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A Contract: ? or ?? The Commercial Impact of Our Emojis

The King's Bench for Saskatchewan has been turning heads and raising eyebrows ? following a recent decision on the legal force of emojis.

In *South West Terminal Ltd v Achter Land* ("*Achter*"), the Court granted summary judgment and enforced a disputed contract finding that a text message that included only the thumbs-up emoji ("?") was a legally-binding form of acceptance.

Lawyers and commentators have reacted to the decision with a mix of celebration ? and outrage ? at what is seen by some as a revolution in the world of commercial contracts. A closer review of the decision, however, should temper these emojis. While the decision is an interesting application of the law to a modern set of facts, it is grounded in traditional principles of contract formation that date back to the industrial revolution.

Background

The contract in question was for delivery of flax. The Plaintiff was a grain and crop supplier and the Defendant was a farming business that produced grain. Importantly, the parties had dealt with one another through various contracts for flax and durum wheat since about 2012. On multiple past occasions, the two parties had concluded their transactions through very similar exchanges as the one giving rise to the present dispute. The Plaintiff buyer would send a photo of a contract to the Defendant seller along with a message like "Please confirm terms of durum contract." The seller would respond with a text such as "yup", "ok", or "looks good", and the durum was always thereafter delivered without issue.

On March 26, 2021, something changed. The buyer, in his usual fashion, sent a text to the seller with a photo of a contract for 86 metric tonnes of flax and the message: "Please confirm flax contract." The seller tapped open his iPhone keyboard to respond. But this time, instead of typing his usual "yup", "ok" or even something more creative like "flax yeah!", he responded without any words at all. Instead, he clicked the grey emoticon symbol in the bottom left corner and responded with a single emoji image: ?. Despite the buyer taking this to mean "yes" and expecting a delivery of flax, the delivery never came.

The seller, for his part, argued that the ? was intended to signify that he had merely received the contract, not that he had agreed to its terms. The buyer sued for breach of contract and damages for non-delivery of the expected flax.

Verdict: ?

As you might expect, the Defendant argued that commercial contract law requires an actual signature to evidence a binding contract, and that holding an emoji against the farmer will open the floodgates and throw private law into disarray.

The Court rejected these arguments, finding that while the case was novel, the common law has developed in these modern times to recognize an exchange of emails as sufficient to form contractual requirements. Texting emojis, the Court held, is simply the new reality in Canadian society, and courts will have to be ready to meet the new challenges that may arise from the use of emojis and the like.

The Supreme Court of Canada's 2021 decision, *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, confirmed what has underpinned commonwealth contract law for hundreds of years: to form a valid contract, there must be an offer by one party that is accepted by the other with the intention of creating a legal relationship and supported by consideration. The test for whether a valid legal contract has been formed is whether an objective reasonable bystander would assess that the parties indicated to the outside world their intention to contract and the terms of such contract. In other words, there must have reasonably appeared to be a mutual agreement—and the court can consider circumstances beyond the four corners of the agreement itself, such as past conduct and the nature of the parties' relationship, to decide whether there was an intention to create a legal contractual relationship.

In *Achter*, the analysis was no different. The Court looked to the parties' past relationship and determined that a reasonable bystander knowing all of the background would come to the objective understanding that the parties had reached a meeting of the minds just like they had done on numerous other occasions. In assessing whether the ? emoji would appear to the objective reasonable bystander as a valid acceptance on the seller's part, the Court noted that each previous time the buyer in *Achter* sent the contract along with "Please confirm terms of durum contract", and each time the seller responded with a message such as "yup", "ok", or "looks good", the seller acted as though he had accepted, delivered the grain, and got paid. In this particular commercial context, a clear pictographic depiction of assent could not reasonably be construed as anything but a valid acceptance.

Despite the seller's counsel noting during cross-examination that their client "is not an expert in emojis", what matters is not what the seller himself may have thought the thumbs-up meant—what matters is what the informed objective bystander would understand in all the circumstances. This is not a novel legal issue—courts use the objective bystander standard all the time.

Takeaways

Emojis are intended to be, and are, used as a modern form of communication. They represent a means of expressing an idea to an individual or audience. As such, it is not particularly surprising that, where the expression is clear from the context of the communication, it can be interpreted objectively and held against its sender. In this way, while the facts of the case may be novel, the principles are not groundbreaking in the law of contracts. This case reveals the common law functioning at its best—applying sound principles of private law to fit our modern world.

Looking ahead, how will the use of other emojis in our daily lives be interpreted and applied in other cases? ????

Be sure to reach out to experienced commercial counsel to best inform and protect yourself with your communications.