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# Thumbs Up, Bruh - Informality and the New Art of Contract Formation

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**Case Commented on:** *South West Terminal Ltd v Achter Land*, 2023 SKKB 116 (CanLII)

Saskatchewan grain contracts rarely attract international media attention, but an exception occurred recently after a judge held a farmer liable for damages under a contract entered into by emoji. It was not even a particularly cute or imaginative emoji, simply a humdrum 'thumbs up' 👍. Nevertheless, this solitary little 👍 did quite a lot of work in the court's eyes; not only did it signify acceptance of a contract offer, it also constituted the signed endorsement of a written document, thus satisfying the requirements of *The Sale of Goods Act*, RSS 1978, c S-1. This short post examines the decision of the King's Bench for Saskatchewan in *South West Terminal Ltd v Achter Land* (2023 SKKB 116) and suggests some potential implications, with a particular emphasis on the formality requirements of contract formation.

## Background

The plaintiff, South West Terminal Ltd (SWT), is a grain and inputs company. The defendant, Achter Land & Cattle Ltd, is a farming corporation owned and operated by Chris Achter (Achter). [Although Achter Ltd and Chris Achter are separate legal identities, for the purposes of this post I will refer to Achter as a single party]. SWT had previously purchased grain from Achter through various deferred delivery grain contracts since approximately 2012.

Throughout their past dealings it was common for the agent of SWT, Kent Mickleborough, to negotiate with Achter. After agreeing upon terms, Mickleborough would draw up a written sales contract for the particular grain, such as durum wheat, sign it, and then send via text message to Achter for confirmation, as in: "Please confirm terms of durum contract." In response, Achter texted back "Looks good". On a subsequent occasion, Achter responded to the same process with an "Ok"; and on another occasion he replied "Yup". On each of these separate occasions, Achter delivered according to the negotiated terms.

On March 26, 2021, Mickleborough sent out a 'text blast' to a number of producers, including Achter, offering to purchase flax seed at a price of $17 per bushel with delivery in the fall. Shortly thereafter Achter and Mickleborough discussed the flax seed purchase by phone and agreed upon the sale of 87 metric tonnes of flax seed at a price of $17 per bushel with a delivery period of November 2021. As he had done previously, Mickleborough told Achter that he would "write up the contract" and send it to him by text so that Achter could confirm the contract via text. Mickleborough wrote up the contract, signed it, took a photo of the document and texted it to Achter. Achter texted back 👍.

Achter did not deliver any flax seed. The spot price for flax on November 30th, 2021 was $41.00 per bushel. The plaintiff sued for damages of $82,200.21 plus interest and costs. The defendant Achter countered that: i) there was no acceptance, or *consensus ad idem*; ii) the agreement was not compliant with the requirements of *The Sale of Goods Act*; and iii) the agreement should fail for uncertainty. I will concentrate on the first two issues in this post, as I think these are of more general applicability; and frankly the defendant's arguments that the term for delivery as 'Nov' was too vague is untenable for a future delivery contract involving agricultural produce. As the well-known House of Lords decision in *Hillas & Co Ltd v Arcos Ltd* (1932), 147 LT 503 HL, indicated, contracts for the supply of natural products such as timber will necessarily have an implied element of flexibility in regards to exact delivery date.

## The Ruling

### *1. Consensus Ad Idem*

Justice Timothy J Keene, in delivering a summary judgment, ruled that Achter's use of the thumbs up emoji constituted contract acceptance (at para 37). The common law approach to the interpretation of contract formation is an objective view of subjective thoughts and decisions. What matters is not what a promisor or promisee thought at a certain moment; what matters is whether their conduct demonstrated an intention to be bound from the perspective of a reasonable onlooker. As Justice Keene noted, citing the Supreme Court of Canada's decision in *Ethiopian Orthodox Tewahedo Church of Canada St Mary Cathedral v Aga*, 2021 SCC 22 (CanLII): "The question is not what the parties subjectively had in mind, but rather whether their conduct was such that a reasonable person would conclude that they had intended to be bound." (at para 18). To come to a determination as to what an objective or reasonable bystander would determine as to the use of the thumbs up emoji the court relied upon i) a basic dictionary description of meaning, and; ii) past dealings.

The judge wryly noted that the parties had been engaged in "a far flung search for the equivalent of the Rosetta Stone in cases from Israel, New York State and some tribunals in Canada, etc. to unearth what a 👍 emoji means." (at para 30). The court preferred a simpler approach and drew upon the dictionary.com definition for 👍 : "it is used to express assent, approval or encouragement in digital communications, especially in western cultures." (at para 31). The essence of 👍 is affirmation, the court found (at para 36).

