

A “THUMBS-UP” TO EMOJIS IN CONTRACT INTERPRETATION: APPLICABILITY OF THE *SOUTH WEST* DECISION TO BRITISH COLUMBIA

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“Emojis” are frequently used in the course of digital communications to convey ideas, thoughts, and emotions. Given the prevalence of emoji use on a wide variety of platforms and across different communication mediums, it is unsurprising that Canadian courts have been required to consider the meaning of emojis in determining disputes.

In this bulletin, we provide a summary of the well-publicized decision of *South West Terminal Ltd. v Achter Land*, 2023 SKKB 116 (“**South West**”) and comment on the applicability of that decision to British Columbia.

Facts

The plaintiff approached the defendant to purchase 87 metric tons of flax seed. The plaintiff drafted a contract after discussing the terms of purchase and sale with the defendant. Subsequently, the plaintiff texted a photo of the signed contract to the defendant with the message “Please confirm flax contract”, to which the defendant responded with the thumbs-up emoji. However, the defendant failed to deliver the flax seed to the plaintiff.

The parties disagreed on the meaning of the thumbs-up emoji. The plaintiff claimed the emoji was a clear acceptance of the contract, whereas the defendant argued that the emoji simply acknowledged receipt of the signed contract.

The Court considered whether a binding contract existed between the parties by determining if the plaintiff had made an offer that was accepted by the defendant. The Court heavily weighed the parties’ long-standing business relationship. There was a history of the plaintiff drafting contracts, texting an image of the signed contract to the defendant, to which the defendant accepted the contract by responding “looks good”, “ok” or “yup”. Accordingly, the parties had a history of understanding curt words to constitute acceptance of a contract by the defendant and not mere acknowledgement of receipt. On this basis, the Court found that the use of the thumbs-up emoji was consistent with the parties’ historical method of accepting contracts.

Further, the Court found that a thumbs-up emoji was “an action in electronic form” that could be used to allow express acceptance of an offer under section 18 of the *Electronic Information and Documents Act*, 2000, SS 2000, c E-7.22.

The defendant argued that the contract was unenforceable as it did not meet the requirements of section 6 of the *Sale of Goods Act*, RSS 1978, c. S-1, which provides that contracts for the sale of goods of the value of \$50 and up are not enforceable, unless some note or memorandum in writing of the contract is made and signed by the party to be charged. The Court rejected this argument, holding the following:

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 (the defendant representative using his unique cell phone number) and as I have found above – to convey the defendant’s acceptance of the flax contract.

Applicability of *South West* to British Columbia

Caselaw

There are at least two reported decisions in British Columbia in which courts have considered the meaning of emojis.

Blom v Blom

In *Blom v Blom*, 2021 BCSC 18, the respondent sought to set aside a separation agreement under the *Family Law Act*, SBC 2011, c 25, which provides that an agreement may be set aside when an agreement is entered into under “circumstances that would, under the common law, cause all or part of a contract to be voidable”. At issue was a text message exchange between the parties in which the respondent told the claimant that she had signed the separation agreement between them under duress, to which the claimant responded with the “mocking” emoji.

Accordingly, the Court considered the claimant’s use of the “mocking” emoji to determine if duress was made out. The claimant stated that he did not believe he had scared the respondent – his use of the emoji was meant to signify he thought it was “hilarious” for the respondent to assert she was under duress.

The Court gave this text exchange significant weight and viewed it relevant that the claimant did not deny the respondent’s assertion of duress, rather opting to use the “mocking” emoji in response.

As the meaning of the emoji was relatively clear in light of other evidence, including “contemporaneous exchanges between the parties” corroborating the duress, the Court’s decision did not solely hinge on the meaning of the emoji as it did in *South West*. Regardless, this decision shows a clear willingness from British

Columbia courts to consider the use of emojis in contract interpretation, and to use emojis to discern the intentions of the contracting parties where necessary.

Redmond v Wiebe

Although *Redmond v Wiebe*, 2022 BCCA 244 is not a contractual dispute matter, a text message chain containing an emoji was considered as evidence and given weight by the Court.

In *Redmond*, the petitioners were electors in the City of Vancouver. They brought a petition under the *Vancouver Charter*, SBC 1953, c. 55 asserting that the respondent had committed various breaches on the basis of conflict of interest. The respondent was a City counsellor who had an ownership stake in a local restaurant.

In response to COVID-19, the City Council had voted to adopt a program allowing local restaurants to apply for permits to create or extend outdoor seating areas. The respondent's restaurant was among the first 14 establishments to be awarded a patio permit, which gave rise to conflict-of-interest allegations. It was later discovered that the respondent had communicated via text with other City counsellors following the passage of the bylaw, referencing his own restaurant patio and using the "beer glass clinking" emoji.

The Court of Appeal considered these texts in determining whether the alleged conflict fell inside the interest-in-common exception, outlined at s.145.6(1)(a) of the *Vancouver Charter*, as an interest shared with "electors of the city generally," rather than just local restaurant owners. The respondent claimed that his use of the emoji was meant to celebrate the successful passage of the bylaw. The Court of Appeal disagreed, finding that the respondent was "in a class of licensees who could immediately enjoy the benefits of the...Program and he clearly knew it — witness the celebratory clinking-of-glasses emoji" and was actively pursuing his private interest. As a result, the Court of Appeal found the exception under s.146(1)(a) did not apply in the circumstances, overturning the lower court's decision.

Legislation

Given that British Columbia has an equivalent provision to section 18 of Saskatchewan's *The Electronic Information and Documents Act*, this suggests that a thumbs-up emoji (or a similar affirmative emoji) may properly convey acceptance of a contract in British Columbia. In both provinces, a party can accept an offer by electronic signature or by an activity in electronic form, which includes touching or clicking on a designated icon.^[1]

However, the B.C. *Sale of Goods Act* ^[2] does not contain a statutory defence similar to section 6 of the *Saskatchewan Act*.^[3] Although the *South West* defendant relied on this statutory defence, the argument was not accepted by the Court, as the thumbs-up emoji was found to be a valid signature under the Saskatchewan legislation.

Given the above, a defendant in a B.C. breach of contract action regarding the sale of goods is best situated to defend the action on the basis that there was no “meeting of the minds”.

Takeaways

- B.C. courts have already been considering the significance of emojis as evidence of the parties' intentions.
- In respect of contract disputes, as emojis are often used in what are traditionally less formal methods of communications (such as text messages), contracting parties should be aware that the emojis will nevertheless form part of the factual matrix that the court will consider.
- The *South West* decision is novel in the sense that the meaning of an emoji was the critical issue in determining whether there was a meeting of the minds, or acceptance of the contract. The parties' history of contracting was key to the Court's decision in finding that the emoji constituted acceptance. Accordingly, the *South West* decision may be persuasive, to the extent there are similar facts arising in a B.C. matter.

[1] *The Electronic Information and Documents Act*, 2000, SS 2000, c. E-7.22 at section 18; *Electronic Transactions Act*, SBC 2001, c.10 at s section 15.

[2] RSBC 1996 c. 410

[3] *Sale of Goods Act*, RSA 2000, c. S-2, s.6

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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