

INTERNATIONAL

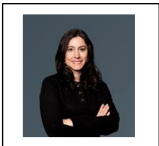
DECEMBER 2023

IN THIS ISSUE

Canadian courts, like those in many other jurisdictions, are adapting to the use of emojis as part of evidence. Emojis, found in text messages, social media interactions, or digital communications, play a role in conveying intent, emotions, or context. But in some instances, they can also create enforceable contractual commitments.

Legal Ramifications of Emojis: Canadian Courts Give a 👍 to the Use of Emojis in Contract Interpretation

ABOUT THE AUTHOR



Joséane Chrétien stands at the forefront of litigation law, boasting extensive expertise in navigating intricate class actions. Her practice revolves around advocating for clients entangled in disputes concerning Consumer Protection Act and Competition Act violations, product liability intricacies, cartel investigations, and instances of false representations. Her comprehensive understanding spans across diverse industries, including pharmaceuticals, banking, finance, manufacturing, and retail. Apart from her proficiency in complex class actions, Joséane holds substantial experience in general commercial litigation, handling cases encompassing contract disputes and shareholder conflicts. She is recognized by the 2023 *Lexpert* as Leading Litigation Lawyer, by the 2023 *Benchmark Litigation: Canadian Guide* as a Litigation Star, and by *Best Lawyers in Canada* as a leading lawyer in the area of Corporate and Commercial Litigation and Class Actions. She can be reached at Joseane.Chretien@mcmillan.ca.

ABOUT THE COMMITTEE

The International Committee is the core international group in IADC and serves those members who have an interest in transnational or international legal matters including transactions, litigation, and arbitration. Thus any member, whether in the USA or abroad, who does cases with a foreign element (inbound or outbound) will find involvement in this committee extremely useful. Many of the members of the committee are from outside the USA, and this provides a rich mix of experiences and expertise as well as great networking opportunities. The International Committee also organizes European, South American, and Asian Regional Meetings and contributes to the International Corporate Counsel College. Learn more about the Committee at www.iadclaw.org. To contribute an article, contact:



Döne Yalçın, Committee Chair
CMS Turkey
doene.yalcin@cms-rrh.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Emojis or emoticons are definitely part of modern communication. There are more than 3,500 emojis in the Unicode Standard, the smiling face with tears of joy being one of the most popular. With yearly new releases, the emojis will continue to illustrate our moods and opinions.

Emoticons are represented by a set of characters positioned to replicate an expression. One can easily replicate “joy” using :-) or ;-). Emojis are small pictures 🤗 of increasing variety.

But what happens when Emojis and Emoticons infiltrate contractual communications?

Canadian courts are frequently faced with evidence containing various forms of emojis, emoticons or other pictograms (together “emojis” to simplify the text). In fact, there are hundreds of published Canadian cases discussing emojis. Most are found in text messages or social media extracts filed into evidence. When presented with emojis, courts must interpret their meaning, and cannot simply disregard them. Emojis cannot be set aside or removed from the communication, as they act, more often than not, as qualifying factors for the words they supplement. For example, in the case of *R. v. Hamdan*¹, the Supreme Court of British Columbia ruled that the prosecutor’s expert,

tasked of interpreting the content of the accused’s Facebook account, should not ignore the emojis. The Court noted: “It is apparent that Mr. Hamdan and others communicating on his Facebook account used emoticons to add meaning to what they said.” The difficulty, however, is how does one adequately interpret the meaning of emojis.

In contractual matters, Canadian courts have recently accepted the binding effect of the thumbs-up emoji 👍 and interpreted them as consent to the proposed agreement. In *Hengyun International Investment Commerce Inc. v. 9368-7614 Québec Inc.*¹¹, the plaintiff, a property owner was disputing the existence of a lease and requesting the eviction from its premises. In this case, the lease had been originally entered into between the owner and a fitness center. Shortly after the lease signature, the fitness center requested a change to the name on the lessee in favor of the defendant, 9368-7614 Québec Inc. However, the change of name was never made. A dispute arose over numerous issues, which lead the landlord to seek an eviction of the Defendant, which was never a party to the lease. The Québec Superior Court ruled against the landlord and recognized the validity of the transfer of the lease based on its interpretation of the content of text messages between the parties. Indeed, the evidence showed that the original lessee, the fitness center, had mentioned the transfer to the Landlord over

¹ *R. v Hamdan*, [2017 BCSC 1770](#).