As to affirmation, the defendant Achter argued that his use of the thumbs up simply denoted receipt, and that Achter would subsequently review the document. The judge disagreed, holding that the parties had established "an uncontested pattern" of "binding deferred delivery purchase contracts" through a process in which "curt words" served as "confirmation of the contract, not a mere acknowledgement" of receipt (at para 21).

### *2. Formality*

Section 6 of Saskatchewan's *The Sale of Goods Act* (*SGA*) requires that for a contract for sale of goods above the value $50 to be enforceable it must either be partly performed or conveyed in "some note or memorandum in writing of the contract is made and signed by the party be charged".

The written requirement for sales of goods over a certain value goes back centuries to the *Statute of Frauds*, while the part performance exception reflects more modern judicial workarounds to the strictures of the Statute. The issue before the court was, therefore, whether the alleged agreement between SWT and Achter could be said to be both written and signed by both parties. The judge found that it was. The judge noted how the common law has developed so that email has been held to satisfy both written and signature requirements, and how that clicking on an 'I agree icon' had been held, in *Quilichini v Wilson's Greenhouse*, 2017 SKQB 10 (CanLII), to constitute an electronic signature to a go-kart waiver document.

The judge cited with approval Justice Donald Layh in *IDH Diamonds NV v Embee Diamond Technology Inc*, 2017 SKQB 79 (CanLII), in considering what signatures are meant to convey:

> I find this discussion significant because it shows that even absent specific legislation allowing for acceptance of electronic signatures, courts have considered an electronic signature as a valid signature simply under longstanding principles of common law. I agree. The common law has always applied a wide range of analysis to determine the sufficiency of a signature. For example, an ordinary signature at the foot of a document probably provides more comfort as to the authenticity of its contents than a signature at the head of a document even though both are "signed." Common law courts have considered several deviations from "wet ink" signatures, including simple modifications such as crosses, initials, pseudonyms, printed names and rubber stamps. (at para 57, citing *IDH Diamonds* at para 43)

The court found that the use of a 👍 was sufficient to serve as a signature because it was akin to a mark of identity as it came from a specific phone number linked to a specific person, Achter.

Achter was accordingly held liable for damages of $82,200.21, plus interest and costs.

**Readings of the Decision**

The case under review, like most good contract law cases, can be viewed in both narrow and broad terms. To describe the lesson of the case in the narrowest terms, I would suggest:

1) In the context of an established and repeated commercial relationship, parties may through their language and/or conduct agree that after all material terms are agreed upon, and a written and signed document is prepared, that the recipient may denote signed endorsement of the document via digital affirmation, such as a text message of 'ok' or a thumbs up emoji.

To describe the lesson of the case in the most broad and general terms, I would propose:

2) The use of text messaging for contract negotiation opens up acceptance by text, including the use of a single emoji that signals affirmation.

To describe the lesson of the case in the most ambitious of terms, I would suggest:

3) A text message represents a written document, and an emoji response represents signed agreement in writing.

**Commentary**

First, as to acceptance, it would be interesting to question whether the 👍 would have constituted acceptance if it had been used in the first instance, in response to a new and first negotiation between the parties. The parties had negotiated and had agreed upon all material terms by phone on March 26th, before any text. This could have served as the effective point of *consensus ad idem*, except that i) the parties did not behave as if they believed they were in a contract yet, and treated confirmation as offer acceptance; and; ii) under statute they were required to do more than agree verbally, which one or both surely knew, and which is confirmed by Mickleborough's regimented process of confirmation.

After verbal negotiations that established all materials terms of a deal, if an offeror then bothers to take the steps of recording the agreement in writing, signing the document, scanning or taking a photo of it, then sending it via text looking for confirmation, it would seem that the offeror is not looking for a verbal confirmation, or a 👍, but something more formal. The offeror is likely seeking a signature or some endorsement on the face of the document. Why else would the offeror bother to record the terms in writing and sign the document if this were not to be the basis of contract formation? If you wish for a text or emoji response, then why not simply convey the offer by text? If text alone were sufficient, the offeror could have simply reiterated by text: "87 bushels flax at $17 per. Nov. delivery. Ok?"

A response of 'ok', or 👍, arguably should not be sufficient as acceptance to a message that invites a signature on a document and its return. Parties ought to have a reasonable amount of control over the method and manner of acceptance. If an owner offers an asset for sale to the first person to make full payment of the prescribed price, it would completely subvert the offeror's intention to allow someone a right to the asset simply by declaring "agreed, I will pay you in the future." The offeror was not looking for an exchange of promises, they were looking for full performance immediately. And if someone asks for a signed and witnessed document to serve as acceptance, they are not looking for an emoji.

What invited the acceptance via 👍 in this case was surely that both parties repeatedly performed after hasty, informal confirmation of agreement. It was as if Mickleborough waived the expected requirements of his initial offer by repeatedly accepting less. It then became clear to both parties that when Achter said 'ok' it was effective acceptance, despite the appearance of requested formality. Acceptance by emoji was opened up by these parties based on their pattern of interaction. A simple lesson from this case might be that if you are going to conduct your business affairs and negotiate in a certain informal manner, or through an informal channel, then you should not be surprised if a court holds you to the offers and promises you make in this manner.

