257.html) at paras. [24 and 27](https://www.canlii.org/en/ab/abca/doc/2008/2008abca257/2008abca257.html#par24). [↑](#footnote-ref-5)
5. *Klemke Mining Corp. v. Shell Canada Ltd.*, 2007 ABQB 176 at paras. 192-193, aff’d 2008 ABCA 257. [↑](#footnote-ref-6)
6. *Betser-Zilevitch* *v. Nexen Inc.* at para 3. [↑](#footnote-ref-7)
7. *Betser-Zilevitch* *v. Nexen Inc.* at para. 4; *Soleil Hospitality Inc. v. Louie*, 2006 BCSC 1920 at para. 26, aff’d 2008 BCCA 206; *Vancouver Canucks Limited Partnership v Canon Canada Inc.*, 2015 BCCA 144 at para. 79. [↑](#footnote-ref-8)
8. *Betser-Zilevitch* *v. Nexen Inc.* at para 3; *Rocca Group Ltd. v Consumers Distributing Co.*, 1977 CarswellNS 306 (C.A.) at paras. 29-30 and 42; *Wilson v. Graydon Hall Pizza & Catering Ltd.*,1994 CanLII 7535 (ON SC) at paras. 30 and 33(7), aff’’d 1996 CanLII 974 (ON CA). [↑](#footnote-ref-9)
9. *175 Ontario* at paras. 40-41. [↑](#footnote-ref-10)
10. *Wilson v. Graydon Hall Pizza & Catering Ltd.*,1994 CanLII 7535 (ON SC) at paras 18, 33, and 37, aff’’d 1996 CanLII 974 (ON CA). [↑](#footnote-ref-11)
11. *Canada Square Corp. v. Versafood Services Ltd.*, [1981 CarswellOnt 124 (C.A.)](https://www.canlii.org/en/on/onca/doc/1981/1981canlii1893/1981canlii1893.html) at para. 34 citing *G. Scammell & Nephew Ltd. V. Ouston*, [1941] A.C. 251 (H.O.L.) at 268. See also: *Desco Plumbing and Heating Supply Inc. v. AVN Plumbing Limited et al.*, 2020 ONSC 6728 at paras. 79-81 and *Klemke Mining Corp. v. Shell Canada Ltd*., 2008 ABCA 257 at paras. 11 and 26. [↑](#footnote-ref-12)
12. *175 Ontario* at paras. 22 and 44-53. [↑](#footnote-ref-13)
13. *Gutierrez v. Tropic International Ltd* (2002), 63 O.R. (3d) 63 (C.A.) at paras. 19 and 24 [“***Gutierrez***”]. [↑](#footnote-ref-14)
14. *175 Ontario* at para. 31. [↑](#footnote-ref-15)
15. *175 Ontario* at paras. 44-48, citing *Singh v. Trump*, 2016 ONCA 747. [↑](#footnote-ref-16)
16. *Royal Bank of Canada v. 1643937 Ontario Inc.*, 2021 ONCA 98 at para. 43; *Bank of Nova Scotia v. Zackheim* (1983), 3 D.L.R. (4th) 760 (Ont. C.A.) at 761-762; *Beer v. Townsgate I Ltd.* (1997), 152 D.L.R. (4th) 671 (Ont. C.A.), at paras. 25-32, leave to appeal refused, [1997] S.C.C.A. No. 666. [↑](#footnote-ref-17)
17. *175 Ontario* at paras. 49-53. [↑](#footnote-ref-18)
18. *Gutierrez* at paras. 16 and 26-27. [↑](#footnote-ref-19)
19. *Soboczynski v Beauchamp*, 2015 ONCA 282 [“***Soboczynski***”] at paras. 41-43. Despite this finding, the Court of Appeal dismissed the action because the plaintiff had not made out the reliance element of the negligent misrepresentation claim (para. 69). [↑](#footnote-ref-20)
20. *Shelanu Inc v Print Three Franchising Corp*, 2003 CanLII 52151 (Ont. C.A.) [“***Shelanu***”] at paras. 46-47. [↑](#footnote-ref-21)
21. *Shelanu* at paras 49-50. [↑](#footnote-ref-22)
22. *Shelanu* at paras. 46-50. [↑](#footnote-ref-23)
23. *6646107 Canada v. The TDL*, 2019 ONSC 2240 at paras. 14-18. [↑](#footnote-ref-24)
