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I Do Solemnly 👍: The Saskatchewan Court of Appeal Endorses the Use of Emojis as Contractual Signatures (and the Decision is Kinda 😒)

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Case Commented On: *Achter Land & Cattle Ltd. v South West Terminal Ltd.*, 2024 SKCA 115 (CanLII)

The most famous emoji in the history of Western Canadian grain contracts has been in the news again, though with much less fanfare than the first time. The trial court decision starring 👍, *South West Terminal Ltd. v Achter Land*, 2023 SKKB 116 (CanLII) (*Achter*), garnered international media attention (see here, here, and here) with the novel story of the farmer found liable for a contract entered into by emoji. The recent appellate court decision in *Achter Land & Cattle Ltd. v South West Terminal Ltd.*, 2024 SKCA 115 (CanLII) (*Achter II*), in comparison, received only a smattering of media coverage (see here and here). Perhaps appellate court endorsements of trial decisions are less newsworthy in general; or perhaps 👍's fading popularity can be attributed to Gen Z, who are said to find 👍 passive aggressive, hurtful, or even hostile. Though 👍 's fifteen minutes of fame may be drawing to a close, its legal legacy may persist for years to come, and not necessarily for the good.

While 👍 can be appreciated for introducing some lighthearted novelty into contract law, and for making Gen Z cry, the Courts of Saskatchewan may have gone too far in trying to keep pace with modern trends and social usage. The implication of *Achter* is that the use of a single generic emoji may now signify both acceptance and a person's signature, essentially circumventing any signature requirement by rendering it superfluous to acceptance.

Background

South West Terminal Ltd (SWT), is a grain and inputs company. 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. It was Kent Mickleborough, an agent of SWT, who usually negotiated with Achter. After agreeing upon terms, Mickleborough would draw up a written sales contract, sign it, and then send it via text message to Achter. In response, Achter had texted back various forms of affirmation, including: "Looks good", "Ok"; and "Yup". In each previous instance, 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 first page 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; ii) the agreement should fail for uncertainty; and, iii) the agreement was not compliant with the requirements of *The Sale of Goods Act*, RSS 1978, c S-1 (*SGA*). The trial judge, Justice Keene, rejected each of Achter's arguments and found for the plaintiff SWT.

The Court of Appeal, in reasons delivered by Leurer C.J.S. with Caldwell J concurring, similarly rejected each of Achter's arguments and endorsed the decision of the trial judge.

The Issue of Formality

As the purported deal in Achter was subject to the *SGA*, a binding contract required the presence of three elements:

1) The parties must have agreed to enforceable terms;

2) The agreement had to be written (or "some note or memorandum in writing of the contract"); and,

3) The agreement had to be signed.

The first element combines the basic requirement of agreement between the parties on material terms, *consensus ad idem*, with the reality that this consensus on terms must be certain enough to be capable of enforcement. The second and third requirements are needed to comply with s 6(1) of the *SGA*. This list of requirements is a slight variation of the one adopted by the Court of Appeal (see *Achter II* at paras 34-38).

While the first element on the basics of formation may explain why the case garnered media attention – a farmer owes over $80,000 for simply using a little thumbs up emoji – the case is arguably of legal significance for the elements of formality, not formation. Contract formation is determined on an objective standard of whether a reasonable bystander would deem that parties had acted in accordance with having a shared intention to contract, regardless of what their internal thoughts may actually have been. If non-verbal behaviour, including silence, can constitute acceptance, then certainly the use of an emoji could be suggestive of consent, just as a thumbs up delivered by a human hand or a head nod could. As with words and gestures, not every emoji will necessarily denote acceptance, but may do so in context. This is especially so when the parties have a course of dealings indicative of relying on informal negotiation and subsequent agreement, as the parties in *Achter* clearly did. I examined the importance of past informal dealings in *Achter*

in a previous ABlawg post. The importance of past dealings in the interpretation of an admittedly ambiguous emoji was affirmed by the majority in *Achter II* (at para 50).

