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Canada Emoji Ruling Considers Digital-Age Contract Realities

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When do you have an agreement that will be enforceable by law — a binding contract? Fundamental components necessary to the formation of a contract include a valid offer and acceptance with respect to final, essential terms.

As technology has continued to develop, more and more business is being conducted by email and, in recent years, by text. The advantage of texting is obvious: it's faster, more noticeable and more personal. As more business is being conducted through electronic means, new legal problems will arise.

In fact, a Canadian Court in South West Terminal v. Achter Land Cattle Ltd. recently addressed the issue of whether a thumbs-up emoji gave rise to a contractual agreement.[1]

Whether the sender meant "message received" or agreed to contractual terms as the recipient contended was at issue.

The law does not require that all agreements be in writing or signed to be enforceable. The Uniform Commercial Code in the U.S. and other laws governing commerce have evolved to be flexible and accommodate changes to technology as new media of communication or as more time-saving present day media comes into general use.

For example, Article 9 of the UCC was amended to eliminate the signature and writing requirements as components of an enforceable security interest,[2] substituting the broad concepts of authentication[3] and record.[4] Similarly, Article 2 of the UCC allows for a contract for the sale of goods to be formed and an offer accepted "by any medium reasonable in the circumstances."[5]

The medium or form of communication used to make a contract is no longer relevant in most instances as long as all of the elements of contract formation are present.

The law, in embracing the needs of modern commerce, has developed such that email and text communications can create legally binding, contractual relationships.[6] Similarly, clicking on an "I agree" icon satisfies

an electronic signature and can be sufficient to manifest assent.

Emojis, small images of facial expressions or objects used in digital text, have added creativity in daily digital communications and have been widely adopted as a form of language.[7] Images of a smiling face [□], handshake [□], thumbs up [□], fist [□], heart [❤□] or other digital picture have not traditionally been considered capable of forming the basis of legal obligations.

However, the widespread use of emoji dialog in today's communications has prompted necessary consideration concerning the scope of legal protection that should be afforded such images.

In Canada's South West Terminal decision, the King's Bench for Saskatchewan ruled June 8 that a thumbs-up emoji, □, used in a text message exchange was just as valid as a signature, declaring that courts should be ready for such new digital challenges. The dispute centered around a sale of goods transaction and serves as a cautionary beacon for businesses and counsel involved in commercial transactions.

Factual Background: Just the Flax Jack

The dispute in South West Terminal revolved around a basic contract in rural Canada involving a farmer's obligation to supply a grain processing cooperative with flax pursuant to a deferred delivery agreement. The farmer failed to deliver the flax and denied entering into a contract with the cooperative.

In the alternative, he relied upon the statutory defense set forth in The Sale of Goods Act — similar to Article 2 of the UCC — which renders any contract unenforceable "unless some note or memorandum in writing of the contract is made and signed by the party to be charged."

During the COVID-19 pandemic, the cooperative changed its practice of sending sales representatives to meet with farmers face-to-face and instead handled contracts by phone or email.

The cooperative claimed that the parties entered into a deferred delivery agreement for 87 metric tons of flax in 2021 for a price of CA$669.26 ($508.06) per ton. An employee of the cooperative prepared a contract that identified the delivery period, signed it, and took a photo of it on his cellphone.

The employee sent it to the defendant with a text that said "Please confirm flax contract." The defendant, in response, used his iPhone and texted back a "□."

The cooperative later sued for breach of contract since the grain never arrived, insisting that the emoji constituted an agreement. The defendant countered by taking the position that he had not meant for the emoji to function as his signature.

He indicated that the thumbs-up emoji simply confirmed that he had received the text message and proposed flax contract, not a confirmation that he agreed with the terms. He added that the full terms of the agreement were not sent to him and expected that the complete agreement would follow by fax or email for review and signature.

The grain buyer countered that the thumbs-up emoji was sent in response to the texted photo of the contract to the defendant's cell phone and a request to "Please confirm the flax contract." In essence, the cooperative was of the view that the defendant was agreeing to the contract and that the emoji was his way of signaling that agreement.

Agreement Reached: Court Rules "□" Counts As Acceptance

The Canadian court examined the context and previous interaction between the cooperative and the farmer. The court noted that the parties had a long-standing relationship and that previous text responses for grain delivery confirmations included succinct responses from the defendant such as "looks good," "ok," or "yup."[8]

In at least four other situations with those text responses, grain was delivered as contracted and payment was made. This was proof of the manner in which the parties had conducted business.

While an emoji is not a traditional means to sign a document, the court found that it can be, and in this case was, a valid means to convey the two purposes of a signature — to identify the signatory and to convey acceptance. It was not sufficient for the defendant to reject the common convention that a □ means something to the effect of "I agree," "I accept," or some other sort of positive affirmation.

What is important is not what the defendant thinks the symbol means, it is what an informed, objective bystander would understand. In reaching his decision, the judge leaned on the dictionary.com definition of the thumbs-up emoji: "It is used to express assent, approval or encouragement in digital communications, especially in western cultures."[9] He added that such a definition also comported with his view of everyday use.

The court expressly found that a modern day □ transmitted by cell phone is as sufficient as "an action in electronic form" that can constitute express acceptance of an offer as defined in the electronic documents legislation adopted in Canada.

