Creating a written record of a contract makes good business sense, and failing to do so can have serious legal consequences. Every common law province has legislation requiring that some contracts be in writing to be enforceable. Even when a contract is put in writing, parties may disagree about its meaning. In this chapter, we identify which contracts must be in writing and discuss the rules for determining the meaning of the words used in a contract.

In particular, we examine such questions as:

- What legislation requires that certain contracts be in writing?
- What types of contracts are affected by the Statute of Frauds?
- How much writing is necessary to comply with the Statute?
- What is the effect of the Statute of Frauds on contracts that do not comply with the writing requirement?
- What are the writing requirements of the Sale of Goods Act?
- What writing requirements exist under general consumer protection legislation?
- What approaches are used to interpret the express terms in a contract?
- What is the parol evidence rule and how do courts apply it?
- When are terms implied into a contract?
THE DISTINCTION BETWEEN SUBSTANCE AND FORM

The Benefits of a Written Record

In previous chapters, we used the term formation of a contract in a legal sense, not in a physical sense. The contract is formed when there is an accepted offer, consideration, and intention. Once created, the contract may exist in the parties’ recollection of the spoken words, or it may be recorded in a written document or stored electronically online, on a memory stick, or in a computer. So the substance—the terms of the contract—may have a variety of physical forms or even no form at all, other than in the minds of the parties. In this chapter, we consider the rules that apply to the physical form of the contact. Contracts may be in one the following three forms:

1. contracts whose terms are entirely oral (spoken);
2. contracts whose terms are part oral and part written; and
3. contracts whose terms are entirely in writing, whether all in one document or spread through several documents, such as a series of letters.

It is good business practice to keep some record of even the simplest transaction at the time it is made. For complicated contracts, it is best to have a complete written record signed by the parties. We forget things over time, especially when burdened with many details, and common sense tells us that relying on written records is better than on mere memory. The large majority of contractual disputes are not about the existence of contracts but about the differing recollections of the terms of the contract and the meaning of the words used. Very often, the reason a party sues over a contract is that he disagrees with its interpretation by the other party. In such cases, the court is asked to determine the meaning or interpret the contract, also known as construing the contract.

When the court is asked to construe a contract, it tries to find the most reasonable meaning that can be attributed to the words in the circumstances. This is no easy task, and over the years courts have developed some strategies to assist them. To ensure that there is some written evidence to aid a judge in establishing the terms of “important” contracts, provincial legislation imposes specific writing requirements for some types of contracts.

Legislation Dealing with Writing

Not all contracts require writing; very often oral contracts are legally enforceable. However, over time, legislators identified some high-risk contracts and required that they be in writing. Originally, writing meant recorded on paper; as will be discussed more fully in Chapter 32, writing requirements may now be satisfied through either paper or electronic means such as PDF documents and emails.1

Typically the subject matter of the contract will dictate the applicable writing requirements, if any. For example, a mortgage will need to meet specific requirements in order to be registered against the land it charges. These may be set out in either the land registration or mortgage legislation. Rather than focusing on the huge number of statutes that impose precise details on specific transactions, this chapter focuses on the less specific writing requirements imposed by three common types of legislation affecting a wider range of contracts:

1. The Statute of Frauds—the first piece of legislation to impose writing requirements
2. The Sale of Goods Act—focusing on the most common type of business transaction—a purchase of goods
3. Consumer Protection Legislation—dealing with the most vulnerable type of party

1 Leopke v. Meston, 2008 ABQB 45; see also the Personal Information Protection and Electronic Documents Act and the Interpretation Act, including province-specific legislation such as the Electronic Transaction Act (Alberta) and Electronic Commerce Act (Ontario).
The Statute of Frauds passed in 1677 by the English Parliament. It was subsequently adopted (with some changes) by most common law jurisdictions around the world, including those of Canada and the United States. British Columbia substantially revised it, and Manitoba eventually repealed it entirely. In the remaining common law provinces, the Statute remains in force in one form or another. The Statute of Frauds makes certain types of contracts unenforceable unless they are in writing. An otherwise valid oral contract that falls within the Statute is unenforceable; neither party may sue on the contract. This allows a party to avoid performing a contract solely because it is oral—the contract might be perfectly valid in every other respect. It has often been said that by defeating the reasonable expectations of parties, the Statute of Frauds promotes more frauds than it prevents. For this reason, the courts have tried to limit the application of the Statute wherever possible. As a result, the scope of the Statute has been restricted by exceptions.

The Types of Contracts Covered by the Statute of Frauds

Originally, the Statute of Frauds covered six types of contracts:

i. A promise by an executor or administrator to pay estate debts out of his or her own money,
ii. A promise to answer for the debt, default, or miscarriage of another (guarantee),
iii. An agreement made in consideration of marriage,
iv. A contract dealing with interests in land,
v. An agreement not performed within one year of its making, and
vi. Ratification of debts incurred while a minor.

In New Brunswick and Nova Scotia, the statute still covers five of these six categories (excepting minors). In other provinces, rules about minors and marriage contracts have been moved to family law statutes and contracts lasting longer than a year are covered under consumer protection legislation. Guarantees, land, and executor’s promises are the categories addressed in most of the remaining provinces’ Statute of Frauds. We will focus on guarantees and interests in land as the categories most relevant to business.

Guarantees A guarantee is a promise “to answer for the debt, default, or miscarriage of another;” it is a conditional promise to pay only if the debtor defaults: “If he does not pay you, I will.” Only after the debtor has defaulted may the creditor claim payment from the guarantor.

In contrast, a person who makes a promise to indemnify a creditor makes herself primarily liable to pay the debt through her indemnity. When the debt falls due, the creditor...
may sue either the original debtor or the person who gave the promise to indemnify, or both. “Give him the goods and I will see to it that you are paid” would usually be a promise to indemnify. A promise by a purchaser of a business to its employees to pay back wages owed by the former owner would be a promise to indemnify.

This distinction is important because the courts have applied the writing requirements of the Statute of Frauds only to simple guarantees. Therefore, a guarantee must be made in writing to be enforceable, but a promise to indemnify is outside the Statute and is enforceable without being in writing. Even the class of guarantees that fall within the Statute has been narrowed; the courts have excluded those guarantees incidental to a larger contract where the element of guarantee is only one of many promises made in the contract.

CASE 10.1
Sutton & Co. were stockbrokers and members of the London Stock Exchange with access to its facilities. Grey was not a member, but he had contacts with prospective investors. The parties made an oral agreement by which Grey would receive half the commission from transactions for his clients completed through Sutton and was to pay half of any bad debts that might develop out of the transactions.

When a loss resulted from one of the transactions and Grey refused to pay his half, Sutton & Co. sued him. Grey pleaded that his promise to pay half the loss was a guarantee and was not enforceable against him because it was not in writing. The court ruled that the whole arrangement between Sutton and Grey had been a much broader one than merely guaranteeing the payment of a debt owing by a particular client, and that the Statute of Frauds should not apply. Accordingly, the agreement was enforceable, and Sutton & Co. obtained judgment against Grey.

British Columbia has done away with the judge-made distinction between indemnity and guarantee by requiring that both types of promise be in writing.

In contrast to the restricted meaning given to the words debt and default, the courts have given the word miscarriage a fairly wide meaning. They have interpreted a promise to “answer for the miscarriage of another” to mean “to pay damages for loss caused by the tort of another person,” for example, by that person’s negligence. The promise “I will pay you for the injury B caused you if B doesn’t settle with you” must be in writing. On the other hand, the promise “I will pay you for the injury B caused you if you will give up absolutely any rights you have against B” is a promise of indemnity and need not be in writing to be enforceable.