As to formality, the third element was arguably the most interesting and important feature in *Achter*. By formality I mean simply the steps or forms of action that are required to render an agreement legally enforceable. I do not mean formality as to language or social media usage, and I do not suggest that contract language must comport with refined style or grammar. The *SGA*, accordingly, imposes two additional formal requirements for contract formation: to be recorded in writing and signed; and only the latter has new legal implications following *Achter*. It is well-established that a contract may be deemed to have been executed in writing "through the reliance on two or more documents under the "joinder" principle, whereby the "courts would allow plaintiffs to rely on two or more documents to prove their case" (*Druet v Girouard*, 2012 NBCA 40 (CanLII) at para 33)" (*Achter II* at para 92). Deeming that an emoji, and a particularly ambiguous emoji like 👍, could constitute a contractual signature, however, was a more noteworthy finding. Tellingly, the issue of formality and the signature requirement formed the bulk of the appellant's submissions and was the sole issue underlying Justice Barrington-Foote's dissent in *Achter II*.

Signature by Emoji

The trial judge's explanation for finding that a text of 👍 satisfied the signature requirement of the *SGA* was brief:

> [62] In my opinion the signature requirement was met by the 👍 emoji originating from [Achter] and his unique cell phone … which was used to receive the flax contract... There is no issue with the authenticity of the text message which is the underlying purpose of the written and signed requirement of s. 6 of [the SGA]. Again, based on the facts in this case – the texting of a contract and then the seeking and receipt of approval was consistent with the previous process between SWT and [Achter] to enter into grain contracts.
>
> [63] This court readily acknowledges that a 👍 emoji is a non-traditional means to "sign" a document but nevertheless under these circumstances this was a valid way to convey the two purposes of a "signature" – to identify the signator ([Achter] using his unique cell phone number) and as I have found above – to convey … acceptance of the flax contract.

Crucially, the trial judge found Achter's signature to be found in the combination of his text of the emoji 👍 and the digital record of Achter's specific phone, the 'metadata'. As the majority in *Achter II* observed: "In substance, therefore, the judge found that the signature in this case was the text message comprised of both the emoji and the metadata accompanying it." (*Achter II* at para 97)

The two purpose view of a signature, to communicate acceptance and identify the signatory, was endorsed by the majority of the Court of Appeal: "Whether the mark is physical or electronic, it must be made for the purposes described, that is, to convey agreement or acceptance and be

communicated in a way that intentionally identifies the maker of the mark and signifies an intention to contract." (at para 130) Similarly, the majority concluded that:

> Mr. Achter may also not have known that, at law, his text message reply amounted to him having "signed" the contract, but that does not invalidate the legal consequences attached to his actions. What is material is that Mr. Achter intentionally communicated his agreement to Mr. Mickleborough and did so in a way that knowingly verified the communication as his own. (at para 138)

Ultimately, the majority agreed with the trial judge on the basic equivalence of Achter's text of 👍 and traditional physical signatures.

> Mr. Achter's text message fulfilled the purpose of a signature used to sign a note or memorandum of a contract under s. 6(1) of The Sale of Goods Act every bit as much as if Mr. Achter had signed his name on a printed copy of the contract or as if he had attached his thumbprint or made an X on top of that document with the same objective intent. (at para 133)

Accordingly, the majority found that the judge did not err in finding that Achter's text message "signed" the contract. (at para 139)

The Dissent

Barrington-Foote J.A. differed on only one issue from the majority, on whether Achter's emoji text *alone* could constitute a signature for the purposes of the *SGA*. Justice Barrington-Foote agreed that a party must communicate agreement and signify identity, and that these could be met with a text, but that this by itself was insufficient to merit a qualifying signature without intentionality. As Justice Barrington-Foote noted:

> ... a signature, whether it be in the form of the person's name or their mark, must be written or placed on the document with the intention of being bound by or authenticating it. However, none of these definitions suggest that every word, such as the word "yes", or any symbol, such as a thumbs-up emoji, that expresses the affirmative, is enough to constitute a signature; *rather, it is the writing or placing of words or a mark that represent a signature on the document, with the requisite intention, that means it has been signed*. (at para 205, emphasis in original)

As Justice Barrington-Foote observed, the majority's interpretation would entail that any affirmative text, such as a simple 'ok' could constitute a signature:

> As I understand their reasons, this means that any writing, mark or combination thereof in a text message that disclosed the sender's information would meet the signature requirement, provided that the text message, whether alone or with other communications, constituted a s. 6(1) note or memorandum. That would have included, for example, Mr. Achter writing the word "yes" or "I agree" in the emoji text, rather than inserting the emoji. (at para 190)

