

Business

Saskatchewan court gives thumbs up to emoji serving as legal signature

By **Heidi J. T. Exner**

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(July 4, 2023, 2:23 PM EDT) -- The COVID-19 pandemic may seem like a distant figure in the rearview mirror for most Canadians. However, how we go about our daily lives and conduct business is permanently altered. From hybrid work environments to remote meetings, digital communication for all purposes has become the norm. Indeed, much of the pandemic's aftermath is a new reality, which for the legal profession entails parsing through the frenzied measures that attempted to keep in step with the age of digital communication.

This article addresses electronic signatures in commercial dealings. In recognition of the need to conduct business remotely, Canada introduced several measures to facilitate these dealings digitally. Although the pandemic expedited these actions, they were arguably imminent, or already overdue.

In 2020, the Canadian Securities Administrators and provincial securities regulators introduced blanket orders that allowed for particular System for Electronic Document Analysis and Retrieval (SEDAR) filings, which were traditionally signed or certified, to be electronically signed instead. These orders were extended in Alberta twice, and they remained in effect through April 2023. Across the nation, securities commissions temporarily revised these exemptions yet again during the upgrade to the new SEDAR+ system. This may show regulators' willingness to move in this direction more permanently.

Electronic commerce legislation that governs electronic signatures was similarly updated in 2020, though these revisions were permanent. In this year the Alberta *Electronic Transactions Act* joined the rest of Canada and removed restrictions that prevented employers' use of electronic signatures on employment contracts. Alberta's legislation, alongside its other Canadian counterparts, recognizes the function of technology in commerce. It prescribes that an electronic signature is treated equally to a handwritten or "wet ink" signature.

These provincial enactments are silent on the matter of acceptable forms or precise media for electronic signatures in commercial transactions, though. Instead, they define "electronic signature" in each jurisdiction, and generally, for an electronic signature to perform the same function as a traditional wet ink signature, it merely needs to identify and link the signing party or parties reliably. It must also indicate each party's acceptance to be bound by the terms of the agreement in question.

So what happens when legislation fails to contemplate the variety of common digital forms and media we use to conduct business? Are our courts adequately equipped to address the array of ways that we digitally communicate and negotiate agreements?

One recent case gives me faith that they are.

On June 8, Saskatchewan King's Bench Justice T. J. Keene ruled in a summary judgment that a "thumbs up" emoji sent via a mobile phone constituted contractual acceptance, and bound grain seller Achter Land & Cattle Ltd. to a sales contract, on which it had failed to deliver (*South West Terminal Ltd. v. Achter Land* 2023 SKKB 116). He ordered Achter to pay damages in excess of

\$82,000, for costs the buyer incurred to purchase the same product at the then-higher spot market price in order to in turn fulfil its obligations to its clients.

Prior to reading the decision in full, I will admit that my knee-jerk reaction was similar to the defendant's so-called "public policy argument" — that finding one emoji an acceptable signature "would open up the flood gates to allow all sorts of cases coming forward asking for interpretations as to what various different emojis mean." Let alone GIFs or other non-verbal communications, or private messaging on social media platforms which equally link the sender's identity to cellular numbers, the possibilities for what may be deemed a signature seem endless. After all, text messaging and social media messaging have rapidly evolved: once forms and mediums of communication reserved for more personal communication, they are now also commonly used in business.

But in this instance, the devil is truly in the details. Justice Keene performed a highly contextual analysis of this unique contract dispute, which engaged Saskatchewan's *Electronic Information and Documents Act*, the *Sale of Goods Act*, and of course, common law jurisprudence and principles on forming a valid contract. As alarming as the thought of a simple emoji saddling one with enormous contractual obligations might be, the reality is much more mundane.

The parties in this dispute had a long history of entering into contracts via text messaging, using means of agreement to pictures of drafted contracts such as, "OK," "Yup," or "Looks good." This had laid the groundwork for the logical shift to a "thumbs up" emoji to indicate a similar agreement. Justice Keene observed, "what we have is an uncontested pattern of entering into what both parties knew and accepted to be valid and binding deferred delivery purchase contracts. The parties clearly understood these curt words were meant to be confirmation of the contract and not a mere acknowledgment of the receipt of the contract by [the purchaser, South West Terminal Ltd.]."

Furthermore, the Saskatchewan justice was prudent to note that the meeting of minds for contractual purposes is an objective analysis instead of a subjective one. He pointed out that an objective "reasonable bystander" would determine that the buyer and seller had agreed to the terms they had outlined.

As the other elements of a valid contract were found to be in place, this was a relatively simple case. Nonetheless, it was a novel ruling that expanded our view on the form of an "electronic signature," in ways that legislation did not outline and seemingly failed to contemplate.

If I were a gambler, I would bet this decision is just one of the first of many cases in which the new reality of digital communication will pose interesting (and possibly comical) quandaries for our courts. Saskatchewan's King's Bench did well in using the applicable law, and Justice Keene's analysis and reasoning did not fail to lose sight of the core issues of this 21st-century digital dispute.

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