Land
Requiring that contracts concerning interests in land be in writing is necessary to protect the public record of land ownerships. The special qualities of land, in particular its virtual indestructibility and permanence, make the ability to ascertain the various outstanding interests and claims against land important. It is essential to have verified written records of transactions affecting interests in land, and these records must be available over many years for inspection by interested persons and the public. Therefore, we have systems of public records where interested parties may search and discover who owns or claims to own the interests in land.

Still, some contracts concerning land are considered too remotely connected with land to be protected by the Statute. The courts have held that agreements to repair or build a

7 As Furmston points out in Cheshire, Fifoot and Furmston’s Law of Contract, 13th ed., at 212, it is the intention of the parties and not their language that determines whether the promise is a guarantee or an indemnity.
9 Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. 2, c. 34, s. 1 (U.K.), and the Law and Equity Act R.S.B.C. 1996, c. 253 s. 59(6).
Part Performance

Part performance is a doctrine that allows some oral land contracts to be enforced despite the Statute of Frauds. It is based on the idea that if the plaintiff can show that performance of the contract has begun and he has relied on its existence, the court would accept that performance as evidence of the contract without writing.\(^\text{12}\)

Not every act of performance under a contract qualifies as a substitute for a written document. The following conditions must be satisfied before the court will enforce the oral contract:

\begin{enumerate}
  \item The contract must be one concerning land.
  \item The acts of performance must suggest quite clearly the existence of a contract dealing with the land in question; they must not be ambiguous or just as possibly explained as part of a quite different transaction. The must fulfill the "very purpose" of the contract.\(^\text{13}\)
  \item Activities of either the plaintiff or the defendant may be considered acts of performance, but the plaintiff must have relied on the existence of the contract and suffered a loss if the contract is not enforced. This is detrimental reliance.\(^\text{14}\)
\end{enumerate}

The act(s) of part performance do not need to disclose all the terms of the contract, just support the existence of the contract and then the court will enforce it according to the terms orally agreed (and proven).

**CASE 10.2**

The Province of Nova Scotia built a new highway through the middle of Ross Hill’s farm. When it expropriated the land, it promised Mr. Hill that he would be permitted to “move people, cattle and equipment” back and forth across the highway. The Province built ramps and gates to allow for Hill’s use. Twenty-seven years later, the Province tried to deny that an equitable interest in land had been created for Hill. The Supreme Court of Canada held that “the actions of the province [spoke] louder than any written document.” Building and maintaining the gates and ramps were clear and unequivocal acts of part performance and Hill relied upon them to his detriment. Higher compensation for the expropriated land would have been sought if access had not been promised. Therefore, the oral contract was exempt from the Statute of Frauds and the court upheld Hill’s interest in the land.\(^\text{15}\)

Typically, mere payment of a deposit, submission of an offer, or waiver of some of the conditions in the contract will not amount to part performance, as is demonstrated in Case 10.3 below.\(^\text{16}\) See the Companion Website for more on this topic.

**Requirements for a Written Memorandum**

The actual writing requirements of the Statute of Frauds are quite vague. It requires only a “note or memorandum” of the contract “signed by the party to be charged” or by the


party's authorized agent; it does not require complete detail of every term or both parties' signatures.

Electronic forms of transmitting documents satisfy the statutory requirement of being in "writing." Canadian courts have assumed that facsimile transmissions or emails are sufficient to satisfy the writing requirement of the Statute of Frauds. Other legislation is being amended to specifically address writing in new ecommerce business methods. Chapter 32 specifically addresses these changes under the heading "Formal Requirements."

**All Essential Terms Must Be Included** The memorandum must contain all the essential terms of the contract, including the identity of the parties. If the contract is for the sale of land, for example, the memorandum must name the parties, describe the subject matter (the land), and set out the consideration to be given for it.

**CASE 10.3**

Wayne and Janet Gretzky made a written offer to purchase a cottage property, including a main house, guesthouse, and two-storey boathouse for $1,860,000. All the terms and conditions were acceptable to the vendor except the date for vacant possession of the boathouse. The offer was rejected and a counter-offer was made. At this point, oral discussions took place between the various agents and their clients and a mutually agreeable date was established. However, the new date was not placed in the agreement and no written memorandum of the boathouse possession term was made. Subsequently, the vendors refused to complete the deal and the Gretzkys sued. The court found that vacant possession of the boathouse was obviously an important issue between the parties, and therefore it was an essential term not in writing. The contract failed to satisfy the Statute of Frauds and was unenforceable. The Gretzkys did not get the cottage.

An exception exists for contracts of guarantee—the consideration for that type of promise need not appear in writing. The memorandum need not be wholly within a single document; several written notes may be taken together to satisfy the requirements of the Statute. Using more than one document to satisfy the writing requirement can be difficult if there are no cross-references within the documents. In one case, the court heard evidence that a signed letter beginning with "Dear Sir" was contained in a particular envelope that bore the name and address of the plaintiff, and in this way linked the two pieces of paper as a sufficient memorandum. The court justified its decision on the grounds that, even without oral evidence, it could reasonably assume that the letter was delivered in an envelope: It admitted oral evidence merely to identify the envelope.

**Signed by the Defendant** The Statute requires that the note or memorandum be signed by the party to be charged—that is, sued (the defendant)—and only that person, not the plaintiff. The plaintiff's own signature is irrelevant; if the defendant has not signed, the plaintiff's signature on the document does not help and he cannot enforce the contract against the other party.

The courts have been lenient in prescribing what amounts to a sufficient signature; it need not be in the handwriting of the defendant. A printed name will suffice as long as it

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17 See *Rolling v. William Investments* (1989), 63 D.L.R. (4th) 760. The Ontario Court of Appeal decided that a facsimile transmission of acceptance of an option was a satisfactory acceptance, even though when the parties made the agreement in 1974, they "could not have anticipated delivery of a facsimile of the [accepted] offer by means of a telephone transmission. . . ." The court concluded that "Where technological advances have been made which facilitate communications and expedite transmission of documents we see no reason why they should not be utilized. Indeed, they should be encouraged and approved. . . . The defendant] suffered no prejudice by reason of the procedure followed." See also *Lepillo v. Meton*, 2008 ABQB 45 at paras. 38–41.

18 Hunter v. Baluke, supra, n 16.

19 See, for example, R.S.O. 1990, c. S.19, s. 6; R.S.N.S. 1989, c. 442, s. 8.

is intended to validate the whole of the document. For example, a letterhead on an invoice is designed to verify the sale of the goods described below without a signature and is sufficient. Ecommerce legislation now expands the notion of signature to include electronic signatures, as will be discussed in Chapter 32.

**CASE 10.4**

An unmarried couple entered into an agreement dividing the proceeds of sale of their home and its contents. One party refused to honour the deal as it violated the Statute of Frauds, and asked the court to divide the proceeds of sale of the home. The court enforced the settlement agreement, finding that, although the Statute of Frauds applied to the agreement as it related to the sale of land, the emails exchanged by the parties satisfied the written “note or memorandum” requirement. The signing requirement was met by the typed first name on the bottom of the email—even though the email was sent from someone else’s email account.21

**Consequences for Contracts within Its Scope**

What do we mean when we say that the Statute of Frauds makes an oral contract unenforceable? This means the parties cannot use the courts to obtain a remedy. The courts recognize that an **unenforceable contract** still exists even though neither party is able to obtain a court remedy. Is this the same as saying it is void? The answer is a definite “No.” Although no action may be brought on the contract itself, the contract may still affect the legal relations between the parties in several ways.

1. **Recovery of Money Paid under a Contract**  
First, both parties to an unenforceable contract may, of course, choose to perform, but if they do not, recovery of any down payment made will depend upon which party repudiates the contract.

**ILLUSTRATION 10.1**

P orally agrees to buy V’s house for $50 000 and gives a down payment of $5000, with the balance to be paid in 30 days.