The court rejected the defendant's contention that a writing or an actual signature is required. The law has developed in these modern times such that email, text messages and other forms of non-wet ink signatures are sufficient to satisfy any writing and signature requirements and to establish the person's approval of a document's contents.[10] While a signature is the classic representation of confirming someone's identity, that does not prevent the use of modern-day methods, like emojis, to confirm a contract or the use of an emoji as a digital signature.

Similarly, the court was not persuaded by the policy argument that allowing a to signify acceptance "would open up the flood gates to all sorts of cases coming forward asking for interpretations as to what various different emojis mean."

The court found that it would not, and should not, "attempt to stem the tide of technology and common usage — this appears to the new reality in ... society and courts will have to be ready to meet the new challenges that may arise from the use of emojis and the like."[11]

The court granted summary judgment, finding that there had been a valid contract between the parties and the defendant breached it by failing to deliver the flax. The court awarded the cooperative damages in the amount of CA$82,200.21 plus interest and costs ($62,400.65).

Implications: So What's the Deal?

It is true that the court's ruling in South West Terminal only applies in Canada at this point. However, the decision illustrates a common situation in an evolving digital age and sets forth a rational framework for addressing legal disputes in U.S. courts and elsewhere.[12]

As technology continues to evolve, legal systems around the world will likely face similar challenges in interpreting and applying emojis in legal contexts. The South West Terminal decision fits neatly into legal tests in this country for contract formation — agreement, offer, and acceptance — and to technological developments envisioned by drafters of the UCC

Emojis have entered the business world. They are commonly used today in emails and text message as a short-handed, casual communication or to emphasize a point. In many cases, emojis can take the place of words. "'This case won't definitively resolve what a thumbs-up emoji means," the Canadian court wrote, adding, "but it does remind people that using the thumbs-up emoji [as well as other emojis] can have serious legal consequences.'"[14]

Here, as the defendant painfully discovered, dashing off a quick text with what has become now a common symbol affirmed that he was officially entering into a legally enforceable contract.

[1] QBG-SC-00046-2022 (King's Bench for Saskatchewan June 8, 2023) (T.J. Keene).

[2] UCC § 9-203(b)(3) (an enforceable security interest is created when the debtor has authenticated a security agreement that describes the collateral).

[3] Id. § 9-102(a)(7) ("authenticate" means to sign or adopt by electronic sound, symbol, or process).

[4] Id. § 9-102(a)(70) ("record" means information that is inscribed on a tangible medium and is retrievable in perceivable form). Revised Article 9

of the UCC is medium neutral: "Given the rapid development and commercial adoption of modern communication and storage technologies, requirements that documents or communications be 'written,' 'in writing,' or otherwise in tangible form do not necessarily reflect or aid in commercial practices." UCC § 9-102 cmt. 9.

[5] Id. § 2-206 & cmt. 1. In 1999 and 2000, Congress enacted the Uniform Electronic Transactions Act ("UETA") and the Electronic Signatures in Global National Commerce Act ("E-Sign Act"), setting for a national standard for internet and electronic transactions and signatures.

[6] See, e.g., Mabus v. General Dynamics C4 Sys. Inc. (In re Mabus), 633 F.3d 1356 (Fed. Cir. 2011) (email); Cloud Corp. v. Hasbro Inc., 314 F.3d 289 (7th Cir. 2022) (email); CX Digital Media, Inc. v. Smoking Everywhere, 2011 WL 1102782 (S.D. Fla. March 23, 2011) (instant messages); St. John's Holdings LLC v. Two Elecs. LLC, Case No. 16 Misc. 000090 (RBF), Memorandum & Order (Mass. Land Court April 14, 2016) (Foster, J.) (text messages).

[7] Emojis were invented in Japan by an engineer named Shigetaka Kurita in about 1999 who designed a group of 176 icons for his company's internet system — the use of emojis has come a long way since the invention of the typewriter and related keyboard in the late 19th century.

[8] Id. at ¶ 21.

[9] Id. at ¶ 31.

[10] Id. at ¶ 59-62.

[11] Id. at ¶ 40.

[12] In Dahan v. Shacaroff, a 2017 case from Israel, the landlord believed that a couple would rent an apartment that was being listed for rent based upon a series of emojis that were transmitted during the course of the parties' communications. A lease was never signed and the landlord commenced suit claiming he had relied on the couple's messages as an indication of acceptance. The court did not constitute a binding contract, however, believed that they were evidence of reliance and supported the conclusion that the defendants acted and bad faith and that the landlord was entitled to damages. See Eric Goldman, Emojis and the Law, 93 Wash. L. Rev. 1227, 1267 & 1268 (2018).

[13] The meaning of an emoji should be objectively clear to be enforced such that its intention can be discerned in a sufficiently concrete manner. Differing interpretations can arise depending upon the context in which an emoji is used, custom and geographic location.

[14] Michael Levenson, Canadian Court Rules Emoji Counts as a Contract Agreement, The New York Times (July 7, 2023) (quoting Eric Goldman, Law Professor and Co-Director of the High Tech Law

Institute at Santa Clara University School of Law).

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