24. *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102 at 112-113; *Gutierrez* at para 19; *Nova Growth v. Kepinski*, 2014 ONSC 2673 (Comm. List.) at para. 64; *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*, 1989CarswellBC 1705 (S.C. [In Chambers]) at paras. 7 and 15, per McLachlin C.J.S.C., as she then was. [↑](#footnote-ref-25)
25. Shelanu at paras. 46-50; Soboczynski at para. 41. [↑](#footnote-ref-26)
26. *Barber v. Glen*, 1987 CanLII 4627 (SK CA) at paras 9-11. [↑](#footnote-ref-27)
27. *Bank of Montreal v. Wilder* (1983), 149 D.L.R. (3d) 193 (B.C.C.A.) at 224-225, aff’d [1986] 2 S.C.R. 551. See also: *Toronto Dominion Bank v. Griffiths*, 1987 CarswellBC 289 (C.A.) at para. 46, and *Palechek v. Canadian Imperial Bank of Commerce*, 1991 ABCA 8 at paras. 8-10. [↑](#footnote-ref-28)
28. *0930043 B.C. Ltd. v. 3 Oaks Dairy Farms Ltd.*, 2015 BCCA 332 at paras. 34 and 42. [↑](#footnote-ref-29)
29. *Sattva* at para. 60. [↑](#footnote-ref-30)
30. *Stankovic v. 1536679 Alberta Ltd.*,2019 ABCA 187 at paras. 8, 14 and 25-29. See also: *Warraich v. Choudhry et al*, 2019 ONSC 2656 at paras. 122-126. [↑](#footnote-ref-31)
31. *Honey Bee (Hong Kong) Limited v. VitaSound Audio Inc.*, 2018 ONSC 5787 at paras. 39-40 and 46, aff’d 2020 ONCA 629; *Fung v. Decca Homes*, 2019 ONCA 848 at para 5. [↑](#footnote-ref-32)
32. *P&C Lawfirm Management Inc. v. Sabourin*, 2020 ABCA 449 at paras. 24-25 and 54-59. [↑](#footnote-ref-33)
33. *Shelanu* at para. 42. [↑](#footnote-ref-34)
34. *6646107 Canada v. The TDL*, 2019 ONSC 2240 at para. 18. [↑](#footnote-ref-35)
35. *Toronto Dominion Bank v. 1745361 Ontario Corp.*, 2013 ONSC 4542 at paras. 13-15; *Toronto Dominion Bank v. Turk*, 1992 CarswellOnt 3185 (Gen. Div.) at para. 5, aff’d 1994 CarswellOnt 2646 (C.A.); *Honey Bee (Hong Kong) Limited v. VitaSound Audio Inc.*, 2018 ONSC 5787 at paras. 39-40 and 46, aff’d 2020 ONCA 629. [↑](#footnote-ref-36)
36. *Toronto Dominion Bank v. Turk*, 1994 CarswellOnt 2646 (C.A.) at para 2. [↑](#footnote-ref-37)
37. *Colautti Construction Ltd v. Ottawa (City)* (1984), 46 O.R. (2d) 236, 1984 CarswellOnt 731 (C.A.) at paras. 28-30; *466369 Ontario Ltd v. 2379078 Ontario* *Inc*, 2018 ONSC 5877 at paras. 27-34. [↑](#footnote-ref-38)
38. *Craigdarloch Holdings Ltd. v Syscon Justice Systems Ltd.*, 2010 BCSC 1186 at paras. 129-139 and 171. [↑](#footnote-ref-39)
39. *Craigdarloch Holdings Ltd v. Syscon Justice Systems Ltd*, 2010 BCSC 1186 at paras. 130-134. [↑](#footnote-ref-40)
40. *Canadian Premier Life Insurance v. Sears Canada*, 2010 ONSC 3834 at paras. 86-87, citing *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4 [“***Tercon***”]at para. 120. [↑](#footnote-ref-41)
41. *466369 Ontario Ltd v. 2379078 Ontario* *Inc*, 2018 ONSC 5877 at paras. 27-34. [↑](#footnote-ref-42)
42. *Archibald v. Action Management Services*, 2015 NSCA 103 at paras. 27-29. [↑](#footnote-ref-43)
43. *Gainers Inc v. Pocklington Holdings Inc*, 2000 ABCA 151 at paras. 11-17. [↑](#footnote-ref-44)