Suppose that P then sees a more suitable property and refuses to pay the balance. The Statute of Frauds applies, and V cannot enforce the contract. On the other hand, P cannot by court action require V to return the payment. Although the contract is unenforceable, it still exists and may be used as a defence: V may retain the payment knowing that he will not be ordered by a court to return it.22

Suppose instead it is V who refuses either to complete the sale or to return the payment. P can sue successfully for the return of the payment. The court in these circumstances will not permit V to repudiate the contract and yet keep the payment received under its terms. Without an enforceable contract, no court will let him keep the deposit.

In the above illustration, we can see that the court will not permit the party who breaches an unenforceable contract to gain a further advantage. If the contract were found instead to be void, the problem of breach would not arise. A void contract cannot be “breached”; the remedy is rescission, as discussed in Chapter 9.

2. **Recovery for Goods and Services**  
Second, a party who has accepted goods and services under a contract that is unenforceable because of the Statute is not permitted to retain the benefit received without paying something for it. He would have to return the goods or pay a reasonable price for them, as was explained in Chapter 6 under the principle of quantum meruit.

21 Logghey v. Meston, 2008 ABQB 45 at para. 45.
3. Effect of a Subsequent Written Memorandum

Third, a written document may come into existence after the contract has been formed and it will still satisfy the Statute. As long as the document comes into existence before the action is brought on the contract, it provides the necessary evidence.

**ILLUSTRATION 10.3**

P agrees to buy Roselawn from V under a written contract containing a promise by V to give vacant possession on a certain day. V then has unexpected difficulty in removing his tenants and tells P that he will not be able to give vacant possession. P finds another property equally suitable to her and available with vacant possession. Rather than get into a dispute, the parties make a mutual oral agreement to call off the first contract: P releases V from his promise to transfer Roselawn with vacant possession in return for a release by V of P’s promise to pay the purchase price. Afterward, V succeeds in removing his tenants and sues P to enforce the original written contract. P may successfully plead that the subsequent oral contract validly terminated the written contract. However, the oral contract cannot be sued upon directly. Suppose that, in addition to terminating the prior contract, V had orally agreed to give an option on another property. Although the oral contract effectively dissolved the prior written contract, P could not sue upon the new promise to give an option because otherwise the court would be enforcing an oral promise for an interest in land.23

4. Defendant Must Expressly Plead the Statute

Fourth, a defendant who is sued upon an oral contract must expressly plead the Statute as a defence to the action. If he fails to mention it, the court will decide the case without reference to the Statute. The plaintiff will then succeed if he establishes that the contract, though oral, was validly formed.

5. Varying a Prior Written Contract

Fifth, an oral contract may effectively vary or end a prior written contract even though the oral contract could not itself be enforced. An oral contract within the Statute is effective as long as a party does not have to bring an action to have it enforced.

**ILLUSTRATION 10.2**

P agrees orally to buy V’s home. P then refuses to complete the contract, and V sends her a letter outlining the contract and demanding that she carry out her obligations. P replies by letter saying that she has decided not to go through with the contract referred to in V’s letter and that she is not bound since the contract is not in writing. Even though the statements in P’s letter were intended to deny liability, the two letters taken together would amount to a sufficient memorandum to satisfy the Statute and make the contract enforceable.

**INTERNATIONAL ISSUE**

Should the Statute of Frauds Be Repealed?

The Statute of Frauds was passed over three centuries ago, and the argument has been made that the historical reasons for creating it no longer exist. In Canada, more detailed consumer protection writing requirements reduce the Statute’s impact. As previously noted, the Statute has been repealed in Manitoba and amended in Ontario and British Columbia. Perhaps it is time to replace or amend it throughout Canada. When the Province of Ontario amended its Sale of Goods Act to remove the writing requirements (see footnote 25), it did so for the express purpose of facilitating electronic commerce. On the other hand, consider this statement from Mr. Justice Côté of the Alberta Court of Appeal:

> Over 20 years ago, it was fashionable to attack the Statute of Frauds, and indeed a number of jurisdictions have repealed large chunks of it. But Alberta has not touched s. 4. In my view, the trend of modern legislation is actually to call for more writing in contracts and commercial transactions. The idea that one can validly sell a valuable piece of land entirely by oral discussions runs contrary to the expectations of most lay people;...

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23 See Morris v. Baron, [1918] A.C. 1, for a similar result.
Requirements of the Sale of Goods Act

Provinces other than British Columbia and Ontario impose writing requirements in their Sale of Goods Acts. Although the specifics vary by province, the basic requirements are similar to those found in the Statute of Frauds—contracts for the sale of goods must be evidenced by some note or memorandum signed by the party to be charged or they are unenforceable.

What Constitutes a Sale of Goods for the Purposes of the Writing Requirement?

Goods  A sale of tangible moveable personal property is a sale of goods for the purposes of the writing provisions under this legislation. It does not apply to money or services. The challenge is that often contracts involve both the goods and services, such as a contract to provide materials and build a garage. If it is considered a contract for the sale of goods, it is subject to the writing requirements; if it is one for work and materials, it is not. The problem of defining a sale of goods is discussed in detail in Chapter 14. Typically, it will depend on the essence of the contract—the proportion of labour or service to goods or materials supplied under the contract.

Threshold Amounts  All provinces set a (very low) threshold value of goods supplied under the contract to trigger the writing requirement. Amounts vary from $30 to $50. The contract may state a fixed price or set a formula for calculation, or the price may be determined by the past dealings between the parties.

Questions to Consider

1. How are business relationships and commercial activity affected by complex legal rules about the enforceability of oral contracts?
2. Are there sound policy reasons for requiring some contracts to be in writing?
3. Are amendments adequate to address the problems arising from the Statute of Frauds, or would it be better to repeal the Statute and replace it with legislation that meets contemporary needs?
4. Can the Statute of Frauds coexist with ecommerce legislation?


Requirements of the Sale of Goods Act

26 The amount is $40 in Nova Scotia; $50 in Newfoundland and Labrador, Saskatchewan, and Alberta; and $30 in Prince Edward Island. These amounts are, of course, insignificant compared to their value over 100 years ago when the Sale of Goods Act was adopted.
27 See, for example, Sale of Goods Act, R.S.B.C. 1996, c. 410, s. 12; R.S.O. 1990, c. S.1, s. 9; R.S.N.S. 1989, c. 408, s. 11.
Evidence That Satisfies the Act

Unlike the Statute of Frauds, the Sale of Goods Act states expressly that a party to a contract for the sale of goods who cannot produce the required written memorandum may still enforce the contract if he can show one of the following kinds of conduct:  

(a) “acceptance” and actual receipt of the goods (or part) by the buyer, or  
(b) part payment tendered by the buyer and accepted by the seller, or  
(c) something “by way of earnest” given by the buyer to the seller.

Acceptance  In the Sale of Goods Act, the word acceptance has a special meaning. It means any conduct by the buyer in relation to the goods that amounts to recognition of an existing contract of sale. The buyer will have “accepted” the goods when he does anything that amounts to admitting that he has a contract with respect to them.

Part Payment  A part payment is a credit toward payment of the purchase price. Therefore, it must be made after the contract is formed and applied to reduce the debt created by the contract. It is not the same as the part performance exception for sales of land discussed under the Statute of Frauds, as a mere payment of money is usually capable of having alternative explanations.

Earnest  Earnest differs from part payment in that it is not deducted from the price to be paid. Rather it is a token sum (or article) given to seal the bargain. Although the giving of something by way of earnest was common at one time, it is now rarely, if ever, done, and the reference to this practice remains as a relic in the Act.

When Both Acts Apply

Both the Sale of Goods Act and the Statute of Frauds may apply to the same contract. They both apply, for example, where there is an oral agreement to sell goods that are to be delivered and paid for by installments over a period exceeding one year. The evidence may satisfy the requirements of the Sale of Goods Act if the buyer accepts some of the goods or makes part payment, but it does not comply with the Statute of Frauds because it is an oral contract that neither party can wholly perform within one year. Accordingly, it is unenforceable because of the Statute of Frauds, but not because of the Sale of Goods Act.