Second, as to formality, contract law has steadily moved toward the equivalence of written and electronic documentation, as well as the relaxation of formality requirements in relation to contract formation. That a single electronic affirmation counts as an acceptance of an offer does not sound

revolutionary. That a single electronic emoji constitutes affirmation of a written and signed contract does sound to be a new and noteworthy development. There are various areas within contract law, with possible intersections with property law, that demand heightened levels of formality, or increased physical steps to accompany the expression of consent or agreement. For instance, the *Statute of Frauds* requires that certain types of contract be conducted in writing to be enforceable. Another example is that a contract may be enforceable without the usual consideration requirement if it is entered into under seal.

This case raises an interesting question of whether, and to what extent, individuals can circumvent legal traditions of formality through technology. The law requires either consideration or agreement under seal for a contract to be enforceable. Well, then, one could imagine a text offer including the word 'seal', and then a texted response 👍. This is approximately the watered-down standard for physical documents, so it stands to reason that the digital word 'seal' should carry the same weight. The *Statute of Frauds* requires, *inter alia*, that contracts conveying an interest in land, or providing security for another's debt, must be conducted in writing, (See, section 4, *Statute of Frauds: An Act for the prevention of frauds and perjuries*, 29 Charles II, c.3 (1677, U.K.). Well, then a texted offer and a texted response of 👍 could produce an enforceable written contract. It is difficult to imagine that the formality requirements of contract law formation could be winnowed down any further than a single emoji.

Heightened formality requirements may be outdated historical vestiges from a time marked by illiteracy and fraud, but it may be useful to recall that the role of formality is not limited to identity verification and fraud prevention. Formality has also played a certain protective role, as if formality served as a series of engineered steps to signify a certain seriousness in the commitment being undertaken. Witnesses to a signature are not simply there to provide credence to the act of signing, though that it is certainly part of it; they arguably also add a certain solemnity to the act of signing. As Justice Bora Laskin once observed in a dissenting opinion in which he defended formality against the modern trend of relaxation, *Royal Bank of Canada v Kiska*, 1967 CanLII 154 (ON CA), 63 DLR (2d) 582 (CA):

> We are in the area of formality… The formal contract under seal is not as formal today as it was in the time of Coke; … there has been a recognized relaxation of the ancient common law requirement of a waxed impression. … I am not tempted by any suggestion that it would be a modern and liberal view to hold that a person who signs a document that states it is under seal should be bound accordingly although there is no seal on it. I have no regret in declining to follow this path in a case where a bank thrusts a printed form under the nose of a young man for his signature…

Individuals are of course still free to ignore the caution of formality, but formality serves to slow the process down and allow the signatory, or a promisee, an added instance of contemplation or reflection before entering into a commitment. Contract formality is like a speed bump in the commercial marketplace; it slows the traffic in goods and services, but only slightly and only temporally. Courts have generally striven to adapt the common law to new technologies, business practices, and everyday usage of language, all of which is commendable and furthers social utility. The elimination of formality requirements may well equate to modernization and liberalization of

contracting, as well as the reduction of paternalism, which, again, all sound commendable. And yet, there seems to be something concerning about the courts removing too many inherited and legislated formalities to contract formation, or speed bumps as it were. Perhaps legislatures in Canada have been derelict in updating the law and removing impediments to contract, but there is also a chance that there was a good reason for the presence of these speed bumps in the first place, and that the rationale for their existence persists. Indeed, it might be said that the value of pockets of formality has only increased, not lessened.

**Conclusion**

The proliferation of social media marketplaces and online sales platforms has meant a proliferation of informal commercial communication and negotiations. At the other end of every haphazard, misspelled, uncapitalized, and unpunctuated request from a random stranger lies a potential contract partner. If that named but unknown user has specified a price in response to a suggested object or service, then seemingly all that might separate strangers and social media weirdos from turning into contract partners is a single little emoji (notwithstanding the important context in *South West Terminal* described above). And so, one must be sure to choose one's emoji wisely. Thumbs up means acceptance, and therefore thumbs down must mean rejection. But what about a smiley face? Or a sad face? Does a sad face response to a counter-offer signify a rejection and cancellation of the original offer, or does it revive the original offer by seemingly inviting the offeree to make the original offeror happy? Admittedly, I am not well-versed in the lexicon of emojis and will have to leave such learned investigations as to the legal meaning of the poop emoji to experts in intellectual property. In any event, I think it is fair to suggest, without too much risk of hyperbole, that the little 👍 from this case could very well wind up as the most important emoji in the entire history of Western Canadian grain contracts. Or top five at least.

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