¹¹ *Hengyun International Investment Commerce Inc. c. 9368-7614 Québec inc.*, [2020 QCCS 2251](#).

text messaging. Following the receipt of these text messages, the landlord had answered with a thumbs-up emoji, without any other words. The Court found that, by doing so, the landlord had consented to the transfer of the lease.

A thumbs-up resulted in a similar result in a recent case issued by the Court of King's Bench for Saskatchewanⁱⁱⁱ. Indeed, in the *South West Terminal Ltd* decision, the dispute revolved around the existence of a contract to purchase flax seeds between long-standing business partners. The plaintiff was a grain and inputs company seeking to purchase flax seeds from a farming corporation. Following negotiations, the prospective buyer drafted a contract and texted an executed copy to the seller requesting the seller to "Please confirm flax contract." Upon receipt of the text, the seller wrote back using a thumbs-up emoji, but never followed up nor delivered the flax seeds. The parties disagree as to whether there was a meeting of minds that would support a contractual obligation.

The Court noted that: "The question at issue is not to determine 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.". As such, the Court conducted its assessment from the perspective of what an "informed objective bystander would understand" from receiving a thumb-up. Online dictionary was

put into evidence to discuss the potential meaning of 👍. The Court then analyzed the contractual history between the parties and concluded that text messages followed by curt words, such as "ok" "yup" or "looks good" had been used in the past to confirm the acceptance of purchase orders. Accordingly, the Court ruled in favor of the buyer and confirmed that the thumbs-up emoji was in fact an acceptance of the proposed contract.

Takeaways 🧐

- Emojis are without a doubt a relevant element of a communication and will be interpreted by the Courts if put before them in evidence.
- The use of a "positive" emojis, such as a thumb-up, could be interpreted as an acceptance to a contract or to an amendment, especially between commercial partners with a history of doing business.
- Choose your emojis wisely.

ⁱⁱⁱ *South West Terminal Ltd. v Achter Land*, [2023 SKKB 116](#).

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

NOVEMBER 2023

[Ontario Moves to Secure its EV Supply Chain and Automotive Manufacturing Future](#)

Steven Rosenhek, André Durocher, and Andrew House

MAY 2023

[The Golden Power in Italy](#)

Filippo Mazza

APRIL 2023

[The First PRC Court Case Recognizing an English Commercial Judgment](#)

Gao Wenjie

MARCH 2023

[European Works Councils: Comprehensive Reform and Preliminary Injunctions are Planned!](#)

Gerlind Wisskirchen and Benjamin Münnich

JANUARY 2023

[Lawyer 2.0: The future of the Industry](#)

Tarek Nakkach

NOVEMBER 2022

[Changes to the EU's Strict Product Liability Regime](#)

Philipp Behrendt, Katie Chandler, and Max Kempe

OCTOBER 2022

[Development, Implementation and Use of the "Electronic Court" in Ukraine](#)

Maria Orlyk and Oleksandr Protsiuk

SEPTEMBER 2022

[Sustainability](#)

Christian Murad and Lorriane Spalding

FEBRUARY 2021

[Supreme Court of Canada Expands Duty of Honest Contractual Performance](#)

Steven Rosenhek and David Ziegler

AUGUST 2017

[CETA \(EU-Canada Comprehensive Economic and Trade Agreement\): Is There any Justified Reason to Move from Arbitrators to Judges in the Resolution of Disputes System?](#)

Manuel P. Barrocas

JUNE 2017

[Digitalization and Automatization and Their Impact on the Global Labor Market](#)

Gerlind Wisskirchen

NOVEMBER 2016

[International Conflicts of Service](#)

Stacey Hsu and Daniel Reisler