The requirement of a written memorandum in the Sale of Goods Act is open to the same criticism as the comparable provision in the Statute of Frauds. Its limited protection is hard to justify in today’s marketplace; its arguably more important function is to imply terms into contracts for the sale of goods, as we shall discuss in Chapter 14.

CONSUMER PROTECTION LEGISLATION

A consumer is an individual who purchases goods or services for personal non-commercial use. Consumers have no power to negotiate terms of their contracts, so provincial legislation imposes some protective measures. Generally this legislation regulates the form (writing) and contents (terms) of consumer contracts, although with differing names and methods of protection. The consumer protection statutes cover both goods and services and extend further than either the Sale of Goods Act or the Statute of Frauds, by dictating not only the evidence of writing but also the terms that must be included in that written document. High-risk industries and contracts formed using particular sales tactics are subject to even greater controls, including consumer cancellation options.

28 R.S.N.S. 1989, c. 408, s. 7.  
Consumer contracts that reach the threshold value must be in writing and include the following information:

- Detailed description of goods or services.
- Itemized purchase price.
- Detailed disclosure of cost of borrowing: this includes annualized interest rates and separate disclosure of other administration fees associated with the extension of credit.
- Name, address, and contact information of the vendor.
- Notice of statutory cancellation rights.
- Complete copy provided to the consumer.

Cancellation options are attached to contracts that are formed or performed in the following ways:

- Future performance contracts—this type of contract is one where the goods are supplied or payment is made at a future time.
- Direct sales contracts—this type of contract is formed when the seller contacts a consumer outside his place of business; for example, via door-to-door sales.
- Distance or remote contracts—this type of contract is formed when the parties are separated by distance; for example, by telephone marketing or promotional mailings.
- Internet contracts—the use of online sales is now regulated by most consumer protection legislation.

Some industries are required to include special terms in their consumer contracts. Designated industries considered high risk include the following:

- Time sharing—one Alberta provision requires that time-share agreements be signed by both business and consumer, and the text of the notice provisions cannot be smaller than 12-point font. 30
- Fitness or personal development—Saskatchewan’s legislation requires these contracts to be in writing and include start and end dates, as well as a formula for reducing the amount owing if the club is not available on a specified date. 31
- Lending (credit)—naturally, all provinces require very specific detailed descriptions of the interest calculations and the composition of the payment amounts.
- Credit card—among Manitoba’s written requirements for credit card agreements are a written description of the method for determining the minimum required payments. 32
- Leasing—many consumers do not understand how their car lease payments are calculated and the importance of the residual value of the vehicle at the end of the lease term. For this reason, Ontario’s legislation requires lessors to provide a disclosure statement before the written lease is signed. 33
- Motor vehicle repair—one Ontario provision prohibits a repairer from charging for work unless an estimate meeting the prescribed requirements has been given or waived. The estimate must be written, and must show the make, model, and odometer reading of the vehicle, as well as a detailed description of proposed work. 34

30 A. Reg.105 /10 s. 2.
31 Consumer Protection Act, S.S. 1996, c. C-30.1, s. 76
32 The Consumer Protection Act, C.C.S.M. c. C200, s. 35.2.
34 O. Reg. 17/05 s. 51.
Funeral services—the British Columbia legislation requires funeral services contracts to disclose in writing the address where the body will be stored pending disposition, and the name of the bank where any pre-paid funds will be held.35

Arbitration—in Alberta, consumer arbitration agreements must be in writing, signed by the parties, and approved by the government before they will be enforced.36

Consumers are not bound by these contracts unless the business has complied with the requirements of the legislation. Provinces have set up agencies to hear consumer complaints, as well as to investigate or even negotiate on the consumer’s behalf. We will discuss consumer protection legislation in more detail in Chapters 3 and 14.

36 Fair Trading Act, R.S.A. 1998, c. F-1.05, s. 16.

### Ethical Issue Do Writing Requirements Protect the Consumer or the Business?

Many of the consumer protection writing requirements involve disclosing onerous terms to the consumer as part of the written contract. As long as the consumer has received the written disclosure, he or she will be bound by the terms. In the fast-paced world of online contracting, few consumers have time to read the disclosed terms and have no power to bargain for a change in terms if they are dissatisfied. Onerous terms are presented on a take-it-or-leave-it basis. Furthermore, even when a cancellation right is available, finding a business that does not require agreement to similar one-sided terms might be impossible for the consumer. In this light, written disclosure requirements may not actually protect the consumer.

**Questions to Consider:**
1. Do writing requirements protect the consumer or the business? Or both?
2. Rather than being given the right to cancel an agreement, should consumers be allowed to modify the terms and conditions before agreeing to them? Would consumers take the time to do this?
3. The European Union has a directive that identifies unfair terms and declares them unenforceable against a consumer. Is this a more fair approach?
4. In Seidel v. TELUS, the Supreme Court of Canada said that unless the legislature intervenes, the courts will enforce contracts of adhesion that are freely entered into.37 Should the courts ever help a consumer subject to a written contract filled with unfair terms? Consider Case 10.7 below, which shows how implied terms in the consumer contract can protect a consumer.

### THE INTERPRETATION OF EXPRESS TERMS

Even when parties put their contracts in writing, disagreements about their meaning regularly occur. Words are at best an inefficient means of communicating thoughts: They can be capable of more than one meaning—ambiguous without the parties realizing it. Therefore, disagreements about express terms are a common business risk and courts are regularly asked to construe a contract’s meaning.

**The Goal of the Courts: To Give Validity to Contracts**

Courts must make difficult interpretation decisions. Frequently, declaring an agreement void because its wording is ambiguous might seem to be the easiest thing to do, but if the courts took this attitude, they would not be performing their role of encouraging reliance on seriously made agreements. Instead, they lean toward keeping an agreement alive rather than brushing it aside as not binding. When it is possible to find one interpretation more likely in the circumstances than another, courts give ambiguous words that meaning and make the contract enforceable.
strict or plain-meaning approach an approach that restricts interpretation to the ordinary or dictionary meaning of a word
liberal approach an approach that looks to the intent of the parties and surrounding circumstances, and tends to minimize, but does not ignore, the importance of the words actually used

Two Approaches to Interpretation

What precisely did Smith promise when he agreed “to build a set of cabinets for $1000”? In attempting to answer such a question, there are two approaches to the interpretation of words: the strict or plain-meaning approach and the liberal approach.

The plain-meaning approach considers the ordinary or dictionary meaning of a word. However, few words have a “plain” or “ordinary” meaning. Browsing through a dictionary will show that many words have two or more definitions. In addition, the meanings of words change from time to time and place to place—or the context of the words in a contract may make it obvious that they have been used in a special sense. 38

The liberal approach looks to the purposes of the particular parties in drafting their agreement: What did they intend? It stresses the circumstances surrounding the contract, the negotiations leading up to it, the knowledge of the parties, and any other relevant facts. It minimizes the importance of the words actually used. The liberal approach also has its limitations. In its extreme form, it too may lead to unsatisfactory results by inviting endless speculation about what the parties may have intended but never expressed. The particular words one chooses to use are a part of one’s conduct in relation to the contract, and in law, conduct (including words) must continue to serve as the primary guide to one’s intentions.

How the Courts Apply the Approaches

Rather than choosing between them, a court will apply both approaches and choose the best meaning for the circumstances. The court begins with the dictionary definitions of the words used, and then examines their meaning in the context of this contract, these parties, and the surrounding circumstances. In each case, the court decides how far it should look beyond the actual words used in search of their meanings.