For Justice Barrington-Foote, this laxity as to the signature requirement would undermine the longstanding 'solemnity' element of providing a signature, and essentially circumvent the plain meaning of the statute:

> In my respectful opinion, to characterize the metadata that identifies the source of a text message – in substance, the text message address – as a signature, … would unnecessarily and improperly stretch the signature requirement beyond recognition. It would "ignore the language chosen by the Legislature to advance what the court considers to be the purpose of the legislation" (Oladipo at para 36, quoting *Windels v Reddekopp*, 2023 SKCA 38 at para 102). Further, it would pay no heed whatsoever to one of those purposes – the solemnity or attentiveness requirement. This would be tantamount to the repeal of s. 6(1) of The Sale of Goods Act in this context, rather than an adaptation to the technology that respects the ordinary and grammatical meaning of the words of the statute … (at para 215)

Commentary

I would suggest that the novel development introduced by the *Achter* decision is the judicial finding of a contractual signature without regard for whether the signature was consciously made or even known of by the purported signatory. Awareness of agreement is not the same as the awareness of having also made a mark or sign of personal attribution. Following *Achter*, conceivably any digital endorsement via text or emoji in response to an offer may automatically constitute a signature without the awareness of the signatory. Again, the trial court's finding of a signature rested on nothing more than a messaged symbol denoting agreement and a digital record attached to the message, the message metadata. Because Achter used a phone that had a digital signature contained in the metadata sent out with every text, like every smartphone or device capable of messaging, this became the basis of Achter's contractual signature. That Achter was no doubt unaware that an implied signature was hidden in his phone's sent out metadata, was clearly besides the point to the courts.

The irrelevance of knowledge or volition was acknowledged expressly by the majority in *Achter II*. Recall this passage from the majority reasons:

> Mr. Achter may also not have *known* that, at law, his text message reply amounted to him having "signed" the contract, but that does not invalidate the legal consequences attached to his actions. What is material is that Mr. Achter intentionally communicated his agreement to Mr. Mickleborough *and did so in a way that knowingly verified* the communication as his own. (at para 138, emphasis added)

According to this logic, marking an envelope with a return address means that it is signed if the letter inside contains agreement, even a picture of 👍, because this act of writing an address knowingly verified the communication as the sender's own. In this example, at least the sender knowingly acted in writing the address, which is not the case with metadata. Not only is the existence of metadata likely unknown to many phone users, even were it known it would be

unintelligible. As the Court of Appeal noted, "the metadata that went with Mr. Achter's text message existed only in electronic form, and was only readable by electronic, magnetic, optical or similar means." (at para 137)

As to Achter's knowing verification of the communication as his own, this was simply the use of his phone at the moment that he used his phone to text a response to Mickleborough. If I have the reasoning correct, in order to knowingly provide verification of communication, it must appear that a person knew that they were using their phone when they used their phone to send a message. This is a convoluted way of stating that communicating acceptance by phone equals signature. The presence of metadata with every message conveyed via smartphone means that every message of acceptance sent by a personal phone will constitute a knowing verification of communication and, thus, a signature. In short, acceptance via an electronic device will inevitably satisfy the second prong of the rather flimsy signature test in *Achter* – endorsement of an offer plus some digitized record of a message's source. This is a rather long way from the previously established legal conceptions of personal authentication. As Evershed L.J., writing for the majority in *Goodman v J. Eban Ld*., [1954] 1 QB 550 (CA), put it:

> ... the essential requirement of signing is the affixing in some way, whether by writing with a pen or pencil or by otherwise impressing upon the document one's name or "signature" so as personally to authenticate the document. (at 557)

Treating metadata as an automated contractual signature is not only at odds with the sense of a personal, conscious endorsement of a document, it also obviates entirely the protective or cautionary role of a signature, which may add solemnity, gravity, or care to the act of endorsing a legal instrument. For example, Barrington-Foote J.A. cited, *inter alia*, Stephen Mason, *The Signature in Law: From the Thirteenth Century to the Facsimile* (London: University of London Press, 2022) (online: Institute of Advanced Legal Studies), who described the purpose of the signature requirement thus (at 8):