44. *West Edmonton Mall Ltd v. Clock Gallery Ltd*, 1993 CarswellAlta 266 (Master) at paras. 22-30. [↑](#footnote-ref-45)
45. *West Edmonton Mall Ltd v. Clock Gallery Ltd*, 1993 CarswellAlta 266 (Master) at paras. 16-19. [↑](#footnote-ref-46)
46. *Becker v. Jane Doe No. 1*, 2015 ABQB 144 (Master) at paras. 33-36. [↑](#footnote-ref-47)
47. *Becker v. Jane Doe No. 1*, 2015 ABQB 144 (Master) at paras. 39-40, citing *Tercon* at para. 123. [↑](#footnote-ref-48)
48. *Gainers Inc v. Pocklington Holdings Inc*, 2000 ABCA 151 at paras. 25-30; *West Edmonton Mall Ltd v. Clock Gallery Ltd.*, 1993 CarswellAlta 266 (Master) at paras. 20-21; *Becker v. Jane Doe No. 1*, 2015 ABQB 144 (Master) at paras. 26-28 and 32. [↑](#footnote-ref-49)
49. *Ruetz v. Metro Canada Inc.et al.*, 2021 ONSC 20 at paras. 56-59, 63-64 and 69. The court also rejected an estoppel argument due to a lack of detrimental reliance (paras. 79-81). [↑](#footnote-ref-50)
50. George P. Costigan, Jr. “The Date and Authorship of the Statute of Frauds, 26(4) Harvard Law Review (1913) 329-346 at 329-330. [↑](#footnote-ref-51)
51. *Erie Sand and Gravel Limited v. Tri-B Acres Inc.*, 2009 ONCA 709 [“***Erie Sand***”] at para. 49. [↑](#footnote-ref-52)
52. See for example, *Statute of Frauds*, R.S.O. 1990, c. S.19, s. 4. The statute is used in its original form (1677 (U.K.), 29 Car. 2, c. 3) in Alberta. In B.C., a less restrictive writing requirement is incorporated in the *Law and Equity Act*, R.S.B.C. 1996, c. 263, s. 59. [↑](#footnote-ref-53)
53. *Hill v. Nova Scotia (Attorney General)*, [1997] 1 S.C.R. 69 [“***Hill***”] at para. 10; *Erie Sand* at para. 49. [↑](#footnote-ref-54)
54. *Erie Sand* at paras. 49 and 75; *Hill* at paras. 5 and 10-14. [↑](#footnote-ref-55)
55. *Haan v. Hann*, 2015 ABCA 395 at para. 15(c); *Mitchell v. Pytel*, 2021 ABQB 403 at para. 234 and 242-247; *Axcess Mortgage Fund Ltd.* *v. 117640 Alberta Ltd.*, 2018 ABQB 626 at paras. 183-187. [↑](#footnote-ref-56)
56. *Roswell Group Inc v. 1353141 Alberta Ltd.*, 2020 ABCA 428 at paras. 22 and 48. [↑](#footnote-ref-57)
57. *Delisle Foods Ltd. v. Glen S. Case Investments Inc.*, 1998 CarswellOnt 752 (C.A.) at para. 4. [↑](#footnote-ref-58)
58. For example, the writing requirement has held to be been inapplicable to the forgiveness of a debt reducing the sale price of land (*Sansalone v Sansalone*, 1997 CarswellOnt 2251 (Gen. Div.) at paras. 27-29), and to an action based on promissory notes given as consideration for the transfer of land (*Kulczycki v. Stupka*, 1984 CarswellSask 269 (Q.B.) at paras. 20-22). [↑](#footnote-ref-59)
59. *Danesh v. Vahed*, 2020 ONSC 3525 at paras. 65-66, aff’d 2021 ONCA 189. [↑](#footnote-ref-60)
60. *Campbell v. Paradise Petroleums Ltd.*, 2018 ABQB 411 at paras. 22-24. [↑](#footnote-ref-61)
61. *Campbell v. Paradise Petroleums Ltd.*, 2019 ABCA 410 at para. 43. See also *Robert Michaels Group Inc.* *v Shaw Communications Inc.*, 2004 ABQB 745 at para. 130. [↑](#footnote-ref-62)