In Illustration 10.4, Smith promised “to build” the cabinets. Does “to build” include “to supply materials”? Literally, “to build” means only “to construct,” but in many circumstances it may include “to supply materials.” As an example, when a contractor undertakes to build a house, the price usually includes the price of materials. In the illustration, the words themselves are not conclusive either way. Since the words are ambiguous, the court will look outside the contract to the surrounding circumstances as a means of clearing up this uncertainty. It will hear evidence of any past transactions between the parties to learn whether materials have been included in previous building contracts between them. It will hear evidence of the negotiations leading up to the contract: perhaps Smith had quoted different prices varying with the kind of wood to be used; perhaps Doe made it clear earlier that she wanted a price including materials. Any of these facts, if established in court, would support the claim that “to build” in this contract meant “to supply materials” as well as labour.


ILLUSTRATION 10.4

Smith offers to build a set of cabinets for Doe for $1000, and Doe accepts. The next day, Smith appears and asks where the lumber is. Doe says, “You are supposed to supply it.” Smith replies, “My price was for the work only, not for the materials.” One party may claim that the offer omitted an essential term (who should supply the lumber); such an ambiguous vague offer is not capable of acceptance, and accordingly, no contract is formed. However, if each side accepts that the agreement “to build a set of cabinets for $1000” is valid, Smith will claim that Doe should supply the lumber, and Doe will claim the contrary.
Special Usage of Words

Words used in a contract may have a special meaning in the particular business, trade, or geographic location. For example, a dozen typically means 12 but a baker’s dozen means 13. In Illustration 10.4, Smith might produce expert witnesses who testify that, in the carpentry trade, usage of the word “build” means labour only. Or he might show that, in that part of the country, the word always has that meaning.

Evidence of special usage is not necessarily conclusive: A court may decide that the word was used in a general rather than a special way, perhaps because the user of the word was aware that the other party was not familiar with trade usage. In general, the courts construe words most strictly against the party who has suggested them because that party could have been more clear.\(^\text{39}\)

Conflicting Testimony and Credibility

Parties to a contract may give conflicting evidence about the circumstances or conversations surrounding its formation. In order to decide which testimony to accept, the court will seek corroboration of one of their versions, if possible, from a non-party, from documentation, or from the actions of the parties in relation to the contract. When the only evidence in a case is the testimony of the disputing parties, the case becomes a “credibility contest.” The judge has to assess the credibility of the witnesses and decide whose version seems more reasonable. Credibility includes both truthfulness and reliability. One person may not have seen or heard clearly, may not remember well, or may have observed only part of an event. Even though a witness is honest, his testimony might not be reliable and therefore not be credible. Judges must give reasons for why they find one witness more credible than another.

Special Types of Contracts

Some types of contracts require special approaches. In Chapter 6, we considered the standard form contract—a contract prepared in advance by one party and presented to the other on a take-it-or-leave-it basis. The law recognizes the one-sided nature of the negotiations and tries to level the playing field. When interpreting an ambiguous term in a standard form contract, the court will prefer the interpretation advanced by the non-drafting party. Of course, it must be a reasonable interpretation. This rule is known as contra proferentem.\(^\text{40}\) It is also applied to the interpretation of an exemption clause and a consumer contract, as will be discussed in Chapters 13 and 14 respectively.

Insurance contracts are an example of a type of contract with special interpretation rules, as outlined by the Supreme Court of Canada.\(^\text{41}\) Interpretation of insurance contracts must

1. follow the contra proferentem rule,
2. construe coverage provisions broadly, and
3. interpret exclusion clauses narrowly.\(^\text{42}\)

We will discuss insurance contracts in Chapter 16.


\(^\text{40}\) The rule does not apply if the term is clear and unambiguous: Hills Oil & Sales Ltd. v. Wynnis Canada Ltd., [1986] 1 S.C.R. 57.


THE PAROL EVIDENCE RULE

The Meaning of Parol Evidence

Before a deal is made, the parties often spend time bargaining and negotiating, making offers and counter-offers, with both sides making concessions until finally they reach a suitable compromise. The bargaining may be carried on orally or in writing. In important contracts, the parties usually put their final agreement into a formal document signed by both sides. During the negotiation process, emails, phone messages, draft documents, faxes, and letters may be created and exchanged. These documents and recordings are collectively known as parol evidence. The word parol means extrinsic to or outside of the written agreement.  43 If a dispute subsequently arises over the meaning of the words used in the formal signed document, this parol evidence contains valuable information about the parties’ understanding of the meaning of the words used in the final contract.

CASE 10.5

When the seller asked the buyer, “What will you give me for 75 shares of Eastern Cafeterias of Canada?”, the buyer said he would think about it and then make an offer. Later in the day the buyer replied, “I will give you $10.50 a share for your Eastern Cafeterias shares.” The seller replied, “I accept your offer.” The seller delivered the shares for Eastern Cafeterias of Canada Ltd. and received a cheque in full payment. The buyer then realized that Eastern Cafeterias Ltd. and Eastern Cafeterias of Canada Ltd. were two different companies, and that he had the former company in mind when he made his offer to buy the shares. He stopped payment on his cheque. In defending the seller’s lawsuit, the buyer claimed that his offer to buy “Eastern Cafeterias” was ambiguous, as he could have meant either company. He argued that since he and the seller were talking about two different companies, there was never any agreement and no contract was formed. The court examined the pre-contractual unambiguous statement of the seller that referenced Eastern Cafeterias “of Canada” and decided that the final agreement was referring to those shares. The defendant’s use of the ambiguous term in the offer was in response to the plaintiff’s earlier inquiry and so the contractual language must be interpreted in the same way.  44

Case 10.5 is an example of a court using parol evidence to establish the meaning of an ambiguous contractual term.  45

The Meaning of the Parol Evidence Rule

The parol evidence rule puts a limit on what uses can be made of parol evidence. As we saw in Case 10.5, parol evidence can be used to help interpret ambiguous words used in a contract. It can also be used to address formation of the contract such as its legality, the capacity of the parties, mistakes, duress, undue influence, or fraud. However, it cannot be used to add a new term to a final written contract.

According to the parol evidence rule, once a final written contract has been formed, a party cannot later use parol evidence to add, subtract, contradict, or modify a term in that written contract.  46 The rule applies both to an oral agreement that has been reduced to writing and to a written agreement that has been set out in a more formal document. A party may still try to argue mistake or rectification as discussed in Chapter 9, but otherwise the contract is final.

Exceptions to the Parol Evidence Rule

The Document Does Not Contain the Whole Contract Once the parties have put their agreement into a document in its final form, the parol evidence rule precludes either party from adding terms not in that final agreement. However, sometimes the court may find that the written document was not intended to be the whole complete contract. Earlier in this chapter, we learned that the terms of a contract may be partly in writing and partly oral; if a party can show that the writing was not intended to contain the whole contract but was merely a part of it, then she may introduce evidence of additional oral terms using parol evidence.47

ILLUSTRATION 10.5

A, the owner of a fleet of dump trucks, agrees orally with B, a paving contractor, to move 3000 cubic metres of gravel within three months from Calgary to Carstairs for $18,000, and to provide any related documents that B may require for financing the project. To finance her paving operations, B applies for a bank loan, and the bank requests evidence that the paving work can be started immediately. B therefore asks A to sign a statement to the effect that he will deliver 1000 cubic metres of gravel from Calgary to Carstairs within the next month for $6000. Soon after A starts to make the deliveries, he discovers that he has quoted too low a price per cubic metre. He claims that his whole agreement with B has been reduced to writing and that he need move only the 1000 cubic metres of gravel referred to in the writing.

The parol evidence rule does not apply. The written document for the bank was not intended to be a complete statement of the contract. Rather, it was drawn up as part of A's performance of his obligation under it. Accordingly, B may sue A for damages if A refuses to perform the balance of the contract, and for this purpose B may offer evidence of the terms of the original oral agreement.