> It is suggested that the primary purpose of a signature serves to provide admissible and reliable evidence that comprises the following elements:
>
> (1) To provide tangible evidence that the signatory approves and adopts the contents of the document.
>
> (2) In so doing, the signatory agrees that the content of the document is binding upon them and will have legal effect.
>
> (3) *Further, the signatory is reminded of the significance of the act and the need to act within the provisions of the document.*
>
> (emphasis added)

The majority reasons, on the other hand, included a perfunctory acknowledgment of the solemnity feature, but then determined that it was satisfied, yet again, by the trial judge's conflation of communicated identity with the communication of acceptance (at para 146). One emoji, two purposes instantaneously satisfied. It is difficult to conceive how it would be possible to send an

affirmation in response to an offer by phone and not have it automatically constitute a signature through the metadata. It is interesting that the most casual manner of contracting imaginable, a finger tap on a screen, should instantly and automatically generate a heightened level of formality and seriousness in the form of a personal signature.

The *Achter* case is seemingly unique in that the act of authentication is not a distinct act by the purported signatory – it is entirely implied and simultaneous with the act of agreement. With other enforceable variations on a personal signature, whether an individual marking a cross or by applying a stamped signature, it is the act of authentication that is express and physically observable, not acceptance. When someone marks a cross on paper in response to an offer, acceptance is implied and simultaneous with the primary act of signing. In *Achter*, by contrast, the only express, physically observable act was that of acceptance – pressing 👍 on a digital keypad – and so authentication was implied and secondary to the act of agreement. Put simply, normally an offeree signs a document and thereby agrees; in *Achter*, the offeree agreed with a tap of an emoji, and thereby signed in an unseen way.

An implied signature is a curious thing, for it suggests that when a person did something else, like saying 'okay' or raising a thumb, they were really, and at the same time, actually endorsing a document with their unique personal signature or mark. If implied, incidental, and unseen signatures are even possible, they would certainly seem to be of lesser gravity or significance than an individual committing their name to a legal document.

A superficial reading of the decision in *Achter* would likely characterize it as the latest yeoman effort of courts to adapt contract law to meet social and technological change. Though the adaptability of contract law is undoubtedly important, contract formation could have been found in *Achter* without any need for doctrinal adaptation. The inconvenient hurdle in this case was not contract law but a statutory requirement for a signature that was clearly not given in any recognizable way. Had the court in *Achter* wanted to accommodate new technology and not alter any established rules or principles, a contract could have been found, but which was rendered unenforceable by the court due to non-compliance with the *SGA*. Indeed, this possibility of a formed yet unenforceable contract was stressed by the Court of Appeal (at para 39). Finding an unenforceable contract would have signaled the viability of contracting through emojis without distorting the legal meaning of a signature.

The problem with an unenforceable contract, of course, would have remained an unfair and unsound result in the specific circumstances of *Achter*. Had Achter's crop of flax materialized, it is easy to imagine that he would have delivered and expected payment on the contract terms proposed by SWT, just as he had on numerous previous occasions. It would defeat the very purpose of a future delivery contract to allow one party to renege based on a technicality of formation that was only complained of when performance was no longer profitable. The result in *Achter* seems fair and sound as a matter of commercial policy; but it appears somewhat wanting in its adherence to statute or principle.

Conclusion

Moving forward from *Achter*, assuming that the decision stands (Achter has sought leave to appeal to the Supreme Court), it might be reasonable to question what is the point of signature requirements? If parties wish to avoid the inconvenience of statutory formalities all they need to do is communicate by text, and these inconveniences will dissolve into the metadata. And as for private signature requirements, or formalities required by an offeror, these could be similarly rendered pointless. So long as a court interprets a digital response as agreement, then the formality of a signature is automatically established. This is not to suggest every digital response of 👍 will denote agreement, but these may, depending upon the judicial interpretation of behaviour in context; which I think can fairly be said to be less certain or objective than a traditional requirement of a signature or a personal mark made with solemnity. Accordingly, an offer that asks for a signed document as acceptance could conceivably be met with a binding response of 👍. Though it must be said that such a response would be a decidedly dismissive way to accept an offer that had asked for formality. Perhaps Gen Z was right after all – 👍 can be downright passive aggressive. Following *Achter*, it now seems possible to endorse a contract and be a jerk at the same time. And I must admit, this 👍 character is starting to grow on me.

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