Subsequent Oral Agreement The parol evidence rule does not exclude evidence of an oral agreement that the parties may reach after they have entered into the written agreement. The subsequent oral agreement may change the terms of the written agreement, 48 or it may even discharge or rescind the prior contract altogether. 49 When such a claim is made, the court will hear evidence of a subsequent oral contract, but the contract must satisfy all the usual formation requirements: offer, acceptance, consideration, and intention.

Collateral Agreement A collateral agreement is an entirely separate undertaking agreed on by the parties at the same time (or prior to) the written agreement but not included in their written contract, probably because the written contract seemed unrelated or separate from it. The argument is that a collateral agreement may be enforced as a separate contract quite independent of the written document. As with oral subsequent agreements, courts will only accept such a claim when all elements of formation are separately met for the collateral agreement (especially separate consideration) and when it does not contradict the terms of the written agreement.50

CASE 10.6

A lawyer signed a written personal guarantee of the indebtedness of a company. The guarantee stated that it was continuous, meaning the lawyer would be responsible not only for the existing debts of the company but also for any future indebtedness the company would create after the signing of the guarantee. It also stated that there were no

50 Haworth, supra, n. 46, at 524.

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condition precedent any set of circumstances or events that the parties stipulate must be satisfied or must happen before their contract takes effect.

Condition Precedent A condition precedent is any set of circumstances or events that the parties agree must be satisfied or must happen before their contract takes effect. It may be an event beyond the control of either party, such as a requirement that a licensing board approve the transfer of a business, or a student graduating before a contract of employment takes effect. Courts will admit evidence of an oral condition precedent even when the written contract expressly states that the parties’ rights and duties are governed exclusively by the written terms. The courts are prepared to recognize and enforce a condition precedent agreed to orally even when the subject matter of the contract falls within the scope of the Statute of Frauds or the Sale of Goods Act. Once a court accepts a contention that the parties did indeed intend to suspend the operation of their contract subject to a condition precedent, then the whole of the contract is suspended, including any term attempting to exclude the admission of such evidence.

ILLUSTRATION 10.6

B offers to sell a car to A for $14,000. A agrees orally to buy it, provided he can persuade his bank to lend him $10,000. The parties agree orally that the contract will operate only if the bank makes the loan, and that otherwise the contract will be void. They then make a written contract in which A agrees to pay B $14,000 in 10 days, and B agrees to deliver the car to A at that time. The writing does not mention that the contract is subject to A obtaining the bank loan. The bank refuses to lend the money to A, who then informs B that the sale is off. B sues A for breach of contract and contends that their oral understanding about the bank loan is excluded by the parol evidence rule.

The parol evidence rule does not apply, and B will fail in his action. In his defence, A must show that there was an oral understanding suspending the contract of sale unless and until he could obtain the necessary bank loan. It is risky to rely on this exception because of the difficulty in proving the oral conversation. It is always better to put any conditions precedent in the written document.

CHECKLIST

Exceptions to the Parol Evidence Rule

A court will admit parol evidence about a missing term when

■ the written agreement does not contain the whole agreement;
■ the missing term is part of a subsequent oral agreement;
■ the missing term is part of a collateral agreement for which there is separate consideration; or
■ the missing term is a condition precedent to the written agreement.

51 Ibid. See also River Wind Ventures Ltd. v. British Columbia, 2011 BCCA 79; but see Corey Developments Inc. v. Eastbridge Developments (Waterloo) Ltd. (1997), 34 O.R. (3d) 73 aff’d (1999) 44 O.R. (3d) 95 for an example where the court refused to follow the parol evidence rule.
IMPLIED TERMS AS A METHOD OF INTERPRETATION

It is difficult for parties to expressly address every possible scenario in a contract. Therefore, the express terms of a contract may not deal with the situation now facing the contractual parties. In such circumstances, a court may imply a term into the contract. An implied term is a term not expressly included by the parties in their agreement but which, in the opinion of the court, they would, as reasonable people, have included had they thought of the possibility of the subsequent difficulty arising. A term will be implied if it is obviously necessary to accomplish the purpose of the contract.

Terms Established by Custom or Statute

Implied terms usually result from long-established customs in a particular trade or type of transaction. They exist in almost every field of commerce and were recognized among business people because they made good sense or because they led to certainty in transactions without the need to spell out every detail. In time, the courts fell into line with this business practice: when a party failed to perform in compliance with an implied term, the courts would recognize its existence and enforce the contract as though it had been an express term.

ILLUSTRATION 10.7

A asks B, a tire dealer, to supply truck tires for his five-tonne dump truck. B then shows A a set of tires and quotes a price. A purchases the tires. The sale slip merely sets out the name and the price of the tires. Later A discovers that these tires are not safe on trucks of more than three tonnes’ capacity and claims that B is in breach of the contract.

On these facts, there was no express promise by B that the tires would be safe for a five-tonne truck or any other type of truck. Nevertheless, the court would hold that, under the circumstances, there was an implied term that the tires should be suitable for a five-tonne truck. It would say that, in showing A the tires after he had made his intended use of them clear, B, as a regular seller of such tires, implied that they would be suitable for A’s truck.

This approach applies to all kinds of contracts, but in some fields—especially the sale of goods, insurance, partnership, and landlord and tenant relations—a large and complex body of customary terms has developed. In many jurisdictions, these customary terms have been codified in a statute that sets out in one place all the implied terms previously established by the courts for a particular field of law. For instance, court decisions in cases similar to Illustration 10.7 led to a specific provision in the Sale of Goods Act.

ILLUSTRATION 10.8

Alberta’s Sale of Goods Act implies the following terms into contracts for the purchases of tangible property:

- The seller is the owner of the goods with the authority to sell them.
- The goods match the description given to the buyer by the seller.
- The goods match the sample of the goods viewed by the buyer.
- The goods are not subject to any liens.

The implied terms of the Sale of Goods Act are also implied into consumer contracts for sale or lease of goods and services. Statutory terms implied into consumer contracts cannot be waived.


**Reasonable Expectation of the Parties**

In what other circumstances are the courts likely to find it appropriate to imply a term into a contract? As a rule, the courts will imply terms reasonably necessary to make a contract effective; if not, the fair expectations of a party would be defeated.

However, the court will not go further than is necessary and will not make a new contract for the parties. Nor will it imply a term that is contrary to the expressed intent of the agreement. A term will be implied on grounds of business efficacy. Parties should therefore consider carefully what unstated assumptions are needed for performing their contract; they need to bring as many of the important possibilities as they can think of into the terms of the written contract.

As a general rule, when parties deal expressly with a matter in their contract, a court will not insert an implied term that deals with the same matter in a different way. If the parties have been diligent in canvassing the foreseeable possibilities for future dispute, a court may conclude that they intended to deal in a comprehensive way with all future events, so that no further terms should be implied. 54

However, even in lengthy and complex contracts, the parties might not have dealt with what later turns out to be a crucial matter. Courts will sometimes come to the conclusion that a term may be implied, so that the purpose of the contract will not be defeated.

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**CASE 10.7**

Szilvasy bought a new home and took over the lease of the rented hot water heater. It sprang a leak and caused $16 000 of water damage to the basement of the home. Szilvasy sued for breach of contract. She alleged that the water heater was not fit for the intended purpose. Reliance Home Comfort defended the action, saying the lease contract did not include an express term on fitness for purpose and it did include a clause exempting Reliance from liability for water damage. The Ontario Court of Appeal held that s. 9 of the Consumer Protection Act implied a term of fitness for purpose into the contract and this implied warranty could not be waived or varied by the express exemption clause. The water heater was not fit for the purpose because it leaked. Judgment was for the consumer. 53

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**CASE 10.8**

Nickel Developments Limited (Nickel), the owner of a new shopping centre in Thompson, Manitoba, signed a long-term lease with Canada Safeway Limited containing several renewal options. Safeway was to be the “anchor” tenant and its supermarket would use more than half of the centre. The rest of the space contained 12 other non-competing retail units.

After 30 years of operation, Safeway closed its supermarket but continued to occupy the space. For some time, Safeway had been operating another supermarket in a competing shopping centre in Thompson. It decided that it could not continue operating the two in a town that had gone through a lengthy recession; it would be better to close down the premises leased from Nickel. Rather than allow its lease to expire, leaving open the prospect of unwanted competition, Safeway chose to exercise its option to renew the lease for a final term of five years and go on paying the rent in order to keep the space vacant. It already knew that one of its supermarket competitors was interested in taking over the space and was communicating with Nickel.

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Strategies to Manage the Legal Risks

Written documents are the best way to prove the existence of a contract, and it should be standard business practice to create written contracts. The first step toward managing the legal risks associated with oral and written contracts is to determine what legislative requirements are applicable to the particular business. This involves familiarity not only with the legislation applicable to the subject matter of the business transaction, such as land development or funeral services, but also with legislation governing the sales and marketing strategy employed to form the contract, such as internet or direct sales. Multiple statutes may apply, and the written contract must comply with all regulations in order to be enforceable.

The best way to ensure that terms advantageous to the business are enforceable against a consumer is through the use of a detailed standard form contract that meets the requirements of consumer protection legislation. Careful, consistent choice of language with clear, unambiguous meaning will avoid interpretation problems later. The consumer protection approach adopted by most provinces is to require disclosure first and allow a revocation period after the written document is signed. In this way, disclosure requirements actually help businesses bind consumers to onerous terms.

An oral agreement can be fortified with follow-up emails that confirm the terms after the fact. This subsequent behaviour can remedy defects caught by the Statute of Frauds and may be helpful to a court when determining the meaning of what was expressly agreed upon.

There are a number of strategies for reducing interpretation disputes:

- Incorporate a definition section into a contract, explaining the meaning of key words, and then be consistent with the use of those words throughout the contract.
- Begin the contract with a statement of the purpose of the agreement; this will help the court when interpreting and implying terms.
- Save pre-contract memos, emails, and the like (parol evidence) for assistance in the interpretation of the terms of the written contract.
- Include an “entirety” clause in the contract that states that the contract contains the whole agreement and no separate oral or implied terms exist. This will invoke the parol evidence rule and limit a court’s power to imply terms. The clause should specifically reference subsequent oral agreements if those are to be excluded as well.  

Nickel served notice on Safeway, demanding possession of the leased space, claiming that Safeway had failed to comply with the implied term to use the leased premises “only as a supermarket” and for no other purpose. It stated that “vacancy by design” was not the kind of use intended. Safeway defended by stating that there was no term in the lease expressly requiring it to keep operating its supermarket or prohibiting it from leaving the space vacant during the lease.

The Court of Appeal agreed with Nickel and held that there was an implied term in the lease that the space would be continuously used as a supermarket. It stated:

“A lessee which effectively shuts down half of a shopping centre and fundamentally alters the original concept cannot, absent very unequivocal language, unilaterally alter the arrangement between the landlord and the tenant which had been followed through the entire term of the lease . . . there must be “continuous use” as a supermarket, and that promise does not include the right to intentionally maintain and renew long-term “non-use.”

In this case we can see how far the court would go when it found the conduct of Safeway to be clearly contrary to the intention of both parties in signing the contract.


Include a “severability” clause that allows a court to cut out an ambiguous term for which the meaning is not clear without destroying the entire contract.

Prepare standard form contracts ahead of time for use in simple deals—these can include all of the aforesaid terms.

Refer customers to standard terms and conditions on websites that provide detailed information.

Request clarification of language included in an offer if it is vague prior to acceptance.

Naturally, legal assistance in the drafting of a contract will avoid some pitfalls.

QUESTIONS FOR REVIEW

1. Distinguish among the different outcomes for contracts that are unenforceable, voidable, and void.

2. What are the consequences of failure to comply with consumer protection legislation as opposed to the Statute of Frauds or Sale of Goods Act?

3. Explain the difference between a guarantee and an indemnity. Is there any policy basis for treating the two differently?

4. What is the difference between part performance and part payment?

5. State which of the following contracts are affected by a statutory requirement that would permit the promisor to plead that the contract cannot be enforced against her because evidence of the terms is not available in the required form:
   - a. A and B, having entered into a written agreement as purchaser and vendor, respectively, of a piece of land, later agree by telephone to call off the sale.
   - b. C enters into an oral contract with D, a contractor, to build a house for C.
   - c. E is the proprietor of a business that requires a bank loan. E’s father, F, tells the bank manager that if the bank approves the loan and E does not repay it, he (F) will.
   - d. G, just before she graduates from university, accepts a job at a manufacturing firm. In the exchange of letters between G and her employer, nothing is said about the duration of G’s employment or the need to actually graduate.

6. Give an example of when a party to an unenforceable contract may nevertheless recover money he has paid to the other party.

7. Why does a dictionary definition of a word not always clarify its meaning in a contract? Give an example.

8. Explain and give an example of special usage of a word.

9. What are the primary goals of a court in interpreting a contract?

10. Name four ways in which a party may persuade a court that the parol evidence rule does not apply to the term or terms it asserts were part of the contract.

11. What is an implied term? Give an example from question 5 above.

12. When a contract is subject to a condition precedent, does the contract nevertheless still exist? May either party simply withdraw from the contract before the condition precedent has been met? Again, consider question 5 above.

CASES AND PROBLEMS

1. Continuing Scenario

   Before opening her restaurant, Ashley contacted O’Brien’s Food Service Ltd. to be her frozen poultry supplier. Because she was new to the business and her volume would be low, O’Brien’s quoted her a price of $25.00 per case of frozen chicken breasts. Adam, O’Brien’s salesman, told her in an email that the price would be only $20 per case for restaurants...
that ordered more than three cases a week. Ashley could not be sure she would need this much chicken, so she proceeded on the initial quote. The next day, Adam stopped by the restaurant with the customer application form describing the price as “as quoted” and told Ashley that because she had no history in the business, he needed a guarantor for her account. Jim, Ashley’s father, was at the restaurant that day painting the dining room. Jim overheard Adam’s request and volunteered to be the guarantor. He gave Adam his personal information to insert into the application form. Ashley signed the form, which stated that “upon acceptance by O’Brien’s the application and corresponding terms and conditions would form the entire agreement between the parties.”

At the end of Ashley’s first year of business, she reviewed her chicken volume and discovered that she was ordering at least four cases or more each week. However, she was still being charged $25.00 per case. When she contacted Adam about this, he said there was no agreement to reduce her price. Ashley was angry and responded that she would not be paying this week’s $320.00 bill and that would even up the amount. Adam threatened to sue her father if Ashley refused to pay. What rules of writing and interpretation are raised in this question? How will the court decide what price is a term of the contract? Will Jim be liable for this week’s bill?

2. On January 15, Tonino and Logan signed a lease in which Logan agreed to rent her commercial office space to Tonino at $2000 per month for three years, commencing February 1. Tonino took possession as agreed. In March of the same year, Tonino and Logan agreed orally that Tonino would pay an additional $250 per month in rent upon the completion of some alterations and repairs to the premises within three months. Logan completed the alterations and repairs in April, but Tonino refused to pay anything but the $2000 a month specified in the lease. In August, Logan sued Tonino for the additional rent.

What points must the court settle in reaching its decision, and what should the decision be?

3. M, N, O, and P each owned 25 percent of the shares in Resort Hotel Inc. As a result of a bad season, the hotel had a cash-flow problem. M arranged to borrow $25 000 from a friend, Q, and to lend it to the hotel on condition that if the hotel did not repay the funds, his three co-owners, N, O, and P, would each pay $5000 to M. The three agreed to the arrangement. Subsequently, the hotel defaulted and M repaid the $25 000 to Q. He requested payment from N, O, and P but they refused to pay.

M sued the three for $5000 each; they defended claiming that their promises were “guarantees,” and since they were not in writing they were unenforceable. M claimed that their obligations were part of a larger transaction to protect their shared interests in Resort Hotel and, therefore, were not mere guarantees. Whose argument should succeed? Give reasons.

4. The manager of Jiffy Discount Stores ordered a carload of refrigerators from Colonel Electric Company by telephone. When the refrigerators arrived at the warehouse, the transport employees and Jiffy’s employees began unloading them. When about half of them were unloaded, the manager arrived and asked to examine one. An employee uncrated one refrigerator, and after looking it over, the manager stated it was not the right model and ordered the transport employees to take them back. The refrigerators were returned to Colonel Electric Company, and the company sued Jiffy Discount Stores for breach of contract. It was proven that the manager was mistaken, and the refrigerators did conform to the telephone order. What legislation applies here? Explain what the result should be.

5. Carter left a position where he was earning $48 000 a year to accept a position as general manager of Buildwell Limited at the same annual salary. All negotiations leading up to his appointment were carried on orally between Carter and Webster, the president of Buildwell Limited. Both parties assured each other in various conversations that the employment would last “for life”; they agreed that each year Carter would receive a bonus, and that if he was not satisfied with it, he could terminate his employment, but that the company could not terminate his employment unless he “did something wrong.”

Over the succeeding few years, Carter’s salary was increased from $4000 to $5000 per month, and he received, in addition, annual bonuses of up to $4000. A letter to Carter
announcing his last bonus was signed by both the president and vice-president of the company and included the words, “And we want you to know that with all the experiences we are going through in connection with the business, your efforts are appreciated.”

Shortly afterward, Webster died, and immediately the company dismissed Carter without explanation, paying him one month’s salary. Carter then attempted to go into business for himself but without success. He sued Buildwell Limited for wrongful dismissal, claiming breach of his employment contract. Can Buildwell Limited successfully plead the Statute of Frauds?

6. In February, Baldwin Co. Ltd., a woollens manufacturer, contracted to sell 500 pieces of blue serge to Martin Bros., tailors, at a price of $40,000, as stated in a written memorandum signed by both parties. After 220 pieces of the cloth had been delivered, a dispute arose between the parties: Martin Bros. complained of delay in delivery, and Baldwin Co. Ltd. complained of failure to pay for the goods delivered. Baldwin Co. Ltd. sued Martin Bros. for the price of the goods delivered, and Martin Bros. counterclaimed for damages for non-delivery.

In August, before the case came to trial, the parties orally agreed to a settlement and to substitute for the original contract a new one in which Martin Bros. would have an additional three months to pay for the goods and have an option of buying the remaining 280 pieces at the prices in the earlier contract. The following November, Martin Bros. paid the amount due on the original 220 pieces of cloth and placed an order for the remaining 280 pieces under the option agreed to in the substituted contract. Baldwin Co. Ltd. refused to deliver these pieces, the agreed price being no longer profitable to them. Martin Bros. then sued Baldwin Co. Ltd. for damages for breach of contract (failure to deliver). Should this action succeed?

7. John Brown, a retired widower, said to Mrs. Adele Barber that if he could find a suitable house and if she would move into it as a housekeeper, help operate it as a rooming house, and take care of him, he would give her the house on his death. Mrs. Barber agreed. Mr. Brown purchased a house that he operated as a rooming house until his death five years later. During this period Mrs. Barber served as housekeeper; she prepared the necessary food, and made other household purchases, always turning over to Mr. Brown the balance of the board money received from the tenants. She received no remuneration for her services other than her own board and an occasional allowance for clothing.

Mr. Brown made no provision in his will for Mrs. Barber, and following his death Mrs. Barber brought an action against the executors of his estate for specific performance of his promise. In evidence, Mrs. Barber offered the testimony of her two daughters, her son, and her son-in-law, who were present at the time of the original conversation between her and Mr. Brown. The executor contested the action. What legal considerations are relevant to a decision in this case? State whether Mrs. Barber’s action would succeed.

8. Provinco Grain Inc. was in the business of selling seeds and buying and reselling the crops grown from the seeds sold. Its sales manager approached Quinlan, a farmer in the Lower Fraser Valley in British Columbia, to grow an early crop of buckwheat for the Japanese market. Quinlan, an experienced farmer, was interested because it would be a valuable market. However, he had never grown the crop before and said he was worried about weeds; he understood they could be a serious problem. The sales manager replied that he need not worry—the buckwheat would smother any weeds. Quinlan bought seeds and signed a printed document stating that Provinco Grain Inc. gave no warranty as to “the productiveness or any other matter pertaining to the seed . . . and will not in any way be responsible for the crop.”

Quinlan planted the seeds but weeds destroyed the crop and he suffered a substantial loss. He sued Provinco for damages on the basis that the sales manager’s statement was a collateral warranty and a deliberate, material misrepresentation. With regard to the misrepresentation, the court found that the sales manager believed it to be true: he came from Saskatchewan where buckwheat did indeed suppress the weeds. Provinco further defended by claiming that the signed contract exempted it from all liability pertaining to the seeds.
and subsequent crop. Accordingly, any statement on this subject by the sales manager would be excluded by the parol evidence rule.

In reply, Quinlan’s lawyer claimed that the sales manager’s warranty was about the risk of weeds, and it did not contradict the terms of the signed contract pertaining to the seed itself. It was on the basis of that warranty that Quinlan signed the contract.

Give your view of each party’s position and what the likely result would be.

9. Chénier sold the surface and minerals in her land in Alberta for $104,000 to Werner under an agreement for sale (an installment sale that reserved Chénier’s ownership in the property until a specified amount of the price was paid). Werner defaulted payment, giving Chénier the right to recover possession by court action. Chénier started proceedings, but they were not yet complete when it became apparent that the land was very valuable. Werner entered into a petroleum and natural gas lease with Imperial Oil Ltd. and received a cash bonus of $110,000, which he intended to use to settle his debt to Chénier. At about the same time, Chénier, anticipating the recovery of her property by court order, entered into a similar lease of the same property with California Standard Oil Co. At the time Chénier gave her lease to California Standard Oil Co., she told the company’s agent that her ability to lease the property depended upon winning her court action against Werner and that she could give the lease only if the company’s agent gave her a signed statement acknowledging that she (Chénier) did not have any right to lease the mineral rights until the court action against Werner went through. The agent gave her a statement to that effect, and Chénier and California Standard Oil Co. entered into a lease of the mineral rights that made no reference to the statement signed by the company’s agent and also contained a paragraph stating that the lease contained the whole of the agreement.

Werner tendered the balance of the purchase price to Chénier, but she refused it and proceeded with the court action. The court dismissed Chénier’s petition for recovery of the property. She was, therefore, unable to lease the property to California Standard Oil Co. and that company sued her for breach of contract. Should the action succeed?

Additional Resources for Chapter 10 on the Companion Website

(www.pearsoncanada.ca/smyth)

In addition to pre- and post-tests, mini-cases, and application exercises, the Companion Website includes the following province-specific resources for Chapter 10:

- **Alberta**: Fair Trading Act; Consumer Protections Acts, Statute of Frauds
- **Atlantic Provinces**: Landlord and Tenant; Statute of Frauds; International Sale of Goods Act; Interpretation Act
- **British Columbia**: Conveyance of Land; Electronic Transactions; Form of Contract
- **Manitoba/Saskatchewan**: Statute of Frauds; Statutory Requirements for Written Contracts; Sale of Goods Act; Implied Terms
- **Ontario**: Consumer Protection Act (2002); Sale of Goods Act; Statute of Frauds; Credibility; Exemption Clauses; Implied Terms; Interpretation Act